



**International Federation of Consulting Engineers**  
The Global Voice of Consulting Engineers

# Fitness for Purpose

A FIDIC Briefing Note prepared by Business Practice Leadership Committee Risk and Liability Task Group

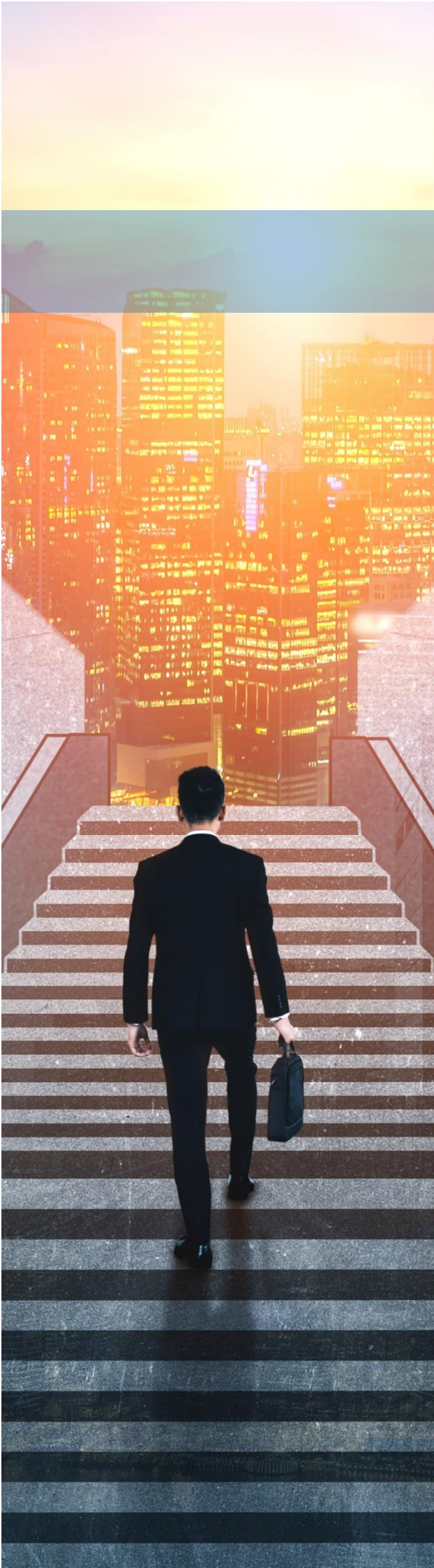
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## Contents

<b>Aim and Introduction</b> .....	2
What is fitness for purpose? .....	3
Avoiding fitness for purpose .....	3
Accepting fitness for purpose .....	3
Insurances .....	4
FIDIC Recommendations .....	4
<b>Summary</b> .....	5
<b>About FIDIC</b> .....	6

# Aim and Introduction

The aim of this guidance note is to provide consultants with a high-level overview of Fitness for Purpose. It is not an exhaustive review of the subject matter and is not a substitute for obtaining legal advice. FIDIC recommends that Consultants liaise with FIDIC Member Associations in the jurisdiction of the project to understand the local law and conditions of the market.



## What is fitness for purpose?

Consultants may, from time to time, be requested by clients to comply with a “fitness for purpose” provision in performing their duties and obligations. Fitness for purpose is an absolute obligation which requires:

1. The consultant to provide a level beyond the duty to exercise a standard of reasonable skill, care and diligence.
2. A guarantee and absolute commitment that the services undertaken during (or the deliverables provided as part of) the appointment will be ‘fit’ for the client’s intended purpose or will comply with a particular criterion or achieve a certain result.

Failure to meet these objectives will be a breach of contract even if the consultant had exercised the standard of reasonable skill, care and diligence in the performance of its services. In some jurisdictions, fitness for purposes obligations may be incorporated into an appointment via an express agreement or implied by statute or law.

**This note is therefore subject to jurisdictional differences which will need to be considered.**

## Avoiding fitness for purpose

In those circumstances where the client has imposed, in addition to the usual standard of reasonable skill, care and diligence, a fitness for purpose obligation on the consultant, the client only needs to establish that the outcome or result has not been met (irrespective of whether the consultant had exercised reasonable skill and care) in order to establish a breach of contract. The client will not need to prove negligence in order to succeed in a claim against the consultant, even in those scenarios where the technical requirements may be impossible to meet.

Where the appointment contains a fitness for purpose, consultants should approach with caution and where possible, delete the obligation. Consultants should:

1. Ensure that the standard of care referred to in their appointments is one based on reasonable skill, care and diligence, and that the performance of its services is only subject to that standard – see for instance, clause 3.3 of the FIDIC White Book which sets this out.
2. Carefully read the scope of services to ensure that a fitness for purpose obligation is not incorporated by reference in the scope of services. Clients may include language requiring the consultant to comply with both the standard of reasonable skill, care and diligence set out under the terms and conditions of the appointment and bury the fitness for purpose obligation under scope of services; in such a scenario the standard may be overridden by the stricter fitness for purpose obligation.
3. Be conscious of accepting any obligations beyond what would be reasonably expected from a competent consultant performing the same services.

## Accepting fitness for purpose

If the provision cannot be removed, the fitness for purpose obligation may be acceptable **provided** that the obligation to achieve fitness for purpose is subject to the exercise of reasonable skill and care so that:

1. The consultant is able to measure the purpose and scope of services against a set of clearly defined criteria with quantifiable conditions outlined in the appointment.

2. Where subconsultants are used, the consultant should ensure that its contract with the subconsultant has back-to-back design obligations to the same standards which are applicable to the consultant under the main contract.

In any event, it is important to review such obligations carefully and consider them in the light of the scope, etc.

## Insurances

Professional Insurance policies may only cover the consultant where there has been a failure to exercise reasonable skill, care and diligence; not where there is a contractual claim for breach of fitness for purpose. Consultants should review the exclusions and restrictions of all insurance policies to ensure that the terms of the policies and the limits of liability are compatible with the insurance coverage and to raise any questions with their brokers as early as possible.

**Accepting fitness for purpose obligations could expose consultants to uninsured losses.**

## FIDIC Recommendations

- 1) The client and the consultant should document their appointment for the provisions of services, modelled on the FIDIC Client/Consultant Model Services Agreement 2017 (the “**White Book**”).
- 2) The White Book states that the consultant shall have no other responsibility than to exercise reasonable skill, care and diligence in the performance of obligations under the appointment. That said, where the client has imposed a fitness for purpose obligation, this should be approached with caution and in the first instance be deleted, where possible.
- 3) The appointment should clearly define, amongst other things:
  - a) the purpose and scope of services to be provided by the consultant, should be measured against a set of clearly defined criteria which are clean and unambiguous, with quantifiable conditions outlined in the appointment.
  - b) the duration of the consultant’s warranties, if any, to be provided.
  - c) the nature and maximum number of insurances upon the failure of either party to the other in carrying out their respective responsibilities capped to the amount of the insurance cover taken out by the consultant.
- 4) Where the consultant has engaged with subconsultants, back-to-back design obligations should be to the same standards as required by the consultant under its main contract with the client.





# Summary

FIDIC recommends, where possible, that consultants do not accept the fitness for purpose obligations under their appointments. If this is not feasible, then the fitness for purpose obligation should be amended to make it subject to the exercise of reasonable skill and care.

# About FIDIC

FIDIC, the International Federation of Consulting Engineers, is the global representative body for national associations of consulting engineers and represents over one million engineering professionals and 40,000 firms in more than 100 countries worldwide.

Founded in 1913, FIDIC is charged with promoting and implementing the consulting engineering industry's strategic goals on behalf of its Member Associations and to disseminate information and resources of interest to its members. Today, FIDIC membership covers over 100 countries of the world. Expert legal advice should be obtained whenever appropriate.

FIDIC Member Associations operate in over 100 countries with a combined population in excess of 6.5bn people and a combined GDP in excess of \$30tn. The global industry, including construction, is estimated to be worth over \$22tn. This means that FIDIC member associations across the various countries are worth over \$8.5tn.



**International Federation of Consulting Engineers (FIDIC)**

World Trade Center II, Geneva Airport P.O. Box 311 CH-1215 Geneva 15 - Switzerland  
Tel. +41 22 799 4900 - Fax +41 22 799 4901  
Email: [FIDIC@FIDIC.org](mailto:FIDIC@FIDIC.org) #  
[www.FIDIC.org](http://www.FIDIC.org)

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