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| The FIDIC's 1999 Forms of Contract |
| FIDIC's Assessment Panel for Adjudicators |
| Peter L Booen & Gordon L Jaynes Published in *Engineers Australia* and **Building and Construction Law**, 2001. |
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| Readers who are involved in the international construction industry, and especially those involved in projects financed by the World Bank and the Asian Development Bank, will be interested in the recent developments with respect to FIDIC’s well-known forms of contract. FIDIC’s new suite of documents are certain to have a significant effect on the future of this industry and on those whose firms are engaged in it. The suite contains many new and changed provisions of which all practitioners should be aware. The FIDIC Contracts Guide to the new forms is of particular interest. |
| Background |
| The Fédération Internationale des Ingénieurs-Conseils (FIDIC) is the international federation of consulting engineers. Its membership is largely comprised of national associations, such as the Association of Consulting Engineers Australia (www.acea.aust.com).  FIDIC is best known as the organisation that publishes standard forms of contract documents related to the procurement of engineering works. These standard forms include those for use by consulting engineers, and other forms that are suitable for the procurement of building and engineering works. FIDIC’s previous standard forms of contract documents for building and engineering works have been known by the colours of their respective covers:   * Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987, Reprinted 1992, also known as the "Red Book"; * Conditions of Contract for Electrical and Mechanical Works, Third Edition 1987, Reprinted 1988, also known as the "Yellow Book"; * Conditions of Contract for Design-Build and Turnkey, First Edition 1995, also known as the "Orange Book". |
| The New Suite |
| Although the above standard forms are still widely used internationally, FIDIC has replaced them by the following First Editions, published in September 1999:   * Conditions of Contract for Construction, which FIDIC recommends for building or engineering works where the Employer provides most of the design. However, the works may include some Contractor-designed civil, mechanical, electrical and/or construction works. * Conditions of Contract for Plant and Design-Build, which FIDIC recommends for the provision of electrical and/or mechanical plant, and for the design and execution of building or engineering works. The scope of these Conditions thus embraces both old Yellow and Orange Books, for all types of Contractor-designed works. * Conditions of Contract for EPC/Turnkey Projects, which may be suitable for the provision on a turnkey basis of a process or power plant, of a factory or similar facility, or of an infrastructure project or other type of development, where (i) a high degree of certainty of final price and completion time is required, and (ii) the Contractor takes total responsibility for the design and execution of the project.   The FIDIC Contracts Guide was published in hard copy in March 2001 (a few months after the electronic version). It includes advice on procurement, model instructions to tenderers, clause-by-clause commentary, and a glossary of terminology. Because, for most sub-clauses, similar wording is used in all three 1999 Conditions, the Guide’s clause-by-clause commentary reproduces the three texts for each sub-clause side-by-side, in landscape format, so that readers can identify the similarities and differences. However, the Guide does not focus on these similarities or differences, but assumes that most readers would be seeking guidance on the general conditions of their own particular contract.  The FIDIC Contracts Guide includes some material that may be considered useful for the training of personnel in procurement. However, it does not provide complete training material for the expertise required for the preparation of tender documents. The comments in FIDIC’s Guide are intended to assist users of the Conditions, namely those who write or administer building and/or engineering contracts, who should have the necessary expertise in contractual and procurement aspects.  Please visit the [FIDIC Bookshop](http://oldwebsite.fidic.org/bookshop/default.asp) to order these publications, either in hard copies or electronically downloaded.\* |
| Drafting Principles |
| One particular principle, which was applied throughout the drafting of the new suite, was to facilitate the preparation of the Conditions of Contract for each contract. Unlike most other published form of Conditions, those published by FIDIC recognise the reality that the tender documents for a particular project typically have to include provisions which are not appropriate for other projects. Preparation of the tender documents has been facilitated by:   * flexibility, (i) by anticipating alternative contractual arrangements, and (ii) by stating in the General Conditions which provisions are subject to likely changes in the Particular Conditions; and * user-friendliness, (i) by maximising the General Conditions so as to minimise Particular Conditions, and (ii) by identifying one location for essential contract-specific data.   The General Conditions were drafted on the principle that users would find it more convenient if any provisions which they did not wish to apply could simply be deleted or not invoked, than if additional text had to be written in the Particular Conditions. Therefore, some of the provisions contained in the General Conditions might be inappropriate for an apparently typical contract. The basic concept was to provide maximum convenience for users, particularly for those who prepare the tender documents. |
| Some New Features |
| In addition to extensive rewording (and re-sequencing) of existing provisions, the 1999 Editions include some new provisions. For example, Sub-Clause 2.4 requires the Employer to submit (if requested) reasonable evidence that he has effected financial arrangements which will enable him to pay the final Contract Price; as estimated at that time. If the Contractor does not receive such evidence, Clause 16 entitles him to suspend work or reduce the rate of work, and ultimately (if no evidence is received within 12 weeks) to terminate the contract.  Sub-Clause 2.5 sets out the procedure that the Employer must follow if he wishes to claim payment from the Contractor: typically, for default. The Employer is not entitled to withhold an interim payment for reasons that were not previously notified to the Contractor with particulars substantiating the Employer’s claim.  In the Conditions of Contract for Construction and those for Plant & Design-Build, Clause 3 describes the role of the Engineer. Unlike previous editions, the Engineer does not act impartially, but is deemed to act for the Employer; however, it is relatively straightforward for the Particular Conditions to require the Engineer to act impartially when making his "fair determinations" under Sub-Clauses 3.5, 14.6 and 14.13. Under Sub-Clause 3.4, the Contractor may object to a proposed replacement Engineer within six weeks after the Employer notifies "the name, address and relevant experience of the intended replacement Engineer".  Sub-Clause 4.2 requires the Contractor to provide a Performance Security. When preparing the tender documents, the Employer has to decide what form of security he requires. Although not forming part of the General Conditions, example wording has been proposed incorporating (by reference) Uniform Rules published by the International Chamber of Commerce ("ICC"):   * Uniform Rules for Demand Guarantees (No. 458, 1992); * Uniform Rules for Contract Bonds (No. 524, 1993).   In the Conditions of Contract for Construction, and those for Plant & Design-Build, Sub-Clause 4.12 covers unforeseeable physical conditions, including a new provision allowing reductions when other such conditions in similar parts of the Works are more favourable than could reasonably have been foreseen when the Contractor submitted the Tender.  Clause 12 of the Conditions of Contract for Construction covers measurement and valuation of the Works, and allows a Bill rate to be amended if (i) its measured quantity is changed by more than 10%, (ii) this change in quantity multiplied by the Bill rate exceeds 0.01% of the total contract price, and (iii) this change in quantity (and no other cause) directly changes the cost per unit quantity of the item by more than 1%.  Clause 13 covers Variations, and adjustments for changes in legislation and in cost. Variations are not immediately binding if the Contractor promptly notifies that he cannot readily obtain the required Contractor’s Equipment, Materials, Plant or Temporary Works. In the case of Contractor-design, Variations are also not binding if the Contractor promptly notifies that the proposed Variation will have an adverse impact on safety, suitability, or the achievement of the specified performance criteria. If he so notifies, the Contractor can then await confirmation (or otherwise) of the Variation.  Clause 18 covers insurances, most of which are required to be arranged by the "insuring Party": which is defined as the Contractor unless otherwise stated in the Particular Conditions. The provisions thus provide for the possibility that the Employer may wish to effect some of the insurances: namely, by defining himself as the insuring Party in respect of such insurances. |
| Claims and Disputes |
| Clause 20 covers the submission of claims and the settlement of disputes. Sub-Clause 20.1 sets out the procedure that the Contractor must follow in respect of claims for extension of time and claims for extra payment.  Sub-Clause 20.2 provides for the appointment of a dispute adjudication board ("DAB"), which makes the pre-arbitral decisions in respect of disputes. Dispute Boards have been in use world-wide since 1995 on projects receiving financing from the World Bank and the Asian Development Bank. They are a major change from the older practice of using the Employer’s Engineer as the maker of pre-arbitral decisions, and have had a significant impact on the industry and on the work of the engineering and legal professions involved in it.  Terms for the DAB’s agreements are appended to the General Conditions. Alternative wording has been proposed for use on contracts where impartial pre-arbitral decisions are to be made by the Engineer, instead of an independent DAB, similar to the arrangements under the old Red and Yellow Books. The use of a DAB was included in the Orange Book, and was later offered (as an alternative arrangement) in the 1995 Supplement to the Red Book.  Sub-Clause 20.4 specifies the procedure under which the DAB makes its decision on a dispute. The decision is immediately binding and both Parties must comply with it, unless and until it is revised in an amicable settlement or arbitration. It is therefore essential that the members of the DAB are expert professionals and independent of each other, of each Party, and of each partner of a joint venture Party; and are acceptable to both Parties. In order to deal with the possibility that the Parties cannot agree upon the membership of the DAB, Sub-Clause 20.3 provides for an appointing entity to be required to name a member if called upon to do so.  The FIDIC Contracts Guide indicates that FIDIC is prepared to perform the role of appointing entity under Sub-Clause 20.3, if the Contract language is English and this appointing entity is defined as "the President of FIDIC or a person appointed by the President". In order for it to be able to act as appointing entity, FIDIC has established an "Assessment Panel for Adjudicators", and required it to set a high standard for FIDIC’s "President’s List of Approved Adjudicators".  Those interested in being included in the President’s List of Approved Adjudicators can obtain further details from [FIDIC’s website](http://www.fidic.org/dab/). It lists the criteria for inclusion on the List, including satisfactory assessment at FIDIC’s Adjudication Assessment Workshop, where attendees are subjected to rigorous testing and their performance as DAB members is assessed.  Consideration is currently being given to arranging a seminar in Australia on these FIDIC 1999 Forms of Contract and, possibly, to FIDIC arranging an Adjudication Assessment Workshop also. However, such Workshops are arranged in response to demand, namely when a sufficient number of prospective listees apply to attend a FIDIC Workshop, which has not yet happened. Will FIDIC receive sufficient applications from engineers and construction lawyers in the region for an Adjudication Assessment Workshop to be arranged in Australia?  \* FIDIC publications are also obtainable in Australia. |