

**International Construction Contracts and the Resolution of Disputes  
ICC-FIDIC Conference Paris 2006**

**Presentation Notes<sup>1</sup> on:**

**THE FIDIC CONTRACT FORMS and the new MDB CONTRACT**

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**1. What is FIDIC?**

FIDIC is probably best known to the outside world as the organisation which produces standard forms of contract for engineering construction projects. For example, the form used for many years for civil engineering construction works, commonly called the 'Red Book', is simply known to many as the 'FIDIC Contract'. In fact, the document is often called 'FIDIC' with many people having no further idea of who or what FIDIC is.

Therefore, I would like to explain briefly what FIDIC is, and its history. FIDIC is the International Federation of Consulting Engineers, and was founded in 1913 by France, Belgium and Switzerland. For the period over the two world wars it remained essentially a continental European organisation. The United Kingdom only became a member in 1949 followed by the United States in 1958. The newly industrialised countries started to become members in the 1970s, and it was only then that FIDIC could truly claim to be an international rather than a European organisation. At present there are more than 70 member associations from all parts of the globe, and it represents most of the independent practising consulting engineer in the world.

FIDIC is a federation of national member associations; individual firms of consulting engineers are not themselves members of FIDIC. Many of these national associations represent other constructional professionals, such as architects, in addition to consulting engineers. FIDIC also has affiliate members interested in the work it undertakes, such as lawyers and insurers.

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FIDIC is run by an Executive Committee (EC) of nine members elected at annual General Assembly Meetings by the national member associations. The EC appoints a President who normally serves for a two-year term. EC members, including the President, provide their services voluntarily. Day to day running of FIDIC is carried out by a small, salaried secretariat, headed by a Managing Director, now based in Geneva.

FIDIC's various activities are delegated to standing committees and to ad-hoc task groups, whose members have the necessary specialised knowledge for the required work. Production of the FIDIC standard forms is the responsibility of the Contracts Committee. FIDIC does not receive external funding, and, like the other committee and task group members, the Contracts Committee members give their services voluntarily and without remuneration. FIDIC's income comes largely from the sale of the documents it produces, and a serious problem, particularly in this electronic age, is the 'pirating' of its documents by outside organisations and individuals. This, in many cases perhaps unwittingly, infringes FIDIC's copyright, and hence denies FIDIC the income which it needs if it is to continue to produce documents which are of value to the whole of the engineering industry.

So much for what FIDIC is. Now what about the contract forms FIDIC produces.

## **2. The Traditional FIDIC Forms of Contract**

Over the years FIDIC has produced a number of standard forms of contract between various parties - e.g. between employers and their consultants, or between contractors and their subcontractors – as well as other 'best-practice' guidelines. However, I shall only discuss FIDIC's standard forms for contracts between 'employers' and their 'contractors'. FIDIC's term 'Employer' means the purchaser, owner or client who employs the 'Contractor' to physically carry out the project 'Works'.

The 'traditional' FIDIC forms for contracts between employers and their contractors, which have become so widely used throughout the international construction market, and which are so familiar to most of those working on construction projects where the various parties involved come from different countries, are commonly known as the 'Red Book' and the 'Yellow Book'. The correct titles of these Books are respectively:

- Conditions of Contract for Works of Civil Engineering Construction (1987)
- Conditions of Contract for Electrical and Mechanical Works including Erection on Site (1987)

The first edition of the Red Book was published in 1957. It was based on the UK standard conditions of contract for domestic projects in the UK, and was intended to provide a standard for use with those

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many projects being undertaken at that time by British and other engineers in the Commonwealth and other countries abroad. The result has been that the documents have tended to be orientated towards a Common Law approach. This, however, does not seem to have hindered their widespread use also in Civil Law countries. There were 4 editions of the Red Book, the last being in 1987 (with reprints with editorial amendments in 1988 and 1992).

As is clear from the title, the Red Book was intended for civil engineering construction works such as roads, water and sewage facilities, bridges, dams, hydropower stations, tunnels and all other such construction work, where most of the work is carried out at the 'site'. The detailed design was provided by the employer or his engineer. It soon became clear that this standard contract was not satisfactory for contracts where the major part of the work was carried out 'off-site', e.g. at the manufacturer's workshops. This led to the production of the first edition of the Yellow Book for electrical and mechanical plant in 1963. Thus the Yellow Book has more emphasis on testing, commissioning procedures, guarantees, etc. and is suitable for manufactured plant, such as turbines, generators, switchyard equipment, and so on. Under the Red Book payment is made to the Contractor every month according to the amount of work carried out by the Contractor during the month. It is relatively easy to establish by measurement the work as it is carried out on site<sup>3</sup>. For work being carried out at the factory, monthly measurement is not practicable, and so the payment terms of the Yellow Book specify payment, usually on a lump sum basis, according to milestones achieved, e.g. a certain percentage when manufacture and testing at the factory is complete, after shipping and delivery to site, when erection is complete and on satisfactory commissioning.

One of the interesting features of construction projects is that nearly every project is unique. Certainly there are projects that are repeated, but by and large no one hydropower station is identical to another, no dam nor tunnel is precisely the same as another. The main principles of construction work, however, may be to a considerable extent standard. Thus it is not possible to write a standard form of contract which will suit all civil works, or all electrical and mechanical works, but it is possible to formulate some guidelines of 'best practice', provided allowance is made for the differing or unique factors of individual projects. The Red and Yellow Books cope with this situation by having a Part I, which is the standard conditions applicable, hopefully, to the great majority of projects, and a Part II, the 'Conditions of Particular Application', which must be drafted to suit the precise requirements of the actual project in hand. FIDIC's intention is that the printed Part I itself shall not be altered, and that any necessary alterations, modifications or additions should be collected in Part II. By not altering the Part I, persons regularly working in the industry will become familiar with the standard clauses, and will immediately see all modifications by looking at the Part II.

The FIDIC Conditions have become recognised as being fair and balanced to both the parties, i.e. the Employer and the Contractor. It is FIDIC's firm belief and dedicated principal that a fair and balanced contract is in the lasting best interest of all concerned. An unfair, unbalanced contract may give a temporary advantage to one or other party, but such advantage will be short-lived, and the negative long-term disadvantages will greatly outweigh any short-term gain. Thus we see in the Red and Yellow Books a fair and balanced allocation of risks and responsibilities between the 2 parties to the contract. The basic principle is that the risk is allocated to the party that is best able to bear and control that risk, and that the contractor can only be expected to be bound by and to price for conditions which are known to him or which he is able to foresee and reasonably to price in his tender. Both Books have therefore clauses stipulating recompense and time extension when uncalculated hinders occur, e.g. late receipt of drawings, or in the case of unforeseeable physical obstructions or conditions being encountered during the execution of the works.

Both Books have the 'Engineer' whose job is principally to supervise and monitor the work being carried out by the Contractor. He has many specific duties, which are stated in the various clauses. In several clauses it is stated that this or that 'shall be in strict accordance with the Contract to the satisfaction of the Engineer'<sup>4</sup>. Basically it can be said that the two contracting parties, i.e. the Employer and the Contractor, have agreed that someone should be appointed to monitor the work being carried out by the Contractor and who should 'keep the balance between the parties'. Who should this be? Obviously someone with adequate experience of the work in question, and whom both parties can trust to act professionally and impartially. No one is better suited to this role than an independent, experienced engineer from a reputable, accredited consulting engineering firm (or, more correctly, the firm itself).

The Red and Yellow Books published in 1987 both had the formal 'Engineer's Decision'<sup>5</sup> as the penultimate step in solving an argument or dispute, and all that a party could do thereafter was to submit the dispute to arbitration. There was, however, a 'cooling off' period during which amicable settlement should be attempted<sup>6</sup>.

### **3. The Orange Book**

At the beginning of the '90's FIDIC decided to publish a new Book to suit the growing market trend for projects being procured on a design-build or turnkey basis. FIDIC set up a task group for this

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<sup>3</sup> Red Book Clause 56.1

<sup>4</sup> e.g. Red Book Clause 13.1

<sup>5</sup> Red Book Clause 67.1, Yellow Book Clause 2.7

<sup>6</sup> Red Book Clause 67.2, Yellow Book Clause 50.1

purpose, which resulted in the 'Orange Book', i.e. the Conditions of Contract for Design-Build and Turnkey (1995).

The Orange Book included a number of innovations. One such change was the departure from the traditional role of the Engineer. In the Orange Book there is no Engineer as such. He was replaced by 'The Employer's Representative', and the difference between him and the Engineer of the Red and Yellow Books was that he was not required to be impartial. However, when he was required to determine value, cost or time extension, he had to 'determine the matter fairly, reasonably and in accordance with the Contract'.

When it comes to dealing with disputes the Orange Book did away with the traditional 'Engineer's Decision' and replaced it by resort to an independent dispute adjudication board (DAB)<sup>7</sup>. This DAB of one or three members shall be appointed jointly by the Employer and the Contractor at the commencement of the contract. The cost of the DAB shall be shared by the parties. (More will be said about the DAB later in this conference).

At about this time the World Bank, while including the FIDIC Red Book in its Standard Bidding Documents (SBD), made a few significant changes, one of the most important being the substitution of the Engineer's traditional pre-arbitral 'Decision' by a mandatory Dispute Review Board (DRB) for all large contracts. Partly because of this, and partly in answer to evolving international views on dispute resolution, FIDIC published in 1996 a Supplement to the Red Book for use of a DAB instead of the 'Engineer's Decision'.

#### **4. The 1999 Suite of Standard Conditions of Contract**

With the publishing of the Orange Book, FIDIC decided that an update of the Red and Yellow Books was necessary, and a task group was appointed for this purpose. The task group was instructed to standardise the New Books, e.g. same definitions, same layout and clause numbering, same wording except where differences required, etc., which had not been the case with the Old Red and Yellow and the Orange Books. They were also to be as user-friendly as possible, and be a balance between legal precision and practicability, i.e. correct level of detail. It was to be remembered that they are primarily intended as 'manuals of good engineering practice' prepared by engineers for practical use.

After years of work, studying current practice, reviewing other standard documents, asking for and studying comments, and so on, the task group handed over for final publication late in 1999 a suite of

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<sup>7</sup> Orange Book Clause 20.3

four new Standard Forms of Contract<sup>8</sup>. This new suite comprises 3 Books for major works and 1 for minor:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer : *The Construction Contract* (New Red Book)
- Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor : *The Plant and Design/Build Contract* (New Yellow Book)
- Conditions of Contract for EPC/Turnkey Projects : *The EPC/Turnkey Contract* (Silver Book)
- Short form of Contract : *The Short Form* (Green Book)

The Books in the suite are all marked 'First Edition 1999', and the reason is that they can not be regarded as direct updates of FIDIC's previous 'Red, Yellow and Orange Books'.

The suite was then complemented by the Contracts Guide for the three major New Books, dated 2000 (but published in 2001). The Contracts Guide is a monumental publication of some 350 pages. It includes the full text of the three major New Books side by side, which means ease of comparison. It also includes a wealth of other useful information – far beyond the actual commentary on the standard clauses – for those involved in procurement of construction projects.

## 5. The New Red and Yellow Books

As will be noted from the titles, the emphasis for the New Red and Yellow Books has changed from the old civil works versus e & m (electrical and mechanical) works to which party is responsible for the design (or most of the design). In modern composite projects the all-important allocation of risks is mainly dependent upon who is responsible for the design, not which particular type of work dominates. Many projects involve several or many types of work.

The New Red Book is similar to – and an update of – the Old Red Book, but with some new features:

- suitable for all projects where main responsibility for design lies with Employer (or his Engineer)
- *some* design may, of course, be carried out by Contractor
- administration of Contract and supervision by Engineer
- approval of work, payment, etc. certified by Engineer
- work done is measured, payment according to Bill of Quantities

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<sup>8</sup> Available from FIDIC Bookshop, Box 311, CH-1215 Geneva 15, Switzerland. [www.fidic.org](http://www.fidic.org)

- option for payment on Lump Sum basis

The New Yellow Book replaces both the Old Yellow Book and the Orange Book:

- Old 'Yellow Book' dealt only with electrical and mechanical construction works (most design being done by Contractor)
- the 'Orange Book' from 1995 dealt with Design-Build and Turnkey for civil and other construction where majority of design done by Contractor
- New Yellow Book is thus suitable for all types of projects where main responsibility for design lies with Contractor
- recommended for the provision of electrical and/or mechanical plant, *and* for the design and execution of building or engineering works
- *some* design may be carried out by Employer or his Engineer
- Employer provides 'Employer's Requirements' to which Contractor designs
- administration of Contract and supervision by Engineer
- approval of work, payment, etc. certified by Engineer
- payment on Lump Sum basis, usually against a Schedule of Payments
- testing procedures usually more complicated than for 'New Red Book'

Identical or similar provisions are included in both Books for many matters:

- traditional competitive tendering procedures are envisaged
- risk sharing is balanced between Parties, as in Old Red and Yellow Books, e.g.
  - Employer takes risk of 'adverse physical conditions' – Cl 4.12
  - and unforeseeable 'operation of the forces of nature' – Cl 17.3(h)
  - and design by Employer – Cl 17.3(g)
  - in addition to war (anywhere), terrorism, riot, & similar (within the country), etc
- all claims, from either Party, have to follow a strict procedure – Cl 2.5 & 20.1 (see later)
- Engineer is no longer stated to be 'impartial' as old Red & Yellow Books
  - he 'shall be deemed to act for the Employer', except as otherwise stated – Cl 3.1
  - however, when he has 'to agree or determine' any matter he shall '*make a fair determination in accordance with the Contract ...*' Cl 3.5
- Employer must submit – when requested – evidence that he has the finances to pay the current Contract Price – Cl 2.4 (Applies to all 3 Books)

## **6. The New Red Book Harmonised for MDB Use**

There is currently much interest in a new version of the FIDIC Red Book called the ‘MDB Harmonised Edition 2005’. I will explain it briefly, and would point out that an Informational Article about the Book, and the reasons for it, is attached as the last pages of this paper.

MDB means Multilateral Development Banks, i.e. World Bank, EBRD, Asian DB, etc. A number of these MDBs have, for many years, adopted the FIDIC Conditions of Contract for Construction (old Red Book) as part of their standard bidding documents, which the MDBs require their borrowers or aid recipients to follow. In using the FIDIC Conditions, it has been the regular practice of the MDBs to introduce additional clauses in the Conditions of Particular Application (Part II) in order to amend provisions contained in the FIDIC General Conditions (Part I). These additional clauses, which are specific to the MDBs, have in many cases standard wording which has had to be repeated whenever procurement documents have been prepared for a new project. Furthermore, the provisions in tender documents, including the additional clauses contained in the Particular Conditions, have varied between the MDBs. This has created inefficiencies and uncertainties amongst the users of the documents and increased the possibilities of disputes.

These problems were recognised by the MDBs as significant, as were the benefits of standardisation. In response, the MDBs resolved to harmonise their tender documents on an international basis. They chose the FIDIC New Red Book (1999) and resolved that there should be a modified form in which the General Conditions would contain the standard wording which previously had been incorporated by MDBs in the Particular Conditions.

FIDIC also recognised the major benefits to the users of the contracts of such harmonisation, and has been pleased to work with the MDBs to produce a special MDB Harmonised Edition of the 1999 Red Book for contracts financed by the MDBs. FIDIC retains the copyright and the responsibility for managing the new MDB Harmonised Edition.

Please note that the MDB Harmonised Edition is for use on MDB financed projects, and DOES NOT REPLACE FIDIC’s standard 1999 Red Book contract, which is available as before for all users where MDB funding is not involved. Please also remember that it is only the Red Book that has a ‘harmonised’ version – the New Yellow, Silver, Green and other Books are not affected.

## 7. Significant Changes in the MDB Harmonised Edition

The first thing to say is that the MDB Edition is very close to the FIDIC Construction Book (1999 New Red Book). The layout, clauses, wording, standard forms, balanced risk-sharing, etc are virtually the same. It does include a number of sub-clauses, particularly dealing with the Contractor's obligations towards his staff and labour force, which one would anyway have found in the Particular Conditions of many contracts, and it does contain some specific requirements of any MDB, e.g. the right of the Bank to audit the Contractor's accounts<sup>9</sup>. FIDIC has also taken the chance to make a few minor improvements particularly to the Dispute Board provisions.

The most striking changes are of little importance, and almost cosmetic:-

- 'Appendix to Tender' becomes 'Contract Data'<sup>10</sup>, and is entirely filled in by the Employer
- 'Contract Data' becomes Part A of the Particular Conditions
- 'reasonable profit' becomes 'profit' because profit is fixed at 5% in the MDB Edition
- 'Dispute Adjudication Board' or 'DAB' becomes simply 'Dispute Board' or 'DB'

There are, however, a few changes which would not be agreed by FIDIC for general use, as they could tend to tilt the accepted balance of risk in favour of the Employer. For example, the Employer may more easily change the authority of the Engineer<sup>11</sup> and may more easily replace the Engineer<sup>12</sup>. The MDBs have argued that an Employer using their funding must be able to change an Engineer who is mis-performing, and if the Contractor really has a grievance about such change he will certainly refer to the funding MDB who will ensure that fair play is sustained.

An interesting and important point which has come about due to the inclusion of the FIDIC 1999 Red Book in the WB Standard Bidding Document is that it is now required that a DB be used for all construction projects of more than US\$10m, not just recommended. Also the DB will now make a decision instead of just a recommendation. This decision will be binding on the Parties, who shall '*promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award*'. The significance of this will be mentioned in a later talk.

There is not time here to look at all the changes, but a list is to be found at the end of this paper.

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<sup>9</sup> Sub-Clause 1.15

<sup>10</sup> Sub-Clause 1.1.1.10

<sup>11</sup> Sub-Clause 3.1

## 8. The Silver Book (EPCT Book)

The Task Group realised early on that the Red and Yellow Books only covered part of the international need. With their balanced risk-sharing it meant that:

- Employer only pays extra when specific risks actually occur
- Contractor does not have to estimate for unlikely hard-to-value risks
- BUT the final price and time is uncertain.

However, the market has shown requirement for more certain final price and time in two ways:

- some Employers have – for many years - changed the FIDIC Books’ balance to place more responsibility on Contractor
- the development of privately financed projects (BOT etc) means that lenders want definition of final price and time.

For such projects the Contractor is being asked to cover a wider range of risks of final cost and time. These may include the risk of poor ground conditions, a guaranteed result, and so on. To ask contractors to bear such extra risks means that the price for the project will be higher to cover the extra risk-taking. Employers will anyway have *some* risks.

FIDIC therefore produced this *completely New Book* for:

- those projects where Employers want traditional projects but with a more certain final price and completion time and less Employer-risk
- BUT as a Book where the Parties enter the Contract with full understanding, and acceptance, of the risks (instead of trying to adapt another risk-sharing arrangement)
- and as a common starting point for EPC<sup>13</sup>/Turnkey type projects, usually with private financing, in a BOT or similar environment.

The EPCT Book is thus intended to be suitable for the many projects, both larger and smaller:

- particularly E & M and other process plant projects
- all types of employers
- often civil law countries
- where government employer or private developer wants his project on a fixed price turnkey basis and with strictly two-Party approach (i.e. no Engineer)

EPCT Book includes an ‘Introductory Note’ where these matters are discussed.

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<sup>12</sup> Sub-Clause 3.4

<sup>13</sup> EPC = ‘engineering, procurement, construction’ (US) which is approx same as ‘Turnkey’ (European)

Among the features of the EPC/Turnkey Book (Silver Book) the following can be mentioned:

- responsibility for design lies solely with Contractor
- Employer provides 'Employer's Requirements' to which Contractor designs
  - Employer's Requirements usually 'performance specification' type
- Contractor carries out all engineering, procurement, construction providing a fully-equipped facility, ready for operation at 'the turn of a key'
- no Engineer – instead it is the Employer who may appoint an Employer's Representative
- lump sum Contract Price
- extended testing procedures including Tests after Completion
- Contractor takes majority of risks, Employer pays more to cover such risks
- final price and time of completion should be more certain

The circumstances for use of the Silver Book are different from traditional projects:

- Employer's Requirements is usually only a brief performance type specification
- procurement procedures are different, with only a small number of tenderers
- Contractor should be given freedom to carry out Works in his chosen manner
- Contractor has to prove reliability and performance of completed project
- privately-financed projects subject to more negotiation than public

These Conditions are *not suitable* in following circumstances:

- if time or information is insufficient before Contract signature
- if considerable work is underground or difficult to inspect
- if Employer intends to supervise closely or control or review
- if an intermediary determines interim payments
- where part of Works is designed by Employer
- for public bidding without negotiations

in such circumstances the P&DB Book should be used instead

We unashamably note that the Silver Book has come about because of market demand – given free choice FIDIC would normally recommend use of P&DB with its balanced risk sharing.

In passing, it is to be noted that there are a number of Employers who are now using the Silver Book for projects where it is not suitable. FIDIC says that a Contractor has to be able to understand and estimate for the risks he is assuming. If he cannot do this, the Silver Book should not be used.

However, uninformed or lazy Employers are thinking that the Silver Book is a 'quick fix' instead of making proper site investigations and preparing adequate tendering documents. Instead of doing this necessary work they throw the responsibility over to the turnkey Contractor, and use the Silver Book.

As one example let me mention a certain bombed generating station, which was still functioning but needed complete refurbishment. Tenderers were permitted a quick tour of the station, but the generators could not be turned off as the power was urgently needed. The Silver Book tendering documents asked for a lump sum fixed price for the complete refurbishment. How could a tenderer know the extent of the damage to machinery, cabling, etc? The Employer chose the lowest tender – as Employers unfortunately usually do – and, of course there was trouble as soon as the Contractor found the extent of unseen damage to many parts of the plant. The correct contract form to use would be the New Yellow Book, with a qualified Engineer to direct on site exactly which parts should be replaced, with the Contractor being paid accordingly.

## **9. The Short Form of Contract (Green Book)**

The main forms of contract are rather long and unnecessary unwieldy for relatively simple projects. So FIDIC have also prepared a much simpler form. Originally the intention was to have a form to suit works of value up to about US\$ 500,000 and six months' duration. As the work progressed it was understood that the amount of the contract sum should not be the governing factor, but rather the complexity of the work. For example, simple and repetitive sewer laying works, or transmission line, or rural road works often do not need a complicated form of contract, while the cost may be large.

The Book, entitled the Short Form of Contract, was published in 1999 together with the 3 Major Books. It is green in colour, and therefore commonly called the 'Green Book'! The drafters have done an excellent job of providing all the provisions necessary for such works in a total of 15 clauses, with a total length of only 10 pages. The sentences are short, and the language uncomplicated and simple to understand. This means that this form is ideal for many, many contracts of a simple nature, particularly in the developing countries, and countries like those of the former Soviet Union – rural roads, water and sewage projects, electricity transmission, and the like.

Translation is rather easy, and foreign contractors, employers and engineers in countries such as these do not like lots of paperwork and legal clauses. Nor are such necessary under these circumstances. I see a great future for this Book on many projects in many countries, and I suggest it be used whenever possible. The World Bank have found it so useful that it is now incorporated in their Standard Bidding Documents for Simple Works.

The printed Book itself is some 35 pages long, but that includes the Agreement with its Appendix, Rules for Adjudication and Adjudicator's Agreement, and some 10 pages of Notes for Guidance.

The Short Form has basically the same balanced risk sharing principle as the New (and old) Red and Yellow Books. There is no 'Engineer', so it is a 'direct' contract between the Employer and the Contractor, but the Employer may appoint an Employer's Representative. Design can be carried out by either party, and all types of construction work may be covered. Payment may be on a lump sum basis or on any other basis. It is already being widely used – most successfully – on all types of projects with values at least up to a couple of million dollars and 18 months completion time.

A special example of work which is relatively straightforward, but involves very expensive equipment, is dredging works. In conjunction with the dredgers' association, FIDIC has recently produced a standard form based on the Short Form for use on dredging and reclamation projects.

## **10. Conclusion**

By the introduction of this suite of 3 matching new standard forms for major contracts, together with the 'Green Book' for minor works and the Dredging Form, FIDIC has updated and widened the scope of its standard forms. It is believed and hoped that one or other of the suite will be suitable for use on virtually every international engineering construction project, from minor projects, through the whole range of traditional civil, electrical, mechanical and other plant contracts, to the large complex multi-disciplinary projects, including those of BOT or similar type.

As regards which Book to select for any particular project, guidance is given in the Introduction to the FIDIC Contracts Guide<sup>14</sup>.

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<sup>14</sup> The FIDIC Contracts Guide, 2000, with detailed guidance on using the First Editions of FIDIC's 3 major New Books

## **FIDIC**

### **Informational Article**

#### **Harmonised Form of FIDIC Construction Contract agreed with Multi-lateral Development Banks**

FIDIC, the International Federation of Consulting Engineers, has reached an historic agreement with the major multi-lateral development banks on the production of a new standard form of contract based on the popular FIDIC 1999 Construction Contract.

FIDIC is a federation of national member associations of consulting engineers and was founded in 1913. The principal objectives of the Federation are to represent the interests of Consulting Engineers internationally, to promote the professional interests of the member associations and to develop and disseminate documents, practice notes and policies which are of value to the members and the engineering and development industry generally. Today FIDIC membership covers more than 70 countries from all parts of the world and encompasses most private practice firms of consulting engineers.

One of FIDIC's key objectives is to promote sound and effective project management of engineering works. In pursuit of this objective, FIDIC has for many years prepared and published standard conditions of contract. At first these conditions were intended for international use; that is for projects where the client country was seeking the participation of contractors from other countries to benefit from the experience and expertise of such contractors. However in recent years the FIDIC forms have been increasingly used for domestic contracts where both client and contractor are of the same nationality. FIDIC forms of contract are drafted with both international and domestic projects in mind. Another aim in drafting the forms is that they should be user friendly and suitable for differing legal systems. The content of the FIDIC forms is determined by engineers with long experience in the management of engineering projects. Lawyers, with wide experience of engineering works, participate in the drafting of the documents to ensure legal consistency in their content.

The FIDIC standard forms of contract have been widely used for many years and have been adopted for engineering projects of all disciplines world wide. One of FIDIC's aims has been to produce documents which offer a fair balance of risks between the contracting parties and

to ensure that the risks incurred by the parties to a contract are clearly identifiable and understood.

A number of the Multilateral Development Banks (MDBs) have, for many years, adopted the FIDIC Conditions of Contract for Construction as part of their standard bidding documents, which the MDBs require their borrowers or aid recipients to follow. In using the FIDIC Conditions, it has been the regular practice of the MDBs to introduce additional clauses in the Conditions of Particular Application in order to amend provisions contained in the FIDIC General Conditions. These additional clauses in many cases, which are specific to the MDBs, have standard wording which has had to be repeated whenever procurement documents have been prepared for a new project. Furthermore, the provisions in tender documents, including the additional clauses contained in the Particular Conditions, have varied between the MDBs. This has created inefficiencies and uncertainties amongst the users of the documents and increased the possibilities of disputes.

These problems were recognised by the MDBs as significant, as were the benefits of standardisation. In response, the MDBs resolved to harmonise their tender documents on an international basis. For this purpose the MDBs resolved that there should be a modified form of the FIDIC Conditions of Contract for Construction, 1<sup>st</sup> Edition 1999, in which the General Conditions would contain the standard wording which previously had been incorporated by MDBs in the Particular Conditions.

FIDIC also recognised the major benefits to the users of the contracts, of harmonisation, and the inclusion in the General Conditions of the main common changes included in the Particular Conditions for MDB contracts. Accordingly, FIDIC was pleased to work with the MDBs to produce a special MDB Harmonised Edition of the 1999 conditions for MDB financed contracts. It was not intended to replace the standard 1999 contract, which is still available to all users.

FIDIC retains the copyright and the responsibility for managing the new MDB Harmonised Edition.

The following MDBs have participated in the production of the Harmonised Edition and are have committed to adopting this form for future projects financed by them:-

African Development Bank  
Asian Development Bank  
Black Sea Trade and Development Bank  
Caribbean Development bank  
European Bank for Reconstruction and Development  
Inter-American Development Bank  
International Bank for Reconstruction and Development (The World Bank)  
Islamic Bank for Development  
Nordic Development Fund

It is expected that other MDBs and international financing institutions will also decide to use the harmonised document in the near future.

It is believed that the harmonised document will simplify the use of the FIDIC Conditions of Contract not only for the MDBs and their borrowers, but also for others involved with project procurement, such as consulting engineers, contractors and contract specialists working on MDB financed projects.

Use of the harmonised conditions should significantly reduce the number of additions and amendments to be included in the Particular Conditions. Nevertheless most projects will have special requirements which will necessitate some specific changes.

In general the harmonised document follows earlier FIDIC risk sharing principles for the types of contract for which they were prepared. In most cases the amendments which have been made to produce the harmonised edition are those arising from the requirements of the MDBs, except for some minor changes of an editorial nature.

However in the case of the dispute provision clauses, the opportunity has been taken to make other amendments which FIDIC considers an improvement on earlier wording.

A draft of the MDB harmonised edition was circulated for comment to interested parties, including organisations representing contractors and lawyers, prior to its finalisation. All of the comments received were considered by FIDIC and some have been incorporated. Other

comments will be reviewed again when in due course FIDIC produces the second edition of their 1999 Conditions of Contract.

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## **MDB Harmonised Edition - Changes from FIDIC Cons 1999 (New Red Book)**

Simple changes that affect many clauses:

- 'Appendix to Tender' becomes 'Contract Data' - and is entirely filled in by Employer (1.1.1.10)
- 'Contract Data' becomes Part A of Particular Conditions
- 'reasonable profit' becomes 'profit' because profit is now fixed at 5% in MDB Cons
- 'Dispute Adjudication Board' = 'DAB' is simplified to 'Dispute Board' = 'DB'

Clause 1: 'Bank' and 'Borrower' defined

- 'Unforeseeable' - '..and against which adequate preventive precautions could not reasonably be taken.' added (1.1.6.8)
- 'tender' synonymous with 'bid', 'tenderer' = 'bidder' (1.2)
- 'Versions of contract in different languages' removed (1.4)
- any error - not only 'technical' - to be informed (1.8)
- Contract details to be confidential (1.12)
- Bank may inspect or audit Contractor's accounts (1.15)

Clause 2

- Con to be informed if Bank suspends disbursement (2.4)
- Empl claims - notice to be given as soon as Empl becomes aware or should have become aware of the event (2.5)

Clause 3 - Engineer (changes not liked by FIDIC!)

- Empl may change authority of Engineer (3.1)
- Eng to obtain specific approval of Empl before acting:
- 4.12 extra time/cost for unforeseeable physical conditions
- 13.1 instructing a variation (except in emergency, or below a stated amount) or approving a Cont proposal (13.2)
- Easier for Emp to change Eng. (3.4)

Clause 4 - Contractor

- Material, services etc from eligible source country (4.1)
- 4.2 Perf Security - unnecessary wording deleted
- Perf Sec may be increased/decreased for 25% variation
- If Con. Reps. not fluent then interpreters req'd (4.3)
- 4.4 SubCs. Confidentiality reqd.
- Reasonable opportunity for SubCs from the Country
- 4.18 Environment. Wording tightened.

Clause 6 - Staff and Labour - many additions

- 6.1- employ staff and labour from Country
- 6.2 - inform personnel about liability to taxes
- 6.7 - health & safety - add HIV-AIDS prevention
- 6.12 to 6.22 - added clauses usually in Part Cond.
- new: prohibition of forced labour; harmful child labour.

Clause 8 - Extension of Time

- delay by Empl personnel anywhere (not only on Site)

Sub-Cl. 12.3 Evaluation - If no rate given in BoQ, item is included

- New rate - only for larger changes

Sub-CI.13.7 Adjustments for changes in legislation - no adjustment if already covered by cost escalation

Sub-CI. 14.1 - Cont.Equipment exempt from import duties

- 14.7 - if Bank loan is suspended, Empl to pay in 14 days
- 14.9 - bank guarantee can be provided for Retention.
- Retention guarantee not req'd if Perf Bond covers 50%

Sub-CI.15.5 - Empl cannot terminate to avoid C terminating

- 15.6 - Corrupt practices added - defined in Notes.

Sub-CI.16.1 - If Bank suspends funds, Con. can suspend work

- Under FIDIC Con is then entitled to extra time/cost+profit
- - removed in MDB (Why? Seems a mistake?)
- 16.2 - If Bank suspends funds, Con can either suspend or terminate (Seems slight misunderstanding in MDB?)
- 16.2(d) - Emp. failure limited slightly by MDB wording.

Sub-CI. 17.1(b) - Indemnity by Con enlarged: from that caused by Con, to cover all damage or loss however arising except only that attributable to Employer. (Not liked by FIDIC!)

- 17.3 - Empl Risks - added wording doubtful. Sabotage.
- 17.6 - Limitation of Liability
- No liability for indirect loss except: delay damages added
- but 16.4 termin for Emp fault omitted.(?)
- Stated limit changed to 'multiplier' (or Accept. Con Amt)

Sub-CI. 18.1 - Insurances - can be placed with eligible source comp

Sub-CI. 19.1 - Force Majeure - sabotage (not Con Pers) added

- 19.6(c) - payment on FM - Costs 'necessarily' added

Sub-CI. 20.1 - Contractor's Claims - NO CHANGES, i.e. within 28 days for Contractor, and 42 days for Engin's response

- 20.2 - 20.4 DAB changed to Dispute Board = DB
- Several minor changes (and improvements),
- e.g. 'suitably qualified' includes profess exper in work type
- - 'if a list included in Contract' omitted
- - 'Parties may jointly refer for opinion' omitted
- - notice of dissatisfaction 'and intention to commence arb'
- 20.6 - Arbitration as stated in Part Con, otherwise ICC

Appendix A Gen Con - only minor changes

- if Parties cannot agree fee then named entity will decide
- Annex -Proc Rules 2 - 'endeavour to prevent .. disputes'.