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3 The FIDIC *Conditions of Contract*

FIDIC YELLOW
BOOK

3.1 Background

3.1.1 FIDIC

FIDIC (Fédération Internationale des Ingénieurs-Conseils) is an international federation of consulting engineers. It was founded in 1913 and now has over 100 member countries. FIDIC publishes various standard contracts to be used for construction works, infrastructure projects, consultancy services etc. The objects of FIDIC are:

- 1 Represent the consulting engineering industry globally.
- 2 Enhance the image of consulting engineers.
- 3 Be the authority on issues relating to business practice.
- 4 Promote the development of a global and viable consulting engineering industry.
- 5 Promote quality.
- 6 Actively promote conformance to a code of ethics and to business integrity.
- 7 Promote commitment to sustainable development.

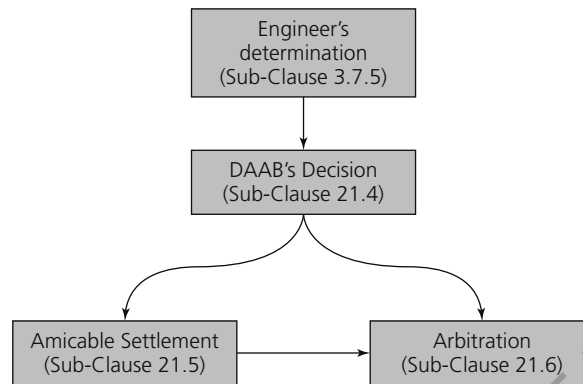
For decades, FIDIC has drafted and published standard contracts to accomplish these objectives, starting with the 1957 *Conditions of Contract for Construction* (the *Red Book*), based on a British standard contract. FIDIC's standard contracts are drafted with input from all relevant actors, including financing bodies (lending agencies and funding institutions), major employer and contractor organisations and advisors. Consequently, even though the FIDIC Contracts are not 'agreed documents' as such, they have over the years – rightfully – earned a reputation for reflecting best practice and procedures of the construction industries around the world.

FIDIC's standard contracts are based on three fundamental principles (as outlined in the FIDIC press release from the 2017 launch, available at fidic.org):

- 1 FIDIC contracts are drafted by engineers experienced in design and construction.
- 2 FIDIC contracts embody a balanced risk allocation between the Parties.
- 3 The role of the Engineer under FIDIC contracts is critical.

It is no secret that the FIDIC contracts are 'contracts **by** engineers **for** engineers' and this is apparent in some of the drafting. The aim was and remains that the contracts should use straightforward language immediately understandable to the users of various professions, thus reducing the need to employ contract lawyers to interpret the contracts. To a very large extent FIDIC has succeeded in this.

Figure 20B Escalation of Disputes



Clause 20 provides a procedure for managing the initial phases of a Claim, the requirements for giving Notice to the other Party and the establishment of records and other documentation in support of the Claim. The GC generally, as well as Clause 20 specifically, include several cut-off provisions, i.e. time periods where failure to comply with the time periods, e.g. for giving Notice, leads to loss of entitlement to relief, entitlement etc. in relation to the Claim in question. Although it is nice to know if the other Party is of the opinion that they have a Claim against you, cut-off for failure to comply with a time period where the failure has no negative consequences for the receiving Party other than ‘it would have been nice to know about the Claim sooner’ may be considered excessive. In some jurisdictions, e.g. Germany, the cut-off provisions may even be contrary to applicable, mandatory Laws with the effect that the receiving Party may not rely on them. In other countries, e.g. the Scandinavian countries, the receiving Party may also not be able to rely fully on the cut-off provisions as the cut-off consequences may be qualified or even fully set aside by a competent court or arbitration. Under Sub-Clause 20.2.5 [*Agreement or determination of the Claim*], the Engineer and, by reference, also the arbitrators, see the second paragraph of Sub-Clause 21.6 [*Arbitration*], may disregard a late Notice if the delay is justified. Nevertheless, this mechanism may induce Disputes to arise as a Party having its Claim rejected by the other Party or by the Engineer is forced to escalate the Dispute to arbitration if they believe the delay is justified; see Sub-Clause 20.2.5.

Further, in the name of equal treatment, the identical cut-off provisions now apply to the Employer’s and the Contractor’s Claims. However, treating the Parties equally is not the same as treating the Parties the same way. The Parties do not have equal insight into what events or circumstances may cause a Claim at a later stage. As an example, the cut-off provision in Sub-Clause 20.2.1 [*Notice of Claim*] states that Notice must be given within 28 days after the claiming Party became aware or should have become aware of the event or circumstance giving rise to the Claim. As this Sub-Clause also applies to the Employer’s Claims arising out of defects in the Works, the Employer must give Notice of defects within 28 days after becoming aware of the event or circumstance giving cause to the Claim, e.g. missing elements from the Contractor’s work. As detecting the missing elements could be fairly simple (by looking at the Works where these elements should have been), the 28 days start as soon as the Employer sees or should have seen that the elements are missing; however this may be years before completion of the Works. Similarly, the Contractor may have a hard time performing a full analysis of an event or

1.1.14 Contractor

Surprisingly, the name and address of the Contractor is not required to be included in the Contract Data. The identity of the Contractor is to be stated in the Letter of Tender. As with the Employer (and, to some extent, the Engineer), if the Contractor is a legal person (a non-human entity like a company or similar, as opposed to a ‘natural person’, who is an individual human being) it is of paramount importance to identify the Contractor with a unique reference to name as well as any registration number or similar unique identification means assigned to that legal entity. The name of the legal entity may change and the name may subsequently be assigned to another legal entity, but without a proper transfer of the Contract from one legal entity to the other, the Contract remains with the legal entity that concluded the Contract, regardless of any changes to the name.

1.1.15 Contractor's Documents

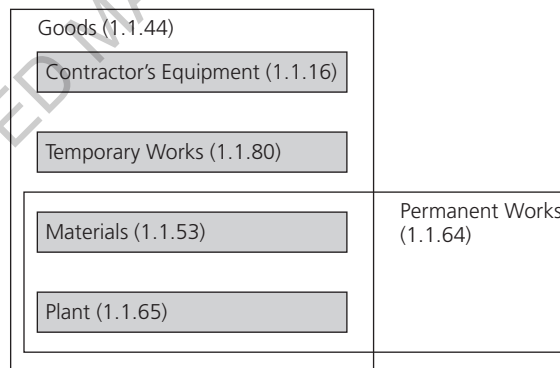
The Contractor's Documents are the deliverables from the Contractor detailed in Sub-Clause 4.4 [*Contractor's Documents*]. Contractor's Documents are not only paper or electronic documents (drawings, technical specifications etc.) but also computer programs and other software, calculations, models etc. The care and supply of the Contractor's Documents are detailed in Sub-Clause 1.8 [*Care and Supply of Documents*].

1.1.16 Contractor's Equipment

The Contractor's Equipment is the equipment, machinery, construction Plant etc. required by the Contractor for the execution of the Works. Presumably, if equipment is utilised by the Contractor, it is ‘Contractor's Equipment’, regardless of whether such equipment, strictly speaking, is actually required. Contractor's Equipment is part of the Goods, see Sub-Clause 1.1.44. The relationship between Goods, Materials and Permanent and Temporary Works is shown in Figure 1.1.16.

Figure 1.1.16 Relationship between Goods and Works etc.

FIDIC RED BOOK



1.1.17 Contractor's Personnel

The Contractor's Personnel is the personnel utilised by the Contractor or a Subcontractor on the Site and other places where the Works are being carried out. Contractor's Personnel include the Contractor's Representative, see Sub-Clause 1.1.18. Some of the Contractor's Personnel may be Key Personnel, see Sub-Clause 1.1.48. As the definition is drafted, the term ‘Contractor's Personnel’ refers not only to personnel employed by the Contractor; insourced personnel would also

adjustments may be appropriate to ensure an efficient process to the benefit of the project, e.g. by stating balanced Review periods. Contractor's Documents are defined as (a) the documents specified in the Specification, (b) the documents required to satisfy all Contractor's permits etc. under Sub-Clause 1.13 [*Compliance with Laws*] (presumably sub-paragraph (b) thereof), (c) the documents described in Sub-Clauses 4.4.2 [*As-Built Records*] and 4.4.3 [*Operation and Maintenance Manuals*], and documents as may be required under sub-paragraph (a) of Sub-Clause 4.1 [*Contractor's General Obligations*]. Sub-paragraph (b) does not refer to documents required to satisfy the Employer's permits etc. under Sub-Clause 1.13; this is probably not the intention as the Contractor is obliged to supply to the Employer 'all documentation ... reasonably required by the Employer, so as to allow the Employer to obtain any permit ...' under paragraph (c) of Sub-Clause 1.13. In the 1999 versions, the Contractor's Documents comprise all 'documents required to satisfy all regulatory approvals'. As many of the Employer's permits etc. would require documents that are most efficiently provided or prepared by the Contractor, and as review by third parties with special authority or certification may be a requirement under applicable Laws, consider specifying exactly what documents comprise the Contractor's Documents to avoid any uncertainty in this respect.

The latter half of Sub-Clause 4.4.2 [*As-Built Records*] describes the process for the Engineer's Review of the documents identified in the Specification as being required to be submitted for Review. If no documents are identified as being required to be submitted for Review, this process does not apply.

The Contractor's Notice under this Sub-Clause shall state that the documents submitted are ready for Review and for use (i.e. that the Contractor considers the documents completed except for the Review process) and also that the documents comply with the Specification. The Review period shall not exceed 21 days, regardless of the complexity of the documents submitted for Review; consequently, consider in the Specification stating specific Review periods for each type or set of documents to cater for a more efficient Review as 21 days may not be appropriate in all circumstances. The Review processes in this Sub-Clause are illustrated in Figure 4.4.

Figure 4.4 Review of Contractor's Documents

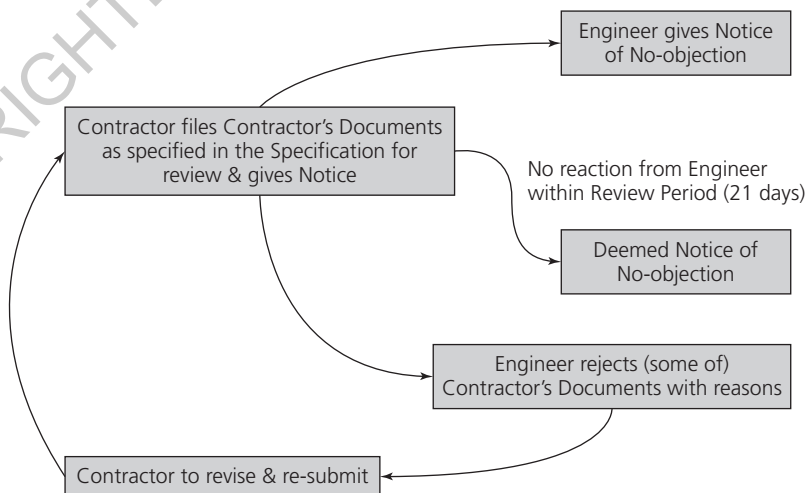
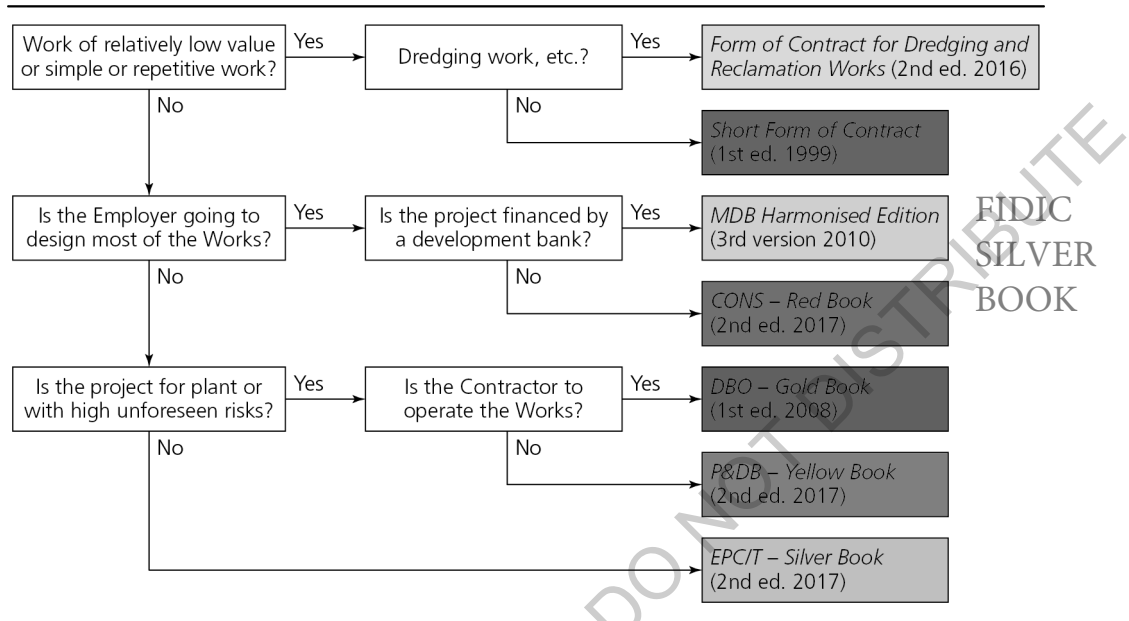


Figure A Which FIDIC?



- 1 Who is responsible for the design, the Employer or the Contractor?
- 2 If the Contractor is responsible for the design, should (almost) all risks be transferred to the Contractor?

If the Employer (or a third party employed by the Employer) is responsible for the design, then use the *Red Book*. If the Contractor is responsible for the design and the parties are looking for a balanced distribution of risks, choose the *Yellow Book*. If the Contractor is responsible for the design and the Contractor is to take the majority of the risks associated with the design and completion of the Works, use the *Silver Book*.

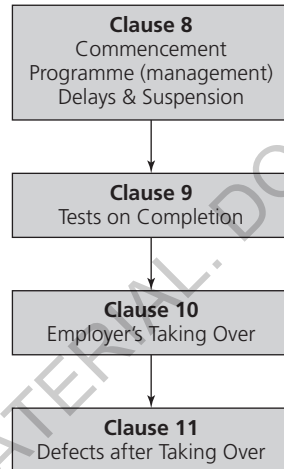
The *Silver Book* differs from the *Red Book* and the *Yellow Book* in several major areas.

Risk allocation. Where the *Red* and *Yellow Books* both employ a balanced distribution of a number of the risks associated with the execution of the Works, the *Silver Book* allocates most of these risks to the Contractor. One example is the correctness of the Employer's Requirements, see the fourth paragraph of Sub-Clause 5.1 [*General Design Obligations*], or of the Site Data and points of reference, where the 'Employer shall have no responsibility for the accuracy, sufficiency or completeness of such data and/or items of reference', see Sub-Clause 2.5 [*Site Data and Items of Reference*], and the Employer is only responsible to the extent stated in Sub-Clause 5.1. Another example is the risk relating to (Unforeseeable) physical conditions at the Site. Under the *Red* and *Yellow Books*, the foreseeable risks are assumed by the Contractor whereas the Unforeseeable risks are assumed by the Employer. Under the *Silver Book*, 'the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the Works', see sub-paragraph (b) of Sub-Clause 4.12 [*Unforeseeable Difficulties*]. Sub-paragraph (c) of that Sub-Clause underlines this principle by stating that 'the Contract Price shall not be adjusted to take account of any Unforeseeable or unforeseen difficulties or costs'.

8 Commencement, Delays and Suspension

Clause 8 is about time; the time period for the performance of the Works (the beginning and the end), management of the Programme, the Contractor's right to Extension of Time and the Employer's right to suspend progress of the Works. Once the Works have been completed, Clause 9 [*Tests on Completion*] deals with the testing at completion and Clause 10 [*Employer's Taking Over*] deals with the mechanics for the Employer's Taking Over of the Works. Clause 11 [*Defects after Taking Over*] deals with defects after the Employer's Taking Over. See also Figure 8.

Figure 8 Sequence



FIDIC SILVER BOOK

8.1 Commencement of Works

The Contractor shall begin executing the Works at the Commencement Date and shall have completed the Works in accordance with Clause 10 [*Employer's Taking Over*] on the Time for Completion as stated in the Contract Data. If the Commencement Date is not stated in the Contract Agreement (which is recommendable), the Employer shall give Notice to the Contractor stating the Commencement Date not less than 14 days before the Commencement Date.

The Commencement Date forms the starting point for the calculation of the Time for Completion, see Sub-Clause 1.1.76. This means that, if the Commencement Date is not stated in the Contract Agreement, the Time for Completion ends on a date not known to the Contractor at the conclusion of the Contract (it may not even be known to the Employer at that time) and that all the key dates, critical for achieving completion of the Works on or before the Time for Completion, are not known either. However, in many projects the Time for Completion is stated as a specific date and that date is calculated based on an assumption as to the date of the conclusion of the Contract and the Commencement Date.