
FIDIC Green Book

**A companion to the 2021
*Short Form of Contract***

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3 The FIDIC Conditions of Contract

3.1 Background

FIDIC (Fédération Internationale des Ingénieurs-Conseils) is an international federation of consulting engineers. It was founded in 1913 and now has representatives from over 100 member countries. The objects of FIDIC are as follows:

- 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 original *Red Book*), based on a British standard contract. FIDIC now publishes various standard contracts to be used for construction works, infrastructure projects, consultancy services etc. 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 standard contracts are based on three fundamental principles.

- FIDIC contracts are drafted by engineers experienced in design and construction.
- FIDIC contracts embody a balanced risk allocation between the Parties.
- 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 FIDIC 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.

In 1999, FIDIC released a suite of *Conditions of Contract* consisting of three forms:

- *Conditions of Contract for Construction (CONS or the Red Book)*;

In principle, the choice between the forms is made by answering three simple questions (see also Figure A for an illustration of the process):

1 *Is the work with perceived low level of risk or do the Parties wish to opt out of significant contract administration and management?*

If yes, then use the *Short Form of Contract* unless the work is dredging work, in which case you should use the *Form of Contract for Dredging and Reclamation Works* (second edition, 2016).

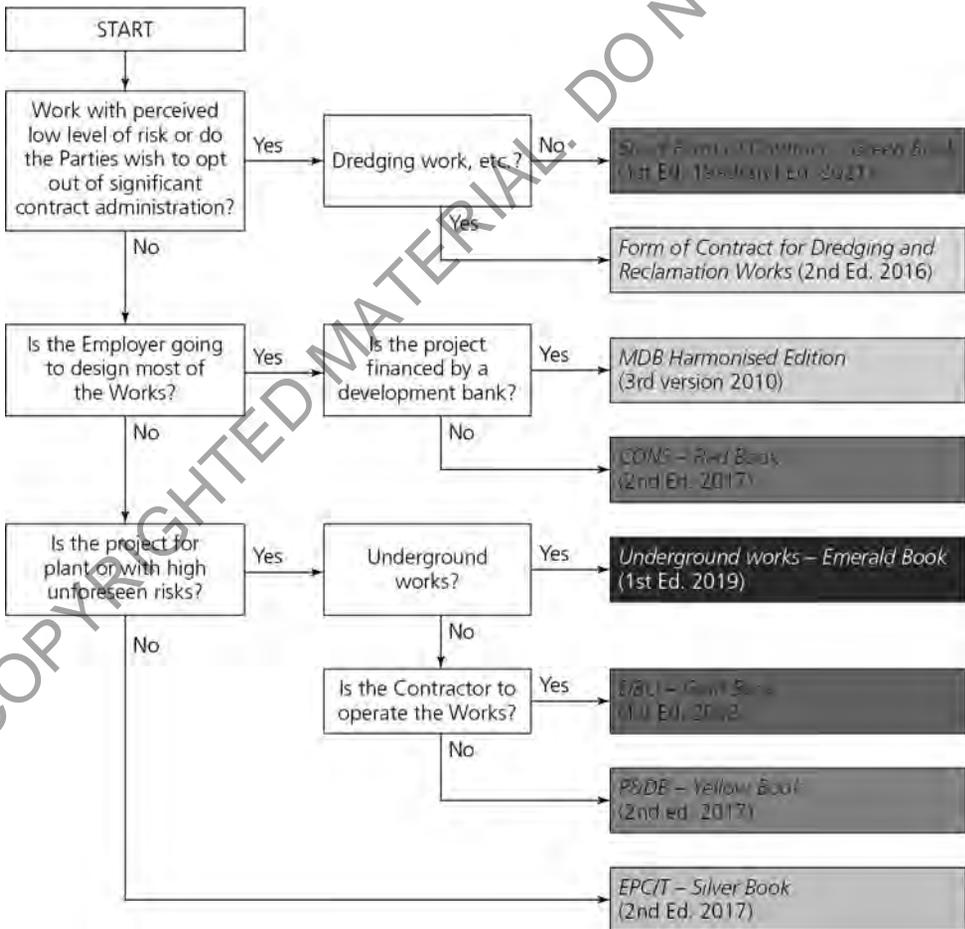
If no, continue to next question.

2 *Is the Employer going to design most of the Works?*

If yes, use the *Construction Conditions (Red Book, second edition, 2017)*, unless the project is financed by a development bank, in which case you may use the *MDB Harmonised Edition, third version (Pink Book, 2010)*. This is, of course, a subject to be agreed with the development bank in question.

If no, continue to next question.

Figure B Which FIDIC?



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2 The Employer

Clause 2 deals with the provisions on the Employer-specific obligations, e.g. providing access to the Site for the Contractor, and making data on the various conditions of the Site available to the Contractor.

2.1 Access to and Possession of the Site

The Employer shall give the Contractor access to the Site at the time stated in the Contract Data. If the Employer fails to provide such access and the Contractor is delayed or incurs Cost in consequence thereof, the Contractor may claim an EOT and payment of such Cost under Sub-Clause 11.1 [*Employer's Risks and Contractor's Entitlements*], unless such failure is caused by an error or delay by the Contractor. The Employer may require the receipt of any Performance Security (under Sub-Clause 4.5 [*Performance Security*]) as a precondition for granting access to the Site. The *Guidance* includes suggested wording for including such a requirement in the Contract. Unlike the full-length *Conditions*, the *Short Form* does not include a fall-back position that applies if the Contract Data (and the Contract in general) do not specify the date for the Contractor's access to the Site. This will then be decided under the applicable law.

2.2 Site Data

The Employer shall make available to the Contractor before the Base Date all relevant information in the Employer's possession on the topography (the shape and features of the surface) of the Site and on sub-surface, hydrological, climatic and environmental conditions at the Site. The Employer shall promptly make available any such information that comes into the Employer's possession after the Base Date.

It is for the Contractor to interpret such data; the Employer does not warrant that the data are correct (or even representative). See also sub-paragraph (d) of Sub-Clause 11.1.3 [*Employer's Risks and Contractor's Entitlements*] on Unforeseeable physical conditions encountered at the Site.

2.3 Employer's Financial Arrangements

This Sub-Clause requires the Employer, on request, to submit reasonable evidence to the Contractor that financial arrangements have been made to enable the Employer to fulfil their payment obligations under the Contract. The Sub-Clause is more or less copied from the first editions of the full-length *Conditions* but the updates from the second editions are missing. Consequently, the exact scope of the Employer's obligations under this Sub-Clause is not clear; e.g. what is 'reasonable evidence'? Failure to comply with this obligation may ultimately entitle the Contractor to first suspend performance of their obligations under Sub-Clause 10.1.2 [*Suspension*] and then terminate the Contract under Sub-Clause 10.3 [*Termination by Contractor*]. The scope of the Employer's obligation should be detailed in the Special Provisions (where an obligation for the Employer to notify the Contractor if circumstances change could also be included).

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6 Time

Clause 6 [*Time*] is about time; the time period for the performance of the Works (the beginning and the end), management of the programme and the Contractor's right to Extension of Time, and also the Employer's right to claim Delay Damages. Once the Works have been completed, Clause 9 [*Taking Over*] deals with the mechanics for the Employer's Taking Over of the Works. Sub-Clause 5.5 [*Remedying Defects*] deals with the Contractor's remedying of defects in and damage to the Works during the DNP.

6.1 Execution of the Works

The Engineer shall notify the Contractor of the Commencement Date and the Contractor shall commence the execution of the Works as soon as practicable after the Commencement Date and shall complete the Works within the Time for Completion.

The Time for Completion is calculated from the Commencement Date, see Sub-Clause 1.1.43. In theory, this means that 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 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. Many contracts will also include an overall programme for the execution of the Works, enabling the Employer to plan execution of other work. Such plans are difficult to draft if the Commencement Date (and thus the Time for Completion and the interim milestones) are not known. Consider if stating the Commencement Date and the Time for Completion in the Contract rather than relying on the notification procedure in this Sub-Clause is more appropriate for your project.

6.2 Programme

As with the full-length *Conditions*, the *Short Form Conditions* do not require a (detailed) programme to be included in the Contract. Instead, the Contractor is required to submit an initial programme to the Engineer within 14 days after receiving the notice of the Commencement Date under Sub-Clause 6.1 [*Execution of the Works*] (or within such time stated in the Contract Data). Unless the Engineer objects (by a notice stating '*the extent to which it does not comply with the Contract*') the Contractor shall then proceed in accordance with the submitted programme. As in respect of the unknown Commencement Date etc., this may create an unwanted uncertainty for the Employer, especially if the Employer needs to plan other activities at the Site. Consider including an initial programme in the Contract; such an initial programme may also state Commencement Date (and Time for Completion), thereby also addressing the issues highlighted under Sub-Clause 6.1.

The *Short Form Conditions* do not contain detailed provisions on updates of the contract and execution programmes when changes in progress make updating the programme appropriate.