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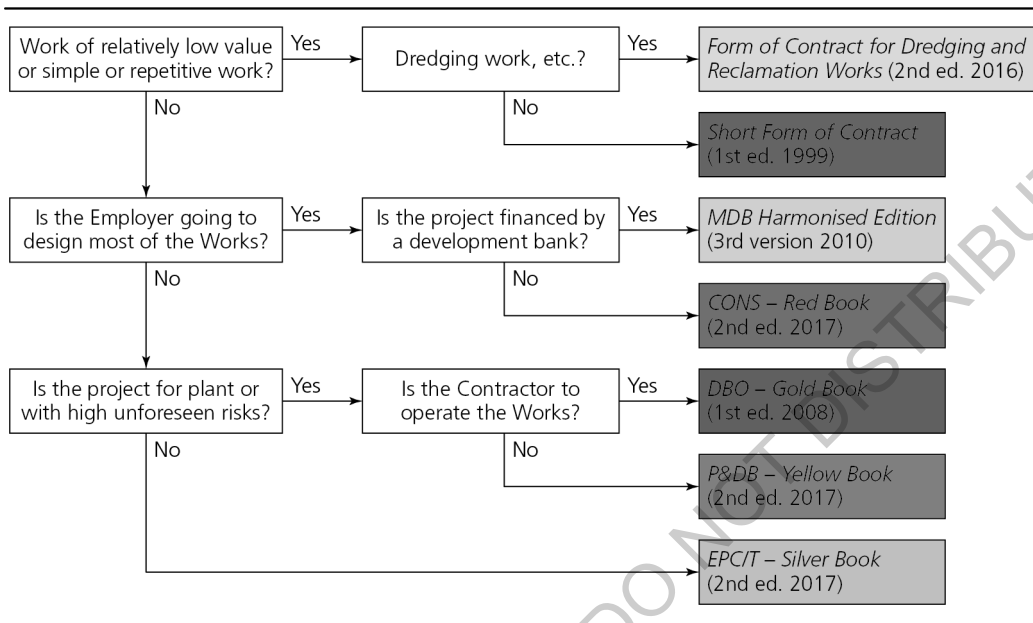
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Figure A Which FIDIC?



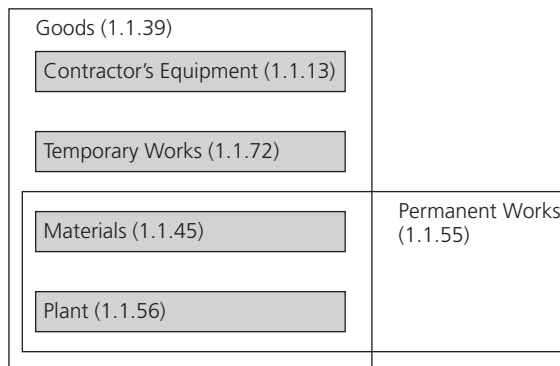
- 1 Who is responsible for the design, the Employer or the Contractor?
- 2 If the Contractor is responsible for the design, should (almost) all risks be transferred to the Contractor?

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'.

Figure 1.1.13 Relationship between Goods and Works etc.



1.1.15 Contractor's Representative

The Contractor's Representative is the person appointed by the Contractor, either by naming the Contractor's Representative in the Contract Data (although no placeholder is provided for this in the FIDIC specimen) or by subsequent appointment in accordance with Sub-Clause 4.3 [*Contractor's Representative*]. The Contractor's Representative must be a natural person.

1.1.16 Cost

This definition (and the subsequent definition of 'Cost Plus Profit') is used in several provisions, predominantly in the Clauses entitling the Contractor to financial compensation, e.g. in respect of the Employer's delay or failure to obtain any permit etc. (Sub-Clause 1.12 [*Compliance with Laws*]) or to provide timely access to the Site (Sub-Clause 2.1 [*Right of Access to the Site*]), cost suffered in complying with an instruction to co-ordinate (Sub-Clause 4.6 [*Co-operation*]) etc.

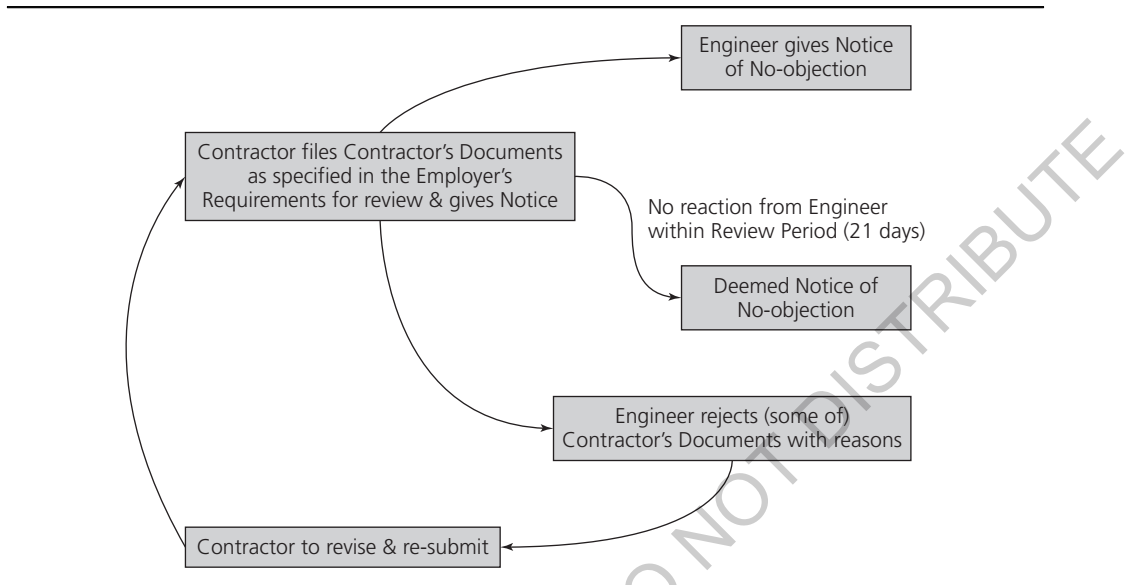
'Cost' means all costs reasonably incurred in performing the Contract, including 'taxes, overheads and similar charges'. In this context, the inclusion of 'taxes' is unfortunate as it is uncertain what taxes are included, or if **all** taxes are included (also indirect taxes or income taxes). Also, by including 'overheads and similar charges', the Contractor is entitled to recover not only the direct costs incurred but also indirect costs like, e.g. head office costs, although the definition does not provide any guidance as to how such overheads are distributed or allocated to the Contract. My suggestion is in the Special Provisions to delete the 'overheads and similar charges' part of the definition and clarify that only **direct** taxes may be included in the Cost. See Appendix B.

1.1.17 Cost Plus Profit

In some circumstances – usually where the Contractor incurs costs due to events or circumstances for which the Employer is responsible – profit is added to the Cost. The level of profit should be stated in the Contract Data but if not stated the profit is 5%. The main provisions entitling the Contractor to Cost Plus Profit are:

- (a) Sub-Clause 1.12 [*Compliance with Laws*];
- (b) Sub-Clause 2.1 [*Right of Access to the Site*] for the Employer's failure to provide access to the Site in accordance with the Contract;
- (c) complying with instructions under Sub-Clause 4.6 [*Co-operation*];

Figure 5.2.2 Review of Contractor's Documents



During construction, the Contractor shall submit the documents required and shall not commence construction until a Notice of No-objection is given (or is deemed given). Describing shorter – but still appropriate – review periods would then theoretically shorten the total time period required for executing the Works. Documents previously submitted for review may be adjusted but only after Notice (with reasons) is given to the Employer. Work relating to the suggested adjustment is suspended pending clarification of the adjustment.

5.3 Contractor's Undertaking

This Sub-Clause is another of the key obligations of the Contractor, together with, e.g., Sub-Clauses 4.1 [*Contractor's General Obligations*] and 5.1 [*General Design Obligations*].

Sub-Clause 5.3 [*Contractor's Undertaking*] emphasises that the Contractor undertakes that the design, the Contractor's Documents, the execution of the Works and the completed Works comply with the Laws of the Country and (the documents forming) the Contract. It also emphasises that the Contractor's obligations not only refer to the end-result (the completed Works) but also the applied methodology in getting there, including the design and execution of the Works (and methods applied).

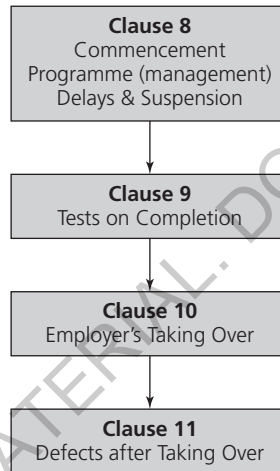
5.4 Technical Standards and Regulations

Under Sub-Clause 5.3 [*Contractor's Undertaking*] the Contractor undertakes that the design, the Contractor's Documents, the execution of the Works and the completed Works will be in accordance with the Laws of the Country and (the documents forming) the Contract. This Sub-Clause 5.4 [*Technical Standards and Regulations*] states that the Contractor's Documents, the execution of the Works and the completed Works (but not the design) shall comply with the Country's technical standards and the building, construction and environmental Laws applicable to the product being produced from the Works, as well as (any) other standards specified in the Employer's Requirements. Where Sub-Clause 5.3 deals with the Works, Sub-Clause 5.4 adds the Laws

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

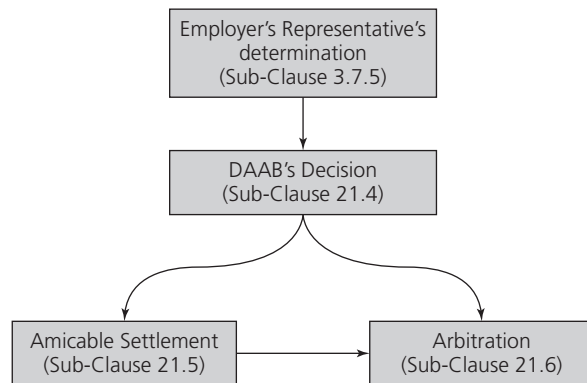


8.1 Commencement of Works

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.

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 Employer's Representative, 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 Employer's Representative 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, 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 may 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 (and what happens if the Contractor was fully aware of the missing elements and planned to install them