



Fédération International des Ingénieurs-Conseils
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FIDIC DBO Contract Guide

FOR THE FIDIC CONDITIONS OF CONTRACT FOR DESIGN, BUILD
AND OPERATE PROJECTS

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2 FIDIC DBO Contract

In 1999, the Fédération Internationale des Ingénieurs-Conseils (FIDIC) published a new series of Conditions of Contract: (a) for Construction; (b) for Plant and Design-Build; (c) for EPC/Turnkey Projects. A guide for these contracts, *The FIDIC Contracts Guide*, was also published by FIDIC. This was followed by the *FIDIC Short Form of Contract* for lower value or less complex projects, and the *Form of Contract for Dredging and Reclamation Works*. Following their publication, it became clear that there was a growing need for a document which combined a design-build obligation with a long-term operation commitment.

Whilst it was recognised that there are alternative scenarios encompassing the Design, Build and Operate (DBO) concept, for example the 'greenfield' scenario of Design - Build - Operate, and the 'brownfield' scenario of Operate - Design - Build, it was also recognised that different scenarios required different contract conditions. Moreover, the conditions applicable to short-term operation differed considerably to those applicable to long-term operation. A further consideration was whether it was best to approach a DBO project as a single long-term contract or as two separate or linked contracts.

For the *FIDIC Conditions of Contract for Design, Build and Operate Projects*, FIDIC chose to adopt the greenfield Design - Build - Operate scenario, with a 20-year operation period, and opted for a single contract awarded to a single contracting entity (which would almost certainly be a consortium or joint venture) to optimise the coordination of innovation, quality and performance, rather than award separate contracts for design-build and for operation. The Contractor has no responsibility for either financing the project or for its ultimate commercial success.

The document, as written, is not suitable for contracts which are not based on the traditional Design - Build - Operate sequence, or where the Operation Period differs significantly from the 20 years adopted.

3 Introduction and Foreword

In 1999, the Fédération Internationale des Ingénieurs-Conseils (FIDIC) published substantially updated Conditions of Contract for Construction and for Plant and Design-Build, and a new form for EPC/Turnkey Projects. This was followed by the *FIDIC Short Form of Contract* for lower value or less complex projects, and a *Form of Contract for Dredging and Reclamation Works*. Following their publication, it became clear that there was a growing need for a document which combined a design-build obligation with a long-term operation commitment.

Thus in 2008, FIDIC published the First Edition of *Conditions of Contract for Design, Build and Operate Projects*.

Whilst it is recognised that there are alternative scenarios which encompass the Design - Build - Operate (DBO) concept, FIDIC chose to base its document on the 'greenfield' scenario. The Conditions of Contract have thus been prepared for projects leading to the creation and development of a completely new facility from scratch.

The type of projects which could benefit from adopting the DBO form of procurement are typically infrastructure projects where the resulting facility will often produce an income or revenue for the Employer and where the Employer might not have the resources or experience to operate the facility himself and might otherwise consider engaging a service provider or operator.

The feasibility and environmental studies and the economic viability studies will normally have been made by, or on behalf of, the Employer before he makes his decision on whether or not to proceed with the Project, and it will also be the Employer who will be responsible for land acquisition, financing, planning, and other permissions.

The Contract awarded to the Contractor will then be for the design and construction of the Project or facility, followed by the long-term operation and maintenance of that facility for a period of 20 years. At the time of commissioning and the issue of the Commissioning Certificate, ownership of the facility reverts to the Employer, and during the 20-year Operation Service Period, the Contractor will be operating and maintaining the facility under an operating licence from the Employer.

The document also assumes that the Contract will be awarded as a single contract to a single contracting entity (which will almost certainly be a consortium or joint venture) rather than adopt the alternative arrangement of one contract for the design-build of the Works, and a separate service contract for the operation.

It was felt that this arrangement would help to optimise the coordination of innovation, quality and performance, and provide the Employer with a facility which is not only 'fit for purpose', which is a fundamental requirement of the Contract, but also a facility which is built to last, since the Contractor knows that he has the responsibility to operate and maintain the facility for around 20 years.

The document, as written, is not suitable for contracts which are not based on the assumed Design - Build - Operate sequence, or where the Operation Period differs significantly from the 20 years adopted, and parties who are considering undertaking a project incorporating the elements of design, build and operation which is not based on the 'greenfield' scenario, or where the planned operation period is significantly greater than or less than 20 years, should not use this document without careful modification. FIDIC can provide assistance and guidance if required.

A common alternative to the DBO 'greenfield' approach for the creation of a new facility is

4 Parties involved in a DBO Project

There are a number of persons and parties who are involved in a DBO project and who are named somewhere in the Contract Documents.

Some of these persons and parties are defined in Sub-Clause 1.1 [*Definitions*] of the General Conditions, and some are not. However, even those with no formal definition have an important role to play.

Signatories to the Contract

Only two Parties sign the Contract and are thereby bound by the terms of the Contract. They are the Employer (see Definition 1.1.32) and the Contractor (see Definition 1.1.17).

They each have obligations, duties and rights towards one another under the Contract, and each of these obligations, duties and rights is governed by the use of the word 'shall' or 'may' (see Sub-Clause 1.2 [*Interpretation*]).

By Sub-Clause 1.8 [*Assignment*], neither Party may assign the whole or any part of the Contract to a third party without the prior written agreement of the other Party to do so, and the Contract is written assuming that both Parties fulfil the duties and obligations assigned to them.

Assignment means the transfer of rights under a contract to a third party and this should not be confused with other relationships such as subcontracting (where, in order to perform a construction contract, a contractor purchases services from another contractor, called a subcontractor, who performs the services under the responsibility of the contractor) or horizontal cooperation such as a joint venture (where two or more contractors agree to perform a project together and share the corresponding risks and rewards of performance).

If either the Employer or the Contractor is to be called by another title such as 'Owner' or 'Ministry' or 'Client', or 'Builder' or 'Constructor', this revised terminology must be clearly explained in the Contract Data or elsewhere in the Contract. Unless such explanation contains any revisions to the foreseen roles of the parties concerned, then such parties shall be deemed to have the roles of the Employer and Contractor as respectively assigned to them in the Contract.

It is essential that each Party is a legal person or entity under the law of the country under which it has been constituted, as only legal persons or entities can enter into contracts. Thus, to take some examples: a branch of a company is not normally a legal person or entity, only the company itself is one, and an administration, authority or ministry of a state may not be a legal person or entity, only the state itself may be one. Where there is any uncertainty about whether a particular body is a legal person or entity, it is advisable to seek a legal opinion.

Other defined parties (in alphabetical order)

Auditing Body

The Auditing Body (see Definition 1.1.4) is a jointly appointed (by the Employer and the Contractor) as a totally impartial body which is active during the Operation Service Period to monitor the performance of both Parties during the Operation Service Period. The body may be one or more persons and its role is to check that both Parties are performing the Contract in a proper way during the Operation Service Period. This role should not be

5 General Conditions – Clause-by-Clause Commentary

The notes which follow the individual clauses of the DBO Conditions of Contract are made by the drafting task group and are intended to serve as a practical guide to the intended operation and use of the various clauses and to explain how they interrelate with each other.

The text from the DBO Contract is shown indented; the commentary by the drafting task group is shown below the indented text.

Not all sub-clauses have commentary. Where the drafting task group felt that no explanation or comment would help in the understanding of the text, no commentary is given.

Clause 1 General Conditions

1.1 Definitions

In the Conditions of Contract (“these Conditions”), which include Particular Conditions and these General Conditions, the following words and expressions shall have the meanings stated. Words indicating persons or parties include corporations and other legal entities, except where the context requires otherwise.

The defined words are listed alphabetically and they are identifiable in the text of the various clauses and sub-clauses by the use of capital initial letters.

1.1.1 “Accepted Contract Amount” means the amount accepted in the Letter of Acceptance for the Design-Build of the Works and the provision of the Operation Service, including the amount of the Asset Replacement Fund.

It is important that the “Accepted Contract Amount” is stated in the Letter of Acceptance or, if there is no Letter of Acceptance, then in the Contract Agreement. If this is not done, it could be argued that the Accepted Contract Amount is the same as the Tender Sum offered by the Contractor to whom the Contract is being awarded. The Accepted Contract Amount should separately identify the amounts applying to the Design-Build of the Works, the Operation Service and the amount of the Asset Replacement Fund.

1.1.2 “Asset Replacement Fund” means the fund provided for under Sub-Clause 14.18 [*Asset Replacement Fund*].

1.1.3 “Asset Replacement Schedule” means the schedule referred to in Sub-Clause 14.5 [*Asset Replacement Schedule*] prepared by the Contractor covering the identification and timing of asset replacements.

It is recognised that during an operation commitment lasting 20 years, a number of items of Plant or Materials will need replacing. The frequency of replacement will depend on the quality of the initial installation included by the Contractor in his basic design. Since the content and value of the Schedule and Fund will be prepared by the Contractor, it is very important that this is checked against the Contractor’s basic design to see that it meets the requirements of Sub-Clauses 14.5 [*Asset Replacement Schedule*] and 14.18 [*Asset Replacement Fund*].

1.1.4 “Auditing Body” means the independent and impartial body appointed to conduct the Independent Compliance Audit in accordance with Sub-Clause 10.3 [*Independent Compliance Audit*].

It is important that both Parties fulfil their obligations during the Operation Service Period if the Operation Service is to be successful. The Auditing Body is independent from both the