



EUROPEAN
INTERNATIONAL
CONTRACTORS

E I C Contractor's Guide
to the
F I D I C Conditions of Contract
for
Construction

THE NEW E I C RED BOOK GUIDE

EIC Contractor's Guide
to
the FIDIC Conditions of Contract
for
Construction

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Foreword

EIC prepared a Contractor's Guide to the FIDIC Conditions of Contract for EPC Turnkey Contracts (the Silver Book) and published it in March 2000. EIC took this decision, not only due to the significant (in some instances unquantifiable) risks that the Contractor is required to carry under the Silver Book but also because it places the Contractor in a contractual environment that permits the Employer considerable scope for interference and unilateral action. It is this combination of high risk and limited freedom of action that concerns contractors. The Guide to the Silver Book was generally well received and whilst it did not receive a wholehearted endorsement from FIDIC they were kind enough to suggest that it provided a useful checklist for both employer and contractor. Feedback from contractors tells us that they find it useful; it highlights and discusses the risks confronting contractors within the restrictive contractual framework of the Silver Book and is a useful checklist, highlighting those clauses requiring careful thought.

As a FIDIC form the Silver Book was completely new to EIC contractors, whereas we are very familiar with the Fourth Edition of the Conditions of Contract for Works of Civil Engineering Construction and generally consider it an acceptable form of contract. Indeed, given the opportunity, contractors have recommended its use to employers. Throughout this Guide, it is referred to as the Fourth Edition. So, why publish a guide to its successor, the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, hereinafter referred to as the Red Book? In contrast to contractors' favourable impressions of the Fourth Edition, our study of the Red Book and discussions with FIDIC led us to the conclusion that whilst it does not present the same high degree of risk as the Silver Book it is more onerous than the Fourth Edition to the extent that the publication of a guide is justified. We have followed a format similar to our Guide to the Silver Book and comment only where we think that there is something important for contractors to consider and only at length where there are important issues at stake.

EIC wishes to make it clear that this document is not exhaustive and is intended for guidance only. Expert legal advice should always be obtained before submitting an offer or making any commitment to enter into a contract. Neither EIC nor the authors of this document accept any responsibility or liability in respect of any use made by any person or entity of this document or its contents which is and shall remain entirely at the user's risk.

To ensure that this Guide provides the maximum benefit to the industry at large, we would like to receive feedback from EIC member companies on its usefulness and relevance and we would particularly like to gather experience of any contracts carried out under the Red Book. All communications should be sent to the EIC Secretariat in Berlin.

1 General Provisions

1.1.2.6 Employer's Personnel

The new definition of the Employer's Personnel includes the personnel of both the Employer and those of the Engineer. This could include a very significant number of people, especially where the Employer is a national government or government agency.

1.1.4.3 Cost

The definition of Cost excludes profit and could result in the Contractor carrying out extra work or incurring expense, possibly quite substantial in extent, without profit. Such work or expense could arise under various Sub-Clauses, for example, 4.12 [*Unforeseen Physical Conditions*], 4.24 [*Fossils*], 8.9 [*Consequences of Suspension*], 13.7 [*Adjustments for Changes in Legislation*], 17.4 [*Consequences of Employer's Risks*], except as indicated, and 19.4 [*Consequences of Force Majeure*]. Under each of those clauses any entitlement would exclude profit unless tenders have been otherwise qualified.

1.4 Law and Language

Provides that **"The Contract shall be governed by the law of the Country (or other jurisdiction) stated in the Appendix to Tender"**. The Contractor should be aware that under certain Civil Law jurisdictions some Red Book conditions may be considered unfair trade terms and therefore inapplicable. There may also be mandatory laws, which cannot be overridden by the Contract. Any potential conflict between the Contract and mandatory legal requirements is best clarified by taking expert advice during the tender period.

1.12 Confidential Details

Requires that, **"The Contractor shall disclose all such confidential and other information as the Engineer may reasonably require"**. This clause could present difficulties if the Contractor were required to disclose confidential information in respect of which the Contractor has a duty of confidentiality to a third party.

The Silver Book allows the Contractor to retain confidentiality over information, which has been specified at tender stage, whereas the Red Book offers no such protection. Whilst the Sub-Clause includes the phrase **"as the Engineer may reasonably require"** no criteria are provided to give guidance on what is reasonable. The Contract should contain a provision to provide the Parties with the opportunity, pre-tender, to discuss and agree the extent of any privileged Contractor's information. Contractors should be mindful of this requirement with regard to internally confidential and sensitive information and that of third parties.

1.13 Compliance with Laws

The Contractor shall comply with all applicable laws. However responsibility for obtaining permits, licences or approvals is not entirely clear when Sub-Clauses 1.13 (a) and (b) are compared:

Sub-Clause 1.13 (a) provides that **"the Employer shall have obtained (or shall obtain) the planning, zoning or similar permission for the Permanent Works"**. Sub-Clause 1.13 (b) states that **"the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by the Laws in relation to the execution and completion of the Works and the remedying of any defects"**. Responsibility for obtaining permissions is ambiguous and