



EUROPEAN
INTERNATIONAL
CONTRACTORS

E I C Contractor's Guide
to the
MDB Harmonised Edition
of the
FIDIC Conditions of Contract
for Construction
(June 2010)

THE PINK BOOK GUIDE

Foreword to the FIDIC June 2010 MDB Edition of the FIDIC Conditions of Contract for Construction

Since the publication of the FIDIC "*Red, Yellow and Silver Books*" (so-called "*New Books*") in 1999, EIC has published four "EIC Contractor's Guides" to the new FIDIC suite of standard contract forms for major works, namely the

- *EIC Contractor's Guide to the FIDIC Conditions of Contract for EPC Turnkey Contracts* (hereafter referred to as the FIDIC 1999 "*Silver Book*"), published in March 2000, with subsequent revision published in August 2003;
- *EIC Contractor's Guide to the FIDIC Conditions of Contract for Construction* (hereafter referred to as the FIDIC 1999 "*Red Book*"), published in March 2002, reprinted in March 2003;
- *EIC Contractor's Guide to the FIDIC Conditions of Contract for Plant and Design-Build* (hereafter referred to as the FIDIC 1999 "*Yellow Book*"), published in March 2003;
- *EIC Contractor's Guide to the FIDIC Conditions of Contract for Design, Build and Operate* (hereafter referred to as the FIDIC "*Gold Book*"), published in September 2009.

As was the case with the Fourth Edition of the old "*Red Book*" (1987) the FIDIC 1999 "*Red Book*" was adopted by the World Bank as the basis for the General Contract Conditions of its Standard Bidding Documents for Works, however with significant modifications reflecting the Bank's standard procurement practice. In the light of the ongoing process of issuing harmonised procurement documents for construction projects for which the Multilateral Development Banks (MDBs) are providing finance, the World Bank and most of the other MDBs resolved that there should be a modified standard form of the FIDIC 1999 "*Red Book*" for use by the MDBs in which the General Contract Conditions would contain the standard wording which previously had been incorporated by the MDBs in the Particular Conditions.

EIC has been consulted several times during the drafting process of the MDB Harmonised Conditions of Contract for Construction as a "friendly reviewer". As early as December 2004, FIDIC invited EIC to review a first draft version that was, at the outset, to become the Second Edition of the FIDIC 1999 "*Red Book*".

Notwithstanding the reservations expressed by EIC, the World Bank published in conjunction with FIDIC in May 2005 a first harmonised version of the FIDIC 1999 "*Red Book*" for use by the MDBs. The 2005 version was scrutinised by EIC and a summary of EIC's early comments was publicised in the January 2006 volume of the *International Construction Law Review*.

Following EIC's critical remarks, as well as those from other commentators, the 2005 version was reviewed and superseded by an update in March 2006 which to some extent addressed the comments of EIC on the FIDIC 2005 version, one such comment regarding the confusing definition of "Unforeseeability".

Executive Summary on the FIDIC 1999 “Red Book”

We readily accept that in some respects the FIDIC 1999 “Red Book” is an improvement on the Fourth Edition. However, we believe that the balance of all amendments will increase the risk to contractors and have concluded therefore that the FIDIC 1999 “Red Book” is a less satisfactory form of contract than the Fourth Edition. From a contracting perspective, the clauses dealing with the provision of confidential information, fitness for purpose, tests on completion and notice of claim represent a move in the wrong direction. Whilst we recognise that today’s engineer can no longer act impartially, we believe that some of his new powers could prove problematical in practice, especially where he is required to make judgements as if he were an experienced contractor.

Improvements

The first of the welcome changes requires the Employer to demonstrate that sufficient finance is available to carry out the Works (Sub-Clause 2.4). This will be particularly important where the immediate client is a Special Purpose Company (SPC) and is funded by loans. For contracts placed by an SPC it is usual for the lending banks to put a Direct Agreement in place, which permits them to take over control of the contract should the SPC default. Where such an agreement exists it is important that the Contractor is given the opportunity to study and consider its terms and conditions before the construction contract is finalised. This clause will also prove useful where major variations are ordered or where the Employer has acknowledged the Contractor’s right to any significant payment for additional works or major claims.

The procedure for dealing with Employer’s Claims (Sub-Clause 2.5) is also an improvement over the Fourth Edition. The Employer must now follow a set procedure if he considers himself entitled to any payment and must give notice as soon as practicable and provide particulars of the claim. These provisions are mandatory. The Engineer must then make a determination but the Contractor can refer such a determination to a new and independent body, the Disputes Adjudication Board (the DAB, Sub-Clause 20.2). These new provisions should go a long way to prevent any unreasonable actions of the Employer, especially in terms of the application of Delay Damages, a not uncommon practice with some employers in countering or indeed negating the legitimate claims of the Contractor. The DAB can comprise either one or three members, to be appointed by the Employer and the Contractor. The appointment of the DAB expires only after a written discharge by the Contractor has become effective and the DAB is therefore available throughout the duration of the Contract. Provided both Parties agree they can refer any matter to it and this provision could prove useful in resolving disputes before they affect the progress of the works. The creation of the DAB is a welcome addition to the FIDIC 1999 “Red Book” and the binding nature of its decisions, even if either Party is dissatisfied, is an added benefit.

Our friendly and impartial Engineer has been laid to rest! The Engineer is now required to act for the Employer (Sub-clause 3.1) and no longer has a duty to act impartially. Why do we consider this a change for the better? Simply because it recognises what has long been the established custom and practice in the industry. In any event, we believe that any possible downside will be more than compensated for by the introduction of the DAB.

Whilst the Employer can still make claims on the Contractor’s Performance Security (Sub-Clause 4.2), any claim must now be made strictly in accordance with the terms laid down in

1 General Provisions

EIC welcomes the alphabetical listing of the definitions in one page at the beginning of Clause 1, thus making the list of definitions more user-friendly.

1.1.1.5 “Specification”

The definition does not clarify the content. Contractors are advised on a case-by-case basis to verify whether a document called “Specification” contains sufficient data and information. At tender stage, contractors are advised to check contradictions between specifications in different documents as well as mandatory requirements of the applicable law.

1.1.1.7 Schedules

Any updates to the Schedules as may be requested or needed from time to time, taking into due consideration the progress of the project, are not considered in the definition.

1.1.1.10 “Contract Data”

The “Appendix to Tender” is changed throughout the FIDIC 2010 MDB Harmonised Construction Contract to read “**Contract Data**”. The definition now also includes “*Schedule of Payment Currencies*”. This amounts to creating a distinction between the “Appendix to Tender” that is included with the Contractor’s Bid and the “Contract Data” which is, in effect, the Appendix to Tender modified by bid clarifications, etc. EIC welcomes this change.

1.1.2.6 “Employer's Personnel”

The new definition of the Employer’s Personnel includes the personnel of both the Employer and of the Engineer. This could include a very significant number of people, especially where the Employer is a national government or government agency. Contractors are advised to request from the Employer and the Engineer an organisation Schedule (to be updated from time to time) with delegated powers.

1.1.2.9 “DB”

The Dispute Adjudication Board is now known as the “**Dispute Board**” and thus conforms to World Bank terminology. Notwithstanding the new term the authority and duty of the Dispute Board under Sub-Clause 20.4 [*Obtaining Dispute Board’s Decision*] is still to render a binding decision.

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 provisions, for example Sub-Clauses 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 Sub-Clauses, any entitlement would exclude profit unless tenders have been otherwise qualified.

In the “FIDIC Contracts Guide” (2000 edition) at page 53 (last paragraph) it is stated that “Cost” is defined as including overhead charges but profit is excluded. It is further stated that overhead charges may include reasonable financing costs incurred by reason of payment received after expenditure. The FIDIC Guide may not serve as evidence of the intention of the Parties and accordingly contractors should consider introducing an express reference to overhead, including reasonable financing cost, within the definition of Cost.