

## *Overview of the FIDIC Contract*

**Introduction :** Before I begin, there are one or two things that may be worth saying about the general nature of contract forms of this kind.

- They are created by committees which seek to represent a variety of interests, and
- They always represent a kind of compromise.

We speak of Model Contract forms as if they were law and, in a sense they are. When two parties, an employer and a contractor, agree to a contract form, they adopt it as if it were to be a written law defining the relationship between them.

Standard forms save a lot of writing and drafting work, of course, but they are more valuable than that.

- Firstly, they are not subject to the urgent pressures of an imminent project, so may be crafted with care.
- Secondly, as they remain the same for reasonably long periods of time, any uncertainties of meaning are likely to be ironed out, either by decisions of courts or by revisions to the text.

As a consequence, the parties to a standard form contract can be reasonably confident that it will be predictable and will deal sensibly with most of the contingencies that one might experience.

The purpose of the standard form is to define the contractual relationship between the parties, setting out their responsibilities one to another and, insofar as is practical allocating the risks associated with the project between the parties. We will be discussing some aspect of risk during the seminar, but there is one thing I would ask you to bear in mind, especially if you are of a mind to vary any of the provisions of the form. It is this: it is always best if the risks of a project are borne by the party best able to know about them. Many instances of litigation result from attempts to shift the risk away from the party who would bear that risk more naturally.

There is one more cause of litigation or dispute, often unnecessary, to which I would call your attention. In complex contracts, there is usually **someone** whose task it is to authorise payment or to make decisions during the course of the work. That task requires that **someone** to exercise judgement. Where there is a question about whether something is due, shall we say, that judgement needs to be exercised sensibly. In the end, where there is a dispute, the judge or the arbitrator will decide on the balance of probabilities, whether one party is more likely to be right than the other. There will be a practical standard of proof. Too many formal disputes arise because the person responsible tries to insist upon proof beyond what is necessary - scientific proof, if you like, rather than use his or her common sense.

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### **THE FIDIC FORM**

Now let us look at the FIDIC form. We are concentrating on the so-called Red Book, *The Construction Contract*, more completely *the Conditions of Contract for Building and Engineering Works Designed by the Employer*. It followed, in late 1999, a previous book, which was intended for civil engineering works alone, still called by some “The Old Fidic Red Book”.

Three other books were published at the same time.

- One was a new Yellow Book, *The Plant and Design/Build Contract* or the *Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor*.
- Another was the so-called Silver Book, *the EPC/Turnkey Contract*, or the *Conditions of Contract for EPC/Turnkey Contracts*. EPC stands for Engineering, Procurement and Construction, where the entire project is created by the Contractor as a turnkey project.
- The last in this group was the *Short Form of Contract*, often abbreviated to *The Short Form*, essentially for minor works where the full detail of the major forms would be inappropriate and the procedures clumsy or even unworkable in the time available.

Previously, there were separate contracts for civil works and for mechanical and electrical works. I would ask you to note that the individual books in the present suite are differentiated, not by the class of works, but by the relationship between the contractor and employer. That was a new departure in 1999, and distinguishes these forms from a number of others, produced by more or less specialist institutions.

I should say, in passing, that FIDIC has published a Guide to the Red, Yellow, and Silver books. I rather hope that my overview will agree with what the authors of the Guide have to say.

Perhaps the first thing to note about the standard form, the Red Book, is that it envisages two kinds of Conditions of Contract:

- The General Conditions, as printed in the book, and
- Particular Conditions for the project in hand.

There is a valuable section of 20 pages of guidance on the preparation of Particular Conditions and related matters. The guidance includes forms of bond and guarantee as well as guidance on detailed terms and suggestions for clauses which might usefully be amended for special purposes.

Careful completion of Particular Conditions is probably as important as adopting the General Conditions in the first place.

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### **STRUCTURE OF THE RED BOOK**

I will run briefly through the structure of the Red Book, if I may. We will return to some of the details later.

The General Conditions are in 20 main clauses or parts. I think you will find that they are logical sections of the whole.

1. The General Provisions include a very complete set of definitions, first of the Contract itself and the documents, specifications, and the like, then of the Persons involved, including the Engineer, who still has a role, and the Dispute Adjudication Board, a group about whom you will hear tomorrow, although I would mention in passing that the Conditions envisage them being appointed and named in the Contract.

The Definitions go on to deal with dates and times for Commencement and Completion and for any tests, together with Taking-Over and Performance certificates. Money terms, such as the “Accepted Amount” and the “Contract Price”. There’s a difference.

Finally, there are two more groups of definition, one covering Works and Goods, defining, among other things, the “Contractors Equipment” and differentiating it from the Permanent Works. Worthy of note is that “Plant” in this form, means machinery and the like, including vehicles, intended to form part of the Works.

In addition to the Definition, the General Provisions have clauses to deal with interpretation, communications and the giving of notices, with choice of law (although the actual choice should be written in an appendix to the Tender), and with languages. They go on to deal with Documents and the relationship between Employer’s and Contractors Documents, with confidentiality, legality of conduct and the liability of a Contractor who is a consortium or other grouping.

I have rather dwelt on the general Provisions, because they are well thought out and well set out, in such a way that they give a firm base on which the rest of the document is grounded. They are practical and clear and precise.

- 2 The second section sets out the duties of the employer and his personnel, requiring co-operation on site and proper financial arrangements. It ends with provisions for employer’s claims against the Contractor.

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3 The Engineer's role is set out in detail in the third section. Interestingly, in view of the debate which has occupied many academics and others over the years since the Second World War, and especially, perhaps the past twenty years, the Red Book makes it clear that the Engineer, when carrying out his duties, is deemed to act for the Employer. However, the clause provides also that, where there is no agreement and the Engineer is required to make a determination, he or she is to make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances. I ought to say that again: a *fair* determination, taking *due* regard of *all* relevant circumstances. That is important; arguably, when an Engineer does not act fairly, he is in breach of his duty, and the Employer in breach of Contract.

I am tempted to go further and say that, if more Engineers followed that simple requirement, the Technology and Construction Court, and the various Arbitrators and Adjudicator of the Construction Industry, together with a good few lawyers, would find themselves on very lean pickings.

4 Fourthly, a section deals with the Contractor and his responsibilities. Sub-contracting the whole of the Works is prohibited, but the document does not discuss whether that means that the whole shall not be the subject of a single subcontract, or if an arrangement would be excluded if it meant that the whole was sub-contracted, albeit in parts. That could be of interest where a joint venture company effectively sub-contracts the whole of its work to its members or others. The Guidance notes comment on variations to the sub-contracting provisions, including a clause to encourage local suppliers and sub-contractors.

4.10, however, is not primarily an obligation of the Contractor but of the Employer. It requires the Employer to have given the Contractor all relevant sub-surface data, hydrological data and environmental data about the Site, or at least that which the Employer has. The Contractor, in turn, is deemed to have obtained all necessary information as to risks and the like, but only to the extent that was practicable at the time of Tendering. This is very like a good faith clause, insofar as information is concerned and of more than passing interest.

The fourth section deserves more detailed treatment than I have time to give. The Contractor's duties, after all, are the primary purpose of the Contract. I would ask you to note, however, the detailed requirement for progress reports at 4.21. The last provision in this section refers to the finding of fossils and archaeological specimens - a sure way to complicate any project not yet complicated enough.

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5 Nominated sub-contractors are the subject of Section 5. There is little to say about it, save that the Contractor has a right to object and to be indemnified if the objection is overridden.

6 Section 6 deals with Staff and Labour. This interesting class distinction isn't defined in the definitions of Section 1, which refer only to personnel. Nor is it relevant to the wording of the clauses themselves. The section deals with working hours and facilities, and with rates and conditions, which must be in line with the trade norms or no lower than the general local level.

There is no provision to protect local employers by prohibiting higher rates and better conditions, but relevant labour laws must be followed. A requirement for a monthly report of Contractor's Equipment, as well as his deployment of labour. is included in this section.

7 Plant, Materials and Workmanship are included in Section 7. You will remember that "Plant", in this form of Contract, means apparatus, machinery and vehicles, intended to form part of the Permanent Works. Here it does not mean the Contractor's equipment or hired equipment.

There is provision for samples specified in the Contract and additional samples to be provide as a variation, for inspection and testing and for remedial work. Plant becomes the property of the Employer when the Contractor is entitled to payment for it, or when it is delivered to site, whichever is the earlier, and the Contractor makes all royalty or other payments for natural materials from outside the site and for disposal of waste off site.

8 Section 8 deals with commencement time, time for completion and extensions of time, and provides for a detailed programme to be prepared by the Contractor within 28 days of commencement and to keep it corrected thereafter.

It also provides for damages for delay, the amount of which will be in the appendix to the tender. Arrangements for suspension of work are set out, with arrangements for payment and for a remedy in the event of prolonged suspension, which may be treated as an omission or as cause to terminate the works, depending on the extent of the works affected.

9 Section 9 discusses tests on Completion and provides for delayed tests, retesting and the effect of failure.

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- 10 The Employer's taking over is the subject of Section 10. It speaks of taking over sections of the Works and of certificates for any part of the permanent works. Logically it provides (at 10.3) that, if the Employer has prevented the Contractor from carrying out the tests, the Engineer shall issue a Taking over Certificate for the relevant part of the works - this is not a discretionary power, it is a mandatory duty.
- 11 The Contractor's liability for defects after taking over is governed by Section 11, which allows for an extended period of notice of defects while the works or a section cannot be used. The section also provides for a Performance certificate to be issued when defects have been remedied. This is an important document, because it is the only certificate deemed to constitute acceptance of the works. At the end of this section is recorded the Contractor's obligation to clear the site of waste and redundant material.
- 12 Section 12 deals with Measurement and Evaluation, including the valuation of omissions from the works. Worthy of note is the Clause on Methods of Measurement, which requires measurement of the net actual quantity of each item of the Permanent Works, according to the Bill of quantities or other applicable schedules, whatever may be the local practice.
- 13 Variations and adjustments are governed by Section 13. There is a right for the Engineer to vary works - acting for the Employer.
- There is an express provision, under the side note "Value Engineering" for the Contractor to make proposals to accelerate completion, to save cost (in building, maintaining or operating), improve the efficiency or value of the works, or benefit the Employer in any way. If the proposal includes a change in design, it is to be the Contractor's design and the cost benefits are shared.
- Other matters covered in the Section are procedures for variation, use of provisional sums, day work, adjustment for changes in legislation, and changes in cost (if applicable).
- 14 The price and payment procedures are set out in Section 14, which provides for advance payment where these have been agreed. This section also deals with Interim and final certificates and with retention money.

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- 15/16 Sections 15 and 16 provide for termination by the Employer and the Contractor respectively, together with arrangements for payment where appropriate. I feel that these sections are almost too important to summarise. Any party seeking to invoke a right of termination should only do so after examining the detailed provisions with care, but essentially, the rights depend upon default by the other party, save that a right for the Contractor to suspend works may follow upon prolonged suspension.
- 17 Section 17 deals with risk and responsibilities and seeks to allocate them appropriately. The contractor is required to indemnify the Employer against the consequences of the Contractor's actions. A list of Employer's risks and of their consequences is included. This section provides for Intellectual and Industrial Property rights, and finally provides for limitation of the liability of the parties one to another (and a limit lower than the Contract Amount may be agreed in the Contract).
- 18 Section 18 provides for insurance, and
- 19 Section 19 defines Force Majeure and its consequences.
- 20 Finally, Section 20 sets out the regime for Claims, Disputes and Arbitration. The process includes the use of a Dispute Adjudication Board and the consequences of its decisions, but that is a topic we shall deal with separately.

However, I would say this generally: one useful way of dealing with a dispute is either to negotiate over a coffee or a game of golf.

If that doesn't work, then consider whether there is really anything to be gained by pursuing it. Recently, I dealt with a dispute about £2,000 in a £250,000 deal. I can't imagine it was worth doing.

Chairman, I have tried to canter over the course set out in the Red Book to give an introductory flavour to it. It is written in plain language and means what it says. Provided Contractor, Engineer and Employer follow precisely the provisions and record their actions and notices in writing, it is a very effective document for our times. I hope that gets us off to a start in our more detailed examination.

Thank you.

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