

FIDIC Contracts in use in International Projects

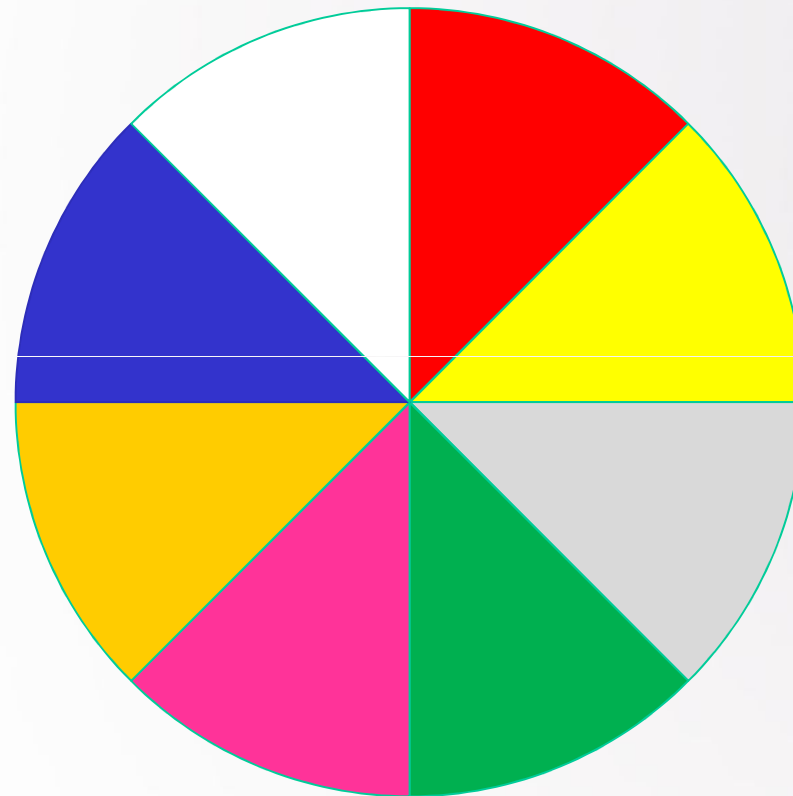
Contract Management from the Contractors
Perspective

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FIDIC Contracts in use in International Projects

The "Rainbow Suite"



- Red
- Yellow
- Silver
- Green
- Pink
- Gold
- Blue
- White

FIDIC contracts are internationally accepted

The standard form is a starting point – it is important to draft the appendix to tender and particular conditions to reflect the full agreement between the parties.

- Clauses are general in nature
- This allows contracts to be agreed quickly but parties have to be diligent that all issues are considered in order to avoid potential for disputes
- Front end investment can avoid back end dispute costs
- Get the right balance Employer Bias v Contractor Bias
- Select the Appropriate Form
- Understand the differences between the forms
- Follow the Contract

FIDIC Contracts in use in International Projects

The Current Suite:

A completely new set of contracts was released by FIDIC in 1999:

- - The 1999 Red Book (first edition)
- - The 1999 Yellow Book (first edition)
- - Silver Book
- - Green Book

- FIDIC has reduced the number of clauses in all of the recent contracts. The Orange Book contained 20 clauses, as now do the Red, Yellow and Silver Books. Previously, the Red Book had 72 clauses.
- FIDIC has also standardised the terms across the full suite so that wherever possible the same words and definitions have the same meanings and the clauses are now grouped in a logical manner across all the contracts.
- Knowledge of one form of FIDIC conditions is therefore of immediate benefit in respect of other forms.

The 1999 RED Book (first edition)

- “Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer”
- Traditional contract
- Re-measurable (option for lump sum)

The 1999 Yellow Book (first edition)

- “Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor”
- Design and Build, Lump sum
- Suitable for all types of works
- Replaced both the original Yellow Book and the Orange Book (Design Build & Turnkey)

Silver Book 1999

“Conditions of Contract for EPC/Turnkey Projects”

- Design and build
- Lump Sum

The Green Book

Short Form of Contract

Recommended for engineering and building work of:

- small capital value and/or
- simple or repetitive work and /or
- short duration

Pink Book

The “Multilateral Development Bank Construction Contract”
(The “Red Book” For Development Bank financed projects)

Features provisions on:

- Corruption
- Social utility
- Loan facility

Blue Book

- Dredging and Reclamation Works

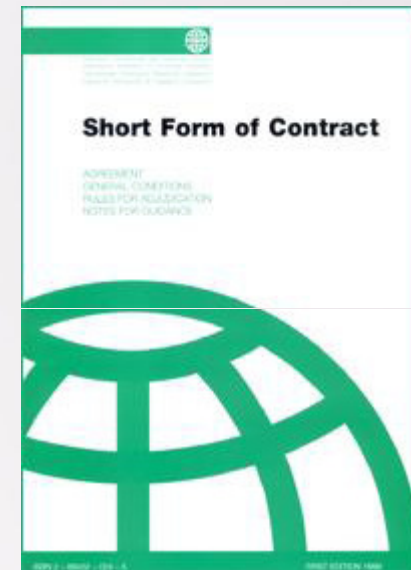
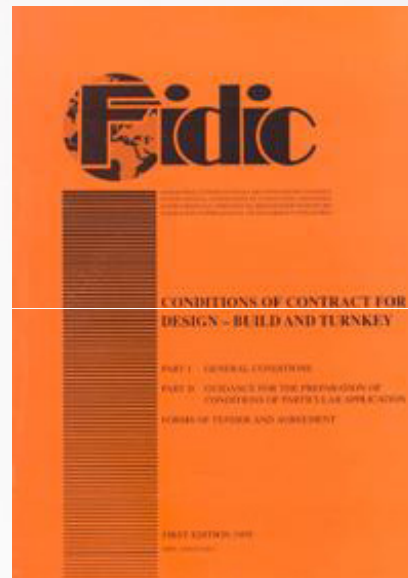
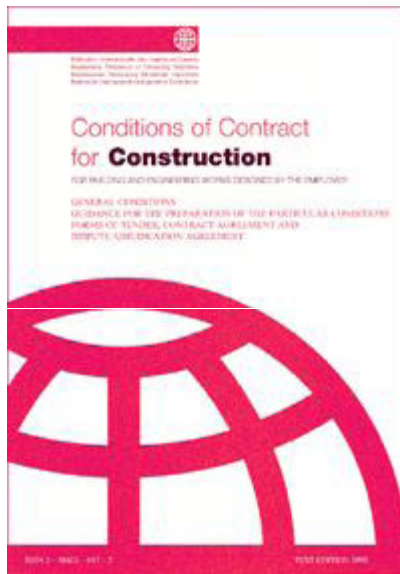
White Book

- Consultancy Agreement

Gold Book

- Design, Build, Operate

FIDIC Contracts currently in use by Kier in Jamaica



Focus Today: Red, Yellow and Silver Books

Red Book is used for traditional procurement

Yellow and **Silver Books** are Lump Sum Design & Build forms of contract

Silver Book was created in response to the needs of private financing for infrastructure projects:

- Little or no risk to the Employer of price increase if there are unforeseen risks
- "Turnkey"
- Contractor under much greater design risk and burden of ground conditions risk under Silver Book

Main Differences between Red, Yellow and Silver Books

- Structure
- Role of the Engineer / Employer
- Design Responsibilities
- Site Conditions & Adverse Physical Conditions
- Taking Over Parts of the Works

Major feature of any international construction contract is the allocation of risks & liabilities

Contractor's General Obligations

Clause 4.1 of the Red Book:

- Design (to the extent specified in the contract), execute & complete the Works in accordance with Engineer's instructions

Clause 4.1 of the Yellow and Silver Books (same obligation):

- Design, execute & complete the Works
- Required to comply with Employer's Requirements

Design Risk

"Fitness for purpose"

Under Red Book, the Contractor is responsible for any part he designs being fit for purpose

Under Silver Book, risk of the adequacy of the Employer's Requirements as well as the Contractor's own design is the Contractor's responsibility

Under the Yellow Book, risk of the adequacy of the Employer's Requirements is only the Contractor's responsibility to the extent that an experienced contractor would have discovered error

FIDIC Contracts in use in International Projects

- In all FIDIC Forms the giving of Notices and further updates by the Contractor is extremely important
- Time-bar issues
- Claims should not be ignored – financial and /or time
- Prescribed time in Contract for responding to claims

Express Provisions for Additional Cost (+ Profit)

Heading	Clause	Red	Yellow	Silver
Delayed Drawings or Instructions	1.9	Y+	N	N
Errors in Employers Requirements	1.9	N	Y+	N
Rights of Access	2.1	Y+	Y+	Y+
Co-operation	4.6 / 13.3	Y+	Y+	Y+
Setting-Out	4.7	Y+	Y+	N
Unforeseeable Physical Conditions	4.12	Y	Y	N
Fossils	4.24	Y	Y	Y
Testing	7.4	Y+	Y+	Y+
Variations	13.3	Y	Y+	Y+

Express Provisions for Additional Cost (+ Profit)

Heading	Clause	Red	Yellow	Silver
Adverse Weather	8.4 (c)	N	N	N
Unforeseeable shortages in personnel or goods due to the Government	8.4 (d)	N	N	N
Delay, prevention due to Employer	8.4 (e) r&Y	N	N	N
Delay by Authorities	8.5	N	N	N
Suspension instructed by CA	8.9	Y	Y	Y
Suspension by Contractor	16.1	Y+	Y+	Y+

Express Provisions for Additional Cost (+ Profit)

Heading	Clause	Red	Yellow	Silver
Delayed Tests & Interference due to the Employer	9.2 / 10.2	Y+	Y+	Y+
Changes in Law	13.7	Y	Y	Y
Employers Risks	17.4	Y/Y+	Y/Y+	Y
Force Majeure	19.4	Y	Y	Y

Limitations of Liability

Clause 17.6 of the Red, Yellow and Silver Books (similar obligations):

Joint exclusion of:

- Loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage (does not apply payments on termination and does not apply to indemnities); and

Contract Sum Cap on Contractor liability (does not apply to indemnities or other listed items, which include intellectual property rights)

No limitation in case of:

- Fraud
- Deliberate default
- Reckless misconduct

Common amendments to Limitations of Liability

Employer Bias

Removal of standard Clause and replacement with only a full exclusion of liability for the Employer for consequential loss

Contractor Bias

Widening of joint exclusion of loss of profits, consequential loss etc

Widening of the Contract Sum cap to include indemnities and a cap on delay damages

Introduction of a time limitation limiting the number of years after the Taking Over Certificate that the Contractor is liable

Time for completion

The Contractor is required to complete the Works by “the Time for Completion” which is set out at Clause 8.2 of the Red, Yellow and Silver Books

This requires:

Passing the Tests on Completion

Completing all work stated as being required by the Contract to be complete for the purpose of taking-over the Works under Clause 10.1

Extension of time for completion

The “Time for Completion” may be extended under Clause 8.4, provided that procedure under Clause 20.1 (claims) is followed.

Extensions of time are important to both Contractor and Employer

Allows the Contractor more time to complete and avoids the imposition of liquidated damages. Allows the Client to plan properly Taking Over.

In general, under English law, where the Employer prevents the works being carried out time must be able to be extended in order to preserve the Employer’s right to liquidated damages

All forms place responsibility on the Contractor to issue Notices and regular updates of any events which may impact upon the Time for Completion. Don’t be offended when the Contractor follows the requirements imposed upon him under the Contract!

Extension of Time for Completion

Defined Causes at Clause 8.4

There are more defined causes for extension of time under the Red and Yellow Books than under the Silver Book

Defined causes under all Books, Clause 8.4:

- A Variation
- A Cause of Delay giving an entitlement to extension of time under a Sub-Clause of the Conditions (see following table)
- Any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site

Additional defined causes under the Red and Yellow Book:

- - exceptionally adverse climatic conditions;
- - unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions;

Contractor Bias amendment:

Add the following cause:

- "any other circumstance for which the Contractor is not responsible under this Contract."

EOT Claims

Clause 20.1 – EOT claims by Contractor

Notice to be given by the Contractor within 28 days of the Contractor becoming aware or when it should have become aware of the event

Condition precedent to entitlement to an extension of time:

“If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, and the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.”

- Contractor bias amendment:
 - Remove condition precedent

Express Provisions for an Extension of Time

Heading	Clause	Red	Yellow	Silver
Errors in Employer's Requirements	1.9	-	Y	N
Right of Access	2.1	Y	Y	Y
Co-operation	4.6/8.4(a)	Y	Y	Y
Setting Out	4.7	Y	Y	N
Unforeseeable Physical Conditions	4.12	Y	Y	N
Fossils	4.24	Y	Y	Y
Testing	7.4	Y	Y	Y
Variations	8.4(a)	Y	Y	Y
Adverse Weather	8.4(c)	Y	Y	N

Express Provisions for an Extension of Time

Heading	Clause	Red	Yellow	Silver
Unforeseeable shortages in personnel or goods due to Government	8.4 (d)	Y	Y	N
Delay, prevention due to Employer	8.4 (e) r&y 8.4 (c) s	Y	Y	Y
Delay by Authorities	8.5	Y	Y	Y
Suspension	8.9 / 16.1	Y	Y	Y
Delayed tests & Interference due to Employer	9.2 / 10.2	Y	Y	Y
Changes in Law	13.7	Y	Y	Y
Consequences of Employer's Risks	17.4	Y	Y	Y
Force Majeure	19.4	Y	Y	Y

Liquidated Damages

Clause 8.7 "Delay Damages"

Amount stated in Contract Particulars / Appendix to Tender

Delay Damages apply per day from the Time for Completion (as may be extended) until the date stated in the Taking Over Certificate

Possible for parties to cap the amount of Delay Damages

Exclusive remedy for the Employer for Contractor delay, except:

- in the event of termination, where the Employer may be able to recover additional costs
- where the Contractor is required to accelerate the Works under clause 8.6 for being "too slow" or having failed to comply with the Programme

Claims

Red and Yellow Books have the same claims provisions.

Silver Book is slightly different, with the only real difference being the involvement or not of the Engineer

For all claims, notices must follow the required formalities at Clause 1.3:

- In writing
- Delivered by hand, sent by mail or courier or any agreed systems of electronic transmission
- Delivered to address set out in the Contract (unless subsequently advised of a different address)

Claims

Clause 2.5

Contractor bias amendment:

“If the Employer fails to give notice of a claim within such period of 15 Business Days after the Employer became aware, or ought reasonably to suspect, or ought reasonably to have become aware, or should have become aware of the event or circumstance giving rise to the claim, then the Employer shall not be entitled to any amount, payment or extension whatsoever from the Contractor in respect of such claim and the Contractor shall be discharged from all liability in connection with such claim”

Golden Rules

- Beware – enter in haste, repent at leisure.....
- Be sure you are in agreement before you enter the Agreement
- The Contract requires the Contractor to issue Notices or Time-bars him – don't let emotions cloud the need to issue or receive Notices.



END OF PRESENTATION

