

# Introduction to the FIDIC Suite of Contracts

## The history of the FIDIC suite

The Fédération Internationale Des Ingénieurs-Conseils<sup>1</sup> (FIDIC) was founded in Belgium in 1913. Since then, it has become the foremost representative body for the world's consulting engineers, with member associations in some 100 countries.

Although the Contracts Committee became one of its earliest constituent parts soon after FIDIC's foundation, it was not until 1957 that the first FIDIC standard form contract was produced.

The first contract, known as the Red Book first edition,<sup>2</sup> was not actually drafted by FIDIC but was instead an authorised reproduction, 're-badged' by FIDIC, of the ICE Conditions of Contract fourth edition, published by the Institution of Civil Engineers. This was itself an 'international' contract in the sense that it had been adopted by the Association of Consulting Engineers as such. Although the modern FIDIC forms have developed very significantly since the 1950s, it is still relevant to note that 'The Red Book is based on a domestic contract.'<sup>3</sup>

These common law origins are still used as a criticism by some commentators, especially in civil law jurisdictions, who are sceptical of FIDIC's entitlement to its paramount position, though the Silver Book, for example, owes relatively little to an English heritage.

Successive editions of the Red Book were issued in 1969,<sup>4</sup> 1977<sup>5</sup> and 1988.<sup>6</sup>

The other long-established FIDIC contract is the Yellow Book,<sup>7</sup> first produced in 1963 and with subsequent editions in 1980<sup>8</sup> and 1987,<sup>9</sup> which is the design and build equivalent of the employer design Red Book.



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1 The International Federation of Consulting Engineers.

2 Conditions of Contract for Works of Civil Engineering Construction, 1957.

3 Nael Bunni, *The FIDIC Forms of Contract*, 3rd ed., Ch. 4, Blackwell Publishing (2005).

4 2nd ed.

5 3rd ed.

6 4th ed.

7 Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor.

8 2nd ed.

9 3rd ed.

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In the mid 1990s, two significant landmarks occurred in the development of the FIDIC contracts. These were the introduction of a turnkey contract—the Orange Book—and the setting up of a task group to produce a major revision of the Red and Yellow Books. These events led to the launch in 1999 of the current editions of the principal FIDIC contracts, known colloquially<sup>10</sup> as the ‘Rainbow Suite’, from the colours of the covers of the respective Books: Red, Yellow and Silver.<sup>11</sup>

## An overview of the current FIDIC contracts

One of the strengths of the FIDIC suite is its consistency of structure and numbering across the major contracts. All of the major Rainbow Suite contracts have the same 20-clause structure, and, so far as possible, the clause numbers correspond to their equivalents in each Book.

These are not superficial similarities and they facilitate use and study of the FIDIC forms. However, the individual contracts reflect quite different approaches to construction procurement, and these extend to divergences in detailed provisions.

There are a number of documents that together constitute the Contract between the Parties. With the exception of the Silver Book,<sup>12</sup> the main FIDIC forms contemplate that the Contract will be formed by the exchange of Letter of Tender and Letter of Acceptance. The design of the project is set out as a Specification,<sup>13</sup> or the basis for the design provided in the Employer’s Requirements.<sup>14</sup> Crucially, there will be Particular Conditions, which are specific to the project in question. The explanation of the characteristics and features of the individual contracts below refers to the General Conditions.

FIDIC has prepared translations of the main Rainbow Suite forms of contract, partly to deal with the problems caused by unofficial, and often very inaccurate, translations.

The Red, Yellow and Silver Books have all been translated into Arabic, Chinese, French, Polish, Portuguese, Romanian, Russian, Spanish, Turkish and Vietnamese. A further nine European languages (Bosnian, Croatian, Estonian, Hungarian, Italian, Latvian, Lithuanian, Serbian and Slovak) have at least one contract translated, as do three Asian languages (Bahasa Indonesia, Japanese and Mongolian). There are guidance notes in German.

## The Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer 1999: the Red Book

The Red Book is not only the oldest of the FIDIC contracts, celebrating its 60th anniversary this year (2017), it is also the most widely used for general construction projects of many kinds. The single most important characteristic of the Red Book is contained in its full title: it is an employer design contract. The design, prepared by the Employer’s staff or by consultants acting on its behalf, is provided to the Contractor in the form of Specifications and Drawings (and any Schedules). The payment mechanism<sup>15</sup> is traditional measurement and valuation. However, it is open to the Parties to vary this position. FIDIC advises<sup>16</sup> of ‘the possibility of replacing Clause 12 by appropriate Particular Conditions for a lump-sum contract or a cost-plus contract’.<sup>17</sup> Also traditional is the role of the Engineer: ‘who shall carry out duties assigned to him in the Contract’.<sup>18</sup> It may seem paradoxical that the Engineer’s duties, including such important functions as the making of determinations,<sup>19</sup> should be usually much more fully set out in the Contract, to which the Engineer is

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10 and somewhat inaccurately.

11 At the time of writing, FIDIC is revising these contracts in order to publish new editions, to which brief reference is made where it is useful and possible to do so.

12 A contract under the Silver Book will be formed by the Parties’ execution of the Contract Agreement.

13 Red Book.

14 Yellow and Silver Books.

15 Clause 12.

16 The FIDIC Contracts Guide, p. 205 (2000).

17 Guidance for the Preparation of Particular Conditions No 14.

18 Sub-Clause 3.1.

19 Sub-Clause 3.5.

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not a Party, than in the contract for professional services (or employment contract), which governs the relationship between employer and engineer. This is regarded as normal in common law jurisdictions, but the 'dual role' of the Engineer as agent of the Employer, and as a decision-maker acting fairly between the Parties, is sometimes regarded with misgivings in civil law jurisdictions<sup>20</sup>

In other respects, the FIDIC Red Book follows in the line of its predecessors as an engineering contract in the common law style. Glover and Hughes provide a brief outline of the 20-clause structure<sup>21</sup> and further analysis of specific aspects of its content is provided in Chapter 5, 'Allocation of Risk in Construction Contracts'. A departure from that tradition is found in the replacement of the dispute-resolution function of the Engineer by a Dispute Adjudication Board (DAB).<sup>22</sup> This mechanism had first been introduced by FIDIC in 1995 in the Orange Book.<sup>23</sup> It is found in Clause 20 of all the main Rainbow Contracts, though not in identical form. In the Red Book, the DAB is appointed<sup>24</sup> by the Parties at the outset of the project, allowing its members to become familiar with its progress and challenges.

## **The Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Works and for Building and Engineering Works Designed by the Contractor: the Yellow Book**

The Yellow Book is FIDIC's second-oldest contract, and almost certainly the most widely used after the Red Book. The Yellow Book contains provisions for electrical and mechanical plant and also for design and build work more generally. As with the Red Book, the contract's most important feature is contained within the full title; it is FIDIC's

principal contractor design contract.<sup>25</sup> The design is prepared by the Contractor in accordance with the Employer's Requirements, which specify 'the purpose, scope and/or design and/or other technical criteria for the Works'.<sup>26</sup>

The Contractor accepts a fitness-for-purpose obligation<sup>27</sup> for the design of the works, as well as for materials and workmanship. The payment mechanism for the Yellow Book is lump sum fixed price, with provision for progress payments on the basis of Engineer certification. Like the Red Book, the Yellow Book contract is administered by the Engineer (see above).

A major difference is evident from the Clause 20 dispute resolution provisions. Whereas the Red Book provides for a 'standing' DAB to be appointed 'by the date stated in the Appendix to Tender', under the Yellow Book,<sup>28</sup> the Parties 'jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB'. This is known as an 'ad hoc' DAB and can be criticised as losing one of the major advantages of the DAB model, namely the ability of the members to become familiar with the project and the personnel engaged on it. It has been suggested<sup>29</sup> that the disparity is explained by the difference<sup>30</sup> in the types of projects for which the Red and Yellow Books are respectively used.

The Yellow Book is one of FIDIC's most important contracts. Its content influenced the Silver Book to some extent and also the Gold Book,<sup>31</sup> both of which are based on the contractor design concept. Its risk allocation (see Chapter 5, 'Allocation of Risk in Construction Contracts') resembles more the Red Book in terms of the perception of traditional balance between Employer and Contractor.

20 For a civil law perspective of this issue, see Axel-Volkmar Jaeger and Götz-Sebastian Hök, *FIDIC—A Guide for Practitioners*, Springer, pp. 103 – 104 (2010).

21 Jeremy Glover and Simon Hughes QC, *Understanding the FIDIC Red Book: A Clause-by-Clause Commentary*, 2nd ed., Sweet & Maxwell, pp. xvi-xix (2011).

22 Sub-Clauses 20.2 – 20.4.

23 Conditions of Contract for Design-Build and Turnkey, 1st ed. (1995).

24 Sub-Clause 20.2.

25 Though not the only one: see also Silver and Gold Books.

26 Sub-Clause 1.1.1.5.

27 Sub-Clause 4.1.

28 Sub-Clause 20.2.

29 Ellis Baker, 'Is it all necessary? Who benefits? Provision for multi-tier dispute resolution in international construction contracts' *Society of Construction Law Paper No. 154*, p. 12 (2008).

30 The difference is removed by the 2016 Yellow Book, 2nd ed., Sub-Clause 21.1

31 The Conditions of Contract for Design, Build and Operate Projects, 2008

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## The Conditions of Contract for EPC/Turnkey Projects: the Silver Book

The FIDIC Silver Book is the third of the major Rainbow Suite contracts. It was the most controversial upon its launch and to some extent remains so. This is largely attributable to perceptions of its risk allocation. FIDIC's first turnkey contract was the Orange Book,<sup>32</sup> but the Silver Book was seen as a greater departure from the FIDIC contracts that preceded the 1999 Rainbow Suite.

Essentially, the Silver Book is a lump sum EPC turnkey contract. As with the Yellow Book, the design is prepared by the Contractor in accordance with the Employer's Requirements.<sup>33</sup> The Contractor assumes full responsibility for the engineering, procurement and construction of the Works and undertakes a fitness-for-purpose obligation for design, materials and workmanship. Unlike the Red and Yellow Books, the Contract is not administered by an Engineer; there is no such appointment. Instead, decisions are made, and other contract administration functions performed, by the Employer, with or without an Employer's Representative. This form of contracting is typically used on complex engineering facilities, such as process or power plants, where a high degree of certainty as to cost, time and performance is required, often because of 'bankability' issues in funding the project. The concept is that the Employer obtains a fully functioning facility, capable of operating immediately to guaranteed standards of performance, ready at the 'turn of a key'.

In these respects, the Silver Book is typical of its kind. FIDIC justified its launch, and the perceived break with balanced risk allocation, purely as a pragmatic response to market demand. In the words of the then Chairman of the Contracts Committee, Christopher Wade, 'FIDIC felt that the best service it could give to the industry at this time would be to come out into the open with a standard form to satisfy those needing more security of final cost and time than FIDIC's traditional forms can give.'<sup>34</sup> Therefore, 'the more risks a contractor is required to bear, the higher the "premium" a prudent contractor must add to his price to cover his extra risk-taking.'<sup>35</sup> FIDIC's position, then, is that the Silver Book is simply a different vehicle for the procurement of engineering projects and that there is no question of unfairness in the greatly altered balance of risk allocation. Some of the responses from representatives of the contracting industry purported to regard the publication of the Silver Book as indicative of anti-contractor animus on the part of FIDIC. The European International Contractors<sup>36</sup> organisation was consulted by FIDIC in the process of preparing the Rainbow Suite, but proceeded to publish its very critical Guide, complaining of 'the Silver Book's departure from the traditional FIDIC contractual and risk-sharing philosophy'.<sup>37</sup> Some of the criticism published by others was more intemperate still: 'Contractors will seek and likely find ways to recover compensation for risk they should not have been required to assume, litigation will increase, not decrease, and projects will suffer.'<sup>38</sup> While the Silver Book, in keeping with the EPC turnkey concept, allocates much more

<sup>32</sup> See 'The history of the FIDIC suite', above.

<sup>33</sup> Sub-Clause 1.1.1.3.

<sup>34</sup> Christopher Wade, 'The Silver Book: The Reality' International Construction Law Review, Part 3, p. 501 (2001).

<sup>35</sup> Christopher Wade (op. cit.), p. 508.

<sup>36</sup> A federation of construction industry bodies from 15 European countries.

<sup>37</sup> Commentary on the EIC Guide by the Chairman of the EIC Conditions of Contract Working Group: Frank Kennedy, EIC Contractor's Guide to the FIDIC Conditions of Contract for EPC Turnkey Projects (The Silver Book). International Construction Law Review Part 4, p. 505 (2000).

<sup>38</sup> Anthony Gaede Jr., 'The Silver Book: an unfortunate shift from FIDIC's tradition of being even-handed and of focusing on the best interests of the project' International Construction Law Review, Part 4, p. 502 (2000).

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risk to the Contractor than in more 'balanced' contracts, such as the Red and Yellow Books, it should not be regarded in emotive terms. Contractors routinely do price for the varying degrees of risk allocation in contracts. It is true that the omission of the Engineer from a FIDIC form of contract will inevitably be remarked on and the absence of the beneficial effect of the Engineer's contract administration may be felt in the conduct of the project, but the Parties will always have made the choice with 'eyes open' and like all contracts, a contract under the Silver Book will have been freely entered into. In the final analysis, it has been no more than an extension of the range of choice in the FIDIC suite and should be seen in this context.

## The other FIDIC construction contracts

The main FIDIC contracts have been introduced above; the following identifies the other FIDIC contracts. This treatment does not mean that they are unimportant—the reverse is true of nearly all—but that they are not the principal constituents of the current Rainbow Suite.

### The MDB Pink Book

The FIDIC Red Book was used widely, over many years, on development projects funded by banks as part of mandatory bidding documents to which borrowers had to adhere. The Pink Book<sup>39</sup> represents a formalisation of the amendments to the Red Book that had been developed by Multilateral Development Banks (MDBs)<sup>40</sup> for use in aid-funded projects. The purpose was to 'simplify the use of the FIDIC Conditions of Contract not only for the MDBs and their borrowers but also for others involved with project procurement including engineers, contractors, and contract specialists. It is intended for use on MDB financed projects only.'<sup>41</sup> The 2010 Pink Book is the latest MDB harmonised version of the Red Book, replacing earlier editions from 2005 and 2006. Essentially,

the Pink Book should be regarded as just that—a version of the Red Book, though the amendments should not be underestimated, justifying as they do a separate publication. Many of the amendments are additional provisions aimed at achieving financial probity and transparency. For example, the Contractor must follow 'Inspections and Audit by the Bank'<sup>42</sup> of the Site, and of its accounts and records, and the Contractor is to be notified if the Bank suspends payments to the Borrower.<sup>43</sup> The intention of many of the Pink Book amendments to the Red Book is to avoid fraudulent and corrupt practices, and the Employer is given additional explicit powers of termination on such grounds.<sup>44</sup> Recognising that many aid-funded projects are in developing countries, there is quite extensive expansion of the provisions<sup>45</sup> on Staff and Labour relating to such specific issues as Foreign Personnel, Supply of Food and Water, Measures against Insect and Pest Nuisances, Arms and Ammunition, Festivals and Religious Customs, Forced Labour, and Child Labour. There are modifications to the provisions for Claims, Disputes and Arbitration<sup>46</sup> with an option for the parties to choose institutional arbitral rules or UNCITRAL<sup>47</sup> Rules instead of ICC,<sup>48</sup> or under ICC Rules, where the Contract is with foreign contractors<sup>49</sup> and a default position in favour of the Singapore International Arbitration Centre for contracts financed by the Asian Development Bank.

### The DBO Gold Book

The Gold Book<sup>50</sup> is FIDIC's first attempt at a design-build-operate (DBO) contract intended to be used in the type of project funded by project financing, for example under a PFI<sup>51</sup> scheme. It is treated by some commentators as one of FIDIC's principal contracts, although it was published in 2008 and so does not form part of the original Rainbow Suite. In terms of extent of usage it cannot, or cannot yet,

39 Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, Multilateral Development Bank Harmonised Edition 2010.

40 The MDBs, known as the Participating Banks, operating under the auspices of the World Bank, are listed in the Introduction to the Pink Book and include the African Development Bank, the Asian Development Bank and the European Bank for Reconstruction and Development.

41 Jeremy Glover and Simon Hughes QC (op. cit.), p. xxi. The Introduction by Christopher Thomas QC contains a useful account of the development of the Pink Book.

42 Sub-Clause 1.15.

43 Sub-Clause 2.4.

44 Sub-Clause 15.6.

45 In Clause 6.

46 In Clause 20.

47 United Nations Commission on International Trade Law.

48 International Chamber of Commerce.

49 Sub-Clause 20.6 (a) (i).

50 Conditions of Contract for Design, Build and Operate Projects 2008.

51 Private Finance Initiative.

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be regarded as the equivalent of the Red, Yellow or Silver Books, nor even of the Pink Book. This is not only because it is younger than those contracts. FIDIC's choice of DBO model is not suitable for all types of DBO project.<sup>52</sup> '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.' However, the greatest restriction in terms of breadth of appeal was FIDIC's decision to adopt what it calls the 'green-field Design-Build-Operate scenario, with a 20-year operation period' where there is 'a single contract awarded to a single contracting entity'.<sup>53</sup> The Gold Book can therefore only be used in projects where the design-build work and the operation and maintenance work are to be carried out by the same contractor.

In simple terms, the Gold Book resembles a design-build contract, which is heavily based on the Yellow Book, with an agreement attached for operation and maintenance during the 20-year Operation Service Period. Obviously, the latter necessitates the inclusion of a number of concepts and technical terms not found in the Yellow Book, such as Asset Replacement Fund,<sup>54</sup> Auditing Body,<sup>55</sup> Commissioning Certificate and Commissioning Period,<sup>56</sup> Operating Licence, Operation Management Requirement, Operation and Maintenance Plan, Operation Service, and Operation Service Period.<sup>57</sup> Because, self-evidently, the Gold Book was not included in the FIDIC Contracts Guide published in 2000, FIDIC subsequently issued a separate equivalent.<sup>58</sup> The commentary reveals that FIDIC was largely able to keep to the established 20-clause structure of the Rainbow Suite and

that where possible many provisions are similar, especially to the Yellow Book. The differences are essentially of two kinds: first, those additions which are a product of the Operation Service Phase, following on from the Design-Build Phase; and second, those changes which FIDIC introduced as improvements. Thus in addition to the Final Payment Certificate Design-Build<sup>59</sup> and the Final Statement Design-Build,<sup>60</sup> there is a Final Payment Certificate Operation Service<sup>61</sup> and a Final Statement Operation Service.<sup>62</sup>

Perhaps the feature of the Gold Book that gives it the greatest importance is not, paradoxically, the frequency of its adoption for projects but rather the fact that it has in several key respects pointed the way forward to the coming generation of FIDIC contracts. While the final content of the latest editions was not available at the time of writing, the Pre-Release Edition of the Yellow Book, given restricted distribution in December 2016, offered some insights into likely reforms. The new second edition of the Yellow Book<sup>63</sup> has a revised dispute resolution mechanism.<sup>64</sup> It contains an addition, not found in the 1999 Yellow Book, of a provision for Avoidance of Disputes.<sup>65</sup> This is a version of the Gold Book's provision, the first of its kind, by which the DAB can assist the Parties with informal discussion or otherwise in trying to resolve disagreements, short of a dispute that has actually crystallised. The problem of adjudicators doing so under English law created by the decision in *Glencot Development & Design Co Ltd v. Ben Barrett & Son (Contractors)*<sup>66</sup> has been identified,<sup>67</sup> but the concept is uncontroversial in some civil law jurisdictions and looks set to be a fixture in the future FIDIC dispute resolution machinery.

52 Some insight into the reasoning is given in the Foreword and Notes of the Gold Book, pp. 2 – 3.

53 Gold Book, Foreword, p. b

54 Sub-Clause 1.1.2.

55 Sub-Clause 1.1.4.

56 Sub-Clauses 1.1.8 and 1.1.9.

57 Sub-Clauses 1.1.54 to 1.1.58.

58 The FIDIC DBO Contract Guide 2011.

59 Sub-Clause 1.1.39.

60 Sub-Clause 1.1.41.

61 Sub-Clause 1.1.40.

62 Sub-Clause 1.1.42.

63 Conditions of Contract for Plant and Design-Build. Pre-Release Second Edition 2016. A revised Pre-Release Second Edition (2017) was distributed at the FIDIC Users Middle East Conference in Abu Dhabi in February 2017.

64 Clause 21 in the new 21-clause structure.

65 Sub-Clause 21.3.

66 [2001] BLR 207.

67 Ellis Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, *FIDIC Contracts: Law and Practice*, Informa, pp. 525 – 526 (2009).

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A further departure was foreshadowed by the treatment of time-bars on claims by the Contractor. These were a long-standing source of criticism under the Rainbow Suite contracts by contractors and their representatives, not least the disparity between the 28-day limit for Contractor claims<sup>68</sup> and the 'as soon as practicable' equivalent for Employer's claims.<sup>69</sup> The Gold Book opened the possibility for challenges by the Contractor to the application of the time-bar,<sup>70</sup> giving the DAB power to 'overrule the 28-day limit' if it 'considers there are circumstances which justify the late submission'. The Pre-Release Edition of the new Yellow Book follows this lead, expressly empowering the DAB to 'waive' the time limits.

The Gold Book represented a foray by FIDIC into an area of procurement it had previously not entered. It can only be regarded at best as a qualified success in its own right. But its importance may have been elevated by its function as a 'testing-ground' for future reform of the principal FIDIC contracts.

## The FIDIC (Blue Green) Dredging Contract

The FIDIC Dredging Contract<sup>71</sup> is sometimes known as the Blue Book or Blue-Green Book, though neither name has achieved the wide currency of the Rainbow Suite contracts. It is often excluded altogether from consideration by commentators on the FIDIC forms of contract. This is an unfortunate omission. Prepared in conjunction with the International Association of Dredging Companies, the Dredging Contract has been extensively used for coastal and marine works of all kinds, including ports and harbours. It is well known in the Middle East and benefits from an absence of competitors in a highly specialised sector. It bears some resemblance to the Short Form of Contract (see below) in being a straightforward, simplified contract, which can

be executed on a design-build basis or with a significant Employer design element. This is a matter of agreement; the Contractor agrees to 'carry out design to the extent specified, as stated in the Appendix'.<sup>72</sup> In the Notes for Guidance<sup>73</sup> it is explained that 'Where the Employer procures any part of the design, the responsibility for design will be shared as this Contract makes the Contractor responsible only for design prepared by him. The extent of the Contractor's design obligation should therefore be clearly stated if disputes are to be avoided.'

In other respects, the Dredging Contract exhibits many of the characteristics of a traditional FIDIC contract, despite being shorter<sup>74</sup> and simpler.

The Dredging Contract is administered by the Engineer. Price can be on a Re-measurement basis, as in the Red Book, or a lump sum, as in the Yellow Book; the Appendix contains a range of pricing options.<sup>75</sup> Dispute resolution is by an ad hoc DAB as in the Yellow Book. The FIDIC Dredging Contract is an example of a sector-specific standard form, which, though not generally well known, has a disproportionately large significance within that specialist industry.

## The Short Form of Contract: the Green Book

Although it is not one of FIDIC's principal contracts, the Green Book would have some claim to be regarded as part of the Rainbow Suite, since it was issued in 1999. FIDIC states it is 'for engineering and building works of relatively small capital value', or for contracts of greater value requiring 'fairly simple or repetitive work or work of short duration'.<sup>76</sup> It is suggested that 'USD 500,000 and 6 months should be regarded as reasonable limits on the capital value and duration respectively'.<sup>77</sup> Like the Dredging Contract (see above), the Green Book has a simplified 15-clause format. Also like the Dredging Contract, the Parties can

68 Sub-Clause 20.1 of the Red, Yellow and Silver Books.

69 Sub-Clause 2.5 of the Red, Yellow and Silver Books.

70 Sub-Clause 20.1(a).

71 Form of Contract for Dredging and Reclamation Works, 2006.

72 Sub-Clause 5.1.

73 p. 27.

74 15 clauses.

75 Clause 11 and p. iv.

76 Short Form of Contract 1999 Foreword.

77 Axel-Volkmar Jaeger and Götz-Sebastian Hök (op. cit.), p. 125, based on FIDIC guidance.

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agree the extent, if any, to which the Employer provides input into the design.<sup>78</sup> The Contractor has a fitness-for-purpose duty for its design,<sup>79</sup> as well as for construction and materials. As with the Dredging Contract, pricing is a matter of choice for the Parties<sup>80</sup> between a range of options extending from varieties of lump sum to re-measurement and even a cost reimbursable option. The Green Book differs from the Dredging Contract in some key respects. First, there is no express provision for the appointment of an Engineer to undertake contract administration. FIDIC invites reconsideration of this position: 'although there is no reference to an impartial Engineer, the Employer may appoint an Engineer to act impartially, should he wish to do so.'<sup>81</sup> Second, the dispute resolution rules are more basic than for other FIDIC contracts. There is no DAB, but an adjudicator, and no time for amicable dispute resolution. Reflecting the anticipated smaller scale of disputes, there is no reference to ICC arbitration.<sup>82</sup> Instead, the parties agree the applicable rules and other arrangements in the Appendix. The Green Book guidance advises that '[t]he UNCITRAL Rules are recommended',<sup>83</sup> though ICC arbitration is raised as an option if institutional administration is required. The Green Book is, in effect, an international version of domestic minor works contracts and it reflects this perspective throughout.

## Subcontract

The FIDIC Subcontract<sup>84</sup> has been expressly prepared for use with the 1999 Red Book. It can also be used with the Pink Book 'but only if the necessary amendments are made to reflect the significant differences'<sup>85</sup> between the Pink and Red Books. Described as a 'First Edition', the Subcontract replaced the 1994 Subcontract, which had been prepared for

use with the FIDIC fourth edition. The General Conditions are prepared to operate 'back to back' with the Red Book in terms of rights and obligations. In the case of the Force Majeure provisions,<sup>86</sup> this is literally done with the words 'The provisions of Main Contract Clause 19 (Force Majeure) shall apply to the Subcontract.' The form is also noticeable for a series of flow charts. These represent typical sequences of the principal events, of payment events<sup>87</sup> and of subcontractor claims and disputes under alternative versions of the dispute resolution provisions.<sup>88</sup> The Subcontract carries a fitness-for-purpose obligation.<sup>89</sup> Payment is by measurement in accordance with the Main Contract (Red Book) provisions.<sup>90</sup>

Obviously, there is no Engineer appointed and contract administration is in the hands of the Contractor. Subcontract disputes are resolved by reference to a Subcontract DAB, followed by time for amicable settlement in the event of reference to arbitration, which provides for ICC Rules with one arbitrator rather than three as the default position.<sup>91</sup>

## Consultancy agreements

The remaining current FIDIC contracts are consultancy agreements. They differ from the Rainbow Suite contracts and the other standard forms above in that they are not construction contracts and do not involve the contractor. Most significant<sup>92</sup> of these by far is the White Book.<sup>93</sup> First published in 1990, the White Book is probably the most important agreement for professional services in construction globally. The contract is between the 'purchaser' of the services: 'Client' rather than 'Employer', and the 'supplier' of the services: 'Consultant' rather than 'Contractor'.

78 Appendix and Clause 5.

79 Sub-Clause 5.2.

80 Appendix and Clause 11.

81 In the Foreword.

82 Sub-Clause 15.3.

83 Notes for Guidance, p. 29.

84 Conditions for Subcontract for Construction for Building and Engineering Works Designed by the Employer, 2011.

85 Foreword to Pink Book.

86 Clause 19.

87 Under Clause 14.

88 Clause 20 and Particular Conditions.

89 Sub-Clause 4.1.

90 Sub-Clause 12.1.

91 Sub-Clauses 20.6 and 20.7.

92 It is not intended to refer further to the Joint Venture (Consortium) Model Agreement 1992, the Sub-Consultancy Agreement 1998 or the Model Representative Agreement (Dark Blue Book) 2004.

93 Client/Consultant Model Services Agreement. The 4th edition 2006 has just been replaced by the 5th edition 2017.



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FIDIC's intention was to produce an agreement for 'general use for the purposes of pre-investment and feasibility studies, detail design and administration of construction and project management, both for Employer-led design teams and for Contractor-led design teams on design and build commissions'.<sup>94</sup>

A feature of the 2006 (and previous editions) of the White Book was the very limited provision concerning the rights and obligations of the Parties. The basic Consultant's duty of care was stated to be 'no other responsibility than to exercise reasonable skill, care and diligence in the performance of his obligations under the Agreement'.<sup>95</sup> This was consistent with the English law concept of the basic duty of the supplier of a service.<sup>96</sup> An attempt has been made in the 2017 fifth edition to make this more flexible, by providing that the 'Consultant shall perform the Services with a view to satisfying any function and purpose that may be described in Appendix I [Scope of Services]'.<sup>97</sup> But this is still said to be only to the extent achievable using reasonable care and skill, so would constitute a problem in the provision of design services, for example, for a design-and-build contractor required to give a fitness-for-purpose undertaking to the employer for design.

The actual substance of the scope of services is very limited. Some more guidance notes have been inserted by the 2017 fifth edition, but the Appendices are still largely blank pages, to be filled in by the parties. Consequently, what are in effect further Particular Conditions will be much greater than the General Conditions. The fifth edition has also added new provisions relating to Client-instructed Variations to the Services.<sup>98</sup> A mechanism exists for instructing Variations but 'Any such Variation shall not substantially change the extent or nature of the Services'.<sup>99</sup>

The dispute resolution provisions of the White Book have always differed sharply from those found in the construction contracts. Under the 2017 fifth edition, disputes are first subject to an amicable dispute resolution stage,<sup>100</sup> which is now stated to be mandatory, followed by adjudication<sup>101</sup> with a further provision for amicable settlement<sup>102</sup> before reference to arbitration,<sup>103</sup> either subject to agreement by the Parties or to ICC Rules.

## Former contracts still in use

It is curious that FIDIC has continued to market the Orange Book<sup>104</sup> after its replacement by the 1999 Silver Book. In some respects, the Orange Book was a forerunner of the Rainbow Suite generally, as well as the Silver Book specifically, with its 20-clause structure, time-bars for Contractor claims<sup>105</sup> and role of the DAB,<sup>106</sup> though the arbitration provision does not include the ICC. Its continued use, now inevitably diminishing, is due partly no doubt to perceptions of the Orange Book as less aggressive than the controversial Silver Book.

More generally, its survival is indicative of the inherent conservatism of the construction industry. This too explains the persevering use of the fourth edition of the FIDIC Red Book, which was often used as a basis for standard forms in the Middle East, though now it is being replaced by its 1999 successor.

94 Foreword to White Book 5th edition 2017.

95 Sub-Clause 3.3.1.

96 Supply of Goods and Services Act 1982 s.13.

97 Sub-Clause 3.3.2.

98 Clause 5.

99 Sub-Clause 5.1.1.

100 Sub-Clause 10.1.1.

101 Sub-Clause 10.2.

102 Sub-Clause 10.3.

103 Sub-Clause 10.4.

104 See n. 24, above.

105 Sub-Clause 20.1.

106 Sub-Clauses 20.3 and 20.4, 20.7 and 20.8.

# Introduction to the FIDIC Suite of Contracts

## Development of the FIDIC contracts

As indicated above, during 2017 FIDIC should conclude its long-running review of the Red, Yellow and Silver Books with the publication of new editions. The first step was taken with the restricted distribution of a so-called Pre-Release Second Edition of the Yellow Book in December 2016 (and further restricted distribution of an amended version in Abu Dhabi in February 2017<sup>107</sup>). Beyond the individual observations made in relation to adoption of Gold Book provisions, for example, regarding DAB powers as to time bars and dispute avoidance, it is not considered useful to attempt a review of a preliminary version which may yet be subject to significant amendment. It can be observed that the Pre-Release Second Edition is much bigger than the current Yellow Book and includes a 21-clause structure; there is to be much greater emphasis on contract administration procedures. The cover states that 'The Yellow Book Second Edition will be formally published by FIDIC early 2017 for use in the market place,' though it is not at the time of writing known whether this means that it will be published ahead of the new Red and Silver Books.

It is understood that in the various Task Groups there are ongoing reviews of DBO, and Dredging agreements, and also the development of a new Tunnelling/Underground works contract.

## Conclusion

The FIDIC contracts are the pre-eminent standard forms in the international construction market. Although there are individual sectors where other standard forms rival this supremacy, such as the LOGIC<sup>108</sup> contracts in the offshore oil and gas industry, and the I Chem E<sup>109</sup> forms in the water and process industries, no competitor can equal FIDIC's global reach or its penetration into so many types of construction and engineering work. The NEC 3<sup>110</sup> suite is said by its proponents to be a potential challenger, but it is still a distant one. An alternative scenario is that FIDIC's dominance will actually grow; such growth is most likely in countries without well-established domestic forms and in those regions, notably the Middle East, where cross-border construction activity has become a common phenomenon.

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107 See n. 64, above.

108 LOGIC stands for Leading Oil & Gas Industry Competitiveness; these contracts replaced the CRINE forms.

109 Institution of Chemical Engineers.

110 New Engineering Contract, 3rd edition of the Engineering and Construction Contract of the UK's Institution of Civil Engineers. This edition will be replaced by a 4th edition during the second half of 2017.

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