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International FIDIC Contracts

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# INTERNATIONAL FIDIC CONTRACTS

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## INTRODUCTION

When one speaks of international construction contract forms, reference is usually to the FIDIC family of forms - those published by the International Federation of Consulting Engineers. And of those forms of contract, the oldest (originating in 1957) is the best known: the Conditions of Contract for Works of Civil Engineering Construction (the "Red Book"). Already well established, the FIDIC Conditions took on increased significance recently when the World Bank issued new Guidelines which mandate the use of the Bank's Standard Bidding Documents for Works (SBDW) by its borrowers - and the Bank's SBDW are predicated upon the FIDIC Red Book.

### I.

#### THE FIDIC CIVIL WORKS CONDITIONS OF CONTRACT

Although FIDIC is an acronym derived from the name Fédération Internationale des Ingénieurs-Conseils, the FIDIC Red Book form is *not* predicated upon French or civil law, but was originally based upon a form published by the British Institution of Civil Engineers. Moreover, unlike standardized American construction contract forms (such as the form for Federal Government contracts or the American Institute of Architect's Document A201), which are extensively discussed in published legal decisions, there is limited precedent interpreting the

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Red Book. This is partly because the form has always provided for arbitration of disputes - a private process that does not usually result in a published decision. Recently, however, certain publications have begun to make significant arbitration award decision available, sometimes in a “sanitized” version, with the names of the parties deleted.

The organization that publishes the Red Book is a federation of engineering societies from around the world. Interestingly, while the Third Edition of the form carried on its cover a specific notation to the effect that it had been approved by four contractor organizations, including the Associated General Contractors of America (AGC), this approval was not sought by FIDIC in the preparation of the Fourth Edition. Nevertheless, the drafting and dialogue that preceded FIDIC’s publication of the new form included participation by the European International Contractors and the AGC, as had occurred during the preparation of the Third Edition. Significantly, the drafting committee from FIDIC, chaired by a Danish engineer, also consulted, for the first time in the preparation of the Fourth Edition, with representatives of various financing institutions, particularly the World Bank.

### **The Structure of the Red Book**

The physical appearance of the text is in two parts - Part I, “General Conditions” and Part II, the “Special Conditions” or, in FIDIC jargon, the “Conditions of Particular Application” bound separately.

The intent of FIDIC is that Part I be used almost *intact*, without alteration, it being recognized that it will be necessary to prepare a Part II, or “Special Conditions,” for each individual contract. Clauses in Part II *must* be used when the Part I language specifically requires certain information to be provided, such as the name of the engineer, the “Ruling

Language,” and the times for the submissions of the schedule and of the cash flow estimate. Part II clauses are used to furnish additional information and provisions necessitated by the type, circumstances, or locality of the work. *Deviations* from the standard terms of Part I are *only* supposed to be effected when necessitated by the law of the country or exceptional circumstances. Accordingly, any departures from Part I provisions made in Part II should be closely analyzed. Part II has been expanded from the brief, aide-memoire, two-page format of the Third Edition to an indexed 26-page booklet that now includes guidelines for preparation of Part II clauses and some sample clauses themselves.

### **Engineer’s Role**

The pivotal role played by the engineer in the construction arena is an important concept that is basic to the FIDIC form. Historically, under the British approach, the engineer, although not a party to the agreement between the employer and the contractor, has had a unique role in the construction *triangle*. In effect, the engineer wears two hats - acting somewhat like an agent for the employer, while at the same time, expected to make judgment calls in a neutral, quasi-judicial fashion when disputes arise between the contractor and the employer. The engineer’s role is somewhat similar to that of the architect in American practice under the AIA Document A201. In numerous clauses of prior editions of the FIDIC form, the engineer had the authority to make certain determinations, including fixing the amounts to be paid to the contractor in certain circumstances, that would be binding upon the employer.

The current Red Book provides for the engineer to *consult* with the employer before making most such determinations. The phrase “after due consultation with the Employer and the Contractor” occurs in many clauses. On the contractor side, it was felt during the FIDIC drafting

dialogue that this language put the engineer under the thumb of the employer so that the engineer's independent professionalism would disappear. On the engineer side, it was argued that consultation with the employer was normal in any event, and properly so, and that the language, albeit new, merely recognized this reality. The "due consultation" language is also the result of assertiveness during the drafting process by the funding institutions, who evidently felt that the engineer and the contractor should not be allowed entirely on their own to reach into the employer's funds. As FIDIC explained it when the current contract form was published, the role of the owner had been made more "visible."

In counterbalance to the larger role in certain key decisions to be played by the employer, language at Sub-Clause 2.6 reinforces the engineer's impartiality. The quasi-arbitral role of the engineer is a vital part of the FIDIC contract system and requires implementation by engineers of candor and courage. Apart from contractual relief for the contractor, including arbitration, there may be direct recourse against the engineer in some countries.

### **Bonding**

Bonding -- or in FIDIC's language "performance security" -- is covered at Clause 10 of the Red Book. Note that the language of Clause 10 does *not* automatically require the furnishing of a bond or letter of credit:

If the Contract requires the Contractor to obtain security for his proper performance of the Contract he shall obtain and provide to the Employer such security within 28 days after the receipt of the Letter of Acceptance, in the sum stated in the Appendix to Tender. When providing such security to the Employer, the Contractor shall notify the Engineer of so doing. Such security shall be in such form as may be agreed between the Employer and the Contractor. The institution providing such security shall be subject to the approval of the Employer. The cost of complying with the

requirements of this Clause shall be borne by the Contractor, unless the Contract otherwise provides.

Part II of the Red Book provides two *sample* forms of performance security. Both are conditional.

However, some Middle Eastern countries require the furnishing of *unconditional* letters of credit. These have the effect of placing the contractor entirely at the mercy of the owner and are not favored by FIDIC. It offers little comfort to the contractor to learn that these instruments are rarely invoked.

Of course, there is more than the bond, or other formal security, available to protect the employer from the results of an impending contractor default. The employer is also in the position to hold back retainage, delay progress payments for work performed, deduct liquidated damages for delay and, depending on local law, seize the contractor's equipment. In short, if the engineer is alert, the employer can be quite well protected -- without the expense of a performance bond. A contractor will attempt to negotiate out of having to provide a bond, if possible.

Sub-Clause 10.3 sets forth a notice requirement for the *employer* when the employer wishes to assert a claim with regard to the bond. Unfortunately, the language is unspecific, requiring only that “[p]rior to making a claim under the performance security the Employer shall ... notify the Contractor stating the nature of the default.” (This language is the remnant of a proposal that would have required a notice period within which the contractor would have an opportunity to remedy alleged performance deficiencies.)



## Changed Conditions

With respect to unforeseen site conditions, as frequent a basis for disputes internationally as domestically, Clause 11, "Inspection of Site," Sub-Clause 12.1, "Sufficiency of Tender," and Sub-Clause 12.2, "Adverse Physical Obstructions or Conditions," should be read together.

What amounts to a direction to tenderers in Clause 11 as to a thorough site visit is extensive and explicit. Under the clause, the contractor is deemed to have satisfied himself with respect to site and surroundings as to: (a) the form and nature thereof, including the subsurface conditions; (b) the hydrological and climatic conditions; (c) the extent and nature of work and material necessary for the execution and completion of the works and the remedying of any defects therein; and (d) the means of access to the site. This language is eased to the extent that the site inspection is to be conducted, "so far as is practicable, having regard to considerations of cost and time."

Relief is specifically afforded by Sub-Clause 12.2 when conditions, "not foreseeable by an experienced contractor," are encountered. It would appear to be clear that, as in U.S. practice, this reference is to *physical* conditions only but there are those who would argue for a more expansive interpretation. Clause 12.2 recites that notice shall be given to the engineer "forthwith." This has to be read with the language at Clause 53, "Procedure for Claims" (discussed below), which sets forth a requirement that notice be given within 28 days of the event giving rise to the claim.

This is a critical example of the "due consultation-with-the-Employer" requirement in connection with an engineer determination for at least two reasons. First, many owners will not have the technical expertise within their own organizations to have a meaningful consultation

with the engineer on the merit or substance of the contractor's claim (other than its financial impact). Second, this is an area where the engineer is most likely to find his own quasi-judicial role difficult, or intrinsically a conflict, because it is the *engineer's* design and estimates of quantities and his client's pre-tender site exploration program, adequate or not, all reflected in the tender documents, that will likely be factors in assessing the contractor's assertion that conditions were not foreseeable. And, the engineer may well have an interest of his own. While it is true that the contractor, when assuming the risk of tendering, is aware that this conflict may come into play, namely that the engineer becomes a judge in his own case, it is also correct to observe that the employer has agreed by contract upon the impartial role required for the engineer by Sub-Clause 2.6. The implementation of Sub-Clause 12.2 thus furnishes the engineer an opportunity to demonstrate that professionalism which is implicit in the Sub-Clause 2.6 requirement of impartiality.

It is interesting to note that, unlike U.S. practice, which provides for reciprocal relief to the owner (employer) when conditions are *more* favorable than expected, there is no opportunity under Sub-Clause 12.2 for the employer (owner) to benefit from easier than expected site conditions.

### **Insurance**

The provisions concerned with insurance coverage are principally found at Clauses 20 through 25. When discussing insurance coverage, it is important to bear in mind the distinction between the concepts of *allocability* and *insurability*. Clause 20 allocates responsibility between the employer and the contractor for damage to the works under construction during performance.

Clause 21 requires the contractor to obtain insurance against the risk allocated to the contractor by Clause 20. Clause 21 also requires that the contractor's equipment be insured.

The employer is responsible for design except for design provided by the contractor. Design responsibility is the employer's *to the extent* it is causal of an event (*i.e.*, prorated). The contractor is not responsible if the work is damaged by an operation of nature where the contractor could not reasonably have been expected to take precautions. The risk assumed by the employer is of that event which is so unexpected that it would not be reasonable to take precautions.

Clause 21 seeks to avoid the situation where duplicative insurance, or parallel policies have in the past been obtained, by requiring that the *contractor* obtain the insurance for the risks as allocated to the contractor and the employer. On certain projects, however, especially when several contractors are working on the same site or a phased takeover is planned, the *employer* may elect to arrange project-wide insurance itself. This approach may well avoid many administrative problems and disputes between carriers, as well as effect an overall insurance cost savings. Part II of the Red Book refers to this alternative and provides sample clauses.

The face amounts of insurance to be obtained pursuant to Clause 21 are, of course, matters that will vary tremendously from contract to contract and are, accordingly, left to be specified -- by the drafter of the bidding documents or as a result of negotiations -- in Part II.

### **Scheduling and Performance Time**

The scheduling of contract work is discussed at Clause 14. Sub-Clause 14.1 requires the submission of a schedule ("programme") and a general description of the "arrangements and methods" proposed by the contractor for the execution of the work.

It is interesting to note that as much as the Red Book form indeed uses some modern terminology (“facsimile transmission” is allowable for notices, for example), the buzz word “acceleration,” a key term in American construction contract administration since the early 1960's, does not yet appear. Nevertheless, the *concept* of constructive acceleration, familiar to the American construction industry and recognized in various forums, should be the basis for relief if time extensions are improperly refused by the engineer. Under Sub-Clause 14.2, when the engineer believes that actual progress does not conform to the schedule, a revised schedule may be requested. This provision must be read together with other time-related provisions.

A series of such clauses entitled “Commencement and Delays” cover performance time from commencement, notice of which must be given by the employer within the period after the issuance of the letter of acceptance stated in the tender documents (Clause 41), to the issuance of the “taking-over certificate” (Clause 48). “Taking-over certificate” is the term for what had been called the certificate of completion in the Third Edition.

The various events that may provide a basis for time extensions are set forth at Sub-Clause 44.1, which reads as follows:

In the event of

- (a) the amount or nature of extra or additional work, or
- (b) any cause of delay referred to in these Conditions, or
- (c) exceptionally adverse climatic conditions, or
- (d) any delay, impediment or prevention by the Employer, or
- (e) other special circumstances which may occur, other than through a default of or breach of contract by the Contractor or for which he is responsible, being such as fairly to entitle

the Contractor to an extension of the Time for Completion of the Works, or any Section or part thereof, the Engineer shall, *after due consultation with the Employer* and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly, with a copy to the Employer. [Emphasis added.]

Under Sub-Clause 44.2, notice must be given to the engineer within 28 days of the event that is the basis for the time extension request.

A practical contractual approach is the provision at Sub-Clause 44.3 allowing interim time extensions when a delaying event has a continuing effect. In this situation, the engineer must make, “without undue delay,” his determination *without* necessarily having a prior “due consultation” with the employer; final review cannot result in a reduction of the time extension thus granted. This gives the engineer the opportunity to resolve promptly whether the contractor will be afforded a time extension or will be compelled to accelerate to achieve a rate of progress necessary to meet the date of completion.

### **Changes**

Like many forms of contract international and domestic, the Red Book, at Clause 51, gives broad authorization to the engineer to effect changes in the work, including quantity increases and decreases, omissions, and even changes in the kind and timing of work. In effect, and rather uniquely, the engineer can change a contract to which he is not a party.

Under Clause 52, changes are priced (a) at the rates and prices set out in the contract, if applicable, (b) on a reasonable valuation using the contract rate and prices as the basis, or (c) upon agreement between the engineer and the contractor, after “due consultation.” A useful provision in this regard is the requirement that the engineer must *provisionally* determine rates or

prices in order for on-account, or partial, payment to be made when agreement or fixing by the engineer of rates or prices does not immediately occur.

When *all* adjustments of the estimated quantities in the bill of quantities have been made, if there are additions or deductions from the contract price that *taken together* are in excess of *15 percent* of the effective contract price, there will be an adjustment in the contract price. This is self-evidently different from the Federal Government contract "Variation in Estimated Quantity" clause that is directed to overruns in particular unit-priced items. This percentage appears to have been an arbitrary choice by FIDIC. The Third Edition had provided an adjustment at *10 percent*, while the First Edition provided an adjustment at 15 percent.

### **Claims and Arbitration Procedures: Reading Clauses 53 and 67 Together**

Clause 53 is a completely new and important provision with respect to the presentation of claims.

Claims can arise from a variety of causes -- a delay leading to less efficient work, suspension, or forced acceleration, an order that is issued by the engineer as within contract requirements but perceived by the contractor as a compensable change, or the encountering of a subsurface condition that is different as to soil, rock, or water from the contractor's expectation.

In some situations, a single event, such as the closing of an access road, may start the running of the 28-day period in which the giving of notice under Sub-Clause 53.1 must occur. In others, the "event" may be more blurred, such as the gradual realization of a subsoil overrun or underrun of great magnitude. In the less explicit situation, contractors who have monitored job performance and costs closely will less likely be victims of an employer contention that notice

requirements were unmet. It should be remembered that notice provisions have a useful and bonafide purpose; they are not simply traps for the unwary. The employer may want to immediately investigate and mitigate his damages by taking corrective action or by redesigning to meet a condition. At the very least, the employer should be enabled to keep, or have kept by the contractor pursuant to Sub-Clause 53.2, such records as will enable him to verify the extra costs being incurred by the contractor for which reimbursement will be sought.

Sub-Clause 53.3 requires an early compilation of the claim amount sought by the contractor and also contemplates the situation where the damage flowing from a claim event may continue *beyond* the initial, 28-day period for the furnishing of claim particularization. An obvious example would be the required extended performance of certain work at the engineer's direction that is out of the originally planned sequence, necessitating the retention of certain equipment on the site beyond that contemplated under the contract or the performance of work in winter when in certain climates, production might be reduced.

To ensure compliance with the record keeping requirements, Sub-Clause 53.4 penalizes the contractor by limiting entitlement to the amount supported by "contemporary records." The term "contemporary records" will be open to definition because a variety of records come into play in the process of substantiating claims, such as foremen's *daily* reports and vendors' *monthly* invoices. It is clear from the language of Sub-Clause 53.4 that the engineer's view of the adequacy of the Sub-Clause 53.2 contemporary records is reviewable by the arbitrator (or arbitrators), proceeding under Clause 67. Although, arguably, the language of Sub-Clause 53.4 would excuse failure to give the notice under Sub-Clause 53.1, what is beyond doubt is that the contractor must so administer his contract as to keep records carefully of increased costs so as to



substantiate *any* claim asserted for additional payment, pursuant to this or any other provision of the contract.

Beyond compelling contractor promptness in claim presentation, what is particularly useful about the claims procedure under the Red Book is that partial payment of a claim may be afforded in the not unusual situation where liability is conceded, but the contractor and engineer cannot agree on the amount of adjustment. Sub-Clause 53.5 provides that the contractor “*shall* be entitled to payment in respect of such part of the claim as such particulars *may* substantiate to the satisfaction of the Engineer.” (Emphasis added.) The engineer again plays a determinative role. Interestingly, in the case of a *partial* payment, consultation by the engineer with the employer is *not* required.

### **Disputes Resolution - Clause 67**

As the breakdown of Clause 67 in the Fourth Edition suggests, the resolution of disputes can be described as a three-phase process: (1) the engineer’s decision (Sub-Clause 67.1); (2) an amicable settlement attempt (Sub-Clause 67.2); and (3) arbitration (Sub-Clause 67.3).

The disputes resolution procedure begins with a referral to the engineer for decision. The engineer must make this decision within 84 days. This requirement of Sub-Clause 67.1 must be read with Sub-Clause 2.6. As provided there, any engineer’s decision under the contract must be impartial, but may be opened up, reviewed, or revised as provided in Clause 67. But Clause 67 starts the disputes settlement process with the engineer’s decision as *its* first step. This could suggest a delaying redundancy, or worse, a lack of impartiality in the Clause 67 decision because decisions under Sub-Clause 2.6 are specifically required to be impartial. However, the unexpressed expectation of the FIDIC draftsmen was that a review of a contract dispute would



occur *within* the engineer's organization -- typically from the field (from the engineer's representative appointed under Sub-Clause 2.2, for example) to the home office or from jobsite encounters between hotheaded hard hats to dispassionate, detached boardroom analysis. As to the second question concerning impartiality, it should be apparent that the engineer acts no less impartially under Clause 67 in rendering a formal decision than under Sub-Clause 2.6 generally in other situations in which the engineer is required to give an opinion, since Sub-Clause 2.6 requires the engineer's impartiality *wherever* his discretion is exercised under the contract. After the engineer's decision has been made, the contractor has 70 days within which to notify the employer of an intention to commence arbitration.

A new provision at Sub-Clause 67.2 requires as a second step in the dispute settlement process that an attempt be made to settle any dispute amicably:

Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, arbitration of such dispute shall not be commenced unless an attempt has first been made by the parties to settle such dispute amicably. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day of which notice of intention to commence arbitration of such dispute was given, whether or not any attempt at amicable settlement thereof has been made.

While this language is merely precatory in nature, it is consistent with what businessmen are everywhere attempting --to find an alternative to dispute resolution short of the adversarial ambience of the arbitration hearing room. The final language is succinct and vague, but the intention of the FIDIC committee was to provide an explicit contract basis, where it may be needed under some legal systems, for what practical parties could in many legal systems always do -- sit down and resolve a dispute without a full-blown arbitration proceeding. The FIDIC

drafting committee considered inserting specific reference here to an institution or a procedure, or both, that would be technically qualified to delve into the merits of a dispute without the complication of extended legal analysis. The recommendation of an independent claims review board, lasting through contract duration on large projects, could be utilized here. Whatever the alternative dispute resolution (ADR) mechanism, the emphasis is on the necessity for quick, expert addressing of the claim.

Finally, failing amicable settlement, Sub-Clause 67.3 goes on to provide for arbitration. The rules of the ICC are proposed with the ICC as the administering institution: this continues prior FIDIC form practice. In recent years, however, it has become quite apparent that arbitral institutions other than the ICC not only exist, and are well qualified, but may be preferable because of their procedures and locale, as well as the perception that they are more neutral, *i.e.*, without the onus of being regarded as organs of Western countries. Thus, Part II of the Fourth Edition includes a sample clause that, if selected, would delete the reference to ICC and substitute the rules of the United Nations Commission on International Trade Law (known by its acronym, "UNCITRAL"). Any variance in the Clause 67 language found in bidding documents must be examined to ensure that the arbitration clause being offered provides genuinely international, and not localized arbitration.

### **Termination**

When contract performance does not proceed as planned and the contract clauses providing adjustment in scope, time, and price are inadequate, reference is made to the termination provisions -- those contract clauses dealing with contractor default (Clause 63),

employer default (Clause 69), and the third type of situation (Clause 66), circumstances outside the control of both parties.

If the contractor (a) fails to commence work, (b) despite written warning from the engineer, neglects to comply with any of his contract obligations persistently, or (c) fails to respond in connection with defective work under Sub-Clause 37.4 and its removal under Sub-Clause 39.1, Clause 63 permits the employer to terminate the employment of the contractor after a 14-day notice period. The employer or the completing contractor may thereafter use the terminated contractor's equipment, work, and material.

In addition, Clause 69 provides that if the employer fails to pay amounts due under the engineer's certification within 28 days *after* the expiration of the time allowed in Sub-Clause 60.10 for interim certificates (28 days) or for the final certificate (56 days) or otherwise defaults as set out in Sub-Clause 69.1, the contractor may terminate. Under Sub-Clause 69.4, the contractor also has the option of slowing down the rate of work or suspending work.

In the event the contractor chooses to suspend work or to slow down and thereby suffers delay or incurs cost, the engineer is required to determine the time extension and price increase to which the contractor is entitled. Once again, this is a determination that is made "after due consultation with the Employer and the Contractor." It is important to note that the contractor must give notice to the employer of either an election to terminate or an election to suspend or slow down performance due to employer default. If after having suspended or slowed down work, the contractor then receives the payment due to him, including interest, the contractor's right to terminate *lapses*.

Finally, under Clause 66 of the Fourth Edition, where circumstances outside the control of both parties make it impossible or unlawful to proceed, then recourse is had to the payment provisions of Clause 65, "Special Risks," which generally cover war risk situations. Basically, these provisions cover cost reimbursement and interest.

On balance, the Fourth Edition of the FIDIC contract is fair to all three entities of the construction "triangle" -- the employer (owner), the engineer, and the contractor. Its format and readability are a considerable improvement over the Third Edition's. And because the World Bank and other funding institutions representing employers' (owners') interests participated directly with the FIDIC drafting committee in the preparation of this edition, it will be seen as a multilateral document. This should enhance its acceptability among employers (owners) who might previously, however unjustifiably, have looked askance upon a document prepared by engineers and approved by contractors.

## II.

### THE FIDIC DESIGN-BUILD CONDITIONS OF CONTRACT

Responding to development in construction internationally, FIDIC published in 1995 its first edition of Conditions of Contract for Design-Build and Turnkey (to be informally referred to as the "Orange Book").<sup>2</sup>

Unlike the Red Book which was originally (1957) based on the British Institution of Civil Engineers' form of contract and then successively updated in later editions (to the 1987 Fourth Edition) while maintaining its basic structure and clause numbering, the Orange Book is a fresh start. Obviously, the design-build concept, with its single-point-of-contact feature is a quite different project procurement approach from that of the traditional FIDIC triangle - *i.e.*, design-bid-build.

Without here going into all of the aspects and the disadvantages and advantages of design-build, we can briefly note a few of the characteristics of the Orange Book and their implications.

Basically, of course, the design is the responsibility of the contractor. The role of the FIDIC "Engineer", so substantial in the Red Book arrangement, is greatly reduced. By way of acknowledging this reduction, the entity charged with monitoring the contract for the owner is called the "Employer's Representative" (Orange Book, Clause 3). The Employer's Representative, when he is required to determine value, cost or extension of time is required to endeavor to reach agreement, failing which he shall "determine the matter fairly, reasonably and

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<sup>2</sup> This document and other FIDIC publications can be purchased from the FIDIC Secretariat, Post Office box 86, 1000 Lausanne 12, Switzerland (fax: 41 (21) 653-5432).

in accordance with the Contract” (Orange Book, Sub-Clause 3.5, captioned, “Employer's Representative to Attempt Agreement”). This is obviously a different and lesser standard than that found in the Red Book which requires of the “Engineer” that, “he shall exercise such discretion impartially within the terms of the Contract and having regard to all the circumstances” (Red Book, Sub-Clause 2.6, captioned, “Engineer to Act Impartially”). In fact, it is evident that the Employer's Representative under the design-build arrangement could even be an employee of the owner; this would not be tolerable under the Red Book, or is at least contrary to its intent, where the Engineer is expected to be professionally detached and truly an independent entity or person.

It is evident that a key variable in design-build is the degree of design, if any, which will be performed by the owner's staff or retained engineering consultant before proposals are requested from contractual tenderers. The pivotal document, which in other places but in similar contexts might be termed the “design brief” or the “owner's concept”, is called the “Employer's Requirements” in the FIDIC design-build Conditions. It is the description of the particular requirements for the works - their scope, standard, design criteria and program, as expected by the owner. Obviously, depending on the project, this document could consist of a single sheet of paper describing the end goal to be reached or it could consist of many sheets of drawings and books of specifications.

The predictable problem area in this type of arrangement will be at the interface - the point at which the design, in outline so to speak, of the owner meets the detailed design of the design-build contractor. We might here note the recommendation of the American Consulting Engineers Council in its 1994 policy paper: “The design professional shall prepare design

criteria, analyses, reports and cost estimates for the proposed project. ACEC recommends that the design professional shall develop the project design requirements to approximately the 35% design level" [sic].

The Orange Book form is generalized enough to be used for a variety of projects, both as to type and location. This adaptability means, of course, that its Part II, Conditions of Particular Application, will take on special importance.

### **Dispute Resolution Under the Orange Book**

The dispute resolution clause of the Orange Book (Clause 20) is a distinct departure for FIDIC. At the outset we might remark with respect to the title "Claims, Disputes and Arbitration" that it is both more fulsome and more accurate than the heading in the Red Book which read, "Settlement of Disputes." It is more fulsome because there are consolidated here the provisions with respect to the presentation of notice of claim and the keeping of contemporary records, found in the Red Book at Clause 53, with the provisions for a decision in the first instance, an intermediate attempt at amicable settlement, and finally arbitration, all found in the Red Book separately from Clause 53 at Clause 67. This is an editorial improvement. The title of Clause 20 is also somewhat more accurate than its predecessor in the Red Book because the expression "SETTLEMENT of Disputes" readily connotes an AGREED settlement which is definitely not what occurs when a dispute is resolved after an arbitration has been conducted and an enforceable award has been rendered in favor of one party.

Moving past the title, when we examine the substance of the Disputes clause we see that while the three-step process of the Red Book is roughly maintained, culminating in arbitration, there is a radical change in the first decisional step: what had been a reference in writing made to

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elicit the decision of the Engineer "in the first place" with respect to a dispute, in the Red Book, is a reference, in the Orange Book, to a "Dispute Adjudication Board" to elicit its decision (Clause 20.4). There are at least three reasons why this is a constructive modification by FIDIC although there will be a certain nostalgia for the concept of THE Engineer's Decision (presumably to be continued nevertheless in future editions of the Red Book?). First, the role of the Engineer does not exist in the design-build context as it does in the traditional design-bid-build context. In the role candidly called the "Employer's Representative," he is not expected to exercise his discretion "impartially within the terms of the Contract," as required by Sub-Clause 2.6 of the Red Book. But he is required in the Orange Book, when making determinations as to value, Cost or extension of time to endeavor to reach agreement and then to determine the matter "fairly, reasonably and in accordance with the Contract" as required by Sub-Clause 3.5.

Secondly, the referring of the dispute in the first instance to a third entity for resolution has the effect, because of the procedure for the constitution of that third entity, the Dispute Adjudication Board, of earlier facing up to the dispute by the parties. This putting the problem on the table for resolution promptly is consistent with the salutary trend discussed above in connection with the Red Book in particular and with the trend in the construction industry generally. It is an approach which engineers find practical. The only aspect which is surprising is that the old approach of postponing problems lasted so long.

It will be quickly noticed that while the language of Orange Book Sub-Clause 20.4, Procedure for Obtaining Dispute Adjudication Board's Decision, tracks the language of the Red Book Sub-Clause 67.1, Engineer's Decision, there is a SHORTER time period in which the Board must render its decision - 56 days - than the period for the Red Book Engineer - 84 days.



In short, the days of leisurely meditation on the Contractor's claim when his financial life may be at stake are over. How is it expected to be possible for this third entity, not involved in the preparation of either the contract or of the design, to act with greater rapidity on a dispute than the Engineer? The answer is in the composition of the Board and the ongoing familiarity of the Board with the project, by means of regular visits to the site and review of the correspondence.

Thirdly, the use of an independent Dispute Adjudication Board in lieu of the FIDIC Engineer to decide, in the first instance, upon disputes with the Contractor abolishes the argument that a fair decision could not be obtained from an engineer who was not only in the pay of the Employer but whose own acts or failures to act may have been at the core of the Contractor's claim. The latter objection had been made to sound more solemn by invoking the Latin maxim: *Nemo in propria causa iudex esse debet* - no one ought to be a judge in his own case.

### **Clause 20.3: The Dispute Adjudication Board - Not a "DRB"**

The approach of having a Dispute Adjudication Board is somewhat similar to but distinct from the Dispute Review Board concept ("DRB"). We are into the era of relatively new acronyms everywhere, especially in connection with the various forms of alternative dispute resolution ("ADR"), but only some of these new terms have developed precise meanings. (And some words have different meanings in different contexts.)

The concept of the Dispute REVIEW Board is being very aggressively promoted by the American Society of Civil Engineers ("ASCE") which has a long list of projects in its current publication on the subject demonstrating its success. DRBs are currently being used on major

projects in the United States, particularly in the Boston area for the work on the Harbor cleanup and the Central Artery/Tunnel work but elsewhere as well.

As the valuable ASCE publication on the subject expresses it, "a Dispute Review Board utilizes experienced and trusted construction professionals with appropriate technical backgrounds to address prevention and resolution of disputes." (ASCE, Technical Committee on Contracting Practices of the Underground Technology Research Council, Avoiding and Resolving Disputes During Construction, 1991 p.10 Emphasis added.) There are two messages here: 1)since disputes are usually factual and technical, rather than legal, construction professionals should be involved, and 2)these experts should be involved to prevent as well as resolve disputes, that is, early.

The significance of Subclause 20.5, Amicable Settlement, is threefold: The language, however vague and precatory it may sound, does remind the parties that an attempt to settle can be made at any time, even when positions as to disputes have begun to harden like 28-day concrete (and we can recall that the FIDIC forms are meant to be instructional as well as to fix legal obligations). Secondly, for those legal systems which, or super cautious bureaucrats who, need contract language to discuss settlement, the basis is provided. And thirdly, the "attempt" language, although it appears as a second step in the dispute resolution sequence of the Orange Book, does not create a blocking condition precedent with which there must be compliance somehow established before a party can move on to arbitration, the only limitation is that the 56-day period must elapse (which may be too long); in that period the attempt to settle may be negligible or non-existent but the opportunity is there.

For international work, it should be noted that an early article in the International Construction Law Review by G. Lodigiani ("A Claims Review Board As A Way for an Amicable Settlement of Disputes, 3 ICLR 498 1986) described a successful DRB on a dam project in Central America.

The basic idea is the addressing of job problems early, as mentioned above but the important distinction from what has been incorporated in the Orange Book is that these DRBs are usually set up to give prompt RECOMMENDATIONS to the parties - *i.e.*, of a non-binding nature. In the case of the Orange Book Dispute ADJUDICATION Board, the Board action results in a DECISION - binding. In fact, the language of Sub-Clause makes it explicitly clear: If no notice of dissatisfaction is given within 28 days of the receipt of the Board's decision, the decision is final and binding; the language is close to that with respect to the Red Book Engineer's Decision, except that the time for "appealing" to arbitration is SHORTER (28 days rather than the 70 days of the Red Book).

#### **Clause 20.5: Attempting Amicable Settlement**

Dissatisfaction with the court system has led the business community in general to cast about for alternatives. The words forming the acronym ADR may not need spelling out but there is a wide variety of meaning to the term, somewhat like the varieties of "construction manager." It's not exactly precise. When someone invokes the nouveau term, "ADR," it includes the whole spectrum from the old-fashioned shouting match of a (non-binding) settlement meeting to an arbitration proceeding, pursuant to contract, resulting in a quite binding and enforceable award. Of the many varieties of ADR within this range, four have applicability in the construction industry - dispute review boards, mini-trials, mediation and, of course, arbitration. What Sub-

Clause 20.5 does is to encourage the parties to make the settlement effort before moving on to the ultimate ADR step of arbitration.

### Conclusion

While there are, of course, other forms of standard international construction contract in use (such as the design-build forms of ENAA and of the European International Contractors), not to mention "one-off" or specially-drafted contracts, these FIDIC forms are the benchmarks to which others are usually. This preeminence is due not only to the historic and widespread use of these forms by engineering firms working internationally but also to the endorsement of the Red Book by U.S. A.I.D. and, although funding for the U.S. foreign assistance program may be reduced, the use of FIDIC forms will be stimulated because of being indirectly included in the now-mandatory Standard Bidding Documents of the World Bank.

The FIDIC Red Book is a balanced document of considerable vintage and, indeed, even Victorian overwordiness. But the provisions are time-tested and are recognizable by counsel and engineers internationally.

The newer FIDIC Orange Book for design-build is more user friendly than the Red Book and it benefits from a determined effort by its drafters to consolidate and clarify related clauses. Its dispute resolution provisions should foster the early addressing of claims while preserving the right to international arbitration.