

The FIDIC Contracts



Obligations of the Parties

Andy Hewitt

WILEY Blackwell

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The FIDIC Contracts Obligations of the Parties

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About the Author

Andy Hewitt, FICCP, FCInstCES, FQSi, ACIOB, ACIArb, MDBF, is the principal of Hewitt Construction Consultancy, which specialises in construction contracts, claims and dispute resolution. He is also the developer and principal of 'Claims Class', which provides education and training on the subject of construction claims by way of distance learning and 2-day intensive training programmes.

Andy comes from a background of over 40 years experience in the construction industry, gained in the United Kingdom, Africa and the Middle East. He has worked on projects in the UK, Nigeria, Bahrain, Saudi Arabia, Jordan, Oman, Sudan, Tanzania and the United Arab Emirates. He has held senior contracts, commercial and project management positions with contractors, sub-contractors and consultants, including several years operating his own practice in the UK in the 1980s and '90s, which offered quantity surveying, estimating and project management services to contractors, subcontractors, consultants and private clients. During his career, he has been involved in a wide variety of construction projects including super high-rise, large low-rise housing development, hotels, shopping malls, airports, hospitals, heavy civil engineering, process plants, marine works, water treatment and reclamation plants, pipelines, marine works, desalination plants and royal palaces.

His project and company management skills together with experience gained in a variety of disciplines and projects within the construction industry have led him, in the latter part of his career, to specialise in the field of construction contractual issues, claims and dispute management.

Andy's first book, *Construction Claims & Responses: effective writing and presentation*, has enjoyed international success and was selected as book of the month by Construction Books Direct during its first month of publication. Details of his consultancy practice may be found at <http://www.hewittconstructionconsultancy.com>. Information on courses offering training and education in construction claims may be found at <http://constructionclaimsclass.com>.

Foreword

Andy Hewitt, having written his successful first book, *Construction Claims and Responses*, embarked upon and completed a second. His first book passed on to its readers his vast knowledge and experience of writing and responding to claims. The second book demonstrates that, as a result of working in the construction industry for all his working life, Andy has recognised that many of those engaged regularly on projects either have a reluctance to examine the fine print set out in the Conditions of Contract or, having read them experience difficulty understanding what is required to enforce the rights and obligations of the parties. This is hardly surprising: for example the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (Red Book), which is the most widely used of the FIDIC forms, comprises 60 pages of close printed conditions and another 30 pages of guide notes and examples.

To overcome this problem Andy has produced a book which sets out the rights and obligations of the parties in a tabular format.

The first thing that strikes the reader is the manner in which the information is contained in the book, which makes it easy to follow and understand.

The book sets out separately the rights and obligations of the Employer Contractor and Engineer and covers every clause in the differing FIDIC forms including the Consultant's Model Service Agreement and the workings of the Adjudication Board.

Those who use the FIDIC forms of contract quickly discover that a failure to follow the procedures as set out in the

Conditions of Contract can have serious financial consequences for the Employer, Contractor and Subcontractor. For example, if a contractor employed using the Red Book encounters unforeseen adverse ground conditions, there is a procedure to be followed to ensure that adequate financial compensation is secured. The book provides in a succinct manner the four essential procedural steps that the Contractor must take to ensure proper financial reimbursement. The Contractor's entitlements to additional time for completion and for additional payment resulting from a significant number of events that may occur on any site are catered for in the contract. The book provides a six step guide to ensure the necessary procedures are followed. This is the format for the whole of the book.

It is clear that there is less chance of failure to observe contract compliance using this book than from reliance on reading through the appropriate clauses in the contract.

A big plus is that those using the book will find answers to queries relating to contractual issues arising from the FIDIC contracts' conditions in a fraction of the time it would take if it were necessary to study the full text.

For those using the FIDIC forms for the first time, or infrequently, this book is a must, whilst experienced users will find it a valuable memory jogger. Whichever category the reader falls into, using this book should improve performance.

The book is ideal for engineers, quantity surveyors, contract managers and any person whose job it is to understand the workings of a FIDIC contract.

Roger Knowles

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Introduction

FIDIC

FIDIC is the International Federation of Consulting Engineers and its members are comprised of national associations of consulting engineers. Today, membership covers 94 countries of the World and since its inauguration in 1913, the FIDIC standard forms of contract have become the international standard for contracts of an international nature and are widely used in developing countries that have not produced their own standard forms of contract.

In 1999 FIDIC published a 'suite' of contracts, which became known as 'the Rainbow Suite' because of the various colours of the covers, these have been refined and developed in the intervening years and today the suite comprises the following contracts:

Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (the Red Book).

Conditions of Contract for Construction, MDB¹ Harmonised Edition for Building and Engineering Works Designed by the Employer (the Harmonised Red Book).

Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer (the Red Book Subcontract).

Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor (the Yellow Book).

Conditions of Contract for EPC² / Turnkey Projects (the Silver Book).

Conditions of Contract for Design, Build and Operate Projects (the Gold Book).

Short Form of Contract (the Green Book).

Conditions of Contract for Dredging and Reclamation Works (the Blue-Green Book).

Client/Consultant Model Services Agreement (the White Book).

The Purpose of this Book

Any document containing conditions of contract should essentially set out the rights and obligations of the parties, but if we look at a comprehensive set of conditions such as those contained in the FIDIC suite, it may be seen that it becomes necessary to set out rules, procedures and requirements and in some cases to provide additional clarification of various provisions. This is because of the complexity of the work that is the subject of the contract and this inevitably results in a lengthy and complicated document.

One of the principles of a contract is that the parties should work positively to help each other to perform the contract and this is usually set out in the conditions by describing the obligations of each party. In most cases, obligations are made specific by including the word 'shall', for example; *'The Employer shall give the Contractor right of access to, and possession of, all parts of the Site ...'*. In other cases however, the obligations are implied, for example, a provision that states that *'The Contractor shall submit a Statement in six copies to the Engineer after the end of each month, in a form approved by the Engineer ...'*, places

an obligation on the Engineer to work positively to approve the form of the statement.

The rights of the parties do not always include obligations. For example, *'If the Tests on Completion are being unduly delayed by the Contractor, the Engineer may, by notice require the Contractor to carry out the Tests within 21 days after receiving the notice'*. This gives the Engineer the right to require the Contractor to carry out the tests, but it is not an obligation. If the Engineer does decide to exercise this right however, he is obliged to inform the contractor by way of a notice.

Inevitably, in a long and complicated document, important information can become difficult to find or not be immediately apparent. This is particularly so for persons who are not 'contractually minded' or are not familiar with the particular contract conditions being used and the consequences of a party not being aware of its own obligations could easily lead to a breach of contract with possible costly consequences. It is also important to be aware of the other party's obligations to ensure that they perform them properly and if they do not do so, be aware of any rights that may provide compensation under such circumstances.

The purpose of this book is therefore to set out the obligations of each of the parties for each of the conditions of contract contained in the FIDIC suite in a simple and easily understood manner and this has been done by listing each party's obligations separately in a table format.

The conditions often require the parties to perform their obligations within specific times and the tables therefore also include details of any time frames that are included within the conditions.

Finally, any specific consequences of non-performance of the obligations are listed. In this regard, it should be noted that only the consequences contained in the conditions are included. If none are listed, this does not mean that there are no consequences and in fact any failure to perform an obligation would be a breach of contract. The fact that no specific remedy is listed just means that the law rather than the contract conditions would determine the remedy for any breach.

Notes

¹ MDB – Multilateral Development Bank

² EPC – Engineer, Procure and Construct

Chapter 1
The Red Book
Conditions of Contract for
Construction, for Building and
Engineering Works Designed by the
Employer, First Edition 1999

The Obligations of the Employer

CLAUSE	OBLIGATIONS	TIME FRAME	SPECIFIC CONSEQUENCES OF NON-COMPLIANCE
GENERAL CONDITIONS			
1 General Provisions			
1.6 Contract Agreement	Enter into a Contract Agreement with the Contractor.	Within 28 days after the Contractor receives the Letter of Acceptance, unless agreed otherwise.	None.
1.8 Care and Supply of Documents	a) Keep the Specification and Drawings in custody and care. b) Supply two copies of the Contract and of each subsequent Drawing to the Contractor. c) Give notice of errors or defects in any document prepared by the Contractor for use in executing the Works.	a) None. b) None. c) Promptly.	None.
1.13 Compliance with Laws	Obtain the planning, zoning or similar permission for the Permanent Works, and any other permissions described in the Specification as having been (or being) obtained by the Employer.	None.	None.
2 The Employer			
2.1 Right of Access to the Site	a) Give the Contractor right of access to, and possession of, all parts of the Site. b) Give the Contractor possession of any foundation, structure, plant or means of access if required.	a) Within the time (or times) stated in the Appendix to Tender, or if not stated, to enable the Contractor to proceed in accordance with the programme submitted under Sub-Clause 8.3 [Programme]. b) In the time and manner stated in the Specification.	Contractor shall be entitled to an extension of time and payment of Cost plus reasonable profit.

CLAUSE	OBLIGATIONS	TIME FRAME	SPECIFIC CONSEQUENCES OF NON-COMPLIANCE
2.2 Permits, Licences or Approvals	Provide reasonable assistance to the Contractor at the request of the Contractor: a) By obtaining copies of the Laws of the Country which are relevant but not readily available, and b) For the Contractor's applications for any permits, licences or approvals required by the Laws of the Country.	None.	None.
2.3 Employer's Personnel	Ensure that Employer's personnel and Employer's other contractors cooperate with the Contractor and take actions similar to those which the Contractor is required to take under Sub-Clause 4.8 [Safety Procedures] and under Sub-Clause 4.18 [Protection of the Environment].	None.	None.
2.4 Employer's Financial Arrangements	Submit reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price.	Within 28 days after receiving any request from the Contractor.	Contractor entitled to suspend work, reduce the rate of work and to an extension of time and additional payment as a result of such actions (Sub-Clause 16.1).
2.5 Employer's Claims	Give notice and particulars to the Contractor if the Employer considers himself to be entitled to any payment under any Clause of the Conditions or otherwise in connection with the Contract and/or to any extension of the Defects Notification Period (this obligation may be carried out by the Engineer).	As soon as practicable after becoming aware of the event or circumstances giving rise to the claim.	None.