

高等学校**建筑类**教材

GAODENG XUOXIAO JIANZHULEI JIAOCAI

FIDIC条款 解析与案例

舒 畅 ■ 主编

FIDIC TIAOKUAN
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<http://www.cqup.com.cn>

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内 容 提 要

本书可以帮助学生了解 FIDIC 合同形式的各个方面,使学生能够理解项目的合同条件。通过详细讲解 FIDIC 1999 版红皮书施工合同理论条款,使学生全面掌握合同的实践应用及注意事项。逐条讲解是为了让学生学习记忆,并且掌握对每一个小条款的运用方式,是掌握合同管理知识和进行工程管理的最佳实践应用。

本书在条款分析前有合同系列介绍,目的是在学习合同条款之前,先了解相关必要的知识和背景。条款分析后,还附有总结性概括,包括工程师角色在条款中的定义,索赔条款的总结,反索赔条款的总结,承包商责任和权力的对应条款和内容,合同定义的专业术语的列表,几个重要事件序列,以及小知识点的补充。

本书希望为本科、研究生或同等学力,初级、中级以及相关的专业人士,尤其是教学从业者,在工程合同管理学习方面提供帮助。

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前言

本书是为了适应云南省工程管理建设需要,培养具有工程的基础理论与专业知识,具有较强的工程实践能力的应用型高层次人才,以及适应国家的双语课程建设的需要,强化工程教育国际化意识而编写的。FIDIC 在国内外都有大量的研究和专著,但是适应本科生学习的教材没有。此书希望为本科、研究生,初级或中级及以上专业人才,在工程管理的核心课程合同管理学习方面提供一个学习的范本。

促成原因包含云南省省级双语示范课程的课题要求和基金支持。云南省计划在 2012 年至 2015 年期间,每年立项建设 10 门双语教学示范课程。本课程的教学理念在于“双语化,精品化,经典代表,典范树立”。工程教育观念国际化就是要将云南省高等工程人才培养的改革和发展置于东盟和世界经济发展的大背景之中,从国际化的视野而非一地区的角度对工程人才培养的总体素质进行考查。FIDIC 合同条款是将最新的国外管理理念带进国内市场的最好的课程范例,也是对学生进行国际化培养方案实施的最重要的课程基础之一。

FIDIC 合同条款解析是典型的外资合同管理类课程,需要外资合同条款理论和工程管理实践课的背景。FIDIC 合同被称为土木工程合同的“圣经”、国际工程建筑业的通行惯例,是建筑业公认的工程施工、合同管理、项目管理和索赔的“最佳实践”。FIDIC 合同涵盖的合同事项极其完备,囊括了工程实施过程中可能出现的所有情形,内容全面,条款周密,措辞精确,脉络清晰,逻辑性强,在国际工程界备受推崇,为各种工程合同范本的“范本”,是企业参与各种工程合同谈判、条款制定与修改最具参考价值的样板和指南,也是项目管理的必备工具。

掌握 FIDIC 合同条件,是每一个项目管理与合同管理者的必修课。对于企业参与国内外建设工程的市场竞争,提升项目管理水

平,借鉴和吸收有利条款,规避合同风险和损失,切实维护自身权益具有重大意义。

本教材结合了 FIDIC 合同条款知识,工程管理专业知识和英语,对学生的全面发展有很大的帮助,是工程管理核心课程的重要参考教材。教材目的是帮助学生在 FIDIC 合同条款知识的基础上,掌握案例分析运用能力和用英语学习的能力。全书分为三大部分。第一部分是前言介绍(第 1 章至第 5 章),包括了 FIDIC 组织介绍,合同的演变和发展历史,产生的背景和前提,合同的特点,合同的语言特色,合同系列介绍。第二部分(第 6 章)是红皮书的条款释义,大量的讨论问题,是作者在教学经验中总结出来的,针对法律、合同的文字性、理解性和应用能力要求很高,这种方法为学生所欢迎,可以帮助他们更深入地了解知识。为了适应国内的文化和知识背景,大量的案例都是选自于国内的。作者没有采用大量的综合案例,而是选用了小的案例,针对条款的单独解释,目的是帮助理解条款的运用。第三部分是附加知识部分(附录 1 到附录 6),是对第二部分知识的总结和小知识点的补充。

双语教材的建设,要避免成为英语专业化的语言教材,而应为教学目标服务,并使枯燥的学习过程成为多元化的思维、逻辑的建设和方法的学习过程。本教材除了结构上的三大部分以外,知识上又分为语言目标、知识目标、思维目标和文化目标四个层面。

(1)语言目标:双语教学使学生逐步掌握各专业的术语以及独特的语言结构与表达方式。例如,FIDIC 合同条款本身的结构就安排了前面 2~3 节课全部为合同术语的讲解,是个很好的典范。FIDIC 合同的语言没有太深奥或生僻的单词,但是句子冗长,结构复杂,未经专业训练过的学生有阅读困难,所以要经常拿典型句子放在大屏幕上进行解构分析;但是长句的目的是使表达的意思严谨,这是英语语言的一种特殊语言结构,也是合同语言的魅力,其他课程很难学到,这是 FIDIC 合同条款很适合作双语课的一个原因,应该帮助学生掌握这种语言结构。另外,还要能听懂该专业的外语授课,读懂该专业的外文教学资料,能使用外语就该专业的问题进行口头(课堂讨论)交流与书面(小论文)交流。

(2)知识目标:双语教学的知识目标应高于语言目标。专业是实施双语教学最直接、最有效的载体,获取专业知识是双语教学最为重要的目标。例如,原版全英文教材应该成为学生的主要教材,但是为了避免有阅读困难的学生产生学习障碍,应该再配备对应的

中文版条款,还有业内专家专著和大量的文献阅读作为辅导材料,目的是让学生学会在实际项目和谈判中运用这些条款。

(3)思维目标:设立双语课的一个主要目标就是因为西方的思维跟东方的不一样,中国的思维侧重于描述和记录,而西方思维侧重于思辨和逻辑。作为理工科的学生,优秀的逻辑思维能力是非常重要的。FIDIC 合同条款中充满了这种逻辑的艺术,层层递推,严密推理,彼此互为证明。例如,在指定分包商一节中,先介绍了指定分包商的指派方式,与一般分包商的区别之一就在于指定方不一样。而后,又提出合同另一方是否有权拒绝这种指派,这样就引出了本门课初始时介绍的 FIDIC 的宗旨,在被证明后,条款又提出这样的另一方观点,原指派方是否有权否定,引出合同对于双方权利抗衡和平衡的巧妙设置,最后补充了相应的补救条款,圆满解决了这一个问题。这种细微逻辑的训练,是管理中,尤其是合同管理的重要教学方法。

(4)文化目标:这种文化目标在法律和经济类的双语课中会尤其突出。例如,中介公司服务制度就会涉及中介服务对象的唯一性和排他性。如果想让学生深入了解这种制度的起源,就必须了解西方的文化背景。所以,双语课往往会涉及对西方文化的介绍和中西文化的对比。

本书由昆明理工大学舒畅老师完成,在课题的申请和材料的编写过程中,大量的专家、同行提出过宝贵的意见,云南省双语示范课课题组、校方、学院和系教研组提供了大力支持。编写过程也参考了大量的文献资料,并促成了教学案例库的建设,对此表示莫大的感谢。

由于作者经验有限,书中难免有不足和有待改善的地方,也希望读者多多地提出宝贵的意见。

编者
2015年3月

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Chapter 1 FIDIC introduction

I Introduction of FIDIC history

FIDIC is indeed a short form of French name “Fédération Internationale des Ingénieurs-Conseils”.

FIDIC is founded in 1913. At the inception stage, there are only three members associations from the European countries including France and Belgium.

In 1949, the British Civil Engineering Association joined and hosted the FIDIC seminar in London, which was described by historians as the birth of the contemporary FIDIC. In 1959, the USA, South Africa, Australia and Canada all came in, thus did the FIDIC break the limit of regional boundaries and became a real international organization. Its headquarter is located in Geneva, Switzerland.

In 1996, China also joined and became its member. Today, its members and associations came from 97 countries, spreading all over the world, representing more than 1 million of professionals and most of the private practice consulting engineers in the world.

II FIDIC Objectives

(1) Be the recognised international authority on issues relating to consulting engineering best practice.

(2) Actively promote high standards of ethics and integrity among all stakeholders involved in the development of infrastructure worldwide.

(3) Maintain and enhance FIDIC's representation of the consulting engineering industry worldwide.

(4) Enhance the image of consulting engineering.

(5) Promote and assist the worldwide development of viable consulting engineering industries.

(6) Promote and enhance the leading position of FIDIC's Forms of Contract.

(7) Improve and develop FIDIC's training and publishing activities.

(8) To promote and encourage the development of young professionals in the consulting engineering industry.

III Types of Members

(1) Member Association

A national association which is the largest association of firms providing technology-based intellectual consulting services for the built and natural environment in a country.

(2) Affiliate Member

Any association, organisation, firm or groups of firms which is based in a country having or not having a Member Association, and which supports the objectives of the Federation. This membership category is aimed at commercial organizations which aim to maintain a close contact with FIDIC and to support the federation's activities.

(3) Associate Member

Any individual, organisation, association, firm or groups of firms which is based in a country not having a Member Association, and which has a major part of its activity in the engineering consulting industry. This membership category is aimed at organizations that aim to become a FIDIC national Member Association.

IV FIDIC publications

FIDIC, in the furtherance of its goals, publishes international standard forms of contracts for works and for clients, consultants, sub-consultants, joint ventures and representatives, together with related materials such as standard pre-qualification forms.

FIDIC also publishes business practice documents such as policy statements, position papers, guidelines, training manuals and training resource kits in the areas of management systems (quality management, risk management, business integrity management, environment management, sustainability) and business processes (consultant selection, quality based selection, tendering, procurement, insurance, liability, technology transfer, capacity building).

V FIDIC Vision

Enabling the development of a sustainable world as the recognised global voice for the consulting engineering industry.

VI FIDIC Mission

To work closely with our stakeholders to improve the business climate in which we operate and enable our members to contribute to making the world a better place to live in, now and in the future.

VII FIDIC Values

(1) Quality

Quality has been one of FIDIC's fundamental principles ever since its establishment in 1913. Quality is important both in the work undertaken by consulting engineers and in the way that they are

selected, and it is very difficult to achieve the first of these if the second is not also implemented.

(2) Integrity

The issue of integrity has always been important but has become even more so of late given the increased legislation in the UK and other countries and the anti-corruption procedures implemented by multinational development banks. FIDIC has responded to the changes by introducing its own updated integrity management system and has also drafted a government procurement integrity management system. It is essential that all integrity systems that are introduced are at least as comprehensive as those drafted by the federation.

(3) Sustainability

Addressing sustainability is, of course, crucial to the survival of mankind. The problem is that in many parts of the world the issue is ill-defined or misunderstood.

Many people are totally confused by the range and variability of sustainability assessment tools available. FIDIC is therefore preparing a publication on this issue and this in turn will, it is hoped, lead to much more consistency between the tools being used (or abused) in different part of the world.

Note

1. FIDIC's fast progress and it's quick expansion of its members in recent years.
2. FIDIC's multiobjective.
3. FIDIC's three types of members.

Coursework

1. Thesis about 200 words, under the title of "How do you value integrity in your study or work"?
2. How will vision and mission of the organization affect your valuation and choice?

Chapter 2 FIDIC contract evolvement

In 1945, the Institution of Civil Engineer, with the joint efforts of the Federation of civil engineering contractor, unified various civil engineering contract forms which were adopted by different countries before the World War II and promulgated a standard form which was widely recognized afterwards.

This standard form package is named as the General Conditions of Contract and Forms of Tender, Agreement and bond for use in connection with works of civil engineering Construction, and abbreviated as ICE Form.

In January of 1950, after the agreement of ACE (in London) who joined recently, ICE form was promulgated again after some amendment. It's reprinted in the march of 1951 (3rd edition), January of 1955 (4th edition), 1969 (with some supplement), June of 1973 (5th edition) and 1991 after repeated modifications.

Many professional associations imitated the ICE form and after some adjustments, published their own contract conditions adapted to their national or regional legislation system. ACE associated with the British architecture export group to work on contract files that could be used elsewhere other than the U. K., as approved by ICE and in urgent need of the international construction industry. This contract file is called the Overseas (Civil) Conditions of Contract with the short name of ACE form and was published in August of 1956. ACE form varies slightly with ICE form as to formation and main text content, and was constituted by standard tendering letter, appendix to tendering latter, and contract agreement sample. In order to be distinguished from ICE, its cover was printed in blue color. The ACE format is the first international standard conditions of contract for works of civil engineering construction, and it's divided into two parts, the first part includes 68 clauses, called the general condition, the second part is the particular conditions of contract, including the explanation to the first part and some new terms for selection.

Short after that, FIDIC worked with FIEC and published the construction contract conditions for the civil engineering in August of 1957 (1st edition) (CONS), often called FIDIC conditions, which is based on the formation of ACE. This FIDIC condition also consists of two parts.

After the recognition and approval of the FAWPC (International Federation of Asian and Western Pacific Contractor's Associations, Philippine, Rizal) in July of 1969, the 2nd edition was republished. The supplementary part of the 2nd edition which is called dredging and filling engineering particular conditions, becomes the 3rd part of the contract conditions later on. In 1973,

it's reprinted after the recognition and approval of the AGCA (Associated General Contractors of America, Washington) and FIIC (Inter-American Federation for the Construction Industry, Panama).

There had been a big controversy about the 5th edition of the ICE form published in June of 1973, yielding a chance for further amendment on FIDIC conditions. The 5th edition deviated from the civil engineering conventions embodied in the 4th edition in some important aspects, and was criticized for being ambiguous in language and structure. While it enlightened the editors of the FIDIC conditions and thus contributed to the publication of the 3rd edition in July of 1977.^[1]

Although not publicly acknowledged, the CONS dealt properly with the potential conflicts caused by different legislative systems. Many projects conducted world widely proved the success of its 2nd edition and 3rd edition, especially the later, with the evidence of the escalated economic growth in the Middle East and Far East countries in the 70s and 80s of the 21th century. The third edition was translated into German and Spanish. While when coming into the late 80s, arbitration cases multiplied and the 3rd edition started to gain public criticism.^[2]

Thus the 3rd edition was critically examined by some lawyers sentence by sentence who are good at big term explanation, and the 4th edition was published in September of 1987. FIDIC conditions initially were drafted for international projects while later on were found out to be adapted to domestic projects as well, thus the word of "International" was removed from the 4th edition.

The second part of particular conditions of the 4th edition was expanded and published as a sole volume, and its clause number corresponds to the general parts and they together constitute the contract conditions specifying the rights and obligation of each party.

In 1988, after some editorial amendments aiming to clarify the real intention rather than altering meaning of the clauses, the CONS were republished.

Of the 1992's reprint, further amendment concerned only with punctuation and alteration of characters like "and", "or".

In November of 1996, FIDIC published the "1992 Fourth Edition Revised Reprint supplement to Contract Conditions for civil engineering construction in 1987", providing convenience for readers in three controversial aspects: dispute resolution, payment, and prevention of delay of issuing payment certificate.

The above publications have been recognized and approved by AGCA (Associated General Contractors of America, Washington), FIIC (Inter-American Federation for the Construction Industry, Panama) and IFAWPCA (International Federation of Asian and Western Pacific Contractor's Associations, Philippine, Rizal) and recommended as standard contract conditions to the International Association of Dredging Companies, international organizations like the World Bank, so on.

中文参考

[1] 1973年6月出版的ICE合同条件第5版引起了很大争议,为进一步修改FIDIC条件提供了契机。ICE合同条件第5版在一些重大方面偏离了其第4版所遵循的土木工程传统惯例。有人批评其编写风格、语言,认为思路不清晰。但它为FIDIC条件的编写者提供了修改思

路。于是,由 FIDIC 和欧洲国际建筑联合会(FIEC)联合编写 Federation Internationale Europeenne de la Construction(巴黎)于1977年7月出版了第3版。

[2] 只是到了20世纪80年代后期,导致仲裁的争议数目逐渐多起来,进而对红皮书第3版的批评也表面化了。有些律师精于词语解释,对红皮书的每一条、每一款都像过筛子似的细细地挑剔了一番。

Chapter 3 Advantages of FIDIC contracts

I Background of FIDIC contracts

As a case has proved in 1999 in China, Three Georges Project Development Corporation sent bidding invitation to 6 qualified companies from different countries like the USA, France and Britain, with people possessing different levels of management and different languages, thus a standardized contract form recognized world widely is wanted.

In the majority of the cases, the contracting parties will react favorably to such a standardized form of contract, which should lessen the likelihood of unsatisfactory performance, increased costs and disputes. If the Contract is to be based on standard conditions of contract, tenders should not need to make financial provision for unfamiliar contract conditions. The widespread use of standard conditions also facilitates the training of personnel in contract management, reducing the need for them having to work with ever-changing contract conditions.

II Distinguished advantages of FIDIC contract

(1) Clear conception with good logic, fair risk division between contractor and employer without ambiguous expressions.

(2) Specify the responsibilities and obligations of employer and contractor, and engineer respectively in case of too many claims during the implementation of contract.

(3) Since FIDIC contracts originated from ICE contract, to a great extent it's in resemble with the standard contract form in countries or regions where ICE is preferred. And this makes a wide adaptability of the FIDIC contract.

i. e. World Bank is the biggest investment and finance institute of civil engineering projects worldwide. And it clearly state that FIDIC contract is preferred in projects which World Band get involved in.

III Highlights for the FIDIC contract conditions

(1) FIDIC contract conditions are drafted with reference to the British domestic contracts.

(2) the concept of FIDIC contract is rooted in British Common Law system.

(3) the wording is based on the principle of British law.

(4) the concept of FIDIC conditions of contract is established on the base by appointing a mutually trusted engineer as to project design and construction supervision.

(5) compensation concept is established on the basis of temporary B. Q. for final measurement and payment.

(6) division of rights of obligations is about risk sharing.

IV Book structure

Book consists of 3 parts:

(1) General Condition (一般条款), the part which is intended to be incorporated into each contract and remains as the main target of our course. The conditions of contract comprise the "General Conditions" and "Particular Conditions", which includes amendments and additions to such General Conditions.

(2) Guidance for the Preparation of the Particular Conditions (特殊条款编写指南), referred as "GPPC", which commences by proposing suitable wording to incorporate the appropriate General Conditions into a Contract, and which concludes with annexed example forms of securities.

(3) "the sample forms" including Forms of Letter of Tender, Contract Agreement and Dispute Adjudication Agreement, etc.

Regroup the 20 clauses in to 4 parts:

Part I : specification of respective role of Employer, Engineer and Contractor

Part II : is to clarify the obligations and liabilities

Part III : about terms in emergency cases

Part IV : covering risk issues

Note

- ① List out the advantages and highlights of FIDIC contract respectively.
- ② Conceive the basic structure of the book and describe it in your own words.
- ③ Good contracts distinct by its risk deviation, how do FIDIC contracts vary from the domestic contracts at this point?

Chapter 4 The characteristics of FIDIC contract language

(1) Interestingly, a census used to be made by the University of Reading about the language characteristics of the “Red Book” and the data collected from 38 countries showed that 71% of the interviewees credited it with the advantage of “easily to understand” followed by another contradicting comment of “incomprehensible”.

(2) When reading the contract conditions, you may go through a lot of formal phrases like “notwithstanding” and technical terms like “force majeure”. Because FIDIC contract originates from ICE, thus bearing the distinct features of British English and law language. Be that as it may, British English and law have always retained as some of the best ways to study English, and FIDIC contract conditions for university students and readers with similar background to learn international contract traditions.

For example: Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract, then upon notice by either Party to the other Party of such event or circumstance.

(3) Long sentence structure, which probably turns out to be the barrier for most of foreign language readers, especially Chinese readers with their reading. As shown by the selected sentence from the text “Notwithstanding any other provision of this clause, if any event or circumstances outside the control of the parties (including, but not limited to, Force Majeure) arises which makes it possible or unlawful...”, the average length of the sentence is 17 words.

For example: Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect. (20.1)

(4) Aiming to provide high quality contract form ever since its birth, FIDIC has shared no efforts in refining its language in pursuit of accuracy and authentic wording in case of discrepancy.

(5) You may notice that some words and expressions are identified by the use of Capital Initial Letters. Therefore, the General Conditions, the Particular Conditions and the standardized forms