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Programmed Textbook of Construction Management
Specialty for Colleges and Universities

FIDIC合同条款概论(双语)

Introduction of FIDIC Conditions of Contract

李德智 刘亚臣 编著

中国建筑工业出版社

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本书主要以 FIDIC “新红皮书” 的结构为框架, 阐述了 FIDIC “新红皮书” 合同条款的主要内容。全书共分为 20 章, 对应了 FIDIC “新红皮书” 的 20 章内容, 每一章内容均按照英文论述、疑难词汇、疑难语句以及中文综述进行编排, 对 FIDIC “新红皮书” 合同条款进行了归纳和总结。本书内容力求反映 FIDIC 合同条款的最新研究成果, 在注重理论体系完备的同时, 也具备了实用性。

本书既可以作为高等学校工程管理专业、土木工程专业、建设法专业的双语教材或教学参考用书, 也可作为国际留学生的 FIDIC 课程用书。同时, 本书也可供政府建设主管部门、律师、工程咨询及监理单位、施工单位相关从业人员参考使用。

为更好地支持相应课程的教学, 我们向采用本书作为教材的教师提供教学课件, 有需要者可与出版社联系, 邮箱: cabpcm@163.com。

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前 言

近年来,我国建筑企业在境外承包各类工程的数量有逐年上升趋势,特别是我国“一带一路”战略为对外承包工程的发展注入了新的活力,这就需要更多既懂国际工程管理,也懂国际工程英语的专门人才,以适应建筑产业国际化的要求。

本书以 FIDIC (First Edition 1999) (“新红皮书”)为蓝本,在参考 FIDIC 1999 版“黄皮书”、“银皮书”等相关规定的基础上,结合国际工程实践,以及各国有关 FIDIC 的著述与研究成果,考虑了中国学生阅读英文的习惯,编写而成。

本书每章内容均由 FIDIC 合同条款英文论述、疑难词汇短语、疑难语句,以及中文综述四部分组成。本书内容共 20 章,依据 FIDIC (First Edition 1999) “新红皮书”的 20 个条款次序进行编排,对 FIDIC “新红皮书”的每个条款逐一进行阐述、归纳和总结。本书力求反映 FIDIC 合同条款的最新研究成果,在注重理论体系完备的同时,也注重内容的实用性。同时,为了便于读者学习和理解 FIDIC,对文中出现的疑难词汇和语句进行了中文解读,并对每一章节作了中文综述,以期读者在阅读英文内容时易于读懂与掌握。

本书可以作为高等学校工程管理专业、土木工程专业和建设法专业的双语教材或教学参考用书,也可作为国际留学生学习工程管理专业 FIDIC 课程的用书。同时,本书也可供政府建设主管部门、律师、工程咨询及监理单位、施工单位等有关工程管理人员工作和学习参考使用。

编者
2017 年 5 月

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Chapter 1 Introduction of the FIDIC

1.1 The Construction Contract

1.1.1 A construction contract is made between two parties:

(1) An Employer who is referred to as the Employer, who has decided that he needs the project and who will pay for the project. The Employer will need to establish his requirements, decide who will prepare the detailed design and check that the construction meets his requirements, and

(2) A Contractor who will prepare all or any part of the design as required by the employer and who will actually construct the works.

The project organization for the design, supervision and construction may vary but the tasks must be carried out by someone, either on behalf of the Employer or on behalf of the Contractor. The FIDIC Conditions of Contract for Construction are based on design by the Employer, the actual design is usually carried out by a Consulting Engineer, on behalf of the Employer. The Conditions of Contract for Plant and Design-Build and the Conditions of Contract for EPC/Turnkey Projects are based on design by the Contractor, again, the actual design may be carried out by a Consulting Engineer, but on behalf of the Contractor.

1.1.2 International Contracts

An international contract may be defined as a contract in which one of the parties is from a different country to the country of the project. In many cases the requirements outlined in the Conditions of Contract for international contracts are similar to those for domestic contracts, but there are additional matters such as different legal systems, or local customs and procedures, currency which must be considered.

1.2 What is FIDIC?

FIDIC is an acronym for Fédération Internationale Des Ingénieurs Conseils-i. e. the French for the International Federation of Consulting Engineers. The organization was founded in 1913 by three countries each wholly or partly francophone (being Belgium, France and Switzerland) . There are now almost 100 Member Associations from all over the world, and FIDIC is currently located in the World Trade Centre in Geneva, Switzerland.

FIDIC represents globally the consulting engineering industry by promoting the business interests of firms supplying technology-based intellectual services for the built and natural environment. FIDIC is particularly well known for its work in drafting standard form conditions of contract which are used on higher value international construction projects, and are endorsed by many multilateral development banks. FIDIC also organizes conference, seminars and training courses.

1.3 A Brief History of FIDIC

The form of the early FIDIC contracts followed closely the fourth edition of the ICE Conditions of contract. In fact so closely did the FIDIC form mirror its English counterpart that Ian Duncan Wallace commented that: *“as a general comment, it is difficult to escape the conclusion that at least one primary object in preparing the present international contract was to depart as little as humanly possible from the English conditions”*.

One difficulty with the original FIDIC Red Book was that it was based on the detailed design being provided to the Contractor by the Employer or his Engineer. It was therefore best suited for civil engineering and infrastructure projects such as roads, bridges, dams, tunnels and water and sewage facilities. It was not so suited for contracts where major items of plant were manufactured away from site. This led to the first edition of the “Yellow Book” being produced in 1963 by FIDIC for mechanical and electrical works. This had an emphasis on testing and commissioning and so was more suitable for the manufacture and installation of plant. The second edition was published in 1980.

Both the Red and Yellow Books were revised by FIDIC and new editions published in 1987. A key feature of the 4th edition of the Red Book was the introduction of an express term which required the Engineer to act impartially when giving a decision or taking any action which might affect the rights and obligations of the parties, whereas the previous editions had assumed this implicitly.

A supplement was published in November 1996 which provided the user with the ability to incorporate alternative arrangements comprising an option for a Dispute Adjudication Board to go with modelled terms of appointment and procedural rules, and an option for payment on a lump sum basis rather than by reference to bills of quantities.

In 1995 a further contract was published (known as the Orange Book). This was for use on projects procured on a design and build or turnkey basis, dispensing with the Engineer entirely, and provided for an “Employer’s Representative”, who, when determining value, costs or extensions of time, had to *“determine the matter fairly, reasonably and in accordance with the Contract”*.

Consequently the need to submit matters to the Engineer for his “Decision” was eliminated. In its place an Independent Dispute Adjudication Board was introduced consisting of either one or three members appointed jointly by the Employer and the Contractor at the

commencement of the contract, with the cost being shared by the parties. This provision mirrored a World Bank amendment to the FIDIC Red Book.

Although People concentrate on the new FIDIC forms, it should be remembered that the FIDIC 4th edition 1987 (“The Old Red Book”) remains the contract of choice throughout much of the Middle East, particularly the UAE. However, this is slowly changing, as the government in Abu Dhabi introduced its own version of the 1999 FIDIC Red Book under cover of Law 21 of 2006.

1.4 The New FIDIC Forms 1999

In 1994 FIDIC established a task force to update both the Red and the other colour Books in the light of developments in the international construction industry, including the development of the Orange Book. The key considerations included:

- (i) The role of the Engineer and in particular the requirement to act impartially in the circumstances of being employed and paid by the Employer.
- (ii) The desirability for the standardization of the FIDIC forms.
- (iii) The simplification of the FIDIC forms in light of the fact that the FIDIC conditions were promulgated in English but in very many instances were being utilized by those whose language background was other than English.
- (iv) The New books would be suitable for use in both common law and civil law jurisdictions.

The 1994 Task force led to the publication of four new contracts in 1999:

(1) Conditions of Contract for Construction, for Building and Engineering Works, Designed by the Employer; The Construction Contract (The New Red Book).

The Red Book is intended for projects where the main responsibility for design rests with the Employer (or its Engineer). Thus, the works are usually completed by the Contractor in accordance with the Employer’s design. However, the works may also include elements of civil, mechanical, electrical and/or construction works designed by the Contractor. The work done is quantified, with payment made on the basis of a bill of quantities (although it is also possible for payment to be made on a lump sum basis) . The Red Book is the most commonly used standard form of construction and engineering contract where most (or all) of the works are to be designed by (or on behalf of) the Employer.

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

The Yellow Book is intended for projects where responsibility for design rests with the Contractor. The Contractor will design the project in accordance with requirements specified by the Employer. The testing procedures prescribed by the Yellow Book are usually more complicated than those in the Red Book. Payment is made on a lump sum basis,

usually against a schedule of payments.

(3) Conditions of Contract for EPC Turnkey Projects (First Edition, 1999) (The Silver Book) .

The Silver Book is intended for Engineering Procurement and Construction (EPC) arrangements. Under an EPC contract, the Contractor is responsible for the entirety of the works and design required to provide the Employer with a facility that is ready for operation at the “turn of a key” . Accordingly, the Contractor’s risk for time and cost is considerably greater than the risk it would assume under the Yellow Book.

(4) Short Form of Contract (The Green Book).

The Green Book is intended for engineering and building work of relatively small capital value. Accordingly, the Green Book is suitable for relatively simple or repetitive work, or work that will not require input from specialist sub contractors.

FIDIC is also aware of the need to develop new contract forms in order to adapt to changing conditions. Since the original publication of the 1999 suite of contracts, FIDIC has also introduced the following:

(1) Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, for bank-financed projects only (The Pink Book).

The Pink Book is intended for projects funded by Multilateral Development Banks, such as the World Bank or the European Bank for Reconstruction and Development. Indeed, The World Bank is clear that:

“These SBDW ^①are mandatory for use in major works contracts (those estimated to cost more than US\$ 10 million, including contingency allowance) unless the Bank agrees to the use of other Bank Standard Bidding Documents on a case-by-case basis.”

The SBDW notes that the use of the Conditions of Contract for Construction for Building Engineering Works Designed by the Employer, Multilateral Development Bank Harmonized Edition, prepared by FIDIC, is compulsory. The User’s Guide makes it clear that: “The provisions in Section I (Instructions to Bidders) and Section VII (General Conditions of Contract) must be used with their text unchanged.”

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

The Gold Book combines design, construction, operation and maintenance of a facility into a single contract, and is intended for “Design, Build and Operate” projects. The project’s commissioning testing is followed by a 20 year operation and maintenance period, during which the Contractor must achieve various operational targets and then hand over the project to the Employer in an agreed condition. The DBO form was a response to the call for a standard concession contract for the transport and water/waste sectors. The

① SBDW means “Standard Bidding Documents for Works” which prepared by the World Bank for use by borrowers in the procurement of admeasurement (unit price or rate) type of works contracts through international competitive bidding.

market had been using the existing FIDIC Yellow Book with operations and maintenance obligations tacked on. FIDIC recognised this unsatisfactory state of affairs and the need to tailor a form to meet the demand.

Under the DBO form, the Contractor (who, given the size of these projects, will typically be in the form of joint venture or consortium) will be responsible for:

- (a) designing and constructing the works during the design-build period; and
- (b) operating and maintaining the facilities for a 20 year period once the facility has been handed over with the issue of the Commissioning Certificate.

However, the Contractor will have no responsibility for the financing and ultimate commercial success of the project.

(3) Conditions of Contract for Design-Build and Turnkey 1995 (The Orange Book)

The Orange book was published in 1995 to provide a design and build option to the current FIDIC suite. This standard form was the first FIDIC contract to adopt the current FIDIC style of drafting and was used as a template for the drafting teams when preparing the 1999 suite of contracts.

(4) Dredgers Contract (The Blue Book).

The Blue Book is intended for dredging and reclamation work and ancillary construction. The Employer undertakes the design of the project.

(5) Consultant Model Agreements, including the Model Representative Agreement (The White Book).

The White Book is an agreement to be used by the Employer and its consultant. In common with other contracts a new version is being prepared.

(6) Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer (the "2011 Subcontract").

Sub-contracts for all the main forms will be prepared as part of the current review.

In addition, there are a number of other forms, based on the FIDIC terms. For example, in 2007 the Abu Dhabi Executive Affairs Authority General Conditions of Contract, introduced for construction of projects undertaken in Abu Dhabi on behalf of Public Entities.

FIDIC also introduced a Procurement Procedures Guide in 2011.

There are also steps being taken to revise the entire suite, starting with the Yellow Book and followed next by the Red and Silver Books, although it is not anticipated that FIDIC will be in a position to release a test edition until some time towards the end of 2016 at the earliest. In a progress report issued in October 2014 the FIDIC Contracts Committee listed the following revisions as being "on the drawing board":

- a. Task Group 4A-Update of Joint Venture Model Agreement and Sub-Consultant Model Agreement;
- b. Task Group 4B-Update of Client / Consultant Model Agreement (White Book);
- c. Task Group 6-Update of 1999 Rainbow Suite (Red, Yellow and Silver book);

- d. Task Group 7-Update of Dredgers Contract;
- e. Task Group 9-New Yellow Book / Silver Book Sub-contract Forms;
- f. Task Group 10-New Tunnelling/Underground Contract;
- g. Task Group 11-New Operate, Design& Build (ODB) Form of Contract; and
- h. Task Group 12-New Contract & Agreement-Glossary of Terms.

1.5 The Consist of the New Red Book

1.5.1 In General

The Conditions of Contract of The New Red Book include;

- (1) General Conditions;
- (2) Particular Conditions.

FIDIC General Conditions of Contract are intended to be used unchanged for every project. The Particular Conditions are prepared for the particular project taking account of any changes or additional clauses to suit the local and project requirements. Some employers have their own versions of the General Conditions available which incorporate some changes to suit their own requirements.

Normally General Conditions include the Appendix to Tender which gives essential project information some of which must be completed by the Employer before issuing the tender documents, together with some information which must be added by the tenderer upon submission of the tender.

In any project in order to overcome problems it will often be necessary to carry out additional work and this will take time and money. The most common situation is that the Contractor spends money and claims it back from the Employer. It is then necessary to decide whether the Employer must pay, or whether the Contractor must bear the additional cost. The initial decision will normally be made by the Employer's Representative or Engineer. However this can only be an interim decision and is subject to appeal to the Engineer or the Dispute Adjudication Board and ultimately to an arbitrator or the courts. The actual dispute resolution processes vary in different FIDIC forms of contract.

The basis on which such decisions must be made is laid down in the Conditions of Contract. The Conditions of Contract deals with the roles of the parties to the Contract and lays down their rights and obligations under the Contract.

1.5.2 The Consist of the FIDIC Forms

In keeping with the desire for standardization, each of the new books includes General Conditions together with guidance for the preparation of the Particular Conditions, and a Letter of Tender, Contract Agreement and Dispute Adjudication Agreements.

The FIDIC forms consist of a number of documents. The contract forms will typically comprise of the following;

- (1) Letter of Acceptance—the Red, Yellow and Gold Books define the Letter of Ac-