

**Overview of the 1999 FIDIC Contract Forms  
and the MDB Contract**

**By**

**Engr. Mushtaq Ahmad Smore  
FIDIC Selected Reviewer  
and Former Head of Contracts Division NESPAK**

## **OVERVIEW OF THE 1999 FIDIC CONTRACT FORMS AND THE MDB CONTRACT**

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### **Abstract**

FIDIC-the International Federation of Consulting Engineers – produced in year 1999 a suite of 4 new standard forms of contract. The suite comprises the following 3 books for major works and 1 for minor:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer: *The Construction Contract (The New Red Book)*
- Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor: *The Plant and Design-Build Contract (The New Yellow Book)*
- Conditions of Contract for EPC/Turnkey Projects: *(The Silver Book)*
- Short Form of Contract: *The Short Form (The Green Book)*

The old Red Book was for civil works and old Yellow Book for E & M works. The 1999 FIDIC Forms of Contract divide as to the responsibility for design, irrespective of the type of work.

The Books are all marked ‘First Edition 1999’ and the reason is that they can not be regarded as direct updates of FIDIC’s well known and widely used ‘Red Book’ and ‘Yellow Book’. The first three books have 20 clauses, 17 common clause titles.

The Green Book has just 15 clauses covering 10 pages.

FIDIC produced in 2006 the following:

- Conditions of Contract for Construction – MDB Harmonized Edition for Building and Engineering Works Designed by the Employer, MDB Harmonised Edition 2006: *MDB Harmonised Construction Contract.*

The MDB Harmonised Construction Contract is the modified form of the FIDIC Conditions of Contract for Construction, First Edition 1999, in which conditions agreed by the 9 Multilateral Development Banks (MDB’s) and the FIDIC, have been incorporated. The MDB’s include the World Bank, Asian Development Bank, etc. The MDB Harmonised Edition is for use on MDB financed projects. The MDB Harmonised Edition 2006 is the revised edition of the MDB Harmonised Edition 2005.

The 1999 FIDIC Contract Forms are being used all over the world, and recommended to be used in Pakistan as well.

## **1. What is FIDIC**

FIDIC is the French acronym for the International Federation of Consulting Engineers, individual firms of consulting engineers are not themselves members of FIDIC. It was founded in 1913 by France, Belgium and Switzerland. The principal objectives of the Federation are to promote the professional interests of Member Associations and to disseminate information of interests to the members. FIDIC membership currently numbers 79 national Member Associations from all parts of the world.

One of the FIDIC's key activity is in the field of procurement. FIDIC publishes internationally recognized forms of Contracts for infrastructure works. FIDIC contracts are fair and balanced to the Employer and the Contractor.

## **2. Overview of the 1999 FIDIC Forms of Contract**

### **2.1 The 1999 FIDIC Forms of Contract**

FIDIC published in 1999 the following Standard Forms of Contract:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, First Edition 1999: *The Construction Contract (The New Red Book)*
- Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor, First Edition 1999: *The Plant and Design-Build Contract (The New Yellow Book)*
- Conditions of Contract for EPC/Turnkey Projects, First Edition 1999: *The EPC/Turnkey Contract (The Silver Book)*
- Short Form of Contract, First Edition 1999: *The Short Form (The Green Book)*

The above 3 Books are for major works and 1 for minor. The old Red Book was for civil works and old Yellow Book for E & M works. The 1999 Contract Forms divide as to the responsibility for design, irrespective of the type of work. For the projects, the important factor of allocation of risks is dependent upon who (the Employer or the Contractor) is responsible for the design or most of the design, of the works.

The Books are all marked 'First Edition 1999' and the reason is that they can not be regarded as direct updates of FIDIC's well known and widely used old 'Red Book' and 'Yellow Book'. The Silver Book and the Green Book were published for the first time.

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## **2.2 Overview of the 1999 FIDIC New Red Book, New Yellow Book and Silver Book**

### **2.2.1 Main Features**

- Conditions of Contract for Construction – The New Red Book
  - Suitable for all works where main responsibility for design lies with the Employer or his Engineer
  - Some design may, be carried out by the Contractor
  - The Contractor constructs works pursuant to the design provided by the Employer
  - Contract administration and supervision by the Engineer
- Conditions of Contract for Plant and Design – Build, The New Yellow Book
  - Suitable for all works where main responsibility for design lies with the Contractor
  - Recommended for the provision of electrical and / or mechanical plant, and for the design and execution of building and engineering works
  - The Employer provides 'Employer's Requirements' to which the Contractor designs
  - Contract administration and supervisions by the Engineer
- Conditions of Contract for EPC / Turnkey Projects - The Silver Book
  - Suitable for a process or power plant, factory or similar facility or an infrastructure project, or other type of development if higher degree of certainty of final price and time is required
  - The Employer provides 'Employer's Requirements'

- Contractor takes total responsibility for the Engineering, Procurement and Construction (EPC) providing a fully equipped facility, ready for operation (at the “turn of the key”)
- EPCT should not be used in some circumstances: insufficient time, or insufficient information, substantial underground work, close supervision required by the Employer for Contractor’s work, amount of each interim payment to be certified

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- Contract administration by the Employer

### **2.2.2 Common Features - Standardization of New Books**

There are 20 Clauses in each Book. Same layout and clause numbering are provided except for Clause 3, 5 & 12. Same definitions and same wording are provided except where differences required. Diagrams of typical sequence of events are included. The text is written in a more user friendly as possible

The General Conditions are drafted on the principle that users would find it more convenient if any provisions which they did not wish to apply, could simply be deleted in the Particular Conditions.

### **2.2.3 Features of Employers’ Interest**

Employers will be pleased to see the following:

The Contractor must give notice for his claim, within 28 days of becoming aware of the event giving rise to claim – Cl 20.1.

Failure to provide claim notice within 28 days provided by Sub-Clause 20.1 means rejection of the Contractor’s claim.

- It will shorten the Contract honeymoon, require increased claims staff. The claim managers will be frequently visiting the Site in the life of the Contract.

Under the New Red Book, and the New Yellow Book, the Employer may now replace the Engineer. However the Employer shall not replace the Engineer with a person against whom the Contractor records objection with supporting particulars - Cl 3.4.

Under the New Red Book, and the New Yellow Book, for unforeseeable physical conditions, the Engineer can reduce the amount of claim for the favourable conditions if any, in similar parts of the works – Cl 4.12.

The Employer may extend the Defects Notification Period as termed now, for the Works or Section for 2 years if and to the extent that the Works, or Section can not be used by reason of a defect or damage - Cl 11.3.

The Employer may terminate the Contract for convenience. The Contractor shall be paid for the work carried out and demobilization, but receives no compensation – Cl 15.5.

#### **2.2.4 Features of Contractors' Interest**

Contractors will be pleased to see the following:

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The Employer shall give within 28 days after receiving any request from the Contractor, reasonable evidence that he has the financial arrangements to pay the contract price punctually.

- This will satisfy the Contractor that its cash flow requirement is assured.

Employer's claims: Employers to comply with a claims Clause 2.5.

- If the Employer considers himself to be entitled to any payment under the Contract or extension of the Defects Notification Period, the Employer shall give a notice and particulars to the Contractor. The Engineer shall make a determination.
- The Engineer's determination is intended to cover all the Employer's entitlements so that any attempt to set-off could result in suspension or termination by the Contractor.
- This will discourage Employers to deduct payment from the amount of interim payment certificates, unless determined by the Engineer.

Contractor's right to adjustment of the Contract Price resulting from changes in legislation affecting the Contractor's obligations, now extended to include judicial or government interpretation of Laws – Cl 13.7.

If the Engineer fails to certify interim payment, or the Employer fails to provide evidence of his financial arrangement, or the Employer fails to make

payment, the Contractor may after giving notice, suspend all part of the works or even terminate the Contract – Cl 16.1 & 16.2.

For delayed payment, the Employer shall pay financing charges compounded monthly, at 3% above the discount rate of the central bank – Cl 14.8.

Contractor's claims: A period of 42 days is provided to approve or disapprove a claim – Cl 20.1.

- The procedure is tightened up. This will help in sorting out the Contractor's claims at the earliest possible.

Contractor's disputes, and Employer's disputes now shall be decided by the Dispute Adjudication Board (DAB) – Cl 20.2.

- DAB members to be independent and impartial
- DAB's remuneration shall be paid equally by the Employer and the Contractor.
- DAB's decision is binding on both the Parties who shall enforce it unless and until it shall be revised in an amicable settlement or an arbitral award – Cl 20.4.

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### **2.2.5 Features of Construction Lawyers' Interest**

Construction lawyers will keep themselves busy by the

- a) extended use of the words "fair", "reasonable", and "Unforeseeable", in the General Conditions, and
- b) provision of rejection of the Contractor's claim if the notice required is not given within 28 days as stated under Sub-Clause 20.1 Contractor's Claims.

### **2.2.6 Role of the Engineer in the New Red Book, and New Yellow Book**

Traditionally, Engineer was to act impartially and render Engineer's decision.

Role of the Engineer under the New Red Book and the New Yellow Book

- The Engineer and its employees are also Employer's Personnel - Cl 1.1.2.6
- *The Engineer shall be deemed to act for the Employer - Cl 3.1(a).*

- The Engineer shall make determination for extension of time, and financial compensation in a manner which is fair in accordance with the Contract - Cl 3.5.
- No Engineer's Decision, but DAB (Dispute Adjudication Board) Decision – Cl 20.4

### **2.3 Overview of the 1999 FIDIC Short Form of Contract**

- Suitable for simple works or repetitive work
- All provisions in total of 15 clauses on 10 pages
- No 'Engineer' but may be Employer's Representative
- Design by either Party
- All types of construction
- Payment on lump sum or any other basis
- A list of 16 Nos. Employer's liabilities gathers together in one place, events which entitle time and money
- For non-payment, Contractor may suspend the execution of the works, after 7 days' notice

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- 56 days adjudication before a single adjudicator, with interim binding
- Balanced risk sharing

## **3 Overview of the MDB Contract**

### **3.1 MDB Harmonised Construction Contract**

FIDIC published the following document:

- Conditions of Contract for Construction – MDB Harmonised Edition for Building and Engineering Works Designed by the Employer, MDB Harmonised Edition 2006: *MDB Harmonised Construction Contract*.

The MDB Harmonised Construction Contract is the modified form of the FIDIC Conditions of Contract for Construction, First Edition 1999, in which conditions agreed by the 9 Multilateral Development Banks and the FIDIC, have been incorporated.

The following banks have participated in preparation of the Multilateral Development Bank (MDB) Harmonised Edition of the FIDIC Conditions of the Contract for Construction.

- African Development Bank
- Asian Development Bank
- Black Sea Trade and Development Bank
- Caribbean Development Bank
- European Bank for Reconstruction and Development (EBRD)
- Inter-American Development Bank
- International Bank for Reconstruction and Development (The World Bank)
- Islamic Development Bank
- Nordic Development Fund.

The MDB Harmonised Edition is for use on MDB financed projects, and does not replace FIDIC's standard 1999 Red Book, which is used where MDB funding is not involved.

The New Red Book has a harmonised version. The New Yellow Book, the Silver Book and the Green Book are not affected.

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FIDIC retains the copy right and the responsibility for managing the new MDB Harmonised Edition.

The MDB Harmonised Construction Contract Edition 2006 is the revised edition of the MDB Harmonised Construction Contract Edition 2005.

### **3.2 Significant changes in the MDB Harmonised Construction Contract, Edition 2006**

The MDB Harmonised Edition is very close to the FIDIC New Red Book 1999. It does include a number sub-clauses, particularly:

- (a) dealing with the Contractor's obligations towards his staff and labour force, and
- (b) specific requirements of any MDB e.g. (i) the right of the Bank to audit the Contractor's account, (ii) the provisions of corrupt or fraudulent practices, and (iii) suspension of the disbursements under the loan by the Bank.

FIDIC has also taken the chance to make a few minor improvements particularly to the Depute Board Provisions.

The following are the significant changes incorporated in the MDB Harmonised Edition 2006 with respect to the 1999 FIDIC New Red Book:

- Definitions – Cl 1.1
  - New Definitions Added
    - Bank
    - Borrower
  - Changed Terminology
    - Appendix to Tender changed to *Contract Data*
    - reasonable profit changed to *profit*
    - Profit is fixed at 5% in the MDB Edition
    - Dispute Adjudication Board changed to *Dispute Board*
  - Particulars Conditions changed to
    - Particulars Conditions – Part A : Contract Data
    - Particulars Conditions – Part B: Specific Provisions
- Inspection and Audit by the Bank: The Bank appointed persons may inspect the Site and/or the Contractor's accounts and records – Cl 1.15.

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- The Contractor must be informed if Bank suspends disbursements under its loan - Cl 2.4

- The Employer shall give notice of its claim within 28 days. – Cl 2.5
- ***The Employer may change the authority of the Engineer without agreement by the Contractor – Cl 3.1***
- ***The Employer may easily replace the Engineer – Cl 3.4***
- Staff and Labour : Provisions extended – Cl 6.1, 6.2 & 6.4
- Staff and Labour : New Sub-Clauses 6.12 to 6.22 added.
- Condition for commencement of works extended – Cl 8.1
- After taken over, the Contractor may substitute remaining retention by guarantee – Cl 14.9
- Employer’s Entitlement to Termination for Convenient : The Contractor shall be entitled for loss or damage – Cl 15.5
- Corrupt or Fraudulent Practices: 5 versions are provided. There are variations in the provisions from MDB to MDB – New Sub-Clause 15.6.

There are, a few changes which could not be agreed by FIDIC for general use, as they could tilt the accepted balance of risk in favour of the Employer. Example is given for changes in the Sub-Clause 3.1 and 3.4 referred above:

### **3.3 Further Changes in the MDB Harmonised Edition 2006 revised April 2007, by the World Bank**

The World Bank in its Standard Bidding Documents for Procurement of Works and User’s Guide, April 2007, incorporated further changes in

- (a) Sub-Clause 1.15 Inspection and Audit by the Bank, and Sub-Clause 15.6 Corrupt or Fraudulent Practices, in General Conditions, and
- (b) Data of Sub-Clause 2.1 Time for access to the Site, 4.2 Performance Security, in the Particular Conditions – Part A: Contract Data, of the MDB Harmonised Edition 2006.

The World Bank also included format of Data for Sub-Clause 20.6 Arbitration. Sub-Clause 1.15 is enlarged by correlating it with Sub-Clause 15.6 and the World Bank Procurement Guidelines.

Sub-Clause 15.6 is enlarged by including obstructive practices.

**4 International use of the 1999 FIDIC Contract Forms and the MDB Contract**

(1)	MDB Harmonised Construction Contract	MDB's adopted its use since 2005  Current edition is MDB Harmonised, Edition 2006
(2)	New Red Book, First Edition 1999	Frequently used in the world
(3)	New Yellow Book, First Edition 1999	The World Bank permitted its use
(4)	EPC/Turnkey Contract, First Edition 1999	Frequently used in the world
(5)	Short Form of Contract, First Edition 1999	The World Bank adopted its use since 2000

Mandatory requirement: For works to be partly or fully financed by any MDB, the MDB Harmonised Construction Contract is to be used.

The FIDIC Contract Forms have a good major impact on the international construction and plant industries.

**5 Recommendations**

- (1) For Works and Goods to be financed by the Government of Pakistan or by any Provincial Government, or by Private Sector, the 1999 FIDIC rainbow of Contract Forms may be used.
- (2) Pakistan Engineering Council (PEC) is to take action for
  - (a) formulation of future documents based on the latest FIDIC Forms, and
  - (b) setting up training facilities in the FIDIC Contract Forms, before it is very late.

- (3) FIDIC General Conditions *must* be maintained in its original form. Changes if any are to be made only in other parts.

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