



EUROPEAN
INTERNATIONAL
CONTRACTORS

EIC Contractor's Guide
to the
FIDIC Conditions of Contract
for
Plant and Design-Build

THE NEW EIC YELLOW BOOK GUIDE

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to
the FIDIC Conditions of Contract
for
Plant and Design-Build

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Foreword

It is one of EIC's principal objectives to contribute constructively to the development of acceptable and standard forms of contract for use in the international construction industry. EIC shares FIDIC's viewpoint that standardisation, both in technical and administrative matters, is more likely to result in the satisfactory and trouble free execution of projects. EIC's contribution to improving standard forms of contract was the publication of guides to FIDIC's Silver and Red Books. The EIC Contractor's Guide to the Silver Book (FIDIC Conditions of Contract for EPC Turnkey Contracts) was published in March 2000 and was followed in March 2002 by the EIC Contractor's Guide to the Red Book (FIDIC Conditions of Contract for Construction).

The Silver Book is a completely new FIDIC form and EIC has expressed serious reservations over many of its provisions. On the other hand, the Red Book is essentially a revised version of the Fourth Edition of the Conditions of Contract for Works of Civil Engineering Construction; a document which most contractors are happy to accept. However, EIC believes that the Red Book will be more onerous for contractors.

The Yellow Book falls somewhere between those extremes. FIDIC recommends it for the provision of electrical and/or mechanical plant and/or other works which may include any combination of civil, mechanical, electrical and/or construction works. EIC believes that such a broad application is inappropriate and we doubt the wisdom of trying to produce a standard form of contract for such a wide range of applications. EIC accepts that the Yellow Book provides a useful starting point for a Design-Build contract, which includes both plant supply and construction works. However, there are many provisions that are onerous and unlikely to be acceptable to contractors and, in EIC's view, require redrafting.

In preparing this guide, we have followed a similar approach to the guides to the Silver and Red Books and comment only where we believe that there are matters of importance to consider and only at length where there are important issues at stake.

Comments received from both contractors and consultants tell us that the EIC guides are proving useful. We would like to continue to receive feedback on their usefulness and relevance and we would particularly like to gather experience of any contracts carried out under the Yellow Book. All communications should be sent to the EIC Secretariat in Berlin.

EIC wishes to make it clear that this document is not exhaustive and is intended for guidance only. Expert legal advice should always be obtained before submitting an offer or making any commitment to enter into a contract. Neither EIC nor the authors of this document accept any responsibility or liability in respect of any use made by any person or entity of this document or its contents which is and shall remain entirely at the user's risk.

1 General Provisions

1.1.2.6 Employer's Personnel

The new definition of the Employer's Personnel includes the personnel of both the Employer and those of the Engineer. This could include a very significant number of people, especially where the Employer is a national government or government agency.

1.1.4.3 Cost

The definition of Cost excludes profit and could result in the Contractor carrying out extra work or incurring expense, possibly quite substantial in extent, without profit. Such work or expense could arise under various Sub-Clauses, for example, 4.12 [*Unforeseen Physical Conditions*], 4.24 [*Fossils*], 8.9 [*Consequences of Suspension*], 13.7 [*Adjustments for Changes in Legislation*], 17.4 [*Consequences of Employer's Risks*], except as indicated, and 19.4 [*Consequences of Force Majeure*]. Under each of those clauses, any entitlement would exclude profit unless tenders have been otherwise qualified.

1.4 Law and Language

Provides that "**The Contract shall be governed by the law of the Country (or other jurisdiction) stated in the Appendix to Tender**". The Contractor should be aware that under certain Civil Law jurisdictions some Yellow Book conditions may be considered unfair trade terms and therefore inapplicable. Mandatory laws may also exist, which cannot be overridden by the Contract. Any potential conflict between the Contract and such mandatory legal requirements is best clarified by taking expert advice during the tender period.

1.12 Confidential Details

Requires that, "**The Contractor shall disclose all such confidential and other information as the Engineer may reasonably require**". This clause could present difficulties if the Contractor were required to disclose confidential information in respect of which the Contractor has a duty of confidentiality to a third party.

The Silver Book allows the Contractor to retain confidentiality over information, which has been specified at tender stage, whereas the Yellow Book offers no such protection. Whilst the Sub-Clause includes the phrase "**as the Engineer may reasonably require**" no criteria are provided to give guidance on what is reasonable. The Contract should contain a provision to provide the Parties with the opportunity, pre-tender, to discuss and agree the extent of any privileged Contractor's information. Contractors should be mindful of this requirement with regard to internally confidential and sensitive information and that of third parties .

Notwithstanding the above, any information made available by one Party to the other Party should be kept confidential from all third parties.