

JAMAICA INSTITUTION OF ENGINEERS – FIDIC SEMINAR



1999 FIDIC RED BOOK vs. 2010 MDB Harmonised Conditions of Contract

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BACKGROUND

- Use of different Conditions of Contract (CC) by MDBs for Works contracts
- Concern over use of PCC to modify GCC
- Own Standard Bidding Document for Construction of Works (SBD) with GCC drafted which was fraught with problems
- MDBs collaborated on a Harmonized SBD and requested FIDIC to prepare the Conditions of Contract based on the 1999 FIDIC “Red Book” but with some MDB-specific requirements.



BACKGROUND

- 8 Participating MDBs Paid FIDIC for a 10-year licence for use of CC in harmonized SBD
- MDB-Specific Requirements included:
 - Enhanced social and environmental clauses
 - Provisions for dealing with “Fraud and Corruption”
 - Payment and Financial Arrangements
- CICA became aware of the document and lobbied the MDBs to include clarifications and a few concessions for Contractors in the MDB document



BACKGROUND

- Who can legally use the MDB Conditions free of charge without buying a copy?
 - Executing Agencies of projects financed by the 8 Participating MDBs on those projects which they finance.
 - **8 Participating MDBs are:** AfDB; ADB; BSTDB; CDB; CEDB; EBRD; IDB; IBRD (World Bank)
 - In 2007, MDBs agreed for FIDIC to extend licensed use to bilateral agencies
 - Development agencies for **Australia, France, Korea and Japan** are now licensed to use it



BACKGROUND

- First Edition of the MDB-Harmonised FIDIC Conditions of Contract published in 2005
- Amended edition published in 2006
- Current edition published in 2010
- Has been a process of evolution but it is generally agreed that each succeeding edition has presented an improved document
- Briefly present some of the differences.



1. General Provisions

- **1.1.1.4:** Letter of Tender also called Letter of Bid
- **1.1.1.9:** “*BoQ., Daywork Schedule and Schedule of Payment Currencies*” replaces Red Book’s 1.1.1.10 “*BoQ and Daywork Schedule*”
- **1.1.1.10:** **Contract Data is Part ‘A’ of the Particular Conditions** and replaces Red Book’s **Appendix to Tender** (1.1.1.9)
- **1.1.2.9:** Dispute Board (DB) replaces Dispute Adjudication Board (DAB)



1. General Provisions

- **1.2 Interpretation:** makes “bid” synonymous with “tender” and stipulates that “profit” in “cost plus profit” is 5% of the “cost”.
- **1.5 Priority of Documents:** the 8 documents in the list become 9 as *Particular Conditions* are split into *Part ‘A’ – Contract Data* and *Part ‘B’* with the former being of higher priority.
- **1.12 Confidential Details:** the confidentiality requirement now extends to the Employer as well



1. General Provisions

- **1.13 Compliance with Laws:**
 - (i) The Employer now has to provide the **Building Permit**, not the Contractor
 - (ii) Contractor is released from his obligation to comply with any laws relating to contract execution if he was impeded and can provide evidence of his diligence in attempting to comply.



2. The Employer

- **2.1 Right of Access to Site:** The difference from the “Red Book” here is in respect of the Contractor’s entitlement to profit if he suffers delay and incurs cost through the fault of the Employer
 - **Red Book:** Contractor entitled to “cost plus **reasonable** profit”
 - **MDB:** Contractor entitled to “cost plus profit”
- Because profit amount fixed by Sub-clause 1.2 at 5% as we saw earlier.



2. The Employer

- **2.4 Employers Financial Arrangements:** The differences in the text of the first paragraph are illustrated below.
 - *“The Employer shall submit, **before the Commencement date and thereafter** within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Contractor to pay the Contract Price **punctually** (as estimated at that time) in accordance with Clause 14 [Contract Price and Payment].....”*



2. The Employer

- **2.4 Employers Financial Arrangements:**
 - MDB CC add a second paragraph requiring the Employer to give the Contractor notice of suspension of financing within 7 days of the Borrower receiving such notification from the Bank, with a copy to the Engineer.
 - Has consequences for Sub-clauses 16.1 *[Contractor's Entitlement to Suspend Work]* and 16.2 *[Termination by the Contractor]* as the Contractor could terminate in the above situation.



The Employer

- **2.5 Employers Claims:** The notice requirement to be given to the Contractor in respect of a claim by the Employer is different
 - **Red Book:** “ as soon as practicable after the Employer became aware of the event....”
 - **MDB:** “as soon as practicable **and no longer than 28 days** after the Employer became aware, **or should have become aware** of the event....”



4. The Contractor

- **4.1 Contractor's General Obligations:**
New paragraph inserted after the first 2 paragraphs of this sub-clause limiting origin of equipment, material and services.
 - *“All equipment, material and services to be incorporated in or **required** for the Works must have their origin in any eligible source country as defined by the Bank”*



4. The Contractor

- **4.4 Sub-Contractors:** In the MDB CC, 2 paragraphs are added to the end of the sub-clause as follows:
 - *“The Contractor shall ensure that the requirements imposed on the Contractor by Sub-clause 1.2 (Confidential Details) apply equally to each Subcontractor”*
 - *“Where practicable, the Contractor shall give fair and reasonable opportunity to contractors from the Country to be appointed as Subcontractors”*



4. The Contractor

- **4.13 Rights of Way and Facilities:**
- **Red Book:**
 - *The Contractor shall bear all costs and charges for special and/or temporary rights-of-way which he may require, **including those for access to the site.** The Contractor shall also obtain, at his risk and cost, any additional facilities outside the Site which he may require for the purposes of the Works”*



4. The Contractor

- **4.13 Rights of Way and Facilities:**
- **MDB CC:**
 - *“Unless otherwise specified in the Contract, **the Employer shall provide effective access to and possession of the site including special and/or temporary rights-of-way which are necessary for the Works.** The Contractor shall also obtain, at his risk and cost, any additional facilities outside the Site which he may require for the purposes of the Works”*



6. Staff & Labour

- **Red Book** has 11 Sub-clauses (6.1 – 6.11)
- **MDB CC** has added 13 new Sub-clauses (6.12 - 6.24) on:
 - Foreign Personnel; Supply of Foodstuffs; Supply of Water; Measures against Insect and Pest Nuisance; Alcoholic Liquor and Drugs; Arms & Ammunition; Festivals & Religious Customs; Funeral Arrangements; Forced Labour; Child Labour; Employment Records for Workers; Workers Organisations; Non-Discrimination & Equal Opportunity



7. Plant, Materials & Workmanship

- **7.7 Ownership of Plant & Materials:** The first option for when plant & materials become the property of the Employer :
 - **Red Book:** “when it is delivered to the Site”
 - **MDB CC:** “when it is incorporated in the Works”



8. Commencement, Delays & Suspension

- **8.1 Commencement of Works:** MDB CC defines the “Commencement Date” as the date at which 4 conditions precedent have been fulfilled and the Engineer’s notification recording the agreement of both Parties on such fulfilment and instructing to commence the Works has been received by the Contractor. It allows the Contractor to terminate under 16.2, if the Engineers instruction is not received within 180 days from his receipt of the Letter of Acceptance.



8. Commencement, Delays & Suspension

- **8.1 Commencement of Works:** The four (4) conditions precedent are:
 - Signature of Contract Agreement by both Parties.
 - Delivery to the Contractor of reasonable evidence of the Employer's financial arrangements.
 - Effective access to and possession of the Site given to the Contractor together with the approvals etc required by law under Sub-clause 1.13 (a).
 - Receipt by the Contractor of the Advance Payment provided that the corresponding bank guarantee has been delivered by the Contractor.



14. Contract Price and Payment

- **14.1 The Contract Price:** A new paragraph has been added to the end of the Sub-clause as follows:
 - *“Notwithstanding the provisions of paragraph (b), Contractor’s equipment including essential spare parts therefor, imported by the Contractor for the sole purpose of executing the Contract shall be exempt from the payment of import duties and taxes upon importation”*
 - **Note:** paragraph (b) speaks to the Contractors liability to pay duties and taxes



14. Contract Price and Payment

- **14.7 Payment:** Amendments made to paragraphs (b) and (c) to accommodate a 14-day payment period requirement (as opposed to the normal 56 days) when the Bank suspends financing (Sub-clause 2.4)



15. Termination by Employer

- **15.6 Corrupt or Fraudulent Practices:**
 - *“If the Employer determines, **based on reasonable evidence**, that the Contractor has engaged in corrupt, fraudulent, collusive or coercive practices, in competing for or in executing the Contract, then the Employer may, after giving 14 days notice to the Contractor, terminate the Contract and expel him from the Site, and the provisions of Clause 15 shall apply as if such termination had been made under Sub-clause 15.2 [Termination By Employer]”*



15. Termination by Employer

- **15.6 Corrupt or Fraudulent Practices:**
 - The MDB CC then goes on to define the terms Corrupt, Fraudulent, Collusive and Coercive Practices **for each participating Bank** as all the Banks are not harmonized on the definitions.
 - World Bank adds a fifth prohibited practice called “Obstructive Practice”
 - The definitions are also consistent with those found in each Bank’s procurement guidelines.



16. Suspension and Termination by Contractor

- 16.1 Contractor's Entitlement to Suspend Work:
 - New paragraph added to confirm the Contractor's right to suspend work if the Bank suspends financing.
- 16.2 Termination by Contractor:
 - *“The Contractor shall be entitled to terminate the Contract if: (d) “The Employer substantially fails to perform his obligations under the Contract in such a manner as to materially and adversely affect the economic balance of the Contract and/or the Contractor's ability to perform the Contract.”*



16. Suspension and Termination by Contractor

- **16.2 Termination by Contractor:** A new paragraph (h) adds one more situation in which the Contractor is entitled to terminate the Contract and is for consistency with Sub-clause 8.1 [Commencement of Works]
 - *“The Contractor shall be entitled to terminate the Contract if: (h) the Contractor does not receive the Engineer’s instruction recording the agreement of both Parties on the fulfilment of the conditions for the Commencement of Works under Sub-clause 8.1”*



18. Insurance

- **18.1 General Requirements for Insurances:**
A paragraph has been added to the end of the Sub-clause allowing the Contractor to place any insurance related to the Contract in any eligible source country.



Other Changes MDB CC

- There are also several other changes which were not necessarily requested by the MDBs but which provide clarifications and improve the language of some of the Sub-clauses.
- Some of the MDB CC amendments are likely to be included in the next edition of the Red Book which is expected to be published this year.
- **THANK YOU.**