



APPLICATION OF FIDIC GENERAL CONDITIONS IN TRANSPORT INFRASTRUCTURE PROJECTS IN CROATIA

Ksenija Čulo¹, Vladimir Skendrović²

¹University J.J. Strossmayer of Osijek, Faculty of Civil Engineering and Architecture, Osijek

²Freelance Consultant

Abstract

Infrastructure is a broad term encompassing a wide range of facilities from roads and railway lines to wind, waste and water projects, oil and gas facilities, pipelines and processing plants. Whilst infrastructure construction contracts have key provisions in common, there is no one standard form that fits all projects. Any standard form will need to be tailored to suit the demands of the projects, the risk profile of the parties and comply with the legal jurisdiction of the contract and project location. Increasingly contractors are enhancing their expertise and working on infrastructure projects internationally. As a result, the forms of construction contracts used are becoming more standardized. Nowadays, FIDIC forms of contract are intended to be suitable for projects carried out around the world by all types of employers with the extensive support of large investors such as the World Bank or the European Union. The terms of the Conditions of Contract for Construction have been prepared by the Fédération Internationale des Ingénieurs-Conseils (FIDIC). Two most frequently used FIDIC models of construction contracts are Conditions of Contract for Construction (known as Red Book) and Conditions of Contract for Plant and Design-Build (known as Yellow Book). These general conditions are also used as contract conditions in Croatia for public procurement of transport infrastructure projects. The use of FIDIC General Conditions of Contract in the realization of transport infrastructure construction works in Croatia is presented in the paper.

Keywords: transport infrastructure projects, construction contracts, FIDIC, FIDIC General Conditions

1 Introduction

FIDIC is a French language acronym for Fédération Internationale des Ingénieurs-Conseils, which means the International Federation of Consulting Engineers. It was started in 1913 by the trio of France, Belgium and Switzerland. FIDIC is now headquartered in Switzerland and boasts of membership from over 100 different countries. [1]

Over the years, FIDIC has become famous for its secondary activity of producing standard form contracts for the construction and engineering industry. FIDIC published in 1957 its first contract, titled *The Form of Contract for Works of Civil Engineering construction*. As the title indicated, this first contract was aimed at the civil engineering sector and it soon became known for the color of its cover, and thus, *the Red Book*. It has become the tradition that FIDIC contracts are known in popular parlance by the color of their cover. [1] The first edition of FIDIC Contract Conditions for Civil Works was compiled on the basis of the general contract

conditions of the British Institute of Civil Engineers (ICE), which were in their initial form drawn up at the end of the 19th century. Consequently, the first sets of FIDIC contracts were based on English law principles. Since 1957, future FIDIC contracts have successfully incorporated the principles of other legal systems especially the European civil law system. This development has been particularly emphasized in recent editions of 1999 as well as of 2017. However, the basic framework of English law principles has survived.

Today, more than 100 national professional associations are members of FIDIC. Only one national association in a country can be a member of FIDIC. In order for a national association to become a member of FIDIC, it must be confirmed that its members adhere to the ethical and moral principles inherent in consulting engineers, and in particular to act in accordance with the principles of [8]:

- a) retaining absolute independence in the relation to contractors, manufacturers and suppliers, and that they never receive services that might interfere with their objectivity;
- b) to act solely in the interest of the contracting authority that has engaged them;
- c) be experts in their profession, enabling them to perform their task conscientiously.

Because of the broad support it enjoys, FIDIC contracts are the foremost contracts in international construction. FIDIC Conditions of Contract are recommended for general use in works subject to international tender, but they are also suitable for use in national tenders. The FIDIC Conditions of Contract only apply if the parties have expressly included them in their contract. This is most often done in such a way that the entire contract is based on the terms of the FIDIC Conditions of Contract. The main conditions of contract consist of two parts: General Conditions and Particular Conditions. The contracting parties may modify the General Conditions, but if they wish to do so, they should do so in the Particular Conditions with the markings on those provisions of the General Conditions that the parties wish to change. While preparing a contract, some clauses of General Conditions shall be implemented generally and some should be modified depending on the features of the work and location. General Conditions of Contracts and the Particular Conditions of Contracts are linked to each other by numbering the clauses mutually, thus the first and second part together create the Conditions of Contract. [3] The contracting parties are therefore free to change the General Conditions of FIDIC as they wish, and these contract conditions only apply if they are expressly made an integral part of their contract by the parties.

Each FIDIC book also contains Guidance for Preparation of Particular Conditions, which sought to assist the compilers of a contract in the preparation of the Particular Conditions. This assistance consists in the fact that FIDIC has already made the selection and prepared the provisions that are expected to be amended, and has already prepared the appropriate formulations for some of these changes.

2 FIDIC Rainbow Suite

Over the years FIDIC has consistently improved its General Conditions of Contract adding new forms replacing previous ones and updating important terms. In 1999, FIDIC published a completely new suite of contracts, (known as “Rainbow Suite” for a variety of their cover colors) which includes 10 different books [6]. These include:

- *The Red Book*: Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (1st Ed 1999).
- *The Pink Book*: Harmonized Red Book (MDB Edition) Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (3rd Ed 2010) - for use as part of the standard bidding documents by the Multilateral Development Banks only.
- *The Yellow Book*: Conditions of Contract for Plant and Design-Build - for electrical and mechanical plant, and for building works, designed by the Contractor (1st Ed 1999).

- *The Silver Book*: Conditions of Contract for EPC/Turnkey Projects (1st Ed 1999).
- *The Orange Book*: Conditions of Contract for Design - Build and Turnkey (1st Ed 1995).
- *The Gold Book*: DBO Contract - Conditions for Design, Build and Operate Projects (1st Ed 2008).
- *The Green Book*: Short form of Contract (1st Ed 1999).
- *The White Book*: Client/Consultant Model Services Agreement (4th Ed 2006)
- *The Blue-Green Book*: Dredgers Contract (1st Ed 2006)
- *Conditions of Subcontract for Construction*: Used in conjunction with the Red Book and The Pink Book (1st Ed 2009)

The criterion for distinguishing between different issues of the FIDIC Condition of Contract is based on the risk sharing between the employer and the contractor, and this division depends primarily on which of the two parties provides the design under which the works will be performed and what additional obligations the contractor assumes.

Unlike previous editions of the FIDIC contracts, which focused on the nature of the works (for example, civil engineering or electrical and mechanical works), the new 1999 generation of FIDIC contracts focuses on the relationship between the parties. The choice of form was changed, to be based on which party was doing the design and the procurement method used, with less emphasis on the type of work being undertaken [7]. The contract structure of all books, except the Green and White book, is generally the same [6]:

- General provisions (Clause 1)
- The Employer, Employer's administration or Engineer, Contractor, Nominated subcontractors, or Design (Clauses 2-5)
- Staff and labor, Plant, materials and workmanship (Clauses 6-7)
- Commencement, delays and suspension, Tests on completion, Employer's taking over, Defects Liability, Tests after completion (Clauses 8-11/12)
- Measurement and evaluation or Variations and adjustments, Contract price and Payment (Clauses 12-14)
- Termination by Employer, Suspension and Termination by Contractor (Clauses 15-16)
- Risk and responsibility (Clause 17)
- Insurance (Clause 18)
- Force majeure (Clause 19)
- Claims, disputes and arbitration (Clause 20)

Besides the Pink Book, which has to be used in all projects funded by the international financial institutions, the Red, Yellow and Silver books have the greatest application in practice. The Red Book i.e. Conditions of Contract for Construction, are recommended for building or engineering works designed by the employer or by his representative, the engineer. The contractor constructs the works in accordance with a design provided by the employer. However, the works may include some elements of contractor-designed civil, mechanical, electrical and/or construction works. The Yellow Book, i.e. Conditions of Contract for Plant and Design-Build, are recommended for the provision of electrical and/or mechanical plant, and for the design and execution of building or engineering works. The contractor designs and provides, in accordance with the employer's requirements, plant and/or other works, which may include any combination of civil, mechanical, electrical and/or construction works. The Silver Book, i.e. Conditions of Contract for EPC/Turnkey Projects, are recommended for the provision on a turnkey basis of a process or power plant, and which may also be used where one entity takes total responsibility for the design and execution of infrastructure project, which involves little or no work underground. Under the usual arrangements for this type of contract, the contractor carries out all the engineering, procurement and construction ("EPC"), providing a fully-equipped facility, ready for operation (at the "turn of the key") [11].

All three of these books are formed in the same way so that they contain the same constituent parts. Many of the provisions of these three Contract Conditions are identical, which greatly facilitates their use, so that those who are familiar with only one of these General Conditions are familiar with many of the provisions that are in General Conditions of other two books. The employer and the contractor shall choose those general conditions which are appropriate to the extent of their assumed responsibility. However, in the most sensitive area of the contract, the division of responsibilities between the employer and the contractor, the Silver Book has made quite a radical change over the Red and Yellow Books. In this context it should be noted that in construction practice there is no one universally accepted definition of the term “turnkey”. However, it is undisputed that the term encompasses “total contractor responsibility for the project”, and that the term typically includes project design, construction, installation of equipment, and components within the scope defined by the contract.

Most recently, in 2017 FIDIC published the second edition of the FIDIC 1999 suite. However, only the Red, Yellow and Silver Books were published by FIDIC so far. In order to be used in Croatia these books have to be translated into Croatian language.

3 FIDIC Conditions of Contract and Croatian Law

The Conditions of Contract prepared by FIDIC form only part of the contract. It is intended and expected that the contract will be formed of many other documents. However, the Parties’ rights, obligations and liabilities under the contract will also depend on the law governing the contract and other laws that might apply to the parties’ performance of their obligations. From the point of view of the application of Croatian legislation, when FIDIC General Conditions of Contract are an integral part of a contract to which Croatian law applies, then the relevant provisions of the Civil Obligations Act [2] also apply to such contractual relationships. The general terms of the contract are contained in Article 295 and 296 of the said Act. According to these provisions, the general conditions are such contractual provisions that have been drawn up for a number of contracts proposed by one contracting party to the other party before or at the time of the conclusion of the contract, either by way of being invoked or contained in the contract. The general conditions, when accepted by the other party, become an integral part of the contract and supplement the particular provisions of the contract and, as a rule, bind as well as these. If there is a disagreement between the general and particular conditions, the latter apply.

The Civil Obligations Act determines that the provisions of the general conditions which are contrary to the principles of morality and conscientiousness and which in this way may cause an inequality in the rights and obligations of the contracting parties (Article 296/1) are null and void. At the same time, the Act stipulates that if a contract is concluded “according to pre-printed content or when the contract was otherwise prepared and proposed by one contracting party, ambiguous provisions will be interpreted in favor of the other party” (Article 320/1). This rule is called *contra proferentem* (against the proposer), and its meaning is clear - the party who prepared and proposed the text of the contract should also be held responsible for its vague provisions. The provisions or conditions of a contract prepared by one party which are not clear and which could cause harm shall be interpreted in favor of the party which did not propose or did not draw up the contract. This rule is obviously also applicable to the general conditions of a contract prepared or proposed by one party and which have become an integral part of a contract. With the FIDIC Conditions of Contract, such a situation is unlikely to occur, given that these Contract Conditions are not made up of either party and are made with the express intention of bringing a fair distribution of responsibilities into the relations between the parties.

When FIDIC General Conditions of Contract are applied in Croatia, such contract is subject to those Croatian regulations which are of a mandatory nature. In the area of civil law, the

Civil Obligations Act is applicable, which contains provisions on contracts and contractual relations. In the Act, there are provisions, some of which are mandatory and others non-mandatory i.e. dispositive. Provisions of a dispositive nature may be freely amended by the contracting parties, and such provisions shall apply only if the contracting parties have not resolved the matter differently or have not addressed it at all in their contract. Provisions that are mandatory in nature cannot be modified by the contracting parties, and if they have been modified in their contract, the courts will not recognize such changes and will apply the mandatory regulation.

However, it should be noted that the “mandatory provisions” of the Civil Obligations Act do not have any prescribed sanctions or penalties if the contracting parties envisage a different solution in their contract than the one stipulated in some mandatory provision. This means that the contracting parties may, in their contract, resolve an issue, which has been resolved in the Act through a provision having a mandatory character, in a different way in their contract. Until one of the contracting parties addresses the court or arbitration, an amended settlement of some mandatory provision of the Civil Obligations Act will be binding on relations between the parties. The contracting parties are expected to fulfill the commitments as agreed. Consequently, if one party has a claim against the other party under a contractual decision contrary to a mandatory regulation, it is entitled to that claim until the other party addresses the court claiming that the contractual solution is contrary to the mandatory regulation. If the other party does not go to court and does not dispute his obligation based on the application of the contractual agreement, he will be obliged to perform it because it is so agreed. However, if he does go to court or arbitration and raise an objection that a contractual decision is contrary to a mandatory provision of applicable law, and if the court or arbitration determines that it is indeed a mandatory provision, the court will not recognize the amended contractual solution and will apply the mandatory rule of the applicable law.

Unlike mandatory civil obligations law regulations, the situation with mandatory administrative regulations is different. Namely, mandatory regulations from various administrative regulations, most often prescribe sanctions for those who do not comply with them. In the area of construction, such regulations may, for example, be those contained in the Physical Planning Act [4] or Building Act [5] or in many other administrative regulations. These regulations, as a rule, set penalties for non-compliance. Such mandatory regulations shall not be amended by the contracting parties and, if they are not complied with, shall be subject to the prescribed legal sanctions.

A further question is whether the contracting parties can contract the application of a foreign law and thus avoid the application of Croatian law. Croatian regulations allow contracting parties to contract the application of foreign law as the applicable law for the settlement of contractual relations, in cases where a relationship has an “international character”. However, if the contract is executed in Croatia and does not have “international characteristics”, then even a contractual provision on the application of a foreign law will not prevent the application of Croatian mandatory regulations. The existence of an “international characteristic” is a factual issue, as determined by the court, examining the circumstances of each individual case. If the court finds that there are no “international features” in the relationship (if the contracting parties are Croatian nationals, if the contract is executed in Croatia, if the contract is signed in Croatia, etc.), it will not allow the application of foreign law. However, even when the application of a foreign law is permitted, if the works are performed in Croatia, the contracting parties must comply with those administrative mandatory regulations that are subject to penalties for non-compliance with Croatian law.

Consequently, when construction works are carried out in Croatia and the FIDIC General Conditions of Contract are applied, the contracting parties should also adjust these Contract Conditions to Croatian mandatory administrative regulations. Therefore, if a contract provides for Croatian law to be relevant then, in principle, it is advisable to align FIDIC General

Conditions of Contract with the mandatory regulations of Croatian law. However, if a dispute arises about an issue that is subject to a mandatory regulation of Croatian law, courts or arbitrations are required to apply a mandatory regulation, regardless of how the issue is regulated in the contract.

4 Use of FIDIC General Conditions of Contract in construction of transport infrastructure in Croatia

Infra means “below” so the infrastructure may be understood as the “underlying structure” of a country and its economy, the fixed installations that it needs in order to function. These include roads, bridges, dams, the water and sewer systems, railways and subways, airports, and harbors. Infrastructure is generally government-built and publicly owned [9].

The application of FIDIC General Conditions of Contract in Croatia began with the construction of road infrastructure financed by loans from international financial institutions, primarily from the World Bank and the European Bank for Reconstruction and Development. These banks insisted on the application of FIDIC General Conditions of Contract, mostly the Red Book, in motorways and state roads construction contracts. The contracts were written in English language, so there was no necessity for translation of the Red Book into Croatian.

While Croatia was preparing for EU membership, pre-accession funding was used for financing infrastructure and other projects. FIDIC General Conditions of Contract were mandatory for construction contracts. The language of contracts was English, so the original FIDIC books, primarily the Red and Yellow Books, were used. With the accession of Croatia to the EU, Croatian language became one of the official languages of the organization, thus construction contracts have been written in Croatian. This was one of the reasons for translating the FIDIC General Conditions of Contract into Croatian. Only three books, i.e. the Red (Uvjeti ugovora o građenju, Hrvatska komora inženjera građevinarstva, 2013), Yellow (Uvjeti ugovora za postrojenja i projektiranje i građenje, Hrvatska komora inženjera građevinarstva, 2013) and White Book (Model ugovora Naručitelja i Konzultanta za pružanje usluga, Hrvatska komora inženjera građevinarstva, 2013) have been translated into Croatian language and are nowadays most commonly used FIDIC General Conditions of Contract in Croatia. In this context, it should be noted that FIDIC gives licenses to member associations to publish translations of the Red, Yellow, Silver or any other book. However, FIDIC considers the official and authentic texts to be the versions in the English language and it does not accept any responsibility for the correctness, completeness or accuracy of the licensed translations.

In the meantime, several Croatian public companies, such as Croatian Motorways Ltd., have translated (with the permission of FIDIC) the FIDIC Red Book, produced their own particular conditions suited to their requirements and have been using these contract conditions as their standard model of contract for construction work financed by the state budget.

After the Croatian motorway network has been largely constructed, transport infrastructure development plans have been focused on the railway network. Recently, the EU has been financing the reconstruction and construction of the railway network in Croatia. These projects simultaneously use the Red Book for earth, concrete and track works and the Yellow Book for work on the power supply network. Since the contracts include both, the construction works and power supply works, the simultaneous use of the Red and Yellow Books produces a very complex contract structure. In addition, unlike road construction works, the employer and contractor are facing requirements for the works to be performed in relatively short period of time in which the employer ensures that the track is closed. In order to make the works

as successful as possible at the time of closing the railway, it is essential for the contractor to plan in detail all the activities that need to be done, and for that it is also necessary to develop a detailed plan of the required resources into which, for critical activities, reserve resources should be included. Otherwise the closing time would be extended, which can ultimately cause considerable costs to the employer due to unforeseen traffic jams. Moreover, unlike the road infrastructure, in the railway infrastructure there are minimal possibilities of making temporary bypasses [10].

5 Conclusions

Widespread application of FIDIC General Conditions of Contract began in Croatia on road infrastructure projects funded by the international financial institutions. The contracts were then in English. This was also the case for projects funded through the European Union pre-accession funds. After Croatia's accession to the European Union, all contracts co-financed by this organization have been subject to the Croatian language, which was also one of the reasons for translating FIDIC General Conditions of Contract, namely the Red and Yellow Books into Croatian.

Once the Croatian motorway network has been largely constructed, the development focus was shifted from roads to the railway network. These projects simultaneously use the Red Book for earth, concrete and track works and the Yellow Book for work on the power supply network.

FIDIC contract conditions, by their very nature, are complex and require experience as well as diverse knowledge, technical, legal and economic, including project management experience, to ensure that contract implementation is smooth and undisputed. FIDIC always emphasizes that its contract conditions were drawn up by engineers for application by engineers. Practice has shown that, unfortunately, there are not enough engineers in Croatia capable of properly understanding and applying FIDIC contract conditions. In this regard, education and continuous training are required.

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