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# **FIDIC Red Book**

**A companion to the  
2017 *Construction Contract***

**Revised edition**

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2017 *Construction Contract***

**Revised edition**

**Jakob B Sørensen**

**Published by Emerald Publishing Limited, Floor 5,  
Northspring, 21–23 Wellington Street, Leeds LS1 4DL.**

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A catalogue record for this book is available from the British Library

ISBN 978-1-83608-177-7

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Cover photo: QinJin/Shutterstock.com

Commissioning Editor: Michael Fenton

Content Development Editor: Cathy Sellars

Books Production Lead: Emma Sudderick

Typeset by KnowledgeWorks Global Limited

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## About the author

Jakob B Sørensen has been involved in construction projects for more than 35 years, and in more than 50 countries worldwide, covering erection, maintenance, operation, refurbishment and decommissioning of especially technical facilities: power plants (conventional as well as renewable), airports, manufacturing and production facilities, breweries, automated warehouses, dairy plants, water purification plants, power distribution, gas distribution, IT and telecommunication systems etc.

Jakob has represented employers and owners, contractors and sub-contractors, suppliers, engineers, financing institutions and advisors.

From 1988 until 2011, Jakob held a position as associate professor of law at Aarhus University, Denmark; from 1988 to 1995 in contract law, from 1995 to 2009 in international trade and finance law and, finally, from 2008 to 2011 in international construction law. In 2015 and 2017, Jakob acted as friendly reviewer for FIDIC; from the initial drafts of the *Conditions of Contract*, leading up to the 2017 editions of the FIDIC forms, and in 2020 Jakob acted as a friendly reviewer for FIDIC on the Short Form of Contract 2nd edition (2021 *Green Book*).

In 2019, ICE Publishing released the first version of Jakob's companions to the 2017 editions of the three full-length FIDIC Conditions: the *Red*, *Yellow* and *Silver Books*. The companions for the full-length FIDIC Conditions are all revised in 2024, following FIDIC's updates of the Conditions.

In 2022, ICE Publishing released Jakob's companion to the FIDIC Short Form 2nd edition (2021 *Green Book*).

Jakob has been involved in construction projects based on a variety of individually developed (bespoke) contracts, as well as contracts based on standard forms (ICE/NEC, Orgalime, ICC, IEE, IChemE, Joint Contracts Tribunal etc.). Since the late 1980s, Jakob has been working with the FIDIC forms of contracts, initially with the *Conditions of Contract for Electrical and Mechanical Works* (3rd edition, 1988 – the original *Yellow Book*) and the *Conditions of Contract for Works of Civil Engineering*

*Construction* (4th edition, 1989 – the *Red Book*), and later also the *Conditions of Contract for Design – Build and Turnkey* (1st edition, 1995 – the *Orange Book*). Jakob has been involved in projects utilising the FIDIC 1999 standard forms as well as the subsequently released *Conditions of Contract for Design, Build and Operate Projects* (1st edition, 2008 – the *Gold Book*) in many projects, worldwide, and, since their release in 2017, Jakob has been involved in several large-scale international construction projects utilising the 2017 editions of the FIDIC *Conditions of Contract*. In all, over the past five decades, Jakob has been involved in more than 200 international construction projects based on the FIDIC forms and more than 400 in total.

In 2007, Jakob was certified as mediator by the Danish Bar & Law Society following studies and training in London and Copenhagen. Today, Jakob's main areas of work are advisory work in relation to complex contracts (international construction and high-tech and ICT projects) and dispute prevention and resolution.

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# List of abbreviations

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AACE	AACE International, an engineering company
BIM	Building Information Modelling
CCIP	Contractor-Controlled Insurance Programme
<i>CONS</i>	<i>Conditions of Contract for Construction</i>
DAA	Dispute Avoidance/Adjudication
DAAB	Dispute Avoidance/Adjudication Board
DAB	Dispute Adjudication Board
<i>DBO</i>	<i>Conditions of Contract for Design, Build and Operate Projects</i>
DNP	Defects Notification Period
EIC	European International Contractors e.V.
EOT	Extension of Time
EPC	engineering, procurement and construction
FIDIC	Fédération Internationale des Ingénieurs-Conseils
FPC	Final Payment Certificate
GC	General Conditions
H&S	health and safety
ICE	Institution of Civil Engineers
ILO	International Labour Organization
IPC	Interim Payment Certificate
IPR	intellectual property rights
JV	joint venture
MDB	multilateral development banks
NEC	New Engineering Contract
NOD	Notice of Dissatisfaction
O&M	operation and maintenance
OCIP	Owner-Controlled Insurance Programme
<i>P&amp;DB</i>	<i>Conditions of Contract for Plant &amp; Design Build</i>
QM	quality management
QMS	quality management system
US	United States (adj.)
USA	United States of America
USD	US dollars

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# INTRODUCTION

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Jakob B Sørensen

ISBN 978-1-83608-177-7

<https://doi.org/10.1108/978-1-83608-174-620241001>

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# 1 About this Companion

## 1.1 Purpose

In 2017, FIDIC (Fédération Internationale des Ingénieurs-Conseils) released updated versions of three of FIDIC's much-used standard conditions of contract:

- *Conditions of Contract for Construction (the Red Book)*;
- *Conditions of Contract for Plant & Design Build (the Yellow Book)*;
- *Conditions of Contract for EPC/Turnkey Projects (the Silver Book)*.

Further, in 2021, FIDIC released the updated version of the Short Form of Contract 2nd Edition (2021 *Green Book*), a substantially shortened version of the full-length *Conditions* targeted for small works or contracts with a value of about USD 10.0 million or less. The USD 10.0 million threshold is only indicative; if the work is of a (perceived) low risk level or if the parties wish to have a contract with simple use – that is, projects that do not require significant contract administration and management – the Short Form can be used for projects with a (much) higher value. See section 3.1.2 of this Introduction ('Which FIDIC Form to Use') on the choice between the various FIDIC forms, including the Short Form (Green Book).

This is a practical handbook or a companion. The intention is to provide practical assistance to users of the FIDIC *Conditions of Contract*. This companion will focus on the 2017 *Conditions of Contract for Construction* or the *Red Book* 'as reprinted in 2022 with amendments'. Similar books on the 2017 *Conditions of Contract for Plant & Design Build* (the *Yellow Book*), the 2017 *Conditions of Contract for EPC/Turnkey Projects* (the *Silver Book*), and the 2021 *Short Form of Contract* (the *Green Book*) are available.

This is not a legal textbook designed to answer any question on the understanding or interpretation of the FIDIC Conditions and, in general, it includes very few references to specific national acts, case law or quotes from other commentators. Also, this companion does not constitute or replace legal advice and is offered only for general guidance and inspiration. The reader is encouraged to seek relevant expert assistance in drafting any contract, FIDIC-based or otherwise.

Since their release in 2017, FIDIC has issued several corrective notices, first in December 2018, then in June 2019 and, finally, in November 2022. All amendments can be found in the FIDIC publication '*Amendments to the FIDIC Conditions of Contract*', downloadable from

the fidic.org website. All amendments have been incorporated into the pdf versions of the Conditions as published by FIDIC, and, consequently, any new pdf versions received from FIDIC will have the amendments incorporated (if it says ‘*Reprinted 2022 with amendments*’ on the cover page; the ISBN reference is the same). In this companion, the 2022 amendment publication with the consolidated amendments is referred to as the ‘Amendments’.

This companion is updated to accommodate for the Amendments and to reflect industry experience gained from the practical use of the 2017 editions since their release.

## 1.2 Structure and Contents

This companion has three main sections:

- **Introduction.** An introduction to the companion, general observations on (international) construction contracts and inspiration for further reading.
- **General Conditions.** A commentary to the 21 Clauses of the 2017 FIDIC *Conditions of Contract* 2<sup>nd</sup> edition with the *Conditions of Contract for Construction* (the *Red Book*) as basis. The commentary includes a brief introduction to each Clause, comments and observations and suggested additions or adjustments for consideration.
- **Appendices.** A mini guide to the use of the FIDIC Conditions, including an overview of the main Employer’s risks (and the Contractor’s corresponding entitlements) and a short guide to preparing Particular Conditions, especially Part B (Special Provisions), including suggested modifications and additions to the General Conditions.

A copy of the FIDIC Conditions as published by FIDIC is not included herein but it is recommended that you always keep an officially licensed version of the Conditions at hand when using this companion. Remember, royalties received by FIDIC for the use and dissemination of FIDIC’s standard forms help fund FIDIC’s many commendable activities.

## 1.3 Background and References

When referring to the FIDIC 2017 *Conditions of Contract for Construction*, in this companion ‘General Conditions’ or the abbreviation ‘FIDIC GC’ or just ‘GC’ are used, unless the context requires more specific reference. ‘Conditions of Contract’ is a defined term, meaning the General Conditions as published by FIDIC as amended by the Particular Conditions drafted for the specific use. ‘General Conditions’ and the abbreviations ‘FIDIC GC’ and ‘GC’ are then a reference to the unamended General Conditions as published by FIDIC (as amended by the Amendments).

The printed and pdf versions of the Conditions released by FIDIC contain several additional sections, such as templates for several of the documents required for the Contract (e.g. Contract Agreement, Contract Data, Letter of Tender, Letter of Acceptance etc.), as well as templates for other documents, such as securities. In addition to these highly recommendable templates, the official printed and pdf versions of the GC also include a comprehensive guide (*Guidance for the Preparation of Particular Conditions*); in this companion, this guide

is generally referred to by its full name or just as ‘the Guidance’. The Guidance is not to be confused with the *FIDIC 2017 Contracts Guide* (2nd Edition 2022) which is a comprehensive guide to the use of the Conditions, published by FIDIC in 2022; the *FIDIC 2017 Contracts Guide (2022)* is herein referred to as ‘the Guide’. See also Chapter 4 of this Introduction.

This companion is not endorsed by FIDIC, and the mistakes herein are entirely the author’s own (unless otherwise indicated).

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Jakob B Sørensen

ISBN 978-1-83608-177-7

<https://doi.org/10.1108/978-1-83608-174-620241002>

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## 2 Construction Projects

### 2.1 Preparing International Contracts

When preparing for a project with international dimensions, special concerns arise. The international dimension could be, for example, that the Contractor is from a country different from where the Employer and the Site are, or the project is situated in a different country from the Employer, or maybe the Site is in one country, the Employer from another country, the Contractor from a third country and the Engineer from yet another country. When preparing contracts with international dimensions, a few points should be noted.

Firstly, the applicable law. Even when the contract is a FIDIC contract, the interpretation and effect of the contract depends heavily on the underlying legal regime, including the applicable law (often referred to as ‘the **background law**’); thus, it is not safe to assume that because the contract is a FIDIC contract, everything is addressed in the General Conditions. Some examples to illustrate where the GC will be supplemented by the applicable law:

- When is a Notice being ‘*unreasonably withheld or delayed*’ under Sub-Clause 1.3 [Notices and Other Communications]?
- What is the ‘*reasonable assistance*’ the Employer is required to provide to the Contractor under Sub-Clause 2.2 [Assistance]?
- What constitutes a ‘*material change*’ under sub-paragraph (c) of the 2nd paragraph of Sub-Clause 2.4 [Employer’s Financial Arrangements]?

If not conclusively settled by the *Conditions of Contract*, it is for the Parties (and the Engineer, the Dispute Avoidance/Adjudication Board (DAAB) and, ultimately, the arbitrators) to establish what this means. Eventually, the arbitrators must look to the background law to seek guidance on the correct meaning of these terms. Because national law differs from country to country (sometimes substantially), an understanding of the applicable law and the legal environment of the contract and the project in general is required. Even between systems of law that are quite closely related, like, for example, the Nordic countries, substantial differences exist. To fully understand the contract and how it works, you need to understand the legal system governing the contract.

Secondly, language. Sub-Clause 1.4 [Law and Language] of the *Conditions* states that the ruling language shall be stated in the Contract Data (if no language is stated, then the ruling language is ‘*the language of these Conditions*’). When you prepare contracts – especially if the contract is drafted in a language different from your native language – several issues arise.

Do you master the ruling language sufficiently to understand what is already in the GC and to draft additions or amendments to the Conditions to cater for project-specific needs without meddling with the integrity of the Conditions? If not, stay away, because the contract that you actually draft may differ substantially from what you believe is in it. Be especially aware of ‘false friends’ – that is, words that sound and look the same in two languages but have completely different meanings. As an example, the Swedish and Danish languages are very closely related but a few words have completely different meanings in the two languages; the word ‘gratis’ means free or without cost in Danish, whereas in everyday Swedish it is a salute, usually meaning ‘Congratulations!’ Closely related to this issue are words that – broadly speaking – do have the same general meaning but with subtle differences, e.g. the word ‘guaranty’, which in English law has one meaning and certain well-established legal implications but the equivalent word in German (‘Garantie’) has a different meaning and different legal implications under German law. If the contract is governed by German law but with English as the ruling language (or the other way around), is it then the German legal interpretation of the term that applies or is it the English? FIDIC has made a huge effort to eliminate – or at least reduce – such issues, for instance by abandoning the use of some of the strict, legal terms with substantially different implications, e.g. ‘Force Majeure’ has been replaced with ‘Exceptional Events’ (now in Clause 18). Nevertheless, these are real issues you must be aware of when preparing contracts with an international dimension.

Thirdly, understand and respect cultural differences. Methodologies or ways of working that function very well in one cultural setting may work completely differently and perhaps even be counter-productive in another setting.

Lastly, preparing construction contracts is a multi-disciplinary exercise and so is the execution and completion of the project. Not all disciplines are equally important, but they are all important. If the basic design is rubbish, it does not matter if the Contractor is skilled, and the contract is perfect. If the Contractor is incompetent, it does not matter if the design and the contract are perfect. If the Engineer is incompetent, little else matters. Each contributor to the project should understand and respect the competences and contributions from the other disciplines.

Numerous publications will give you valuable insight into how to draft contracts but, like tennis, golf, sailing, trench digging, welding, embroidery and numerous other activities, you will not master the craft if you only study – it takes practice.

## **2.2 Construction Contracts**

### **2.2.1 Overview**

The main key to drafting contracts is proper prior planning and preparation; this principle is often abbreviated as the 5P, 6P or 7P (or even 10P or 12P) principle. Allegedly, the P principle is of army origin (US or British): *‘Proper Planning (and Preparation) Prevents (Piss-) Poor Performance’*.

In addition, when preparing for a project, **always start with the ‘Why’**. What are the objectives and purpose of the project? Why is it being initiated? What do the interested parties wish to accomplish? When the objectives have been identified and presented and are clear to all,