

Applied Management for FIDIC Contracts, Part One: Segregation of General Provisions

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Abstract

The International Federation of Consultant Engineers “FIDIC” is an organization which publishes standard forms of contract documents related to the procurement of engineering works. The FIDIC forms of contracts are a group of forms of contracts presented by the Federation Institute of Consultant Engineers, with the first publication on 1957 of the first edition of “Conditions of Contract for Works of Civil Engineering Construction” known as the ‘Red Book’. The group includes different forms of contracts which are widely used over the globe and became preferable in the world and specifically in the Middle East where it almost always the first choice of the contract parties in the construction projects. In the course of the implementation FIDIC based contracts, different management processes and provisions are required to safeguard optimized benefit of the use of such prominent forms of contracts. This paper is a part of a comprehensive guide for appropriate implementation of the construction contracts based on FIDIC forms of contracts, in this part, the author will start by the introduction through the general provision clause.

Keywords: FIDIC- Contracts- Applied Management – Best Practice

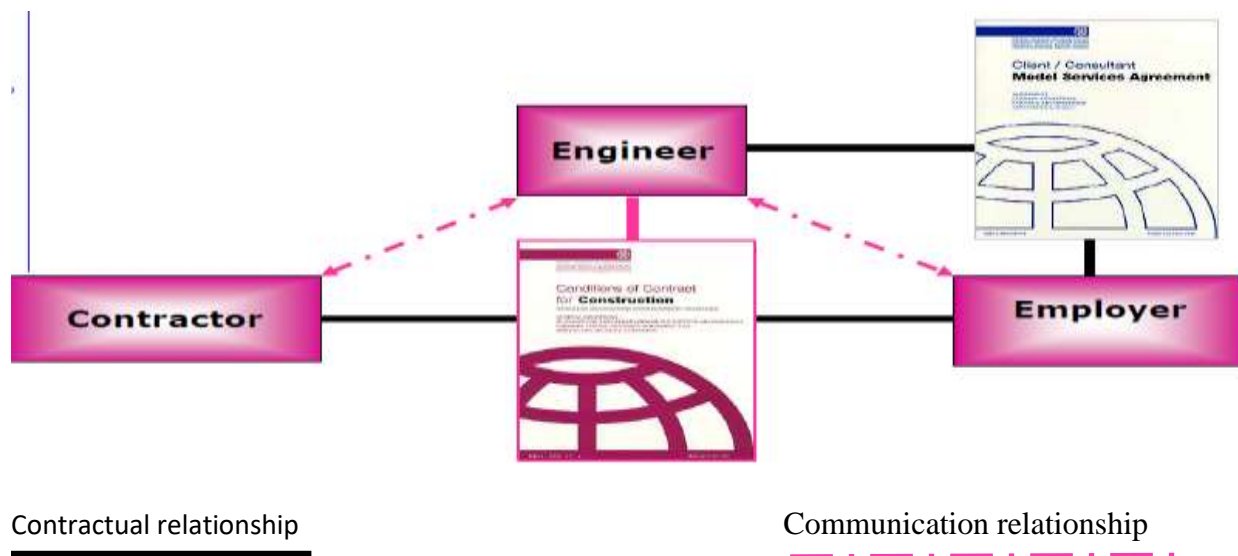
1. Introduction

The FIDIC standard forms group includes different forms of contracts where each form is used for a specific type of projects, such as the published forms on 1999, including, Conditions of Contract for Construction which are recommended for building or engineering works designed by the Employer or by his representative, the Engineer and it is referred to as Red Book, in this type of contract, the Contractor builds the works in based on the design provided by the Employer. Another form of FIDIC contracts is the Conditions of Contract for Plant and Design-Build, which is referred to as the Yellow book and is which are suggested for the provision of electrical and/or mechanical work/plant, normally, in this form of contract the Contractor prepares the design and provides, as per the Employer's requirements, the work; that can compromise different civil and electromechanical tasks. The case of turnkey project where a party takes the entire responsibility to design/engineering, procures and constructs the project entirely which is called EPC contract, Silver Book. This type of contracts is recommended for those projects of specific characteristics such as a process or power plant, also the EPC form contracts are frequently used in the Middle East for different types of projects which are let by the governments to international contracting companies to deliver the projects as an Engineering,

Procurement and construction, “EPC” with an entirely equipped facility. Other different FIDIC forms of contracts are presented by the FIDIC and recommended for a specific type of work, such as the Blue Book for Dredging and reclamation, the Green Book short form for small projects which is budgeted less than 500,000.00 \$, and etc. The FIDIC form includes the contract general condition, some guides to prepare the particular conditions and any required appendixes, and the forms of tender and contract agreement. It is recommended to maintain the general condition as per the standard form and insert any modifications or customization in the particular conditions. This paper will present the analysis of the FIDIC contract management approach to be implemented in the physical contract lifecycle considering the order of the general conditions of the FIDIC forms for the first three mentioned forms of contracts, Red, Yellow, and Silver Books.

2. FIDIC forms general conditions

The construction contract is signed between the Employer and the Contractor, where the Employer assigns a consultant to represent him in the project, the Engineer with a separate service client/consultant model service agreement, the relationship in the project course is shown below in figure 1.



2.1 Selecting the suitable FIDIC form of contract

The practitioners make the first decision to use a FIDIC form of contract as the core of their potential contractual relationship. Depending on the project work features and particulars they explore the different FIDIC forms to choose the best suitable contract¹, as shown in table 1- Figure 2. The recommended forms can be impacted by the situation and elements shown below:

Table 1: Recommendation for choosing the FIDIC form of contract

| FIDIC Form | Project Characteristics | Design by Employer | Design by Contractor |
|--|--|--------------------|----------------------|
| Red Book | Clear and repeated scope of work | √ | |
| Green Book | Clear and repeated scope of work | √ | |
| White Book | Service agreement of any characteristics | NA | NA |
| Yellow Book | Specified Employer's requirement, implied high risks and a proposal by the contractor | | √ |
| Silver Book | Lump-sum, no high risks, financed by the employer, one party takes complete responsibility of the work, little employer interference- Tailored upon negotiation | | √ |
| Blue Book | Dredging and reclamation works. Issued With the collaboration of the International Association of Dredging Companies (IADC), and for dredging and reclamation work. Design provided by the Employer /Engineer. | | √ |
| DBO Contract (1st Ed. 2011) | Design-Build-Operate scenario, with a period of 20- year operation | | √ |
| Condition of Subcontract for construction (1st Ed. 2011) | In conjunction with the Red Book | √ | |

¹ Totterdill, B. (2006) FIDIC users' guide A practical guide to the 1999 Red and Yellow Books 2nd ed. London: Thomas Telford Publishing.

Figure 2: Choosing the suitable FIDIC Book

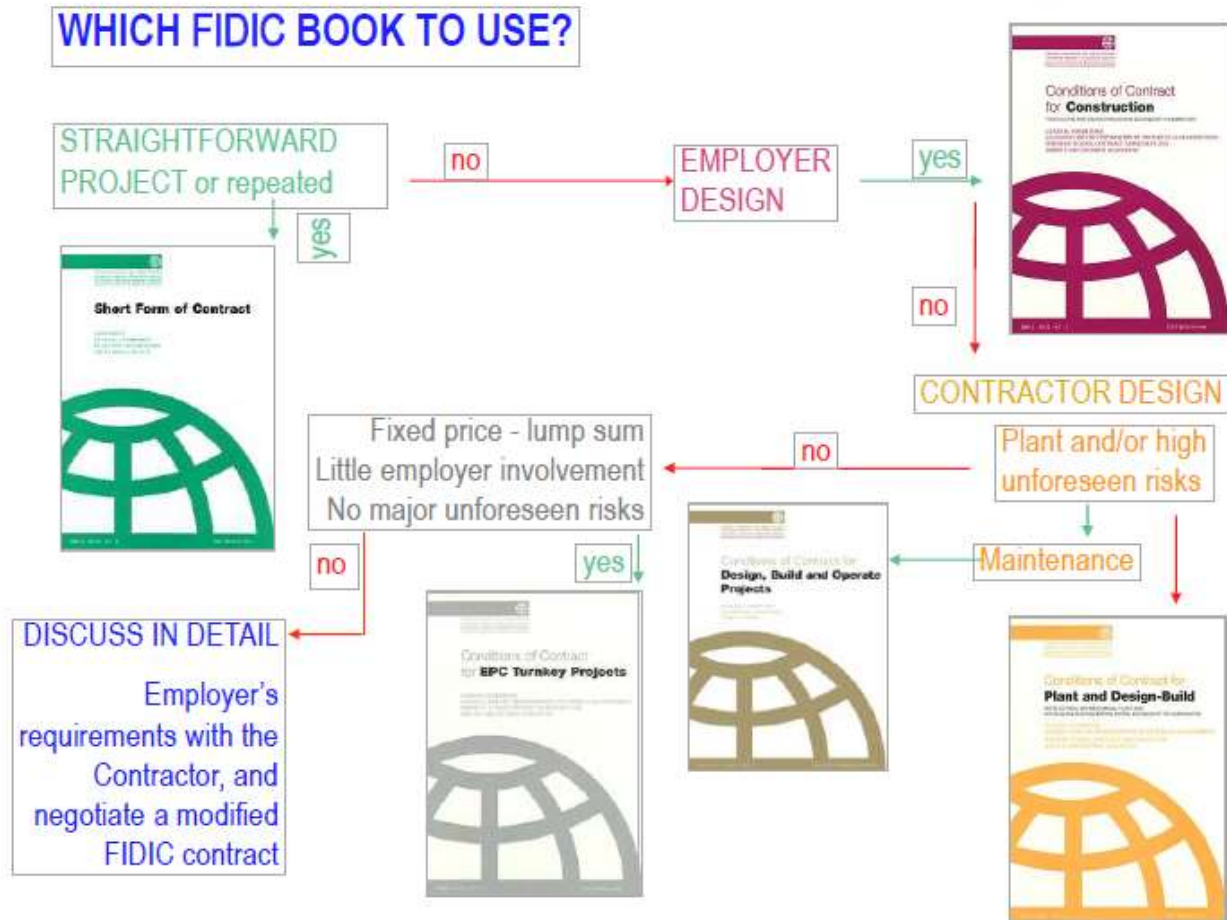
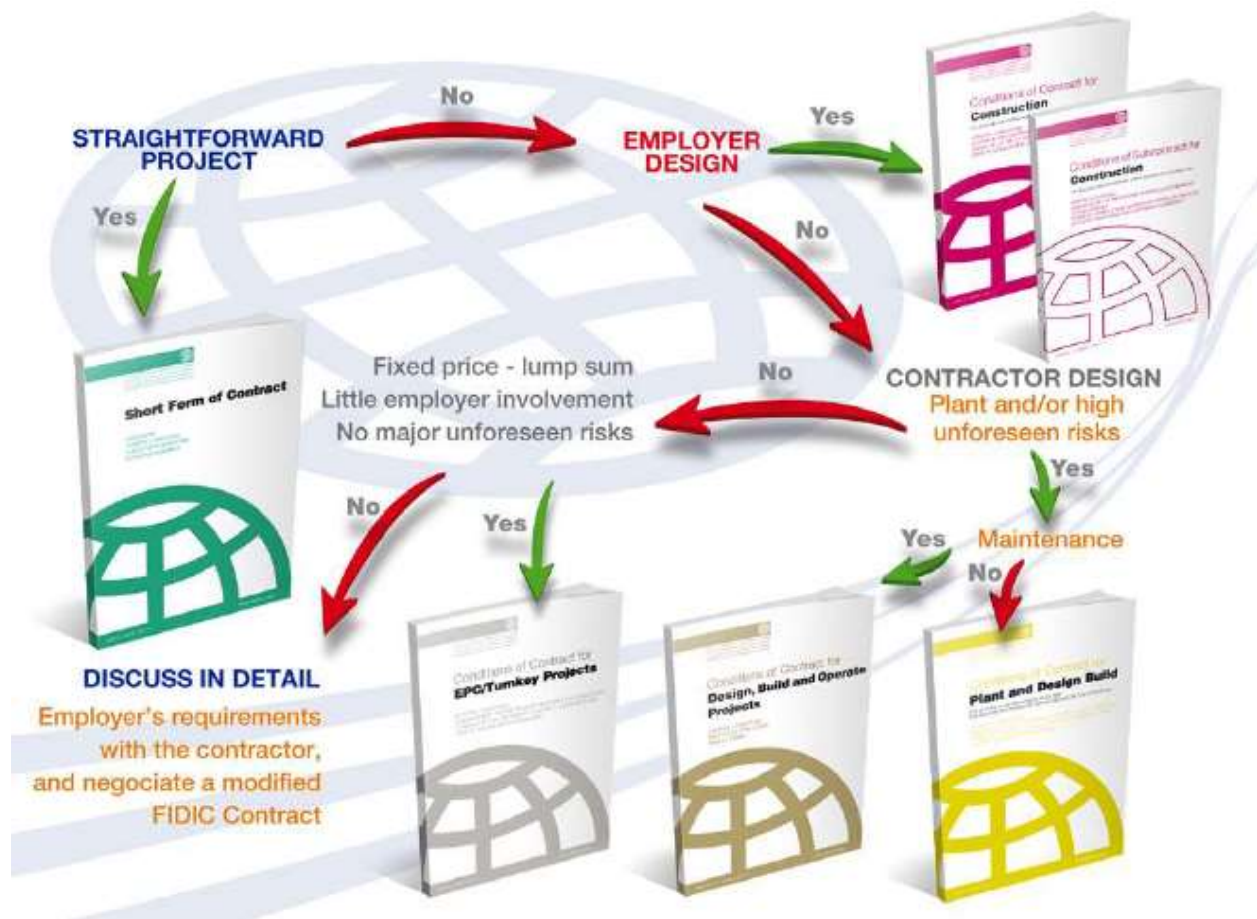


Figure 2: Choosing the suitable FIDIC Book continued



Source: "FIDIC" Mohammed Said Fatha a Presentation in FIDIC conference, Cairo, 2009

2.2 Structure of the general conditions

The general conditions comprise 20 clauses that stipulate the route of applying the contract through the project different processes. Akin other forms of contracts the flow of clauses starts by the General Provisions, the Employer, the Engineer, the Contractor, and Nominated Subcontractors which will be discussed and analyzed in the following section of the paper, section 3.

3. Segregation of General conditions clauses

In order to properly administer a FIDIC form of contract the author will analyze some driving selective clauses over the 20 FIDIC clauses, starting by the general provisions, clause number one.

3.1 General provision

The general provisions set out some definitions that deemed necessary to interpret some regularly used words and expressions and this supports the unified use of the same word during the contract implementation. Examples of the provided definitions are: The definition of the meaning of contract, contract agreement, and letter of acceptance which is signed by the Employer to inform the Contractor for the acceptance of the letter of tender submitted by the Contractor, including the complete signed offer including the appendix to tender and the completed priced bills of quantities and schedules as applicable. Also, it provides the definitions of specifications, drawings, Contractor, Contractor personnel, the Engineer and his representative/s, the Employer and his personnel including the Engineer and his assistants and any Employer personnel notified to the Contractor, the dispute adjudication board “DAB” is clearly defined in the sub-clause 1.1.2.9. The third section of the definition is considering the dates, tests, periods and completion such as; commencement date, time for completion, tests on completion, taking-over certificate, defects notification period, performance certificate, which is issued to document the completion of the work.

↑↑ Recommendations and best practice

The definitions are pivots for the proactive contract administration, prudent parties should assign skilled and talented employees for the role of contract administrators and contract managers to ensure successful contract implementation, minimum claims, minimum disputes, and optimized deliverable with the project constraints. Depending on the size, nature of the project the contract management role may be described and assigned to the competent employees, whether in the Employers/Engineer party or the Contractors party. All parties must clearly define the responsibility of the contract management in the organization chart to ensure single responsibility and comprehensive contract management. Diligent organization provides competent contract management personnel and contract training to the key personnel in the project. Recently it became apparent that personnel attending FIDIC training and holding professional certificates from the international certification bodies had proved high performance in the contract and project management domain entirely.

↓↓ Pitfalls

The project manager may eliminate the role of the contract manager and assign it in a multi-task manner to an overloaded individual who may provide poor contract management, generating different risks, claims, disputes, and direct and indirect project losses, such as extended duration and additional cost. For example unskilled Employer’s representative, may faulty reject a justified extension of time request by the contractor,

which may drive the project duration to the situation of Time at Large, where the duration will be practically reevaluated and decided in a complicated approach.

3.1.1 Interpretation of the contract words, phrases, and expressions

The aim of the interpretation sub-clause is to furnish the same base for the understanding of any word mentioned in the general conditions. For example, the single is applicable for plural and vice versa, one gender is referred to any gender, the word agrees requires written document in any form.

↑↑ Recommendations and best practice

The practitioners here are encouraged to read and review the contract documents with this ground rules of the words meaning to include all the effect of this way of implementation. For example when we find in the drawing the sentence “provide a lock for the door” it indicates to calculate the cost of the lock for all doors in the drawing. It is recommended to avoid any potential disputed understanding of the documents to thoroughly review all bid documents before calling for bidders by the Employer or submitting the letter of tender by the contractor.

↓↓ Pitfalls

Some disputed cases were established on the difference in understanding of the contract documents; each party had a different interpretation of some specific and significant words. Such cases came into the dispute because of lack in reviewing all the documents prior contract sign due to shortage of time allowed to the estimation team or unavailability of the competent resources. Hence the party in default starts discussing and debating the meaning after the contract sign which causes unjustified delays, fertile ground for conflicted relationships between the contract parties.

3.1.2 Communications

The FIDIC imposes the project communication methods to be in written and documented in the project records. The submission of any correspondence by the contractor to the Employer/Engineer is to be in written and received by the recipient. The communication can be delivered by hand, courier, fax, and any electronic transmission which shall be agreed and documented in the appendix to tender. The parties addresses shall be stated in the contract and all communication are to be delivered to the said address of each party.

The FIDIC requests² each party to promptly apply the processes, approvals, certificates, consents and determinations and it shall not be unreasonably suspended or delayed. Each party shall provide a copy of his initiated document to the other party, when a certificate is issued to a party, the certifier shall send a copy to the other Party, and when a notice is issued to a party by the other party or the Engineer a copy shall be sent to the Engineer or the other Party.

↑↑ Recommendations and best practice

The contract parties shall keep a proper document control system on site to maintain the record keeping which is the prime element in the project success. Each party should provide the obligatory communications in the relevant contract time or the most practicable time if not stipulated in the contract clauses. The parties should maintain a special tracking system for the time bar clauses. An electronic system can be used in moderate to large scale projects, in all cases, the project parties must have awareness training in communications methods, style, and technology.

↓↓ Pitfalls

Improper communication flow and record keeping can cause significant issues in the contract management domain. For example, the Engineer may delay the approval of a submitted sample unreasonably, causing delay in the activity start date. In the contractor side, he may neglect to issue a claim notice for more than 28 days, missing the right to submit the claim as per clause 20 (Contractor's Claims³).

3.1.3 Law and Language

The governing Law of the contract by default is country Law where the contract is signed and the project is executed or the governing Law can be mentioned in the appendix to tender. Also, the ruling language and communication language should be stated in the appendix to tender which will always prevail in case there is a document written in more than the ruling language.

3.1.4 Priority of Documents

The contract documents include different documents which integrate altogether forming the contract. Those documents mainly include:

² International Federation of Consulting Engineers "FIDIC" Conditions of Contract for Construction for building and engineering works designed by the employer, general conditions, First Edition 1 999 ISBN 2-88432-022-91999

³ Seppälä, C. (2005) Contractor's Claims Under the FIDIC Contracts For Major Works. In: International Construction Contracts and Dispute Resolution Co-Hosted by ICC and FIDIC In partnership with The Cairo Regional Centre for International Commercial Arbitration. Semiramis Intercontinental Hotel, Cairo, Egypt April 9 – 10, 2005

- i. Contract Agreement
- ii. Letter of Acceptance.
- iii. Letter of Tender.
- iv. the Particular Conditions.
- v. the General Conditions.
- vi. the Specification. Or the Employer's Requirements in the Yellow Book or Silver Book
- vii. the Drawings. and
- viii. the Schedules (the Contractor's Proposal in the Yellow Book) and any other documents forming part of the Contract.

This set of documents are working together in an integrated application and any missing in one document can be substituted from another document, if an ambiguity or discrepancy is found in the documents, the Engineer shall issue any necessary clarification or instruction considering the above-mentioned priority of documents.

3.1.5 Delayed Drawings or Instructions

The project communication management involves the agreed flow of the processes and submit-approve cycle for all the required contractual submissions, drawings, material, method of statement, baselines, and project management plan and its subsidiaries. The contractor and the Engineer/Employer should coordinate together to ensure proper management of the agreed flow of processes. When the works/ processes is likely to be delayed or disrupted the contractor shall give notice to the Engineer for the delay in response for any contractor's submittal or request for information which should be released within in a certain time, the notice should include the impact of the required information in delaying the work along with supporting detailed evaluation of the delay and relevant cost if any. The Engineer shall be in default if unreasonably withheld or delay the required information/response/drawing which should be released within a reasonable time or a contractually stipulated period. In such case if the contractor suffers delay and/or incurs additional cost, the Contractor shall provide a further notice to the Engineer and as per sub-clause 20.1 shall be entitled (Contractor's Claims) to extension of time and compensation of the incurred additional cost plus reasonable profit.

The Engineer is requested to evaluate and determine the Contractor's claim for extension of time and additional cost under sub-clause (Determinations).

↑↑ Recommendations and best practice

In this submission, the Contractor shall furnish a proper submittal which enables the Engineer to review and decide within the reasonable time. Any missing information or incorrect submittal will cause re work by the Contractor and the Engineer as well, in addition, such circumstances may eliminate the Contractor's entitlement for extension of time and cost reimbursement. So prudent parties should adopt the rule do it right from the first time through providing competent resources and complying with the contract requirement and agreed management plans.

⇓ Pitfalls

It is common in the construction contract management to find a significant number of contractor's claims pertinent to the Employer/Engineer action or inaction; these come out as direct causes of the improper response timing by the Engineer to the contractor's submittals. Delayed action by the Engineer will significantly share in the project delays and contractor's claims. The main reasons of the improper management by the Engineer are; lack of resources, lack of experience within the Engineer's personnel, and or poor submittals by the contractor. Such situation will be barriers in the efforts of the Engineer determination for cost reimbursement and extension of time which will be a part of concurrent delays that is very tough in the delay analysis process.

3.1.6 Management of Contractor's and Employer's Documents

The copyright and other intellectual Contractor's documents property rights in the Contractor's documents and other design documents made by of for the Contractor shall be retained by the contractor. By signing the contract, the Contractor shall give to the Employer the complete authority, ability and free license to copy, use and communicate the entire Contractor's documents. For the information and details deemed confidential, the contractor is obliged to disclose such confidential information as the Engineer may reasonably require for the purpose of substantiating the Contractor's compliance with the contractual requirements.

The Employer shall retain the copyright and other intellectual property rights in the specification, drawings, bid documents, and other documents made by or for the Employer. The Contractor is permitted to copy, use, and obtain communication of these documents for the purposes of the Contract. Both the Employer and the Contractor must get written consent from each other before sharing any of the opponent party to a third party.

⇑ Recommendations and best practice

Document management should comply with the contract clauses in addition to the agreed conditions stated in the appendix to tender.

⇓ Pitfalls

The property of documents and intellectual property are sensitive items that need special care to avoid huge losses in case of failure.

4.1.6 Conclusion

The International Federation of Consulting Engineers "FIDIC" had published several forms of contracts that can be applied for the different projects. The FIDIC forms of contracts include the Red Book, the Yellow Book, Silver Book, and etc., where each form is more suitable and recommended for specific projects and type of works. The FIDIC form includes the general condition, a guide to prepare the particular conditions and any required appendixes, and the

forms of tender and contract agreement. The review of the general conditions in this paper revealed the need for proper pre-contract processes and post contract management to ensure successful management for the construction project contract. Through the general provision clause, supporting recommendations for some selected sub-clauses were provided and the potential drawbacks were highlighted in order to achieve project success within the project constraints and optimized deliverables.

References

1. Abu Dief, M. (2010) Claims Management in Commercial Construction Projects, MSc. University of Al Azhar, Faculty of civil engineering.
2. Bunni, N. (2005), the FIDIC Forms of Contract 3rd. ed. Blackwell.
3. International Federation of Consulting Engineers “FIDIC” (1999) Conditions of Contract for Construction for building and engineering works designed by the employer, general conditions, First Edition 1999
4. International Federation of Consulting Engineers “FIDIC” (1999) Conditions of Contract for Plant and Design-Build Contract First Edition
5. International Federation of Consulting Engineers “FIDIC” (2000) The FIDIC Contracts Guide First Edition
6. Nguyen, L.D. (2004). A Study on Project Success Factors in Large Construction Projects in Vietnam. *Journal of Engineering, Construction and Management*, Emerald, 11 (6),404-413.
7. Oteifa, S. and Abu Dief, M. (2016), Application of FIDIC Contracts in Construction Claims and Arbitration. *IntJRecentSci Res.* 7(9), pp. 13351-13356.
8. Seppälä, C. (2005) Contractor’s Claims Under The FIDIC Contracts For Major Works. In: *International Construction Contracts and Dispute Resolution Co-Hosted by ICC and FIDIC In partnership with The Cairo Regional Centre for International Commercial Arbitration.* Semiramis Intercontinental Hotel, Cairo, Egypt April 9 – 10, 2005
9. Robinson, M. (2011) *A Contractor’s Guide to the FIDIC Conditions of Contract* 1st ed. West Sussex, UK: John Wiley & Sons, Ltd
10. Totterdill, B. (2006) *FIDIC users’ guide A practical guide to the 1999 Red and Yellow Books* 2nd ed. London: Thomas Telford Publishing.

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