



## FIDIC in the Middle-East

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April 2007

There is an expression which goes "the road to success is always under construction". This expression appropriately captures the current and foreseeable surge in the construction industries of Arab countries (particularly in the Gulf) and the prevailing attitude of public, private and foreign stakeholders. This article will provide a brief overview of the emergence and applicability of FIDIC contracts in the Gulf given their historic and widespread use internationally, particularly in the public sector.

FIDIC forms of contract have been in use in the Middle East since the 1970s. It is paradoxical that although the FIDIC conditions of contract have been drafted on the basis of English common law principles, the public and private sectors in Gulf countries who source their law from a mixture of civil law and Shariah law such as the UAE, The Kingdom of Saudi Arabia, Kuwait and Oman, have based their conditions of contract on the FIDIC form. Historically, the public sector in those countries have led the way for FIDIC to be adopted or used in response to the national tendering laws and the corresponding requirements of various government ministries. It is worth noting from our previous articles on FIDIC that although the Emirate of Abu Dhabi has recently and officially adopted the FIDIC form, the Emirate of Dubai (particularly the Dubai Municipality) has yet to follow the same lead.

Lawyers who have trained in civil law jurisdictions in the Middle East often do not appreciate the English legal concepts underpinning those conditions.

Conversely the same could be said of lawyers who have trained in common law jurisdictions but are unfamiliar with the applicability of governing civil code articles in Middle Eastern jurisdictions, which will have the practical effect of overriding the FIDIC conditions of contract. Parties to a contract and their advisers should therefore be aware of trying to reconcile the conditions with civil code provisions when negotiating FIDIC contracts.

The issue of language to be adopted in a FIDIC contract is critical and not to be underestimated. The FIDIC forms of contract give parties the option to choose the governing language to be used in the contract and the primary language in the event of an issue of interpretation or construction (particularly with reference to proceedings or arbitration). Whilst there has been a historic trend in countries such as Saudi Arabia and Iraq to adopt Arabic as both the governing and interpretative language, the increasing involvement of foreign contractors and consultants in construction projects in Arab countries, particularly since the 1980s, has led to English being the preferred language.

Whilst this trend may be understood in the context of arbitration proceedings, it is difficult to establish the extent to which this contractual arrangement makes practical sense in the local courts of Arab countries.

The 1987 FIDIC conditions of contract have been adopted and modified to some extent by the public sectors in countries including Iraq, Oman, Saudi Arabia, and Kuwait. Furthermore, international institutions such as the World Bank have adopted the FIDIC conditions of contract when entering into contracts with Arabic governments to fund engineering or infrastructure projects.

The cost of the works under the FIDIC conditions of contract is generally treated on the basis of a remeasurement contract i.e. the price of the works are recalculated on the work that is actually carried out rather than the price originally estimated at the time the contract was entered into. An Employer, in theory, therefore carries the risk of changes to the quantities of material used in the works and accordingly the cost of the works.

Public sector employers in the Middle East, similar to those internationally, tend to prefer lump sum fixed price contracts.

The Ministry of Public Works in Kuwait, for example, has historically issued its own set of contractual conditions based on FIDIC conditions. But where such conditions have been heavily amended to reflect a lump sum fixed price requirement primarily driven by local public tender laws.

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It is interesting that the Public Housing Authority of Kuwait stipulate in their standard conditions of contract (based on the FIDIC conditions) that any discrepancy between items or materials or work in the document which refers to the same (Bills of Quantities) is dealt with in favour of the Employer. However, it is worth noting that a Kuwaiti government ministry or public body must obtain governmental consent before it decides to award a variation which affects the contract price by more or less than 5%.

It is important for anyone advising Employers to be aware of the distinction between a lump sum contract, where there is greater scope for cost variations, and a lump sum contract fixed price contract which presupposes lesser scope.

According to Law 6 of 1997, the Dubai government departments are entitled to increase the stated quantities in the contract by up to 30% of the original contract price without allowing for any increase in the original contract price. In other words, an increase of up to 30% will be deemed to be within the contract price and will supersede any corresponding conditions of the FIDIC contract.

Essentially, the Contractor bears the risk of the discrepancy, so that it may not be likely to succeed in a claim for additional payment.

In considering the role of the Engineer under the FIDIC contract conditions, it is important to appreciate the inherent dichotomy in its role. The Engineer is supposed to be independent in that they generally administer the contract between the parties, certify works in accordance with the contract and act as the adjudicator in the event of a dispute. Furthermore the Engineer acts as the Employer's agent so that in receiving payment for his services to the Employer, he owes the Employer a duty of care. This dichotomy which may have been unintended by the FIDIC drafting committee at the time, has been addressed to the extent that public authorities in Arab countries such as the Emirate of Abu Dhabi, and Kuwait, give themselves sole discretion in ordering variations including the costs associated with risks which are not attributable to the Contractor or the Employer.

The standard conditions of contract issued by the Dubai Municipality (the main public body in Dubai involved in procuring public sector projects) departs from the FIDIC standard conditions in that the Engineer is obliged to seek the prior approval of the Employer on matters including the contractor's programme and expenditure of monies pursuant to the contract sum and the issuing of certificates for completion or non completion of the works.

It may be viewed as a relief to Employers in Arab countries, who are uncertain as to whether to adopt the 1999 FIDIC "Red" and "Yellow" contracts, that this dichotomy has apparently been resolved by the FIDIC drafting committee. These conditions do not require the Engineer to be impartial and he shall be deemed to act for the Employer except where fair determinations are required, or unless the contract conditions express otherwise.

This may perhaps encourage the wider use of the 1999 FIDIC contracts which is increasingly being used in Arab countries, particularly given the increase in project finance and BOT type transactions.

The Contractor's overall liability for the works under the FIDIC contract are based on English common law principles e.g. contractor to carry out works using reasonable skill and care.

The Contractor's liability is considered satisfied under the FIDIC conditions when a certificate (defects liability certificate) is issued by the Engineer confirming that all defects in the works, which are apparent after the works have been substantially completed, are remedied.

However, the civil codes of countries such as Bahrain, Kuwait, Iraq, Jordan, Egypt and Lebanon contain articles extending the contractual liability of the Contractor, under FIDIC contract conditions, beyond the issue of the defects liability certificate. Basically, these provisions impose what amounts to strict liability on a Contractor in favour of an Employer for any defects affecting the integrity of a structure or a collapse of any part of it. Such liability is co-extensive with an Architect or a consultant beyond the defects liability period specified in the contract (10 years in the case of the UAE) whereby the Architect or consultant is responsible for the design of the structure.

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It is important to note that this provision, imposing strict liability, is an implied term in the contract which cannot be modified or excluded by the parties. However, Contractors should note when defending a claim under this provision, they are entitled to raise arguments (if applicable) based on force majeure provisions and or default by or on behalf of the Employer e.g. Engineer failing to perform his obligations under the Contract.

Similarly under Omani law, the Contractor can show a separate contributing factor for the collapse of a structure which it has built as a defence to a claim under this type of provision.

In Bahrain, the law stipulates that a Contractor and a consultant are jointly liable for the construction of a structure and for the structure's safety for a period of 5 years.

In respect of design, the FIDIC conditions generally oblige the Contractor to be responsible for design in carrying out the Works. The FIDIC conditions go further in that the Contractor is obliged to notify the Employer (via the Engineer) of any defect or mistake in the design at the time of tender or when carrying out the Works (post contract). Whilst there is no corresponding obligation under the civil codes of countries in the Middle East, such as the UAE, for the Contractor to notify the Employer of defects, it is submitted, Contractors do owe a general duty of care to notify under the civil law doctrine of good faith. This would make practical sense in respect of the application of the strict liability provision (referred to above), even if the negligence in design was not, in real terms, the Contractor's fault.

Notwithstanding the points made in the preceding paragraph, the conditions of contract currently issued by the Dubai Municipality unusually do not appear in effect to impose strict liability on the Contractors under this strict liability provision preferring instead to rely on the concept of negligence.

The FIDIC conditions allow the parties to agree fixed damages for the Contractor's delay in completing the Works. In assessing the nature and level of damages under common law, an Employer should be mindful of agreeing to a sum which represents a genuine pre-estimate of its losses at the time the contract was entered into as a result of the contractor's delay and not a penalty or a sum of money that is disproportionate to the Employer's actual loss.

In the UAE, however, there is a local practice of imposing a limit of ten percent of the contract value for any delays on the part of the Contractor in failing to complete the Works by an express completion date (subject to extensions of time) notwithstanding any fixed damages which may have been agreed to by the parties and inserted in the FIDIC contract. This local practice was ignored by the local Court of Cassation in a local case which held that local courts had the authority to fix a level of damages (in order to balance the equities between the contracting parties) should it become evident the damages actually suffered were either higher or lower than the contractual amount originally envisaged and agreed upon.

Despite the complexities and barriers associated with applying an international standard form contract to the construction market in the Middle East, it is fair to conclude that FIDIC has demonstrated a level of flexibility beyond arguably any other form of contract across the Middle East. The need to adapt to changes in legal systems, language or construction types has not inhibited the emergence and continued growth of FIDIC in the Middle East.

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