

# FIDIC Middle East Contract Users' Conference

Dubai,  
24-27 February 2020



## Dr. Götz-Sebastian Hök

FIDIC Accredited Trainer  
Dispute Adjudicator (President's List)  
Friendly Reviewer 2<sup>nd</sup> Edition  
TG 11 Member



International Federation of Consulting Engineers  
The Global Voice of Consulting Engineers



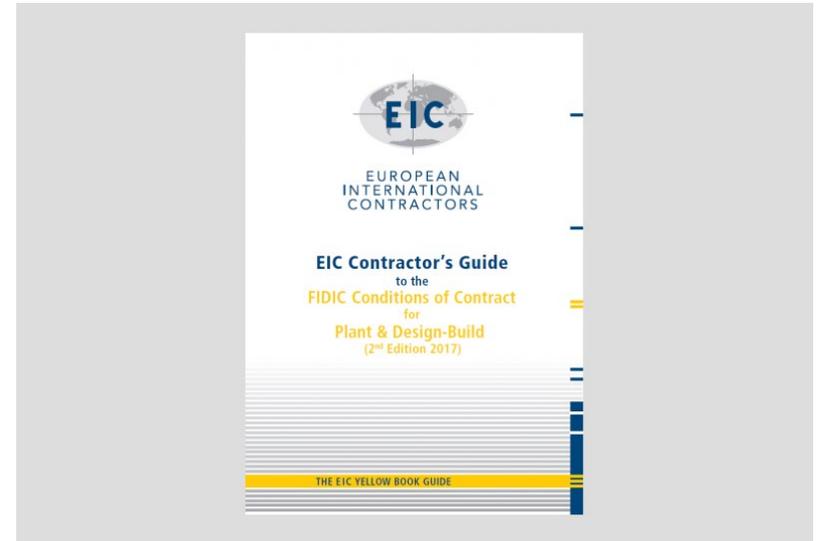


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Dubai, 24-27 February 2020



Launched  
December 2017



Launched  
February 2020





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- Short Title: EIC Contractor's Guide to the FIDIC YB 2nd Edition
- Launched January 2020
- Author: European International Contractors (EIC)





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- EIC GOALS
  - First access / introduction to the YB?
  - Comprehensive Guide from a Contractor's perspective?
  - Update: changes from 1999 to 2017?





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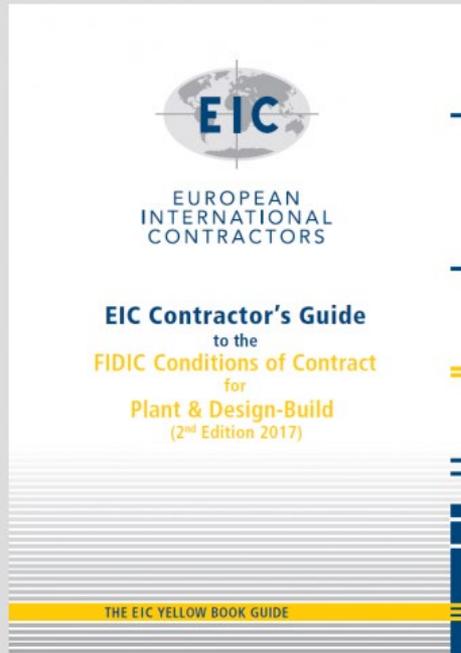
- Foreword
- Acknowledgements
- Executive Summary
  - Progressions
  - Regressions
  - Conclusions
- FIDIC Golden Principles
- Clause by Clause Commentary
  - Clause 1 -21





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- Richard Appuhn (geologist)
- Cameron Beverley (lawyer)
- Stefan Ciufu-Hayward (lawyer)
- Andrea Costanzi (lawyer)
- Jan Decker
- Sonia de la Fuente (lawyer)
- Francois Doré
- Mathias Fabich (Engineer)
- Daan Goedkoop (lawyer)
- Valentina Grippa (lawyer)
- Nabeel Khokar (Engineer)
- Harrie Tak
- Amaury Teillard (lawyer)
  
- Conclusion: A legal view prevails?





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- The Guide provides
- A clause by clause commentary including
  - executive summaries on changes from 1999 to 2017
  - Reference to English case law on FIDIC contracts (Guide at page 46, 47)
- Tables listing Contractor's claims & Employers' claims (Annex 1 & 2)





## Golden Principles

### EIC welcomes FIDIC Golden Principles

EIC deems it necessary to ensure that ... contracts remain recognisable as a FIDIC contract embracing its philosophy and ethos of a balanced risk allocation

**But it seems that the EIC is likely to understand the Golden Principles too narrowly → it does also focus on proper contract administration & management because poor contract management & administration may have adverse effects on the use of FIDIC standard forms as well.**

The EIC Guide welcomes various times the reinforcement of the position that appropriate amendments to the GGC should be made (p. 9, ...)





## General EIC Observations

EIC correctly observes that the new FIDIC wording is **much more prescriptive** than the previous one

It seems as if EIC would have preferred a **more robust and simple wording** while it only exceptionally welcomes prescriptive wording

Unfortunately the Guide does not trade off the advantages against the disadvantages of prescriptive wording by taking in account the effects of clear wording (less interpretation) and the effects of compliance with prescriptive wording (improving record keeping, programming, etc.) which reflects based on best practice.





## Progressions

### ➤ EIC observed the following progressions:

- I. Definitions
- II. Deeming Provisions
- III. Employer's Financial Arrangements
- IV. Fitness for Purpose
- V. Variations
- VI. Claims
- VII. Dispute Avoidance

### ➤ Comments

- I. The order in which definitions are stated is not the only change
- II. Is rejection really a welcomed option?
- III. Everything which facilitates calculation is ok
- IV. YB 1999 definition of ER referred to purpose
- V. More clarity vs. More risk (see Notice requirement in S-C 3.5)
- VI. Reciprocity regarding claims is important
- VII. It seems that Contractors like dispute avoidance → which activities does this include and how does FIDIC support it



## Regressions

### ➤ EIC observed the following regressions:

- I. Notices & Other communications
- II. Employer's Financial Arrangements
- III. Agreement or Determination
- IV. Fitness for purpose for Design
- V. Review by Engineer
- VI. Key Personnel
- VII. Programme
- VIII. EOT
- IX. Claims, Disputes & Arbitration

### ➤ Comments

- I. Triumph of form over substance?
- II. Restrictions vs. clarifications
- III. Determination procedure overly prescriptive, complex & administrative vs. More certainty
- IV. Extension of fitness for purpose to design unusual in most jurisdictions vs. Demand & what shall be the guidance instead?
- V. Shouldn't the aim of the submission of design be a review based on all relevant information?
- VI. Small extension of old wording
- VII. Undeniably proper programming is allowance for costs. Is a programme really a medium for co-operation and planning of Works or is it also a tool for claim management
- VIII. Concurrent delay will continue to cause problems
- IX. Too prescriptive wording requires re-structuring of CA activities



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## EIC View on Engineers

The EIC Guide perceives the Engineer predominantly as an Employer's agent emphasizing that the Contractor is neither privy, nor even usually cognisant, of the terms of the Engineer's contract (EIC Guide, at page 10).

The EIC classifies the newly introduced requirement for a « qualified engineer » as a formality and not only denies the usefulness of this contract provision but also suspects cross hierarchies and dilution of responsibility where large teams are involved.

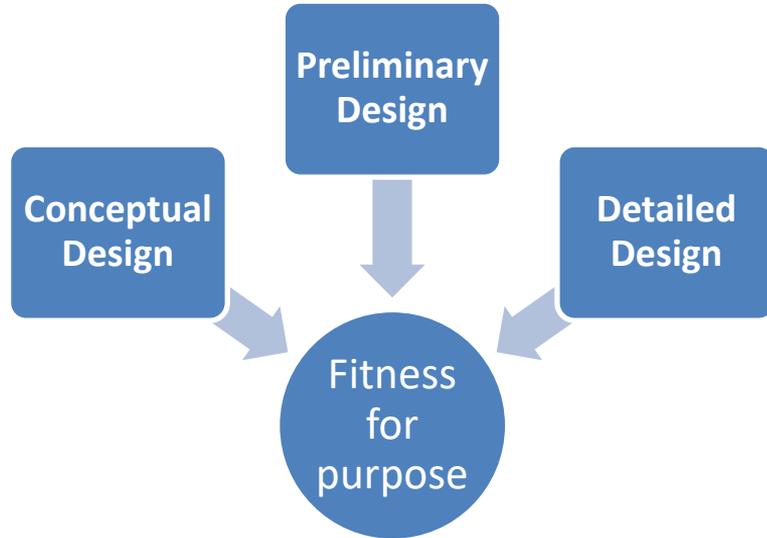
Not surprisingly the EIC Guide comments in a very detailed manner the newly introduced standard to act neutrally which from FIDIC's perspective does merely emphasize the normality and traditional approach as underlined by English case law.

The EIC believes that words like impartiality, neutrality, lack-of-bias are interchangeable words while FIDIC has introduced the word « neutral » consciously and intentionally in order to avoid the term « unbiased ».





## Design & Fitness for purpose



➤ Who is responsible for accuracy of the Employer's Requirements?

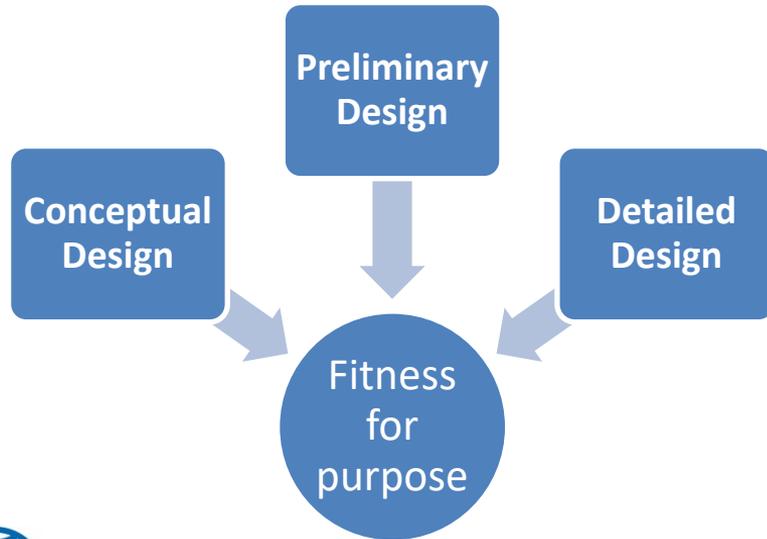
- Contractor
- Employer
- Both



EIC proposes that the Employer should be responsible for the accuracy of the ER!



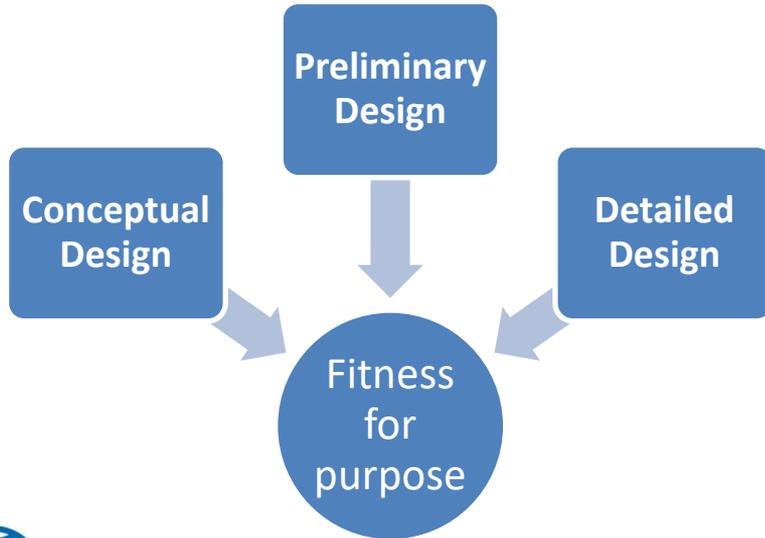
## Design & Fitness for purpose



- Who defines purpose?
- Who can achieve purpose?
- Who is best able to bear it?
- Is fit for purpose insurable?



## Design & Fitness for purpose



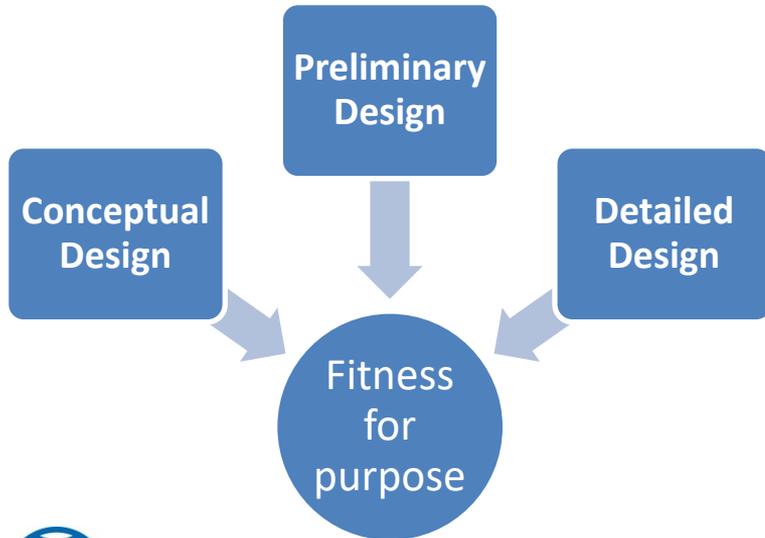
- A fitness for purpose obligation imposes an obligation on the contractor or designer that the works or design will be fit for the purpose for which they were intended, and liability is strict which means that liability will arise regardless of any negligence on the contractor's or designer's part.

## Design & Fitness for purpose

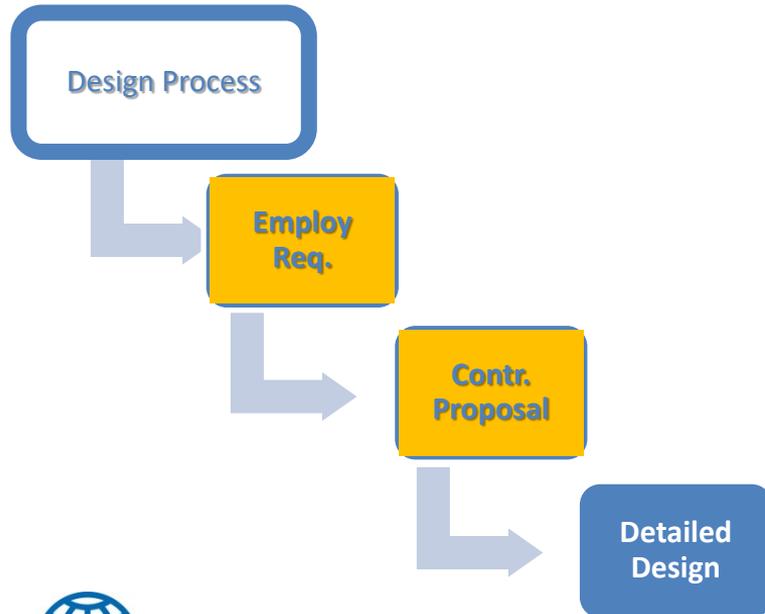
### ➤ Max Abrahamsons' test

A party should bear a construction risk where:

1. It is in his control, i.e., if it comes about it will be due to willful misconduct or lack of reasonable efficiency or care; or
2. He can transfer the risk by insurance and allow for the premium in settling his charges to the other party (or to his other customers) or spread it directly in his prices, and it is most economically beneficial and practicable for the risk to be dealt with in that way; or
3. The preponderant economic benefit of running the risk accrues to him; or
4. To place the risk on him is in the interests of efficiency (which includes planning, incentive, innovation) and the long term health of the construction industry on which that depends; or
5. If the risk eventuates, the loss falls on him in the first instance, and it is not practicable or there is no reason under the above four principles to cause expense and uncertainty, and possibly make mistakes, in trying to transfer the loss to another.



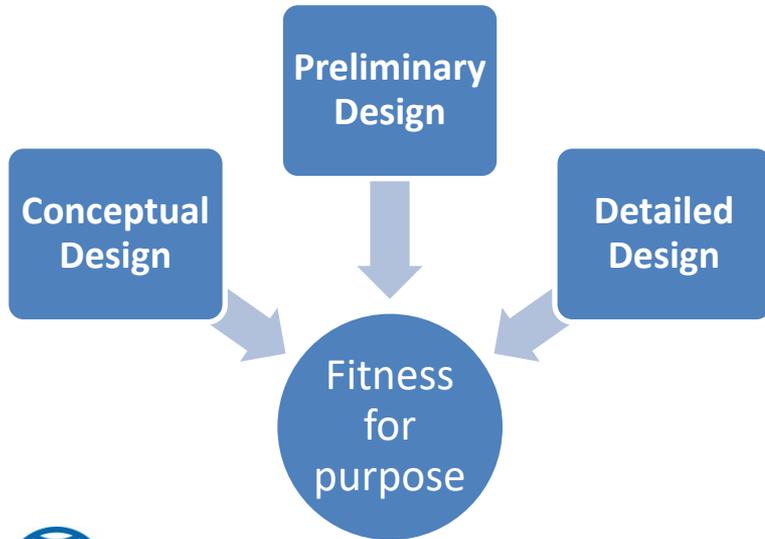
## Design Interface



- EIC Guide correctly advises on design interface and Contractor's responsibility for Employer's Requirements
  - See EIC Guide, at page 23
- In my respectful submission EIC Guide incorrectly states that the Employer should remain responsible for the accuracy of ER – assuming that he is fully responsible for the ER
  - It should be noted that the YB proposes a shared responsibility for the ER while S-C 5.1 SB shows the exclusive Employer's responsibilities in this regard



## Design & Fitness for purpose



- Surprisingly the EIC Guide does not discuss the issue of „ordinary purpose“ (see EIC Guide at page 17)
- The meaning of ordinary purpose should be clear to a contractor who must achieve fitness „for the ordinary purpose“!



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## Payments

I should begin with to note that the EIC Guide is on the Yellow Book whereunder the Accepted Contract Amount is a **lump sum**

The nature of a lump sum entails that interim payments are difficult to evaluate since there is very little information which could help to ascertain the value of work done

The EIC Guide seems to assume that in most cases Schedules of Payments exist which is rarely the case in developing countries; unfortunately the EIC Guide does not discuss the second alternative in S-C 14.4 « estimates »

The EIC Guide correctly emphasizes and welcomes the revised approach in the event of disagreement on certified amounts and the newly introduced right to refer the matter to the Engineer for a **formal determination** and subsequently to the **DAAB**





## Liability

- Contractor is responsible
  - Design, execution & completion of Works
  - Remedy of defects
- Contractor is liable for
  - Breach of contract
  - Damage to property & injury of persons
  - Fitness for purpose
  - Achievement of performance requirements → liquidated damages clause S-C 1.1.63 YB
  - Delay
- **Limitation Clauses:**
  - S-C 8.8, 1.15
- Guide emphasizes
  - S-C 1.15 (f) & (iv) and the limited reference to the first para. of S-C 17.4 protecting Contractors against unlimited liability for fitness for purpose
    - See EIC Guide, at page 53
  - The EIC Guide does not capture the **new** S-C 1.1.63



## Increased contract management workload

EIC GUIDE observes increased workload  
regarding

Programming, Guide at page 29

Similar observations could have been expected in respect of  
Claims' management

Variations

Monthly Reports





## Dispute Resolution

The EIC Guide concentrates on significant modifications in Clause 21 and provides an executive summary of Clause 21

Surprisingly the EIC Guide does not discuss the significant amendments of the General Conditions of DAAB Agreements and the Procedural Rules  
[for instance challenge of DAAB members, correction of mistakes]

Also, it does not advise on the important amendment in Sub-Clause 21.6 regarding cost bearing if a Party failed to cooperate with the other Party in constituting a  
DAAB





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## Miscellaneous

EIC Notes: Incentives for early completion are hidden in Guidance Notes, EIC Guide at page 31

The EIC Guide carefully lists the increased number of determinations at page 14

Annex 1 includes a list of Contractor's claims

Annex 2 includes a list of Employer's « damages » claims (actually cost claims)





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## Observations

The EIC Guide includes very helpful advise on the mangement of the interface between the design input and the Contractor's design → see page 3 – S-C 1.9 and page 23 – S-C 5.1

**The EIC Guide omits to highlight that the 2<sup>nd</sup> edition is more contractor friendly than the first edition regarding**

the evaluation of Variations → Cost plus as default rule

the procedure as to late claims (excused delays) [but see Guide at page 60]

EOT as a result of a Variation → no claim notice [but see Guide at page 39]

The (increased) amount of claims → S-C 1.13, 4.6, 4.15





## Conclusions

- **The EIC Guide is well drafted and balanced.**
  - It definitely meets an important demand in that it shows how Contractors perceive the 2nd edition of the FIDIC Yellow Book and it helps Contractors to understand major differences between the 1st and 2nd edition and a number of other crucial points.
  - However, it is predominantly aimed at putting light on changes 1<sup>st</sup> → 2<sup>nd</sup> Ed.
- The EIC Guide highlights progression and regression from the Contractor's perspective
- The EIC Guide provides helpful and important guidance to Contractors on various matters but surprisingly the chapter on claims is rather slim
- Not surprisingly the EIC denounces the increasing contract administration demands involving more resources and costs
- Surprisingly the EIC Guide calls only little attention to the practical challenges with regard to fitness for purpose and « ordinary purpose »
- Contractors worldwide might have appreciated more practical guidance for instance in respect of
  - how to proceed under Sub-Clause 4.10 – Site Visits ...
  - how to identify « ordinary purpose »
- Practical PI insurance advice would have been welcomed by (smaller) Contractors





## Thank You

- I kindly thank you for your attention.
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