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Boutique Property Law Firm

VIETNAM CONSTRUCTION CONTRACTS

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## INTRODUCTION

This newsletter presents some Legal Issues Relating to Construction Contracts, including (i) types of construction contracts, (ii) potential risks, (iii) differences between Vietnamese law and FIDIC, and (iv) price, payment and payment application.

Respectfully, current legislation of these legal issues are (i) the Law on Construction; (ii) the Law on Bidding; (iii) Civil Codes and (iv) and various FIDIC Contracts. Some regulations are outdated, obsolete, and perhaps desuetude. CNC uses them to compare changes in current regulations and highlight the reasons for the change in law.

For the convenience of our readers this newsletter will (1) address issues that requiring analysis; (2) analyze and evaluate the issues; (3) and in conclusion, offer practical suggestions. Please note, however, that some subsections (due to their characteristics) irrelevancies may be omitted.

Explanation of abbreviations (terms) throughout this newsletter – unless otherwise noted:

<b>TERM</b>	<b>EXPLANATION</b>
<b>PMB</b>	Project Management Board
<b>DAB</b>	Dispute Adjudication Board
<b>SBVN</b>	State Bank of Vietnam
<b>FIDIC</b>	International Federation of Consulting Engineers
<b>USD</b>	United States Dollar/ US Dollar
<b>VND</b>	Vietnam Dong
<b>BXD</b>	Ministry of Construction
<b>Ers</b>	Employer Requirements
<b>VIAC</b>	Vietnam International Arbitration Center
<b>BLDS 2015</b>	Civil Code 2015 No. 91/2015/QH13 enacted by the National Assembly on 24/11/2015
<b>CV 2507</b>	Decision No.2507/BXD VP promulgated by Minister of Construction Ministry on 26/11/2007
<b>CV 2508</b>	Decision No. 2508/BXD-VP promulgated by Minister of Construction Ministry on 26/11/2007
<b>Law on Bidding 2005</b>	Law on bidding No. 61/2005/QH11 on 21/11/2005

TERM	EXPLANATION
<b>Law on Construction 2003</b>	Law on Construction No. 76/2003/QH11 on 26/11/2003 enacted by the National Assembly
<b>Law on Construction 2014</b>	Law on construction No. 50/2014/QH13 on 18/11/2014 enacted by the National Assembly
<b>Law on Bidding 2013</b>	Law on bidding 43/2013/QH13 on 26/11/2013 enacted by the National Assembly
<b>Law on Commercial 2005</b>	Law on Commercial No. 36/2005/QH11 on 14/06/2005 enacted by the National Assembly
<b>Decree 48/2010</b>	Decree 48/2010/NĐ-CP promulgated by Government dated on 07/05/2010 about contracts in construction.
<b>FIDIC Contract</b>	Contracts/contract conditions introduced by FIDIC applicable in construction.
<b>Red Book 1999</b>	Conditions of Contract for Building and Engineering Works designed by the Employer
<b>Yellow Book 1999</b>	Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Works and for Building and Engineering Works designed by the Contractor
<b>Silver Book 1999 -or- EPC/Turnkey</b>	Conditions of Contract for EPC/Turnkey Projects
<b>Green Book</b>	Short Form Contracts
<b>FIDIC Pink Book</b>	MDB Harmonized Edition of the Red Book, including editions 2005 2006 and/or current version 2010

## I. CONSTRUCTION CONTRACTS

### 1. Nature of Construction Contracts

Defining the nature of contracts provides readers with the legal aspects governing the types of contracts. In Vietnam, contracts in the field of construction (hereinafter referred to as “construction contracts”) are basically a civil contract<sup>2</sup>. This means that commencement and performance of such contracts are based on the Civil Code of 2015 and guiding documents.

When entering into and performing a construction contract, parties must pay particular attention to the conditions of construction and adhere to Construction Law of 2014 as well as the relative guiding documents such as the capacity of contractors; prioritizing domestic subcontractor selections; consistency among various packages; *pacta sunt servanda* based on the spirit of good-faith, cooperation, and legal<sup>3</sup> compliance.

Therefore, the Law on Commercial 2005 will not be directly cited and applied for issues arising from construction contracts with the exception that (i) such issues are not regulated by two of the aforementioned legal resources; (ii) Commercial Law 2005 is referred to as directly applied legal norms.

### 2. Timing is Essential

Construction is considered the first and foremost activity in understanding, operation, management, and use of a project. Therefore, Employers (and their Engineers) often require Contractors to complete the Work or Projects within a specified period of time. Failure to meet deadlines can and will result in dangerous consequences including loss and damages due to prolongation, increase in overhead and construction, third party claims etc.

With the exception of specific cases, small scale, or low-cost investment projects, all projects are based on long-term construction contracts. In many circumstances, it takes years to complete a project due to a myriad of reasons.

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<sup>2</sup> Refer to Decree 37/2015/NĐ-CP, Article 2.1; Decree 48/2010/NĐ-CP, Article 2.1.

<sup>3</sup> See more in Decree 37/2015/NĐ-CP, Article 4; Decree 48/2010/NĐ-CP, Article 4; Construction Law No.50/2014/QH13, Article 138.

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Normally, the prolonging of a construction contract term tends to cause a change in the context compared to that of the date of signing, including changes in legislation, financial arrangements, pricing and personnel, etc. of all relative parties. These factors are the major reasons for risks which are outlined in Section II below.

Apart from the nature of the long-term construction contracts, there are provisions under a contract that entitles contractors to an extension of time for completion, including<sup>4</sup>:

- Extensions due to the fault of the Contractor - lack of capability and experience, bankruptcy, breach of safety regulations, etc.
- Delays in performing other packages/contracts under the project
- Variations of work
- Climate adversities
- Delays or disruptions cause by authorities
- Unavoidable or unforeseeable circumstances
- Employers at default under contract (delays in payment, confirmation/acceptance and access to or possession of site, etc.)

Depending on each situation, lawyers should consider the circumstances that the Employers or the Contractors may be dealing with for which an extension of time for completion is entitled.

It is worth noting that among adjustments for change in cost, the determination of a circumstance or an event causing delay in construction is cumbersome and challenging issue. Apart from each party's acknowledgement to extend the time for completion and legislation etc., the requirements of (i) time-bar for a claim notice to an extension time; (ii) particular justification for project completion; (iii) and the Contractor's contemporary records all play an important role. A late notice of a claim may result in an objection to that claim by the Employer or by the Tribunals (arbitrators or court).

Any extension of time for completion which is granted shall impact the cost of contract performance, including but not limited to indirect costs, direct costs, and reasonable profit. In many cases, the pursuit of an extension of time can help the Contractor release

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<sup>4</sup> Article 8.4, 8.5, FIDIC Red Book 1999.

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its liability from the delay, but entitle the Contractor to appropriate compensation for such an extension. On the contrary, the Employer is entitled to a claim for delayed damages, and/or denied other liabilities due to an extension of time, adjustment of contract price in Section II.2 below is an example as long as he reasonably rejects such claim.

In all reality, the direct conflict of interest between parties, concerning the extension of time for completion, is attributable to various disputes. It is worth mentioning these important issues while simultaneously advising clients in order to hold lawyers harmless against legal risk.

To determine whether an event or a circumstance causing any delay in the performance of a contract or not, lawyers should seek advice from delay experts who are specialized in schedule analyses to investigate problems in an exact, detailed, and dynamic way. The questions a lawyer might raise to assess whether a request for extension of time for completion are eligible include:

- Are there any situations or events causing an extension of time for completion?
- Are there any notices or particulars that have been timely submitted by the Contractor to the Employer?
- Are there any necessary remedies, mitigation that have been taken by the Contractor to overcome the negative influences of those situations or events?
- Are there any concurrent delays (simultaneous delays caused by the Contractor affecting the schedule and completion date)?
- Are there any circumstances or events that could enable the Contractor to accelerate the rate of progress to compensate for such delays?

In conclusion, under a construction contract, it is obvious that time is of the essence. This is a principle concept and will be the key toward solving any issues that arise.

### **3. No Specified Regulation Applicable to Private Funded Construction Contract<sup>5</sup>**

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<sup>5</sup> In this chapter, the phrase “privately funded” means all the cases which are not included or subject of Article of Article 1, Decree 37/2015/NĐ-CP or Article 1, Article 2, Law on bidding No.43/2013/QH13.



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Vietnamese law changes at a fast pace to meet the increasing and ever-changing demand of practitioners in the construction industry. However, inadequate regulations concerning private-funded project contracts do exist. In particular, Vietnamese law focuses on state funded construction contracts such as<sup>6</sup> (i) construction projects by regulatory agencies, political organizations, socio-political organizations, political-social-occupational organizations, socio-occupational organizations, social organizations and units affiliated to People's armed forces and public service providers; (ii) construction projects by state-owned enterprises; (iii) construction projects not mentioned above but using state capital, state-owned enterprise capital from 30-percent or more or less than 30- percent to over VND 500 billion of total project investment capital. Application of Decree No. 37/2015 or Law on Bidding No. 43/2013 for privately funded projects is recommended or for reference only.<sup>7</sup>

In the meantime, Civil Code 2015 seems to keep silent on construction contracts. Moreover, while Construction Contract 2014 only has a few regulations governing construction contracts (from article 138 to article 147), none of those explicitly promulgate construction contracts of privately funded project.

The inadequate regulations concerning the construction contracts of privately funded projects have caused employers, contractors, engineers, contract manager and/or lawyers, to have difficulties in both practical application and mitigation of risk. When entering into and performing a contract of privately funded projects, parties will only have three options to choose a law which are (i) application of analogy of law; (ii) application of agreement between parties; and (iii) using templates of a third party which are agreed upon by the parties, for example regulations of construction contracts introduced by FIDIC. Each method has its own potential risks.

Firstly, the choice of analogy of law means that the regulations of Decree No. 37/2015 or Circular 09/2016/TT-BXD or the previous laws, express or implied, shall be applied to the construction contracts concluded. In addition to the stiffness of state budget management

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<sup>6</sup> See more in Article 1, Decree No. 37/2015/ND-CP or Article 1, Article 2, Law on bidding No. 43/2013/QH13.

<sup>7</sup> See more in Article 1, Decree No. 37/2015 ND-CP; Article 1, Decree No.48/2010/ND-CP; Article 1, Circular No.09/2016/TT-BXD; Article 1, Circular No.09/2011/TT-BXD; Article 2, Law on Bidding 2013.

as stated in Section 3.4 below, the application of construction contract regulations concerning privately funded projects results in a risk for the contractors to be pushed into a lower position than the employers. On the contrary, the employers often apply those regulations in such an adverse way that it leads to a breach of contract by the contractor and in an increase in the contractual cost.

Additionally, determining the true meaning of the decree and the circular as well as their positions in the corresponding context, will be difficult for the contracting parties, because in certain circumstances, they are unable (if not impossible) to define the corresponding meanings of these legal texts to their positions under the construction contract.

Therefore, unless otherwise agreed upon by the parties, the application of Decree No.37/2015 can easily cause disagreements or disputes. This becomes more complicated when contracting parties wrongly consider themselves to be subject to the regulations listed above.

Secondly, there is the choice of agreement between parties. It means that parties themselves make the request(s), the proposal according to their own circumstances, and consider agreement with each other if the requests and proposals appear to be suitable.

This method presents various risks: an (i) inability to anticipate issues that can happen in a construction contract such as contract structure issues, order of priority, operational regulations, and selection of dispute resolution methods etc.; (ii) the absence of mechanisms or sanctions sufficient and feasible to apply to problems in which the parties are facing up to; or (iii) the application of such rules occurs in many variations which creates inconsistency in how to understand and apply the law to the specific similar problems etc. In general, the application of the provisions agreed upon by the parties will create a lack of synchronization and will cause inconsistencies between different contracts, different regions of the country and different subjects

Thirdly, there is the method of using templates of a third-party that are acknowledged by the contracting parties, for example the provisions of the construction contract introduced by FIDIC. As for this method, the contents invoked by the parties can overcome the inadequacies of the two aforementioned methods. Indeed, these are sample provisions that are broadly disseminated and used by many subjects as well as in many countries.

However, the parties of the contract will encounter other difficulties, for instance (i) the difference between civil law and common law systems; (ii) the differences or inconsistencies in approaches adopted by the Vietnamese Civil Code pertaining to contracts and templates, for example, FIDIC; (iii) inadequate understanding of provisions of templates resulting in inaccurate application; and (iv) the difference between parties' approaches to the same provisions.

In conclusion:

- The first question that lawyers should raise to their clients is whether the construction contract they are entering into uses the state budget. With the exception of cases in which the parties are required to apply the provisions of Decree 37/2015, Law on Tender No. 43 as mentioned above, not all subjects are subjected to such regulations for construction contracts. Whether or not the clients use a method like the regulations or the provisions of the templates, lawyers should explain and adjust it to suit the reality, scenarios, and circumstances in order to find the most suitable solution for their clients.
- In due course, the introduction of one or more contracts or templates in the construction field is not necessarily only for state funded projects, but also for private ones. On the contrary, it is recommended to introduce the templates for private funded construction contracts and propose or require other factors to be used for state-owned construction contracts.

#### **4. A Lot of Legal Sources Can Be Used**

As stated in Section 1, the contractual relationship is governed by two important legislative sources, the Civil Code 2015 and the Construction Law 2014. However, due to the specific nature of the construction field which is the participation of many service providers, there are normally more than one construction organization (contractor) capable, competent, experienced, and affordable to handle the task/services proposed by the employer. Therefore, to select the most competitive construction organization (in terms of capacity, price, time, finance etc.), employers usually organize bidding to select contractors. This can be considered as one of the most important reasons for the fact that the signing of

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construction contracts is also governed by many other sources of law, especially the Law on Bidding and its guiding documents.

The issue will become simpler if both the application of the Construction Law of 2014 and the application of the Law on Bidding of 2013 have different limitations and scope of application. In practice, however, the rules and application of these two sources of law overlap in many areas. Consequently, clients, especially those who are subject to the contract or have a contractual relationship with the state, should determine the law applicable to their own situation to avoid the following case<sup>8</sup>:

- 4.1. Whether a construction contract may be signed by either party (a member) of the joint name on behalf of the joint name

The Construction Law of 2014 stipulates *“If the contractor is a joint name of contractors, there must be a joint name agreement. The partners shall sign and affix their seals (if any) to the construction contract, unless otherwise agreed to by the parties”*<sup>9</sup> (emphasis added).

Whereas, in accordance with the Law on Bidding of 2013 *“... For joint name contractors, all contractors under a joint name must directly sign and affix their seal (if any) on the written contract. Any contract signed between parties must comply with the provisions of this Law and other provisions of relevant legislation.”*<sup>10</sup> (emphasis added).

This raises the question of whether the contractors of a joint-name can authorize one of its members to sign a construction contract (*the mandate is considered legitimate and in accordance with the provisions of the civil law*). In the Construction Law of 2014, the contractor can propose a mandate for the employers entitlement to sign the contract on behalf of the joint name. However, according to the Law on Bidding of 2013, the mandate is NOT possible.

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<sup>8</sup> Suppose that the case falls under the scope of the Law on Bidding and the Law on Construction.

<sup>9</sup> See Article 138.2(d), Construction Law 2014.

<sup>10</sup> See Article 65.1, Law on Bidding 2013.

In many cases, especially cases where there are international bidding or projects of infrastructure with international contractors participating in the form of a joint-venture, contractors often authorize a contractor in the partnership to sign on behalf of the others. While other people, especially employers who fall under the subject and scope of the Law on Bidding, refuse to do so due to (i) the likelihood of the violation of some provisions of the Law on Bidding; or (ii) consideration of some risks when one of the contractors in the joint-venture evades their reliability when the joint-venture breaches the contract.<sup>11</sup>

An overlap of the scope of application of the laws applicable to construction contracts can be resolved if (i) the Law on Bidding of 2013 does not address issues relating to construction contracts, but allows these issues to become subject to the Construction Law of 2014; or if (ii) the Law on Bidding only regulates contracts on procurement and provision of services which falls outside the scope of the Construction Law. In this case, the Law on Construction of 2014 does not regulate contracts that are not essentially construction contracts, by nature, as set forth in Section III.3.2; or (iii) the Law on Bidding only regulates the Letter of Acceptance, i.e. the method by which a Letter of Acceptance is issued. The Construction Law of 2014 will regulate matters relating to the establishment and performance of a construction contract, including the content, form and manner in which a Letter of Acceptance is issued.

In reality, the lack of detailed regulations for the Letter of Acceptance also leads to many cases in which the parties refuse to invoke the Letter of Acceptance as a construction contract. Their refusal can be explained by the fact that (i) the parties still believe that a contract must be titled “contract,” “contract agreement,” or something similar. Meanwhile, in accordance with Vietnamese law, the nature of the contract is only an agreement between at least two parties that establishes the

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<sup>11</sup> In practice, many contractors use capacities of each other to meet the requirements of the bidding documents but are not directly involved in the performance of the contract. When the joint name does not meet the requirements of the signed construction contract, the other members of the joint name shall evade their responsibility or provide evidence to prove that the scope of work that the member undertakes is very small or non-existent in the contract and has been excluded by other members of the joint name.

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rights and obligations among parties<sup>12</sup>; and (ii) the Letter of Acceptance itself does not address issues that could easily establish rights and obligations of the parties. Meanwhile, when a party has issued a document confirming the approval of an entire proposal (without additional recommendations), it will form a contract between parties<sup>13</sup>.

Therefore, it can be basically understood that whether the contract is signed by a member of the joint name or not, it does not affect (i) the value and legality of the construction contract and (ii) the rights of the employer to request that the joint-named contractor(s) shall be held responsible for the work that the jointly named (or a member) has failed to fulfill.

- 4.2. There aren't any laws concerning bidding that can be applied to privately funded projects. Similarly, in the construction field, there are no current bidding laws for privately funded projects in Vietnam. Therefore, bidding activities for privately funded projects are left open, and the risks for private bidding may also occur in the same way as the risks to construction contracts of privately funded projects.

Referring to Section 1.3 above helps clients get the necessary considerations to prevent problems that may arise from private bids and construction contracts of privately funded projects. They need to find the appropriate legal solutions based on these considerations.

In addition, the need to apply general regulations for all bidding activities is urgent in Vietnam, including those of state and privately funded factors. The reference to bidding procedures in countries around the world, in redevelopment banks such as the Asian Development Bank, the World Bank, etc. or in prestigious consulting organizations will help Vietnam to advance and allow Vietnam to achieve a result toward development equal to that of the rest of the world and to avoid any shortcomings or inadequacies of actual implementation.

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<sup>12</sup> See Article 385, Civil Code 2015.

<sup>13</sup> See Article 393, Civil Code 2015.

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## II. MAJOR RISKS ARISING FROM THE CONSTRUCTION PROCESS

### 1. Risk of Change in Exchange Rate

Changes in the exchange rate is an inherent risk to construction contracts, especially construction contracts using two or more currencies or construction contracts using a single currency converted from a foreign currency. Ten years prior, from 2007 to 2016, VND tended to decrease in value compared to the world's strongest currencies - especially USD<sup>14</sup>. The VND depreciated by almost 40-percent against the USD between 2007 (16,061VND/USD) and 2016 (22,450VND/USD). Therefore, underestimating or mitigating attention to changes in exchange rates in construction contracts will lead to considerable risks.

With respect to short-term performance contracts, small value changes in exchange rates of currency will not be a serious risk. However, a direct or indirect increase of investment capital for projects will affect most contracts that are of high value, have long-term performance, or contain various types of foreign currency. One or all parties must have a mechanism to allocate risk arising from a change in exchange rates.

In reality, and with respect to construction contracts, clients should pay special attention to the following common cases of exchange rate changes:

- An exchange rate between VND and another foreign currency for payment should be fixed during the construction stage regardless of the high likelihood of fluctuations of exchange rate between VND and the foreign currency. When losses occur, the contractor may appeal to the employer for compensation or to minimize the damage caused by such fluctuation;
- Buying, selling or averaging the exchange rate (buy-sell) used to convert the currencies for payment shall not be set in advance;
- There is no direct exchange rate between a foreign currency used for bidding and one used for payment. Foreign currency used for bidding must be converted into VND (or an intermediary currency) and then the VND can be converted into a third currency;

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<sup>14</sup> See Table 6. II – 1.1. Change in exchange rate of VND and USD.

In some cases, in response to exchange rate fluctuation or the world economic circumstances that may have a significant impact on the economy, the authorities, especially the SBVN, often decide to widen the margins of exchange rate adjustments as they have done in the recent past. When such a situation occurs, one of the parties may request a price adjustment to the terms of the contract due to a change in the law. However, the question of whether the authority's decision(s) will require other parties to adjust the contract price due to changes in the law is still unknown.

In conclusion, it can be inferred that the risks arising from exchange rates in construction contracts are permanent and can be influenced by many factors. Therefore, when clients participate in specific construction contracts, lawyers should have a very careful and multidimensional view. They should mention the important issues clients to avoid such cases. The failure to mention these problems specifically, affects the performance of construction contracts, potentially causes disputes, and increases the investment costs of the project.

## **2. Risks of Change in Costs (Price Change)**

Apart from changes in the exchange rate as mentioned above, the risk from cost changes (price changes) is also an important issue in construction contracts. With the exception of lump-sum, contracts that do not allow price adjustments or fixed-price construction contracts, other contracts allow contract prices to be adjusted when construction costs are inflated beyond the expected extent.

In construction contracts, the objectives of price adjustments encourage competitive bidding which balances the employer's and the contractor's interests when price fluctuations go beyond their initial intention.

From a legal perspective, the approach taken in Vietnam since 2007 - for the regulations' application on cost changes in construction contracts – it is relatively suitable and in accordance with the FIDIC contract. In particular the Ministry of Construction used a



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formula similar to the FIDIC Red Book 1999 and the FIDIC Yellow Book 1999<sup>15</sup> in the guiding document about the use of price adjustments.

However, since the adjustment of the contract price due to a change in cost is a type of agreement between parties, the contract price can be adjusted if an event, situation or time anticipated by the parties occurs. Adjusting the contract price due to cost changes is completely different from adjusting the contract price due to changes in the law. For example, some construction contracts may be subject to price changes when the Circular 09/2008/TT-BXD was issued.

The adjustment of the contract price, by change of law (required by law), is done to reflect the actual situation. It should be complied with by the parties. Non-compliance with the law may be considered as a breach of contract. In contrast, as the change in the contract price is due to a change in the law, the price adjustment method, the scope of application, etc. must comply with the provisions given. These two factors clarify the difference between contract price adjustments due to cost changes and those due to changes in the law.

Finally, as aforementioned in Section I.2, the performance time of the construction contract is often enduring. Therefore, it is difficult for the parties to assess the extent in which the price affects the performance of the contract. Concerning contract price adjustments due to cost changes, a combination of factors such as quantity of work, the time of inflation, etc., leads to a need for special considerations and clarifications of the following questions:

- Whether there is, or is not, a price adjustment for a contract due to changes in costs;
- If there is, whether the price adjustment is for all factors constituting the contract price (labor, machinery, petrol, etc.) or only for a certain number of materials;
- When the price spiral is allowed;
- Whether or not, the base date has already been set or not;

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<sup>15</sup> See Appendix 5 attached to Circular No. 06/2007/TT-BXD; Article 13.7, Red Book 1999, Article 13.8 Yellow Book 1999.

- From which kind of sources (General Statistics Office, Department of Construction, or other agencies), the indicators (weighting) or coefficients for adjusting price spiral are derived from;
- If the contractor has the right to request contract price adjustment, when he is at fault which leads to the extension of the contract performance period;

### 3. Risk arising from the Employer's Inability to Control the Contractor's Capacity

Due to the complexity and specificity of the construction sector, employers should be especially concerned with the contractor's capacity. The capacity of the contractor encompasses the contractor's experience: his/her number of successfully finalized projects, particularly the projects like the current project. It also includes the contractor's capacity to relate to financial ability; his/her understanding of laws, environment, culture, weather, climate and hydrology of Vietnam; his/her managerial and executive capacity, etc.

When the contractor fails to guarantee his/her capacity during the project (in any aspect), there is a likelihood that the project/package will be delayed and/or the project costs will be increased. The contract termination of the party in breach and his/her liability for the damages incurred is only a temporary solution. Indeed, in many cases, the costs, damages, losses and liability arising out of the termination of the contract are even more valuable than the price of the breached contract.

The contractor may incur costs resulting from contract termination. They may include: (i) termination costs with the breaching contractors; (ii) costs associated with securing alternative contractors; (iii) costs for the payment of other contractors to carry out unfinished work, including the costs of incurring spiraling prices until a new contractor is chosen; (iv) project management costs; (v) interest expenses; (vi) insurance costs; (vii) profit losses resulting from delays of putting the project/package into use; (viii) cost associated with the employer's responsibilities to a third party etc.

Hence, as for a construction contract, it is necessary for the employer to be empowered to take measures to immediately replace the contractor or require him to take remedial actions. The measures include, but are not limited to, (i) the right to require the bank, financial institution or parent company of the contractor, to perform guarantee

obligations pledged to the employer; (ii) the right to terminate the contract with the contractor and require remaining work to be transferred to another contractor; (iii) the right to require the employer to directly compensate the remaining members in the partnership or payment to the main subcontractor of the work; (iv) the right to require contractors to take corrective measures such as replacing inadequate manpower; financial arrangements for the project; or open a bank account that is used only for the purpose of implementing the project, etc.

In practice, however, the risk of inability to control the contractor's capacity still exists, especially for projects in which termination is subject to approval (or ratification) of the investment decision-making body; or to approval of a funding agency etc. In such cases, the objectives of the project may be broken completely.

Summarily, when clients participate in contracts of great value or concerning complex technology, or in which the contractor has the same nationality as the sponsor (funding agency), or in the firstly implemented project etc., they should ask for advice on preventive measures - especially for the following types of issues:

- The full nature of the contract price shall be deemed to include the obligations of the contractor in accordance with the contract;
- Contractor's presentation and warranty issues on (i) the legal status of the partnership and the change of status of the partnership's members, if any; (ii) the availability of the site data (as it is); (iii) the understanding of the contract requirements, including drawings, technical specifications or other requirements of the employer;
- The right of the employer to terminate the contract, confiscate the insurance, and/or other means of protecting his/her interests;
- Employer's right to delay payment until the performance of one or more of the principal obligations of the contractor after the employer's request.

#### 4. Risks arising from the Selection Of EPC/Turnkey Contracts

Silver Book 1999 (EPC/Turnkey) is only recommended for (i) electrical and technical works of civil works; (ii) energy projects such as thermal power, hydropower, nuclear power; (iii)

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chemical plants, petrochemical refineries; (iv) types of projects that require unity of assembly line, technology equipment.<sup>16</sup>

One of the characteristics of EPC/Turnkey is the allocation of almost all the risks to the contractor, and his/her rights to carry out the projects without any intervention of the employer or the employer's representatives. In the Silver Book 1999 - EPC/Turnkey introduced by FIDIC, contrary to the Red Book 1999 or Yellow Book 1999, the Engineer is normally not functional, but replaced by the management of the employer<sup>17</sup>. If the Employers or the Contractors lack attention to these specific features, they will both face the following potential risks:

- An increase of the Contractor's obligations when the project does not fall under the circumstances recommended by the Silver Book 1999 - EPC/Turnkey contract condition;
- An increase in the costs for employers when the project does not fall under the circumstances recommended EPC/Turnkey contract;
- An improper exercise of the employer and contractor's rights and obligations during performance of a contract;
- An allocation of payment schedules/methods inconsistent with the requirements of the EPC/Turnkey contract;
- An inability to anticipate all problems at the Employer's Request; or
- The test, accreditation, and trial results do not meet the requirements of the employer - including failure to meet product requirements when marketed.

The issues mentioned above for the employer, contractor, and the customer require a dynamic perspective of (i) the scope of application of the EPC/Turnkey contract conditions; (ii) the adherence to the principles of the EPC/Turnkey contract conditions; and (iii) the settlement mechanisms of any disputes that may arise.

## 5. Risks arising from Decentralization of Construction Project Management

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<sup>16</sup> See more at [www.fidic.org/](http://www.fidic.org/)

<sup>17</sup> See Article 3, FIDIC Silver Book 1999.

In Vietnam, the decentralization of the of construction project management for state funded projects or projects involving state administrative bodies is complicated. In many cases, management decentralization of such investment projects leads to serious consequences for bidding, project management, and management of construction contracts

The first consequence is a mismatch between the need for administrative management, the protection of the state budget, and the need for profit maximization of the contractor.

Normally, to implement a construction investment project, a PMB will be established and named in the contract as the employer. Pursuant to the law, the PMB, including those with expertise, capacity, and experience in the construction sector to implement the project<sup>18</sup>, are established as a legal entity and have their own seal and account, Thus, the PMBs can make their own decisions and are responsible for the decisions on the signed construction contract. However, the operational mechanism of the PMB is governed by many state administrative management factors and in essence, the PMU is not a competent authority - authority depends on other subjects especially people who decide to invest.

Table 6.II. – 5.1 is an example of the competent authorities involved in developing a subway project in Vietnam.

In many cases, the decentralization of the management of a construction investment projects leads to the following scenario. On one hand, an organization, the employer of the project, who is unprofessional, lacks authority to develop a project and carries out procedural and administrative burdens. On the other hand, an organization providing construction services, a contractor, who is mindful of maximizing benefits is the ultimate goal. This is the reason why, in Vietnam, most employers of infrastructure projects have been criticized or sued by contractors in arbitration or court and this increases the implementation costs of the project.

Secondly, it is difficult to choose applicable legal sources, because it is impossible to determine exactly what is the meaning of the term "state budget". Presently in Vietnam, there are many regulations that refer to the phrase "state budget" or "use of state

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<sup>18</sup> See Article 45, Construction Law 2003; Article 33, Article 34 Decision 12/2009; Article 63, Article 64, Construction Law 2014.

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budget"<sup>19</sup>. The Law on Bidding 2013, Article 4.44 defines in its provisions what is considered state capital, including the state budget funds and other types of capital that are considered of the state.

However, there is no rule that clarifies the content and scope of the state budget, including what kind of capital it is and where it comes from.

Accurate determination of the state budget will help identify the legal sources applicable to the contractual relationship of the parties involved. As stated in Section I.3, there is a clear distinction between construction contracts of state funded projects and privately funded projects. When parties do not identify whether a project is funded by the state budget or not, or if the subject of the project is subject to Decree 37/2015 (or other documents), the likelihood of disputes arises. In the cases where (i) a party is not subject to the provisions of the construction law, in particular Decree No.37/2015/NĐ-CP, but insists on applying or requesting the other party to apply such provision; or where (ii) one party is subject to Decree No. 37/2015/NĐ-CP but doesn't apply it, there would be a breach of contractual provisions, of the relevant legislations, and, in some cases, the parties may even be subject to criminal liability for willfully violating regulations.

In fact, there have been many disputes among parties and one of the issues that parties are specifically concerned about is whether it is possible to apply the regulations of Vietnamese law on bidding, construction contract of state funded projects to their contract. There are several questions that need to be answered to effectively resolve these concerns: (i) Where should the portion of the state budget be determined in the organization of the employer or of the contractor or in the total investment capital of the project? (ii) what kind of capital can be considered state budget? Whether or not the capital borrowed by the employer, from development banks, capital guaranteed by the state, etc., may or may not be considered as state budget? (iii) What is the scope of the state budget: the whole project or just a particular package? etc.

Therefore, when clients conclude construction contracts, they should pay special attention to questions such as:

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<sup>19</sup> See Construction Law 2014, Law on Bidding 2013, Law on State investment 2014.

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- Whether the project, package or subjects of contract are subject, or not, to Decree 37/2015;
  - Whether the parties choose to apply, or not, Decree No. 37/2015;
  - Whether this application is automatic (statutory) or based on spirit of law;
  - Whether there is evidence, or not, that this application is in accordance with the provisions of the law;
  - What kinds of the state budget funds are used by the employer or contractor and if they constitute a part or all the projects/packages that the parties are implementing.

### **III. REGULATION ON CONSTRUCTION CONTRACTS UNDER VIETNAMESE LAW AND FIDIC**

#### **1. Vietnam's Historical Law Changes and FIDIC Construction Contracts**

Until Decree 99/2007 and Circular 06/2007/TT-BXD were introduced, Vietnamese law on construction contracts was relatively unclear and rudimentary. The most important milestones of this time are the publication by the Ministry of Construction of two important decisions to guide the construction contract: (i) Decision 2507/QD-BXD: Guiding the contract of engineering; and (ii) Decision 2508/QD-BXD: Guiding construction contracts.

To mold the provisions on construction contracts, Decree 48/2010 and Circular 09/2011/TT-BXD were introduced and specifically address the form of construction contracts, separating it from any problems of construction project management.

After the Construction Law of 2014 came into effect, the Government and Ministry of Construction inherited the previous regulations on construction contracts to issue Decree 37/2015 and the latest Circular 09/2016/TT-BXD which details construction contracts.

Undeniably, Vietnam has made efforts to improve the law by separating the various aspects of the operation for specific adjustment. However, it is clear that the promulgation of construction contracts has two of the following characteristics: (i) inheritance between Decree 48/2010, Circular 09/2011/TT-BXD and Decree 37/2015 and Circular 09/2016/TT-BXD; and (ii) A setback between the "new" decrees and circulars and the Decision 2507 and Decision 2508, especially for matters such as (i) the extent of contract's which is

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reflected in the length of the template; (ii) the nominated sub-contractor contract; (iii) the validity of the contract; (iv) the structure of the contract, etc.

Meanwhile, since inception of the 1957 edition, FIDIC has continuously undergone updates, revisions or amendments; and introduced new editions of construction contracts. If the template of construction contract for traditional construction (Red Book 1987) introduced 72 different clauses, some of them show the complexity and the inappropriate content and structure of FIDIC contracts at that time<sup>20</sup>. Meanwhile, when 1999 FIDIC's edition was issued, the contract structure was simplified and arranged in a scientific, easy-to-follow<sup>21</sup> and accessible sequence. Accordingly, the standard structure of a FIDIC contract consists of the following groups:

- Group 1: General provisions, including 1 clause.
- Group 2: Provisions depending on the subject, including 4 articles, arranged in order from the Employer, the Engineer, the contractor to the nominated sub-contractor.
- Group 3: Provisions on preparation for the commencement of work, the execution and the completion, including 6 articles, arranged in scientific order, from people, materials, equipment, constructions, the completion to the guarantee.
- Group 4: Provisions on Contract costs, including 3 items arranged in a scientific order, from measurement, contract price to payment.
- Group 5: Provisions on the right to suspension and termination of the contract, including two articles arranged from the employer to the contractor.
- Group 6: Other provisions, including 3 articles arranged in order of risk, risk division and insurance.
- Group 7: Provisions on complaints and dispute settlement, including 1 article.

Clients may consider the structured arrangement, as well as the order of FIDIC contract terms to be able to provide an appropriate structure for their construction contract and,

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<sup>20</sup> Refer to Annex 6.III – 1.1 [Provisions of FIDIC Contract 1987]

<sup>21</sup> Refer to Annex 6.III – 1.2 [Provisions of FIDIC Contract 1999]



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avoid repetition, duplication or lack of any important elements of a construction contract, especially those of great value.

## 2. The Similarities between Vietnam's Construction Contract Law and FIDIC Contracts

In addition to the differences between construction contracts under Vietnamese law and the FIDIC contracts as discussed below, it is generally recognized that Vietnam has made significant efforts consistent with the international convention with respect to construction contracts, especially the FIDIC contract. These efforts are inevitable in many aspects that will be considered below.

### 2.1. The Structure and the Content of Contracts

Despite being a backward step compared to the Decision 2507 and 2508, the creation, in Vietnam, in recent years, of compulsory templates for construction contracts, has some positives and similarities with the FIDIC Contract. In particular, the latest published construction contract template has 25 clauses and some of them correspond to the FIDIC Red Book 1999. Details of similarities between contract templates attached to Circular 09/2016/TT-BXD compared and the Red Book 1999 are shown in Table 6.III - 2.1.1.

Likewise, Vietnam has also begun to distinguish in construction contract between operation method of particular and general conditions. This shows that Vietnam has a better understanding of the importance of general and particular regulations, and the functions, roles and positions in the contract of other documents that are not merely the document named as a contractual agreement. Accordingly, it is essential that clients understand the structure of the FIDIC contract or of the structure created under Vietnamese law and simultaneously make reasonable recommendations on the use of the most appropriate contract structure.

In the case where the parties agree to apply general and particular conditions, clients principally agree on the priority of the contract documents between the general conditions themselves and between the general and the particular conditions to understand the structure, as well as the operation of the terms in the construction contract.

The content of the construction contract templates (issued with Decision 2508/QD-BXD), which are made by BXD, is based on the provisions of the FIDIC Contract 1999 (despite

some variations). This content made some progress in comparison with the content in Circular 09/2016/TT-BXD. The limitation of Circular 09/2016/TT-BXD may partly be explained by the management of funds from the state budget, while Vietnam has a high state debt or by the similarities between Decree 37/2015 and Decree 48/2010.

In connection with Vietnam's construction templates there are four points that must be given serious attention. Firstly, the quality of the content stipulated in these templates is unclear and lacking in consistency. Secondly, much of the important content stated in these forms has been amended in terms of semantics and scope of application compared to the meaning given in the FIDIC contract conditions, in particular the Red Book 1999. Thirdly, in general, the provisions in these templates apply to the traditional construction contracts (the contractor only executes according to the drawings and technical requirements set forth by the employer) without any distinction or directives for design-build contracts or EPC/Turnkey contracts. Finally, the scope of application of these provisions concerns the projects funded by state budget capital, which are not commonly applied to all construction contractual relationships in Vietnam.

## **2.2. Choosing DAB and/or Jurisdiction**

Along with the impact and the introduction of internationally recognized templates, Vietnam has also introduced DAB. Although not fully introduced in Decree No. 48/2010/ND-CP and Circular No. 09/2011/TT-BXD, it has been included in Decision 2508/QD-BXD and most recently in Decree 37/2015/ND-CP<sup>22</sup>.

Dispute settlements by DAB are a rather unique mechanism. Indeed, collectively, top DAB experts primarily treat technologically related issues. Decisions of the DAB (if any) will be the basis for the parties consideration and application. This mechanism helps resolve disputes objectively, scientifically and inexpensively. It should be noted, however, that the choice or designation of an individual or organization as a DAB does not imply the exclusion, restriction, or prevention of any contracting parties to refer the issues to the courts or other dispute settlement bodies.

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<sup>22</sup> Article 45.2, Decree 37/2015/ND-CP;

In addition, many of the arbitration centers, including VIAC, have been used in construction contracts such as a DAB. However, VIAC is also designated as a tribunal to settle disputes in a construction contract. The maturity of VIAC is necessary and is expected by many subjects to assist involved parties in resolving disputes and avoid use of the ICC or SIAC – whose awards or decisions may not be recognized and/or enforced in Vietnam if they violate Vietnamese principles of law.

This does not deny the value and significance of arbitration centers such as ICC or SIAC in the dispute settlement process. In some cases, contractors or sponsors only want to settle disputes in these centers, to ensure transparency, clarity, and compliance with international practices. Moreover, arbitration centers, in Vietnam, provide an opportunity for legal practitioners and the subjects involved in project development to have experiences and lessons for international lawsuits in the future.

### 3. The Fundamental Differences

#### 3.1. Classification of the Contracts According to Relations

Construction contracts are categorized to shape the transactional structure (contract structure) and then impose suitable types of contracts, FIDIC takes into consideration the relationships of the parties. Particularly, FIDIC is based on the following two key relations<sup>23</sup>:

Relation number 1: Employment relation

In this relation, FIDIC is divided into 3 small groups:

- Employer and Engineer
- Employer and Contractor
- Contractor and Subcontractor

Relation number 2: Partner/cooperation relation

- Employer and Employer
- Contractor, Engineer and Contractor, Engineer

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<sup>23</sup> Table 6.III – 3.1.1 [Conditions of major FIDIC contracts]

- Subcontractor, Sub-engineer and Subcontractor, Sub-engineer

Meanwhile in Vietnam, as mentioned in Section III.2.1 above, there is no clear distinction on the basis of the relationship between the parties, the guidelines on construction templates focus mainly on the traditional construction templates. Clients need to be aware of the type of contractual relations they are engaging in, because it will shape the structure of the transaction as well as the allocation of risks to the subjects involved.

### **3.2. Contractual Classification Based on The Involvement of Transactions in Construction Activities**

Unlike FIDIC's approach, in Vietnam the division of contracts is based on three important criteria<sup>24</sup>:

The first criteria divides contracts according to the nature of the work, construction contracts:

- Consultant contract;
- Building contract;
- Technological equipment provision contract;
- Design – build contract;
- Design and technological equipment provision contract;
- Technological equipment provision and building contract;
- Design - technological equipment provision and building contract;
- EPC/Turnkey contract: project planning, design, technological equipment provision, building of a project;
- Manpower, engine and building equipment provision contract;
- Other construction contract.

The second criteria distinguish the contracts with respect to the contract price:

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<sup>24</sup> Reference to article 3, Decree 37/2015.

- Lum-sump contract;
- Fixed unit price contract;
- Adjusted unit price contract;
- Chronological contract;
- Combined price contract.

Finally, the contracts are classified in function of the relations, construction contracts

- Main contract;
- Subcontract;
- Internal contracting contract;
- Foreign construction contract.

These approaches increase unnecessarily the number of contracts governed by construction law. For example, technological equipment provision contracts are naturally a sales contract and Manpower, engine and building equipment provision contracts are a service or rental contract. All these kinds of contracts may be governed by Civil Code 2015 or Commercial law 2005 without needlessly using Construction Law. Moreover, when contracts are governed by Construction Law without having the nature of a construction contract, disputes easily arise because of the incompatible nature of contracts and the molding of contracting parties' perspectives.

Additionally, the criteria to classify EPC/Turnkey projects are different between FIDIC and Vietnamese Law. An EPC/Turnkey project concerns the projects in which the contractor is in charge for all work and hand overs to the employer only when the project is completed and operational. In Silver Book 1999, there is no distinction between an EPC contract and a Turnkey contract. However, under

Vietnamese law, they are distinguished based on planification, or not, of the project<sup>25</sup>.

### 3.3. Classification Based on the Principle of Risk Allocation and Bearing

The launching of Contract Conditions in 1999 marked the development of the principle of risk allocation and bearing. In particular, to allocate the risk between employer and contractor, FIDIC has raised the question as to who is the subject that is performing the design work.

With respect to the traditional approach, contractors should use Red Book 1999, as they will work only according to (i) drawings; (ii) specifications and (iii) schedules. However, if the contractor designs and builds, it is recommended to use Yellow Book 1999. In such a case, the contractor must (i) comply with employer's requirements to perform the work (ii) do the designing work; and (iii) construct hand over the completed work to the employer once it is finished.

Presently, construction in the industrial field can set out more requirements for the contractor, and is not only required to (i) design and (ii) build, but also to research (iii) technological methods and technology transfer. FIDIC suggests using Silver Book – EPC/Turnkey.

Therefore, with the exception of the FIDIC Short Form - which is considered the simplest - the principles of risk allocation and bearing in FIDIC are dependent as to who is the subject to perform the design work. Once the subject responsible for designing the work is found, the risk allocation between the contractor and employer becomes much simpler.

The consequences of the above risk allocation entitle the party bearing the risk (contractor) to bid at a higher price to mitigate the risks that he has to undertake. Therefore, bidding will be simpler and shorter for a tender using Red Book 1999 than for one using Yellow Book 1999 and will be the hardest and longest for projects using Silver Book 1999.

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<sup>25</sup> Clause 3.1(g), 3.1(h).

In conclusion, clients need to know the employer's needs, exactly, the circumstances in which the employer is participating in, and the requirements of protecting the rights and obligations of the parties in order to choose the most suitable contract type.

### **3.4. Classification Based on Principles of State Budget Capital Management**

There are three important points for this classification based on the principles of state budget capital management.

Firstly, the principle of state budget capital management is reflected in the provisions of the decrees guiding the laws relating to the construction sector. However, as mentioned in Section 1.3, there is no specific legal provision in Vietnam to regulate construction contracts in the private sector.

Secondly, the application of the provisions of Vietnamese law on take-over, hand-over of works and projects mentioned in Section 3.5.2 below.

Thirdly, concerns final settlement of the work upon completion. Under Article 147 of the Construction Law 2014, the final settlement of projects financed with state budget capital shall not exceed 120-days after the date of the take-over of the entire contract work, which includes varied work. The requirement of early completion of the financial statement to serve the management of construction projects, has implied that the warranty obligation is not a contractual obligation. Indeed, if it was a contractual obligation, the contract could not be terminated before the end of its obligation.

Consequently, although this provision may be invoked by the lawyer as a basis for the protection of a contractor in projects financed by state budget capital, this provision should not be considered enforceable or it should be adjusted in an approach that ensures consistency and logic in the implementation of the construction contract to avoid potential disputes.

### **3.5. Other Differences**

#### **3.5.1. Performance Bond**

Under the contract, a performance bond is a tool that ensures the contractor's compliance and performance of his/her contractual obligations - suitably and methodically - especially in terms of the time required to satisfy the employer's requirements or support him to reach his standards when he accepts involvement of the contractor.

Bearing this in mind, FIDIC conditions require the contractor to open and maintain the performance bond until he has fulfilled contractual obligations in their entirety, which include the warranty obligation<sup>26</sup>. FIDIC does not distinguish performance and warranty obligations as two distinct obligations. In such a case, it is necessary to maintain the performance bond to avoid the following cases:

If the contractor has a warranty obligation, the amount of money retained by the employer may be low or lower than the amount for resolving defects or the contractor can reject it to perform his obligation of resolving defects. Therefore, the employer will require a third party (commonly a bank in Vietnam) to perform warranty obligations for him.

The determination and the nature of the warranty obligation, which is an obligation of the contract, that the amount of money retained by the employer does not represent the obligation to resolve the defects of the contractor. It is, therefore, easier and more suitable to request a bond. This is different from Vietnam's inference and practical implementation of a contract performance bond.

Under Vietnamese law, a performance bond expires when the contractor has completed the work and transferred the warranty obligation<sup>27</sup>. Thus, there are many concerns as to whether or not the employer has the right to require the contractor to open a performance bond until the end of the warranty (illegal or not); whether or not the employer can require the guarantor to perform the contract performance obligation if the contractor fails to comply with the obligation to provide a bond (whether or not to require a performance bond during

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<sup>26</sup> Clause 4.2, Clause 11.9, 1999 FIDIC Red Book, Yellow Book, Silver Book.

<sup>27</sup> Clause 16.2 and Clause 16.6, Decree 48/2010; Clause 16.2 and Clause 16.6 Decree 37/2015.



the warranty period); and whether or not the contractor's obligation to correct the defects is limited to the available funds the employer is holding.

Hence, depending on the position and role in contract as well as the stage in which the contract is progressing (negotiation, signing, performance, or dispute settlement), the client will choose different methods.

### 3.5.2. Taking-over and Handing-over

In a Vietnamese construction contract, the take-over and the hand-over of the work are performed without reference to the specific provisions of the contract or referring to the particularity of each specific construction work.

As for FIDIC's approach, the contractor may be considered to have fulfilled contractual obligations when they have executed and completed the contract according to the drawings, specifications (Red Book 1999), or when construction and completion fulfil the requirements of the employer (Yellow Book 1999 or Silver Book 1999). Once the Contractor has reached that stage, the Engineer or the Employer (as the case may be) must respond (agree or refuse with reason) to the contractor's request. If not, the work is considered completed and the risk is believed to have been transferred to the employer, or the contractor can request an extension of the completion time.

In the event of refusal, the Engineer will specify reasons for the refusal and specific work must be completed before applying for the take-over and performance certificates. The hand-over can be approved if there are still minor outstanding works or defects that may be overcome during the exploitation and use of the work<sup>28</sup>.

Succinctly, in FIDIC, the completion of work is ensured with the completion of two important elements: (i) major work and (ii) quality records necessary to prove the quality of the work. The third factor of approval by the authorities is not a prerequisite.

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<sup>28</sup> Article 10.1, Red Book 1999.

However, in Vietnam, in order to assess the completion of work required by the contract, the contractor needs approval from the authorities.<sup>29</sup> This is unreasonable and infeasible when these jobs (i) are temporary - not fixed or will be abandoned upon completion of the project or (ii) do not affect the operations of a project - such as floor-coverings, sanitary supplies, maintenance, and preventative maintenance wares, etc.

Therefore, along with the provisions of the law on contract in the field of construction, which are not within the scope and application of Decree 37/2015, there should be new provisions on construction contracts, especially concerning autonomy, self-determination and civil liberties in construction contracts in order to avoid making unreasonable obligations for the contractor.

Respectfully, the contractor should be advised to stay out of the mandatory general or statutory provisions. In such cases, the scope of work that the contractor undertakes needs to be taken into consideration to make exceptions to the contractor's obligations in connection with the take-over and the hand-over.

### **3.5.3. Compensation and Penalty for Delay Damage**

Pursuant to the Vietnamese legal system, the notion of compensation and penalty are apparently obvious and there is no confusion over these two regulations<sup>30</sup>. However, recently disseminated guidelines on construction contracts raise a myriad of issues about, the interpretation and application of penalty and/or compensation, particularly among the following issues.

- If the contractor breaches the time limit for completion (failing to complete by the due date), he may not be fined more than 12-percent of the value of the violating part of the contract<sup>31</sup>.
- Not to mention the polysemy (multiple meanings) of the phrase "value of the violating part of contract", some authors argue that the imposition of a penalty

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<sup>29</sup> Section 3.2 above

<sup>30</sup> Civil Code 2015, Commercial Law 2005.

<sup>31</sup> Article 146, Construction Law 2014.

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which differs from the obligation of compensation is necessary. This is an unreasonable approach, because the contractor could be awarded a penalty for breaching contractual obligations in a plethora of cases, including all time, safety, quality issues, etc. If those violations are subject to a penalty, the employer is significantly increasing contractor obligations. The punitive purpose of the penalty has not been admitted but could give the employer a greater advantage in the implementation of the contract.

- In opposition, FIDIC has implicitly determined the contractor's liability for delayed completion of work as a liability assigned at the expected loss<sup>32</sup>. FIDIC addresses this approach with two important issues. Firstly, the necessity of care to avoid overstating the contractor's obligations when such obligations are breached. Secondly, the need to assist the employer in estimating damages resulting from delayed construction. The determination, evaluation, and consideration of the exact value of damage caused by delayed construction will be extremely difficult and complex. In many cases, there is a discrepancy between the following values: the one estimated by employer, the one considered appropriate by the contractor and the one possibly considered by the judge. The parties' agreement on the value of damage due to delay must be strictly respected.
- In addition, (in many cases) with respect to the principle of strict liability, the contractor's liability to the employer may be unlimited (due to compensation under actual damages). However, according to FIDIC's general rules, the limitation is usually the total value of the contract, unless otherwise stated<sup>33</sup>.

#### 3.5.4. Final Settlement

Final settlement is, in essence, the confirmation of state debts, the comparison of obligations and termination of contracts, the contractor's and the employer's full discharge of appropriate obligations. Therefore, final settlement is only made after

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<sup>32</sup> Clause 8.7, 1999 FIDIC Red Book, Yellow Book or 1999 Silver Book.

<sup>33</sup> Clause 17.6, 1999 Red Book, Yellow Book, Silver Book.

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termination of the contractor's defect resolution period and the reception of the certificate of performance by the contractor<sup>34</sup>.

Conversely, Vietnamese law stipulates that the time for final settlement of projects funded by state budget capital shall not exceed 120-days post completion of the work (as discussed in Section 3.4 above). The 120-day time limit is not appropriate, indeed - it is not feasible to rely on an unsuitable landmark. In addition, this will lead to legal risks, particularly among the followings issues.

- Firstly, if final settlement occurs within a 120-day period, it would have allowed a termination of unfulfilled obligation (obligation of warranty and complete all outstanding works, including the submission of commitments, warranty, quality records);
- Secondly, after the final settlement is made, the question remains as to whether the contractor's warranty obligation as a contractual obligation or as a statutory obligation may not be appropriately clarified. As aforementioned, when the parties have completed the final settlement, they are released of their contractual obligation (completed or not). Concurrently, the relinquishment by a party of his/her rights and interests to the other party with respect to the warranty, precludes the party from invoking the law in order to force the other party to perform his/her discharged obligations;
- Thirdly, when Party A invokes the provision to require the Party B to make final settlement within a specified period of time and Party B fails to perform such obligation, Party B unintentionally facilitates invocation of the dispute settlement provisions by the Party A and therefore the requirement of compliance with the Party A's obligation or even the termination the contract and the claim of damages and/or the discharge of contractual obligations.

Thus, although the law clearly regulates the time for the final settlement of projects funded by state budget capital, the client also needs to correspond with the different interests among the parties, to adhere to the principle of mutual

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<sup>34</sup> Clause 14.11, 1999 Red Book.

benefit cooperation between employer and contractor and to acquire the understanding of (i) what is a payment at the time of hand-over and (ii) what is a payment at the end of all contractual obligations, including warranty obligations to plan appropriately and effectively.

### **3.6. The Role of Engineer**

The role of the Engineer in the FIDIC Contract is central, especially with respect to the representation of the employer in contract management, as well as in the implementation of the project/work.

Tables 6.III - 3.6.1 presents the Authority and Duties of the Engineer in some key issues under the conditions of the FIDIC Red Book 1999.

However, in Vietnam, due to many objective and subjective factors, the hiring of Engineers, and an Engineer's performance do not truly satisfy the requirements of objectivity, equity, and impartiality in the execution of the construction contract. Likewise, the Engineer's right of employment is often limited, for example concerning (i) the issuance of a take-over certificate; and for many projects funded by the state budget capital, the minutes of the take-over with the participation and signatures of designers, Engineers, Employers, the Contractors and possibly the competent authorities; (ii) the decision regarding the time and cost of issues, such as the decision to extend the time of completion; the evaluation of the costs incurred from extending the completion time; in most of these cases, the Engineer had already issued a payment certificate, but the employer will revise this payment certificate and slow down the payment process for the contractor.

In addition, clients should note that, in FIDIC contracts, the Engineer is referred to as a Project Management Consultant. Supervision Consultants, Quantity Surveyors, or other consultants shall only be considered as the engineer's supporters in professional practice or as an employee of the employer for tasks outside those of the Engineer. Identifying this role will more effectively and appropriately solve problems arising in the course of contract implementation in an effort to avoid Contractors contacting and working with many subjects thereby wasting time or causing damage to the parties.

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## IV. CONSTRUCTION CONTRACT PRICE, PAYMENT METHOD AND PAYMENT RECORD

### 1. Construction Contract Price

One of the peculiarities of a construction contract is the variety in types of contract price that can be used<sup>35</sup>. This section identifies the specific characteristics or necessary notes when considering the types of construction contract prices.

#### 1.1. Lump-Sum Contract

The definition of a lump-sum price is found in Article 15.3 (a) of Decree 37/2015. Accordingly, the contract price has two basic characteristics: (i) the contract price has not changed throughout the contract performance for the volume of work under the signed contract; and (ii) it can only be changed when the force majeure occurs, and the scope of work is changed.

Likewise, Vietnamese law specifies the conditions for applying for a lump-sum price contract, which are<sup>36</sup> (i) at the time of signing the contract, the parties are qualified enough to determine the quantity and unit price for the implementation of the work in the contract; and (ii) the price has covered the risks of inflation and quantities during the execution of the construction contract.

There are varying points to be made about the value of lump-sum contracts:

- It stands for all necessary value for the contractor to perform any contractual obligations that may be required, including architectural changes, specifications, and/or employer requirements;
- Additionally, if the quantity of work performed in reality is less than the corresponding quantity of work stipulated in the bill of quantity, then the contractor will be paid according to actual quantities, and, if the actual quantity of work performed is greater than the corresponding quantity of work stipulated in the contract, then the contractor will be paid according to the bill of quantity;

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<sup>35</sup> See Section III.3.2 above.

<sup>36</sup> See Article 15.5(a).

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- Adjustments in the contract price will not occur if there are out-of-contract costs.

Such understanding is not appropriate to a certain extent because it is not based on origin and the reason for the differentiation of contract prices in the construction sector. When choosing a lump-sum payment price, two factors are considered: (i) the minimization of employer risk concerning payment of additional costs (ii) existence of possible contractor grievances to the employer to be paid for the varied value, changed or adjusted due to a change in the law; costs which are the beneficial and may be granted to the contractor when supervising a nominated subcontractor or when the contractor is not required to do the actual work required in the drawing (while stated in bill of quantities), etc.

Consequently, it is important for clients to understand the nature of a lump-sum contract as (i) based on the stability and fixedness of the drawings, specifications (under the traditional construction contract); or of employer's requirements (under design – build contract or EPC/Turnkey contract); (ii) any change in material will likely result in an adjustment of the contract price; (iii) the application of a lump sum contract does not hinder or prevent the parties from adjusting the contract price in the event of any change in the law or cost<sup>37</sup>; and (iv) the actual quantities performed regardless of more or less than the quantity in the bill of quantity (if any) does not affect the employer's obligation to pay the contractor the accepted contract price.

## 1.2. Estimated Contract Price

The term “estimated contract” refers to contracts in which the accepted contract price is provisional - the final price depends on any and all changes in (i) quantity; (ii) unit price; or (iii) a combination of both<sup>38</sup>.

For an estimated contract, payment of the contract amount becomes complicated as a result of minor changes in costs during the performance of the contract. Since

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<sup>37</sup> Clause 13.7, Clause 13.8 1999 Yellow Book and 1999 Silver Book.

<sup>38</sup> Clause 15.5(b) and 15.5(c), Decree 37/2015.

the adjustment of the contract price (as defined in Section II.1 and II.2) depends on many factors, including the determination of (i) the subject of price adjustment - total unit price adjustment or an exclusive component consisting of the unit price; (ii) the proportion of the components of the unit price; (iii) the time relevant to inflation; (iv) the source in which the inflation index is derived; (v) the formula for calculating inflation; (vi) whether or not various currencies are offered/used to resolve contract prices; (vii) and contractor delays with respect to building and completion of work according to the contract - how the price adjustment is assessed, etc.

Thus, to manage the contract in a convenient way, the contracting parties usually fix, in practice, the unit price and only use the lump-sum contract for the actual measurement of the quantity.

Clients should also pay particular attention to work not performed in reality or performed less than the quantity stated in the bill of quantity which will not be paid or will be paid in correspondence to the actual quantity. This is a fundamental difference with lump-sum contracts and is also a general rule for templates published by FIDIC.

### **1.3. Cost Plus Contract**

In addition to the aforementioned types of contracts, there are many other kinds of contracts such as (i) the contractor ensures that the total investment cost shall not exceed a guaranteed maximum price; (ii) actual costs will be reimbursed by the employer - including all costs associated with actual works arising from the implementation of the project; and (iii) a payment of a reasonable profit amount for the execution of work itself.

Payment to the contractor may be made in one of three main ways. The first is to fix a rate or fix a value for the charge without considering the difference between the actual project cost and the total fixed price agreed upon. The second method is to set a rate based on the reduction of the difference between the actual cost of the project and the total fixed price agreed upon. The greater the difference between the fixed price agreed upon and the actual project cost is, the higher the



bonus rate is and vice versa. The third method a combination of the aforementioned methods, in which the contractor is assigned a fixed rate of profit (minimum bonus) and bonus depending on the savings between the actual project cost and total fixed price agreed upon.

In Vietnam, this kind of cost plus contract is selected by the employers and contractors when the real estate market is prospering, as well as in decline, because it is an appropriate mechanism to calculate the total investment value by determining the total floor area to be executed and the unit price per square meter per floor. Accordingly, the contractor has the right to optimize all design matters and material selection and advise the employer of appropriate options to reduce costs, while still ensuring the objectives and quality of the project. Due to the newness of this mechanism and its lack of popularity and lack of clarity with respect to the stated provisions in the contract law, clients should ask for recommendation concerning the structure, operations, and templates of this contract.

In conclusion:

Despite some efforts, in Vietnam, the classification of construction contracts continues to lack clarity. Many types of contracts have been introduced, but the guidelines still focus on traditional construction (only building contracts). Additionally, a lack of focus exists with respect to the separation of contract prices or of guidelines for contracts of privately funded project. Therefore, in many cases, advisers are encouraged to refer to international templates, including FIDIC to understand the structure of contracts, arrangement of terms, and exact decisions on contract pricing.

## 2. Payment Method

Payment of a construction contract is based not only on the type of contract but also on each specific agreement of the parties on a case-by-case basis<sup>39</sup>. However, there are two main payment methods, chiefly:

### 2.1. Payment Based on Remeasurement

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<sup>39</sup> See Article 19, Decree 37/2015.

This method of payment consists of a joint interest of the Parties involved. It involves the quantity executed by the Contractor as the actual quantity executed reflects the actual amount that the Contractor is entitled to. The more quantity executed the greater entitlement of the Contractor has and vice versa, the lesser. In certain situations, small or insignificant quantities are executed at intervals which might imply that the contractor is unable to complete the work on time.

The advantage of this method is to keep track of the quantity performed. The employer can control the progress and know exactly what the contractor has or will perform in the future.

However, to be paid for the quantity, some important documents are required and, consequently the cost of contract management and payment in this method may increase. Normally, there are many different packages in a project (from structure to finishing, mechanical - technical, exterior, elevators or packages of structure, infrastructure, lighting, etc.). Therefore, it is not simple to check payment records for these packages and it is time consuming to measure, verify, and make the payment. It is a major disadvantage to the employer that should take this into account and make financial arrangements for the payment of various packages.

## **2.2. Payment Based on Predefined Schedules**

For this type of payment method, clients may set out two types of payment based on either a time-based schedule and/or on a completion-based schedule.

For a time-based payment, contractors tend to shift the cash flow at the early stages and spend less during later stages of the contract to optimize the benefits. Therefore, faithful allocation of the benefits between the employer and the contractor to balance both the finance as well as the duties aspects to complete the projects in a timely manner are necessary to avoid overpayment in comparison to the actual execution of the Works.

For schedule-based payment, the parties need to have specialists in schedule to understand the works in order to anticipate what milestones will be completed and the expected value paid upon reaching the milestone.

As for the regulation of construction contracts in Vietnamese law, there are no specific provisions on schedule of payment but using the term “payment schedule” as a payment term. Under FIDIC contract rules, payment schedule is not clearly stated, but FIDIC has used Section 14.4 to describe important issues in a payment schedule.

### 3. Payment Applications

In Vietnam, the requirement for the payment applications under each type of contract are specified in Article 20 of Decree No. 15/2015, Article 8.7 Circular 09/2016/TT-BXD.

In the meantime, FIDIC does not specify which documents shall constitute the payment application but requires the Contractor to submit a payment statement, together, with the “*supporting document*”. However, in practice, it is possible to infer or establish the type of required documents for a construction contract:

- Documents issued by the Contractor, such as (i) Payment Statement; Detailed Bill of Quantity executed; (iii) appropriate financial invoices.
- Supporting Documents concerning the status of performance, such as (i) a milestone completion certificate according to the schedule; (ii) plan of the next period; (iii) progress reports.
- Supporting Documents concerning the quality of the work executed, such as (i) relevant technical documents; (ii) operation guidelines; (iii) completion drawings; (iv) quality records; (v) certificates of origin.
- Documents obtained from a third party, such as (i) approvals, certifications from competent authorities or from the Engineer; (ii) deductions; (iii) results of experiments, tests provided by competent authorities or third parties;
- Extracted contract provisions, such as the specific terms of payment, the right to make a complaint, etc.

In addition, there are various payment statements that function at the time of realization of the Payment Applications. Payment Applications may be divided into: (i) advance payment; (ii) periodical payment - interim payment; and (iii) final payment records.

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Particularly in an interim payment statement, the Contractor should appropriately present as entitled under the contract. It may include, for example:

- Estimated value for the works performed by contractor as well as the contractor's documentations that has been carried out up to the point of request for payment, including those varied;
- Any addition or subtraction due to the adjustment of the contract price by a change in cost or change of law
- Any amount added or subtracted from advance payment;
- Any amount added to or deducted from the retention money
- Any amount added or subtracted in connection with the advance payment of the materials delivered to the site or ordered (as the case may be);
- Any amount added or subtracted in accordance with the terms of the contract;
- Any deductions that have been confirmed in previous payment periods.

#### **4. Payment under FIDIC Contract**

Payment under FIDIC Contracts are classified into three corresponding types of payment as noted below:

##### **4.1. Advance Payment**

The first Payment Certificate under a FIDIC contract is the certificate for Advance Payment. This certification is made only after the submission by the Contractor of a Performance Bond in accordance with Clause 4.2 and of an advance Payment Security in accordance with Clause 14.2<sup>40</sup>.

The installment of the Advance Payment under the FIDIC contract is relatively long, It can take more than 42-days after the reception of the Letter of Acceptance by the Contractor or more than 21 days after submission of the payment application according to contract requirements<sup>41</sup>.

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<sup>40</sup> See Clauses 14.2, 14.3 and 14.6.

<sup>41</sup> See Clause 14.7.

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Normally, the amount of Advance Payment will be progressively deducted in each Interim Payment, and the deduction will begin after the Contractor has received more than 10-percent (10%) of the Accepted Contract Amount and the deduction rate is at 25-percent (25%) for each Payment Certificate<sup>42</sup>. There is a striking difference in Vietnamese law, indeed. In Vietnam, it is customary that the Advance Payment shall be deducted immediately upon the first interim payment and it will come to an end when approximately 80-percent (80%) of the Accepted Contract Amount is paid.

## 4.2. Interim Payment

The period of interim payment in FIDIC is usually determined at the end of each month<sup>43</sup>. The Engineer will have 28 days to confirm the amount requested for payment and the Employer shall make payment within 56 days after receiving the payment record<sup>44</sup>.

Payment records should be based on the basics analyzed in Section IV.3 above. During each payment period, the Engineer has the right to correct previous payment certificates if errors are discovered<sup>45</sup>. Clients should pay special attention to this possibility. Indeed, a dispute may arise if the Employer finds the inaccurate point in the Interim Payment Certificate post issuance by the Engineer and does not accept the payment. In such cases, the protection of the Employer is not high, as under the terms of the FIDIC contract, (i) any confirmation (including confirmation of payment) does not reduce or release the contractor's liability; (ii) all payment confirmations made during the construction consist only of interim payments. Only a payment certified by the Engineer after the expiration of the Defects Notification Period consists of a confirmation of final settlement; (iii) the Engineer retains the right to modify the previously Certificate. As a result, a delay,

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<sup>42</sup> Clause 14.2.

<sup>43</sup> Clause 14.3.

<sup>44</sup> Clause 14.7(b).

<sup>45</sup> Clause 13.6

a non-payment or a correction of the due date by the employer may result in a claim by the contractor to delay the payment.

### 4.3. Final Settlement

Contrary to the Vietnamese approach of final settlement as analyzed in Section III.3.5.4 above, under FIDIC, the final settlement will only be made after (i) the expiration of the defect notification period; (ii) the fulfilment of all security obligations by the Contractor; (iii) the issuance of the Performance Certificate by the Engineer; and (iv) only if, within 56 days after receiving Performance Certificate, the Contractor has sent the final settlement records to the Engineer to confirm the final settlement amount and finish all contractual obligations<sup>46</sup>.

Therefore, from a legal perspective, any issue that dissatisfies any of the parties during the preparation, submission, and approval (or issuance) of the final payment certificate may be referred to settle by proper jurisdiction and then, the statute of limitations begins to take effect. However, this may not be feasible if the parties comply with the provisions of Decree 37/2015, under which final settlement may have been made more than two years earlier than it would have and the file for petition may be dismissed because the statute of limitations has expired.

After the confirmation of the final settlement by the Engineer, the Contractor will be paid by the Employer within 56 days after the date of the reception of the Final Payment Certificate by the Employer.

### 4.4. The Last Notes

Under FIDIC, the Employer's failure to pay the Contractor will entitle the latter to a finance charge without prejudice to any other rights of the contractor<sup>47</sup>. However, it is worth noting that under a FIDIC contract, the Contractor shall maintain the validity of the performance bond at any time during the execution of the contract. Any failure to maintain this bond will result in the Engineer's refusal

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<sup>46</sup> Clause 14.11, Clause 14.12 and Clause 14.13, 1999 FIDIC Red Book.

<sup>47</sup> Clause 14.8, 1999 FIDIC Red Book.

to confirm the payment amount or the employer's refusal to make the payment<sup>48</sup>.

There have been many contractual disputes arising out of insufficient attention to the amount and to the significance of this contract performance bond.

The provisions of FIDIC concerning contracts in general, with respect to payment in particular, are recommended by FIDIC as a guide and are applied in general. Adjustment, modification, supplementation and replacement of such provisions to suit the circumstances of the contractual parties or to comply with the country's laws are of necessity only.

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<sup>48</sup> Clause 14.6, 1999 Red Book.

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Table 6.II – 1.1 – Change in Exchange Rate of VND/USD between 2007 and 2016

Source (vietcombank.com.vn)

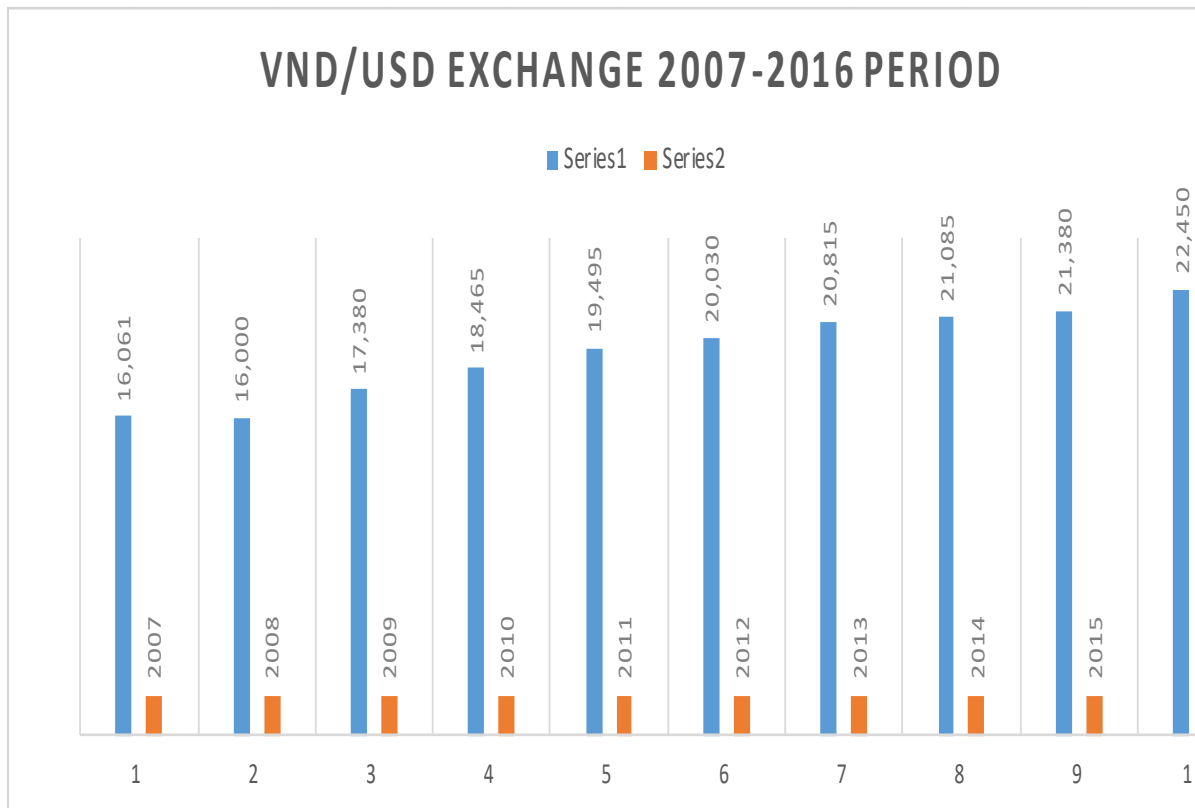


Table 6.II. – 5.1 [The Authorities Involved in Metro Project Development]

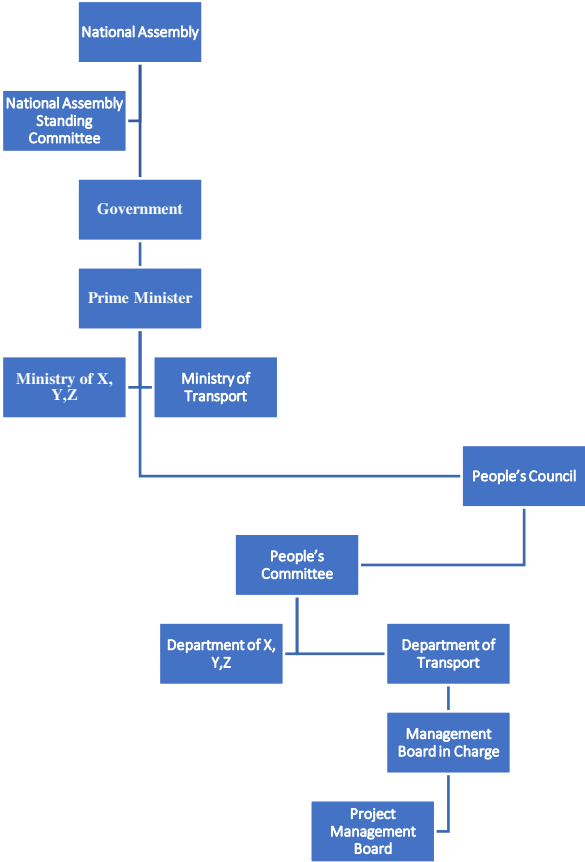


Table 6.III – 1.1. [*The Conditions of 1987 FIDIC Contract*]

No.	PART I: GENERAL CONDITIONS Definition and Interpretation
1.1	Definitions
1.2	Headings and Marginal Notes
1.3	Interpretation
1.4	Singular and Plural
1.5	Notices, Consents, Approvals, Certificates and Determinations
	<i>Engineer and Engineer's Representative</i>
2.1	Engineer's Duties and Authorities
2.2	Engineer's Representative
2.3	Engineer's Authority to Delegate
2.4	Appointment of Assistants
2.5	Instruction in Writing
2.6	Engineer to Act Impartially
	<i>Assignment and subcontracting</i>
3.1	Assignment of Contract
4.1	Subcontracting
4.2	Assignment of Subcontractor's Obligations
	<i>Contract Documents</i>
5.1	Language/s and Law
5.2	Contract Documents' Priority
6.1	Custody and Supply of Drawings and Documents

No.	PART I: GENERAL CONDITIONS Definition and Interpretation
6.2	One Copy and Drawings to be Kept on Site
6.3	Disruption of Progress
6.4	Delays and Cost of Delay of Drawings
6.5	Failure by Contractor to Submit Drawings
7.1	Supplementary Drawings and Instruction
7.2	Permanent Works Designed by Contractor
7.3	Responsibility Unaffected by Approval
	<i>General Obligations</i>
8.1	Contractor's General Responsibility
8.2	Site Operations and Methods of Construction
9.1	Contract Agreement
10.1	Performance Security
10.2	Period of Validity of Performance Security
10.3	Claims under Performance Security
11.1	Inspection of Site
12.1	Sufficiency of Tender
12.2	Not Foreseeable Physical Obstruction or Conditions
13.1	Work in Accordance with Contract
14.1	Submission of Program
14.2	Revised Program
14.3	Submission of Cash Flow Estimate
14.4	Contractor not Relieved of Duties or Responsibilities

No.	PART I: GENERAL CONDITIONS Definition and Interpretation
15.1	Contractor's Superintendence
16.1	Contractor's Employees
16.2	Engineer at Liberty to Object
16.3	Language ability of Superintending Staff
16.4	Employment of Local Personnel
17.1	Setting-out
18.1	Boreholes and Exploratory Excavation
19.1	Safety, Security and Protection of the Environment
19.2	Employer's Responsibilities
20.1	Care of Works
20.2	Responsibilities to Rectify Loss and Damage
20.3	Loss or Damage due to Employer's Risks
20.4	Employer's Risk
21.1	Insurance of Works and Contractor's Equipment
21.2	Scope of Cover
21.3	Responsibilities for Amount not Recovered
21.4	Exclusions
22.1	Damage to Persons and Property
22.2	Exceptions
22.3	Indemnity by Employer
23.1	Third Party's Insurance (including Employer's Property)
23.2	Minimum Amount of Insurance
23.3	Cross Liabilities

No.	PART I: GENERAL CONDITIONS Definition and Interpretation
24.1	Workmen's Accident or Injury
24.2	Insurance against Workmen's Accident
25.1	Evidence and Terms of Insurance
25.2	Adequacy of Insurance
25.3	Remedy on Contractor's Failure to Insure
25.4	Compliance with Policy Conditions
26.1	Compliance with Statutes, Regulations
27.1	Fossils
28.1	Patent Rights
28.2	Royalties
29.1	Interference with Traffic and Adjoining Properties
30.1	Avoidance of Damage to Road
30.2	Transport of Contractor's Equipment or Temporary Works
30.3	Transport of Materials or Plants
30.4	Waterborne Traffic
31.1	Opportunities for Other Contractors
31.2	Facilities for Other Contractors
32.1	Contractor to Keep Site Clear
33.1	Clearance of Site on Completion
	<i>Labor</i>
34.1	Engagement of Staff and Labor
35.1	Return of Labor and Contractor's Equipment

No.	PART I: GENERAL CONDITIONS Definition and Interpretation
	<i>Materials, Plants and Workmanship</i>
36.1	Quality of Materials, Plants and Workmanship
36.2	Cost of Samples
36.3	Cost of Tests
36.4	Cost of Tests not Provided for
36.5	Engineer's Determination where Test not Provided for
37.1	Inspection of Operation
37.2	Inspection and Testing
37.3	Dates for Inspection and Testing
37.4	Rejection
37.5	Independent Inspection
38.1	Examination of Work before Covering up
38.2	Uncovering and Making Openings
39.1	Removal of Works, Materials or Plants
39.2	Default of Contractor's Compliance
	<i>Suspension</i>
40.1	Suspension of Works
40.2	Engineer's Determination following Suspension
40.3	Suspension Lasting more than 84 Days
	<i>Commencement and Delays</i>
41.1	Commencement of Works
42.1	Possession of Site and Access Thereto

No.	PART I: GENERAL CONDITIONS Definition and Interpretation
42.2	Failure to Give Possession
42.3	Rights of Ways and Facilities
43.1	Time for Completion
44.1	Extension of Time for Completion
44.2	Contractor to Provide Notification and Particulars Detail
44.3	Interim Determination of Extension
45.1	Restriction on Working Hours
46.1	Rate of Progress
47.1	Liquidated Damages for Delay
47.2	Reduction to Liquidated Damages
48.1	Taking-over Certificate
48.2	Taking over of Sections or Parts
48.3	Substantial Completion of Parts
48.4	Surfaces Requiring Reinstatement
	<i>Defect Liabilities</i>
49.1	Defect Liability Period
49.2	Completion of Outstanding Works and Remedying Defects
49.3	Cost of Remedying Defects
49.4	Contractor's Failure to Carry out Instructions
50.1	Research's Contractor
	<i>Alterations, Additions and Omissions</i>
51.1	Variations



No.	PART I: GENERAL CONDITIONS Definition and Interpretation
51.2	Instruction for Variations
52.1	Valuation of Variations
52.2	Engineer's Power for fixing rates
52.3	Variations Exceeding 15%
52.4	Day-work
	<i>Procedure for Claims</i>
53.1	Notice of Claims
53.2	Contemporary Records
53.3	Substantiation of Claims
53.4	Failure to Comply
53.5	Payment of Claims
	<i>Contractor's Equipment, Temporary Works and Materials</i>
54.1	Contractor's Equipment, Temporary Works and Materials; Exclusive Use for the Works vesting
54.2	Employer not Liable for Damage
54.3	Customs Clearance
54.4	Re-export of Contractor's Equipment
54.5	Conditions to Hire Contractor's Equipment
54.6	Cost for Purpose of Clause 63
54.7	Incorporation of Clause in Subcontracts
54.8	Approval of Materials not Implied
	<i>Measurement</i>

No.	PART I: GENERAL CONDITIONS Definition and Interpretation
55.1	Quantities
56.1	Works to be Measured
57.1	Method of Measurement
57.2	Bear down of Lump-sum Items
	<i>Provisional Sums</i>
58.1	Definition of “Provisional Sums”
58.2	Use of Provisional Sums
58.3	Production of Vouchers
	<i>Nominated Subcontractors</i>
59.1	Definition of “Nominated Subcontractors”
59.2	Nominated Subcontractor; Objection to Nomination
59.3	Design Requirements to be Expressly Stated
59.4	Payment to Nominated Subcontractors
59.5	Certificates of Payment to Nominated Subcontractors
	<i>Certificates of Payment</i>
60.1	Monthly Statements
60.2	Monthly Payments
60.3	Payment of Retention Money
60.4	Correction of Certificates
60.5	Statement of Completion
60.6	Final Statement
60.7	Discharge

No.	PART I: GENERAL CONDITIONS Definition and Interpretation
60.8	Final Certificate
60.9	Cessation of Employer's Liabilities
60.10	Time for Payment
61.1	Approval only by Defects Liability Certificate
62.1	Defects Liability Certificate
62.2	Unfulfilled Obligations
	<i>Remedies</i>
63.1	Default of Contractor
63.2	Valuation at Date of Termination
63.3	Payment after Termination
63.4	Assignment of Benefit of Agreement
64.1	Urgent Remedial Works
	<i>Special Risks</i>
65.1	No Liability for Special Risks
65.2	Special Risks
65.3	Damage to Works by Special Risks
65.4	Projectile, Missile
65.5	Increased Costs Arising from Special Risks
65.6	Outbreak of War
65.7	Removal of Contractor's Equipment on Termination
65.8	Contractor Termination Payment
	<i>Release from Performance</i>

No.	PART I: GENERAL CONDITIONS Definition and Interpretation
66.1	Payment in the event of Release from Performance
	<i>Settlement of Disputes</i>
67.1	Engineer's Decision
67.2	Amicable Settlement
67.3	Arbitration
67.4	Failure to Comply with Engineer's Decision
	<i>Notices</i>
68.1	Notice to Contractor
68.2	Notice to Employer and Engineer
68.3	Change of Address
	<i>Default of Employer</i>
69.1	Default of Employer
69.2	Removal of Contractor's Equipment
69.3	Payment on Termination
69.4	Contractor's Entitlement to Suspend Work
69.5	Resumption of Work
	<i>Change in Cost and Legislation</i>
70.1	Increase or Decrease of Cost
70.2	Subsequent Legislation
	<i>Currencies and Exchange Rate</i>
71.1	Restrictions on Currencies
72.1	Exchange Rates

No.	PART I: GENERAL CONDITIONS Definition and Interpretation
72.2	Proportion of Currencies
72.3	Currencies for Provisional Sums' Payment

Table 6.III – 1.2 [Conditions of FIDIC Contract 1999]

(Summary)

Clause	FIDIC		
	Red Book	Yellow Book	Silver Book
1	General provisions		
2	The Employer		
3	The Engineer		Employer's Administration
4	The Contractor		
5	Nominated Subcontractors	Design	
6	Staff and Labour		
7	Plants, Materials and Workmanship		
8	Commencement, Delays and Suspension		
9	Test on completion		
10	Employer's Take-over		
11	Defects Liability		
12	Measurement and Evaluation	Tests after Completion	
13	Variations and Adjustments		
14	Contract Price and Payment		
15	Termination by Employer		
16	Suspension and Termination by Contractor		
17	Risk and Responsibility		
18	Insurance		
19	Force Majeure		
20	Claims, Disputes and Arbitration		

**Note:**

The blank spaces in Yellow Book and Silver Book means they have the same Articles as Red Book.

Table 6.III – 2.1.1.1.1. [The Similarities Between Templates Attached to Circular 09/2016/TT-BXD And FIDIC Red Book 1999 Conditions]

1999 FIDIC Red Book	Circular 09/2016/TT-BXD	Headings
Clause	Clause	
1.1 & 1.2	1	Definitions and interpretations
1.5	2	Contract documents and priority
1.4	3	Governing law and languages
4.2 & 14.2	4	Performance security and advance security
4.1	5	Scope of works and quantities
4, 7, 9, 10	6	Requirements for quality of Works, take-over and hand-over the Works under the construction contract
8	7	Time and progress
14	8	Contract price, advance payment and payment
13.7 & 13.8	9	Contract price's adjustment
2	10	Rights and obligations of employer
4	11	Rights and obligations of contractor
3	12 & 13	Rights and obligations of Engineer
4.4	14	Subcontractors
4, 17	15	Safety procedure, environment protection and fire prevention
4.19	16	Electricity, water and site's safety
15	17	Suspension and termination by Employer
16	18	Suspension and termination by Contractor
18 & 11	19	Insurance and security

1999 FIDIC Red Book	Circular 09/2016/TT-BXD	Headings
Clause	Clause	
17 & 19	20	Risks and Force Majeure
13.2	21	Value Engineering, and penalties
20	22	Claims and dispute resolution
14.11, 14.12 & 14.13	23	Final settlement and liquidation
Not Available	24	Validity of contract
Not Available	25	General provisions



Table 6.III – 3.1.1 [Types of FIDIC Contract Template]

No.	Conditions of contract	Edition	Note
1	Conditions of Subcontract		
1.1	Conditions of Subcontract	2011	<p>Subcontracts between the General Contractor and the Contractors or between the Main Contractor and the Nominated Contractors.</p> <p>Need to be used in conjunction with Conditions of Contract for Construction (First Edition 1999) for Building and Engineering Works designed by the Employer (1999 Red Book), or Multilateral Development Bank Harmonized Edition (Pink Book 2005, 2006, 2010).</p>
1.2	Conditions of Subcontract	2009	Trial
1.3	Conditions of Subcontract	1994	<p>Subcontracts between the General Contractor and the Contractors or between the Main Contractor and the Subcontractor (or <u>Nominated Subcontractor</u>)</p> <p>Need to be used in conjunction with the Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987 Reprinted 1992 (1987 Red Book) with further amendments.</p>

No.	Conditions of contract	Edition	Note
2	Conditions of Contracts funded by Multilateral Banks (ADB, WB, v.v.)		Only apply to projects funded by Multilateral Banks.  Applicable to traditional construction (not design-build).
2.1	Conditions of Contracts funded by Multilateral Banks	2010	
2.2	Conditions of Contracts funded by Multilateral Banks	2006	
2.3	Conditions of Contracts funded by Multilateral Banks	2005	
3	Conditions of Contracts		
3.1	1999 Red Book	1999	Contractors only execute the Works in accordance with designs provided by the Employer. This kind of contract is frequently used in civil construction industry.
3.2	1999 Yellow Book	1999	Both Constructors' build and design.  This kind of contract is frequently used in civil construction.
3.3	1999 Silver Book	1999	Both Constructors' build and design.  This kind of contract is frequently used in industrial construction.
3.4	Green Book (Short Form)	1999	Only apply to low-value project (under 10 billion); short execution

No.	Conditions of contract	Edition	Note
			time (under 6 months); repeated works; or simple design.
3.5	1987 Red Book	1987	Both Constructions' build and design.  This kind of contract is frequently used in civil construction.
4	Gold Book	2008	Apply to infrastructure, BOT, BT, BTO, PPP.
5	Blue Green Book	2006	Apply to dredging and réclamation works.
6	Client/Consultant Model Services template	2006	Apply to consultant or service provision like Design agreement.
7	Joint Venture Model template	1992	Apply to subjects participating in bid or to carry out the project.

Table 6.III – 3.6.1 [Authority and Duties of the Engineer under FIDIC 1999 Red Book]

No.	Matters	Ref.
1	Engineer gives appropriate Instruction/Guideline to clarify ambiguity found in the Contract.	1.5
2	Engineer is not entitled to amend the Contract.	3.1
3	Engineer is considered to act on behalf of or for the benefit of the Employer.	1.1.2.4; 1.1.2.6; 3.1(a);
4	Engineer Consent, Approval or Determination shall not release or reduce the obligations of any parties as provided in the Contract.	3.1(b); 3.1(c);
5	Engineer gives Instructions, Guidelines, Determinations or Assessment impartially and diligently.	3.5
6	The Engineer issues Take-over Certificate.	10.1 & 10.2
7	The Engineer issues Performance Certificate.	11.9
8	The Engineer instructs the Contractor to employ Nominated Subcontractor.	5; 13.5(b)
9	The Engineer issues Payment Certificates.	14.2. 13.6 and 14.13
10	The Engineer makes decision on Extension of Time for Completion.	8.4; 8.5; 20.1
11	Decisions, Instructions, Confirmations, Approval of the Engineer can be reviewed by DAB, the Arbitrators, or the Course.	20