



FIDIC Pink Book: The MDB Harmonised Edition of the Red Book by Frederic Gillion

This note highlights the main features of the Multilateral Development Banks (MDBs) Harmonised Edition of the 1999 Red Book (FIDIC Conditions of Contract for Construction) and key differences between it and the 1999 Red Book. This FIDIC contract is usually referred to as the "Pink Book" or "MDB Harmonised Edition". In this note, we refer to it as the Pink Book.

What is the Pink Book?

The Pink Book is the form of contract used by MDBs for construction projects (building and engineering works designed by the employer) for which MDBs are providing finance first published the contract in May 2005 and then published revised editions in March 2006 and June 2010.

Before 2005, MDBs commonly adopted the FIDIC General Conditions of Contract (including the 1999 Red Book) as part of the standard bidding documents that they required their borrowers or aid beneficiaries to follow. However, the MDBs usually heavily amended the FIDIC General Conditions of Contract by introducing additional clauses. These additional clauses were often standard and repeated whenever bidding documents had to be prepared, which led to inefficiencies at the procurement stage. Different MDBs used different amendments, which could create uncertainties amongst the users of the documents.

The MDBs realised that all users of the tender documents (the MDB itself, the borrower and others involved with project procurement, including consulting engineers and contractors) would benefit from an harmonisation of these documents by including the most common changes, previously introduced by MDBs in the Particular Conditions, in the General Conditions of Contract.

The heads of procurement of the MDBs and FIDIC worked together to produce the Pink Book. This harmonised document includes modified General Conditions of Contract but also contains provisions for Particular Conditions, as most contracts will still need to be tailored to the requirements of specific projects and countries. The Pink Book also includes sample forms for Contract Data (Particular Conditions – Part A), Securities, Bonds, Guarantees and Dispute Board agreements.

What is an MDB?

MDBs are supra-national institutions established by sovereign states, who are their shareholders. Their purpose is to help economic and social progress in developing countries by financing projects, supporting investment and generating capital. MDBs finance projects using long-term loans at market rates, very-long term loans below market rates (sometimes known as credits), and by making grants.

MDBs often have a broad membership, including both borrowing developing countries and developed donor countries. They are not limited to member countries from the region of a regional development bank. Each MDB is legally and operationally independent from the other MDBs. However, because many of the MDBs share similar mandates and (in some cases) share some members, it makes sense for them to cooperate. These are arguably the main MDBs:

- African Development Bank



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- Asian Development Bank
- European Bank for Reconstruction and Development (EBRD).
- Inter-American Development Bank Group.
- World Bank

A wider categorisation of MDBs would include several "Sub-Regional" MDBs. Typically, their membership includes only borrowing nations and they include:

- Black Sea Trade and Development Bank.
- Caribbean Development Bank.
- Central American Bank for Economic Integration.
- Corporación Andina de Fomento.
- East African Development Bank.
- West African Development Bank.

Multilateral Financial Institutions (MFIs) are similar to MDBs but they are sometimes categorised separately, since they have more limited memberships and often focus on financing certain types of projects. MFIs include:

- European Commission.
- European Investment Bank
- International Fund for Agricultural Development.
- Islamic Development Bank.
- Nederlandse Financieringsmaatschappij voor Ontwikkelingslanden NV.
- Nordic Investment Bank.
- OPEC Fund for International Development.

Whatever their precise categorisation, whether an MDB or otherwise, the following international institutions were involved in the preparation of the Pink Book:

- African Development Bank.
- Asian Development Bank.
- Black Sea Trade and Development Bank.
- Caribbean Development Bank.
- European Bank for Reconstruction and Development.
- Inter-American Development Bank.
- Islamic Development Bank.
- Nordic Development Fund.
- World Bank.

When the Pink Book was created, the understanding reached between them was that these MDBs (each described as a "Participating Bank") will use this edition whenever they finance a project and that the contract is suitable for this type of project.

What projects is the Pink Book suitable for?

The parties should use the Pink Book when the project is MDB financed and the 1999 Red Book would have been applicable (that is, if it is a contract for building and engineering works designed by the Employer).

If a project is financed by an MDB (or a group of MDBs) but the Employer will not carry out



the design (that is, where the 1999 Red Book would not have applied), the parties should not use the Pink Book without amendment. They should consider using one of the other FIDIC Forms of Contract (for example, the Yellow Book or Silver Book), tailoring it through the Particulars Conditions of Contract).

To assist the parties in that situation, in spring 2010 FIDIC released guidance on adapting the Pink Book for use on a design-build project.

Changes from the 1999 Red Book

General changes to presentation and contents

In terms of the presentation, the main difference between the 1999 Red Book and the Pink Book is the Particular Conditions, which have been divided in the Pink Book into Part A and Part B:

- Part A provides the information supplied by the Employer (the Contract Data), which is a renamed and partially re-structured "Appendix to Tender".
- Part B includes the Particular Conditions, which are a concise version of those contained in the 1999 Red Book.

Key differences between the 1999 Red Book and the Pink Book

To create the Pink Book, the participating banks and FIDIC have amended the General Conditions of the 1999 Red Book to include the standard wording and additional clauses that were commonly introduced by MDBs in the 1999 Red Book's Particular Conditions.

The most significant changes to the 1999 Red Book are the following (for more information on other, detailed, changes made to the 1999 Red Book to create the Pink Book, see the following note, FIDIC: Red Book and MDB Harmonised Edition (Pink Book) compared at <http://www.fenwickelliott.co.uk/articles/contract-issues>)

| Clause | Sub-Clause | Amendment |
|-----------------|--|--|
| 2: The Employer | 2.4: Employer's Financial Arrangements | Under the 1999 Red Book, the Employer is required to submit reasonable evidence that financial arrangements have been made and are being maintained to enable the Employer to pay the Contract Price, within 28 days of the Contractor's request to do so. The Pink Book requires the Employer to submit the reasonable evidence "before the Commencement Date" as well as within 28 days of the Contractor's request. In addition, the evidence that the Employer provides must demonstrate that it is able to pay the Contract price "punctually". |



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| | 2.5: Employer's Claims | The amendment to the 1999 Red Book concerns the service of the Employer's notice of claim. Under the Pink Book, the Employer must still give notice as soon as practicable, but (in any event) the notice must be given within 28 days of the Employer becoming aware, or when it "should have become aware", of the circumstances giving rise to the notice. This appears to be a more onerous provision for the Employer. However, the words "should have become aware" makes it difficult to operate as a condition precedent. |
| 3: The Engineer | 3.1: The Engineer's duties and authority | Under the Pink Book, the Employer is allowed to change the authority of the Engineer without the agreement of the Contractor. In contrast, under the 1999 Red Book, the Employer has an obligation not to impose "further constraints on the Engineer's Authority except as agreed with the Contractor." This change may be seen as potentially affecting the balance of risk. The second amendment under sub-clause 3.1 requires the Engineer to obtain the Employer's approval before taking action under sub-clauses 4.12, 13.1, 13.3 and 13.4. |
| | 3.5: Determinations | In both the 1999 Red Book and the Pink Book, the Engineer is required to give the Contractor and the Employer notice of its determination of any matter not agreed between the parties. However, the Pink Book is more onerous for the Engineer as it now fixes a time limit for the determination (28 days from receipt of the corresponding claim or request). |



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| 15: Termination by Employer | 15.6: Corrupt or Fraudulent Practices | A new clause dealing with corrupt or fraudulent practices has been inserted into the Pink Book. The amendment is consistent with the global trend to seek to prevent fraud and corruption. The contractual sanction is that the Employer may terminate the Contract if it determines “based on reasonable evidence” that the Contractor has engaged in a fraudulent practice. The definition of “fraudulent practice” is very broad (“misrepresentation or omission of facts in order to influence a procurement process or the execution of a contract”) and may have far-reaching implications for the Contractor in the administration of the Contract. |
| 16: Suspension and termination by Contractor | 16.1: Contractor’s Entitlement to Suspend Work | If the Bank suspends payment of the funds from which the Contractor is paid, and no alternative funds are available, the Contractor can suspend or reduce the rate of work it performs at any time (having received a notice from the Bank). |
| | 16.2: Termination by Contractor | The grounds on which the Contractor can terminate the Contract have been amended in the Pink Book. It is not enough for the Employer to fail to perform its obligations under the Contract. The Employer’s breaches must “materially and adversely affect the economic balance of the Contract and/or the ability of the Contractor to perform the Contract.” The Pink Book includes two new grounds for termination: |
| | | <ul style="list-style-type: none"> • If the Bank suspends the loan or credit from which the Contractor is paid and 14 days after the Contractor has followed the payment mechanism under sub-clause 14.7 it has still not received the sums due to it, the Contractor can suspend work, reduce its rate of work or terminate the Contract. • If the Contractor does not receive the Engineer’s instruction to commence work 180 days after the Letter of Acceptance, the Contractor may terminate the Contract. |



FIDIC Conditions of Subcontract for Construction

In February 2010, FIDIC published the 2009 "test" edition of FIDIC Conditions of Subcontract for Construction, a sub-contract for use with the 1999 Red Book and 2004 (Revised 2006) Pink Book.

It is the first time FIDIC has published a sub-contract specifically to be used with these contracts and has been produced to meet requests from MDBs for an internationally recognised form of sub-contract. The sub-contract is available from the FIDIC website.

Under the sub-contract:

- The sub-contractor assumes the duties and obligations of the contractor under the main contract for the sub-contract works.
- The payment terms include pay-when-paid clauses. FIDIC has included guidance notes and sample particular conditions, to assist the parties in jurisdictions, like the UK, where pay-when-paid clauses are unenforceable.
- The parties can refer disputes that are specific to the sub-contracting relationship to an ad hoc dispute adjudication board.
- The sub-contractor must provide programme details that are not required under the Pink Book's programming requirements. That is, the sub-contract has more detailed programme requirements than the Pink Book.

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