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The new FIDIC DBO contract: points for discussion

Michael Mortimer-Hawkins
FIDIC Contracts Committee and Chairman of FIDIC DBO Task Group

The purpose of this Workshop is firstly to tell you a little bit about the background to the new document, a little bit about how the new document will look, and then some of the key issues we have been looking at which have perhaps given rise to the main discussions within the Task Group.

As this is a workshop, I am then planning to ask each of the round tables to consider some of these key issues, and give us some feedback on how you think these key issues should be addressed. This feedback will prove invaluable to the Task Group in dealing with these issues.

Before we finish, I am planning a question and discussion session – and to answer your questions we have a panel made up of the members of the DBO Task Group. FIDIC is taking this work very seriously and we value your thoughts and input – and who better to answer your questions than the authors of the new document.

So let me introduce the DBO Panel

MMH	UK
Axel Jaeger	Germany
Des Barry	Ireland
Christoph Theune	Germany
Toni Bauer	Germany
Erica Lund	Ireland.

1. Background to the DBO Form

The DBO approach to contracting combines design, construction, and long-term operation (and maintenance) of a facility into one single contract awarded to a single contractor (who will usually be a joint venture or consortium representing all the skills called for in a DBO arrangement).

An early consideration was to look at the pros and cons of carrying out a project – which is essentially made up of two principle periods – the Design-Build period and the Operation period – as a single contract with a single contractor – rather than use the FIDIC Yellow Book for the Design-Build and prepare a new document for the Operation part.

Basically the success of a true DBO contract depends on the commitment of the contractor to the complete project - and the best way to do that is to cover the whole DB plus the operation elements in a single contract.

The format of a DBO arrangement can be based on either a ‘green field’ scenario (D-B-O), or on a ‘brown field’ scenario (O-D-B). Either is quite common, however the contractual requirements and procedures are quite different.

FIDIC has chosen to produce a document based on the DBO green field scenario, with a Guide containing guidelines on the changes necessary to cover a brown field arrangement.

The other factor we had to consider was the length of the Operation period, since the conditions suitable for long-term operation are not necessarily suitable for a short-term operation. From the experience of the

DBO members it was decided that the most useful period to consider was 20 years operation – again giving guidelines if a shorter period was required.

2. Advantages of DBO

There are many advantages of using the DBO approach.

However, as with all forms of Contract, if one attempts to use the DBO form on projects which are not suitable for this approach – the advantages and benefits will be lost.

The recognized advantages are:

Time:	With possibilities to overlap some design and build actives it will be possible to minimize delays and optimize the smooth flow of construction activities.
Financial	With cost restraints and commitments and other risks being carried by the Contractor, there is less risk of price over-runs.
Quality	With the Contractor responsible for 20 years operation, he has an interest to design and build quality plant with low operation and maintenance costs. Not only will then plant be 'fit for purpose' but it will be built to last.

All this will optimize the life-cycle costs of the project.

3. The New DBO Document

The format of the new document follows the traditional format and layout of previous FIDIC documents, with 20 clauses, and, where appropriate, using the same terminology and definitions which are found in the other documents.

The document will have General Conditions, Particular Conditions, flow charts and sample forms – just like the other FIDIC documents, and a Guide which will include guidelines on how to change the clauses if it is required to have a document for a 'brown field' situation, or an operation period significantly different to the 20 years we have adopted.

It assumes an organization similar to the Silver Book, with the Employer, the Contractor and the Employer's Representative as being the principal parties.

In many areas it is also necessary to differentiate between the different stages of the project:

- Design and planning
- Build and construction
- Operation and maintenance

For example, risks and insurance – and the document contains provisions appropriate for each specific area.

Time does not permit a detailed look at the document – and in any event, this could be misleading, as there are a number of key issues still under discussion.

However, to show the overall sequence of events in a visual form, let us look at the flow chart which shows the coordinated flow of events which we have envisaged in a typical DBO project.

This will hopefully give you a helpful picture of the procedures as we proceed through the document.

What I would now like to do is to give a brief overview of the new document, identifying important deviations from other FIDIC documents, and identifying some key issues which we would like to look at during the round table discussions.

Your input and experience here will be invaluable to the Task Group in helping to cover certain provisions, so please do add your contributions to the round table discussions.

Clause 1 General Provisions

Definitions. These are essentially the same as other FIDIC documents although new definitions have been added – for example:

- Clear definitions of 'Design-Build' and 'Operation Service'.
- 'Cut Off Date' which a safeguard for the Employer if the Contractor fails to complete the BD works in time.
- 'Cost plus Profit' is a term used in the document which is frequently misunderstood, and a definition has been added.
- 'Financial Memorandum' is a requirement for the Employer to give details of his financial arrangements.
- In other FIDIC documents, this was more of an optional provision. We believe for a 20 year commitment, it is essential for the Contractor to have this information and re-assurance when tendering.
- 'Licence Agreement' is the agreement needed by which the Employer gives the Contractor authority to operate the plant on his behalf.

Clauses 2, 3 and 4 which cover the roles of the Employer, the Employer's Representative and the Contractor are very similar to the roles assigned to them in other FIDIC documents.

Clauses 5 (Design), 6 (Staff and Labour) and 7 (Plant Materials and Workmanship), all very similar to other FIDIC documents – with wording extended where necessary to cover the Operation Service Period.

We now come to several clauses which differ considerably for the other documents. The reason for this is the need to differentiate between the Design-Build Period and the Operation Service Period, and to create proper and workable provisions for the moment in time of transfer between the two.

Clause 8 – Commencement Date. This deals with the provisions of Commencement, Time for Completion, Programme, Delays and Completion of the Contract as a whole – which includes the Design-Build Period and the Operation Service Period, with fundamental requirements similar to those in Clause 8 of the other books.

Clause 9 is called "Design-Build" and deals specifically with the Design-Build Period. The provisions here are very similar to those for a design-build assignment carried out under the Yellow Book.

9.1 Commencement of Design-Build
9.2 Time for Completion of Design-Build
9.3 Extension of Time for Completion of Design-Build
9.4 Delays Caused by Authorities
9.5 Rate of Progress
9.6 Delay Damages relating to Design-Build
9.7 Suspension of Work
9.8 Consequences of Suspension
9.9 Payment for Plant and Materials in Event of Suspension
9.10 Prolonged Suspension
9.11 Resumption of Work

However, unlike the Yellow Book, the completion of the Design-Build is critical for the commencement of the Operation, and

9.12 Completion of Design-Build – gives the criteria necessary for completion to be achieved, and for the Commissioning Certificate to be issued. In this respect the Commissioning Certificate is like the Taking Over Certificate found in the other books – but in this document it certifies that the DB is complete AND it also gives the commencement date for the Operation Service.

9.13 Failure to Complete – this is a safeguard for the Employer if the Contractor fails to complete by the 'Cut-Off Date', allowing the Employer to terminate if the Contractor is seriously late.

The document allows for an immediate start of the Operation Service and the Contractor is entitled to assume this will be the case. If the Employer delays the start, then the Contractor will be entitled to financial compensation.

Clause 10 is called "Operation Service" and deals specifically with the Operation Service Period. These provisions are substantially different to those applying during the Design-Build period.

10.1 General Requirements – which require the Contractor to follow the agreed modus operandi given in the Operation Management System, and to generally look after the facility in accordance with the Maintenance Plan.
10.2 Commencement of Operation Service- this ties in with Clause 9.12 and the issue of the Commissioning Certificate.
10.3 Licence Agreement – this is the licence which the Employer gives to the Contractor allowing him to operate the plant on behalf of the Employer. The wording of this licence is important. Furthermore, the licence is agreed and signed and becomes binding within 28 days after the Letter of Acceptance. However it does not come into effect until it is needed – that is, upon issue of the Commissioning Certificate and commencement of the Operation Service. And it remains in force until the issue of the Contract Completion Certificate at the end of the Operation Service Period.
10.4 Independent Compliance Audit. During the Design-Build Period, the Employer has his Representative to see that the Contractor is fulfilling his obligations under the Contract. During the 20 year Operation Service Period, where both parties have an important part to play – even if the Contractor is responsible for Operation – we have replaced the Employer's Representative by a totally independent "auditing body", whose job it is to monitor the performance of both parties to see that each is doing what it should. The auditing body cannot 'instruct' or 'decide'. It is there to monitor and advise. The body is appointed by the Employer and paid from a Provisional Sum in the Contract.
10.5 Delivery of Raw Materials – assumed to be the responsibility of the Employer
10.6 Training – standard provision
10.7 Delays and Interruptions in Operation Service – this addresses delays caused by (a) the Contractor; (b) the Employer; and (c) suspension ordered by the Employer. In any of the above cases, compensation is purely financial. There is no provision to extend the Operation Service Period.
10.8 Failure to Reach Production Outputs – similar to above, and compensation is financial, and prolonged failure can lead to termination.
10.9 Completion of Operation Service

Clause 11 Testing – all testing requirements, both on completion of the Design-Build and prior to completion of the Contract are now covered in this Clause.

Clause 12 Defects. Although there is an obligation on the Contractor to repair and make good defects, there is no 'defects liability period' as we find in the other books – since the Contractor is responsible to operating the plant, he is also responsible for making good any defects which occur.

Clause 13 Variations – variations are permitted, with very similar provisions to the Yellow Book.

Clause 14 Payment – payment provisions are essentially divided into payment for the design-build work, and payment for the operation service. The DB provisions are similar in principle to those found in the Yellow Book with the Contractor entitled to submit his final statement for the DB work on completion of the Design-Build Period.

The final statement for the Operation Service is submitted at the end of the Operation Service Period.

Two interesting inclusions in the DBO document are:

(i) the provision of an Asset Replacement Fund under Clause 14.14 to provide funds for essential replacements during the Operation Service which are not the responsibility of the Contractor during the Operation (e.g. not regular maintenance, replacement of spares etc)
(ii) the provision of a Maintenance Retention Fund, which is in effect money withheld from the Contractor to ensure that he carries out essential maintenance required under the Contract. If he does, he gets the money back, if he doesn't, he doesn't.

Clauses 15 and 16 Termination.

The termination clauses have been discussed at great length – especially the right of either party to 'terminate for convenience during the Operation Service Period' – and this is one of the topics for round table discussion. Should either party be permitted to break the 20 year agreement to operate the plant purely for his convenience?

During the Design-Build Period, the picture is straight-forward – very similar to the Yellow Book - with Clause 15 allowing the Employer to terminate either for Contractor's Default or for his own convenience, and Clause 16 allowing the Contractor to terminate if the Employer is in serious default (e.g. non-payment) or there is a prolonged suspension. However, the Contractor does not have the right to terminate for his convenience.

During the Operation Service Period, the right to terminate for the other party's default remains – as it should. But what about the right to terminate for convenience?

The questions to be considered are the cause and the consequence of such a termination. What are the basic reasons why either party would want to terminate? And – What are the consequences (for the project and for the Employer) of termination?

We have chosen to allow the Employer to 'terminate for convenience', even during the Operation Service Period – but not for the purposes of getting another contractor to complete the operation. We have chosen NOT to allow the Contractor the right to terminate during this time (except for named defaults or actions by the Employer).

- But is this fair? Is this equitable? Is this the right approach?
- We believe it is – but what do you think?

When it comes to Risk and Insurance, we have made a number of changes to the traditional FIDIC approach.

Firstly we have addressed these matters in a logical sequence:

Risk >> Responsibility >> Liability >> Indemnity >> Insurance

These are the events which must be addressed and covered.

We have also recognized that the potential risks arising during the Design-Build Period are significantly different to those arising during the Operation Service Period, and the clauses have been structured accordingly. And we have clearly differentiated between risks which result in physical loss or damage, and risks which result in financial or time loss. Finally, we have recognized that there will be 'unidentified' risks – events which occur which were not foreseen.

We have been more specific in the allocation of risks to the party concerned than is to be found in the current documents (which essentially define the Employer's Risks, and then assume that all other risks lie with the Contractor).

And we have simplified the terminology, so that terms such as Force Majuere (which has a number of differing legal interpretations) are no longer used, and we have re-ordered the clauses to make the sequence follow the sequence discussed above.

Thus we now have:

Clause 17 General Risks
Clause 18 Exceptional Risks
And having defined and allocated the risks, we have
Clause 19 Insurance

So, as another topic for round table discussion, we are asking you to consider how the risks should be allocated to each party during both the Design-Build and Operation Service Periods.

The final clause, as in all documents, is Clause 20 (Claims, Disputes and Arbitration).

This clause is currently being reviewed by the Contracts Committee to iron out a couple of ambiguities which have revealed themselves during the use of the given procedures – but we do not see any need to change these, and we will be adopting the clause in the up-dated form which comes from the Contract Committee.

However, we do need to consider the role of the Dispute Adjudication Board (DAB) during the 20 year Operation Period. How should we handle disputes during this Period?

Another topic for round table discussion is thus What type of DAB provision should we include for (a) the DB and (b) Operation Service period?

Summary of Round Table Discussion Topics

(i)	Licence Agreement.	Key points to be included in the Licence Agreement.
(ii)	Auditing Body.	The appointment of the Auditing Body and its role during the Operation Service.
(iii)	Rights of Termination	What rights should each Party have to terminate during the Operation Service? Should each party have the same rights?
(iv)	Risk Allocation	How should risks be handled and allocated during DB and Operation periods?
(v)	Handling Disputes during the Operation Service	How should we deal with disputes? What form of DAB should we have?
(vi)	Securities	What form of securities should the Employer require during DB and Operation?
(vii)	Procurement Procedures	What key criteria should be included in the Procurement procedures to ensure a 20 year commitment?