



CONSTRUCTION

Dispelling FIDIC myths

FIDIC forms are a convenient way to execute construction projects, as long as the Particular Conditions are appropriately adapted



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Investment construction projects implemented using standard FIDIC forms (the Books) are becoming more common in Russia. However, a number of mechanisms provided by the Books are still unclear for many in Russia, since they are based on common law and, as a result, hold a different meaning and are inconsistent with Russian laws, or disregard the specifics of administrative procedures.

This article reviews only one procedure – the transfer and acceptance of the result of works performed. The procedure described by the Books differs from the procedure stipulated by Russian laws. In order to understand the difference, let us dispel a few common myths.

Myth No.1

First is the belief that the issue of a taking-over certificate for works as provided by the Books is the same as signing a transfer and acceptance act for works as provided by the Civil Code of the Russian Federation (the Civil Code).

According to Russian laws, an act reflecting no defects is deemed a confirmation of the works performed with due quality and serves as grounds for payment.

Pursuant to the Books, the acceptance procedure is divided into two stages. At the first stage, a taking-over certificate is signed, following which a defects notification period starts running. The second stage sets in upon expiry of the defects notification period, with a performance certificate being signed. Only both documents signed confirm final acceptance of works.

The fundamental principle of the Books is 'substantial performance'. Therefore, a taking-over certificate is to be signed even if there are works in progress or defects that do not affect the use of the works result, provided the tests on completion were successful. The taking-over certificate therefore demonstrates that a substantial portion of works has been completed, but does not confirm that the works were performed with due quality and in full, which is to be confirmed by the performance certificate.

The procedure is convenient for both parties. It allows the employer to commission the facility into operation, and the benefit for the contractor is that there is no charging of penalties for delay, though the contractor is still obliged to remedy defects. At the same time, as provided by the Civil Code and law enforcement practice, claims on remedying defects not indicated in a transfer and acceptance act may only be made if the defects are acknowledged as latent.

Claims pertaining to patent defects are enforceable, provided the respective right to make claims for remedying patent defects is established by the contract. There is also a risk that in the event of a dispute, it is not the performance certificate but the transfer and acceptance act that will be regarded as the document confirming final acceptance of works.

For the purposes of making provisions of the Books enforceable, the Particular Conditions should be amended so as to state that signing a taking-over certificate does not lead to the same consequences as signing a transfer and acceptance act under the Civil Code and that after signing the taking-over certificate, the contractor must remedy both latent and patent defects.

Myth No.2

Here we face the second myth: the defects notification period, according to the Books and the warranty period under the Civil Code, are one and the same.

As opposed to the warranty period under the Civil Code, during which the contractor must remedy defects arising due to the contractor's fault, the defects notification period according to the Books also entitles the employer to request that the contractor remedy, at extra cost, defects for which the contractor is not liable and to perform additional works required for completing construction.

The warranty period as such is not regulated by the Books and its existence and all conditions are determined only by applicable laws. As follows from the Books, the warranty period starts running only after a performance certificate is issued. Under Russian law, the parties are free to determine commencement date of the warranty period. In practice, such periods are often perceived in Russia as the same periods, and as a result the parties establish only one period – from signing the taking-over certificate for works performed to signing the performance certificate.

To summarise, Books can be used for projects and, since their conditions are thorough, are convenient for the parties, but require proper amendments to the Particular Conditions.