

Kuwait Procurement Conference

3 - 5 April 2018, Hilton Kuwait Resort

Three days of inspirational insight on how to transform procurement to deliver more profit, innovation and shape the future using technology.

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PUBLIC PROCURMENT

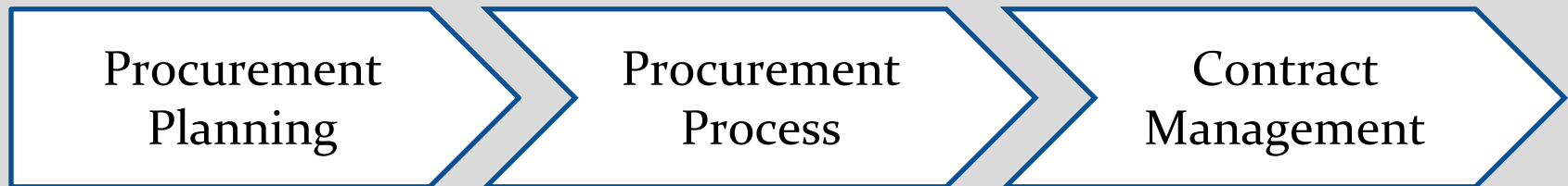
Principles & Concepts

& a look @ FIDIC Books

Public Procurement: Definition



- ❑ Public Procurement may be defined as the **Government's** activity of **purchasing the goods and services** which it needs to carry out its functions;
- ❑ Public Procurement process comprises three key Phases:



- ❑ Although the three phases are distinct and at times involves different players, they should be regarded as a single cohesive “**Cycle**” for the process to be successful;
- ❑ Regulatory rules on public procurement generally focus on the **second stage** where legal rules and other regulatory measures are important tools of policy;

Public Procurement : Definition

□ Procurement is divided into three broad categories:

(a) Goods; (b) Works; and, (c) Services

(b) A good procurement law should address each of these categories separately since the procurement approach is largely different;



Legal Framework for Public Procurement Contracts

❑ The key objectives of public procurement are:

- (1) Value for money
- (2) Integrity
- (3) Accountability
- (4) Equal opportunities and treatment for providers
- (5) Fair treatment of all suppliers and service providers
- (6) Efficient implementation of industrial, social and environmental objectives in procurement (horizontal policies)
- (7) Opening up public markets to international trade; and,
- (8) Efficiency in the procurement process



Legal Framework for Public Procurement Contracts



❑ It is however important to mention that the said objectives compete among each other ; rigid rules that emphasize accountability may result in reduced “Value for Money” or “Efficiency” in certain procurement procedures; **It is therefore necessary to strike the right balance on the relative importance of each of the objectives in policy formulation;**

Key Principles for Implementing Procurement Objectives



❑ Transparency

- ❑ This principle entails; (a) publicity for contract opportunities; (b) publicity for the rules governing each procedure; (c) rule-based decision making; and (d) mechanism for verification and enforcement ;

❑ Competition

- ❑ To ensure that government obtains; (a) best contract terms; (b) enhance transparency; and (c) regulate the functioning of the international market;

❑ Equal Opportunities and Treatment

- ❑ Provide all bidders with fair access to (a) bidding opportunities; and (b) similar treatment during and after contract award;

Public Procurement as a Business Process

- ❑ Public Procurement is a function that encompasses both economic and political dimensions; A good procurement system enhances transparency in the management of public resources and encourages firms to have confidence in the process thus attracting the best firms to participate in the process;
- ❑ It is a major economic activity of the government; in most economies it accounts for 15 percent of the GDP;
- ❑ It is a significant factor for achieving development objectives of the government; It can be used to provide strategic outcomes;

Public Procurement as a Business Process

- ❑ It is everybody's business and every citizen must play their part; stake-holder participation should be encouraged;
- ❑ It is however vulnerable to abuse, wastage, corruption, and most of the time affects government spending; there is therefore need for continuous reforms and improvement so as to bring on board emerging international best practices;

Reforms in the Public Procurement Function are Critical

- ❑ **Automation of operations:** This would enhance overall operational efficiency, improve reporting and allow structured records management;
- ❑ **E-procurement:** This is still at elementary level; embracing e-procurement would enhance transparency, minimize transaction costs, and increase efficiency;
- ❑ **Use of Framework Agreements:** used in the procurement of common user items by a central agency; it eliminates duplication of effort, wastage, and reduces costs of goods through economies of scale and enhances overall operational efficiency;

Definitions and objectives



Public sector

- Organizations owned and controlled by the state or government

Objectives

- Provide an essential service
- Provide it cheaply or free of charge, therefore it is available to everybody
- They are generally beneficial to society. It is good to have healthy and well educated people in the country.



Private sector

- Organizations owned and controlled by private individuals and organizations
- **Objectives**
 - To survive in a competitive market
 - To maximize their profits
 - To make returns for their shareholders (dividends)

- To some people the distinction between public and private sectors creates two different worlds, which require completely different approaches to purchasing and supply management.
- Globally all nations have a combination of both public and private and non profit making organisations
- the relative size of each sector in a particular country depends on the nature of its economy.

Differences

| | Public firms | Private firms |
|---------------------------------------|---------------------|---|
| Competition | No | Yes |
| Profit - maximisers | No | Yes |
| Enjoy the benefits | Indirectly | Yes |
| Less regulations | Poor | Yes |
| Terms of operations, size, spend, etc | Smaller | Wider |
| Communication | Poor | Better |
| Share holders, employees etc. | Much wider | Limited constituency |
| Competitive tendering | Usually constrained | Important tool but not suitable for long-term partnership |
| Sheer diversity of items | May be purchased | Not affected |

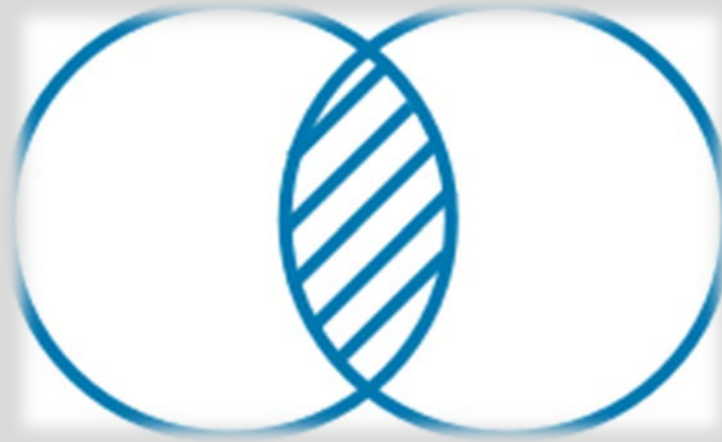
Differences



| | Public firms | Private firms |
|--|--------------|---------------|
| Demand for funds | Not Limited | Limited |
| Flexibility | Less | More |
| Confidentiality between buyers and suppliers | Limited | Wider |

Similarities between private and public sectors

- 1- quality,
- 2- quantity,
- 3- source,
- 4- place,
- 5- time and
- 6- price
- 7- area of customer satisfaction
- 8- achieve value for money



USE OF FIDIC CONTRACTS AND THE INDUSTRY CONTEXT: What Stays As Previously



- ❖ Limited use and awareness of FIDIC forms of contract, Mainly, Red Book and Yellow Book are used
- ❖ No dedicated laws or clarifications, case-law on the use of FIDIC
- ❖ No ready texts available in Arabic
- ❖ Engineer's role and functions are not quite understood

USE OF FIDIC CONTRACTS AND THE INDUSTRY CONTEXT: What Stays As Previously

- ❖ Practical difficulties during implementation (contract administration and discipline, audits, claims settlement, etc.
- ❖ Public budget constrains, public employer's prejudice:
 - Narrow interpretation of law and contract
 - Resistance to contract adjustments, waiver of Contractor claims
 - Demanding extra safeguards
 - Reducing the Engineer's authority → e.g., by way of validation of determinations and variations by the Employer's decisions and/or contract addenda

USE OF FIDIC CONTRACTS AND THE INDUSTRY CONTEXT: What Stays As Previously



- ❖ On the positive side:
 - Narrow interference with General Conditions of Contract through Special Conditions of Contract
 - No derogative or prohibitive rules set by law with a direct reference to FIDIC

USE OF FIDIC CONTRACTS AND THE INDUSTRY CONTEXT: What Is Improving.

- ❖ A longer term view is taken by the industry: efforts to consolidate, match international standards and qualifications, search for international opportunities
- ❖ A progress in the industry self-awareness and self-governance

USE OF FIDIC CONTRACTS AND THE INDUSTRY CONTEXT: What Is Improving.



- ❖ Anti-corruption initiatives less space for abusive creativity, such as:
 - Discriminatory/ambiguous description of the subject matter of the contract
 - Package coupling
 - Bidder-tailored qualification and selection criteria

USE OF FIDIC CONTRACTS AND THE INDUSTRY CONTEXT: What Is Improving.



- ❖ Anti-corruption initiatives less space for abusive creativity, such as:
 - Qualification or discrimination criteria and requirements? – e.g.: *Experience in analogous projects, availability of manufacturing facilities, producer warranties, etc.*
 - Distortive or abusing post-award contract amends, etc.

- ❑ Mandatory system of E -PROCUREMENT is to be implemented in stages
- ❑ MEAT (most economically advantageous tender) - is the award criteria set by law
- ❑ LOWEST PRICE - as form of MEAT – works for steadily established markets where procurement is not based on technical assignment (design or other input data)
- ❑ No direct provision in law for: QBs - (quality based selection), BVP (best value procurement)

- ❑ Price component still dominates: “Weighting” (a share) of the price should not be less than: 70%
- ❑ Selection criteria other than price – narrower wording compared to the Directive: *payment terms, timing, warranty, maintenance costs, transfer of know-how, capacity building*
- ❑ A comprehensive notion was mentioned in the draft bill: *Entire life-cycle costs, but then deleted*

- ❑ Abnormally low tenders are not regulated

BUT: Collusion (leading to the distortion of tender results) may be inferred. Collusion, if established, may lead to tender cancellation, liability, negative projection on future bids

- ❑ No automatic **disqualification** of contractors based on the history of past performance, etc.
- ❑ Lack of proper grounds for contract modification **post-award**

CONTRACT MODIFICATION POST AWARD

EXCEPTIONS :

- ☐ Decrease in the procurement volume
- ☐ Change in the cost of unit not $>10\%$ - in the case of market fluctuations, without increasing the total contract amount
- ☐ Improvement in the procured quality without increasing the contract amount
- ☐ Agreed decrease of the contract amount without changing quantity (volume) or quality of goods, works or services

CONTRACT MODIFICATION POST AWARD

EXCEPTIONS :

- ☐ A change in the price or other contract terms due to changes in tax/duties
- ☐ Amendments due to the changes of the consumer index, exchange rate, stock market rate, regulated tariff, etc. – if an adjustment mechanism is expressly set by contract
- ☐ Extension of the contract term - where there are documented objective circumstances (e.g., force majeure, lack of financing) - without increasing the contract amount

- ❑ **Unlike the Directive** - no direct provision for contract modification due to:
 - succession/ replacement of the contractor
 - substantial changes - material difference, unforeseeability
 - expediency, reasonability, convenience reasons or avoidance of duplication (e.g., for additional works)
- ❑ Exhaustive list of grounds for modification is set by law. Revision clauses of a contract are supplementary

- ❑ Quality and life-cycle criteria come to increasingly matter
- ❑ A longer-term evaluation approaches are considered, incl. with regard to involved sustainability and efficiency effects
- ❑ Industry self-governance strengthens and getting institutionalized, engineering and construction companies are set to become competitive internationally
- ❑ More infrastructure and energy projects are internationally funded, quality engineering support is in a growing demand

Best Practice & Procurement Process meaning:

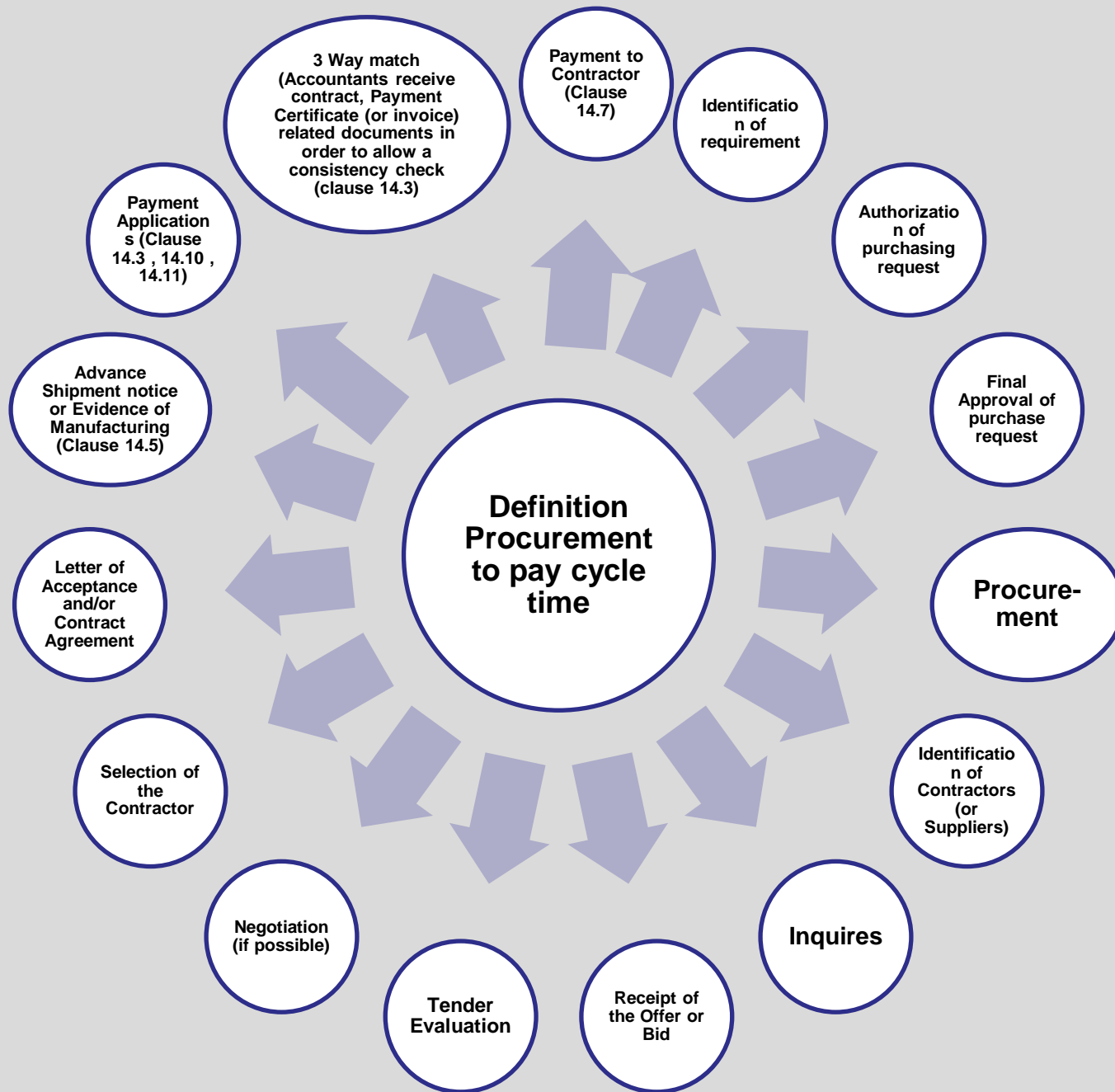
- ❑ It has been said that using best Practice means to achieve consistently results superior to those achieved with other means.
- ❑ Procurement means the Processes from **identification** of a Project up to receipt of **tenders** and **award** of contracts for its implementation taking in account the subsequence Phases of design, construction and eventual cooperation services.

Best Practice & Procurement Process meaning:

- ❑ it is suggested that a Best Practice Procurement Process involves:
 - 1) using such Procurement processes which are suitable to achieve consistently results superior to those achieved with other means; Thus,
 - 2) Using procurement in order to assure that:
 - a) the employer may select the best service provider based on responsive and competitive tenders
 - b) the management of the future contract will achieve consistently results superior to those achieved with other means

Procurement Aspects

- ❑ The Procurement mandate can be simple or more advanced.
- ❑ Simplest means for instance : keep costs low
- ❑ More advanced means a set of procurement policies aimed at for instance the:
 - Rapid identification and selection of the appropriate bidder
 - Reduction in procure to pay cycle time
 - Procurement responsiveness
 - Appropriate risk allocation and sharing of risks
 - Assuring the manageability of the Contract
 - Identification and delivery and saving potentials



What FIDIC does?

- ❑ Provide the industry with guidance on procurement and contract management

What FIDIC offers the industry?

- ❑ Be the authority on issues relating to best practice in terms of procurement and contract management

What are FIDIC's governing principles?

- ❑ Promote **quality**
- ❑ Actively promote **conformance** to a code of **ethics** and to **integrity**
- ❑ Promote commitment to **sustainable** development

Why does FIDIC come into play?

- ❑ Codes of Conduct or Codes of Best Practice are [other] examples of the dominance of private governance in international business.
- ❑ This practice dates back to the 1930s. The first international code of conduct for multinationals was created by the ICC as Code of Standards Advertising Practice in 1937.
- ❑ Since then, this technique has become extremely popular as a means to reflect good practices or policies which participants in a certain industry are expected to observe.

Why does FIDIC come into play?

- These rules are said to be economically more efficient than state legislation. International organizations like UNCITRAL, the ICC, the UNIDROIT, OHADA, FIDIC, ISDA, LMA and CMI as the oldest formulating agency of its kind all function as formulating agencies.

Why does FIDIC come into play?

- ❑ Consistent interpretation of FIDIC clauses will reduce **uncertainty** as to the law, and therefore some of the contracting **risk**, when contractors tender on international projects. This will require, however, increased availability of the **arbitration awards** which construe clauses. The **confidentiality feature**, sometimes cited as an advantage of arbitration, is of minimal relevance in large construction projects because of their high visibility and the involvement of so many firms and individuals.



Procurement Decisions

Pricing

Responsibility

Risk

Funding

FIDIC Design Stages

Conceptual Design

Preliminary Design

Detailed Design



Contractor's responsibilities (RED Book)



❖ The Contractor

- ❖ Is under an obligation of «fit for Purpose » subject to the applicable law
 - If the Contract specifies that the Contractor shall design any Part of the Permanent Works, then unless otherwise stated in the Particular Conditions:
 - (c) the Contractor shall be responsible for this Part and it shall, When the Works are completed, be fit for such purposes for Which the Part is intended as are specified in the Contract (Sub-Clause 4.1 (c))
 - Pursuant to Sub-Clause 8.2 the Contractor shall complete the Works Within Time for Completion.

Contractor's responsibilities (YELLOW Book)



The Contractor:

- ❖ Is under an obligation of (fit for Purpose) subject to the governing law
 - When completed, the Works shall be fit for the purposes for Which the Works are intended as
 - defined in the Contract (Sub-Clause 4.1 Para. 1)
 - Pursuant to Sub-Clause 8.2 the Contractor shall complete the Works within Time for:
 - Design
 - Execution of works
 - Remedy of Defects
 - guarantees

Silver Book



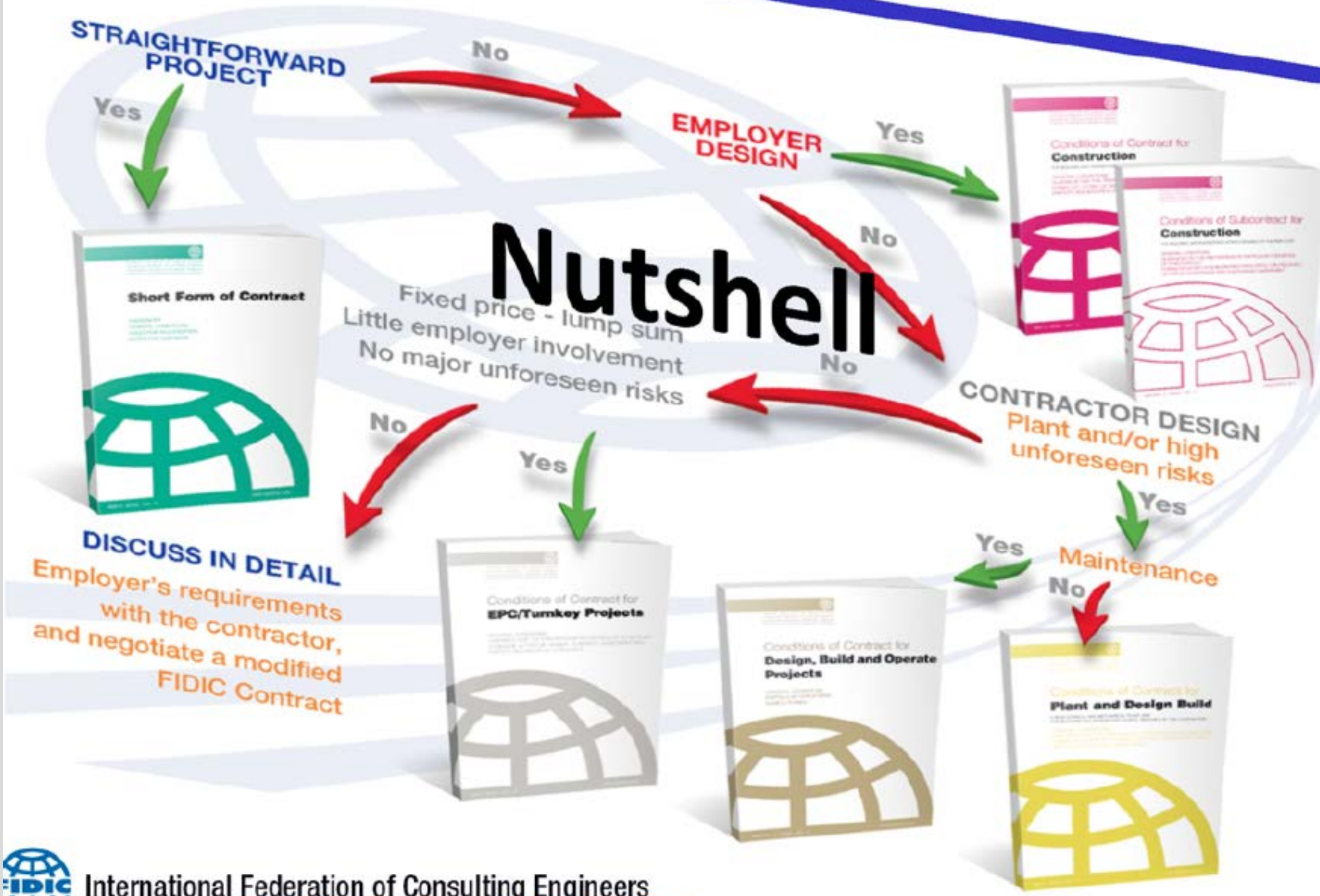
- ❖ The Silver Book is intended for use for turnkey projects with a special approach concerning risk allocation allocating most of the risk to the Contractor. It is a lump sum contract where the design is made by the Contractor. There is no Engineer.

Gold Book



- ❖ New: the Gold Book, intended for turn key and infrastructure projects, where the Contractor also operates the project.
- ❖ This contract is administered by an Employer's Representative (anglosaxon style).

Nutshell



International Federation of Consulting Engineers



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Conclusion:



❖ **Best Practice regarding procurement envisages to combine two aims:**

- to receive value for money and,
- To assure the manageability of contracts
- in order to achieve consistently results superior to those achieved with other means.

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