FIDIC 1999 RED BOOK 2nd Edition
(December 2017)

WHAT IS NEW?

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Introduction

In December 2017, FIDIC published the second edition of the Red Book (Conditions of Contract for Construction), Yellow Book (Conditions of Construction for Plant and Design Build) and Silver Book (Conditions of Contract for EPC Turnkey Projects) (“2017 FIDIC Suite”). This set of documents is intended to update the previous editions which were published in 1999.

The amendments are extensive with more detailed contractual provisions, new definitions which are now contained in alphabetical order, and changes in terminology, all of which have led to the contracts becoming considerably longer than the previous versions.

This briefing provides commentary on some of the more important changes to the 2017 FIDIC Suite.

Overview and Structure

• The structure of 2017 FIDIC Suite remains largely the same as the earlier 1999 edition.

• There are now 21 clauses (as opposed to the 20 clauses in the 1999 edition) and this is due to the split of former clause 20 to separate ‘day-to-day’ parties’ claims (Employer’s and Contractor’s Claims) from parties’ disputes (Disputes and Arbitration).

• New definitions, now in alphabetical order, have been added, i.e. among others “Claim”, “Delay Damages”, “Extension of Time”, whilst some have been renamed, i.e. “Force Majeure” to “Exceptional Events”.
Overview and Structure

- More detailed contract management obligations have been imposed on both parties through:

(i) introduction of the co-called concept of “Advance Warning” of any future events which may have an adverse effect on performance of the Works, increase of the Contract Price or delay in execution of the Works (Sub-Clause 8.4),

(ii) significant extension of details concerning the Contractor’s programme, e.g. start and end dates for each activity, the float and critical path (Sub-Clause 8.3),

(iii) new management meetings (Sub-Clause 3.8) and an updated quality management system (Sub-Clause 4.9).

Overview and Structure

- The significant increase of the rights and obligations of the parties which are based on the principle of reciprocity, e.g:

i. Obligation to assist the Employer in obtaining its permits (Sub-Clause 1.13 (c)),

ii. Obligations not to poach (headhunt) staff (Sub-Clause 6.3),

iii. Advance warning obligations (Sub-Clause 8.4).

- An enhanced, strengthened and clarified role of the Engineer has been marked in the 2017 FIDIC Suite (Sub-Clause 3.7), pursuant to which the obligation of the Engineer’s neutrality has been confirmed and details of the Engineer’s role in dealing with parties’ claims through a step-by-step procedure has been re-introduced.
Overview and Structure

- Considerable modifications have been incorporated to the design provisions in relation to the so-called Fitness for Purpose (FFP) requirements (Sub-Clause 4.1),

- Under the new version of which “if no purpose is stated in the Employer’s Requirements, then the Works must be fit for their ordinary purpose”.

- The foregoing modification is further backed up by:

  (i) the indemnity clause, according to which the Contractor is required to indemnify the Employer for failures of the Works or any Section or any major item of Plant not being FFP (Sub-Clause 17.4), and

  (ii) the Contractor’s obligation to hold professional indemnity insurance against its liabilities for failure to achieve FFP requirements (Sub-Clause 19.2.3).

Overview and Structure

- There are new Procedural Regulations for DAB Dispute Avoidance/Adjudication proceedings (now called DAAB proceedings),

- A new dispute avoidance role has been assigned to DAAB (Dispute Avoidance and Adjudication Board), whereby it can also provide ‘informal assistance’ to the parties. DAAB is thus now intended to have a more prominent role to attempt to resolve any disputes between the parties.

- Also, the standing DAAB is now to apply in all three of the contracts as opposed to FIDIC 1999, wherein ad-hoc DABs were provided in the Yellow and Silver Books.

- An advisory note to users about Building Information Modeling.

- templates of other contract documents such as the Letters of Tender, Performance Security documentation (such as Parent Company Guarantee and Performance Bonds)
EOT Claims

• the provisions are now contained in Sub-Clause 8.5 rather than Sub-Clause 8.4.

• However, that the exceptionally adverse weather provision has been altered so that the Contractor’s entitlement to an extension of time is limited to Unforeseeable adverse climatic conditions at the Site which may place an increased burden on a Contractor when making a claim.

EOT Claims

• Another notable addition is with regards to claims during periods of concurrent delay (being circumstances where a Contractor’s delaying event and a separate Employer’s delaying event are running in parallel)

• Sub-Clause 8.5 provides that the Contractor’s entitlement to an EOT shall be assessed in accordance with any rules or procedures provided for by the parties in the Special Provisions of the Particular Conditions, or if none are so stated “as appropriate taking due regard of all relevant circumstances”.

• However, It is unlikely that this clause will prevent disputes in such circumstances.
EOT Claims

- Parties should note that Sub-Clause 8.5 must also be viewed in light of the increased duties towards programme updates and “early warning” notifications in Sub-Clauses 8.3 and 8.4.

- The emphasis of the 2017 FIDIC Suite is to enable contemporaneous identification and management of delays.

- Sub-Clause 8.3, 2017 FIDIC Suite replicates the previous burden on a Contractor to issue revised programmes

- It increases the amount of detail a programme must contain.

- Sub-Clause 8.4 each party now has the responsibility of providing an advance warning of matters which might, for

Variations

- Sub-Clause 13.3 is much more detailed under the 2017 FIDIC Suite.

- Now there is a specific procedure dealing with variations initiated by the Engineer namely, Variation by Instruction and Variation by Request for Proposal, and how the Contractor must respond to this.

- The procedure for instructed variations is not entirely new but the update is much more prescriptive as to what the Engineer and Contractor have to do than was previously the case.

- An instructed Variation must also now be clearly stated to be a “Notice” and comply with the provisions of Sub-Clause 1.3 regarding its communication.
Variations

• If the Engineer does instruct a Variation, the Contractor must within 28 days of receiving the Notice (or other period agreed) submit certain information to the Engineer. The introduction of this time period is new. The information which must be provided by the Contractor is more detailed. For example:

(i) the Contractor must provide details of the resources and method to be adopted and proposal for adjustment to the Contract Price with supporting particulars for any change to the Contract Price (including details of any omissions).

(ii) Parties (i.e. the Employer and the Contractor) can now agree to the omission of any work which is to be carried out by others and in such case, the Contractor’s proposal may also include the amount of any loss of profit and other losses and damages suffered (or to be suffered) by the Contractor as a result of the omission.

Variations

• The updated clause clarifies that if the Contractor complies with this procedure, the Engineer must proceed in accordance with Sub-Clause 3.7 to determine any extension of time (EOT) or adjustment to the Contract Price and Schedule of Payments, if any.

• Sub-Clause 3.7 introduces new procedures and time limits for determining the EOT and price adjustment.

• The Engineer is to encourage the parties to reach agreement and give a Notice of Agreement within a time limit of 42 days (or within such other time limit agreed by both parties), and if the parties fail to agree, the Engineer then has a further time limit of 42 days (or within such other time limit agreed by both parties) to make a fair determination and give a Notice of Determination.
Variations

• Where the Contractor is dissatisfied with the determination, the Contractor has to give a Notice of Dissatisfaction with the Engineer’s Determination within 28 days after receipt of the Engineer’s determination, failing which the determination is final and binding.

• There are also two methodologies set out for valuing Variations, namely, Cost Plus Profit when no Schedule of Rates and Prices is included in the Contract, and rates or prices specified in the Schedule of Rates and Prices when such a schedule is included in the Contract.

• At Sub-Clause 13.1 there are more grounds for the Contractor to object to a Variation.

• These include that the work was Unforeseeable having regard to the scope and nature of the Works, the proposed variation will adversely affect the Contractor’s ability to comply with health and safety and environmental protection obligations, and that it may adversely affect the Contractor’s obligation to complete the works so that they are fit for purpose under Sub-Clause 4.1.

Variations

• The Engineer can cancel, confirm or vary the instruction, but if it is confirmed or varied it is then treated as an instructed Variation.

• There are however, no time limits given save for the provision that the Contractor must give notice promptly and the Engineer must respond promptly.

• There is a new procedure stipulating how the Engineer must respond to a proposal for value engineering from the Contractor at Sub-Clause 13.2.

• It is left to the Engineer to determine the adjustment to the Contract Price, taking into consideration the sharing of “any benefit, costs and/or delay” between the parties as may be stated in the Particular Conditions (although there is no relevant reference to Sub-Clause 13.2 in the Contract Data section of the Contract Particulars).
Variations

• There is now new provision for the Engineer to require the Contractor to produce quotations from suppliers in relation to Provisional Sums. The process for dealing with quotations for Daywork is set out in more detail.

• There is also provision for the determination of disagreement relating to statements under Sub-Clause 3.7.

• The change in law provisions have been expanded to include a change in any permit, permission, license or approval obtained by the Employer or the Contractor under Sub-Clause 1.13 or changes in the requirements for any such permits, permission, license or approval.

• There is now also a process whereby the Employer can request a reduction in the Contract Price as a result of any change in laws.

Variations

• Sub-Clause 3.5 now includes a mechanism by which the Contractor can give a Notice to the Engineer with its reasons when the Contractor considers an instruction constitutes a Variation (or involves work that is already part of an existing Variation) or does not comply with applicable Laws or will reduce the safety of the Works or is technically impossible.

• The Engineer has 7 days to respond upon receipt of the Notice by giving a Notice confirming, reversing or varying the instruction, failing which the instruction is deemed to be revoked.

• There is however, no guidance on what happens if the Contractor does not give such notice.
Liabilities and Indemnities

Liabilities

• The limitation of liability clause has been given greater prominence in its relocation to the front of the Contract at Sub-Clause 1.15.

• There are now more carve outs to the exclusion of liability for loss of profit, loss of use, loss of contract or any indirect and/or consequential loss e.g. delay damages.

• Parties should pay close attention to the carve outs to ensure that they are appropriate for the project.

• In relation to the total cap on liability of the Contractor, provisions have been inserted to make it clear that limitations of liability will not apply in the case of fraud, gross negligence, deliberate default or reckless misconduct. **So, for example, delay damages will not be capped in these circumstances.**

Liabilities and Indemnities

Liabilities

• There has been a clarification in respect of the fitness for purpose obligation at Sub-Clause 4.1

• The works must now be fit for the purpose as defined in the Employer’s Requirements rather than the Contract.

• Where no purpose is specified, the works must be fit for their “ordinary purpose”.

• Employers should take care to specify the purpose prescriptively if they have particular requirements in mind.
Liabilities and Indemnities

✓ Indemnities

• Although the old Sub-Clause 17.1 did include indemnities given from both the Employer and the Contractor, the indemnities were more favorable to the Employer.

• The new forms include more indemnities going back to the Contractor so as to introduce more reciprocity.

• However, there is also a significant and controversial new indemnity given by the Contractor to the Employer in respect of all acts, errors and omissions by the Contractor in carrying out the design obligations that results in the Works, when completed, not being fit for purpose.

Liabilities and Indemnities

✓ Indemnities

Although, Sub-Clause 1.15 makes it clear that the Contractor is not liable for loss of profit, loss of use, loss of contract or any indirect and/or consequential loss which arises as a result of such breach, and there is an overall cap on the Contractor’s liability, this is still an onerous new obligation. Contractors will need to discuss this provision with their insurers and watch out for attempts to amend the exclusion at Sub-Clause 1.15.
Liabilities and Indemnities

✓ **Indemnities**

• Bodily injury, sickness, disease or death, No substantive changes

• Damage to or loss of any property (other than the Works), No substantive changes

• Shared indemnities, the 2017 FIDIC Suite includes a provision which effectively states that each party’s liability to the other shall be reduced proportionately to the extent that any event is contributed to by a risk for which the other party is responsible.

• Intellectual and Industrial Property Rights, No substantive changes

Claims Procedure

• A detailed and elaborated new claims procedure is established, significant additional administrative requirements are on the parties and reliable and diligent contract management becomes even more important.

• Failure to strictly comply with these requirements may result in a loss of claims within very short period *(the consequences, however, may significantly differ depending on the applicable law)*.

• *the entire claims procedure has become mutual, i.e. the same procedure now applies for claims of both, the Contractor as well as the Employer.*
Claims Procedure

• The former rather large gap between the respective claims procedures in the 1999 FIDIC Suite (Sub-Clause 2.5 for Employer’s Claims versus Sub-Clause 20.1 for Contractor’s Claims), imposing a strict procedure on the Contractor while the Employer was not required to comply with such procedure, has often been an issue resulting in heavy disputes when negotiating Particular Conditions.

• It will be interesting to observe whether such disputes will now decrease and Employers will accept the new strict requirements.

Claims Procedure

• If one party considers itself to have a claim for payment and/or extension of time (EOT), the new Sub-Clause 20.2 requires such party to submit a “Notice” latest within 28 days. Failure to give such “Notice” in time will generally result in a loss of such claims.

• the new definition of “Notice” and the requirements in Sub-Clause 1.3 can become a contractual monster which may quite easily destroy the prospects of a claim.

• a “Notice” must be identified as such, i.e. a valid “Notice” cannot be given within any other communication not expressly identified as “Notice” and may thus not be “just” a paragraph in a general letter or in minutes of meeting any more.

• Even though the risk of losing claims increases, this new requirement ensures that claims have to be clearly communicated and potential disputes are discovered when they arise which is a useful improvement for all parties involved.
Claims Procedure

• While the further procedure once a “Notice of Claim” is made still requires the Engineer to agree or determine a matter or claim, the respective provisions in Sub-Clause 3.7 of the 2017 FIDIC Suite are far more detailed and formalistic.

• Failure to comply with the respective requirements may – again – result in a loss of claim.

• Thus, Contractors as well as Employers may want to modify the new claims procedure by agreeing changes in Particular Conditions or adjusting it due to major inconsistencies with the applicable law. However, any such modifications or adjustments need to be made with due care in order to prevent material disadvantages or the imposition of substantial risks under the applicable law for one or both parties of the

Disputes and Arbitration

• Clause 20 of the 1999 FIDIC Suite which covered the multi-tier dispute resolution provisions has been divided into two parts in the 2017 FIDIC Suite. Clause 20 is now solely dealing with Claims whereas Clause 21 covers Disputes and Arbitration.

• Major principles of dispute resolution already known from the 1999 FIDIC Suite can still be found in the 2017 version.

• First of all, a claim has to be filed with the Engineer which – if not settled and a party disagrees with the Engineer’s determination – may be referred to Dispute Adjudication again attempting an amicable settlement and thereafter to ICC Arbitration.
Disputes and Arbitration

• the 2017 FIDIC Suite also contains a number of major changes and deviations compared to the 1999 version:

• The Dispute Adjudication Board (DAB) of the 1999 FIDIC Suite has been changed into a Dispute Avoidance/Adjudication Board (DAAB), the latter now being a standing (!) DAAB in the Yellow and Silver Book, as already stipulated in the Red Book, rather than an ad-hoc DAB.

• The DAAB shall now be appointed within 28 days following contract signature unless the parties agree otherwise.

Disputes and Arbitration

• the 2017 FIDIC Suite now puts more emphasis on amicable settlements by allowing the parties to ask the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement.

• In this context it is worth mentioning that the procedural rules for the DAAB have been tremendously expanded and have become more complex.

• Most remarkably there is the obligation of the DAAB to convene with the parties on a regular basis even if formal proceedings are not pending.

• This will undoubtedly lead to additional cost of the dispute adjudication process.
Disputes and Arbitration

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Disputes and Arbitration

• Any amount decided upon by the DAAB or the Arbitral Tribunal as being payable from one to the other party shall now become immediately payable without the necessity of any further certification or notice and the Engineer is bound by DAAB decisions.

• As in the 1999 FIDIC Suite, a Notice of Dissatisfaction (NOD) may be issued with respect to a decision of the DAAB.

• However, the new 2017 FIDIC Suite now allows to only partially contest such decisions.

• The parts defined in the NOD as being disputed (and any parts affected by such statement) shall then be deemed to be contested whereas the rest of the decision will become final and binding upon the Parties.
Disputes and Arbitration

• If one party does not adhere to a binding (even still not final) decision of the DAAB, the other party may refer the decision directly to Arbitration under the 2017 FIDIC Suite.

• The Arbitral Tribunal is then empowered to hand down an interim or provisional measure or an award enforcing the decision of the DAAB.

• However, the before described provisional measures of the Arbitral Tribunal are of course subject to the final and binding decision on the merits of the matter.

• It should be noted that the arbitration clause has been amended with respect to the number of arbitrators to be appointed, now providing for “one or three arbitrators” instead of formerly three arbitrators to be appointed in accordance with the ICC Rules.

Building Information Modeling

• There is no specific reference in the General Conditions of the 2017 FIDIC Suite to Building Information Modeling (or “BIM” as it is commonly known).

• BIM is described as not being a set of contract conditions but a mechanism to provide an environment to access information relevant to respective parties’ roles.

• The 2017 FIDIC Suite does include however Advisory Notes which provides some guidance for projects in relation to the use of BIM and for the parties involved with the same.

• The Advisory Note includes summaries of the following matters:
Building Information Modeling

- Background and use of BIM, as well as benefits.
- Reference to co-ordination and goals typically being achieved by a BIM Protocol and a BIM Execution Plan
- Risks in working with BIM
- Transition from a design or construction phase to an as-built phase.

Looking ahead, FIDIC state that there are to publish “Technology Guidelines” and a “Definition of Scope Guideline Specific to BIM” in due course which will provide support and guidance to those using BIM and FIDIC forms.

Q & A

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