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OFFICIAL LAUNCH OF THE 2017 FIDIC SUITE OF CONTRACTS

FUNDEMENTAL CHANGES



International Federation of Consulting Engineers
The Global Voice of Consulting Engineers

FIDIC 2017 VS FIDIC 1999: FUNDAMENTAL CHANGES

I. THE BACKGROUND FOR THE CHANGE

As for construction field, a popular standard form of construction and engineering contract, especially First Edition Rainbow Suites of contracts published by the Fédération Internationale des Ingénieurs-Conseils (FIDIC) have played inevitably important role nearly past two decades. Firstly, launched in 1999, they were widely accepted by engineers, employers, construction lawyers and other users of FIDIC or FIDIC – based contracts from every corner of the world. After 17 years of application in reality, Red Book, Yellow Book and Silver Book of this First Edition were revised by FIDIC and introduced at International Contract Users Conference on 5 December 2017, known as Second Edition Rainbow Suite of contract or FIDIC Contract 2017 for short.

The FIDIC Contracts were revised as an attempt to meet the increasingly strict requirements of construction contract users, thereby aiming at containing some outstanding characteristics of developed contract in general and construction contract in particular, such as enhancing project management tools and mechanism; bolstering the role of the Engineer; balanced risk allocation; clarity, transparency and certainty in expression and interpretation of contract provisions; reflecting international best practice; addressing issues raised by users over the past 17 years arising out of use of the 1999 Suite; and incorporating most recent development in FIDIC contracts, in particular the Gold Book². The above purposes of revising FIDIC contracts will play as the key themes for the changes in FIDIC Contract 2017 and guidelines on better digestion of the new ones.

The following part of this newsletter will address some notable changes in FIDIC Contract 2017 in comparison with their 1999 counterparts.

² *Jeremy Glover, Change to the FIDIC form of contract.*

II. THE KEY CHANGES TO RED, YELLOW AND SILVER BOOK

Topic	Form of Contract	Clause	Content
Total number of Clauses ³	All		2017 FIDIC Contracts contain 21 clauses - one clause more than its old version. Some clauses are added with some new sub-clauses; however, the general structure of contracts does not seem to be so different from the previous edition.
Order of definition	All		<p>In the last version, the definitions were arranged in group of topics: the contract; dates, tests, periods and completion; money and payment; works and goods; and other definitions. In order to check the definition of one word, users had to take two steps: firstly, search it in the “Definition listed alphabetically” to identify the Sub-clause it was provided and secondly, come to the designated Sub-clause.</p> <p>Now in this updated version, the definitions are listed in alphabetical order. This approach has its own pros and cons. In one hand, it saves time if users know exactly the words defined but takes more time in case where the users just happen to know the topic.</p>
Particular Conditions	Red Book and Silver Book		These Books add Part B – Special Provisions, along with Part A – Contract Data in Particular Conditions to meet the specific requirement of many Employer, especially governmental agencies for special conditions of contract, or particular procedures, which differ from those included in the

³ See Content in Annex 1.

Topic	Form of Contract	Clause	Content
			General Conditions ⁴ . This makes the Particular Conditions of Red Book familiar to FIDIC Gold Book 2008.
Notices	All	Clause 1.3 [Notices]	Each of new FIDIC contracts call for Notices some 80 times. “Notice” is separated from other means of communication to become an independent Sub-clause. While latter must refer to the clause under which it is issued, a Notice does not ⁵ .
Limitation of liability	All	Clause 1.15 [Limitation of Liability]	The provision of Limitation of liability has been moved from Sub-clause 17.6 to Sub-clause 1.15 in 2017 Edition in which indirect or consequential losses have been excluded. As a result, delay damages and indemnity liabilities for breach of intellectual property rights and gross negligence are carved out from the aggregate cap ⁶ . Also, FIDIC provides the definition of the term “gross negligence” for the application of this Sub-clause. The appearance of this term in FIDIC 2017 has raised much concerns for its international application because of the different approaches “gross negligence” is adopted under civil law and common law.
The role of engineer	Red and Yellow Book	Clause 3 [Engineer]	The Engineer has its role reinforced significantly in administration of the project to include greater procedural detail and time limits for the carrying out of its functions ⁷ .

⁴ <http://fidic.org/books/construction-contract-2nd-ed-2017-red-book>

⁵ Amir Ghaffari, *FIDIC Red Book 2017: Top 7 changes*, para. 2.

⁶ <https://www.twobirds.com/~media/pdfs/bb-fidic-bulletin.pdf?la=en>

⁷ <https://www.twobirds.com/~media/pdfs/bb-fidic-bulletin.pdf?la=en>

Topic	Form of Contract	Clause	Content
			<p>The number of sub-clause as increased from by 3 to 8 sub-clauses. Among others, Sub-clause 7 [<i>Agreement or Determination</i>] should be given more attention. As its name, this Sub-clause deals with Agreement and Determination.</p> <p>As for “Agreement”, the Engineer is required to encourage discussion between parties in an deavour to reach an agreement. When issuing a determination, the Engineer is supposed to act "neutrally" between the Parties in accordance with a detailed procedure provided herein this Sub-clause and shall not be deemed to act for Employer as the agent of Employer⁸. The “fairness” of the Engineer were also mentioned in last version but now are upgraded to a new level.</p>
Subcontract	Red Book	Clause 5 [<i>Subcontracting</i>]	<p>Reb book regulates two kinds of subcontractors which are nominated subcontractors and other subcontractors. In 1999 version, these two kinds of subcontractors are regulated in two separate Clauses: Clause 4 for other subcontractors and Clause 5 for nominated subcontractors. Now in this latest version, they are integrated in one clause – Clause 5 [<i>SUBCONTRACTING</i>].</p>
Advance Warning	All	Sub-clause 8.4 [<i>Advance Warning</i>]	<p>This Sub-clause sets out events which require each Party to give early notice of any potential problems. This provision is expected to reduce disputes between parties by encouraging them to settle the controversial</p>

⁸ <https://www.whitecase.com/publications/alert/new-fidic-rainbow-red-yellow-and-silver>

Topic	Form of Contract	Clause	Content
			<p>problems at early stage when it is still minor thereby preventing them from escalating into more serious ones⁹.</p> <p>However, there is neither time limit for giving an advance warning, nor any explicit sanction for failing to do so¹⁰.</p>
Extension of time (EOT)	All	<p>Sub-claim 8.5 [<i>Extension of Time for Completion</i>]</p>	<p>The majority of changes lie in the circumstances for extension of time, including the addition of new circumstances, for example the delay caused by private utility entities¹¹ and by an increase of more than 10% of an estimated quantity¹². Moreover, under this edited Sub-clause, it is not obligatory for contractor to give separate claims for an EOT claim for delay caused by Variation¹³.</p>
Termination for Employer's convenience	All	<p>Clause 15.5 [<i>Termination of Employer's Convenience</i>]</p>	<p>The FIDIC Contract 2017 has made a significant change in the regime of termination for the Employer's convenience. In particular, Article 15.6 [<i>Valuation After Termination for Employer's Convenience</i>] of 2017 version grants the Contractors with loss of profit following termination for convenience under Clause 15.5 [<i>Termination of Employer's Convenience</i>]. Moreover, under Clause 15.5 of 2017 version, when terminating the contract for convenience, Employer is now entitled give the work to</p>

⁹ Jeremy Glover, *Change to the FIDIC form of contract*.

¹⁰ Amir Ghaffari, *FIDIC Red Book 2017: Top 7 changes*, para. 5.

¹¹ <https://www.twobirds.com/~media/pdfs/bb-fidic-bulletin.pdf?la=en>

¹² Amir Ghaffari, *FIDIC Red Book 2017: Top 7 changes*, para. 6.

¹³ Amir Ghaffari, *FIDIC Red Book 2017: Top 7 changes*, para. 6.

Topic	Form of Contract	Clause	Content
			another contractor while this is forbidden under Clause 15.5 [<i>Employer's Entitlement to Termination</i>] of 1999 version.
Expanding obligations to indemnify both for the Employer and the Contractor	Yellow book	Clause 17.4 [<i>Indemnities by Contractor</i>]	<p>Beside the indemnities by Contractor listed in Article 17.1 [INDEMNITIES] of 1999 version, Contractor in 2017 version shall indemnify Employer against “<i>all acts, errors or omission by Contractors in carrying out the Contractor's design obligations that result in the Works when completed, not being fit for purpose for which they are intended [...].</i>”</p> <p>As for Employer, apart from the indemnities provided in Article 17.1 [<i>Indemnities</i>] of its predecessor, FIDIC Contract 2017 provides that Employer shall indemnifies for losses or damages to properties attributable to an Employer's Personnel or respective agents.</p>
Exceptional Events	All	Clause 18 [<i>Exceptional Events</i>]	<p>FIDIC Contracts 2017 record change in the order of the clauses, in particular Clause 18 and Clause 19, which were [<i>Insurance</i>] and [<i>Force Major</i>] respectively in their predecessor. The Insurance is governed in Clause 19 while Force Major is stipulated in Clause 18 and renamed Exceptional Events. However, the definition of exceptional events is similar in nature to the Force Major definition found in previous versions and the risk allocation remains unchanged.</p> <p>FIDIC Contracts 2017 record change in the order of the clauses, in particular Clause 18 and Clause 19, which were [<i>Insurance</i>] and [<i>Force Major</i>] respectively in their predecessor. The Insurance is governed in Clause 19 while Force Major is stipulated in Clause 18 and renamed Exceptional Events. However, the definition of exceptional events is</p>

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			<p>similar in nature to the Force Major definition found in previous versions and the risk allocation remains unchanged.</p> <p>Such change may result from the difference in the way force major is treated in common law and civil law. In common law system, there is no clear and official definition for “force major” while it is represented in civil code of most countries of civil law systems. Consequently, it causes burden for those using it in the civil law jurisdiction as they have their own pre-conceptions of force major and do not seriously consider what FIDIC meant by the term¹⁴.</p>
New claim procedure	All	<p>Clause 20 <i>[Employer’s Claim and Constructor’s Claim]</i></p>	<p>FIDIC Contract 1999, Clause 20 [<i>Claim, Disputes and Arbitration</i>] was split into Clause 20 [<i>Employer’s Claim and Constructor’s Claim</i>] and Clause 21 [<i>Disputes and Arbitration</i>]. The reason for this is to try to distinguish between making a Claim and raising a Dispute. While the former means making a request for an entitlement under contract, the latter arises if the Claim is rejected (in whole or in part) or ignored.</p> <p>Under the First Editions, the Contractor’s claims were provided in Sub-clause 20.1 [<i>Contractor’s Claim</i>] and the Employer’s claims in Sub-clause 2.5 [<i>Employer’s Claim</i>] with different obligations for each. Now, in Second Edition, the claim procedure is solely dealt with in Clause 20 [<i>Employer’s Claim and Constructor’s Claim</i>] with the burden of obligations of each party is reciprocal.</p>

¹⁴Edward Corbett, *Clause 18: Exceptional Event*, first para.

Topic	Form of Contract	Clause	Content
Dispute Adjudication/Avoidance Board	All	Clause 21 <i>[Disputes and Arbitration]</i>	<p>Dispute Adjudication Board (DAB) has been renamed Dispute Adjudication/Avoidance Board (DAAB). This change can be seen as clear expression of the increasing focus on avoidance of disputes rather than adjudicate them as a saying indicates “prevention is better than cure” and not all claim leads to dispute.</p> <p>In order to achieve the above aim, in the new edition, all DAABs will be standing DAABs. They are jointly appointed by parties at the start of the contract (within 28 days after the Contractor receives the Letter of Acceptance) and in charge throughout the duration of a project, meeting parties at stipulated intervals, rather than on an ad-hoc basic as was previously the case.</p> <p>In comparison to its 1999 counterpart, it is evaluated to be more rigid and prescriptive which put more pressure on employers and contractors to comply while, as foretasted, make no change to risk allocation¹⁵.</p>

¹⁵ Amir Ghaffari, *FIDIC Red Book 2017: Top 7 changes*, first para.

III. OVERVIEW TO THIS CHANGE

Second Edition Rainbow Suite of contract or FIDIC presents as a landmark in the of upgrade of First Edition. Unlike others, in case of applying Second Editions, care should be more seriously taken when drafting the Particular Conditions, especially the Part B – Special Condition due to its separate nature.

Along with the debut of this Edition, the matter as to whether it is more convenient and beneficial to use this one instead of its predecessor is often raised. Up to now, its answers have sparked controversy in the area of constructions around the world. At first glance, its ultimate objectives are progressive and welcome; however, only time can reveal to us how effectively it works and what achievements it constitutes as well as the benefits it can bring about.

As far as you all know, the applicable versions of FIDIC is free of choice regardless of the appearance of the latest versions. Consequently, making decision on using which FIDIC edition is of users' option in awareness of specific context, their positions in contract and particular requirements.

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ANNEX 1: CONTENT¹¹⁰

FIDIC CONDITIONS OF CONTRACT FOR CONSTRUCTION FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYERS (2017 RED BOOK)

GENERAL CONDITION CONTENTS

- 1. GENERAL PROVISION**
 - 1.1 Definitions
 - 1.2 Interpretation
 - 1.3 Notices and other communications
 - 1.4 Law and language
 - 1.5 Priority of documents
 - 1.6 Contract agreement
 - 1.7 Assignment
 - 1.8 Care and supply of documents
 - 1.9 Delayed drawings or instructions
 - 1.10 Employer's use of contractor's documents
 - 1.11 Contractor's use of employer's documents
 - 1.12 Confidentiality
 - 1.13 Compliance with the laws
 - 1.14 Joint and several liabilities
 - 1.15 Limitation of liability
 - 1.16 Contract termination

- 2. THE EMPLOYER**
 - 2.1 Right of access to the site

¹¹⁰ <http://fidic.org/books/construction-contract-2nd-ed-2017-red-book>

- 2.2 Assistance
- 2.3 Employer's personnel and other contractors
- 2.4 Employer's financial arrangements
- 2.5 Site data and items of reference
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APPENDIX

GENERAL CONDITIONS OF DISPUTES AVOIDANCE/ADJUDICATION AGREEMENT

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