



FIDIC RAINBOW SUITE ed.2017

Second edition of the Red, Yellow & Silver Books

The Fédération Internationale des Ingénieurs-Conseils («FIDIC») is an International Federation of Consulting Engineers founded in 1913, now with over 100 member countries. FIDIC publishes various standard contracts to be used for construction works, large-scale machinery supplies, infrastructure projects, consultancy services, etc. Each contract applies to a specific area and is characterised by an individual colour label. The contracts aim at distributing liabilities and risks on the relevant parties, but they are not «agreed documents» per se.

The second edition of the Red, Yellow and Silver books was unveiled in December 2017, at the International FIDIC Contract Users Conference in London. This edition succeeds and updates the 1999 editions of the Red, Yellow and Silver books, and continues to serve as the pre-eminent standard form contracts between the employers and the contractors in the international scene of construction and engineering projects.

The FIDIC Red Book is primarily intended for building and engineering works where the employer bears the design responsibility. The FIDIC Yellow Book is primarily intended for contracts where the contractor bears not only responsibility for construction, but is also responsible for the design of the works to be constructed. This form of contract can be used for all construction projects where the contractor is to bear both design and construction responsibility, including, but not limited to contracts related to electrical/mechanical installations. The FIDIC Silver Book is essentially a turnkey contract. All three contracts have been prepared for the purpose of tenders. They are all structured in the same manner providing consistency and ease for practical usage. Hence it is easier for the tenderers to obtain a concise overview of the conditions of contract and any deviations from the standard wording and, consequently, to prepare a tender.

The new versions of the FIDIC Red Book, Yellow Book and Silver Book constitute updates of the former editions from 1999, which can still be used by the industry. All three contracts have been significantly amended with the main goal to increase clarity and certainty. These amendments should lead to fewer disputes and more successful projects. Underlying this overarching aim, is the recognition of a need to reflect current best practice and the issues raised by users of the 1999 editions over the past 18 years.

A key theme of the Second Edition is the increased emphasis on dispute avoidance. The Second Editions are much more comprehensive, spanning more than 200 pages each and containing 21 Clauses. The additional length is the consequence of more prescriptive provisions, with greater clarity, transparency and certainty being achieved by setting out in detail the step-by-step requirements on the employer, the contractor, and the engineer during the course of a project.

In addition to the Yellow, Red and Silver books, an updated FIDIC White Book, which is intended for consultancy/advisory services, was published in the spring of 2017. FIDIC also offers a wide variety of other standard contract forms.

The fundamental principles which underlie all FIDIC contracts are:

- 1/ FIDIC contracts are drafted by engineers experienced in design and construction,
- 2/ FIDIC contracts embody a balanced risk allocation between the Parties, and
- 3/ The role of 'the Engineer' under FIDIC Contracts is critical.

With the aim of increasing clarity and reducing potential misunderstandings on interpretation, FIDIC has improved the contract provisions in the 2017 edition by making them more prescriptive and introducing step-by-step project management and procedural mechanisms. These set out exactly what is expected from the Employer, the Contractor, and the Engineer during the performance of the Contract.

In updating the three forms of contract, FIDIC has also attempted to use simple language since the mother-tongue of many users is not English. This approach is also intended to facilitate the translation of the documents into other languages.

As the recognised international standard forms of construction contract, FIDIC's aim is improve and strengthen the application of these contract forms in all jurisdictions, and in all situations.

While the provisions under the three forms of contract have been improved, the overall structure of each form remains unchanged. However, there are now 21 clauses of General Conditions of Contract in FIDIC's 2017 contract updates, rather than the 20 clauses in the 1999 FIDIC



contracts. What was Clause 20 [*Claims, Disputes and Arbitration*] in the FIDIC 1999 forms of contract has now been split into Clause 20 [*Employer's and Contractor's Claims*] and Clause 21 [*Disputes and Arbitration*]. The purpose of introducing this change was to clearly distinguish and separate 'day-to-day' Parties' claims from Parties' disputes, and to highlight the distinction between how they are dealt with under FIDIC contracts.

In the drafting process FIDIC's 2017 contract updates were subjected to a number of systematic reviews and controls by over fifty eminent and experienced professionals, specially chosen and invited by FIDIC from across the spectrum of interested users (including employers, contractors, engineers, lawyers and bilateral/multilateral development banks from around the world); The comments and suggestions received at each review stage were carefully considered by FIDIC and, where appropriate, necessary amendments were made.

What follows below is a summary of the more noteworthy changes that have been incorporated into the updated FIDIC Red, Yellow and Silver Books, second edition 2017. Many of these changes have been made across all three of FIDIC's 2017 contract updates.

One of the main factors in the success of the FIDIC 1999 forms of contract has been the project management procedures and mechanisms that were included in the General Conditions of Contract. In FIDIC's 2017 contract updates many of these procedures and mechanisms have been enhanced and clarified to reflect modern international best-practice. For example:

- in order to promote effective communication, there is a new sub-clause (Sub-Clause 3.8 under 2017 Red and Yellow Books, and Sub-Clause 3.6 under 2017 Silver Book) providing for management meetings
- there are more detailed requirements in respect of the Contractor's programme of works (please see further below)
- updated provisions have been added for the Contractor to implement a quality management system and new provisions for a compliance verification system to demonstrate that the works, materials, plant and workmanship comply with the requirements under the Contract
- there is a new requirement for the Contractor to submit a health and safety manual which has been specifically prepared for the Works and the Site
- a new sub-clause (Sub-Clause 8.4) has been added requiring each Party to give advance

warning to the other Party of any event that may have an adverse effect on the Works, cause delay or increase the Contract Price

- should the Parties wish to have milestones under their contract, suggested provisions are provided in the Guidance for the Preparation of Particular Conditions, published with each of FIDIC's 2017 contract updates .

In order to uphold FIDIC's fundamental principle of balanced risk allocation between the Parties, a number of the contractual provisions that applied to just one Party under the FIDIC 1999 forms of contract are now reciprocal between the Employer and the Contractor. For example:

- confidentiality of contract documents;
- assistance to obtain the necessary permits/permissions/licences/approvals for the Works;
- the right to file a claim if the other Party does not obtain the necessary permits/permissions/licences/approvals or comply with one that has been obtained; the right of one Party to require the other Party to remove from his/her personnel any person who is found to have engaged in corrupt, fraudulent or coercive practice; the prohibition of recruitment by one Party from the other Party's personnel; and the claims procedure to be followed for Contractor's and Employer's claims.

Some sub-clauses have been moved to what FIDIC believes are more suitable locations within the General Conditions of Contract. For example:

- the sub-clause [*Limitation of Liability*] has been moved from Clause 17 under the 1999 FIDIC contracts to become the last sub-clause of Clause 1 in FIDIC's 2017 contract updates. This was done to align with the changes to Clause 17 (please see below)
- the sub-clause [*Employer's Claims*] is no longer part of Clause 2 since Employer's claims are now dealt with in the same way as Contractor's claims - both under Clause 20
- the Employer's obligation to provide site data, and the provisions relating to materials and/or equipment to be supplied by the Employer for the Contractor's use, have been moved from Clause 4 to new sub-clauses under Clause 2
- currency of payment for Variations has been moved from Sub-Clause 13.4 [*Payment in Applicable Currencies*] in the FIDIC 1999 contracts to Sub-Clause 14.15 [*Currencies of Payment*] in FIDIC's 2017 contract updates.



The statement 'time is of the essence' is particularly applicable to construction and engineering projects, and so there are now a number of new, stated time periods for actions by the Contractor or the Engineer (and in one or two cases, the Employer) that have been added to various sub-clauses in FIDIC's 2017 contract updates. As stated in the Guidance given for the preparation of the Particular Conditions Part B - Special Provisions, published with each of FIDIC's 2017 contract updates: "Each time period stated in the General Conditions is what FIDIC believes is reasonable, realistic and achievable in the context of the obligation to which it refers, and reflects the appropriate balance between the interests of the Party required to perform the obligation, and the interests of the other Party whose rights are dependent on the performance of that obligation. If consideration is given to changing any such stated time period in the Special Provisions (Particular Conditions – Part B), care should be taken to ensure that the amended time period remains reasonable, realistic and achievable in the particular circumstances".

In order to reinforce the intention behind stating specific time periods, if the time period is not met, then a corresponding deeming provision has been added. For example: if the Contractor requests consent to subcontractors, or the appointment/replacement of Key Personnel, and the Engineer (under the Red and Yellow Books 2017) or the Employer (under the Silver Book 2017) does not respond within the stated time period with an objection, then he/she is deemed to have given consent. Similarly, if the Engineer (under the Red and Yellow Books 2017) or the Employer (under the Silver Book 2017) does not issue the Performance Certificate within the stated time period, the certificate will be deemed to have been issued.

Sub-Clause 1.1 definitions: Under Sub-Clause 1.1, the definitions now appear in alphabetical order and there are a number of new definitions to reflect FIDIC's core aim of increased clarity and certainty. For example:

- 'Claim', 'Date of Completion', 'Delay Damages', 'Dispute', 'Joint Venture', 'Notice', 'Notice of Dissatisfaction' and 'Programme' are now defined terms, as are 'Extension of Time', 'Key Personnel', 'No-objection'. The meanings of 'may', 'shall' and 'consent' have also been set out.
- The 'Appendix to Tender' document under the 1999 FIDIC contracts, is now referred to as 'Contract Data'.

'Particular Conditions' is now defined as comprising of two parts: Part A – Contract Data and Part B – Special Provisions.

Abbreviations of some terms have also been added, for example: "DNP" for "Defects Notification Period", "EOT" for "Extension of Time", "IPC" for "Interim Payment Certificate", "FPC" for "Final Payment Certificate".

- The term "plus reasonable profit" as was used under the 1999 FIDIC contracts has been found to cause problems in practice and so a new definition "Cost Plus Profit" has been added in FIDIC's 2017 contract updates. This definition refers to a percentage for Contractor's profit to be stated in the Contract Data, but the default of 5% is stated in the event that nothing is stated in the Contract Data.

Sub-Clause 1.1: The requirements under Sub-Clause 1.3 regarding Notices (now defined under Sub-Clause 1.1) have been strengthened to reflect the more important role that this special type of communication plays in FIDIC's 2017 contracts.

Sub-Clauses 1.9 & 4.7: The provisions of Sub-Clause 1.9 [*Errors in the Employer's Requirements*] in the Yellow Book 2017, and of Sub-Clause 4.7 [*Setting Out*] in the Red and Yellow Books 2017, have been improved by stating in greater detail what is required of the Engineer and of the Contractor in circumstances where errors are discovered by the Contractor in the Employer's Requirements or in the items of reference provided by the Employer. Also, in the Contract Data, the Parties have the flexibility of stating the time periods for the Contractor's review (although these sub-clauses state default time periods in the event that none are stated in the Contract Data).

Sub-Clause 2.4: The provisions concerning the Employer's financial arrangements under Sub-Clause 2.4 have been further developed so that, in FIDIC's 2017 contract updates, the Employer is now required to describe such financial arrangements in the Contract Data, must notify the Contractor if there is a material change, and show (at the Contractor's request) that financial arrangements are in place for payment of Variations of value greater than the stated thresholds.

Clause 3: Under Clause 3 of the Red and Yellow Books 2017, new specific provision has been made for what is commonly the case in practice, namely that 'the Engineer' appointed is a legal entity rather than an individual. Also, to reflect the fact that FIDIC is the global voice of the Consulting Engineering industry, there is a new requirement that 'the Engineer' is an engineering professional. In practice it is often the case that the Engineer is represented on site by a certain individual, and this is now reflected in a new sub-clause [*Engineer's Representative*]. This, and the following sections, have



been modified to clarify, strengthen and reinforce the role of the Engineer to the contract.

Sub-Clauses 3.4 & 3.5: In practice, the question of whether or not an instruction issued by the Engineer/ Employer's Representative constitutes a Variation has caused difficulties. So, under what is now Sub-Clause 3.5 in the Red and Yellow Books 2017 and Sub-Clause 3.4 in the Silver Book 2017, if an instruction does not state that it is a Variation, the Contractor can give a Notice if he believes that it is a Variation, and the Engineer (under the Red and Yellow Books 2017) or the Employer (under the Silver Book 2017) has the opportunity to confirm, reverse or vary the instruction within a stated time period. If this time period is not met, the instruction is deemed to have been revoked.

Sub-Clause 3.7: In the Red and Yellow Books 2017, the Engineer's role in dealing with the Parties' claims, and with other matters under the contract, is set out in greater detail using a step-by-step procedure with time limits, under what is now Sub-Clause 3.7 (Sub-Clause 3.5 under the 1999 Red and Yellow Books):- consultation with the Parties to encourage them to reach agreement → determination in the absence of agreement → effect of the agreement or determination → dissatisfaction with the determination.

In order to promote what is expected of the Engineer under this Sub-Clause, namely that he/she deals with the Parties even-handedly in trying to broker an agreement between the Parties and, if there is no agreement in coming to a "fair determination" of the matter or claim, it is now expressly stated that what was implied under the 1999 Red and Yellow Books: the Engineer is required to "act neutrally between the Parties" and "not be deemed to act for the Employer". To avoid the problems that many users have reported to FIDIC in recent years, it is now also expressly stated (under Sub-Clause 3.2) that there shall be no requirement for the Engineer to obtain the Employer's consent before exercising his/her authority under Sub-Clause 3.7.

Sub-Clause 3.7: In the Silver Book 2017, there is now an obligation on the Employer to appoint the 'Employer's Representative' - this was just an option under the 1999 Silver Book. This obligation has been added for two reasons: firstly, so that the Contractor's Representative has a single-point-of-contact during the performance of the contract, particularly when it comes to the issuing of instructions; and secondly, it is the Employer's Representative who is now expressly responsible for dealing with the Parties' claims, and with other matters under the contract under Sub-Clause 3.5 (unchanged sub-clause number from that under the 1999 Silver Book).

Sub-Clause 3.5: The Employer's Representative's role under Sub-Clause 3.5 is set out in greater detail using a step-by-step procedure with time limits, in a similar manner to that described above for Sub-Clause 3.7 of the Red and Yellow Books 2017. In carrying out his/her duties under Sub-Clause 3.5, it is now expressly stated that the Employer's Representative shall "not be deemed to act for the Employer".

It is worth noting that the provisions for agreement/determination, under Sub-Clause 3.7 of the Red and Yellow Books 2017 and under **Sub-Clause 3.5 of the Silver Book, now apply not just to claims but also:**

- in the Red Book 2017, to measurement of the Works in the event that the Contractor does not agree with the Engineer's measurement - under Sub-Clause 12.1 [*Works to be Measured*]
- in the Red Book 2017, to a new rate/price in the event that the Contractor and the Engineer cannot agree the new rate/price - under Sub-Clause 12.3 [*Valuation of the Works*]
- to Variations: the Contractor's entitlement to extension of time and/or adjustments of the Contract Price/Schedule of Payments, under Sub-Clause 13.3 [*Variation Procedure*]
- where Daywork resources are not agreed, under Sub-Clause 13.4 [*Daywork*]
- where actual progress differs from planned progress affecting payment in accordance with a Schedule of Payments, under Sub-Clause 14.4 [*Schedule of Payments*]
- to the amount to be paid to the Contractor in respect of plant and/or materials when shipped or delivered to site, under Sub-Clause 14.5 [*Plant and Materials intended for the Works*]
- where the Engineer does not certify an amount that the Contractor considers should have been certified in a previous interim payment certificate, under Sub-Clause 14.6 [*Issue of IPC*]
- where the cause of a defect is in question, under Sub-Clause 11.2 [*Cost of Remedying Defects*].

Sub-Clause 4.2: Under Sub-Clause 4.2, the provisions relating to the Performance Security have been re-structured, and there is now a new provision allowing for an increase or decrease of the amount of the security in the event that Variations result in an increase or decrease of the Contract Price above a stated threshold. There is also new wording stating that any amount that the Employer receives by claiming under the Performance Security is to be taken into account in the final payment



certificate or, in the case of termination, in the valuation of payment due after termination.

Sub-Clause 4.4 & 5.1: Based on feedback received over the past 18 years, the FIDIC 2017 contract updates contain a new provision for possibly limiting the value of subcontracted work for a particular contract by providing for this in the Contract Data (if nothing is stated in the Contract Data, the default maximum limit stated in this Sub-Clause is “the whole of the Works”) – this appears under Sub-Clause 4.4 of the Yellow and Silver Books 2017 and under Sub-Clause 5.1 of the Red Book 2017. Also on the basis of feedback from users, the provisions relating to nominated subcontractors (Sub-Clause 5.2 of the Red Book 2017 and Sub-Clause 4.5 of the Yellow and Silver Books 2017) have been restructured and further details have been added in respect of the Contractor's right to object, and the payments to be made to nominated subcontractors.

Sub-Clause 4.12: In the Red and Yellow Books 2017, the provisions under Sub-Clause 4.12 [*Unforeseeable Physical Conditions*] have been restructured and further detail added in a step-by-step format so that it is clear what is expected, and when it is expected, of the Contractor and the Engineer in the event that unforeseeable conditions are encountered:- notice by the Contractor → inspection and investigation by the Engineer → instruction by the Engineer → the Contractor's right to claim for any delay and cost → agreement/determination of the claimed delay and cost.

Sub-Clause 5.2: Similarly, in the Yellow and Silver Books 2017 the provisions concerning submission and review of the Contractor's design under Sub-Clause 5.2 [*Contractor's Documents*] have been restructured and further detail added in a step-by-step format, again making it very clear what is expected, and when it is expected, of the Contractor and the Engineer (under the Yellow Book 2017) or the Employer (under the Silver Book 2017) during the design review process.

Clause 5 In the Red Book 2017, Clause 5 is now devoted to subcontracting (concerning ordinary subcontractors, as well as nominated subcontractors) and so, what was covered by Sub-Clause 4.4 and 4.5 in the Red Book 1999, have been moved to Clause 5.

Sub-Clause 4.4 of the Red Book 2017 now provides for the situation where an element of the Works is to be designed by the Contractor and so this sub-clause sets out provisions concerning submission and review of the Contractor's design (and, where required under the Specification, as-built records and/or operation and maintenance manuals).

Sub-Clause 4.5: of the Red Book 2017 deals with training by the Contractor of the Employer's personnel – where such training is required under the Specification.

A new sub-clause has been added under FIDIC's 2017 contract updates to provide for positions of Key Personnel to be identified by the Employer in the Specification (under the Red Book 2017) or the Employer's Requirements (under the Yellow and Silver Books 2017), for the persons named in the Contractor's tender to be appointed in those positions, and sets out the requirements if the Contractor wishes to replace any such person.

Sub-Clause 7.5: Under Sub-Clause 7.5 [*Defects and Rejection*] in FIDIC's 2017 contract updates, again to reflect best-practice, additional provisions have been included requiring the Contractor to submit a proposal for remedying defects and allowing the Engineer to review such proposals.

Sub-Clause 8.3: The Contractor's programme for execution of the Works is an important project management tool during the performance of the Works, and so Sub-Clause 8.3 has been updated with additional requirements for the initial programme and all revised programmes to be submitted to the Engineer (under the Red and Yellow Books 2017) or to the Employer (under the Silver Book 2017) for review.

These additional requirements include: showing the Commencement Date, the Time for Completion of the Works and of any Section; the date or dates that the Contractor requires access to the Site or parts of the Site; the critical path and any float for logically linked activities; days of rest and holidays; key delivery dates for plant and materials; and in revised programmes, the actual progress to date, any delays and the sequence and timing of remedial works.

The Contractor is also now required to include in the supporting report for each submitted programme the proposals to overcome the effects of any delay(s) to progress of the Works. The Engineer (under the Red and Yellow Books 2017) or the Employer (under the Silver Book 2017) then has a stated time period for reviewing each submitted programme within which he/she can give a Notice stating that the programme is non-compliant with the Contract or the Contractor's obligations, or does not reflect actual progress – in which case the Contractor is required to submit a revised programme. If such Notice is not given within the stated time period, then a Notice of No-objection is deemed to have been given, and the submitted programme then becomes the Programme – which shall be followed by the Contractor and on which the Employer's personnel can rely.



Sub-Clause 8.5: Under Sub-Clause 8.5 [*Extension of Time for Completion*] it is now expressly stated that there is no requirement for the Contractor to follow the claims procedure in respect of the entitlement to extension of time for Variations (please see further below).

In the Red and Yellow Books 2017, under sub-paragraph 8.5(c), the meaning of “exceptionally adverse climatic conditions” has been added, which it is hoped will avoid some of the difficulties that have arisen with the interpretation of this wording under the 1999 Red and Yellow Books. The issue, which very often arises in practice, of concurrent Employer-delay and Contractor-delay has been addressed in a new paragraph under Sub-Clause 8.5. FIDIC has not set a mechanism for assessing the extension of time in such circumstances, but allows the Parties to include such a mechanism in the Special Provisions and gives guidance in the Notes for the preparation of Special Provisions, published with each of FIDIC’s 2017 contract updates.

Sub-Clause 9.1: Regarding Tests on Completion, Sub-Clause 9.1 has been improved by requiring the Contractor to submit a detailed test programme to the Engineer (under the Red and Yellow Books 2017) or to the Employer (under the Silver Book 2017) and, when the Contractor considers that the tests have been successfully passed, to submit a certified report of the results of the tests. In each case the Engineer or the Employer may then review what has been submitted and notify the Contractor of any non-compliance with the requirements of the Contract.

Sub-Clause 10.1: Under Sub-Clause 10.1 [*Taking Over of the Works and Sections*], where the Contractor is required to submit as-built records and/or operation and maintenance manuals and/or to carry out training of the Employer’s personnel (in each case: in the Red Book 2017 only if expressly stated in the Specification, and in the Silver Book if expressly stated in the Employer’s Requirements) the Works will not be ready for taking-over by the Employer until a Notice of No-objection has been given or deemed to have been given in respect of the records and/or manuals, and/or the training has been carried out.

Sub-Clause 11.5, 11.6, 11.7: Where the Contractor requests consent to remove an item of Plant off-site for remedying defects, under Sub-Clause 11.5 there is a new requirement for the Contractor to give a Notice setting out the details of the item of Plant, the defect, transportation and insurance, and planned durations for the remedial works and re-installation.

The provisions of Sub-Clause 11.6 [*Further Tests after Remedying Defects*] have been supplemented by requiring the Contractor to submit a proposal for repeat

testing to the Engineer (under the Red and Yellow Books 2017) or the Employer (under the Silver Book 2017), who is then required to give a Notice agreeing to the Contractor’s proposal or instructing the repeat testing that is required.

The requirements under Sub-Clause 11.7 [*Right of Access after Taking Over*] have been developed by requiring the Contractor to give a Notice with details of what and when the access is required, and requiring the Employer to respond within a stated time period. If such access is unreasonably delayed, the Contractor has a new right to claim under this Sub-Clause.

Clause 12, 12.1, 12.3: Measurement and evaluation of the Works under the Red Book 2017 remains under Clause 12. As noted above, there are new provisions under Sub-Clause 12.1 [*Works to be Measured*] and Sub-Clause 12.3 [*Valuation of the Works*] which require the Parties to proceed under Sub-Clause 3.7 [*Agreement or Determination*] if the Contractor and the Engineer cannot agree to the measurement of the Works or a new rate/price to be used to value the Works.

The provisions for Tests after Completion covered under clause 12 with the Yellow and Silver Books 2017 have been improved by clarifying the procedures that are set out therein. For example, rather than referring to other details “specified in the Contract” these details are now referred to as “specified in the Employer’s Requirements” so that it is very clear exactly where in the Contract documents the specified details are to be found.

Sub-Clause 12.1 of the Yellow Book 2017 has been improved by requiring the Engineer to provide a test programme to the Contractor showing the estimated timing of the tests - in order that the Contractor can plan his/her attendance at the time and place of the testing. Similarly, Sub-Clause 12.1 of the Silver Book 2017 has been improved by requiring the Contractor to submit a detailed test programme to the Employer who then has the opportunity to notify the Contractor of any non-compliance with the Contract.

Sub-Clause 13.1, 13.2: Under Sub-Clause 13.1 [*Right to Vary*] what was a ban on instructing an omission of any work to be carried out by others in the 1999 FIDIC contracts, is now qualified by allowing the Parties to agree to such a Variation – to deal with omissions of this type that do sometimes happen and have caused problems in practice. This new qualification is counter-balanced by a corresponding new provision under what is now Sub-Clause 13.3.1 [*Variation by Instruction*] stating that, where the Parties agree to the omission, the Contractor will be entitled to recover loss of profit and other losses/damages (which is now excluded from the general statement of the Parties’ non-liability for indirect losses/



damages under the first paragraph of Sub-Clause 1.15 (1.14 in the Silver Book 2017) [*Limitation of Liability*].

Also under Sub-Clause 13.1, new grounds have been added to the Contractor's right to object to an instructed Variation: the varied work was Unforeseeable; that it will have an adverse effect on the Contractor's ability to comply with his/her health and safety and/or environmental obligations; and, under the Yellow and Silver Books 2017, that the varied work may adversely affect the Contractor's fitness-for-purpose obligation in respect of the completed Works.

In order to give the Parties full flexibility as to how the benefits/costs/delay of a Contractor's value engineering proposal under Sub-Clause 13.2 should be shared between the Parties, the wording has been amended to refer to details which can now be agreed between the Parties under the Particular Conditions.

Sub-Clause 13.2, 13.3, 13.3.1: Sub-Clause 13.3 [*Variation Procedure*] has been restructured into two parts: Sub-Clause 13.3.1 [*Variation by Instruction*] and Sub-Clause 13.2 [*Variation by Request for Proposal*]. In the Yellow and Silver Books 2017, express provisions have been added to clarify how the Contract Price adjustment for a Variation should be valued.

If the Contractor has been requested to provide a proposal for a Variation, but the Variation is not then instructed, there is a new right for the Contractor to claim the cost of preparing the proposal. It is worth noting that, under a number of sub-clauses, there are now new provisions requiring the Variation procedure of Sub-Clause 13.3 to be followed. For example:

- Sub-Clause 1.9 [*Errors in the Employer's Requirements*] of the Yellow Book 2017, for the measures to be taken by the Contractor to correct an error in the Employer's Requirements
- Sub-Clause 4.7.3 [*Agreement or Determination of rectification measures, delay and/or Cost*] of the Red and Yellow Books 2017, for the measures to be taken by the Contractor to correct an error in the items of reference provided by the Employer
- Sub-Clause 8.7 [*Rate of Progress*] of all three of FIDIC's contract updates 2017, in respect of any Engineer's instruction to revise the method of working or accelerate progress to reduce delays caused by matters for which the Contractor would be entitled to an extension of time
- Sub-Clause 13.6 [*Adjustments for Changes in Laws*] of all three of FIDIC's contract updates 2017, in respect of any necessary changes to the Works arising from changes in Laws

- Sub-Clause 17.2 [*Liability for Care of the Works*] of all three of FIDIC's contract updates 2017, for the Contractor's rectification of loss/damage resulting from any of the causes listed in this sub-clause.

Sub-Clause 13.6: Under Sub-Clause 13.6 [*Adjustments for Changes in Laws*] the Contractor now has added entitlement to claim in the event of changes to permits/permissions/licences/approvals obtained for the Works, or to the requirements for the Contractor to obtain permits/permissions/licences/approvals. Also added is an element of reciprocity between the Parties: the Employer can now claim a reduction in the Contract Price if a change in Laws gives rise to reduced costs for the Contractor.

Sub-Clause 13.8: The somewhat complex formula that appeared under Sub-Clause 13.8 [*Adjustments for Changes in Cost*] of the Red and Yellow Books 1999, and the simple reference to the Particular Conditions under the same sub-clause of the Silver Book 1999, has now been replaced in all three of FIDIC's contract updates 2017 by a reference to a "Schedule of cost indexation" in the Contract - in order to give the Parties full flexibility to agree to the method of calculating the adjustment to the Contract Price arising from changes in labour/plant/materials. If no such Schedule is included in the Contract, it is now stated that this Sub-Clause 13.8 does not apply.

Sub-Clause 14.2: Sub-Clause 14.2 [*Advance Payment*] has been restructured and further detail added in a step-by-step format so that it is clear what is expected, and when it is expected, of the Contractor, the Employer (and the Engineer under the Red and Yellow Books 2017) in respect of the advance payment guarantee, making the advance payment, and repaying the advance payment.

Sub-Clause 14.6: Similarly, for interim payments to the Contractor, Sub-Clause 14.6 has been restructured and further detail added in a step-by-step format so that it is clear what is expected, and when it is expected, of the Contractor, the Employer (and the Engineer under the Red and Yellow Books 2017). As an addition to the requirement for the Contractor to provide the Performance Security, it is now stated that no interim payment amount is to be (certified under the Red and Yellow Books 2017 or) paid to the Contractor until the Contractor's Representative has been appointed. The Engineer under the Red and Yellow Books 2017, or the Employer under the Silver Book 2017, is now required to "fairly consider" the amount of interim payment due to the Contractor and to identify any difference in any amount between what is certified/notified and what the Contractor included in his/her Statement giving reasons for the difference. There is now an added entitlement



for the Engineer under the Red and Yellow Books 2017, or the Employer under the Silver Book 2017, to take account of any error/discrepancy in a Statement until it is corrected by the Contractor in a subsequent Statement.

Sub-Clause 14.7: Under Sub-Clause 14.7 [*Payment*], in order to give the Parties full flexibility to agree to the timing of payments the time periods can be stated in the Contract Data (although this sub-clause also states default time periods in the event that none are stated in the Contract Data).

Sub-Clause 14.11, 14.13: Sub-clause 14.11 [*Final Statement*] has been restructured and the wording has been amended to clarify the steps to be followed in respect of the draft Final Statement to be submitted by the Contractor leading to an agreed Final Statement or Partially Agreed Final Statement. Similarly, Sub-Clause 14.13 [*Issue of FPC*] in the Red and Yellow Books 2017 has been amended to set out what is expected of the Engineer, and Sub-Clause 14.13 [*Final Payment*] in the Silver Book 2017 has been amended to set out what is expected of the Employer, in respect of the Final Statement or Partially Agreed Final Statement.

Clause 15, Sub-Clause 15.6, Sub-Clause 15.7: The provisions under Clause 15 [*Termination by Employer*] have been restructured and further detail added in a step-by-step format to make it very clear what steps are to be followed before the Contract is terminated by the Employer: the Contractor's default/failure → Notice to correct → the Contractor's default/failure → Employer's Notice of intention to terminate (not required in the event of bankruptcy/insolvency or corruption/fraud on the part of the Contractor, the Contract can be terminated immediately) → the Contractor's further default/failure → Employer's Notice of termination → immediate termination. New rights of termination have been added – one example is where the Contractor's failure to comply with a binding determination or decision by the Dispute Avoidance/Adjudication Board (DAAB) constitutes a material breach of the Contract; another example is if the Contractor is in delay to such an extent that the Employer's entitlement to delay damages exceeds the maximum amount stated in the Contract Data. To clarify and add certainty in the situation where the Employer terminates the Contract for convenience, two new sub-clauses have been added: Sub-Clause 15.6 [*Valuation after Termination for Employer's Convenience*] and Sub-Clause 15.7 [*Valuation after Termination for Employer's Convenience*].

Clause 16: The termination provisions under Clause 16 [*Suspension and Termination by Contractor*] have similarly been restructured setting out steps to be followed before the Contract is terminated by the

Contractor: the Employer's default/failure → Contractor's Notice of intention to terminate (not required in the event of bankruptcy/insolvency or corruption/fraud on the part of the Employer, the Contract can be terminated immediately) → the Employer's further default/failure → Contractor's Notice of termination → immediate termination. New rights of termination have been added – one example is where the Contractor does not receive a Notice of the Commencement Date within a stated time period, another example is where Employer's failure to comply with a binding determination or DAAB decision constitutes a material breach of the Contract.

Clause 17: In respect of Clause 17 in FIDIC's 2017 contract updates: the heading has been changed to "Care of the Works and Indemnities", the sub-clauses have been re-ordered and the provisions have been clarified to more accurately reflect FIDIC's intention for the provisions of this clause and to avoid some of the difficulties experienced by users in practice in respect of what was Sub-Clause 17.3 [*Employer's Risks*] and Sub-Clause 17.4 [*Consequences of Employer's Risks*] in the 1999 FIDIC contracts.

Sub-Clause 17.1, [*Responsibility for Care of the Works*] now deals with the Contractor's responsibility for care of the works and Sub-Clause 17.2 [*Liability for Care of the Works*] covers when and where the Contractor is liable and not liable for any loss/damage caused to the Works. Sub-Clause 17.3 now concerns intellectual and industrial property rights and, what was Sub-Clause 17.1 [*Indemnities*] in the 1999 FIDIC contracts, has now been split into Sub-Clause 17.4 [*Indemnities by Contractor*] and Sub-Clause 17.5 [*Indemnities by Employer*]. There is also a new sub-clause: Sub-Clause 17.6 [*Shared Indemnities*] - as mentioned above, the limitation of liability provisions under what was Sub-Clause 17.6 in the 1999 FIDIC contracts have been moved to a new sub-clause under Clause 1 in FIDIC's 2017 contract updates.

Clause 18 [*Exceptional Events*] in FIDIC's 2017 contract updates now covers the subject-matter that was covered by Clause 19 [*Force Majeure*] in the FIDIC 1999 contracts - the change in terminology from "force majeure" to "Exceptional Event" (now a defined term) being in line with the development introduced under FIDIC's Conditions of Contract for Design, Build and Operate Projects, first edition 2008 ('Gold Book').

Clause 19: in FIDIC's 2017 contract updates now covers insurance, and the provisions have been amended to align with similar provisions under Clause 19 of FIDIC's Gold Book (except Sub-Clause 19.3).

Clause 20: The provisions of Clause 20 in FIDIC's 2017 contract updates concern only claims – as noted above;



disputes are now dealt with under new Clause 21. Also as noted above, Contractor's claims and Employer's claims are now dealt with in exactly the same way. Sub-Clause 20.1 describes how a Claim (now a defined term) can be for time and/or money but also for a relief or remedy that is not time or money. For example: a request by the Contractor for the Employer to provide assistance under Sub-Clause 2.2 [**Assistance**]. The last paragraph of Sub-Clause 20.1 describes the procedure to be followed for claims that are not for time and/or money, and it is Sub-Clause 20.2 that deals with claims for time and/or money.

Sub-Clause 20.2: [Claims for Payment and/or EOT] prescribes the step-by-step procedure to be followed for Employer's and Contractor's claims for time and/or money:- Notice of Claim (the 28 days time-bar provision of the 1999 FIDIC Contracts has been retained to apply to both Contractor's and Employer's claims) → the Engineer's (under Red and Yellow Books 2017) or the other Party's (under the Silver Book) initial response as regards the timing of the Notice of Claim → requirement to keep "contemporary records" (now defined under this Sub-Clause) → submission of the "fully detailed Claim" (also now defined under this Sub-Clause) and claims of continuing effect → agreement or determination of the Claim (by reference to Sub-Clause 3.7 in the Red and Yellow Books 2017, and to Sub-Clause 3.5 in the Silver Book 2017).

The 28 days time-bar provision of the 1999 FIDIC Contracts has been the subject of much discussion and debate over the past number of years. In order to address some of the main difficulties that users have brought to FIDIC's attention, there are new provisions to deal with the situation where the Engineer's (under Red and Yellow Books 2017) or the other Party's (under the Silver Book) initial response is that the Notice of Claim is time-barred but the claiming Party disagrees or he/she believes there are circumstances justifying the late notice. In this case:

- the claiming Party is required to include these points in the fully detailed claim, and
- the Engineer (under Red and Yellow Books 2017) or the Employer's Representative (under the Silver Book) is required to proceed with agreement/determination of the Claim, taking into account the points raised by the claiming Party.

It is recognised that these new provisions are a departure from what is stated under Sub-Clause 20.1(a) in FIDIC's Gold Book 2008 which allows the DAB to consider the Contractor's justification for late submission of the Notice of claim and, if fair and reasonable, to overrule the time-bar. For the 2017 FIDIC contract updates, FIDIC

came to the conclusion that it was more appropriate that the claiming Party's arguments concerning the timing of his/her Notice of Claim should first be considered during the agreement/determination process for the Claim. Then, if either Party is dissatisfied with the Engineer's (under Red and Yellow Books 2017) or the Employer's Representative's (under the Silver Book) determination, the issue can be referred to the DAAB for a decision.

The provisions of new Clause 21 [**Disputes and Arbitration**] are, in essence, based on those set out in Sub-Clauses 20.2 to 20.8 of the 1999 FIDIC Contract, which have been further developed as summarised below.

On the basis of how successful, in practice, 'standing' Dispute Adjudication Boards (as provided for under FIDIC's Red Book 1999) have proven to be in the last eighteen years, under Sub-Clause 21 [**Constitution of the DAAB**] in all the 2017 FIDIC contract updates, the Dispute Avoidance/Adjudication Board (DAAB) is to be a 'standing' board: i.e. appointed at the start of the Contract and in place for the duration of the Contract to assist the Parties with any disagreement/issue that may arise and to resolve any and all Disputes.

This is in contrast to an 'ad-hoc' DAB (as provided for under FIDIC's Yellow and Silver Books 1999), appointed only when a dispute arises and only for that particular dispute. Based on many users' experience and the significant advantages of dispute avoidance, consistency of decisions if there is more than one Dispute and the benefits of having the DAAB as part of the 'project team', as a matter of best-practice, FIDIC firmly believes that the appointment of a 'standing DAB' leads to a significantly increased probability of a successful project.

A very important factor in the success of the dispute avoidance/adjudication procedure is the Parties' confidence in the agreed individual(s) who will serve on the DAAB, and it is important that DAAB member(s) are not imposed by one Party on the other Party. As such, provision has now been made in Contract Data for each Party to name three potential DAAB Members ensuring that both Parties have equal opportunity to put forward (the same number of) names for potential DAAB Members. Sub-Clause 21.2 [**Failure to Appoint DAAB Member(s)**] applies if the Parties cannot agree on a DAAB member.

Sub-Clause 21.1: It has been brought to FIDIC's attention in recent years that, unfortunately, it has not been uncommon for a reluctant party to try to obstruct the appointment of the dispute board by failing to agree member(s) or, having agreed a member, by failing to agree his/her fees or to sign the DAB agreement. To avoid such difficulties, Sub-Clause 21.1 allows for the



appointing entity stated in the Contract Data (if nothing is stated, the President of FIDIC) to appoint the DAAB member(s), to set the fees, and a DAAB agreement will be deemed to have been signed with the Parties.

As a further incentive for the Parties to cooperate with each other in the appointment of the DAAB, under Sub-Clause 21.6 [*Arbitration*] a new provision has been added in respect of any award costs: allowing the arbitral tribunal to take account of a Party's failure to cooperate in the appointment of the DAAB.

Sub-Clause 21.3: To reinforce and enhance the DAAB's role in assisting the Parties with any disagreements/issues and so avoid them becoming Disputes, new Sub-Clause 21.3 [*Avoidance of Disputes*] has been added. This Sub-Clause allows the Parties to jointly refer an issue to the DAAB and for the DAAB to "provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen" with the Parties. Similarly, the General Conditions of the Dispute Avoidance/Adjudication Agreement and the DAAB Procedural Rules have been improved by including further express provisions in respect of the DAAB's role in assisting the Parties to avoid Disputes. Hence the re-naming of the board to Dispute Avoidance/Adjudication Board in the 2017 FIDIC contract updates.

Sub-Clause 21.4: [*Obtaining DAAB's Decision*] prescribes the step-by-step procedure to be followed for Disputes: referral to the DAAB (within a stated time period of the NOD, if Sub-Clause 3.7 in the Red and Yellow Books 2017, or Sub-Clause 3.5 in the Silver Book 2017, applied to the subject matter of the Dispute) → the Parties' obligations after referral of the Dispute → the DAAB's decision → dissatisfaction with the DAAB's decision.

Sub-Clause 21.7 [*Failure to Comply with DAAB's Decision*] is based on Sub-Clause 20.7 of the 1999 FIDIC contracts, together with appropriate amendments which follow the recommendations given in the FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1st April 2013.

Finally, it is sincerely hoped that the improvements, amendments and developments that FIDIC has (after very careful consideration) introduced in the 2017 Red, Yellow and Silver Books will lead to what is the ultimate end-goal of all standards forms of construction contract, namely successfully completed projects, which meet the expectations of all parties, and the end users.

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