

On 5 December 2017, new editions of the Yellow, Red and Silver Books were published by the International Federation of Consulting Engineers (FIDIC). This follows publication of a pre-release Yellow Book in December 2016. Significant changes have been made to the new Yellow Book. It is approximately 50% longer than the 1999 version with most provisions having been re-drafted - though the standard FIDIC approach to clause names and numbering is largely unaltered. FIDIC appears to have taken on board much of the critical feedback it received on the pre-release Yellow Book, softening the risk allocation that was previously viewed by some as not reflecting good industry practice. However, the 2017 Yellow Book is still much more administratively burdensome than its 1999 counterpart, with various deeming provisions and time bars that may catch parties out if they are not careful. FIDIC has stated that the new Books are aimed at increasing clarity and certainty within the forms. However, the introduction of highly prescriptive procedures may not be what some users want to see.

This document sets out some of the key changes to the Yellow Book that users need to be alive to, both from a risk perspective and also in terms of contract administration.

POTENTIAL RISKS

CONTRACTOR

Design Risk (Cl. 17.4) A new indemnity has been inserted requiring the Contractor to indemnify the Employer against all errors in the Contractor's design which result in the Works not being fit for purpose. Importantly, the exclusion of indirect or consequential loss and the aggregate cap on liability under cl. 1.15 applies to this indemnity, limiting the Contractor's liability in this regard (a significant change to the uncapped indemnity included in the pre-release Yellow Book which caused substantial criticism from contractors).

Concurrent Delay (Cl. 8.5) The 1999 Yellow Book was silent on the issue of concurrent delay (meaning the governing law approach would apply) but the 2017 version now requires Parties to adopt rules and procedures to deal with concurrent delay and refer to these in the Special Provisions. It is likely that Employers will inevitably adopt a procedure to limit the Contractor's relief in such circumstances, which could potentially lead to protracted negotiation to deal with a risk that actually rarely arises.

Adverse Climatic Conditions (Cl. 8.5) The Contractor's entitlement to an extension of time as a result of adverse climatic conditions has been clarified to mean adverse climatic conditions at the Site which are Unforeseeable having regard to climatic data made available by the Employer and/or climatic data published in the Country for the geographical location of the Site. Whilst this clarification is helpful, reference to data being published in the Country is fairly wide and relief is limited to adverse climatic conditions affecting the Site only, which wouldn't apply where adverse weather elsewhere delayed delivery of key items of plant or materials.

Liability Caps (Cl. 1.15) Delay Damages and indemnity liabilities relating to intellectual property rights have been carved out from the exclusion of indirect or consequential loss. Gross negligence has also been carved out from the aggregate cap and the Employer has a new right to terminate where the Delay Damages cap is exceeded.

EMPLOYER

Liability for Care of the Works (Cl. 17.2, 17.5 & 17.6) The categories of what used to be referred to as 'Employer's Risks' have been expanded and now also include any act or default of the Employer's Personnel or other contractors. FIDIC's approach to risk allocation in the pre-release Yellow Book of comprehensively setting out the Employer's commercial risks or risks of damage, with all other risks being allocated to the Contractor, has been abandoned.

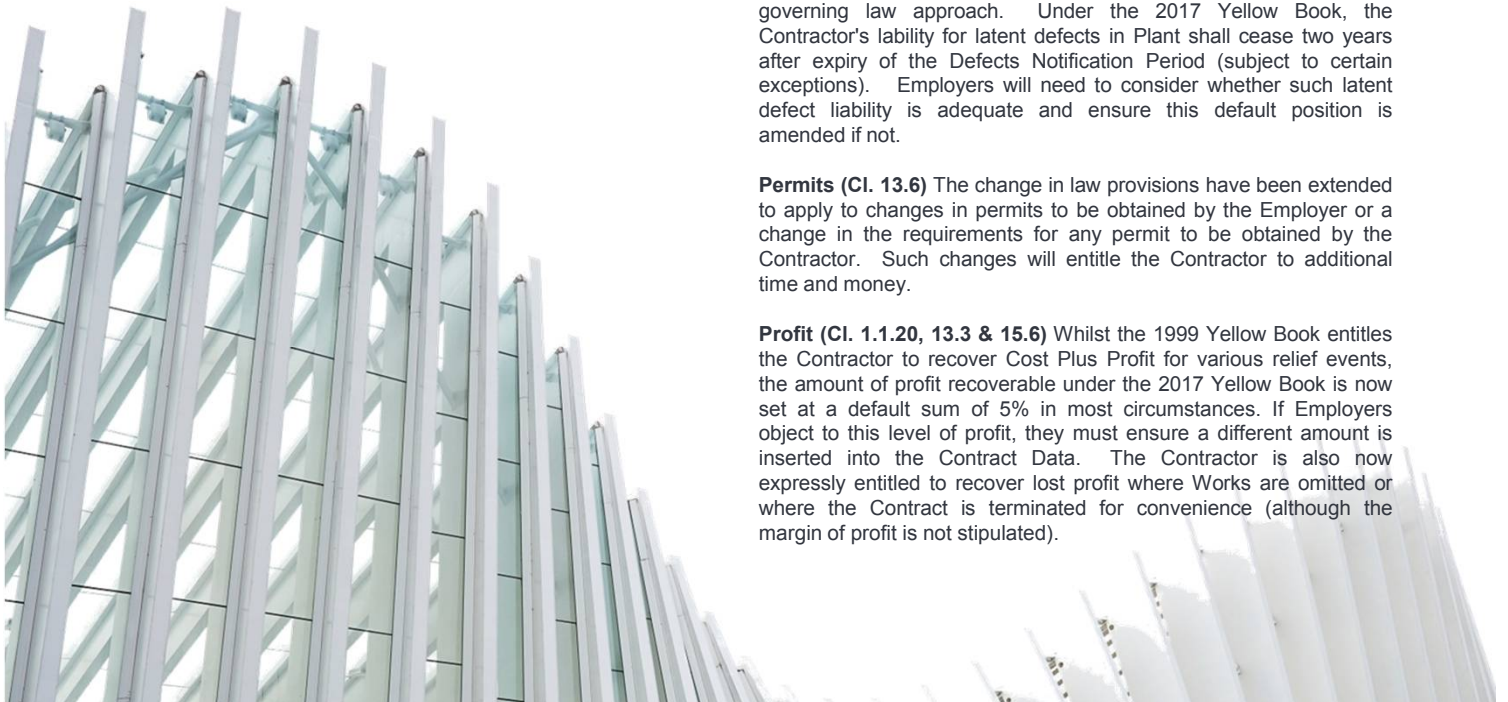
Indemnities (Cl. 17.5) The Employer's indemnities in favour of the Contractor have now been expanded to include loss of or damage to property attributable to any negligence, wilful act or breach of contract by the Employer, the Employer's Personnel, or any of their respective agents. The Employer is also now required to indemnify the Contractor in respect of all claims, damages, losses and expenses in respect of damage to or loss of property to the extent such damage arises from an event for which the Employer is liable under cl. 17.2. Both parties' liability under the indemnity provisions will be reduced proportionately to the extent an event for which the other party is responsible has contributed to the loss.

EOTs (Cl. 4.15, 8.5 & 8.5) The Contractor's entitlement to extensions of time has been expanded to grant relief where the non-suitability or non-availability of an access route arises as a result of changes to that access route by a third party after the Base Date. The extension of time entitlement as a result of delays caused by public authorities has been extended to include delays caused by private utility entities. Also, the extension of time entitlement in relation to Unforeseeable shortages in the availability of personnel or Goods has been extended to include Employer-Supplied Materials.

Latent Defects (Cl. 11.10) The 1999 Yellow Book was silent on latent defect liability (save to say that each Party shall remain liable for unperformed obligations following issue of the Performance Certificate) and so the Contractor's liability would be subject to the governing law approach. Under the 2017 Yellow Book, the Contractor's liability for latent defects in Plant shall cease two years after expiry of the Defects Notification Period (subject to certain exceptions). Employers will need to consider whether such latent defect liability is adequate and ensure this default position is amended if not.

Permits (Cl. 13.6) The change in law provisions have been extended to apply to changes in permits to be obtained by the Employer or a change in the requirements for any permit to be obtained by the Contractor. Such changes will entitle the Contractor to additional time and money.

Profit (Cl. 1.1.20, 13.3 & 15.6) Whilst the 1999 Yellow Book entitles the Contractor to recover Cost Plus Profit for various relief events, the amount of profit recoverable under the 2017 Yellow Book is now set at a default sum of 5% in most circumstances. If Employers object to this level of profit, they must ensure a different amount is inserted into the Contract Data. The Contractor is also now expressly entitled to recover lost profit where Works are omitted or where the Contract is terminated for convenience (although the margin of profit is not stipulated).



CONTRACT ADMINISTRATION

CONTRACTOR

Notices (Cl. 1.3) There are far more notification requirements under the 2017 Yellow Book. Whilst these apply to both the Contractor and Employer, in reality the Contractor will be hardest hit for failure to comply with the notification obligations. All notices must be in writing and identified as a Notice (but don't need to refer to the clause under which it is issued as was a criticised requirement in the pre-release Yellow Book). Contractors will need to ensure they have adequate resources to comply with these requirements.

Advance Warning (Cl. 8.4) Advance warning provisions have been introduced requiring each Party to advise the other of any known or probable future events which may adversely affect the performance of the Works, increase the Contract Price or delay the execution of the Works. There do not appear to be any consequences for failure to issue an advance warning. Contractors should expect Employers to address this with amendments reducing the Contractor's entitlement to relief where they fail to issue an advance warning.

Programming (Cl. 8.3) The programming requirements have been expanded to include additional details that must be included in each programme, including logic links, float and critical path.

Cessation of Employer's liability (Cl. 14.14) Contractors must take care to include all claims in the Statement on Completion (except for those arising after the issue of the Taking-Over Certificate), Final Statement or any Partially Agreed Final Statement, whether such claims have been referred to the DAAB or have had a Notice of Dissatisfaction (NOD) issued in relation to them, otherwise the Employer will avoid any liability for them. In addition, the Contractor only has 56 days to dispute the Final Payment Certificate (FPC) under cl. 20.2 otherwise the Contractor will be deemed to have accepted the amounts and the Employer shall have no further liability. Contractors will need to take extra care to ensure all claims are captured in their statements and that the 56 day time bar for disputing the FPC is not missed.

EMPLOYER

Engineer (Cl. 3) The importance of the Engineer's role has increased under the 2017 Yellow Book. The Engineer is required to have suitable qualifications, experience and competence to act as the Engineer under the Contract and must act as a skilled professional. The Engineer may also appoint an Engineer's Representative to be present on Site. Employers will need to consider more carefully who they appoint as Engineer, as a failure of the Engineer to satisfy the above may amount to an Employer breach.

Programme (Cl. 8.3) There are new deeming provisions for acceptance of any revised programme which require the Engineer to give notice to the Contractor of the extent of the revised programme's non-compliance with the Contract, inconsistency with actual progress or the Contractor's obligations, within 14 days of receiving it, failing which it will become the Programme.

BOTH PARTIES

Engineer's Determination (Cl. 3.7) The Engineer's determination provisions have been significantly expanded and are much more procedural. The Engineer must act neutrally in exercising its obligations under this clause and there are new deeming provisions in relation to the issue of the Engineer's determination. If the Parties cannot agree a Claim / matter within 42 days and the Engineer fails to issue a 'fair determination' within a further 42 days, then either (i) the Engineer is deemed to have rejected the Claim; or (ii) in the case of any other matter, it is deemed to be a Dispute which either Party can refer to the DAAB without the need for a NOD.

Contractors will likely seek amendment requiring either deemed acceptance or automatic referral to the DAAB for all Claims / matters not determined in time. Also, if either Party objects to a determination, it must issue a NOD within 28 days, otherwise the determination shall be deemed final and binding. If either Party doesn't comply with an agreement of the Parties or a final and binding determination, the other Party may refer the failure directly to arbitration for enforcement by expedited procedure.

Claims (Cl. 20) The Claims provisions have been redrafted and separated from the Dispute provisions (now cl. 21). If a Party's Notice of Claim or Fully Detailed Claim are not submitted within the set timeframes, the Notice of Claim will be invalidated and the claiming Party time barred. This means the 1999 FIDC 28 day time-bar on notification of Claims that always applied to Contractors now also applies to all Employer claims. There is a deemed validation procedure if the Engineer fails to notify the claiming Party it is outside the relevant timeframe and a mechanism by which the Party can challenge the invalidity of its Notice of Claim, requiring the Engineer to consider their position and allow the late submission if it is justified in the circumstances. FIDIC has also increased the timeframe for provision of the Fully Detailed Claim to 84 days. Both Parties should be careful to ensure they comply with the relevant timeframes under cl. 3.7 and 20.

Termination (Cl. 15.2 & 16.2) Additional termination rights have been added for both Parties, the most important being that either has a right to terminate if the other fails to comply with a binding agreement or final and binding determination of the Engineer or a decision of the DAAB and such failure constitutes a material breach.

CHANGES TO THE DAAB PROVISIONS

While the fundamental aspects of the Dispute Avoidance /Adjudication Board (DAAB) process have been retained, a number of amendments have been made to promote good contract management and ensure disputes cannot roll on indefinitely. However, in practice, it is likely that the Parties will end up prematurely referring disputes to the DAAB or to arbitration to avoid falling foul of these revised provisions. Key changes include:

- The DAAB is now appointed as a standing board.
- The DAAB may now provide 'informal assistance', if the Parties jointly request it, under new 'Avoidance of Disputes' provisions. The Parties are not bound to act on the DAAB's advice and the DAAB is not bound in any future dispute by views given during this informal process. This process is not available when the Engineer is making a determination.
- A 42 day time bar applies to the reference of disputes to the DAAB following the issue of a NOD in relation to an Engineer's determination.
- A 28 day time bar applies to the issue of a NOD following a determination by the DAAB, otherwise the DAAB's decision shall become final and binding. However, unlike the pre-release Yellow Book, there is no time bar to referring disputes to arbitration following issue of such NOD.

Further information

If you would like further information on the updates to the FIDIC Yellow Book, please contact: infrastructure@clydeco.com