

FIDIC Book Guide

Last December, the much anticipated 2017 editions of the Yellow, Red and Silver Books were released by the International Federation of Consulting Engineers (FIDIC) at their annual conference. Significant changes have been made across the Books which users need to be alive to. This interactive document looks at the core changes and provides quick reference guides to each of the Books.

If you would like further information or details of upcoming training sessions in your regions please email infrastructure@clydeco.com.

Executive
Summary



Red Book



Yellow Book



Silver Book





Executive Summary

FIDIC has introduced significant changes across the 2017 Red, Yellow and Silver Books. Though these changes are largely similar across the Books, there are of course changes that are specific to the nature of each Book.

All are considerably longer than their 1999 counterparts and most provisions have been re-drafted. Despite this, FIDIC's standard approach to clause names and numbering is largely unaltered.

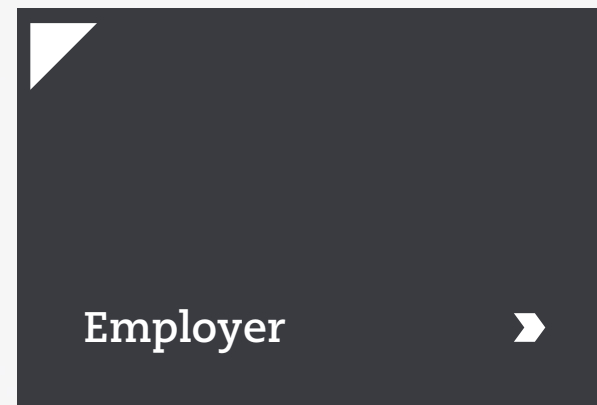
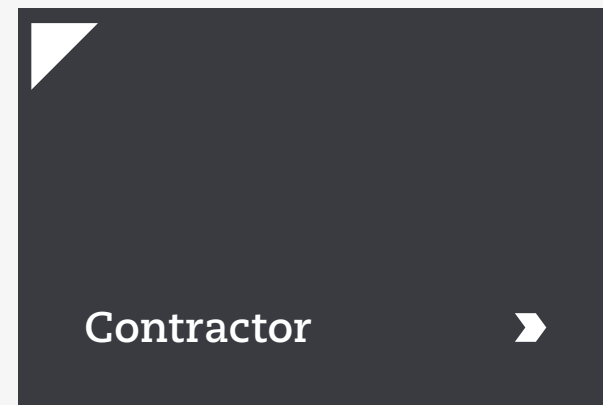
Readers will recall that the pre-release Yellow Book, released at the end of 2016, was not looked upon favourably by users. FIDIC appears to have taken on board much of the critical feedback it received on the pre-release Yellow Book, softening the risk allocation that was previously viewed by some as not reflecting good industry practice. However, the 2017 Books are still much more administratively burdensome than the 1999 versions, 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.

- A philosophy that is broadly similar to the pre-release version of the 2017 Yellow Book
- Generally less flexible, more complex and less user friendly
- 50% longer than the 1999 Books
- Expanded role and powers for the Engineer / Employer's Representative
- Exceptionally prescriptive drafting, including new definitions and 'step-by-step' procedures, results in greater administrative burden on the Contractor and (in principle) additional costs for the Employer
- New time limits which, if not met, trigger deeming provisions or result in time bars
- More reciprocity with the Contractor's and Employer's rights and obligations
- Provisions to promote collaboration between the parties
- Enhanced (and separate) claims and disputes provisions, including the introduction of a new standing 'Dispute Avoidance / Adjudication Board' (DAAB) and a focus on early dispute avoidance

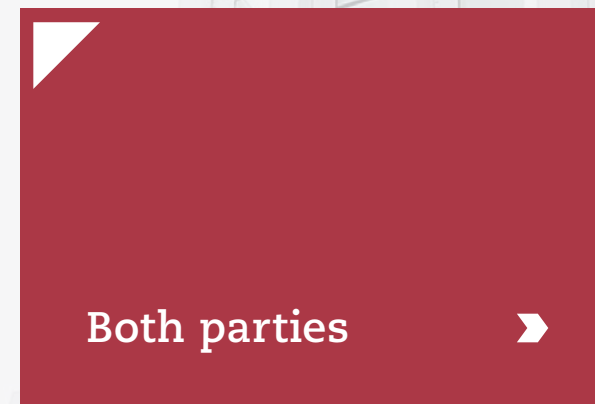
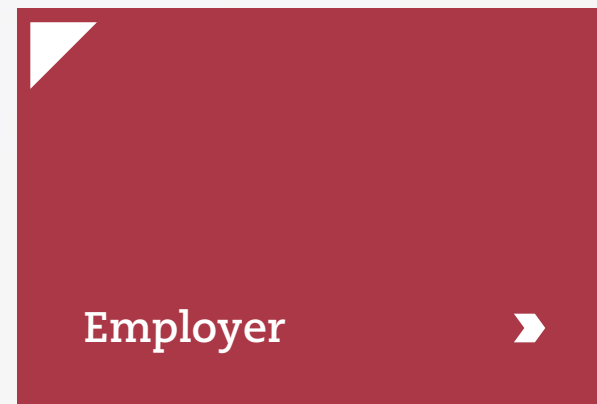
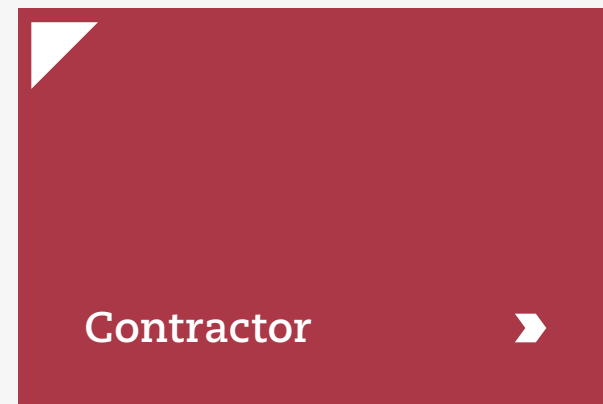


FIDIC Red Book 2017

POTENTIAL RISKS



CONTRACT ADMINISTRATION





FIDIC Red Book 2017

Potential risks - Contractor

General Obligations (Cl. 4.1)

The Contractor's general obligations in relation to design (if any) have been expanded and there is an additional undertaking by the Contractor that the design and the Contractor's Documents will comply with the technical standards stated in the Specification and the Laws (in force when the Works are taken over) and otherwise in accordance with the documents forming the Contract.

Contractor's Documents (Cl. 4.4)

Construction cannot commence until the Engineer has (or is deemed to have) issued a Notice of No-objection to the Contractor's Documents. The Contractor's obligations to provide As-Built Records and Operation and Maintenance Manuals have been expanded and are now set out separately in cl. 4.4.2 and 4.4.3.

Training (Cl. 4.5)

There is a new obligation on the Contractor to train the employees of the Employer in the operation and maintenance of the Works and to provide qualified and experienced staff and all necessary facilities and materials. This is also a pre-condition to taking over under cl. 10.1.

Costs of Remedying Defects (Cl. 11.2)

The Contractor is responsible for remedying defects that arise from improper operation and maintenance which was attributable to matters for which the Contractor is responsible (i.e. As-Built Records, Operation and Maintenance Manuals and Training).

Adverse Climatic Conditions (Cl. 8.5)

The Contractor's entitlement to an EOT as a result of adverse climatic conditions has been clarified to mean those at the Site which are Unforeseeable having regard to climatic data made available by the Employer and/or published in the Country for the geographical location of the Site. Whilst this clarification is helpful, 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.

Concurrent Delay (Cl. 8.5)

Whereas the 1999 Red Book was silent on the issue of concurrent delay (meaning the governing law approach would apply), the 2017 version now requires Parties to adopt rules and procedures to deal with concurrent delay by means of the Special Provisions.

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 (if applicable) 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.

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.



FIDIC Red Book 2017

Potential risks - 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 includes a 'catch all' any act or default of the Employer's Personnel or other contractors.

Indemnities (Cl. 17.5)

The Employer's indemnities in favour of the Contractor have 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 & 8.6)

The Contractor's entitlement to EOTs 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, where delays are caused by private utility entities or where there are Unforeseeable shortages in the availability of Employer-Supplied Materials. In a major departure from the 1999 Red Book, the Contractor has an express entitlement to an EOT for delays (caused by epidemic or governmental actions).

Latent Defects (Cl. 11.10)

The 1999 Red 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 Red 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.

Profit (Cl. 1.1.20, 13.3 & 15.6)

Whilst the 1999 Red Book entitles the Contractor to recover cost plus profit for various relief events, the amount of profit recoverable under the 2017 Red 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).



FIDIC Red Book 2017

Contract administration - Contractor

Notices (Cl. 1.3)

There are far more notification requirements under the 2017 Red Book. All notices must be in writing and identified as a Notice. Contractors will need to ensure they have adequate resources to comply with these requirements. A “Notice of No-objection” replaces approvals and consents.

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 – increasing costs at tender stage. Nothing in any programme will relieve the Contractor from any obligation to give a contractual notice, reducing the scope for reliance on programmes as notices of claims for delay.

Variations (Cl. 13.3)

A clearer distinction is made between the methods for initiating Variations by Instruction and Variations by Request for Proposal. Regarding the former, Contractors are now required to submit detailed particulars of the work, resources and methods to be adopted, a programme for execution of the Variation, a proposal for modifying the Programme and Time for Completion, a proposal for modifying the Contract Price and the amount of any time related costs.

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.



FIDIC Red Book 2017

Contract administration - Employer

Engineer (Cl. 3)

The importance of the Engineer's role has increased under the 2017 Red 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. The Engineer's instructions must also now be in writing and otherwise comply with cl. 1.3 – they can no longer be issued verbally and later confirmed in writing.

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.



FIDIC Red Book 2017

Contract administration - 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 statement of legal basis for claim to be included in the Party's Fully Detailed Claim are not submitted within the set timeframes, the Notice of Claim will be invalidated and the claiming Party time barred. 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. Most importantly, FIDIC has introduced reciprocity with respect to the 28 day time bar to submit a Notice of Claim and the new 84 day time bar to submit the Fully Detailed Claim - so that the Claims provisions apply to Employers as well.

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.



FIDIC Red Book 2017

Contract administration - 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.

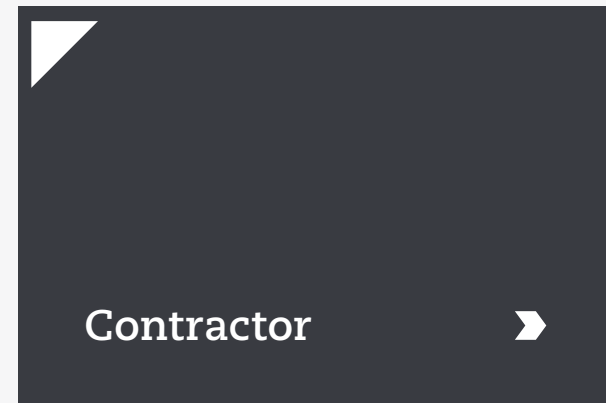
Key changes include:

- The DAAB is appointed as a standing board with a dispute avoidance function.
- 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.
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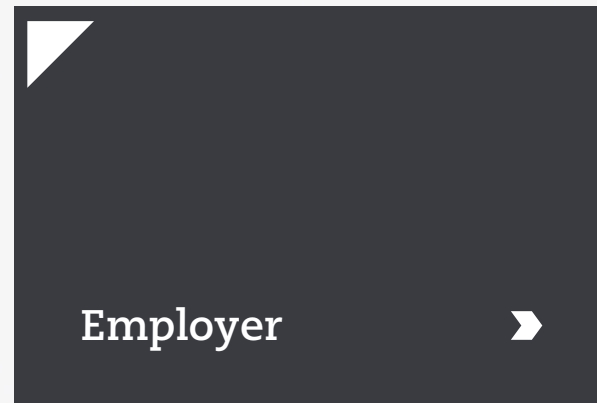


FIDIC Yellow Book 2017

POTENTIAL RISKS

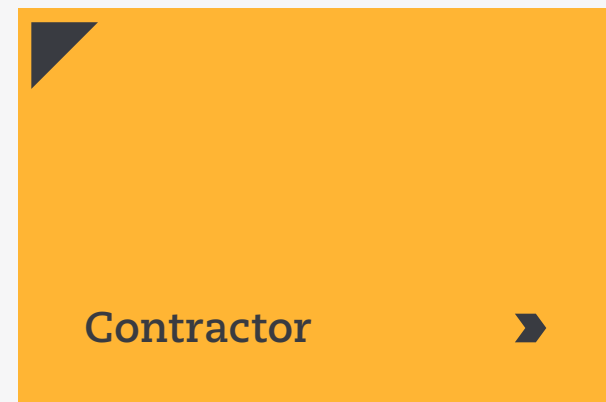


Contractor ▶

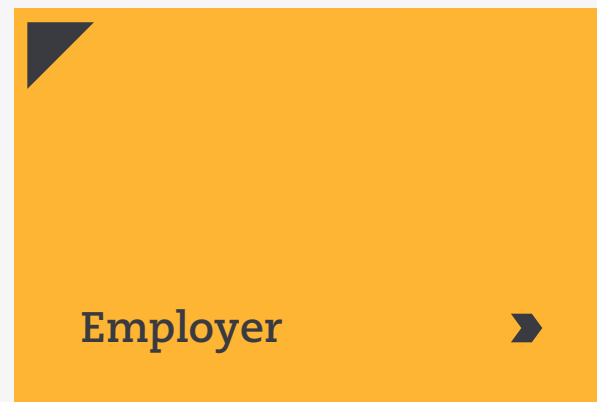


Employer ▶

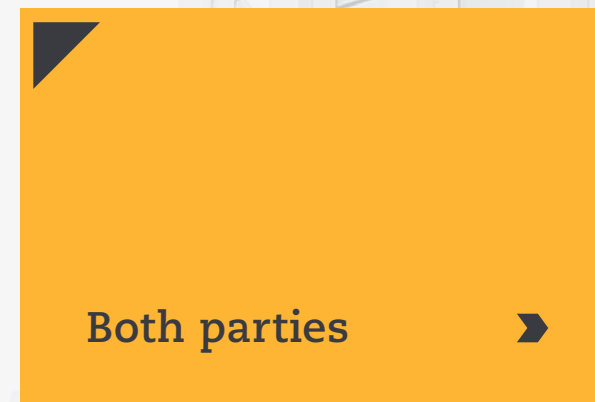
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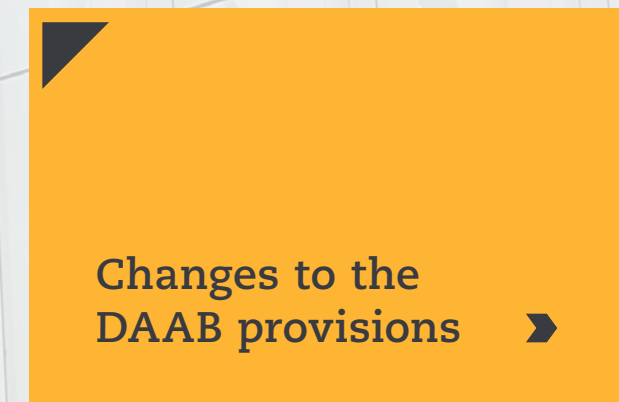
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Employer ▶



Both parties ▶



Changes to the DAAB provisions ▶



FIDIC Yellow Book 2017

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Key changes include:

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FIDIC Silver Book 2017

POTENTIAL RISKS

Contractor ▶

Employer ▶

CONTRACT ADMINISTRATION

Contractor ▶

Employer ▶

Both parties ▶

Changes to the DAAB provisions ▶



FIDIC Silver Book 2017

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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. 1.1.17, 13.3 & 15.6)

Whilst the 1999 Silver Book entitles the Contractor to recover Cost Plus Profit for various relief events, the amount of profit recoverable under the 2017 Silver 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).



FIDIC Silver Book 2017

Contract administration - Contractor

Notices (Cl. 1.3)

There are far more notification requirements under the 2017 Silver Book. 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. A "Notice of No-objection" replaces approvals and consents.

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 – increasing costs at tender stage. Nothing in any programme will relieve the Contractor from any obligation to give a contractual notice, reducing the scope for reliance on programmes as notices of claims for delay.

Variations (Cl. 13.3)

A clearer distinction is made between the methods for initiating Variations by Instruction and Variations by Request for Proposal. Regarding the former, Contractors are now required to submit detailed particulars of the work, resources and methods to be adopted, a programme for execution of the Variation, a proposal for modifying the Programme and Time for Completion, a proposal for modifying the Contract Price and the amount of any time related costs.

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.



FIDIC Silver Book 2017

Contract administration - Employer

Employer's Representative (Cl. 3)

The importance of the Employer's Representative's (ER) role has increased under the 2017 Silver Book. The ER is required to act as a skilled professional and must be competent to carry out his/her duties. Employers will need to consider more carefully who they appoint as ER, as a failure of the ER 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 ER 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.



FIDIC Silver Book 2017

Contract administration - Both Parties

ER's Determination (Cl. 3.7)

The ER's determination provisions have been significantly expanded and are much more procedural. The ER is deemed not to act for the Employer when carrying out his / her duties under this clause. There are also new deeming provisions in relation to the issue of the ER's determination. If the Parties cannot agree a Claim / matter within 42 days and the ER fails to issue a 'fair determination' within a further 42 days, then either (i) the ER 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 statement of legal basis for claim to be included in the Party's Fully Detailed Claim are not submitted within the set timeframes, the Notice of Claim will be invalidated and the claiming Party time barred. There is a deemed validation procedure if the other Party 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 ER to consider their position and allow the late submission if it is justified in the circumstances. Most importantly, FIDIC has introduced reciprocity with respect to the 28 day time bar to submit a Notice of Claim and the new 84 day time bar to submit the Fully Detailed Claim - so that the Claims provisions apply to Employers as well.

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 ER or a decision of the DAAB and such failure constitutes a material breach.



FIDIC Silver Book 2017

Contract administration - 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 with a dispute avoidance function.
- 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 ER 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 ER’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.