

Construction & Engineering Focus Team



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NEW EDITION OF THE FIDIC SUITE OF CONTRACTS

After almost 18 years, FIDIC has updated its Rainbow Suite of Contracts, which is widely used in major construction projects worldwide.

The Second Edition was unveiled at the International Contract Users' Conference in London on 5 and 6 December 2017 and consists of the following books:

- The **Red Book**: Conditions of Contract for Construction
- The **Silver Book**: Conditions of Contract for EPC/Turnkey Projects
- The **Yellow Book**: Conditions of Contract for Plant & Design Build

According to the authors, the new FIDIC books continue to implement the “FIDIC’s fundamental principles of balanced risk sharing while seeking to build on the substantial experience gained from its use over the past 18 years”.

Main changes at a glance

- **New mechanisms to avoid disputes, including the following**
 - **Advance warning** of any “known or probable future events or circumstances” that could: (i) adversely affect the work of the contractor’s personnel; (ii) adversely affect the performance of the completed works; (iii) increase the contract price; and/or (iv) delay the execution of all or part of the works.
 - **Dispute Avoidance/Adjudication Boards (DAABs)**, whose main purpose is to prevent claims from becoming disputes. The creation of a **permanent DAAB** differs from the ad hoc DAB (Dispute Adjudication Board) under the former edition. The new permanent DAAB is designed to have a **more prominent role**. In addition to the authority to issue binding decisions (which become final unless a timely notice of dissatisfaction is given): (i) the parties may jointly request informal assistance or advice from the DAAB; (ii) the DAAB may invite parties to submit joint requests if it becomes aware of an issue or disagreement; and (iii) the DAAB may provide informal assistance during meetings and site visits.
- **New claims procedure**

The claims procedure and notification requirements are now more **detailed** and a clear **parity** among the parties has now been established:

- The provisions concerning claims are now **reciprocal**: both the employer and the contractor must give notice for all types of claims. If the claim is disputed, it must be referred to the Engineer.
- Notice of claims for additional payment (by either party), price reduction (by the employer) and extension of time (by the contractor) must be given **within 28 days** from becoming aware of the underlying circumstances: failure to do so results in the entitlement being lost. Under the former edition this applied only to contractors' claims.

▪ **Enhancement of the Engineer's role in contract management**

Another major amendment is the new role of the Engineer (in the Red Book and Yellow Book) in the overall **contract management** and in **resolving claims/disputes** between parties.

- The clause regarding the Engineer is **wider** and the Engineer's role **more detailed**.
- The Engineer is required to act **neutrally**.
- The Engineer has the duty to **encourage the parties to settle claims** arising under the contract.
- The Engineer must comply with **time limits** for reaching agreements and for making determinations, and the parties must comply with time limits to challenge the Engineer's determinations.

▪ **Binding force of the Engineer's determinations and DAAB's decisions**

The provisions concerning the binding force of the Engineer's determinations and DAAB's decisions are more detailed and specifically address the remedies available to enforce provisionally binding decisions until the underlying dispute is settled by arbitration.

▪ **Increased programming requirements**

- The initial programme for the execution of the works must be prepared using **programming software** "stated in the Employer's Requirements" (if not stated, the software must be acceptable to the Engineer).
- The activities to be included in the programme are **more detailed**.
- The Engineer is **required to review** the initial programme within 21 days and each revised programme within 14 days from receipt.

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Concluding remarks

The above highlights are merely a taster of the numerous changes introduced in the new edition of the FIDIC books.

The changes concerning contract and project management are significant and impose an increased administrative burden on the parties. According to the authors, however, the changes **promote dispute avoidance, provide greater clarity** and **reflect the current best international practice**.

If correctly implemented and followed, more detailed contract management provisions can help prevent disputes. But experience has taught us that detailed and complex contractual mechanisms do not always serve this purpose: they can have a boomerang effect if the parties are not ready – or equipped – to follow them and do not devote the necessary resources to contract management.

The changes introduced in this new edition, however, address various practical issues that arose when interpreting the previous edition – including issues that members of our team have addressed in advising clients on the execution of FIDIC contracts or acting as counsel or arbitrators in international arbitrations. Indeed, issuing new editions of standard contracts such as the FIDIC books reflects the learnings gained from the previous editions and, thus, pursue the aim of achieving clarity, consistency and uniformity in their interpretation and application.

Only time and practice will tell whether these new FIDIC books will be as widely adopted as the previous ones and whether they will achieve their goals.

We will continue analysing their application, so please do get in touch if you have any questions.