



SECOND EDITIONS OF THE FIDIC RAINBOW SUITE

On 5th December 2017, the International Federation of Consulting Engineers (FIDIC) launched the Second Editions of the three major forms of contract in the FIDIC Rainbow Suite at the FIDIC International Users' Conference in London. This bulletin provides a summary of the key changes in the Second Editions.

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Second Editions of the Rainbow Suite

The three updated forms are:

- Conditions of Contract for Construction, Second Edition 2017 (the “Red Book”)
- Conditions of Contract for Plant & Design Build, Second Edition 2017 (the “Yellow Book”); and
- Conditions of Contract for EPC/ Turnkey Projects, Second Edition 2017 (the “Silver Book”)

The First Editions were originally published in 1999.

What has changed in the Second Editions?

For anyone picking up the Second Editions for the first time, the most striking feature is their length. They are over 50% longer and have 50% more words. This immediately suggests that a lot has changed. However, conceptually the Second Editions are almost identical to the First Editions, with only minor changes to the allocation of risks. Instead, much of the increased length relates to new, ‘enhanced’ contract management provisions discussed further below and a re-structuring of the contracts.

Users had a sneak-peak at many of the changes in the pre-release version of the Yellow Book that was published at the end of 2016. However, in response to feedback that FIDIC received on the pre-release version, there are some significant differences in the Second Editions.

Structure and Approach

The Second Editions follow the same approach as the First Editions in seeking to adopt a set of clauses common to all three forms. As a result, most of the changes found in one Book also appear in the others, unless relating to the specific procurement methods covered by the particular Book.

The Second Editions introduce a new common structure across the suite and they have a different look and feel to the First Editions. Some of these changes might be considered as being relatively cosmetic. These changes are primarily aimed at providing greater clarity and making the contracts more user-friendly. Examples include:

- The Books all now contain 21 clauses, compared to the previous 20 clauses, with claims and disputes dealt with in separate clauses.
- The definitions are now in alphabetical order, as opposed to being divided into groups.

- Additional defined terms have been introduced and there are now a number of defined abbreviations, for example ‘NOD’ for Notice of Dissatisfaction and ‘EOT’ for Extension of Time.
- The order of the previous clauses 18 and 19 has been reversed (with Force Majeure events being renamed as Exceptional Events) and clause 19, dealing with insurance, significantly restructured.
- Sub-clauses have been relocated. For example, the limitation of liability clause is now found in clause 1.15 (clause 1.14 of the Silver Book).
- The Appendix to Tender found in the First Editions of the Red and Yellow Books has been renamed as the Contract Data in the Second Editions and now features in all the Books as Part A of the Particular Conditions.

Contract Management

The vast majority of the changes found in the Second Editions relate to contract management. Here, FIDIC’s aim is to provide clarity and certainty as to what is expected of the parties and when, as well as the consequences of non-compliance. If a party fails to comply, ‘deeming’ provisions are triggered, often resulting in a deemed rejection or consent, to avoid the project becoming ‘stalled’. There is an emphasis on dispute avoidance, requiring the parties to deal with issues as they arise. The result is much longer clauses containing detailed, prescriptive procedures with timescales for the parties to follow.

Examples of the changes that have been made in relation to contract management include:

- All communications (including ‘Notices’, now a defined term) must be expressly identified as the particular type of communication it is and state the provision of the contract under which it is given (except in the case of Notices) (clause 1.3).

- The number of situations in which a party has to give a Notice has significantly increased.
- There are more detailed procedures and provisions relating to the review of Contractor's Documents, Engineer's determinations, variations, taking-over, payment applications, termination, claims and disputes.
- Greater clarity has been provided as to the Engineer's role and his or her staff.

A central feature of the FIDIC contracts is the Engineer (except in the Silver Book where the Employer's Representative fulfils this role). The changes that have been made to the provisions concerning the Engineer's determinations (clause 3.7 (or 3.5 in the Silver Book)) is probably the best illustration of the approach that FIDIC has adopted to contract management in the Second Editions. In the First Editions, this clause comprised two paragraphs; in the Second Editions, it now extends to just over three pages and contains:

- An express duty on the Engineer (or Employer's Representative) to act "neutrally" when determining any matter or claim.
- The process leading to a determination broken down into different, clear steps.
- Detailed provisions for each step in the process.
- Time periods specified for each step in the process and deemed consequences (for example deemed rejection by the Engineer) if not followed.
- Detailed requirements for communications.
- A new requirement for a party to issue a NOD within the required time if it is dissatisfied with a determination otherwise the determination becomes final and binding.

Claims and Disputes

The Second Editions have restructured and extended the claims and disputes provisions

across two clauses, clauses 20 and 21. The intention is to separate these issues both procedurally and psychologically.

Under the First Editions, the Contractor's claims were governed by clause 20.1 and the Employer's claims by clause 2.5. The provisions of those clauses are asymmetrical, with more detailed and arguably stricter arrangements applying to Contractor's claims. Under the Second Editions, there is now one clause that governs claims (clause 20) and the provisions are now reciprocal: the same procedures apply equally to claims by both the Contractor and the Employer. There are several other significant changes:

- For claims for time and money, there are now two potential time-barring provisions: the first requiring a claim to be notified within 28 days of becoming aware of the event or circumstance giving rise to the claim; the second – a new addition – requiring a party to submit its fully detailed claim within 84 days.
- The period for submitting a fully detailed claim has been extended from 42 days (of becoming aware of the event or circumstance giving rise to the claim) to 84 days.
- Despite the time-barring provisions, the validity of any notice of claim is to be agreed or determined by the Engineer under clause 3.7 (Employer's Representative under clause 3.5 of the Silver Book). As part of this process, the claiming party may make submissions as to why late submission of a notice of claim or fully detailed claim was justified.
- More detailed provisions have also been introduced as to the timetable and process for the agreement or determination of claims.
- A third category of claims, in addition to claims for time and money, has been introduced which are to be referred directly to the Engineer (or the Employer's Representative under the Silver Book) for agreement or determination under clause

3.7 (3.5 in the Silver Book). The more detailed clause 20 claims procedure does not apply to this category of claim.

Similarly, fundamental changes have been introduced into the dispute resolution clause now found in clause 21. Probably the most far-reaching of these is the provision for a standing DAAB (Dispute Avoidance/Adjudication Board) in all three contracts. In the First Editions, this was only the case in the Red Book, with ad hoc DAB's featuring in the Yellow and Silver Books. Other key changes include:

- An emphasis on the informal dispute avoidance role of the DAAB set out in a new, separate clause (clause 21.3).
- Detailed provisions dealing with the failure of a party to engage in the appointment of the DAAB (clause 21.2).
- A requirement to refer disputes to the DAAB within 42 days of giving a NOD in relation to an Engineer's (or Employer's Representative's) determination. If this time period is not complied with, the determination becomes final and binding.
- Enhanced provisions relating to enforcing a DAAB's decision.
- A significantly expanded Dispute Avoidance/Adjudication Agreement.

What are the other key changes?

Material changes have also been made to many of the core clauses and more substantive provisions. Some of the highlights include:

- Enhanced project management provisions, including significantly more detailed programming requirements (clause 8.3), advance warning notices (clause 8.4) and more comprehensive quality assurance requirements (clause 4.9).
- A new requirement on the Employer to set out its financing arrangements in the Contract Data (as opposed to only having to provide reasonable evidence

in response to a request by the Contractor in the First Editions) (clause 2.4).

- Changes to the Contractor's fitness for purpose obligations (clause 4.1 in the Yellow and Silver Books) backed up by an indemnity in favour of the Employer if the works are not fit for their defined purpose(s) (clause 17.4). (However, unlike in the pre-release edition of the Yellow Book, this indemnity is not unlimited.)
- More detailed provisions in the Red Book to deal with any design responsibility accepted by the Contractor (clause 4.1).
- An additional paragraph has been included in the extension of time clause (clause 8.5) that seeks to address the issue of concurrent delay.
- Expanded provisions dealing with the valuation of variations in the Yellow and Silver Books, and for valuation and measurement of the Works in the Red Book (clause 13.3).
- Clarifications as to the Employer's right to performance damages in the Yellow and Silver Books (clause 12.4).
- New insurance provisions in clause 19, including a requirement on the Contractor to obtain professional indemnity insurance.
- A revised limitation of liability clause with more clarity as to carve-outs (clause 1.15 (1.14 in the Silver Book)).
- New grounds for termination for cause for both the Contractor and the Employer (clauses 15.2 and 16.2), including for the Employer

in the event that the cap on delay damages is reached.

- Anti-bribery and corruption provisions.

In addition, the Guidance Notes published with the Books have been significantly expanded and include more example alternative clauses. To reflect developments in the construction industry, the Guidance Notes also include advisory notes on the use of BIM with FIDIC contracts.

Some thoughts

It has now been 18 years since the First Editions of the Rainbow Suite were first published and the updates were probably overdue.

An enormous amount of work has been put in to the Second Editions by a large number of people over a long period of time and it will take the industry some time to digest the results. Indeed, it took almost ten years in some jurisdictions for parties to move from the 'old' FIDIC contracts to the First Editions (and the previous contracts are still commonly used in the Middle East). While some of the changes simply reflect developments in the construction industry since 1999 and current best practice, others are more novel.

At their heart, the philosophy behind risk allocation under the Second Editions has not changed dramatically from that under the First Editions. However, the changes that have been made in relation to contract management to provide more clarity and certainty are potentially quite radical, certainly for standard form contracts.

There can be no doubt that the Second Editions will increase the administrative burden on all the

parties. Contractors, employers and engineers using the Second Editions will need to ensure that they are very familiar with the contract and that they have sufficient resources to cope with the more prescriptive regime. These resources will be needed both to ensure that the necessary Notices and other communications are properly identified and sent on time but also that the parties are in a position to take the necessary decisions in time. The consequences of failing to do so are clearly set out in the contract and could be severe.

Only time will tell how the more sophisticated and prescriptive regime in the Second Editions will be received by the international construction industry. In the meantime, however, even users of the First Editions should not ignore the updates. The changes made in the Second Editions provide a helpful insight into the issues that arise, and will continue to arise, under the First Editions – which the new editions have sought to address.

This briefing is based on a blog originally published by Practical Law Construction, as part of a series of regular blogs by Ben Mellors on FIDIC Contracts.

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