

FIDIC Latin America Users' Conference

Updates to the FIDIC 1999 contracts
by
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Member of FIDIC contracts Committee

12 & 13 September 2017

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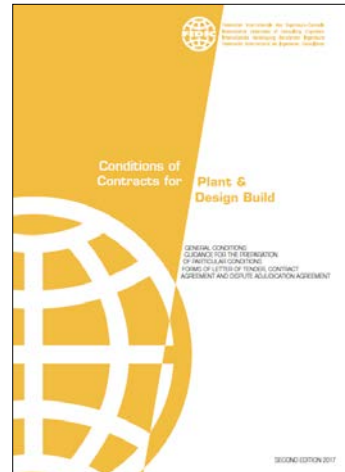
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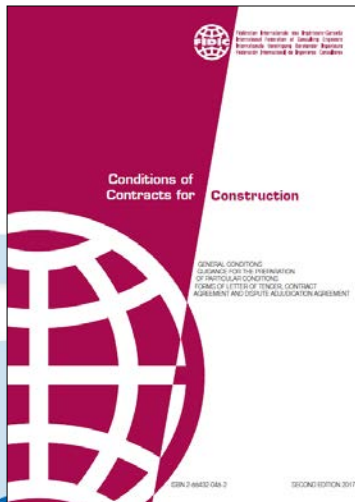
The FIDIC Suite of Contracts

– currently being finalised for publication before end 2017



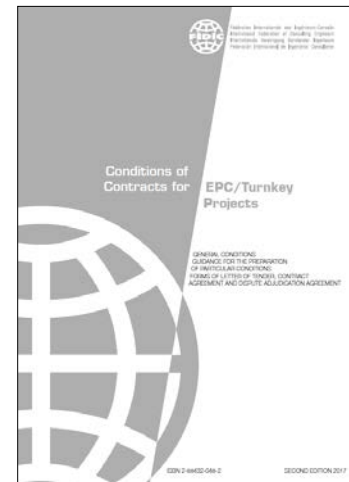
YELLOW BOOK

Conditions of Contract for Plant and Design Build, for Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor



RED BOOK

Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer



SILVER BOOK

Conditions of Contract for EPC*/Turnkey Projects



International Federation of Consulting Engineers

Underlying philosophies of the update of the FIDIC Rainbow Suite:-

- **by engineers for engineers**
but ...FIDIC contract = a legal document => also used by *lawyers*
- enhance *project management* 'tools'/mechanisms
- reinforce the role of *the Engineer*
- **balanced** risk allocation: more reciprocity between the Parties
- reflect current international **best practice**
- address **issues/comments raised by Users:**
for ~18 years the 1999 contracts have been 'tried and tested' around the world
- incorporate **most recent developments** in FIDIC contracts



Updating the FIDIC 'Rainbow Suite' 1999 - sources:

- Contract Users' feedback
- More Contract User's feedback!
- FIDIC Conditions of Contract for Design, Build and Operate Projects, 1st Edition **2008** ('the Gold Book')
- FIDIC Conditions of Contract for Construction Multilateral Development Banks (MDB) Harmonised Edition [2010]
- FIDIC CC's Special Advisors' proposed update items
- latest international construction trends and good-practices
- feedback (not project-specific) from the ICC (International Chamber of Commerce)
- court judgements (where relevant)
- friendly reviewers' feedback 2015 → update of Yellow Book
- more friendly reviewers' feedback 2016 → further review of update of Yellow Book, updates of Red Book & Silver Book

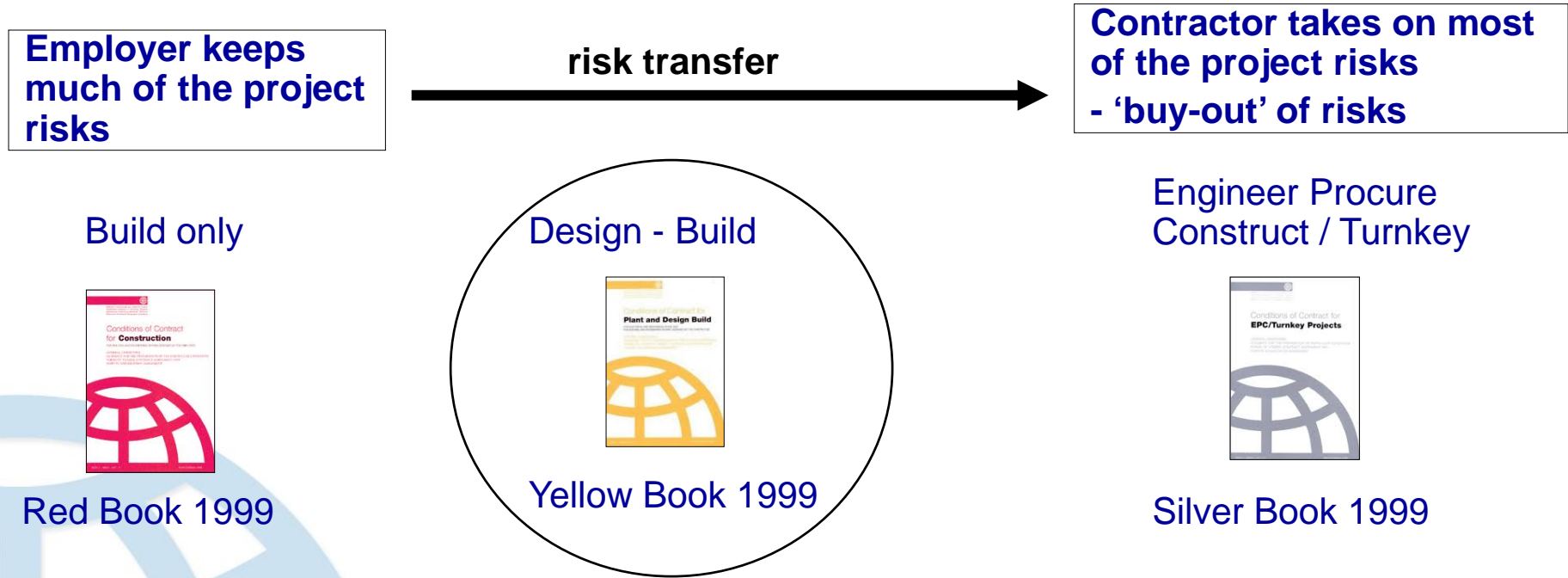
“friendly reviewers”: > 50 eminent professionals from around the world representing many stakeholders: Employers, Contractors, Engineers, construction lawyers, funding institutions, professional organisations, governmental agencies, equipment suppliers ...



ia, Peru
& 13 September 2017

Why the Yellow Book first?

Risk Allocation under FIDIC Contracts: (in general terms)



Key features of the new FIDIC Yellow Book

- under the following headings:

The Engineer

TIMING

More detailed PROJECT MANAGEMENT provisions

New reciprocal provisions

DESIGN

VARIATIONS

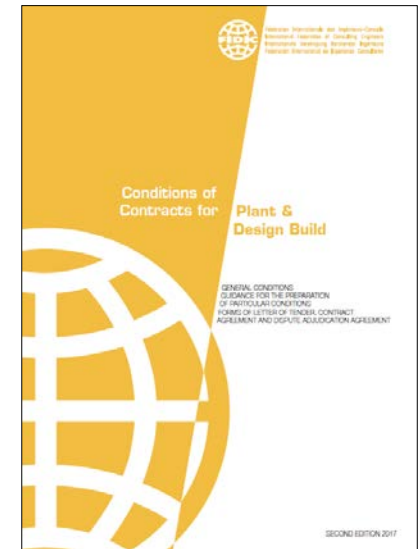
CONTRACT PRICE / PAYMENT

SUSPENSION / TERMINATION

AGREEMENT / DETERMINATION by the Engineer

CLAIMS

DISPUTES



The Engineer – Clause 3

→ Sub-Clauses 3.1 to 3.3 are *more structured*

- who is the Engineer expected to be
- what are the essential duties and authority of the Engineer

→ if Engineer = legal entity => natural person to be appointed

=> *'a professional engineer having suitable qualifications, experience and competence to act as the Engineer under the Contract ...'* *

→ Sub-Clause 3.3 introduces a “new” terminology: the “**Engineer’s Representative**” = ‘Resident Engineer’ on Site => reflects “real life practice”

→ Sub-Clause 3.7 [*Agreement or Determination*]

- step-by-step provisions => certainty for the Engineer **and** both Parties
- **when** is the Engineer expected to ‘broker’ Parties’ agreement or make a determination?

13.3 Variations 13.5 Daywork 14.4 Schedule of Payments

- not just for claims!

14.5 Plant and Materials intended for the Works

14.6 Issue of IPC



* **The FIDIC contract updates are currently being finalised - wording may be subject to change!**



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Lima, Peru
12 & 13 September 2017



time is of the essence ↔ time is money



YB update: • new specified time limits

• time limits not met → **'DEEMING' PROVISIONS**

FOR EXAMPLE

time limits for action by the Engineer:

- ⇒ Engineer's instructions: no response < 7 days → deemed confirmation of instruction
- ⇒ agreement/determination: no Engineer's Notice of agreement/determination < 42 days (or >agreed by Parties) → **deemed rejection**
- ⇒ consent to subcontractors, QM system, replacement of Key Personnel, Contractor's proposal for remedial works, testing programme: no objection / Notice < 14 days → deemed consent / Notice of No-objection
- ⇒ Contractor's programme: no Notice of non-compliance < 21 days initial / < 14 days revised programme → deemed Notice of No-objection → **Programme**

time limits for action by Contractor:

- ⇒ Final Payment Certificate: no Notice of claim / referral to DAB < 56 days → **deemed acceptance** of FPC

time limits for action by Employer:

- ⇒ access after taking-over: no response < 7 days → deemed consent for Contractor's access during DNP

TIMING

New defined terms:

“Delay Damages”

“Extension of Time” or “EOT”

“**P**rogramme”: Contractor’s programme to which Engineer gives a Notice of No-objection

“Date of Completion”: referring to Clause 10 [*Employer’s Taking Over*]



Commencement of Works – Sub-Clause 8.1:

Engineer’s Notice > **14 days** before Commencement Date (8.1 of YB1999: >7 days)

Advance Warning – Sub-Clause 8.4:



obligation on **both Parties** to warn of “*any known or probable future events*” *

- adversely affect Contractor’s work or performance of Works when completed
- increase Contract Price
- delay execution of Works or Section

⇒ Engineer can request the Contractor to make a proposal for a Variation to minimise the effects



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September 2017

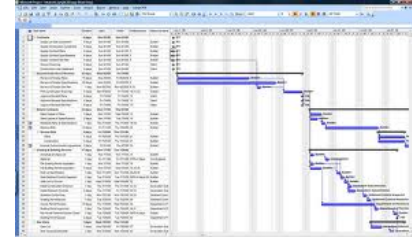
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Programme – Sub-Clause 8.3:

Contractor's **initial programme** → Engineer < 28 days after s-c 8.1 Notice

- software specified in ERs and new requirements:

- Commencement Date and Time(s) for Completion
- for revised programmes: the sequence, timing of remedial works
- all activities logically linked, showing earliest & latest start and finish dates, float and critical path
- days of rest and holidays
- key delivery dates of Plant and Materials
- actual progress for each activity, delay, knock-on delay to other activities



→ required for the **initial programme** and all **revised programmes**

Review by Engineer - gives Notice if initial programme or any later programme is:

- non-compliant with Contract
- ceases to reflect actual progress
- inconsistent with Contractor's obligations

→ Contractor to submit **revised programme < 14 days**

No Engineer's Notice < **21days** after receiving **initial programme**

< **14days** after receiving **revised programme**

→ **deemed** Notice of No-objection → **Programme**

Project Management_

For example:-

Sub-Clause 4.8 Health and Safety Obligations

- clearer requirements
- project-specific health and safety plan

Sub-Clause 4.9 Quality Management and Compliance Verification Systems

- quality management: more detailed requirements
- **compliance verification system**: *“to demonstrate that the design, Materials ... and workmanship comply in all respects with the Contract ...” **

Step-by-step detailed procedures enabling the Parties and the Engineer to comply with expected **“good practice”**.

For example:	1.9	Errors in the Employer’s Requirements,
	3.7	Agreement or Determination,
	4.7	Setting Out, and
	4.12	Unforeseeable Physical Conditions

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New reciprocal provisions Employer/Contractor:

Sub-Clause 1.12 Confidentiality

- equal requirements for the Parties regarding the treatment of confidential information.



Sub-Clause 1.13 Compliance with laws

- the Contractor now also obliged to provide assistance to the Employer in obtaining permits
- compensation entitlement for both of the Parties if the other Party fails to assist

Sub-Clause 6.3 Recruitment of Persons

- now *neither* Party (nor the Engineer) may recruit staff from the other's personnel.

Clause 20 Employer's and Contractor's Claims

- the new structure and provisions of this Clause provide equal treatment of the Parties in all related procedures
- easier to follow and more balanced



Employer's Requirements – increased importance

- **more express references** to “Employer's Requirements”
=> more certainty for the Parties and the Engineer as to where to find obligations/requirements in the Contract documents

For example:

6.7	Health and Safety of Personnel
7.3	Inspection
7.4	Testing by the Contractor
8.3	Programme
12.1	Procedures for Tests after Completion

- **increased the flexibility** of the application of the Conditions of Contract by allowing for alternative – and/or more detailed – procedures to be included in the Employer's Requirements

For example:

4.19	Temporary Utilities	4.20	Progress Reports
5.5	Training	5.6	As-Built Records
5.7	Operation and Maintenance Manuals		
6.6	Facilities for Staff and Labour		
6.12	Key Personnel	9.1	Tests on Completion
10.2	Taking Over Parts	11.11	Clearance of Site



Design

Sub-Clause 5.1 General Design Obligations:

→ **more explicit** requirements related to **designers**:

- engineers or other professionals, qualified, experienced and competent in the disciplines of the design for which they are responsible;
- qualified and entitled under applicable Laws to design the Works.



Sub-Clause 5.1 Contractors Documents:

→ **clearer and more explicit step-by-step procedures for the Engineer's Review of the Contractor's design**

→ Sub-Clause 5.2.2: defined terms

“Review Period”

“Contractor's Document”

“Contractor's Notice”

“No-objection”: a defined term under sub-clause 1.1.57 - “...may include comments concerning minor matters which will not substantially affect the Works” *

→ reflects “real life”

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Variations

Sub-Clause 3.5 Engineer's Instructions

If the instruction does not state that it is a Variation
and the Contractor believes that it is: the Contractor can give Notice
Engineer can then confirm, reverse or vary the instruction

Under the following Sub-Clauses it is **made clear** that
the "Variation" procedure under Clause 13 is to be followed:

- 1.9 – correction of errors in Employer's Requirements]
- 4.7.3 – correction of errors in items of reference
- 4.12 – Engineer's instruction to deal with Unforeseeable physical conditions
- 8.7 – revised methods / acceleration to expedite progress
- 8.12 – prolonged suspension => omission of works
- 11.4 – Contractor's failure to remedy => omission of works
- 17.4 – damage caused by Employer's Risks



Sub-Clause 4.2.1: **adjustment of Performance Security** if Variations cause
"accumulative increase or decrease of the Contract Price" *
by > 20% of Accepted Contract Amount

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CONTRACT PRICE / PAYMENT

“**Cost Plus Profit**” – “ ... percentage for **profit stated in the Contract Data (if not stated, five percent (5%))** ... only be added to the Contract Price where the Contractor is entitled under a Sub-Clause of these Conditions”.*



Provisional Sums – Sub-Clause 13.4: the Contractor may be required to submit **quotations** → Engineer can instruct Contractor to accept a particular quotation(s) or revoke the instruction

Adjustments for Changes in Laws – Sub-Clause 13.6: if there is a **decrease** in Cost, the Employer is entitled to a reduction in the Contract Price

Adjustments for Changes in Cost – Sub-Clause 13.7: formula in YB1999 replaced by “*schedule(s) of cost indexation*” in the Particular Conditions

Advance Payment – Sub-Clause 14.2:

14.2.1: Advance Payment Guarantee

14.2.2: Advance Payment Certificate

14.2.3: Repayment of Advance Payment

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Issue of Interim Payment Certificate (IPC) – Sub-Clause 14.6:

14.6.1 The IPC: amount that “*the Engineer fairly **considers** to be due*” *

14.6.2: Withholding (amounts in) an IPC: Engineer to give Notice and “***detail his calculation** of the amount and state the **reasons** for it being withheld*” *

14.6.3: **Correction or modification:** Contractor can identify and Engineer to correct in next IPC

If Contractor is not satisfied with next IPC, can refer it to the Engineer for agreement/determination under s-c 3.7



Payment – Sub-Clause 14.7:

Periods for payment **as stated in Contract Data**, but default periods

- advance payment: 21 days after Employer receives the Advance Payment Certificate
- interim payment: 56 days after Engineer receives the Statement
- final payment: default 56 days after Employer receives the FPC.

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SUSPENSION / TERMINATION

Employer's suspension: Sub-Clauses 8.9 → 8.13 as in YB1999



Employer's termination: Clause 15 as in YB1999

... but:

Contractor's failure → Engineer's Notice to Correct → Contractor's failure
 → Employer's **Notice of intention to terminate**** → Contractor's failure
 → Employer's **Notice of termination** → immediate termination

****Notice of termination if bankruptcy/insolvency or corruption**

... and:

Termination for Employer's Convenience – two new sub-clauses:

NEW

Sub-clause 15.5: valuation after termination

Sub-Clause 15.6: payment after termination

Contractor's suspension: Sub-Clause 16.1 as in YB1999

Contractor's termination: Sub-Clauses 16.2 → 16.4 as in YB1999





Notice to Correct – Sub-Clause 15.1 :

- describe the Contractor's failure
 - state the Sub-Clause of the Contractor's obligation
 - specified time for remedying the failure: "*reasonable, having due regard to the nature of the failure and the work involved to remedy it*" *
- Contractor to "*immediately respond*": describing remedial work and when it will be commenced to comply with the time specified in the Notice to Correct.

Termination for Contractor's Default – Sub-Clause 15.2:

15.2.1: Notice – Employer's **Notice of intention to terminate**

- two **new grounds** for termination:-

- NEW** • Employer's entitlement to **Delay Damages > maximum amount** in Contract Data
- NEW** • failure to comply with Engineer's rejection under s-c 7.5 [*Defects and Rejection*] or Engineer's instruction under s-c 7.6 [*Remedial Works*]

- amended grounds:-
 - bankruptcy/insolvency of one member of unincorporated **JV**
 - "*is found, based on **reasonable evidence**, to have engaged in corrupt, fraudulent, collusive or coercive practice at any time in relation to the Works or to the Contract*". *

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15.2.2: Termination

Contractor fails to remedy < 14 days

→ **second Notice** by Employer → immediate termination

... but: if Employer's Notice under 15.2.1 is on the grounds of bankruptcy/insolvency or corruption, then first Notice → immediate termination.

15.2.3: After Termination ~ wording of 4th para of 15.2 of YB1999

15.2.4: Completion of the Works ~ wording of 5th & 6th paras of 15.2 of YB1999

Payment after Termination for Contractor's Default – Sub-Clause 15.4:

Employer also entitled to recover **Delay Damages**

- for every day after date of termination to the due date for completion

Employer's entitlement to recover costs, losses, Delay Damages

→ Employer's claim under s-c 20.2

Termination for Employer's Convenience – Sub-Clause 15.5:

Employer has no right to complete the Works unless Contractor paid under s-c 15.6(b) (i.e. **loss of profit** or other losses and damages as a result of termination)

Valuation after Termination for Employer's Convenience – Sub-Clause 15.6:

- Contractor to submit to Engineer:

- the value of work done
- the amount of any **loss of profit or other losses** and damages as a result of termination.



→ Engineer to proceed under **Sub-Clause 3.7 [Agreement or Determination]**

→ Engineer to issue Payment Certificate *“without the need for the Contractor to submit a Statement”*.

Payment after Termination for Employer's Convenience – Sub-Clause 15.7:

- payment by Employer of Payment Certificate under s-c 15.6

- < 56 days after the Engineer receives Contractor's submission under s-c 15.6



Termination by Contractor – Sub-Clause 16.2:

16.2.1: Notice - Contractor's Notice "of his intention to terminate"

- two new grounds for termination:-

- Contractor does not receive Notice of the **Commencement Date** < 180 days after receiving Letter of Acceptance
- "the **Employer** is found, based on reasonable evidence, to have engaged in corrupt, fraudulent, collusive or coercive practice at any time in relation to the Works or to the Contract".

16.2.2: Termination

Employer fails to remedy < 14 days

→ **second** Notice by Contractor → immediate termination

... but: if Contractor's Notice under 16.2.1 is on the grounds of bankruptcy/insolvency or corruption, then first Notice → immediate termination.

If Employer does remedy < 14 days: Contractor entitled to **EOT / Cost Plus Profit** subject to s-c 20.2 [*Claims For Payment and/or EOT*]

Payment after Termination by Contractor – Sub-Clause 16.4:

Contractor entitled to be paid any **loss of profit or other losses** and damages as a result of termination subject to s-c 20.2 [*Claims For Payment and/or EOT*]



AGREEMENT / DETERMINATION by Engineer → not just for claims!

Sub-Clause 3.7: “When carrying out his/her duties under this Sub-Clause, the Engineer shall act **neutrally** between the Parties and shall **not** be deemed to act for the Employer...” *

3.7.1: Consultation to reach agreement

3.7.2: Engineer's Determination

3.7.3: Time Limits

time limit for Engineer's Notice of agreement: **42 days**

time limit for Engineer's Notice of determination: **42 days after the date of no agreement**

“or other period proposed by Engineer and agreed by both Parties” *

No Notice < time limit: - if a claim, then deemed to be rejected
 - if another matter, then deemed to be a dispute.



Under Sub-Clause 3.2 [Engineer's Duties and Authority]:

“There shall be **no requirement for the Engineer to obtain the Employer's consent** before the Engineer exercises his authority under Sub-Clause 3.7 [Agreement or Determination]. **The Employer shall not impose further constraints on the Engineer's authority.**” *



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3.7.4: Effect of Agreement or determination: binding unless and until revised by DAAB or in arbitration

- if payment, Contractor to include in next Statement and Engineer to include in next Payment Certificate
- if error found < 14 days → Engineer to correct < 7 days or advise no error



3.7.5: Dissatisfaction with Engineer's determination:

- dissatisfied Party to give **Notice of Dissatisfaction "NOD"** with reasons < 28 days after Engineer's Notice of determination (or corrected Notice of determination or deemed rejection) → proceed to DAAB

no NOD < 28 days: Engineer's determination (or deemed rejection) "*shall be deemed to have been **accepted** by both Parties*" *

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CLAIMS

New definition: “**Claim**” - a **request or assertion** for an **entitlement or relief**

⇒ ANY entitlement / relief not just for time and/or money

Claims – Sub-Clause 20.1

- Claim**
- (a) Employer’s claim for \$ / EOT → s-c 20.2
 - (b) Contractor’s claim for \$ / EOT → s-c 20.2
 - (c) claim for other entitlement / relief → **last para s-c 20.1**
 - including Engineer’s certificate, determination, etc
 - **NOT** \$ / EOT, **NOT** 3rd party claims



last para s-c 20.1:

→ Notice to Engineer “**as soon as practicable** after the claiming Party becomes aware of the other Party’s disagreement with the requested entitlement (or deemed disagreement if no response is received from the other Party within a reasonable time)”

*

+

“details of claiming Party’s case and the other Party’s disagreement”. *

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Claims for Payment and/or EOT – Sub-Clause 20.2 → Employer and Contractor

- 20.2.1 Notice of Claim:** ~ wording 1st & 2nd paras of 20.1 YB1999 but: “Contractor” replaced with “claiming Party”
- 20.2.2 Engineer’s initial response:** Engineer to give Notice if claim is time-barred, with reasons < 14 days. No Engineer’s Notice → Notice of Claim is valid
- 20.2.3 Contemporary Records:** “records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim”* + wording 4th para of 20.1 YB1999
- 20.2.4 Fully detailed Claim:** [facts, law, quantum, records]
< 84 days after event / circumstance or other period agreed with the Engineer
→ if **statement of contractual/legal basis** not submitted, claim is **time-barred**.
- 20.2.5 Agreement or determination of the Claim:** by Engineer under s-c 3.7
If Engineer asks for additional information “*he shall nevertheless give his response on the contractual or other basis of the Claim within the time limit for agreement under Sub-Clause 3.7.3 [Time limits]*”*
- 20.2.6 Claims of continuing effect:** interim claims at monthly intervals
“*final fully detailed claim*” < 28 days after end of effects or other period agreed with the Engineer → s-c 20.2.5 applies

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Waiver of Time Limits – Sub-Clause 20.3

If claim is time-barred under:

20.2.1 (Notice of Claim)

or

20.2.4 (statement of contractual/legal basis)



and the claiming Party:

- **disagrees**, or
- considers there are **circumstances which justify late submission**

→ waiver of time-limit

- by DAAB?

or

- by agreement / determination under s-c 3.7?



... still under consideration by FIDIC!



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Disputes

as in YB1999: **dispute** → DAAB → arbitration

...but **standing DAAB, separate Clause 21, new definitions**



“**Dispute**” - where:

- (a) one Party makes a claim against the other Party
- (b) the other Party (or the Engineer under s-c 3.7.2) rejects the claim in whole / part and
- (c) the first Party “*does not acquiesce*” (by giving a NOD under s-c 3.7.5 or otherwise)

*“provided however that a failure by the other Party to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAAB or the arbitrator(s), as the case may be, deem it reasonable for it to do so”**

“**DAAB**” or “**Dispute Avoidance/Adjudication Board**” – one / three members
- named in the Contract or appointed under s-c 21.1 or 21.2

“**DAAB Agreement**” - agreement entered into by both Parties and (each) DAAB member “*incorporating by reference the “General Conditions of Dispute Avoidance/Adjudication Agreement”*” * – published as appendix (as in YB1999)

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Constitution of the DAB – Sub-Clause 21.1 ~ wording of s-c 20.2 of YB 1999 amended with some new provisions

Failure to Appoint DAB Member(s) – Sub-Clause 21.2 ~ wording s-c 20.3 of YB 1999 new conditions for appointment of DAB member by appointing entity/FIDIC

Avoidance of Disputes – Sub-Clause 21.3

DAB facilitates “assistance and/or informally discuss and attempt to **resolve any issue or disagreement** that may have arisen”



Obtaining DAB's Decision – Sub-Clause 21.4

21.4.1 Reference of a Dispute to the DAB

21.4.2 The Parties' obligations after the reference

21.4.3 The DAB's decision

21.4.4 Dissatisfaction with DAB's decision



Amicable Settlement – Sub-Clause 21.5 ~ s-c 20.5 of YB1999

Arbitration – Sub-Clause 21.6 ~ s-c 20.6 of YB1999

Failure to Comply with DAB's Decision – Sub-Clause 21.7 ~ s-c 20.7 of YB1999 amended with some new provisions

No DAB in place – Sub-Clause 21.7 ~ s-c 20.7 of YB1999

Update of the FIDIC Red Book:

= **Yellow Book update** ... unless irrelevant / inappropriate for design-bid-build
=> consistency!

⇒ Clause 5 [*Nominated Subcontractors*]

⇒ Clause 12 [*Measurement and Valuation*]

• More detailed provisions *if* the Contractor is to design

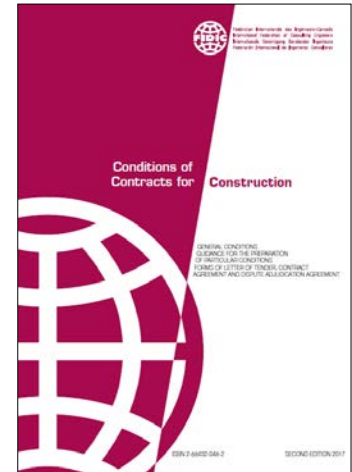
⇒ 'lite' provisions from Yellow Book update for:

design to be fit for purpose

Engineer's review of Contractor's design

Training of Employer's staff

operation and maintenance manuals



• More details regarding the procedure for **remeasurement and valuation**

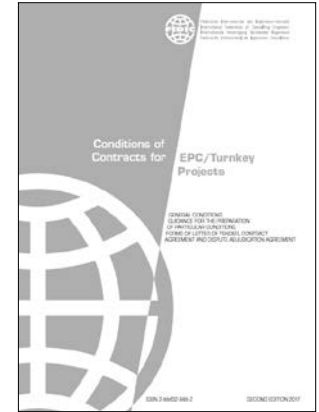
- if no agreement on quantities

- if no agreement on “*appropriate rate or price*”

→ Engineer to proceed under **Sub-Clause 3.7 [*Agreement or Determination*]**

Update of the FIDIC Silver Book:

= **Yellow Book update** ... unless irrelevant / inappropriate for EPC/Turnkey => consistency!



⇒ no change to allocation of **most** risks to the Contractor as in SB1999

⇒ but: Employer **shall** appoint Employer's Representative

- so the Contractor's Representative knows who to deal with
- **if/where** specified in the Employer's Requirements: review of design by Employer's Representative
 - ... and **Employer** can review the Contractor's programmes
- Sub-Clause 3.7 [Agreement or Determination]:
 - Employer's Representative "**shall act neutrally** between the Parties and shall not be deemed to act for the Employer"*

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Thank You for
Your Kind
Attention

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