



New FIDIC Forms of Contract

Plesner Insight on the new FIDIC Red, Yellow
and Silver Books

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INTRODUCTION

Globally, the use of the FIDIC forms of contract has increased widely over the last 18 years since the publication of the 1999-versions of the so-called Red (Construction), Yellow (Plant and Design Build) and Silver (EPC) books. The FIDIC forms of contract are today arguably the most used standard contracts within the energy, infrastructure and construction sectors, e.g. as basis for construction work for both wind park projects, solar projects, transport infrastructure, power plants and even oil and gas plants.

In particular, the success of the FIDIC forms of contract derives from the fact that they are suited for use across a diverse range of legal systems; that they are well-known to the market participants, including financiers; and that they have proactively been updated over time to serve its market.

Approximately eight years ago, FIDIC initiated the planning of a revision of the Red, Yellow and Silver Books as a response to various feedback from user and market participants. Naturally, the overall aim with the revisions was to have the FIDIC forms of contract reflect international best practice.

Most awaited, FIDIC gave a pre-release (draft versions) of the forms of contract in December 2016, which sparked debate on various issues to be dealt with in the final version.

At the FIDIC international Contract Users Conference in London on 5 and 6 December 2017, in which Plesner attended, the three new 2017 FIDIC forms of contract were revealed for more than 350 delegates.

In this Plesner Insight, we will provide you with the most important changes to the forms of contract that arguably will serve as the new contractual basis for any "FIDIC-projects".

THE PURPOSE OF THE NEW FIDIC REVISIONS

Overall, the core aim and purpose of the new revisions are to enhance:

- Clarity, transparency and certainty;
- Balance and reciprocity;
- Project and contract management mechanisms; and
- Dispute avoidance.

In FIDIC's instructions distributed to conference speakers, which Plesner received during the conference, FIDIC further explained the purpose of the revisions as:

"The core aim of the majority of the changes in FIDIC's 2017 contract updates is increased clarity and certainty, to reduce the risk of disagreements regarding the interpretation of contract terms and, as a result, increase the probability of successful projects.

Consistent with the above, FIDIC has improved the contract provisions by making them more prescriptive and introducing step-by-step project management and procedural mechanisms, by setting out exactly what is expected from the Employer, the Contractor and the Engineer during the performance of the Contract."

In addition, FIDIC has aimed at balancing the rights/obligations of the Employer and the Contractor, e.g. by amending and balancing the process for the Employer and the Contractor's claims, compared to the generally perceived "Employer-friendly" approach in the 1999-versions.

Also, a number of the revised provisions are aimed at avoiding late and old claims and instead forcing the parties to deal with such claims during the project. To solidify this, and as one example of the focus on dispute avoidance, FIDIC has in Sub-Clause 21.1 introduced a standing (and not an ad hoc) DAAB - a Dispute Adjudication/Avoidance Board.

As regards the depth and nature of the revisions, it is worth noting that in order to enhance, in particular, the step-by-step approach, the length of the FIDIC contracts have increased dramatically from the 1999-versions. As such, the core terms of the contracts span more than a 100 pages compared to the 1999-version of approximately 60 pages, and the word count has grown considerably as well, including the list of defined terms.

While the number of revisions are extensive, we will in the following provide you with an insight into the most important changes in the 2017 FIDIC forms of contract.

MAJOR CHANGES IN FIDIC RED, YELLOW AND SILVER BOOK

FIT FOR PURPOSE

A clause of much debate has been Sub-Clause 4.1 [*Contractor's General Obligations*], which is now revised so that the Contractor's fit for purpose obligation no longer is related to "the Contract" as a whole, but instead to the "Employer's requirements". Arguably, this is a more limited obligation for the Contractor compared to the 1999-versions.



In addition, last paragraph of Sub-Clause 17.4 [*Indemnities by Contractor*], includes an indemnity on part of Contractor for its design obligations not being fit for purposes, as intended under Sub-Clause 4.1. It is noteworthy that debate arose subsequent to the 2016 pre-release of the FIDIC contracts, as it appeared that this indemnity was uncapped. However, from an *e contrario* reading of Sub-Clause 1.15 [*Limitation of Liability*], the fit for purpose indemnity is now included in the total cap on liability.

Finally, FIDIC has left it to the parties to determine whether the fit for purpose obligation as stated in Sub-Clause 4.1 shall be covered by the professional indemnity insurance, see Sub-Clause 19.2.3.

Whereas the exact reach of a fit for purpose obligation under Danish law is not clear, the fit for purpose principle has attained a lot of attention due to the recent UK Supreme Court ruling in *MT Højgaard A/S vs. E.On Climate and Renewables UK Robin Rigg East Ltd.*

We therefore in general advise our clients to be mindful of fit for purpose provisions, including in the 2017-versions of the FIDIC contracts.

CHANGES TO THE ROLE OF THE ENGINEER

A number of amendments have been made to Clause 3 [*The Engineer*]. Most importantly, Sub-Clause 3.7 [*Agreement or Determination*] represents the step-by-step approach sought by FIDIC to avoid discussions as to process of determinations by the engineer. Notably, FIDIC has amended the role of the engineer under the Sub-Clause in the sense that the engineer shall "...act neutrally between the parties and shall not be deemed to act for the Employer". While the word "neutrally" is not defined in the FIDIC contracts, it will arguably give rise to much debate, when the engineer has to make determinations on neutral grounds.

Obviously, the Silver Book does not include provisions regarding the Engineer.

PROGRAMME AND ADVANCE WARNING

Another example of FIDIC's focus on contract management in the 2017 contracts is the changes to Sub-Clause 8.3 [*Programme*], which has become much more detailed in terms of the information that the Contractor shall provide to the Employer in the programme.

In *litra (g)* it is e.g. required that the Contractor includes all activities, logically linked and showing start and end dates for each activity, the float and the critical path.

Sub-Clause 8.3 also includes a requirement on the Engineer (or the Employer in the Silver Book) to review the programme, to ensure compliance with the Contract.

Further, Sub-Clause 8.4 [*Advance Warning*] is new and requires each party and the Engineer to give advance warning of circumstances that will adversely affect the Work or the performance of the Work; the Contract Price and/or delay the execution of the Works.

In general, the revised clauses regarding time represents an interesting step towards a more proactive management of the Contract and the performance of the Works.

parties' indemnities, and at the same time, a provision on a shared indemnity is included to reflect that if the other party has contributed to the indemnified event, the party's indemnification shall be reduced proportionally.

CLAIMS AND DISPUTES

In order to create a level playing field for the parties and to avoid ambiguities, FIDIC has decided to split the previous Clause 20 in two. It is now clear that Clause 20 relates to "Employer's and Contractor's Claims", whereas Clause 21 relates to "Disputes and Arbitration". In other words, a Claim is not the same as a Dispute, i.e. a Claim is a request for an entitlement under the Contract, whereas a Dispute arises, if that Claim is rejected or ignored. In addition, Clause 20 now includes provisions with respect to the Employer's Claims, which was treated differently in the 1999-version of the FIDIC contracts.

FIDIC has also clarified in Sub-Clause 20.1 [*Claims*] that a claim relates not only to time and money, but also to any other entitlement or relief under the Contract.

What is also noteworthy is that Clause 20 includes very detailed requirements as to the process of handling claims, including the issue of time barring and a right for the Engineer to waive the time bar of 28 and 84 days.

Another important change is the new Clause 21 on DAAB (Dispute Avoidance/Adjudication Board), which is intended to have a different role compared to the Dispute Adjudication Boards (DAB). Notably, the DAAB is a standing board and not an ad hoc board. Undoubtedly, FIDIC's aim is that the standing DAAB will have a more prominent role as a proactive "tool" to avoid conflicts. As an example, the new Sub-Clause 21.3 [*Avoidance of Disputes*] provides that the parties may "*jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract*".



CARE OF THE WORKS AND INDEMNITIES

While the content of Clause 17 [*Care of the Works and Indemnities*] does have some resemblances with the 1999-versions of the FIDIC contracts, Clause 17 has undergone a reordering of the entire structure of the Clause. This has definitely enhanced the clarity of the Clause. In particular, Sub-Clause 17.4 [*Indemnities by Contractor*] and Sub-Clause 17.5 [*Indemnities by Employer*] includes a clear split of the

BIM

The 2017-versions of FIDIC does not include provisions or references to the very hot topic of Building Information Modelling (BIM). However, the 2017 FIDIC contracts include in the Advisory Notes to the Particular Conditions (Special Conditions), a short note on the use of BIM under the FIDIC regime, and FIDIC intends to issue a "Technology Guideline", to further support the use of BIM.

CONCLUSION

With the success of the FIDIC 1999-contracts, FIDIC has undoubtedly taken a further step with the new FIDIC contracts of 2017 to solidify the position of the FIDIC contracts, as the most used standard contract globally within energy, infrastructure and construction. In particular, FIDIC has in our opinion succeeded in preparing a more proactive contract tool that potentially will lead to dispute avoidance.

However, a result of this approach is firstly that each party will have to have an increased focus on managing the contract in the true sense of the word and each and every of the processes included in the new revisions. Secondly, the consequences of a party's deviation or lack of adherence to the process requirements will potentially - even under Danish law - be that the party's specific entitlement, relief and claim will be considered waived or lost.

CONTACT PLESNER

If you have any questions or comments to the updated and new FIDIC forms of contract, or any other related questions or comments, you are always welcome to contact us.



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Read more about the Energy, Infrastructure and Construction team on Plesner's website

We are a part of Plesner's Energy, Infrastructure and Construction team, which advises Plesner' clients on all strategic and legal aspects of energy, infrastructure and construction projects.

Our team focuses on providing advice, which is based on detailed industry knowledge and on a business oriented approach, within the relevant sector. Our clients choose us because we synthesise technically, legally and financially complex problems and we deliver advice, which is essential to successful preparation, completion and operation of projects.

Over the past years, we have assisted various of our clients with the application of the FIDIC forms of contract, both in regard to the negotiation and formation of contracts subject to FIDIC; contract management of FIDIC based contracts, as well as in connection with any arisen disputes.

If you have any questions or comments to the updated and new FIDIC forms of contract, or any other related questions or comments, you are always welcome to contact us.

