
FIDIC 2017: The Contract Manager's Handbook



FIDIC 2017: The Contract Manager's Handbook

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Preface

My experience of FIDIC contracts dates back to 1981. Since then, I have had occasional spells of working with other standard forms of contract, such as the JCT suite and the ENAA forms, but I estimate that 85–90% of the contracts with which I have worked, initially as contract manager, then expert, dispute board member and arbitrator, have been FIDIC based.

For more than ten years now, I have spent a significant proportion of my time teaching and training people all around the world on FIDIC contracts, contracts management, claims and disputes. The interaction with students and trainees has confirmed the view which I had already formed from my many years of using FIDIC contracts, which is that a large proportion of disputes arise from poor preparation of the Particular Conditions and/or Specifications and Employer's Requirements, and even more so, from misunderstandings about how the General Conditions are to be operated.

The FIDIC 2017 suite of Contracts is still young, and relatively few people have had the opportunity to work with them. Being much more detailed than the earlier versions, particularly with respect to procedures, the scope for misunderstanding is magnified. Therefore, when I was approached by ICE Publishing, I seized the opportunity to compile a book, which I hope will serve as a practical guide to help Contract Managers.

This book would not have been possible without the agreement of FIDIC for which I am grateful. I am also grateful to the World Bank for allowing me to refer to their Standard Procurement Documents.

On a more personal note, I wish to thank my colleagues and friends, Jim Perry, Guillaume Sauvaget and Dick Appuhn, for their constant encouragement since the outset of this venture. I also thank Michael Fenton of ICE Publishing for his support. Above all I thank my wife, Marie-France, for being so tolerant and understanding throughout the many precious hours that I diverted from our family life to spend on drafting.

About the author

Geoffrey Smith, BSc, CDipAF, LLDip, CEng, FICE, FCI Arb, Barrister, Accredited Conciliator and Mediator, FIDIC Certified Adjudicator, Member of FIDIC President's List of Disputes Adjudicators, has more than 40 years' practical experience in the use of FIDIC contracts throughout Africa, Asia and Europe as Contract Manager, Expert, Counsel, Dispute Board Member and Arbitrator.

After gaining initial experience in the United Kingdom, his international career began in the Middle East in 1981 preparing and negotiating claims on behalf of a contractor on a billion-dollar project. Several projects later, he moved to France in 1988, where he opened an office for a UK firm of contract managers, advising European contractors working in Africa and Asia.

After qualifying as a barrister in 1995, Geoffrey moved towards dispute resolution, through arbitration and mediation. He was admitted to the FIDIC President's List of Disputes Adjudicators in 2012 and since then has dedicated the majority of his time to Dispute Boards. As a Dispute Board member, he is known to be a keen advocate and practitioner of dispute avoidance.

Projects have included tunnels, dams, ports and marine works, power stations, electricity distribution, water treatment and distribution, sewerage, roads, bridges, railways, petrochemical and industrial installations, as well as buildings. Since 2008, he has trained large numbers of people in FIDIC contracts and Contracts Management for FIDIC, World Bank, Asian Development Bank, Islamic Development Bank, Japanese International Cooperation Agency, the European Union, the OECD and ILO. He also lectures at Université Paris II–Panthéon Assas, the École Supérieure des Ponts et Chaussées and the University of Turin.

He is a past Director of the Dispute Resolution Board Foundation (Region 2) and from 2012 to 2022, he chaired its Bank Liaison Committee developing and maintaining links between the Foundation and the Multilateral Development Banks and bilateral funding agencies. He advised the World Bank with respect to its Special Provisions for use with FIDIC 2017 Contracts, many of which have been adopted by other banks. He has also frequently advised the Asian Development Bank and the Japanese International Cooperation Agency on contractual matters.

He was a 'friendly reviewer' of the FIDIC Green Book 2021 (2nd Edition) and reviewed the French translations of FIDIC 2017 Contracts and the FIDIC White Book 2017. He chairs FIDIC Task Group 20 which is preparing a Joint Venture agreement for Contractors. He is one of the assessors of candidates aiming to be FIDIC Certified Adjudicators.

In 2021, he was the winner of the 'Al Mathews Award for Dispute Board Excellence' from the Dispute Resolution Board Foundation and received its Distinguished Service Award in 2022.

Glossary

Accepted Contract Amount	The amount accepted in the Letter of Acceptance for the execution of the Works in accordance with the Contract.
Advance Payment Certificate	The Payment Certificate issued by the Engineer for advance payment under Sub-Clause 14.2.2 [<i>Advance Payment Certificate</i>].
Advance Payment Guarantee	The guarantee provided to the Employer by the Contractor under Sub-Clause 14.2.1 [<i>Advance Payment Guarantee</i>] as security for the advance payment.
Base Date	The date 28 days before the latest date for submission of the Tender.
Bill of Quantities	The document entitled bill of quantities (if any) included in the Schedules, containing the estimated quantities of work together with the Contractor's rates and prices.
Claim	A request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works.
Commencement Date	The date as stated in the Engineer's Notice issued under Sub-Clause 8.1 [<i>Commencement of Works</i>] at which the Time for Completion begins.
Compliance Verification System	The compliance verification system to be prepared and implemented by the Contractor for the Works in accordance with Sub-Clause 4.9.2 [<i>Compliance Verification System</i>].
Conditions of Contract	General Conditions as amended by the Particular Conditions.
Contract (Red Book)	The Contract Agreement, the Letter of Acceptance, the Letter of Tender, any addenda referred to in the Contract Agreement, these Conditions, the Specification, the Drawings, the Schedules, the JV Undertaking (if applicable) and the further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance.

Contract (Silver Book)	The Contract Agreement, any addenda referred to in the Contract Agreement, these Conditions, the Employer's Requirements, the Schedules, the Tender, the JV Undertaking (if applicable) and the further documents (if any) which are listed in the Contract Agreement.
Contract (Yellow Book)	The Contract Agreement, the Letter of Acceptance, the Letter of Tender, any addenda referred to in the Contract Agreement, these Conditions, the Employer's Requirements, the Schedules, the Contractor's Proposal, the JV Undertaking (if applicable) and the further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance.
Contract Agreement	The agreement entered into by both Parties in accordance with Sub-Clause 1.6 [<i>Contract Agreement</i>].
Contract Data	The pages, entitled contract data which constitute Part A of the Particular Conditions, which provide the data necessary for the operation of some provisions of the Conditions of Contract.
Contract Price	The price defined in Sub-Clause 14.1 [<i>The Contract Price</i>], including Variations and Adjustments.
Contractor	The person(s) named as contractor in the Letter of Tender accepted by the Employer and the legal successors in title of such person(s).
Contractor's Documents	The documents prepared by the Contractor as described in Sub-Clause 4.4 [<i>Contractor's Documents</i>], including calculations, digital files, computer programs and other software, drawings, manuals, models, specifications and other documents of a technical nature.
Contractor's Equipment	All apparatus, equipment, machinery, construction plant, vehicles and other items required by the Contractor for the execution of the Works. Contractor's Equipment excludes Temporary Works, Plant, Materials and any other things intended to form or forming part of the Permanent Works.

Contractor's Personnel	The Contractor's Representative and all personnel whom the Contractor utilises on Site or other places where the Works are being carried out, including the staff, labour and other employees of the Contractor and of each Subcontractor; and any other personnel assisting the Contractor in the execution of the Works.
Contractor's Representative	The natural person named by the Contractor in the Contract or appointed by the Contractor under Sub-Clause 4.3 [<i>Contractor's Representative</i>], who acts on behalf of the Contractor.
Cost	All expenditure reasonably incurred (or to be incurred) by the Contractor in performing the Contract, whether on or off the Site, including taxes, overheads and similar charges, but not including profit. Where the Contractor is entitled under a Sub-Clause of these Conditions to payment of Cost, it shall be added to the Contract Price.
Cost Plus Profit	Cost plus the applicable percentage for profit stated in the Contract Data (if not stated, five percent (5%)). Such percentage shall only be added to Cost, and Cost Plus Profit shall only be added to the Contract Price, where the Contractor is entitled under a Sub-Clause of these Conditions to payment of Cost Plus Profit.
Country	The country in which the Site (or most of it) is located, where the Permanent Works are to be executed.
DAAB Agreement	The agreement signed or deemed to have been signed by both Parties and the sole member or each of the three members (as the case may be) of the DAAB in accordance with Sub-Clause 21.1 [<i>Constitution of the DAAB</i>] or Sub-Clause 21.2 [<i>Failure to Appoint DAAB Member(s)</i>], incorporating by reference the General Conditions of Dispute Avoidance/Adjudication Agreement contained in the Appendix to these General Conditions with such amendments as are agreed.

Date of Completion	The date stated in the Taking-Over Certificate issued by the Engineer; or, if the last paragraph of Sub-Clause 10.1 [<i>Taking Over the Works and Sections</i>] applies, the date on which the Works or Section are deemed to have been completed in accordance with the Contract; or, if Sub-Clause 10.2 [<i>Taking Over Parts</i>] or Sub-Clause 10.3 [<i>Interference with Tests on Completion</i>] applies, the date on which the Works or Section or Part are deemed to have been taken over by the Employer.
day	A calendar day.
Daywork Schedule	The document entitled daywork schedule (if any) included in the Contract, showing the amounts and manner of payments to be made to the Contractor for labour, materials and equipment used for daywork under Sub-Clause 13.5 [<i>Daywork</i>].
Defects Notification Period	The period for notifying defects and/or damage in the Works or a Section or a Part (as the case may be) under Sub-Clause 11.1 [<i>Completion of Outstanding Work and Remedying Defects</i>], as stated in the Contract Data (if not stated, one year), and as may be extended under Sub-Clause 11.3 [<i>Extension of Defects Notification Period</i>]. This period is calculated from the Date of Completion of the Works or Section or Part.
Delay Damages	The damages for which the Contractor shall be liable under Sub-Clause 8.8 [<i>Delay Damages</i>] for failure to comply with Sub-Clause 8.2 [<i>Time for Completion</i>].
Dispute	Any situation where: <ul style="list-style-type: none"> (a) one Party makes a claim against the other Party (which may be a Claim, as defined in these Conditions, or a matter to be determined by the Engineer under these Conditions, or otherwise); (b) the other Party (or the Engineer under Sub-Clause 3.7.2 [<i>Engineer's Determination</i>]) rejects the claim in whole or in part; and

(c) the first Party does not acquiesce (by giving a NOD under Sub-Clause 3.7.5 [*Dissatisfaction with Engineer's determination*] or otherwise),

provided however that a failure by the other Party (or the Engineer) 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.

**Dispute Avoidance/
Adjudication Board**

The sole member or three members (as the case may be) so named in the Contract or appointed under Sub-Clause 21.1 [*Constitution of the DAAB*] or Sub-Clause 21.2 [*Failure to Appoint DAAB Member(s)*].

Drawings

The drawings of the Works included in the Contract and any additional and modified drawings issued by (or on behalf of) the Employer in accordance with the Contract.

Employer

The person named as the employer in the Contract Data and the legal successors in title to this person.

Employer's Equipment

The apparatus, equipment, machinery, construction plant and/or vehicles (if any) to be made available by the Employer for the use of the Contractor under Sub-Clause 2.6 [*Employer-Supplied Materials and Employer's Equipment*], but not including Plant which has not been taken over under Clause 10 [*Employer's Taking Over*].

Employer's Personnel

The Engineer, the Engineer's Representative (if appointed), the assistants described in Sub-Clause 3.4 [*Delegation by the Engineer*] and all other staff, labour and other employees of the Engineer and of the Employer engaged in fulfilling the Employer's obligations under the Contract; and any other personnel identified as Employer's Personnel, by a Notice from the Employer or the Engineer to the Contractor.

Employer's Representative	The person named by the Employer in the Contract Data appointed by the Employer for the purposes of the Contract, or any replacement appointed under Sub-Clause 3.1 [<i>The Employer's Representative</i>].
Employer's Requirements	The document entitled employer's requirements, as included in the Contract, and any additions and modifications to such document in accordance with the Contract. Such document describes the purpose(s) for which the Works are intended, and specifies Key Personnel (if any), the scope, and/or design and/or other performance, technical and evaluation criteria, for the Works.
Employer-Supplied Materials	The materials (if any) to be supplied by the Employer to the Contractor under Sub-Clause 2.6 [<i>Employer-Supplied Materials and Employer's Equipment</i>].
Engineer	The person named in the Contract Data appointed by the Employer to act as the Engineer for the purposes of the Contract, or any replacement appointed under Sub-Clause 3.6 [<i>Replacement of the Engineer</i>].
Engineer's Representative	The natural person who may be appointed by the Engineer under Sub-Clause 3.3 [<i>Engineer's Representative</i>].
Exceptional Event	An event or circumstance as defined in Sub-Clause 18.1 [<i>Exceptional Events</i>].
Extension of Time	An extension of the Time for Completion under Sub-Clause 8.5 [<i>Extension of Time for Completion</i>].
Final Payment Certificate	The payment certificate issued by the Engineer under Sub-Clause 14.13 [<i>Issue of FPC</i>].
Final Statement	The Statement defined in Sub-Clause 14.11.2 [<i>Agreed Final Statement</i>].
Foreign Currency	A currency in which part (or all) of the Contract Price is payable, but not the Local Currency.
General Conditions	The document entitled ' <i>Conditions of Contract for Construction for Building and Engineering Works designed by the</i>

	<p><i>Employer</i>’, or alternatively ‘<i>Conditions of Contract for Conditions of Contract for Plant and Design-Build</i>’, or alternatively ‘<i>Conditions of Contract for EPC/Turnkey Projects</i>’, all as published by FIDIC.</p>
Goods	<p>Contractor’s Equipment, Materials, Plant and Temporary Works, or any of them as appropriate.</p>
Interim Payment Certificate	<p>A Payment Certificate issued by the Engineer for an interim payment under Sub-Clause 14.6 [<i>Issue of IPC</i>].</p>
Joint Venture	<p>A joint venture, association, consortium or other unincorporated grouping of two or more persons, whether in the form of a partnership or otherwise.</p>
JV Undertaking	<p>The letter provided to the Employer as part of the Tender setting out the legal undertaking between the two or more persons constituting the Contractor as a JV. This letter shall be signed by all the persons who are members of the JV, shall be addressed to the Employer and shall include:</p> <ul style="list-style-type: none"> (a) each such member’s undertaking to be jointly and severally liable to the Employer for the performance of the Contractor’s obligations under the Contract; (b) identification and authorisation of the leader of the JV; and (c) identification of the separate scope or part of the Works (if any) to be carried out by each member of the JV.
Key Personnel	<p>The positions (if any) of the Contractor’s Personnel, other than the Contractor’s Representative, that are stated in the Specification or Employer’s Requirements.</p>
Laws	<p>All national (or state or provincial) legislation, statutes, acts, decrees, rules, ordinances, orders, treaties, international law and other laws, and regulations and by-laws of any legally constituted public authority.</p>

Letter of Acceptance	The letter of formal acceptance, signed by the Employer, of the Letter of Tender, including any annexed memoranda comprising agreements between and signed by both Parties. If there is no such letter of acceptance, the expression ‘ <i>Letter of Acceptance</i> ’ means the Contract Agreement, and the date of issuing or receiving the Letter of Acceptance means the date of signing the Contract Agreement.
Letter of Tender	The letter of tender, signed by the Contractor, stating the Contractor’s offer to the Employer for the execution of the Works.
Local Currency	The currency of the Country.
Materials	Things of all kinds (other than Plant), whether on the Site or otherwise allocated to the Contract and intended to form or forming part of the Permanent Works, including the supply-only materials (if any) to be supplied by the Contractor under the Contract.
month	A calendar month (according to the Gregorian calendar).
No-objection	The Engineer/Employer’s Representative has no objection to the Contractor’s Documents, or other documents submitted by the Contractor under these Conditions, and such Contractor’s Documents or other documents may be used for the Works.
Notice	A written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [<i>Notices and Other Communications</i>].
Notice of Dissatisfaction	The Notice one Party may give to the other Party if it is dissatisfied, either with an Engineer’s determination under Sub-Clause 3.7 [<i>Agreement or Determination</i>] or with a DAAB’s decision under Sub-Clause 21.4 [<i>Obtaining DAAB’s Decision</i>].
Part	A part of the Works or part of a Section (as the case may be) which is used by the Employer and deemed to have been taken over under Sub-Clause 10.2 [<i>Taking Over Parts</i>].

Particular Conditions	The document entitled particular conditions of contract included in the Contract, which consists of Part A – Contract Data and Part B – Special Provisions.
Party	The Employer or the Contractor, as the context requires.
Parties	Both the Employer and the Contractor.
Payment Certificate	A payment certificate issued by the Engineer under Clause 14 [<i>Contract Price and Payment</i>].
Performance Certificate	The certificate issued by the Engineer (or deemed to be issued) under Sub-Clause 11.9 [<i>Performance Certificate</i>].
Performance Damages	The damages to be paid by the Contractor to the Employer for the failure to achieve the guaranteed performance of the Plant and/or the Works or any part of the Works (as the case may be), as set out in the Schedule of Performance Guarantees.
Performance Security	The security provided to the Employer by the Contractor under Sub-Clause 4.2 [<i>Performance Security</i>].
Permanent Works	The works of a permanent nature which are to be executed by the Contractor under the Contract.
Pink Book	‘ <i>Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, MDB Harmonized Edition</i> ’, as published by FIDIC.
Plant	The apparatus, equipment, machinery and vehicles (including any components) whether on the Site or otherwise allocated to the Contract and intended to form or forming part of the Permanent Works.
Programme	A detailed time programme prepared and submitted by the Contractor to which the Engineer has given (or is deemed to have given) a Notice of No-objection under Sub-Clause 8.3 [<i>Programme</i>].

Provisional Sum	A sum (if any) which is specified in the Contract by the Employer as a provisional sum, for the execution of any part of the Works or for the supply of Plant, Materials or services under Sub-Clause 13.4 [<i>Provisional Sums</i>].
QM System	The Contractor's quality management system (as may be updated and/or revised from time to time) in accordance with Sub-Clause 4.9.1 [<i>Quality Management System</i>].
Red Book	' <i>Conditions of Contract for Construction for Building and Engineering Works designed by the Employer</i> ', as published by FIDIC.
Retention Money	The accumulated retention moneys which the Employer retains under Sub-Clause 14.3 [<i>Application for Interim Payment</i>] and pays under Sub-Clause 14.9 [<i>Release of Retention Money</i>].
Review	Examination and consideration by the Engineer of a Contractor's submission to assess whether (and to what extent) it complies with the Contract and/or with the Contractor's obligations under or in connection with the Contract.
Schedule of Payments	The document(s) entitled schedule of payments (if any) in the Schedules showing the amounts and manner of payments to be made to the Contractor.
Schedule of Performance Guarantees	The document(s) entitled schedule of performance guarantees (if any) in the Schedules showing the guarantees required by the Employer for performance of the Works and/or the Plant or any part of the Works (as the case may be) and stating the applicable Performance Damages payable in the event of failure to attain any of the guaranteed performance(s).
Schedule of Rates and Prices	The document(s) entitled schedule of rates and prices (if any) in the Schedules.
Section	A part of the Works specified in the Contract Data as a Section (if any).

Schedules	The document(s) entitled schedules prepared by the Employer and completed by the Contractor, as attached to the Letter of Tender and included in the Contract. Such document(s) may include data, lists and schedules of payments and/or rates and prices, and guarantees.
Silver Book	' <i>Conditions of Contract for EPC/Turnkey Projects</i> ', as published by FIDIC.
Site	The places where the Permanent Works are to be executed and to which Plant and Materials are to be delivered, and any other places specified in the Contract as forming part of the Site.
Special Provisions	The document (if any), entitled special provisions which constitutes Part B of the Particular Conditions.
Specification	The document entitled specification included in the Contract, and any additions and modifications to the specification in accordance with the Contract. Such document specifies the Works to be executed.
Statement	A statement submitted by the Contractor as part of an application for a Payment Certificate under Sub-Clause 14.3 [<i>Application for Interim Payment</i>], Sub-Clause 14.10 [<i>Statement at Completion</i>] or Sub-Clause 14.11 [<i>Final Statement</i>].
Subcontractor	Any person named in the Contract as a subcontractor, or any person appointed by the Contractor as a subcontractor or designer, for a part of the Works; and the legal successors in title to each of these persons.
Taking-Over Certificate	A certificate issued (or deemed to be issued) by the Engineer in accordance with Clause 10 [<i>Employer's Taking Over</i>].
Temporary Works	All temporary works of every kind (other than Contractor's Equipment) required on Site for the execution of the Works.
Tender	The Letter of Tender, the Contractor's Proposal, the JV Undertaking (if applicable), and all other documents which the Contractor submitted with the Letter of Tender, as included in the Contract.

Tests after Completion	The tests (if any) which are stated in the Specification/Employer's Requirements, and which are carried out in accordance with the Special Provisions after the Works or a Section (as the case may be) are taken over under Clause 10 [<i>Employer's Taking Over</i>].
Tests on Completion	The tests which are specified in the Contract or agreed by both Parties or instructed as a Variation, and which are carried out under Clause 9 [<i>Tests on Completion</i>] before the Works or a Section (as the case may be) are taken over under Clause 10 [<i>Employer's Taking Over</i>].
Time for Completion	The time for completing the Works or a Section (as the case may be) under Sub-Clause 8.2 [<i>Time for Completion</i>], as stated in the Contract Data as may be extended under Sub-Clause 8.5 [<i>Extension of Time for Completion</i>], calculated from the Commencement Date.
Unforeseeable	Not reasonably foreseeable by an experienced contractor by the Base Date.
Variation	Any change to the Works, which is instructed as a variation under Clause 13 [<i>Variations and Adjustments</i>].
Works	The Permanent Works and the Temporary Works, or either of them as appropriate.
year	365 days.
Yellow Book	' <i>Conditions of Contract for Conditions of Contract for Plant and Design-Build</i> ', as published by FIDIC.

Abbreviations

ADB	Asian Development Bank
AfDB	African Development Bank
AIIB	Asian Infrastructure Investment Bank
BOQ	Bill of Quantities
DAAB	Dispute Avoidance/Adjudication Board
DAB	Dispute Adjudication Board
DNP	Defects Notification Period
EOT	Extension of Time
FPC	Final Payment Certificate
GC	General Conditions
IADB	Inter-American Development Bank
IFI	International Financing Institution
IPC	Interim Payment Certificate
IsDB	Islamic Development Bank
JV	Joint Venture, Consortium or similar
MDB	Multilateral Development Bank
NOD	Notice of Dissatisfaction
PC	Particular Conditions
RB	Red Book
RB 1999	Red Book 1999 Edition
RB 2017	Red Book 2017 Edition
SB	Silver Book
SB 1999	Silver Book 1999 Edition
SB 2017	Silver Book 2017 Edition
TOC	Taking-Over Certificate
WB	World Bank
YB	Yellow Book
YB 1999	Yellow Book 1999
YB 2017	Yellow Book 2017

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Chapter 1

Introduction

The author first worked with a FIDIC Contract in the Middle East in 1981. It was a Red Book 3rd Edition of 1977. It weighed 133g. This was followed by experience with the Red Book 4th Edition which weighed 258g. The new Red Book published in 1999 (now referred to as the 1st Edition) weighed 532g. The Red Book 2017 (now referred to as the 2nd Edition), which was reprinted in 2022 with amendments, weighs 1022g. It can be seen that each new version is approximately twice as heavy as its immediate predecessor.

Between 1977 and 2022, the rights and obligations of the Employer and the Contractor as stated in the contract, have changed little. The descriptions of the rights and obligations have perhaps become more complex, and a few new obligations have been inserted such as those dealing with labour. However, most of the increase in weight comes from the procedures.

Take as an example the provisions related to claims and disputes. The Red Book 3rd Edition of 1977 contained a single sub-clause (Sub-Clause 52.3) dealing with claims and was composed of two short paragraphs. Sub-Clause 67, composed of a single paragraph, dealt with Engineer's decisions and arbitration.

In the 4th Edition of 1987, claims became the subject of a separate clause (Clause 53), composed of five sub-clauses, each of a single paragraph. The Engineer's decisions and arbitration became the subject of four sub-clauses, totalling nine paragraphs.

By 1999, the corresponding claims provisions had expanded to nine paragraphs under Sub-Clause 20.1 [*Contractor's Claims*] and four paragraphs under Sub-Clause 2.5 [*Employer's Claims*]. In addition, Sub-Clause 3.5 [*Determinations*] contained two paragraphs dealing with the Engineer's processing of the claims and Sub-Clauses 20.2 to 20.8 dealt with Dispute Boards and arbitration (25 paragraphs), which referred to sample forms for the Dispute Adjudication Agreement, the General Conditions of Dispute Adjudication Agreement and the Procedural Rules.

In the reprint of Red Book 2017, Clause 20 [*Claims*] contains eight sub-clauses totalling 25 paragraphs which deal with Claims; Sub-Clause 3.7 [*Agreement or Determination*] dealing with the Engineer's handling of the Claims has been expanded to 17 paragraphs in five sub-clauses. Sub-Clause 21 [*Disputes and Arbitration*] stretches to almost seven pages plus 15 pages of General Conditions of DAAB Agreement and DAAB Procedural Rules.

A second example is the use of the word 'deemed' in Red Book 2017. It is used 120 times, mostly to bestow a right on one Party if the other Party (or the Engineer) fails to act within a specified period or to cause a Party to lose a right by failing to act within the specified period.

It is therefore essential for the Contract Manager to fully understand the detailed procedures set out in the FIDIC 2017 Contracts, to be aware of their strengths and weaknesses and to ensure that the appropriate action is taken at the required time.

This task of the Contract Manager is made more complicated by the existence of differences between the books which make up the 2017 suite, as well as other differences imposed by the Multilateral Development Banks (MDBs) and International Financing Institutions (IFIs) for use with FIDIC 2017 Contracts for projects which they finance. Finally, the situation is made even more complex by amendments introduced in the 2022 Reprints of the FIDIC 2017 Contracts.

It is widely recognised that proper implementation of the FIDIC 2017 Contracts will require more Contract Managers within the Contractor's team but also within the teams of the Engineer and the Employer.

This book is intended to offer practical guidance to all such Contract Managers working with FIDIC 2017 Contracts – in their 'pure' state or as amended by the MDB and IFI and/or by the 2022 Reprints.

It concentrates on the Red Book 2017 (RB 2017) or to use its formal title: *FIDIC Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, Second Edition 2017*. However, it also addresses differences between RB 2017 and the Yellow Book 2017 (YB 2017), formally known as: *FIDIC Conditions of Contract for Plant and Design-Build for Electrical & Mechanical Plant, and for Building and Engineering Works, designed by the Contractor, Second Edition 2017* and the Silver Book 2017 (SB 2017), formally known as: *FIDIC Conditions of Contract for EPC/Turnkey Projects, Second Edition 2017*.

The structure of the book generally follows the structure of the Contracts, except that Chapter 2 sets out some pre-contract considerations. Chapter 3 covers the General Provisions (Clause 1 in FIDIC 2017). Chapters 4 and 5 correspond to Clauses 2 and 3 of FIDIC 2017 and address the roles of the Employer and the Engineer/Employer's Representative. Chapter 6 considers the Contractor's obligations under Clauses 4, 5 and 6 of RB 2017 (Clauses 4 and 6 of YB 2017 and SB 2017). Chapter 7 covers the Contractor's role as designer (Clause 5 of YB 2017 and SB 2017). Chapter 8 addresses all the steps to be taken prior to commencement of the Works. Chapter 9 deals with quality (Clause 7 in FIDIC 2017). Chapter 10 deals with timing (Clause 8 in FIDIC 2017).

Chapter 11 covers matters related to completion of the Works and corresponds to Clauses 9, 10 and 11 of FIDIC 2017. Chapters 12 and 13 deal with payments and Variations and Adjustments. Chapter 14 deals with termination, both by the Employer and by the Contractor (Clauses 15 and 16 under FIDIC 2017). Chapter 15 groups together the Contractor's obligations with respect to care of the Works, Employer's Risks and Exceptional Events (Clauses 17 and 18 in FIDIC 2017). Chapter 16 deals with insurances (Clause 19 of FIDIC 2017) and Chapters 17 and 18 cover Claims and Disputes respectively (Clauses 20 and 21 of FIDIC 2017).

A reprint of each of the FIDIC 2017 contracts was issued at the end of 2022 (2022 Reprint) which introduced modifications to several clauses. Chapter 19 explains these modifications.

Modifications to the standard provisions which are imposed by the MDB, are shown in boxes.

Hints from the author, specific points to be noted and examples are shown in shaded boxes.

A glossary is included on pp. xv–xxvi, and a list of abbreviations is to be found on p. xxvii.

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Chapter 2

Setting the scene

2.1. Introduction

Most of this book addresses the General Conditions of the FIDIC 2017 contracts. However, experience shows that many of the challenges that arise when using FIDIC contracts do not arise from the General Conditions but from poorly prepared Particular Conditions. The seeds for future disputes are sown during the pre-contract phase and the preparation by the Employer of the bidding documents.

DAAB members and arbitrators are not unused to seeing projects for which the incorrect contract was chosen at the outset. In RB 2017, FIDIC warns:

'These Conditions allow for the possibility that the Contractor may be required to design a small proportion or a minor element of the Permanent Works, but they are not intended for use where significant design input by the Contractor is required or the Contractor is required to design a large proportion or any major elements of the Permanent Works. In this latter case, it is recommended that the Employer consider using FIDIC's Conditions of Contract for Plant and Design-Build, Second Edition 2017 (or, alternatively and if suitable for the circumstances of the project, FIDIC's Conditions of Contract for EPC/Turnkey Projects, Second Edition 2017).'

Yet, notwithstanding this warning, some Employers make the fundamental error of giving the Contractor responsibility under RB 2017 for the detailed design of Works such as hydroelectric schemes and are then surprised when the Contractor 'over-designs' such that it requires payment for significantly increased quantities.

Other Employers choose to use SB 2017, and insist upon approving every Contractor's Document before it can be used, despite the warning in the introductory note:

'These Conditions of Contract for EPC/Turnkey Projects are not suitable for use in the following circumstances:

- If there is insufficient time or information for tenderers to scrutinise and check the Employer's Requirements or for them to carry out their designs, risk assessment studies and estimating;*
- If construction will involve substantial work underground or work in other areas which tenderers cannot inspect, unless special provisions are provided to account for unforeseen conditions; or*
- If the Employer intends to supervise closely or control the Contractor's work, or to review most of the construction drawings.'*

The starting point for a successful project is therefore to choose the correct set of General Conditions.

2.2. Contract Data

Like previous editions of the Red, Yellow and Silver Books, the 2017 editions provide guidance for the preparation of the Particular Conditions, which are now composed of two parts: Part A – Contract Data (previously referred to as the ‘Appendix to Tender’) and Part B – Special Provisions. The Contract Data provides information needed for some of the General Conditions to be applied, such as the duration of the Time for Completion of the Works, or the amount of Delay Damages payable for each day of delay in completing the Works, or a Section. FIDIC provides a form listing the relevant sub-clauses and the description of the information to be provided. Some of the information is to be inserted by the Employer prior to issuing the bidding documents. Some is to be inserted by the bidders. In relation to one matter (the list of proposed members of the DAAB), input is required from both the Employer and the bidders.

In some cases, if the relevant information is not inserted, it will not be possible to apply the sub-clause. Examples include: the duration of the Time for Completion under Sub-Clause 1.1.84; the amount of the Performance Security under Sub-Clause 4.2 [*Performance Security*]; the daily rate for Delay Damages under Sub-Clause 8.8 [*Delay Damages*]; and the amount of the advance payment under Sub-Clause 14.2 [*Advance Payment*]. For some such provisions, it is expressly stated that the sub-clause will not apply if the information is not provided in the Contract Data, for example with respect to the advance payment under Sub-Clause 14.2 [*Advance Payment*]. For others, there is no such express statement, but it is established practice that the sub-clause will be inapplicable: for example, Delay Damages.

In other cases, if the relevant information is not inserted in the Contract Data, the default position described in the sub-clause will apply. Examples are: the duration of the Defects Notification Period (DNP) under Sub-Clause 1.1.27 and the payment periods under Sub-Clause 14.7 [*Payment*].

Most of the items listed by FIDIC in its template are uncomplicated and can be readily understood by reference to the relevant sub-clause. However, some are worthy of comment.

In its discussion with respect to the drafting of the Special Provisions (see below), FIDIC strongly recommends that drafters take due regard of FIDIC’s five Golden Principles.¹ FIDIC explains that these Golden Principles are necessary to ensure that modifications to the General Conditions

- are limited to those necessary for the particular features of the Site and the project, or necessary to comply with the applicable law
- do not change the fair and balanced character of a FIDIC contract and
- do not make the Contract unrecognisable as a FIDIC contract.

When considering the application of these Golden Principles, the Employer should bear in mind that risk has a price and that a transfer of risk to the Contractor will lead to higher bid prices.

The Employer should also bear in mind that the Contract Data is one of the first documents that potential bidders review before deciding whether to submit a bid.

¹ https://fidic.org/sites/default/files/_golden_principles_1_12.pdf

The items which are particularly relevant in this respect, are the following:

Sub-Clause	Data to be given	Data
1.1.84	Time for Completion	. . . days
1.8	Total liability of the Contractor to the Employer under or in connection with the Contract	
4.2	Performance Security (as percentages of the Accepted Contract Amount in Currencies) %
8.8	Delay Damages payable for each day of delay Maximum amount of Delay Damages	
12.3	Percentage profit %
14.2	Total amount of Advance Payment (as a percentage of Accepted Contract Amount) %
14.7	Periods of payment days
14.8	Financing charges for delayed payment (percentage points above the average bank short-term lending rate as referred to under sub-paragraph (a)) %
14.15 (f)	Rates of exchange	
17.2 (d)	Forces of nature, the risks of which are allocated to the Contractor	
21.6	Institution/Rules for administering arbitration and/or place of arbitration	

If the Time for Completion is too short, some bidders will add 10% to their bid to cover the liability for Delay Damages. Others will accept the risk but will be exceptionally aggressive from the outset with regard to Claims.

With respect to the amount of the Performance Security, some international contractors will not bid if the amount is to be in excess of 15%.

The position is similar with respect to the Delay Damages and/or Performance Damages.

With respect to the amount of the advance payment and the repayment conditions, bidders will plan to remain in a positive cash-flow position for much of the Time for Completion. If it is apparent that this will not be possible, they will add to their bids an allowance for financing costs or increase the percentage for risk.

Note:

The template for Contract Data provided with the FIDIC 2017 Contracts does not include any mention with respect to Sub-Clause 21.6 [*Arbitration*]. This is because the General Conditions state that the arbitration will be finally settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) '*unless otherwise agreed by the Parties*'. By excluding any reference to Sub-Clause 21.6 in the Contract Data, FIDIC discourages the Parties from agreeing otherwise.

The template for the Contract Data used by many MDBs, allows the Parties to insert rules of arbitration other than those of the ICC and also the place of arbitration.

Hint:

Another item in the FIDIC template which merits comment is the list in Sub-Clause 21.1 [*Constitution of the DAAB*] of proposed members of the DAAB. The Employer is to provide three names in the bidding documents and each bidder is required to provide three names. This is regardless of whether the DAAB is to be composed of a sole member or three members. Thus, for a project for which six bids are submitted, a total of 21 names could be proposed for an appointment of a sole member. Thus, the probability of any named person being appointed is less than 5%. For a three-member DAAB, the probability of a candidate being appointed to the DAAB is slightly higher but still low.

Before adding names to the list, the Employer and bidders should check whether the potential candidates are interested, expect to be available and are free of any conflict of interest. Because of the low probability of being appointed and the uncertainty about when the project is likely to start, potential candidates often reply positively. However, the award of the contract is often delayed significantly and, in the absence of news, the potential candidates accept other appointments. So, when finally contacted by the Employer and Contractor, the chosen candidate(s) are no longer available. It is not unusual for two years or more to pass without news between when the potential candidate is first contacted and when the Parties agree to appoint the person – only to find that it is not possible.

To minimise this risk, it is recommended that the Employer and the bidders keep the potential candidates regularly informed of the position: for example, whether their names have been included in the bidding documents or bid, whether the bidding process has been delayed, whether a Letter of Acceptance has been issued, and so forth. It is also important and polite to inform candidates that have been unsuccessful.

2.3. Special Provisions

The Special Provisions delete, add to or otherwise modify provisions in the General Conditions, to suit the particularities of the project. This is because the FIDIC document containing the General Conditions cannot be modified without the agreement of FIDIC due to copyright. The Special Provisions, when attached to the General Conditions, implement the modifications which the Employer wishes to make. One reason for including the modifications in a separate document is to make them readily visible. If the wording of the General Conditions was itself changed, such modifications might not be identified by bidders, for example, if the word 'not' was inserted in the text, it might not be found by bidders during the short period available for preparing bids.