

FIDIC 2022 Reprints: 10 Key Areas of Change in the FIDIC Red Book 2017

Written by Victoria Tyson

FIDIC 'launched' the FIDIC 2022 reprints at the FIDIC International Construction Users' Conference 2022, in London. The reception to the changes was mixed – some embraced the clarity; others questioned the significance and cost.

The reprinted contracts are to be described as *'The Conditions of Contract for Construction Second Edition 2017, reprinted 2022 with amendments'*. The changes were said to 'come into effect' on 1 January 2023: FIDIC have not explained what this means. Only the Parties to a contract can change an existing contract; and the Parties will decide which version of a FIDIC 2017 contract they wish to use.

The changes include:

- the errata issued in December 2018;
- the additional errata issued in June 2019; and
- further errata and new amendments made in November 2022 (and said to be effective from 1 January 2023) which FIDIC states are *'improvements & clarifications in response to industry feedback + to support the increased use of 2017 contracts'*.

This article draws your attention to 10 of the key areas of change in respect of the FIDIC Red Book 2017 including the definition of Claim, matters to be agreed or determined, the definition of Dispute and Exceptional Events.

1. Definition of Claim

At Sub-Clause 1.1.6, the definition of Claim has been amended so that it now excludes matters to be agreed or determined under Sub-Clause 3.7 (a). This means that a Claim is clearly distinguished from the matters to be agreed or determined which are listed in Sub-Clause 3.7 (a). This is a welcome clarification.



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2. Agreement or Determination

Under Sub-Clause 3.7, matters or *'Claims'* which require an Engineer's agreement or determination must comply with a specified procedure. In the 2022 reprints, matters and Claims are separated into sub-paragraphs (a) and (b). Under sub-paragraph (a) matters are now limited to those provided for in 13 specific sub-clauses which each identify the date of commencement of the time limit for agreement. The list of 13 specific Sub-Clauses is not expressed to be exclusive and therefore the list is, perhaps, unnecessary.

The Guidance¹ states:

"It should also be noted that if there is a matter that is specifically required to be agreed or determined, as referred to in

¹ The FIDIC 2017 Contracts Guide, Second Edition 2022, page 7.



[Sub-Clause 3.7 (a)] (which, in turn, refers to specific listed Sub-Clauses that each expressly states that the particular matter is to be agreed/determined), then such a matter is not included in the definition of "Claim". It follows, therefore, that the express and detailed provisions in Clause 20 do not apply to the matter. Instead, it is stated in each of such listed Sub-Clauses that the Engineer [...] is obliged to proceed with the agreement/determination of the matter. Each such listed Sub-Clause expressly states what date shall be "*the date of commencement of the time limit for agreement*" under [Sub-Clause 3.7.3] and, thereafter, [Sub-Clause 3.7.5] addresses the situation where a Party may be dissatisfied with the determination of a particular matter. "

3. Definition of Dispute and deemed Disputes

At Sub-Clause 1.1.29 there is a new and simpler definition of Dispute. It now requires:

- (a) a Claim, or a matter to be agreed or determined under Sub-Clause 3.7 (a);
- (b) an Engineer's determination rejecting in whole or in part (i) the Claim (or a deemed rejection if the determination is not given within the time specified in Sub-Clause 3.7.3) or (ii) the Party's assertion(s) in respect of the matter; **AND**
- (c) a NOD from either Party.

This distinguishes a Claim from a matter to be agreed or determined, and both (together with a NOD) are required to fall within the definition of Dispute.

Replacing '*claim*' with '*Claim*' means that a Dispute will be confined to disputes between the Parties. It will not include claims against third parties².

² 2 The FIDIC 2017 Contracts Guide, Second Edition 2022, page 7 states: '*Claim is defined to distinguish: one Party's request or assertion to the other Party from an entitlement or relief under the Contract' from a 'claim, which is used in the 2017 Books to refer to*

In certain circumstances, a Dispute may now be fast-tracked. At Sub-Clause 21.4, wording has been added to identify certain situations in which a Dispute shall be deemed to have arisen, and which may be referred directly to a DAAB for a decision (i) without the need of a Sub-Clause 3.7 agreement or determination and NOD, and (ii) without being subject to the time bars at Sub-Clause 21.4.1 (a). Broadly, these situations are non-payment of a Payment Certificate, non-payment of financing charges, and termination.

It is worth noting that, as in the original 2017 edition, a Dispute is not required for dispute avoidance.

It is very likely that the amendments in the 2022 reprints will cause the Engineer's workload to increase as more formal determinations are required. It will also curtail the DAAB's power to award provisional relief (under Procedural Rule 5.1 (j)) promptly, because an Engineer's determination and NOD would first be required.

4. Performance Security

Sub-Clause 4.2.1 has been amended so that where there are Variations and/or adjustments under Clause 13 which result in an accumulative increase or decrease of the Contract Price '*in one currency*' by more than 20% of the Accepted Contract Amount '*in that currency*' the Contractor must (for an increase) and may (for a decrease) amend the amount of the Performance Security.

5. Errors in Site Data and Employer's Requirements

Where there are problems with the items of reference (which inform the Contractor as to how the Works must be set out), the Contractor must issue a Notice under Sub-Clause 4.7.2. Sub-Clause 4.7.3 then gives the procedure for the Engineer's agreement or determination.

In the 2022 reprints, upon receipt of the Sub-Clause 4.7.2 Notice, the Engineer must consider:

- (a) whether or not there is an error in the items of reference, and

any claim that may be made under the Performance Security, under a guarantee, under an insurance policy, or in connection with intellectual/industrial property rights'.



(b) whether or not an experienced contractor would have discovered an error in the items of reference

(i) when examining the Site, the Drawings and Specification before submitting the Tender, or

(ii) if when examining the items of reference within the time period specified in Sub-Clause 4.7.2, they are specified on the Drawings and/or in the Specification, and

(c) the measures (if any) the Contractor must take to rectify the error.

As in the original 2017 edition, it is an objective assessment and must take into account time and cost.

If the Engineer agrees or determines that (a) there was an error in the items of reference, and (b) which an experienced contractor would not have discovered, then:

- if the Contractor is required to take measures to rectify the error Sub-Clause 13.3.1 applies, and
- if there are no such measures and therefore no Variation, the Contractor may be entitled to an EOT and/or Cost Plus Profit subject to compliance with Sub-Clause 20.2 which includes a 28 day time bar.

6. Exceptional Events

In Sub-Clauses 1.1.37 and 18.1, Exceptional Events must now be exceptional, as in Sub-Clause 19.1 of the FIDIC 1999 editions. This correction is welcomed because, strictly, the defined term itself cannot be used in its interpretation.

Further, Sub-Clause 17.2 (e) is amended so that the Contractor has no liability caused by 'any Exceptional Event'. If the Works, Goods or Contractor's Documents are damaged, the Contractor must notify the Engineer and subsequently rectify the loss/damage if instructed to do so by the Engineer. Such instruction is deemed to have been given under Sub-Clause 13.3.1. However, the 2022 reprints add wording to the effect that, in the case of Exceptional Events, the instruction to rectify the loss/damage shall be without prejudice to the Contractor's rights under Sub-Clause 18.4 i.e. time and/or Cost incurred by reason of the Exceptional Event. Therefore, if the Engineer does not instruct the

Contractor to rectify the loss/damage, the Contractor may still be entitled to any additional time and/or Cost it incurred by reason of the Exceptional Event.

7. Taking-Over Parts

At Sub-Clause 1.1.58 there is a revised definition of Part. It means a part of the Works which is either (i) taken over by the Employer, **OR** (ii) used by the Employer. Previously, 'Part' referred to a part used by the Employer **AND** deemed to have been taken over.

Sub-Clauses 10.1 and 10.2 have been amended to better address deemed taking over.

The Guidance³ recognises:

"There is a possibility that no Taking-Over Certificate is issued under the second paragraph of this Sub-Clause (or it is not issued immediately (as stated in sub-paragraph (c) of this Sub-Clause) "

Therefore, the provisions have been amended not by reference to the issue of the Taking-Over Certificate (in the original 2017 edition) but instead uses the wording:

- in the third paragraph of Sub-Clause 10.1: *'If any Part of the Works is taken over or deemed to have been taken over under Sub-Clause 10.2...'*;
- in the fourth paragraph of Sub-Clause 10.2: *'the taking over or deemed taking over of a Part'* which gives the Contractor the right to make a Claim under Sub-Clause 20.2 if it suffers delay and/or incurs costs as a result of the Employer's use;
- in the last paragraph of Sub-Clause 10.2: *'a Part has been taken over or is deemed to have been taken over'*, giving the Contractor the right to a reduction of the daily rate of Delay Damages for the remainder of the Works/Section.

'After a Part has been taken over or is deemed to have been taken over', the Contractor must carry out any outstanding work and/or remedial work as soon as practicable. *'If the Contractor incurs Cost as a result of the taking over or deemed taking over of a Part'* it shall be entitled to Cost Plus Profit, subject to a Notice

³ The FIDIC 2017 Contracts Guide, Second Edition 2022, page 312.



that the Employer has been using part of the Works before the Taking-Over Certificate is issued under Sub-Clause 10.2 and a Notice of Claim under Sub-Clause 20.2.

Where there is delay *'after the date that a Part has been taken over or is deemed to have been taken over'*, the Delay Damages *'for completion of the Works or the section (as the case may be) in which this Part is included'* shall be reduced. The 2022 reprints make it clear that it will be the Engineer who will, under Sub-Clause 3.7, agree or determine the reduction within the time limit for such. In the 2022 reprints, that time limit runs from the date the Engineer (i) issues the Taking Over Certificate, or (ii) receives the Contractor's Notice identifying the use of any part of the Works before the Taking-Over Certificate is issued. The maximum amount of Delay Damages is not affected.

The Guidance states⁴:

"Therefore, before the Employer decides to require the Engineer to issue a Taking-Over Certificate in order to enable the early taking-over of part of the Works, the Employer should recognise the implications of this decision. Not only may additional payment become due to the Contractor, but this decision may also cause the Time for Completion to be extended and reduce the Employer's entitlement to Delay Damages. "

8. Care of the Works

In Sub-Clause 17.1, the Contractor takes responsibility for the care of the Works, Goods and Contractor's Documents from the Commencement Date until issue (or deemed issue) of the Taking Over Certificate of the Works, as in Sub-Clause 17.2 of the FIDIC 1999 edition. In the original 2017 edition, it was until the Date of Completion of the Works. This correction is welcomed as it allows, once again, for deemed taking over.

⁴ The FIDIC 2017 Contracts Guide, Second Edition 2022, page 311.

9. Interim payment at final payment stage

At Sub-Clause 14.13, it has been clarified that, at final payment stage, the Engineer will issue an IPC (rather than a FPC) where the Contractor fails to submit a discharge but has either (i) submitted a Partially Agreed Statement, or (ii) submitted draft final Statement which is deemed by the Engineer to be a Partially Agreed Final Statement.

The Guidance⁵ states

"This is because in both of these circumstances it is appropriate that the Contractor is paid but, since the Contractor's discharge is outstanding and some amounts will not have been agreed and/or are the Contractor's estimated amounts referred to in Sub-Clause 14.11.1(c)(iii), it would be inappropriate for the FPC to be issued [...]. In the event that the Engineer [...] issues an IPC [...] under this Sub-Clause, although not expressly required under this Sub-Clause, it is strongly recommended that he/she makes an express reference to the last paragraph of this Sub-Clause and includes a clear and sufficiently detailed explanation to justify why he/she is issuing an IPC [...] and not issuing an FPC [...]"

10. DAAB appointment and practice

There have been a number of changes to Clause 21. Under Sub-Clause 21.2, where the Parties fail to appoint DAAB member(s), FIDIC gives itself the power to appoint the DAAB member(s) from beyond the names listed by the Parties in the Contract Agreement (which we identified in our book *'FIDIC 2017 - A Practical Legal Guide'* as a matter requiring clarification) and set the terms of the appointment (including fees). The appointed DAAB member(s) does not need to be on *'The FIDIC President's List of Approved Dispute Adjudicators'*, but probably will be. The only pre-requisites to FIDIC's power to appoint are

⁵ The FIDIC 2017 Contracts Guide, Second Edition 2022, page 424.



(i) the application by one or more of the Parties for such an appointment, and (ii) due consultation with both Parties and the prospective DAAB member(s).

The Guidance⁶ states:

"FIDIC does not administer adjudication and the President of FIDIC will appoint member(s) of the DAAB or a replacement member only if this authority has been expressly delegated to it under the Contract (as it is under this Sub-Clause in the GCCs). The appointee selected by the President of FIDIC will usually be one of the adjudicators on the list of approved adjudicators that is maintained by FIDIC, "The FIDIC President's List of Approved Dispute Adjudicators" at <https://fidic.org/president-list>. If the Employer or the Parties wish to name another appointing official, it is recommended that he/she/they should first make sure that the named official:

- has the capacity and is, in fact, able to make an independent and appropriate appointment of member(s) of the DAAB;
- is knowledgeable in the experience and competence that is required of a member of the DAAB;
- is willing to make the appointment if called upon to do so; and
- is willing and able to set the "monthly services fee and daily fee" of each appointee, as stated in sub-paragraph (i) of this Sub-Clause".

In the 2022 reprints, the appointment and its terms are expressly stated to be '*final and conclusive*'. Therefore, once the appointment is made, neither it nor the terms of the appointment can be appealed or

overturned by either or both Parties. The Guidance⁷ states:

"This is confirmed and reinforced by the provisions of the second-last paragraph of this Sub-Clause stating that Thereafter, the Parties and the member(s) so appointed shall be deemed to have signed and be bound by a DAAB Agreement".

This deemed acceptance has not been amended from the original 2017 edition, and the same queries as to whether a DAAB member(s) will be content to proceed where payment is dependent upon enforcing a deemed DAAB Agreement arise. The matter might also be revisited where issues of independence come to light after the appointment has been made.

The interests of the DAAB members themselves have been improved in the General Conditions of DAAB Agreement and Procedural Rules.

At Clause 4 of the General Conditions of DAAB Agreement, the requirements of independence and impartiality have been relaxed. The period of time in which the DAAB member(s) must not have been employed by the Employer, Contractor, Employer's Personnel or Contractor's Personnel has been reduced from 10 years to five years and is zero years if disclosed in writing before signature (or deemed signature) of the DAAB Agreement. At the FIDIC International Construction Users' Conference in London 2022, it was stated that this was to enable FIDIC Accredited Trainers to be more easily appointed as DAAB members. As one legal source said, '*FIDIC's concern for due access to an adequate body of available DAAB Members is evident here*'.

The Guidance⁸ states:

"The period of "five years before signing the DAAB Agreement" is stated in Sub-Clause 4.1 (c) because it is what FIDIC considers an adequate length of time for the DAAB member to have distanced himself/herself from the party that previously employed him/her "as a

⁶ The FIDIC 2017 Contracts Guide, Second Edition 2022, page 528.

⁷ The FIDIC 2017 Contracts Guide, Second Edition 2022, page 528.

⁸ The FIDIC 2017 Contracts Guide, Second Edition 2022, page 559



consultant or otherwise". The wording "or otherwise" means that this sub-paragraph will apply if the individual has acted as a dispute resolution practitioner under other contract(s) where the Contractor or the Employer (or any person of the Employer's Personnel or the Contractor's Personnel) was a party".

Five years is more than the three years stated in the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) Orange List (i.e. the list giving doubts as to an arbitrator's independence or impartiality) for: an arbitrator's previous services for one of the parties/affiliates or other involvement in the case (paragraph 3.1), an arbitrator's affiliation with another arbitrator or counsel in the case (paragraph 3.3.3), an arbitrator's appointment by the same counsel or law firm (paragraph 3.3.8), an arbitrator and another arbitrator or counsel having acted together (paragraph 3.3.9), and where the arbitrator is a former judge having heard a significant case involving one of the parties/affiliates (paragraph 3.4.5).

At Clause 9 of the General Conditions of DAAB Agreement, the amendments make it clear that where the DAAB member has been appointed by FIDIC (or another appointing entity), FIDIC can set the monthly and daily fee of the DAAB member(s). This was originally the case, but the wording has been simplified. The 2022 revisions clarify that the daily fee includes, among other things, time spent on preparing and attending hearings, and time spent on preparing decisions and studying written documentation and arguments (whether or not submitted under Rule 7.1 (c) of the DAAB Procedural Rules).

In the DAAB Procedural Rules, FIDIC has reduced its emphasis on in-person or face-to-face DAAB meetings. By default, meetings will remain in-person or face-to-face but the Parties and DAAB may agree to on-line meetings. The Contractor is now expressly obliged to provide access to an on-line video conference platform for each on-line meeting. The Parties were always free to agree to on-line meetings, but this has now been spelled out in detail. Some have expressed a concern that fewer real-life connections (in-person or face-to-face Site visits) limit access to different perspectives and miss opportunities and possibilities

on-Site. Under Rule 3.5, either party can request that the DAAB visit the Site, but this is restricted to times of critical construction events. The costs of telephone calls and video conference calls have been deleted from 'reasonable expenses' in Sub-Clause 9.1 (c) of the General Conditions of DAAB Agreement and several of the DAAB Procedural Rules.

Conclusion

It is unlikely that the Parties will amend their existing contracts to incorporate these changes retrospectively or prospectively (none are significant enough to justify the effort), but it will be interesting to see how the changes are used in the interpretation of the original 2017 edition.

In new contracts, the FIDIC 2022 reprints are likely to be incorporated, but there is no obligation to do so. The Parties are free to choose whichever edition they wish. Some still use the FIDIC Red Book Fourth Edition (1987). Where the 2022 reprints are to be incorporated, they are to be described as '*The Conditions of Contract for Construction Second Edition 2017, reprinted 2022 with amendments*'. If it is not clear whether or not the 2022 reprints are incorporated, it will be a matter of ordinary contract interpretation in accordance with the laws governing the contract.

**Please get in touch at
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thoughts or to discuss any concern**

