

Bird & Bird

New FIDIC Books (2017 Editions)



Are you prepared?

On 5 December 2017, FIDIC published the Second Editions of their Red, Yellow and Silver Books, which have been setting the standard for international engineering and construction contracting since 1999. The Second Editions bring substantive changes that could lead to more effective contract management - but at what price?

Evolution or Revolution?

In recent years the construction industry has seen the evolution of many popular standard form construction and engineering contracts (JCT's 2016 updates, NEC4 suite in 2017 and now FIDIC). Whilst many updates did not set out to drastically amend their previous editions, FIDIC's approach resulted in a more revolutionary development to its Red, Yellow and Silver Books. In hopes of decreasing the number of disputes and disagreements encountered after project work has commenced, FIDIC have made many structural and substantive changes to the 1999 predecessor publications in the Second Editions, including:

- 1 the contracts are around 40% longer, with additional definitions, step-by-step processes and procedures and best project management practices;
- 2 changes have been made which increase the potential risks and liabilities for parties such as:
 - possible performance liquidated damages for the Contractor
 - release of liability from the Contract for latent defects in plant of the works; and
- 3 there is greater emphasis on dispute avoidance mechanisms and a bigger role for the renamed Dispute Avoidance/Adjudication Board (DAAB).

Users of FIDIC or FIDIC-based contracts should give proper consideration to the changes before jumping to use the new editions simply because they are the most up-to-date versions. We set out some of the key changes to be aware of below.

Some Key Changes

- **Enhanced contract management provisions** – greater clarity as to the parties' obligations with more formal notification requirements and prescriptive procedures, such as:
 - expanding the programme requirements to include critical path, floats and logical links;
 - an increase in "deeming provisions" where failure to comply will have binding consequences (for example in the event the Contractor fails to dispute the Final Payment Certificate under clause 20.2 of the FIDIC Yellow Book);
 - the introduction of new advance warning provisions to give early notice of a potential issue, so that the parties can work at an early stage to resolve.
- **Emphasis on dispute avoidance** – the 2017 Editions distinguishes between claims and disputes, in order to emphasise that not every claim need necessarily result in a dispute. The former Dispute Adjudication Board (DAB) has been renamed the Dispute Avoidance/Adjudication Board (DAAB) and is appointed throughout the lifetime of a project, meeting parties at prescribed intervals, rather than on an ad hoc basis as was previously the case.
- **Claims procedure** - under the 1999 Editions, the Contractor's claims were governed by clause 20.1 and the Employer's claims under clause 2.5, with differing obligations for each (a greater burden lying on the Contractor). The claims procedure is now solely dealt with in clause 20 and its obligations are reciprocal, which means, for example, that a claim by the Employer may now be invalidated if notice of the claim is not submitted within the required time period.
- **Bolstering of the Engineer's role (Red and Yellow Books)** - the role of the Engineer has been expanded to include greater procedural detail and time limits for the carrying out of its functions.
- **Limitations of Liability** – the exclusion of indirect or consequential losses now carves out delay damages and indemnity liabilities for breaches of intellectual property rights and gross negligence from the aggregate cap. FIDIC provides a suggested definition of "gross negligence". It will be interesting to see the effect of the reference in jurisdictions where the principle is not recognised.
- **Extensions of Time** – expanded to include additional circumstances for extensions of time such as to include delays caused by private utility entities.
- **Indemnities** – these have been expanded both for the Employer and the Contractor. For example, the Contractor now provides an indemnity that the works will be fit for their purpose where designed by the Contractor, and the Employer indemnifies for losses or damage to properties attributable to an Employer's Personnel or respective agents.



Conclusion

As with any other standard form of contract, the General Conditions of the FIDIC Second Editions are intended to be amended and supplemented by bespoke modifications ("Special Provisions") to account for project specific requirements and/or local legal requirements. In light of the substantively amended and extended Second Editions, it is likely that any pre-contractual negotiations to agree the Special Provisions will be more challenging and lengthy than may be the case using the 1999 editions (for example, the Second Editions invite the parties to agree who takes responsibilities for concurrent delays, a topic not usually the subject of simple conversations).

Whilst prolonged negotiations might not seem an attractive course of events, and may indeed lead some to continue using the 1999 editions, such early hashing-out can have its benefits. In particular, if the objective of having fewer disputes is achieved in practice, that parties are able to turn their attention to the proper administration and completion of the project.

Only time will tell if FIDIC's ultimate objective in publishing the considerably extended Second Editions will be achieved. However, whilst the changes do offer better transparency, success greatly depends on the parties' willingness to invest in sufficient resources to manage the projects. FIDIC's attempt to contractually require the parties to do so, is in our view, a very positive development in the world of international construction and engineering projects.

Contact Us

Marco Nicolai
UK Head of Construction

Tel: +442074156153
marco.nicolai@twobirds.com



Elizabeth Reid
Partner

Tel: +442079056226
elizabeth.reid@twobirds.com



Michael Rudd
Partner

Tel: +442074156174
michael.rudd@twobirds.com



Kathryn Noble
Associate

Tel: +442030176850
kathryn.noble@twobirds.com



twobirds.com

Aarhus & Abu Dhabi & Amsterdam & Beijing & Bratislava & Brussels & Budapest & Copenhagen & Dubai & Dusseldorf & Frankfurt & The Hague & Hamburg & Helsinki & Hong Kong & London & Luxembourg & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & Shanghai & Singapore & Stockholm & Sydney & Warsaw

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses. Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.