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Overview of the 2017 Contracts

1.1 Introduction

The second editions of the three main FIDIC construction contracts were formally introduced at the London users' conference in December 2017. The new Red, Yellow and Silver Books had long been anticipated and represented the first update to the three main forms since 1999.

A key aim of the new contracts was to increase clarity and certainty. Users will find several new definitions, which are now in alphabetical order (clause 1.1). 'Claim', 'Dispute', 'Notice' and 'Programme', for example, are now defined terms; 'may', 'shall' and 'consent' are also defined, with the particular aim of assisting those whose first language is not English. 'Particular Conditions' is now defined to comprise Part A – Contract Data and Part B – Special provisions. 'Plus reasonable profit', as used in the 1999 Contracts, often caused difficulty. A new definition, 'Cost Plus Profit', now applies, and refers to a percentage for Contractor's profit to be stated in the Contract Data, or in default 5%.

One important procedural change concerns notices in the 2017 contracts. By a new clause 1.3 a notice must be in writing and identify itself as such, among other requirements. Notices are now required in many more situations than previously and, when given, trigger time limits. For example, under a new clause 3.5 in the Yellow and Red Books, or clause 3.4 in the Silver Book, if the Contractor considers that an instruction not stated to be a variation does in fact amount to one he must immediately, and before commencing any related work, give a notice to that effect with reasons. If the Engineer (Red and Yellow Books) or Employer (Silver Book) does not respond to this notice within a defined period by giving another notice confirming, reversing or varying the instruction he will be deemed to have revoked it.

The contract administrator's role in agreeing or determining any claim or other matter under the Contract is also set out in more detail than in the 1999 Books, and in a step-by-step fashion with time limits. Clause 3.7 of the 2017 Yellow and Red Books, for example, requires the Engineer first to consult the parties to try to reach agreement; if no agreement is reached within 42 days, or the parties give 'early notice' of no agreement, the Engineer must give a notice accordingly and within 42 days (or other agreed time limit) must make a determination. If the Engineer is late then, in the case of a claim,

he is deemed to have rejected the claim and for any other matter a dispute is deemed to have arisen which may be referred to the renamed Dispute Avoidance/Adjudication Board (DAAB) for its decision. Similar provisions apply in clause 3.5 of the 2017 Silver Book.

Another key aim in preparing the second editions was to improve project management and reflect international best practice. New procedures designed to promote this aim include requiring the Contractor to prepare and implement a Quality Management System to show compliance with the Contract requirements (clause 4.9.1) and a Compliance Verification System to show that the design, materials, workmanship and certain other matters all comply (clause 4.9.2). There is in general much greater emphasis on dispute avoidance, including an enhanced role for the DAAB in this respect, and promoting cooperation between the parties during the project.

1.2 The Rainbow Suite: The Main Features of the 1999 Red, Yellow and Silver Books

1.2.1 The 1999 Red Book

The origins of the 1999 Red Book go back to 1957, when a first edition based on the English civil engineering ‘ACE’ (Association of Consulting Engineers) form was introduced. The ACE form was in turn an international version of the UK Institution of Civil Engineers (ICE) form, fourth edition, the main UK domestic engineering contract of the time.

The Red Book’s UK origins are not just of historical interest since important features of the form, and indeed of all three 1999 Books, are attributable to them. Expressions such as ‘fitness for purpose’ and ‘consequential loss’, for example, are common law expressions used in the three Books. More generally, the 1999 contracts are drafted in English. In the notes to the 1999 and 2017 editions the English language versions are stated to be the official and authentic texts.

The Red Book underwent several changes since its introduction in 1957, culminating in the very widely used 1987 fourth edition. It was this edition to which the FIDIC task group mainly had regard when preparing the 1999 edition of the Red Book, which we know as the ‘first edition’; 1999 was a watershed year for FIDIC, when the three main forms constituting the ‘rainbow suite’ were simultaneously issued. Each of the 1999 contracts had the same simplified 20-clause format, with many of the same topics dealt with by clauses with the same numbering. These features, which all had in common, led to their designation as ‘first editions’: they were the first editions of a new, fundamentally overhauled and restructured suite of contracts.

- *Employer design*

The main distinguishing feature of the 1999 Red Book is that the Employer is responsible for all or most of the design of the works. The title of the 1999 edition (and the 2017) is *Conditions of Contract for Construction, for Building and Engineering Works designed by the Employer*. That is not to say the Contractor is never responsible for any design, but the form is intended for use where the Employer or those acting on his behalf are responsible for all or most of the design. The Contractor’s basic responsibility under the

Red Book forms is to execute the works in accordance with designs prepared by or on behalf of the Employer.

- *Re-measurement*

The second main distinguishing feature of the 1999 Red Book is that it is a re-measurement contract. The Contractor's entitlement is to be paid in accordance with the quantity of work he executes under the Contract applying the relevant rates, typically stated in the bills of quantities. This is by contrast with the other two members of the rainbow suite, the Yellow and Silver Books, where the Contractor's basic entitlement is to be paid a fixed price lump sum subject to adjustments or additions for such things as variations.

- *The Engineer*

The third feature of the Red Book, which it shares with the Yellow Book, is that an important role is assigned to the Engineer. Under both Books in both the 1999 and 2017 editions the Employer is obliged to appoint an Engineer to administer the Contract. The Engineer is not a party to the Contract, but he exercises a range of important functions which control the project and affect the rights of the two parties, the Employer and Contractor. Broadly speaking, those functions involve administering the Contract, by for example certifying interim payments due to the Contractor, and determining certain matters affecting the parties' entitlements under the Contract, such as the Contractor's entitlement to an extension of time or an additional payment.

This latter adjudicative function in particular highlights the dual role Engineers perform of being at once the agents of the Employer for various purposes and determiners of the parties' entitlements. Engineers' decisions about such matters as extensions of time or additional payments are not in general final under the FIDIC forms, although, as we shall see, if time limits are breached an Engineer's determination might become final; but the importance of ensuring that as far as possible the Engineer, in making his determinations, should do so in a disinterested and fair way as between the parties has led to express provision in both the 1999 and 2017 editions of the Red and Yellow forms for the Engineer to act fairly, in accordance with the Contract and taking into account all relevant circumstances (clause 3.5/1999 and 3.7/2017) with, in the 2017 editions of the two Books, the express additional requirement that the Engineer should act neutrally between the parties and not be deemed to act for the Employer (clause 3.7 of the 2017 editions). The 2017 editions also provide (clause 3.2) that there should be no requirement for the Engineer to obtain the Employer's consent before exercising his authority under clause 3.7.

The role of the Engineer in the 2017 editions of the Red and Yellow Books is another legacy of the UK origins of the FIDIC forms. The UK domestic engineering forms historically assigned an important role to the Engineer, broadly in line with the role adopted by the Engineer in the FIDIC Books; and historically the Engineer was treated as a professional person to be accorded great respect, and who was expected by both parties to act neutrally and fairly in carrying out all his functions. This traditional status of the Engineer has for some time been eroded, and in many cases in projects internationally he has come to be regarded as no more than the mouthpiece of the Employer. For that reason the 2017 editions have sought to reinforce the expected neutrality of the Engineer by the new provisions in clauses 3.2 and 3.7.

- *Risk allocation*

The fourth feature of the 1999 Red Book, which it also shares with the 1999 Yellow Book, is that the allocation of risk between Contractor and Employer is intended to be an even handed or fair one, having regard to each party's ability to manage and control risk. Thus, for example, under clause 4.12 of both Books the Contractor may claim both additional time and money if he encounters physical conditions which were unforeseeable in the sense that they were not reasonably foreseeable by an experienced contractor at the date of tender, or the Base Date¹ in the 2017 editions.² The Contract allocates risk by striking a balance between the need to protect the Employer from the time and cost consequences of physical conditions which an experienced Contractor ought to have foreseen, and the need to protect responsible contractors from the time and cost consequences of conditions which they cannot reasonably have been expected to foresee at tender stage.

The reputation which FIDIC has traditionally enjoyed of fairly allocating risk between the parties largely derives from this approach, reflected not merely in the 1999 edition of the Red Book but in its predecessors and in the Yellow Book (to which we turn below) and its forebears; and the same can be said of the 2017 editions of the two Books.

The scope for claims under the Red and Yellow Books in both editions is considerable by comparison with the third member of the 1999 rainbow suite, the Silver Book, considered in Section 1.2.3 below.

1.2.2 The 1999 Yellow Book

The Yellow Book is the second oldest member of the 1999 FIDIC suite of contracts. Its origins go back to an electrical and mechanical form of contract, the Electrical and Mechanical Yellow Book, first published in 1963. In contracts for electrical and mechanical works much of the design is carried out off-site and installation carried out by specialist contractors. In this type of contract it makes more sense for the contractor rather than the employer to be primarily responsible for design. The 1963 Yellow Book was therefore a contractor-design form of contract under which the Contractor and not the Employer was responsible for all or most of the design.

The Yellow Book underwent various editions, culminating in the third edition in 1987, the same year as the fourth edition of the FIDIC Red Book. When preparing the 1999 Yellow Book the task group mainly had regard to the 1987 version of the Yellow Book, and also to another form, first published in 1995, called *Conditions of Contract for Design-Build and Turnkey*; this was known as the Orange Book.

The Orange Book was introduced to accommodate the growing trend for projects to be procured on a design-build or 'turnkey' basis. Its scope was wider than the 1987 Yellow Book because it was not a specifically electrical and mechanical form of contract. Among the distinctive features of the Orange Book was a departure from the use of the Engineer. In the Orange Book there was no Engineer but the Employer administered the Contract. He was not intended to be neutral although when making determinations had

¹ The Base Date is defined in clause 1 of both editions of all three Books as 28 days before the latest date for submission of the tender.

² 'Unforeseeable' is defined in clause 1 of the three 2017 Books to mean 'not reasonably foreseeable by an experienced contractor by the Base Date'.

still to act fairly, reasonably and in accordance with the Contract. A second significant feature of the Orange Book was that it introduced an independent dispute adjudication board, called the DAB, considered below in Chapter 16.

The 1999 Yellow Book replaced both the Yellow Book 1987 and the 1995 Orange Book. Whereas the 1987 Yellow Book dealt only with electrical and mechanical works, the 1999 Yellow Book covered any building and engineering works designed by the Contractor, reflecting the wider scope of the Orange Book.

- *Contractor design*

The first feature to note about the 1999 Yellow Book, distinguishing it from the Red, is, therefore, that it is a contractor-design form of contract; under the form, the Contractor is responsible for all or most of the design.

This is also the case with the 2017 edition, the title of both editions being the same: *Conditions of Contract for Plant and Design-Build, for Mechanical and Electrical Plant and for Building and Engineering works designed by the Contractor*.

- *Fixed price lump sum*

The second important feature of both editions of the Yellow Book, which also distinguishes it from the Red Book forms, is that it is a fixed price lump sum rather than a re-measurement contract. The Contractor's basic entitlement is to be paid a fixed price, stated in the Contract at the outset and expressed as a lump sum, subject only to adjustments or additions made pursuant to the terms of the Contract for such matters as variations or unforeseeable physical conditions.

- *The Engineer*

The third main feature of the Yellow Book in both editions is that, like the Red Book forms, an important role is assigned to the Engineer, who performs the same functions under both Books and in the 2017 edition must also act neutrally.

- *Risk allocation*

The fourth feature of the Yellow Book in both editions is that, also like the Red Book forms, it seeks to strike a fair balance of risk between Contractor and Employer. Many of the circumstances in which the Contractor can claim in the Red Book (for example, where unforeseeable physical difficulties are encountered) are also circumstances in which he can claim in the Yellow Book.

1.2.3 The 1999 Silver Book

Unlike the other two Books in the rainbow suite, the Silver Book 1999 was a completely new form of contract. It was introduced to meet a perceived market need for a form of contract which would give project sponsors maximum certainty as to time and budget. This need was particularly evident in Build-Operate-Transfer and other concession-type projects, in which the project financing placed huge constraints on sponsors to ensure that the project was completed on time and within budget. The fair or even-handed allocation of risk characteristic of the Yellow and Red Books was wholly unsuited to such projects. What the sponsors required was a contract form under which the contractor carried virtually all the risk and had very limited opportunities to claim.

FIDIC noted a trend for sponsors to cause the general conditions of typically a Yellow Book form to be amended to try to place as much risk as possible on the Contractor, quite often with disastrous results. To avoid this tendency, and to meet head on the demand for a new form, FIDIC introduced the Silver Book in 1999. It can be used not merely in concession-type projects but in any case where the project sponsors require maximum certainty about time and budget.

The title of the Silver Book in both editions is *Conditions of Contract for EPC/Turnkey Projects*. 'EPC' stands for Engineer-Procure-Construct, and indicates the range of the Contractor's responsibilities under the Contract; the Contractor is responsible for engineering design, the full range of procurement and for construction. The Contractor designs to Employer's Requirements, which in some cases amount to little more than a performance specification although they may contain considerable engineering design.

The word 'Turnkey' is used synonymously with 'EPC' in the title of the Silver Book forms to signify that the Contractor is to provide the Employer with a complete package, so that he has the plant or other facility 'at the turn of a key'. The Employer thus has a single point of responsibility for design, procurement and construction.

The project sponsors are provided with much greater certainty about time and cost than would be available under a Yellow Book Contract; under the form, the Contractor agrees a lump sum fixed price and has very limited scope for claiming additional time or money. The Contractor is forced correspondingly to price for risk, and therefore a Silver Book Contract can result in considerably higher project costs for the sponsors. Silver Book contracting has sometimes been called a Rolls Royce method of procurement for that reason.

FIDIC itself counsels caution when contractors are invited to tender on the basis of a Silver Book form. The guidance is to the effect that contractors ought not to contemplate contracting on such a basis unless they have had an opportunity to assess all relevant risks; something which it is difficult in practice to achieve when the tender period and available resources are limited. What often happens in practice, although this will depend on the individual contractor's bargaining power, is that the parties will negotiate exceptions to the contractor's otherwise comprehensive responsibility and, for example, identify particular items of design or information for which the contractor will not be responsible or carry the risk. Even when such exceptions might be carved out, a responsible contractor will need to exercise extreme care before deciding to contract on a Silver Book basis and will almost always have to build into the price a significant cushion against remaining risk.

There is no Engineer in the Silver Book forms, the Employer in the 1999 edition being able to administer the Contract himself, although typically he will appoint an Employer's Representative to do so on his behalf. Whether or not such a representative is appointed, any determinations made must in the 1999 Silver Book be fair, in accordance with the Contract and take account of all relevant circumstances.

In the 2017 edition of the Silver Book the Employer is obliged to appoint an Employer's Representative and so cannot administer the Contract himself. As with the 1999 edition, determinations must be fair, in accordance of the Contract and take account of all relevant circumstances (clause 3.5). In the 2017 edition there is an added requirement (also in clause 3.5) that in carrying out his determining functions the Employer's Representative shall not be deemed to act for the Employer; unlike the 2017 Yellow and Red Books, however, he is not expected to act neutrally, although whether in practice this

will make much difference is not entirely clear since in all three Books in both editions determinations have to be fair, in accordance with the Contract and take account of all relevant circumstances.

A significant difference exists between the 1999 Silver Book on the one hand, and its 2017 version and both editions of the Yellow and Red Books on the other, as to the effect of a determination. In the 1999 Silver Book, each party must give effect to a determination unless the Contractor gives notice of his dissatisfaction with the determination within 14 days; he may then refer the matter to a DAB under clause 20.4. In both editions of the Yellow and Red Books, on the other hand, the parties are to give effect to the determination unless and until it is revised by a DAB/DAAB or, ultimately, arbitral tribunal. That difference could favour the Contractor in some situations where, for example, the Employer is entitled to a payment, as the Contractor can hold off paying by notifying his dissatisfaction with the determination within the 14 days. In the 2017 Silver Book, where the Employer is no longer permitted to administer the Contract himself, the position has been changed to bring it into line with the other forms, so that both parties have to give effect to a determination unless and until it is revised by a DAAB (or ultimately an arbitral tribunal).

1.3 Contractor Risk in the Silver Book: Two Examples

The following two examples may serve to illustrate how the Silver Book stands out from the other two FIDIC forms.

1.3.1 Unforeseeable Difficulties

Clause 4.12 of the Silver Book in both editions provides that, unless the Contract (or, in the 2017 edition, the Particular Conditions) states otherwise, the Contractor (a) is to be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the works; (b) by signing the Contract he accepts ‘total responsibility’ for having foreseen all difficulties and costs of successfully completing the works; and (c) the Contract Price is not to be adjusted to take account of any unforeseen difficulties or costs.

This comprehensive allocation of risk contrasts with clause 4.12.4 of the Yellow and Red Books in both editions, where the Contractor may, subject to complying with the relevant notice and other requirements in clauses 4.12.1 to 4.12.3, claim both additional time and money if he encounters physical conditions which were unforeseeable in the sense that they were not reasonably foreseeable by an experienced contractor at the date of tender (1999) or the Base Date (2017).

1.3.2 Errors in Employer’s Requirements

The 1999 Yellow and Silver Books impose on the Contractor the obligation to design, execute and complete the works in accordance with the Contract so that when complete the works will be fit for the purposes for which they are intended ‘as defined in the Contract’ (clause 4.1). This is similar in the 2017 editions, except that the works when completed are to be fit for the purpose or purposes for which they are intended ‘as defined or described in the Employer’s Requirements’ or, where no such purposes are defined or described, fit for their ‘ordinary purposes’.

Thus the fitness for purpose obligation in the 2017 editions is anchored, not in the Contract generally, but in the Employer's Requirements or, in default, in the 'ordinary purposes' of the relevant works. These important distinctions are examined in Section 4.1 below.³

The extent to which the Contractor has to accept responsibility for errors in the Employer's Requirements, including any design criteria and calculations, is markedly different between the two forms.

In both editions of the Silver Book the Contractor is responsible for errors in the Employer's Requirements even if the Contractor could not reasonably have been expected to detect them, with certain limited exceptions. Clause 5.1 in both editions provides that the Contractor is assumed to have scrutinised, prior to the Base Date, the Employer's Requirements (including design criteria and calculations, if any) and the Employer is not to be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements as originally included in the Contract, unless one of the exceptions set out in sub-paragraphs (a)–(d) of clause 5.1 applies. These exceptions are examined in Section 5.1.1 below.

The Yellow Book deals with errors in the Employer's Requirements quite differently. The Contractor is entitled to claim additional time and/or cost plus profit if a hypothetical experienced and careful contractor would not have discovered the error by a certain date.

Thus clause 1.9 of the 1999 edition entitles the Contractor to claim if delay and extra cost result from an error in the Employer's Requirements which an experienced contractor exercising due care would not have discovered when scrutinising the Requirements under clause 5.1. Although more detailed and differently structured, clause 1.9 in the 2017 edition applies a substantially similar test to determine the Contractor's right to claim more time or money in respect of errors contained in the Employer's Requirements.⁴

1.4 New Potential Risks for Contractor and Employer in the 2017 Books

The 2017 Books contain new potential risks for both Contractor and Employer, some of which are highlighted below. They are considered in more detail in the chapters indicated.

1.4.1 Contractor Risks

- *New fitness for purpose indemnity*

In the 2017 Yellow and Silver Books clause 17.4 creates a new indemnity by the Contractor in respect of any acts, errors or omissions by him in carrying out his design obligations which result in the works, when complete, not being fit for their purpose

³ In the 1999 Red Book (clause 4.1), where the Contractor is, under the Contract, to design any part of the works then that part when completed must be fit for such purposes as those for which the part is intended as specified in the Contract. In the 2017 edition, the purposes are to be as specified in the Contract or, where they are not so defined and described, their ordinary purposes.

⁴ See Section 5.1.4 for a fuller discussion of errors in Employer's Requirements in the Yellow Book.

under clause 4.1.⁵ In the 2017 Red Book this applies to the extent that the Contractor has the relevant design obligations.

In the pre-release Yellow Book this indemnity was not within the exclusion of indirect or consequential loss or the overall liability cap under clause 17.6. However, following strong objections from contractors during the friendly review, this position has been reversed in the published 2017 Books. By a new clause 1.15 (Red and Yellow Books)/1.14 (Silver) the indemnity is now within both the exclusion and the cap.⁶

- *Exceptions to liability limitation*

The new clause 1.15/1.14 in the three 2017 Books does not include within the exclusion of indirect or consequential loss intellectual and industrial property rights under clause 17.3, or delay damages under clause 8.8, and the former is excluded from the total liability cap under the second paragraph of that clause.⁷ Further, whereas in the 1999 editions clause 17.6 did not limit liability in any case of fraud, deliberate default or reckless misconduct, the new clause 1.15/1.14 adds gross negligence to this list.⁸

- *Delay damages and termination*

The 1999 editions provide, by clause 8.7, for a maximum amount of delay damages. This is also the case in the 2017 editions, but the 2017 Books give the Employer a new right to terminate the Contract under clause 15.2.1(c) if the Contractor exceeds this limit.⁹

- *Adverse climatic conditions*

Clause 8.4(c) in the 1999 Red and Yellow Books gives the Contractor a right to claim an extension of time in respect of exceptionally adverse climatic conditions, but the meaning of this expression often gave rise to dispute. Clause 8.5(c) in the 2017 editions of the two Books goes some way to providing clarity, but at the expense of limiting the scope of this ground to adverse climatic conditions at the site which are unforeseeable having regard to climatic data made available by the Employer and/or which are published in the relevant country for the geographical location of the site.¹⁰ By thus limiting the conditions to those affecting the site only, the Contracts now exclude claims based on adverse conditions elsewhere which affect the Contractor's ability to maintain progress (by, for example, interfering with supply chains).

- *Cost of remedying defects/training*

Red Book contractors should note that clause 11.2 in the 2017 edition has expanded the scope of the Contractor's responsibility for executing outstanding or remedial works

⁵ See Section 13.2.1.

⁶ The 2008 Gold Book had introduced a fitness for purpose indemnity in the second paragraph of clause 17.9. This indemnity, as in the pre-release Yellow Book, is excluded from the general exclusion of indirect or consequential loss in clause 17.8 of the Gold Book; but is within the overall liability cap (second paragraph of clause 17.8). The pre-release Yellow Book thus followed the Gold Book in introducing a Contractor's fitness for purpose indemnity, but went beyond it by excluding the indemnity from both the indirect loss exclusion and the overall liability cap.

⁷ See Section 2.8.2.

⁸ See Section 2.8.

⁹ See Section 12.1.3.

¹⁰ See Section 7.6.

under clause 11.2 and a new clause 4.5 introduces a requirement to train the Employer's employees and/or other specified personnel if stated in the Specification.

Although responsible, by clause 4.1(d), for submitting the as-built documents and operation and maintenance manuals prior to commencement of the tests on completion, the 1999 Red Book Contractor has no training obligation and no specific liability in the terms of clause 11.2(c) of the other two Books. (In the 1999 Yellow and Silver Books clause 11.2(c) requires the Contractor to execute at his own risk and cost any works resulting from improper operation or maintenance attributable to matters for which he is responsible under clauses 5.5–5.7 – that is, training (to the extent specified in the Employer's Requirements), provision of as-built documents and operation and maintenance manuals – or otherwise.)

These differences have now been removed in the 2017 Red Book. The Red Book Contractor now has an obligation to provide training for the Employer's employees and/or other specified personnel under clause 4.5 if this is stated in the Specification, and has the same responsibility (under clause 11.2(c)) in respect of improper operation or maintenance attributable to any failure to provide such training, operation and maintenance manuals or as-built records as the Yellow and Silver Book Contractor.¹¹

1.4.2 Employer Risks

- *Liability for care of the works and indemnities*

Clause 17.3 in the 1999 editions of the three Books defines a number of Employer's risks which, if they eventuate, entitle the Contractor to claim an extension of time and/or cost for rectifying any resulting loss or damage. Clause 17.2 of the 2017 Books adds significantly to the risks borne by the Employer¹² and includes in particular a general sweeping-up provision covering any act or default of the Employer's personnel or the Employer's other contractors.

The Employer's indemnities in favour of the Contractor under clause 17.5 have also been expanded to include, as well as death or personal injury, loss of or damage to any property other than the works which is attributable to any negligence, wilful act or breach of contract by the Employer, Employer's personnel or any of their respective agents. The Employer must also indemnify the Contractor in respect of all loss or damage to property, other than the works, to the extent that it arises out of any of the events for which the Employer bears the risk under clause 17.2.¹³

- *Extensions of time*

In all three of the 2017 Books the Contractor's entitlement to claim an extension of time has been increased.

(a) *Access routes*

The 1999 Books all provide for the Contractor to bear the costs of any non-suitability or non-availability of access routes for the use required by the Contractor without apparent qualification. If an access route were, for example, altered by the Employer

¹¹ See Section 9.2.

¹² See Section 13.1.3.

¹³ See Section 13.2.3.

or those for whom he was responsible, including his other contractors on site, the Contractor might be able to rely on clause 8.4(e) to claim an extension of time if he suffered delay as a result, on the basis that the alteration of the route was a delay, impediment or prevention caused by or attributable to the Employer, his personnel or his other contractors on site; but if the route were altered by a third party the Contractor would not be able to come within this ground and clause 4.15 would not appear to give him any basis for claiming an extension either.

The Contractor's position has been improved by clause 4.15 of the 2017 Books, which provides (in the last paragraph of clause 4.15) that to the extent that non-suitability or non-availability of an access route arises as a result of changes to the access route by a third party, as well as the Employer, after the Base Date and they result in delay and/or cost the Contractor may claim an extension of time and/or payment of that cost. This fills an important gap in the 1999 forms.

(b) Private utilities

The Contractor under the 2017 Books is now able to claim an extension of time in respect of delays caused not only by public authorities but also private utilities in the country of the project under a new clause 8.6. In the 1999 contracts clause 8.5 permitted a claim only in respect of delays caused by public authorities. This updates the earlier forms to reflect the fact that many utilities are now provided by private entities and represents a significant addition to the Contractor's right to claim.

(c) Shortages in Employer-supplied materials

The Contractor may in all three 2017 Books claim an extension of time in respect of unforeseeable shortages in the availability of Employer-supplied materials, as well as personnel or goods, caused by epidemic or government actions (clauses 8.5(d) 2017 Red and Yellow Books and 8.5(c) Silver). In the 1999 editions of the Red and Yellow Books the Contractor (by clause 8.4(d)) is only able to claim for unforeseeable shortages in personnel or goods caused by epidemic or government actions and in the 1999 Silver Book this ground is not available at all. The 2017 editions have therefore created an entirely new basis of claim for the Silver Book Contractor and increased the scope of the existing sub-paragraph (d) of clause 8.4 in the other two Books by including Employer-supplied materials.

- *Latent defects in plant*

The 1999 contracts provide for defects which become apparent after the Employer's acceptance of the works (by issue of the Performance Certificate) by treating each party as remaining liable for the fulfilment of any unperformed obligations at that time, the Contract to be deemed to remain in force for the purpose of determining the nature and extent of such unperformed obligations (clause 11.10). There is no time limit placed on the extent of this liability; that question depends on the governing law.

The 2017 contracts contain the same provision for latent defects in clause 11.10, but introduce a time limit with respect to plant. In relation to plant, the Contractor is not to be liable for any defects or damage occurring more than two years after expiry of the Defects Notification Period for the plant, unless this is prohibited by law or in any case of fraud, gross negligence, deliberate default or reckless misconduct. Thus, subject to those exceptions, and unless clause 11.10 is amended in the special provisions, the Employer now faces a two-year cut-off for bringing any claims in respect of latent defects in plant,

that is, any apparatus, equipment, machinery or vehicles whether on the site or otherwise allocated to the Contract and intended to form or forming part of the permanent works (clause 1.1.65 2017 Red Book/1.1.66 Yellow Book/1.1.56 Silver Book).

- *Termination for convenience and omitted work*

One of the complaints contractors make about the 1999 Books is that, in the event of the Employer's terminating the Contract for his own convenience, that is, in the absence of any fault on the part of the Contractor, the Contractor is not entitled to any loss of profit suffered as a result. Instead, clause 15.5 gives the Contractor no more than he would be entitled to where there has been a termination by reason of force majeure.

This was thought to be anomalous and the position has been corrected in the 2017 Books. The Employer now faces the prospect of having to compensate the Contractor for loss of profit or other loss or damage suffered as a result of a termination for convenience under a new clause 15.6.¹⁴

There is also an important provision entitling the Contractor to loss of profit where work has been omitted from the Contract scope in order to be carried out by the Employer or others. In the 1999 contracts there was a blanket prohibition against the Employer's instructing the Contractor to omit work in order for it to be carried out by others (clause 13.1). This has been modified in the 2017 editions by permitting work to be omitted which is to be carried out by the Employer or others but (unless there has been a failure to remedy defects and clause 11.4 applies)¹⁵ only where the Contractor agrees to this (clause 13.1). In that case, however, the Contractor can include in his proposal for an adjustment to the Contract Price under clause 13.3.1 any loss of profit and other loss or damage suffered or to be suffered by him as a result of such an omission (clause 13.3.1(c)).¹⁶

- *Change in laws*

Another important new risk for the Employer in the 2017 forms is that the scope for claiming additional time and/or money as a result of changes in the laws and regulations affecting the project has been significantly increased in a new clause 13.6.¹⁷ In the 1999 editions the Contractor can claim time and/or money where the laws of the country where the project is situated or the judicial or official interpretation of them, after the Base Date, gives rise to delay and/or additional cost (clause 13.7). The new clause 13.6 adds to this by providing for changes made or published after the Base Date in:

(a) any permit, permission, licence or approval obtained by the Employer or Contractor according to their respective obligations under clause 1.13 (Red and Yellow Books)/1.12 (Silver Book); or

(b) the requirements for any permit, permission, licence and/or approval to be obtained by the Contractor under clause 1.13(b)/1.12(b)

to entitle the Contractor to claim an extension of time and/or additional payment for any delay caused and/or cost incurred as a result.

This additional risk to the Employer is counterbalanced, however, by a new provision in clause 13.6 that provides for the Employer to be entitled to claim a reduction in the

¹⁴ See Section 12.2.2.

¹⁵ See Section 9.4 below.

¹⁶ See Section 11.3.1.

¹⁷ See Section 11.4.1.

Contract Price should a change in the laws, including the above changes in or requirements for permits, permissions, licences and/or approvals, result in a decrease rather than an increase in cost.

1.5 FIDIC's Guidance for the Preparation of Particular Conditions

As mentioned in Section 1.1 above, the Particular Conditions in the 2017 contracts comprise (a) the Contract Data and (b) the Special Provisions. The 1999 contracts also provide for Particular Conditions but do not divide them up into these two categories; instead, the relevant details are included more generally. The division of the Particular Conditions into Contract Data and Special Provisions was introduced in the 2008 Gold Book for greater clarity, and has been adopted accordingly in the 2017 editions. Together with the general conditions, the Contract Data and Special Provisions comprise the conditions of contract for each of the 2017 Books.

1.5.1 The Contract Data

An example of the Contract Data is given at the back of each of the 2017 forms in the section headed 'Guidance for the Preparation of Particular Conditions'. As the brief notes accompanying the example explain, the Contract Data identify the specific information needed to be provided before the documents forming the Contract are complete and in order to avoid the default provisions to be found in some of the clauses of the general conditions taking effect. Thus the Contract Data, which are to be completed by the Employer in preparing the tender documents, set out each of the sub-clauses of the general conditions which require such specific further information. So, for example, clause 1.1.20 defines 'Cost Plus Profit' to mean Cost plus the applicable percentage for profit stated in the Contract Data or, if not so stated, 5%; the first item in the Contract Data example sheet then refers to clause 1.1.20 and leaves a space to be completed by the Employer for identifying the specific percentage profit to be added to Cost. The Employer will ensure that this item is completed if he wishes to avoid the default 5% applying. Similarly, the second item in the Contract Data refers to clause 1.1.27, which requires the Defects Notification Period which is to apply to the Contract to be stated, failing which the default one-year period will apply. Other Contract Data items include the time for completion, the governing law, the ruling language and a host of other important specific details which need to be addressed.

1.5.2 The Special Provisions

The Special Provisions enable the parties to amend the general conditions. Amendments of one kind or another are inevitable in any contract in order to meet the specific needs of the project. As FIDIC points out in its Guidance, local legal requirements may necessitate modifications to the general conditions, particularly if they are to be used on domestic contracts. Where any amendments are made to the general conditions great care needs to be taken to ensure both that the amendments are internally consistent and that they are consistent with the unamended general conditions; confusion and disputes are otherwise likely to arise.

As FIDIC points out in the Guidance, the Special Provisions have priority over the general conditions, with the Contract Data having priority over the Special Provisions. This is consistent with clause 1.5 of the general conditions, which sets out the priority of documents forming the contract in the event of any conflict, ambiguity or discrepancy between them.

1.5.3 Golden Principles

As part of its Guidance FIDIC urges the parties to have regard to certain ‘Golden Principles’ when drafting Special Provisions. These Golden Principles are intended to ensure that amendments to the general conditions be limited to those necessary for the particular features of the project and compliance with applicable law; in the case of the Red and Yellow Books, do not change the essential fair and balanced character of the FIDIC Contract; and that the Contract remain recognisably a FIDIC Contract. There are five such Principles set out in the Guidance, some of which might be easier to follow in practice than others. For example, General Principle 1 is that the duties, rights, obligations, roles and responsibilities of all the Contract participants must be generally as implied in the general conditions and appropriate to the requirements of the project; however, it might not be very obvious how this is to be applied in practice, or even whether it ought to be attempted to be applied in a particular project. General Principle 2, on the other hand, which is that the Particular Conditions must be drafted clearly and unambiguously, is certainly salutary general advice.

1.5.4 Tender Documents

The FIDIC Guidance provides useful notes on the preparation of tender documents. These notes develop the notes which also appear at the back of the 1999 editions.

Particularly helpful is the guidance on the contents of the Employer’s Requirements in the case of the Yellow and Silver Books. FIDIC also places more emphasis in the 2017 notes on the need for the tender documents to be prepared by suitably qualified engineers who are not only familiar with the technical aspects of the required works but also the particular requirements and contractual provisions of a design-build project (in the case of the Yellow and Silver Books) or a construction project (in the case of the Red) and recommends a review by suitably qualified lawyers. The notes also refer to FIDIC’s intention to update the FIDIC Procurement Procedures Guide, planned for publication at a later date, to provide guidance on the content and format of the tender documents issued to tenderers specifically by reference to the 2017 editions.

1.5.5 Drafting Options

The FIDIC Guidance gives options for various sub-clauses, with in some cases example wording and in others notes and suggestions. These are set out in the Notes on the Preparation of Special Provisions forming part of the Guidance. They are well worth taking into account.

The notes on definitions (clause 1.1), for example, give some useful warnings about how any changes to the definitions may well have serious consequences for the interpretation of the Contract documents and should not generally be made, but go on to

give specific instances where some definitions, such as the Base Date, might be usefully amended, or where the site crosses the border between two countries.

Example wording is provided under clause 1.15, for example, dealing with limitation of liability where parties wish to take into account liabilities which are to be insured under clause 19 and so provide for specific liability by reference to each potential head of damage. Other examples concern notes on Provisional Sums (clause 13.4), formulae for adjustments for changes in cost (clause 13.7) and notes on Schedules of Payments (clause 14.4) and financing arrangements, with example wording.

1.5.6 Building Information Modelling

The 2017 editions also include as part of the Guidance at the back of each form advisory notes on the use of FIDIC Contracts where the project uses Building Information Modelling (BIM) systems, with guidance given on specific clauses of the general conditions needing review when the Particular Conditions are drafted. FIDIC anticipates more detailed guidance being necessary and accordingly intends to publish a 'Technology Guide' and a 'Definition of Scope Guideline Specific to BIM' at a later date.

1.6 Forms

As in the 1999 editions, the back of the 2017 Books contains example forms, in particular forms of required securities (such as an advance payment guarantee), forms of letter of tender, letter of acceptance and contract agreement for the Red and Yellow Books, or letter of tender and contract agreement for the Silver Book, and in each case a form of dispute avoidance/adjudication agreement.

