

# Standard clauses and template forms

## Standard clauses

As with earlier editions, the key to reading and understanding the 2017 2nd edition of the FIDIC Red, Yellow and Silver Books is to understand their structure. Unlike the earlier editions these versions have 21 clauses in the general conditions and (other than the FIDIC Red Book where clause 5 deals with subcontractors and clause 12 deals with measurement) they follow the format as set out below:

Clause 1 ? General provisions  
Clause 2 ? The employer  
Clause 3 ? The engineer  
Clause 4 ? The contractor  
Clause 5 ? Design  
Clause 6 ? Staff and labour  
Clause 7 ? Plant, materials and workmanship  
Clause 8 ? Commencement, delays and suspension  
Clause 9 ? Tests on completion  
Clause 10 ? Taking over  
Clause 11 ? Defects after taking over  
Clause 12 ? Tests after completion  
Clause 13 ? Variations and adjustments  
Clause 14 ?Contract price and payment  
Clause 15 ? Termination by employer  
Clause 16 ? Suspension and termination by contractor  
Clause 17 ? Care of the works and indemnities  
Clause 18 ? Exceptional events  
Clause 19 ? Insurance  
Clause 20 ? Employer?s and contractor?s claims  
Clause 21 ? Disputes and arbitration.

## Template forms

The FIDIC forms also contain standard:

- examples of the different types of bonds and guarantees that the parties may be required to enter into (although parties frequently use bespoke forms of security documents)
- wording for the letter of tender (including a template appendix to tender)
- contract agreement and
- dispute avoidance/adjudication agreements.

## Guidance and amending the 2017 editions

As was the case with earlier versions, the 2017 2nd editions contain guidance for the preparation of particular conditions. The guidance includes pro-forma contract data, notes on the preparation of tender documents and highlights some of the key points that, if missed, could lead to difficulties during the project.

The guidance also sets out, on a contract-by-contract basis, additional clauses and

amendments to the general conditions already set out in this isurv section and reminds users and drafters that if using these or seeking to amend the general conditions to include bespoke amendments, the five FIDIC ?golden principles? should be taken into account. The ?golden principles? can be summarised as:

- parties? duties, obligations and responsibilities should be set out in the published form and appropriate to the project in question
- amendments should be drafted clearly and unambiguously
- amendments must not change the risk/reward allocation in the published form
- any time periods must be reasonable and
- all formal disputes must be referred to a dispute avoidance/adjudication board (or dispute adjudication board if relevant) for a provisionally binding decision as a condition precedent to arbitration.

FIDIC released [a guide to the ?golden principles?](#) in 2019.

FIDIC?s view is that the changes to the general conditions in the 2017 2nd editions should be limited:

1. to deal with particular features of a site or to ensure compliance with applicable law
2. so that the ?essential fair and balanced character of a FIDIC contract? is not changed and
3. so the contract is recognisable as a FIDIC contract. However, this guidance is unlikely to limit the extent and scope of amendments made to the general conditions.

Given the increased interdependence between the drafting in different clauses, a change to one provision may have unintended consequences elsewhere.

Notwithstanding the ?golden principles? referred to above, FIDIC recognise that some changes may be needed and, as with previous editions, the guidance contains suggestions for changes to particular conditions. For example, the guidance to the FIDIC Red Book provides suggested alternative drafting for:

- **Sub-clause 1.15** ? if the parties agree to be responsible for certain types of indirect or consequential loss which would otherwise be excluded
- **Sub-clause 3.2** ? if the engineer needs the employer's consent before it takes certain actions and
- **Sub-clause 4.12** ? the allocation of risk between the contractor and employer for unforeseeable physical conditions where significant sub-surface work is being carried out.

The guidance also includes drafting for entirely new sub-clauses dealing with the use of milestones and incentives for early completion (among others).

## Differences between 1st edition (1999) and 2nd edition (2017)

### Why have the contracts been updated?

FIDIC have stated that the aim behind the update is to improve clarity, transparency and certainty as well as take into account feedback from users of the 1st editions over the last 17

years.

## What are the main changes?

The most significant overall change is that the contracts have become more of a project management tool setting out who is expected to do what, by when and what the consequences of non-compliance are.

**Role of the engineer:** which remains central to the administration of the contract, has expanded significantly. There is a new role for the engineer's representative (who is expected to be on site full time); an obligation for the engineer to act ?neutrally? (FIDIC has accepted it is difficult for an engineer to be impartial, being paid and engaged by the employer) when seeking to reach ?agreement? or make a determination and new timescales within which the engineer is required to make a determination (failing which a claim will be deemed to be rejected and capable of being referred to the dispute board) and these changes are to be welcomed.

**Greater emphasis on dispute avoidance** as evidenced by:

1. a new early (or advance) warning process (inspired by the Gold Book) under which the employer, contractor and engineer are required to notify each other in advance of any known or probable future events which may adversely affect the work
2. dispute adjudication boards being changed to dispute adjudication/avoidance boards (DAABs) along with a new requirement that those DAABs be ?standing? rather than ad hoc to improve the chances of avoiding a dispute and
3. time bar provisions encouraging parties to deal with claims as they arise rather than wait until the end of the project. A number of these changes reflect principles that have been incorporated into other standard form construction and engineering contracts and also reflect dispute avoidance and dispute resolution procedures that are often added to the 1st edition contracts by way of amendments to the general conditions.

**Increased programming obligations** so that:

1. every payment application is to be accompanied by a monthly progress report
2. the contractor is required to update the programme whenever it does not reflect actual progress
3. the programme is to include additional details including logic links, float and critical path and
4. if the engineer does not give notice of non-compliance within the required timescales the programme is deemed to comply with the contract.

**Fitness for purpose:** the contractor is to indemnify the employer in the event that errors in the contractor's design mean the works are not fit for purpose. The harshness of this provision has been softened following feedback on the consultation draft and indirect and consequential losses are now excluded and the indemnity is subject to the aggregate cap on liability. However, it is likely that contractors (and their insurers) will look to amend these provisions.

**Indemnity provisions:** as well as the contractor's ?fitness for purpose? indemnity referred to above the employer's indemnities in favour of the contractor have been expanded to include:

1. loss or damage to property other than the works due to any negligence, wilful act or breach of contract by the employer or a party for whom the employer is responsible and
2. loss or damage to the works for any of the grounds set out or referred to in

clause 17.2 (which includes risks such as war, natural catastrophes, the employer's use or occupation of the works).

**Concurrent delay:** the previous editions were silent on concurrent delay so, in the case of contracts governed by English law at least, the contractor would be entitled to an extension of time in the event of concurrent delay unless the contract said otherwise. The 2017 2nd editions require the parties to clarify how concurrent delay will be dealt with and to refer to these provisions in the particular conditions and it is likely that employers will attempt to transfer the risk of concurrent delay to the contractor.

In the English decision [North Midland Building Ltd v Cyden Homes Ltd \[2018\] EWCA Civ 1744](#), the Court of Appeal upheld a contract clause that disallowed a contractor's claim for additional time in the event of concurrent delay, so these clauses are, in England at least, enforceable in principle.

**The contractor's grounds for an extension of time** has expanded to include:

1. lack of suitability or availability of an access route where the access route is changed by a third party after the base date and
2. delays caused by private utilities.

**Notices:** to improve transparency and avoid disputes about whether notice has been given, all notices have to be in writing and clearly state they are a ?Notice? (although the requirement in the consultation draft Yellow Book that the notice had to refer to the clause it was given under has not been included in the final editions). The Contractor's Quality Management System also has to contain procedures to ensure that notices and other communications can be traced with full certainty. This is a helpful project management tool.

**Claims:** have been split out from the dispute provisions (which recognises the difference between a party claiming a contractual entitlement and disputes (i.e. where a claim has been rejected) and there is a new and very detailed (4? pages long) procedure for dealing with them (including time bars (see below)).

The Hong Kong decision of *Maeda Kensetsu Kogyo Kabutshiki Kaisha (aka Maeda Corporation) v Bauer Hong Kong Ltd [2020] HKA 830* (which considers claims wording very similar to that in the 2017 FIDIC forms) suggests a party can only rely on the basis of claim originally notified to the other party and cannot later (e.g. in arbitration or court proceedings) seek to rely on different grounds.

**Time bars:** have been expanded to encourage both parties to comply with contractual timescales. For example:

1. if the engineer does not notify the contractor that the programme does not comply within the required timescale the programme is deemed to comply with the contract
2. the 28-day time bar claim which applied to contractor claims under the 1st edition 1999 has been expanded to apply to employer claims. This follows the trend seen in other standard form construction and engineering contracts to encourage claims to be dealt with in real-time, rather than stored until the end of a project.

**Both parties have additional rights to terminate:** for example if the other party fails to comply with a binding agreement or final and binding determination of the engineer or a decision of the DAAB and the failure amounts to material breach.