

## Differences in Concepts between 1987 Red Book & 1999 Red Book Editions of the FIDIC Forms



**Hasaranga Fonseka BSc., MSc ACI Arb, CCE**

Quantity Surveyor  
Mina al Arab Infrastructure Works  
Halcrow International Partnership

### The FIDIC form: a brief history

The Fédération Internationale des Ingénieurs-Conseils ("FIDIC") organisation was founded in 1913 as a collaboration of France, Belgium and Switzerland. The first edition of the Conditions of Contract (International) for Works of Civil Engineering Construction was published in August 1957 having been prepared on behalf of FIDIC and the Fédération Internationale des Bâtiment et des Travaux Publics (FIBTP).

Both the Red and Yellow Books were revised by FIDIC and new editions were published in 1987. A key feature of the 4th edition of the Red Book was the introduction of an express term which required the Engineer to act impartially when giving a decision or taking any action which might affect the rights and obligations of the parties, whereas the previous editions had assumed this implicitly. Although this paper concentrates on the new FIDIC forms, it should be remembered that the FIDIC 4th edition ("The Old Red Book") remains the contract of choice throughout much of the Middle East, particularly the UAE.

In 1994 FIDIC established a task force to update both the Red and the Yellow Books in the light of developments in the international construction industry, including the development of the Orange Book. The differences in concept between the 1987 Red book and the 1999 Red book are more important when dealing with Contract Administration, so the list of items below are the major differences of this 2 forms.

- A basic change has been made to the role of the Engineer in the 1999 Red Book. This change can be seen by comparing sub-clause 2.6 of the fourth edition of the Red Book with sub – clauses

3.1 and 3.5 of the 1999 Red Book. In the former the Engineer is required to exercise the discretion granted to him under the contract impartially with the terms of the contract; in the latter, the Engineer is deemed to act for the employer unless expressly stated to the contrary but, if required to agree or determine any matter, is obliged to consult with the parties in any attempt to reach agreement and failing agreement, to make a fair determination.

- Whilst all the forms of contract recognize the matrix of pure financial risk and make provision for the employer to require the contractor to provide a performance guarantee, the wording of the provision in the fourth edition of the Red Book differs greatly from that in the 1999 forms of contract. Under the 1999 book the employer is required to return the performance security within **21 days of receiving a copy of the performance certificate** (under sub – clause 11.90), whereas by virtue of clause 10.2 of the fourth edition of the Red Book the performance security is to be returned within 14 days of **issuance of the defect liability certificate** (under sub-clauses 62.1).
- Under the sub clauses 2.4 of the 1999 Red Book the risk of inadequate employer's financial arrangements has been recognized and upon the contractor's request, if the employer fails to comply with this requirement then the contractor is entitled to suspend or reduce the rate of work and ultimately to terminate the contract. There is no corresponding provision in respect of the employer's financial arrangements under the fourth edition of the Red Book.

- There is a new provision in the 1999 Red and Yellow books expressly entitling the contractor, that in the event of late payment by the employer, for that amount to be reimbursed as financing charges calculated at any annual rate which is 3% above the discount rate of central bank (in the country of the currency of payment) and be compounded monthly.
- One of the contractor's obligations in the 1999 forms of contract is to ensure that the works are fit for the purpose for which they were intended as stated in the contract conditions. There is no such requirement in the fourth edition of the Red Book.
- Whilst the concept of clause 12 of the fourth edition of the Red Book, in respect of the risks of unforeseeable physical obstruction or conditions, has been maintained in the 1999 Red Book, both the negative and positive aspects of such risks are taken into consideration in the latter forms. Therefore under the 1999 books, in making a determination in respect of a contractor's claims for adverse unforeseen physical obstructions/conditions, the Engineer is entitled to review whether other physical conditions encountered were more favourable than could reasonably have been expected at tender stage. In fourth edition of the Red Book there is no such provision.

As an example the ground conditions claims are recognized in clause 4.12 in the Red Book with the provision that a claim may be reduced where "other physical conditions in similar parts of the works (if any) were more favorable than could reasonably have been foreseen when the Contractor submitted the Tender." Employers faced with ground conditions claims will no doubt be looking for reductions and the meaning of "similar parts" and "more favorable" will come under close scrutiny.

- The term 'unforeseeable' is expressly defined in the 1999 forms of contract. This definition is a useful attempt at bringing some certainty to the concept of unforeseeability. This concept relates to the allocation of risks between the parties under the FIDIC form of contract, namely those risks which are foreseeable and are borne by the contractor and those which are unforeseeable and are borne by the

employer. It would appear to derive from a similar concept which has been developed by the courts of the law of negligence.

- The start of time limits in relation to interim payments to the contractor has been altered. Under sub –clause 14.7(b) of the 1999 Red Book, the interim payment must be made within 56 days after the Engineer receives the contractor's statement (and supporting document), whereas in sub –clause 60.10 under the fourth edition of the Red Book such payment is required to be made within 28 days from the date of the employer's receipt of the interim payment certificate from the Engineer.
- The employer under sub –clause 15.5 of the Red Book is entitled to terminate the contract at any time and for his/her convenience, by simply giving notice to the contractor of such termination. The only condition that applied to this provision is that the employer must not choose to terminate the contract in order to execute the work him/herself or to arrange for the work to be executed by another contractor. Termination for convenience is provided for at clause 15.5 upon 28 days' notice. The Contractor is paid for work done and demobilization but **receives no compensation.**
- Some changes have been made in relation to the allocation of the risk between the employer and the contractor. In particular, reference is made in the 1999 forms to sub –clause 17.3, which now includes terrorism as one of the employer risk; and Clause 19, which now expressly defines force majeure and the relief available to the parties in such an event.
- There is a new provision in the 1999 forms entitled 'limitation of liability' – sub-clause 17.6, which states that neither party shall be liable to the other party for **loss of use of any works, loss of profit, loss of any contract or for any indirect or consequential loss or damage** which may be suffered by the other party in connection with the Contract, other than under Sub Clause 16.4 ( Payment on Termination ) and Sub Clause 17.1 (Indemnities). Also it limits the contractor's liability to the accepted contract amount, or to sum stated in the particular conditions (if any).

- The insurance provision of the 1999 form of contract, clause 18, differs greatly from the provision under the fourth edition of the Red Book, leaving the matter to be discussed and agreed at the meeting that is required to be held before the date of the letter of acceptance. This agreement of terms shall take precedence over the provisions of this clause. (Second paragraph of sub –clause 18.1)
- Under the clause 16.1 of the 1999 Red Book, if the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Engineer and shall be subject to Sub-Clause 20.1 [Contractor's Claims] to a payment of any such Cost plus reasonable profit, which shall be included in the Contract Price. But according to 1987 Edition the entitlement will be only for the cost.
- Clause 19 of the 1999 forms entitled 'force majeure' replaces 'special risk' concept of fourth edition of the Red Book. Since force majeure is a legal concept which has slight but potentially significant application in different jurisdictions, intending employer should follow the recommendation given in the Guidance for the preparation of particular Condition to the 1999 forms of contract, namely that before inviting tenders they should verify that the wording of this clause is compatible with the law governing the contract. Equally important are the consequences set out in clause 19.4, which indicate that the Contractor receives both time and reimbursement of costs that result from the event.
- There is a new provision in the 1999 forms of contract requiring the employer to comply with claims procedure for employer's claims. According to sub-clause 2.5 this procedure is different from that which is stipulated for the contractor, particularly in respect of the time limits that apply. The notice shall be given as soon as practically possible after the employer become aware of the event or circumstances giving rise to the claim. This amount may be included as a deduction in the Contract price and payment certificate.

## Employers Claims and Other Deductions

Clause No.	Clause title	Event	Procedure	Comments
2.5	<i>Employer's Claims</i>	<i>Various</i>	<i>Notice + particulars as soon as practicable</i>	
4.2	Performance Security	Specified failures (a) to (d)	None	
4.19	Electricity, Water and Gas	Amounts consumed	2.5/3.5	Notice not required (2.5)
4.20	Employer's Equipment and Free Issue Material	Amounts due for use	2.5/3.5	Notice not required (2.5)
7.5	Rejection	Additional costs due to rejection and retesting	2.5	
7.6	Remedial Work	Contractor fails to comply with remedial instruction	2.5	
8.6	Rate of Progress	Revised methods cause Employer to incur costs	2.5	

Clause No.	Clause title	Event	Procedure	Comments
8.7	Delay Damages	Contractor fails to comply with Time for Completion	2.5	May be reduced under 10.2
9.4	Failure to Pass Tests on Completion	Part of works useless	Termination	All sums paid for Part, financing, clearing
ditto	ditto	Value reduced	Agreement + TOC or TOC/3.5	Reduced value
11.3	Extension of Defects Notification Period	Part of works useless due to defect	2.5	Max extension: + 2 years
11.5	Failure to Remedy Defects	Failure to remedy within reasonable time	Prior reasonable notice of reasonable time	Cost of works by others or reasonable reduction or, for useless works, all sums paid, financing, clearing
11.11	Clearance of site	Non-clearance by Contractor	-	Cost of sale
15.4	Payment after Termination	Termination by Employer	2.5	Extra cost to complete, losses and damages
18.1	General Requirements for Insurances	Contractor fails to insure	2.5	Premiums

- The Defects Notification Period, as it is now called, may be extended for up to 2 years “if and to the extent that the Works, Section or a major item of Plant cannot be used for the purposes for which they are intended by reason of a defect or damage.”- clause 11.3.
- Under the 1999 forms of contract, until the Performance Certificate has been issued, the Contractor shall have such right of access to the Works as is reasonably required in order to comply with this clause, except as may be inconsistent with the Employer’s reasonable security restrictions. In the fourth edition of the Red Book there is no such provision.
- Strict time limits are imposed under the 1999

forms of contract that if a claim is to be made by the Contractor under sub-clause 20.1, a notice of such a claim must be made within 28 days after the contractor become aware, or should have become aware, of the event giving rise to the claim. Details of the claim with supporting particulars should be given within 42 days. If a Contractor fails to give notice of a claim, the employer is discharged from all liabilities in connection with the claim.

Failure to provide claim notices within the 28 days as provided by clause 20.1 means,

*“the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.”*

## Contractors claims

Cl No.	Clause title	Red			Yellow	Silver
		Event	Notice	Cost/Profit		
1.9	Delayed drawings or Instructions	Late drawing or instruction	Reasonable prior notice + 20.1	Cost + profit	N/a (Errors in ERs)	N/a (Confidentiality)
2.1	Right of Access to the Site	Late access or possession	20.1	Cost + profit	✓	✓
4.7	Setting-Out	Error in specified reference points (not reasonably discoverable by experienced Contractor)	20.1	Cost + profit	✓	✗
4.12	Unforeseeable Physical Conditions	Adverse unforeseeable physical condition	As soon as practicable +20.1	Cost	✓	✗
4.24	Fossils	Compliance with instructions	Promptly +20.1	Cost	✓	✓
7.4	Testing	Instruction for additional passed test, or delay for which Employer responsible	20.1	Cost + profit	✓	✓
8.4	<i>Extension of time for Completion</i>	<i>Various</i>	<i>20.1</i>	<i>n/a</i>	✓	✓ (not weather or shortages)
8.5	Delays caused by Authorities	Delays caused by authorities	20.1 (via 8.4)	✗	✓	✓
8.9	Consequences of Suspension	Suspension	20.1	Cost	✓	✓
10.2	Taking over of Parts of the Works	Employer's use of part of Works without Contractor's agreement	20.1	Cost + profit	✓	Employer may not take early possession without consent
10.3	Interference with Tests on Completion	Prevention of tests	20.1	Cost + profit	✓	✓
11.2	Cost of Remedying Defects	Defects not Contractor's responsibility	Notice by Employer + 20.1?	V.O.	✓	✓
11.8	Contractor to Search	No Contractor defect found	20.1?	Cost + profit	✓	✓



Cl No.	Red				Yellow	Silver
	Clause title	Event	Notice	Cost/Profit		
12.4	Omissions	Omission of work	Notice with particulars	'Cost' incurred anyway	N/a Claim for delayed Tests after Completion	N/a Claim for delayed Tests after Completion
13.2	Value Engineering	Approved proposal changes design	20.1?	50% of net saving	✗	✗
13.3	Variation Procedure	Re-rating justified	12 + 20.1	V.O.	✓	✓
13.7	Adjustments or Changes in Legislation	Change in law	20.1	Cost	✓	✓
15.5	Employer's Entitlement to Termination	Employer terminates at will	16.3/19.6	Value of work + Cost	✓	✓
16.1	Contractor's Entitlement to Suspend Work	Contractor suspends due to Employer's default	21 days prior + 20.1	Cost + profit	✓	✓
16.4	Payment on Termination	Contractor terminates due to Employer's default	14 days prior (or immediate)	Release of bond, value + Cost, profit, loss and damage	✓	✓
17.4	Consequences of Employer's Risks	Loss or damage to Works etc. due to Employer's risk	Promptly/ 20.1	Cost (+ profit in two instances)	✓	✓
19.4	Consequences of Force Majeure	Prevented from performing any obligation	Within 14 days/20.1	Cost (except natural catastrophes)	✓	✓
19.6	Optional Termination, payment and Release	Prolonged prevention	7 days' notice	Value + Cost	✓	✓
19.7	Release from Performance under the Law	Impossible, unlawful or released by law	'Upon notice'	Value + Cost	✓	✓
20.1	Contractor's claims	Contractor considers himself entitled to EOT or extra payment	28 days (42 days for fully detailed claim)	-	✓	✓

- Strict time limits are imposed for other notices, for example, the contractor must give 28 days 'notice of the intended commencement of each sub contractor's work; and employer is required not less than 7 days notice of the commencement date.
- The 1999 of contract has expressly introduced the concept of '**value Engineering**' which will if adopted, accelerate the completion of the works; reduce the cost to the employer of executing, maintaining or operating the works; improve the efficiency or value to the employer of the completed work or otherwise be of benefit to the employer. The contractor may make a proposal incorporating value engineering at any time to the Engineer; if approved it is valued under the variation under the sub –clause 13.3.
- ii. The Guidance for the preparation of particular conditions to the 1999 Red Book includes an option of reverting to the traditional role of the Engineer (and gives example sub-clauses to replace /amend sub-clauses 20.2 to 20.4).
- As per 1987 edition, on the issue of the Taking-Over Certificate for the whole of the Works, it is found that as a result of;
  - (a) *all varied work valued under Sub-Clauses 52.1 and 52.2, and*
  - (b) *all adjustments upon measurement of the estimated quantities set out in the Bill of Quantities, excluding Provisional Sums, day works and adjustments of price made under Clause 70, but not from any other cause, there have been additions to or deductions from the Contract Price which taken together are in excess of 15 per cent of the "Effective Contract Price" then and in such an event, they shall be added to or deducted from the Contract Price as such further sum may have been in regard to the Contractor's Site and general overhead costs of the Contract. Such sum shall be based only on the amount by which such additions or deductions shall be in excess of 15 per cent of the Effective Contract Price.*

If this change results in a reduction in the contract value of this part, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine a fee, which shall be included in the Contract Price. This fee shall be half (50%) of the difference between the following amounts:

- (i) such reduction in contract value, resulting from the change, excluding adjustments under Sub-Clause 13.7 [*Adjustments for Changes in Legislation*] and Sub-Clause 13.8 [*Adjustments for Changes in Cost*], and
- (ii) the reduction (if any) in the value to the Employer of the varied works, taking account of any reductions in quality, anticipated life or operational efficiencies.

However, if amount (i) is less than amount (ii), there shall not be a fee.

- A new step in the dispute settlement procedure referral of the dispute to a Dispute Adjudication Board (DAB) similar to that introduced in the 1996 Supplement to the fourth edition of the Red Book, has been introduced under sub-clauses 20.2 to 20.4 of the 1999 form of contract. There are however a few important aspects that differentiate the DBA concept introduced in the 1996 supplement and the 1999 forms. These as follows:
  - i. The DAB in the 1999 Red Book is appointed by the date stated in the Appendix to tender , which proposes 28 days after the commencement date.
  - Under the 1999 forms of contract in Application for Interim Payment Certificates, retention will not be deducted from
    - the measured quantity of the item is changed by more than 10% from the quantity of this item in the Bill of Quantities or other Schedule,
    - this change in quantity multiplied by such specified rate for this item exceeds 0.01% of the Accepted Contract Amount,
    - this change in quantity directly changes the Cost per unit quantity of this item by more than 1%
    - this item is not specified in the Contract as a "fixed rate item"

- any amounts to be added and deducted for Plant and Materials in accordance with Sub-Clause 14.5 [*Plant and Materials intended for the Works*];
- any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [*Claims, Disputes and Arbitration*];

But as per 1987 edition retention will be deducted from the above two items also.

- Number of words in Part I of the FIDIC forms  
Red Book 1987 Edition - 23,544 words  
Red Book 1999 Edition - 29,800 words

## References

1. FIDIC Conditions of Contract 1987 Edition, by International Federation of Consulting Engineers
2. FIDIC Conditions of Contract 1999 Edition, by International Federation of Consulting Engineers
3. The FIDIC Forms of Contract – 3rd Edition, by Nael G Bunni

## *Anns and Others -v- Merton London Borough Council [1978]*

*The plaintiff bought her apartment, but discovered later that the foundations were defective. The local authority had supervised the compliance with Building Regulations whilst it was being built, but had failed to spot the fault. The authority appealed a finding that it was liable, arguing that the claims were time barred and that it had owed no duty beyond its statutory duty.*

*Held: As a public body, the defendant's powers and duties were defined in public not private law. Any distinction between the powers and duties of a local authority fell to be considered in that context. The authority should at least have considered whether to inspect the foundations, and if it did inspect, to do so with care. The authority could not protect itself entirely, simply by failing to carry out any inspection at all. A duty of care might exist at common law, and whether it did so did not depend upon whether the statute imposed a duty or a power to inspect. The cause of action arose at the time when the condition of the building suggested some fault, and time did not begin to run until this happened. The action was not statute barred.*