

## FIDIC Updates its Rainbow Suite of Contracts

### IN SHORT

**Background:** Fédération Internationale Des Ingénieurs-Conseils ("FIDIC")'s Red (Construction), Yellow (Plant and Design and Build), and Silver (EPC) Books ("Rainbow Suite of Contracts") are widely used on major construction and infrastructure projects worldwide. Their popularity stems largely from the fact that these standard forms are familiar to market participants across both civil and common law jurisdictions.

**The Development:** Almost 18 years after it released the first edition of the Rainbow Suite of Contracts, FIDIC has launched the much-anticipated second edition of the Rainbow Suite of Contracts.

**Looking Ahead:** The updates made to the Rainbow Suite of Contracts are intended to, among others, reflect current international best practices and promote greater clarity, transparency, and certainty in standard form contracting between employers and contractors.

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FIDIC has recently launched updates to the first edition of the Rainbow Suite of Contracts, marking the first time these contracts have been amended since their release in 1999. The new contracts are not yet publicly available, but this update is based on FIDIC's announcements made to date. A more detailed update will be issued when FIDIC formally releases the new contracts.

In introducing the changes, FIDIC explained that these have been drafted with the intent of:

- Promoting dispute avoidance;
- Enhancing project management mechanisms;
- Achieving increased clarity and certainty; and
- Reflecting international best practice since the 1999 release.

The new contract forms are substantially more prescriptive, particularly across notice and time period requirements, contain more detailed "deeming provisions" (e.g., if notices are not issued on time), and hard and soft time bars. Some specific changes made include the following.



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### Role of the Engineer

In the new edition of the Red and Yellow Books, changes have been made to enhance the role of the Engineer in the overall management of the contract, as well as in resolving claims between the parties before these become disputes.

These changes include requiring the Engineer to: (i) act "neutrally" as between the Employer and the Contractor in seeking to make any determination; and (ii) consult and positively encourage the agreement of claims arising under the contract.

### Advance/Early Warning and Programming

The new edition contains changes intended to help parties avoid getting into disputes arising from potential delays during the performance of the works. These include: (i) an advance/early warning regime for any potential or foreseeable circumstances that may affect the performance of the work to promote early attention; and (ii) increased programming requirements (to better promote actual progress of the works).

### Profit

A default percentage of 5 percent profit has been included across the amended Rainbow Suite of Contracts where a contractor would be entitled to "Cost Plus Profit." It is interesting that the default percentage is applied across the Red, Yellow, and Silver Book contracts notwithstanding the different risk profiles for build only, design and build, and EPC/turnkey contracting. FIDIC contracts are commonly used in developing infrastructure jurisdictions, and many contractors will consider such a default profit

percentage as low.

### Claims Procedure

The claims procedure has been expanded in what is seen to be FIDIC's attempt to achieve reciprocity between the parties. Under the updated edition, both the Contractor *and* the Employer are now required to submit claims (if any) under an updated claims process. This probably aims to reduce ambiguities created under the first edition of the suite of contracts with respect to claims made by the Employer. Under the updates, claims are now distinguished from disputes (which are dealt with under a new Clause 21, as described below).

In addition, more prescriptive administrative requirements are imposed on the parties (for example, requiring that all communications issued under the contract as "Notices" must be expressly identified, that the Contractor *and* the Employer shall provide a Notice within 28 days of any event giving rise to a claim and followed by an extended time period to submit a fully detailed claim). The contracts also contain more "deeming" provisions so as to provide for consequences allowing for the performance of the contract to continue if parties do not comply with prescribed time periods.

Finally, the Engineer's determination will now become final and binding unless a Notice of Dissatisfaction is issued within the prescribed time period of 28 days. This appears to be a hard time bar and so may force a dissatisfied party into an early escalation of a dispute.

### Dispute Resolution

FIDIC has split the old Clause 20 into two provisions—Clause 20 deals with claims from both the Employer and Contractor while Clause 21 now relates to disputes and arbitration. The new Clause 21 provides that the "DAB" is now referred to as the "Dispute Avoidance/Adjudication Board" ("DAAB"), and this reflects FIDIC's overall goal of having parties try to avoid disputes in the first instance (with resolution by the DAAB) instead of immediately referring disputes to arbitration.

All DAABs are to be constituted as standing DAABs with the primary purpose of preventing claims from escalating into formal disputes.

### THREE KEY TAKEAWAYS

1. The changes that have been made to the Rainbow Suite of Contracts are in relation to contract/project management and are said to be focused on dispute avoidance.
2. The changes are intended to provide greater clarity and certainty, and some of these changes result in far more prescriptive administrative requirements and hard and soft time bars across the contract suite being imposed on the Employer and the Contractor.
3. Parties will need to take greater care when tendering or entering into the new FIDIC contracts in their construction projects as the changes made are extensive and change the contracting and contract management requirements in several key areas.

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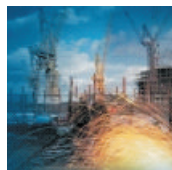


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