

# Over the rainbow

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## Are recent changes to the FIDIC suite of contracts a help or a hindrance?

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The Fédération Internationale Des Ingénieurs-Conseils (FIDIC) is the most commonly used for of construction contract in international projects, and at the end of last year the second edition of the Rainbow Suite – Red, Yellow and Silver – was launched at its International Contract Users' Conference in London.

This was highly anticipated, as much debate had followed the test edition of the Yellow Book in December 2016, with some proposed changes prompting vigorous objections from contractors. FIDIC appears to have heeded these concerns by maintaining fundamental principles of fair and balanced risk allocation, while reflecting the current trend towards more active contract management.

Critics of the test Yellow Book had pointed to the heavier burden of new and prescriptive contract management procedures. FIDIC, however, felt that increased clarity and certainty was needed to encourage more active contract management, reflect international best practice and emphasise dispute avoidance. Reflecting the approach advocated by the New Engineering Contract, FIDIC's 2017 suite recognises, for example, the importance of the programme as a contract management tool, while articulating step-by-step procedures and deeming provisions for processes only drafted vaguely in 1999's first edition.

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The significant changes to this edition can be grouped into 3 themes:

1. liability and risk allocation;
2. enhanced contract management processes; and
3. emphasis on dispute avoidance.

## Liability and risk

Of particular significance for design and build contractors, the pre-release version included an apparently revised risk profile with a more onerous uncapped indemnity as to fitness for purpose in Sub-Clause 17.7, Contractor's Indemnities. Although that indemnity remains in the 2017 Yellow and Silver Books, FIDIC has removed the carve-out from the liability limits and kept the proportional reduction in liability for the Employer's contributing factors.

The new Clause 4.1, Contractor's General Obligations, balances this with a tighter definition of fitness for purpose by reference to the 'purpose' in the Employer's

Requirements, rather than to the Contract as a whole. This should provide greater certainty about the obligations to which the Contractor is agreeing.

However, the possible risk of a purpose loosely defined throughout the Contract remains, and Clause 4.1 now provides, as a default position, for defining it by reference to what is 'ordinary'. It is also noteworthy that the fitness for purpose obligation applies to a 'Section or major item of Plant, if any' as much as to the Works, leaving a possible area for future dispute.

## Contract management

The amendments to the contract management process are extensive. A more detailed programme is now required from the outset of the project, as part of the drive to identify significant changes at the same time as overcoming delays and resolving differences between parties as the work progresses, and ensure timely completion.

Deeming provisions are now much more prevalent, with the aim of addressing potential delays from a party's inaction. The Engineer-related provisions of the new FIDIC Red and Yellow Books have been simplified in order to better structure and clarify their role, with potential for an Engineer's permanent presence on site and greater involvement in resolving issues as they arise.

## Dispute avoidance

Another significant change is the addition of a Clause 21, Disputes and Arbitration, separating these from Claims in Clause 20 as part of an increased emphasis on dispute avoidance. Clause 20 now includes a detailed claims process applicable to both Contractor and Employer, with the latter's claims to be determined under the same procedure as the former's, with the same time limits and requirements for detail.

A further significant change to the process is that a Dispute Avoidance/Adjudication Board is to be appointed for the duration of a project, so the parties may jointly agree to refer any matter to it at any time.

## Conclusion

With the myriad changes that have been made in the new suite, FIDIC intends to implement a proactive and engaged approach to risk management.

Overall, the amendments made are positive. The contract terms are now much better structured to reflect modern practices, and several gaps in the original drafting have been rectified. That said, in seeking to update its 1999 edition, FIDIC may have made amendments where none were needed, adding perhaps unnecessary prescriptive procedures and time bars. With each new contract now more than 50% longer than in the first edition, could there be room for a new short form?

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