

# FIDIC Latin America Contract Users' Conference



**Panama City, 2-3 October 2018**

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International Federation of Consulting Engineers  
The Global Voice of Consulting Engineers





# Main Features of the Updated Red, Yellow and Silver Books

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## Agenda

- FIDIC Forms of Contract
  - History
  - Overview
- 2017 Rainbow Suite: Evolution and Innovation
  - Sources for the Updates
  - What remains the same
  - The revisions: main features



## FIDIC's Conditions of Contract Common Law History

- First standard form of contract published in 1957
  - The “original” Red Book
  - Developed for civil engineering works in the international field
  - Two party Contract [Employer, Contractor]
    - Three Party execution
      - Employer
      - Contractor
      - Engineer
        - » Employed by Employer
        - » Designer
        - » Impartial, quasi-arbitral role during contract execution





## Continual focus on keeping with industry state of the practice...

- 1963 Yellow book, Conditions of Contract for Mechanical and Electrical Works
- 1987 4th edition of Red Book and 3rd edition of Yellow book
- 1994 Update task force established to update Red and Yellow books
  - The role of the engineer and, in particular, the requirement to act impartially while employed and paid by the employer
  - The desirability for standardization within the FIDIC forms
  - The simplification of the FIDIC forms considering that the FIDIC conditions were issued in English but in very many instances were used by those whose language background was other than in English
  - The new books to be suitable for use in both common law and civil law jurisdictions





## Continual focus on keeping with industry state of the practice...

- Shift from product focus to procurement strategy focus
  - Irrespective of the size of the project, the employer will look for a procurement strategy that results in contractual arrangements that will provide a defect-free project, that is fit for purpose and completed in a timely fashion and within budget.
    - The strategy should take into account the need for economic whole-life operating and maintenance costs
  - This requires:
    - A procurement package that is properly and fully prepared by experienced staff, and includes the correct standard form of FIDIC's conditions of contract







## Continual focus on keeping with industry state of the practice...

- 1995 Orange book, Conditions of Contract for Design-Build/Turnkey
  - 1st FIDIC design-build contract
  - Engineer replaced with Employer's representative
  - Dispute Adjudication Board (DAB) introduced



## Continual focus on keeping with industry state of the practice...

- 1999 1st Edition FIDIC 'Rainbow' Suite: The result of the 1994 Update Task Force
  - New' Red and Yellow books replaced the 'old' Red and Yellow books
  - Introduced Silver book for EPC/Turnkey projects
  - Rendered the Orange book redundant
  - Included new Green book, short form of contract
- 2017 2nd Edition Red, Yellow and Silver
  - Green to be updated separately







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## Works Contracts – Rainbow Collection

FIDIC publishes internationally recognized forms of contract for infrastructure works.



More than 40,000 copies supplied each year

[www.fidic.org](http://www.fidic.org)



## 2017 Rainbow Suite



- **Red Book**  
Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 2<sup>nd</sup> Edition 2017
- **Yellow Book**  
Conditions of Contract for Plant and Design Build, for Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor, 2<sup>nd</sup> Edition 2017
- **Silver Book**  
Conditions of Contract for EPC/Turnkey Projects, 2<sup>nd</sup> Edition 2017



## The 2017 FIDIC Rainbow Suite: Evolution and Innovation The Sources for the Updates

- Contract User's feedback
- International state of the practice
  - Address issues/comments raised
  - Lessons learned from the globe – FIDIC's users
- Recent developments in FIDIC contracts
  - Gold Book, 2008
  - Pink Book, 2010
- Friendly reviewers' feedback
  - 2015 Yellow Book
  - 2016 Red, Yellow and Silver
  - Employers, Contractors, Engineers, construction lawyers, funding institutions, professional organisations, governmental agencies, equipment suppliers





## Red, Yellow and Silver Books (1999 and 2017) The General Features Remain

- 'Manuals of good engineering practice'
  - Prepared by engineers, reviewed by legal advisors
- Prepared for 'international' and domestic use
  - Compatibility with both common and civil law concepts
  - Readily adaptable
- Harmonized in form, wording and definitions, to extent practicable
- Focus on usage of clarity and consistency in wording





## Red, Yellow and Silver Books (1999 and 2017) The General Features Remain

- Each of the Books is in three parts:
  - General Conditions
    - 20 Clauses (1999) vs 21 Clauses (2017)
  - Guidance for the Preparation of the Particular Conditions
    - Particular Conditions in two parts: Contract Data and Special Conditions
      - Appendix to Tender now Contract Data
  - Forms



## Red, Yellow and Silver Books (1999 and 2017) Much Remains the Same

- **Balanced** - Seen as generally fair apportioning of risks, rights and obligations between parties (not Silver Book)
- **Engineer** - Two party contract, three party execution (Red and Yellow)
- **Accepted** - In wide use for international contracting
- **Supported** - Recommended or required by Multilateral Development Bank Standard Bidding Documents
- **Continuity** - Long term use gives familiarity and degree of certainty
- **Proactive** - Dispute avoidance and early resolution focused







## The 2017 FIDIC Rainbow Suite: Aiming for greater clarity, certainty and enhanced contract administration ....

- Greater clarity
  - More prescriptive
  - New defined terms
- Certainty
  - Certainty of obligations
  - Key personnel clause
  - More detailed programme provisions
- Promoting collaboration and reciprocity between the parties



Enhanced contract administration



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## Clarity





## The 2017 FIDIC Rainbow Suite: Greater Clarity....

- More prescriptive
  - General Conditions longer:
  - 1999 Yellow Book 63 pages vs 2017 Yellow Book 106 pages
- More detailed guidance notes
  - 1999 Red Book 29 pages vs 2017 Red Book 65 pages
- New defined terms
  - 30+ new defined terms
    - 1999 Red Book: 58 defined terms
    - 2017 Red Book: 88 defined terms
  - Definitions listed in Alphabetical order





## Greater Clarity

## Examples of New Defined Terms

- Claim
- Dispute
- Cost Plus Profit
- Key Personnel
- No-objection
- Notice of Dissatisfaction
- Programme
- Review



❖ Also includes defined abbreviations: DAAB, EOT, DNP, FPC, JV, NOD,



## Some New Defined Terms

- **“Cost Plus Profit”** means Cost plus the applicable percentage for profit stated in the Contract Data (if not stated, five percent (5%)). Such percentage shall only be added to Cost, and Cost Plus Profit shall only be added to the Contract Price, where the Contractor is entitled under a Sub-Clause of these Conditions to payment of Cost Plus Profit. (SC 1.1.20)
- **“Exceptional Event”** means an event or circumstance as defined in Sub-Clause 18.1 [Exceptional Events]. (SC 1.1.37)
  - The change in terminology: “Force Majeure” [1999] –» “Exceptional Events” [2017] intended to help users in avoiding possible conflict with local law. (SC 1.1.48)



## Some New Defined Terms

- **“Key Personnel”** means the positions (if any) of the Contractor’s Personnel, other than the Contractor’s Representative, that are specified in the Employer’s Requirements. (SC 1.1.48)
- **“No-Objection”** means that the Engineer has no objection to the Contractor’s Documents, or other documents submitted by the Contractor under these Conditions, and such Contractor’s Documents or other documents may be used for the Works.
- **“Review”** means examination and consideration by the Engineer of a Contractor’s submission in order to assess whether (and to what extent) it complies with the Contract and/or with the Contractor’s obligations under or in connection with the Contract. (SC 1.1.72)





## Some New Defined Terms

- **“Programme”** means a detailed time programme prepared and submitted by the Contractor to which the Engineer has given (or is deemed to have given) a Notice of No-objection under Sub-Clause 8.3 [Programme].
- **“Notice of Dissatisfaction” or “NOD”** means the Notice one Party may give to the other Party if it is dissatisfied, either with an Engineer’s determination under Sub-Clause 3.7 [Agreement or Determination] or with a DAAB’s decision under Sub-Clause 21.4 [Obtaining DAAB’s Decision].





## Some New Defined Terms Abbreviations

- “Joint Venture” or “JV”
- "DAAB" or “Dispute Avoidance/Adjudication Board”
- "Defects Notification Period" or “DNP”
- “Extension of Time” or “EOT”
- "Final Payment Certificate" or “FPC”
- "Interim Payment Certificate" or “IPC”



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## CERTAINTY





## The 2017 FIDIC Rainbow Suite:

### A Focus on Certainty

- Certainty of obligation
- Certainty in communication
  - Notice: A defined term
- Certainty of personnel
  - Key Personnel
- Certainty of liability
  - Limitation of liability





## The 2017 FIDIC Rainbow Suite: Certainty of Obligation

- SC 1.2 Interpretation
  - "shall" means that the Party or person referred to has an obligation under the Contract to perform the duty referred to
    - "may" means that the Party or person referred to has the choice of whether to act or not in the matter referred to
  - "execute the Works" or "execution of the Works" means the design, construction and completion of the Works and the remedying of any defects.





## The 2017 FIDIC Rainbow Suite: Certainty of Obligation

- SC 1.2 Interpretation
  - provisions including the word "agree", "agreed" or "agreement" require the agreement to be recorded in writing
    - "written" or "in writing" means hand-written, type-written, printed or electronically made, and resulting in a permanent record
  - “consent” means that the Employer, the Contractor or the Engineer (as the case may be) agrees to, or gives permission for, the requested matter







## The 2017 FIDIC Rainbow Suite: Certainty of Obligation

- SC 1.5 Priority of Documents
  - If a Party finds an ambiguity or discrepancy in the documents, that Party shall promptly give a Notice to the Engineer, describing the ambiguity or discrepancy. After receiving such Notice, or if the Engineer finds an ambiguity or discrepancy in the documents, the Engineer shall issue the necessary clarification or instruction



## The 2017 FIDIC Rainbow Suite:

### Certainty of Communication

- "Notice" means a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [Notices and Other Communications].
  - SC 1.3 “Whenever these Conditions provide for the giving of a Notice ... the Notice ... shall be in writing and ... be identified as a Notice... and include reference to the provisions of the Contract under which it is issued...shall have effect when it is received ”
  - Note: Progress reports and schedules do not constitute a notice
    - SC 4.20 “However, nothing stated in any progress report shall constitute a Notice under a Sub-Clause of these Conditions.”
    - SC 8.3 “Nothing in any programme, the Programme or any supporting report shall be taken as, or relieve the Contractor from any obligation to give, a Notice under the Contract.”





## The 2017 FIDIC Rainbow Suite:

### Certainty of Personnel

- SC 6.12 Key Personnel Clause
  - The Contractor shall appoint the natural persons named in the Tender to the positions of Key Personnel.
    - The Contractor shall not, without the Engineer's prior consent, revoke the appointment of any of the Key Personnel or appoint a replacement (unless the person is unable to act as a result of death, illness, disability or resignation, in which case the appointment shall be deemed to have been revoked with immediate effect).
    - All Key Personnel shall be based at the Site (or, where Works are being executed off the Site, at the location of the Works) for the whole time that the Works are being executed. If any of the Key Personnel is to be temporarily absent during execution of the Works, a suitable replacement shall be temporarily appointed, subject to the Engineer's prior consent.





## The 2017 FIDIC Rainbow Suite: Certainty of Liability

- Capping Liability
  - 1999 and 2017 Contracts contain provision for liability cap
    - 2017 Sub-Clause 1.15 [Limitation of Liability]: Moved from SC 17.6 in 1999 to emphasize its importance and general applicability
- Total liability capped at the sum stated in the Contract Data or (if a sum is not so stated) the Accepted Contract Amount, other than under:
  - Sub-Clause 2.6 [Employer-Supplied Materials and Employer's Equipment];
  - Sub-Clause 4.19 [Temporary Utilities];
  - Sub-Clause 17.3 [Intellectual and Industrial Property Rights]; and
  - First paragraph of Sub-Clause 17.4 [Indemnities by Contractor]



## The 2017 FIDIC Rainbow Suite: Certainty of Liability

- Carveouts from the liability cap
  - **1999 Sub-Clause 17.6** [*Limitation of Liability*]:  
*“This Sub-Clause shall not limit liability in any case of fraud, deliberate or reckless misconduct by the defaulting Party.”*
  - **2017 Sub-Clause 1.15** [*Limitation of Liability*]:  
*“This Sub-Clause shall not limit liability in any case of fraud, **gross negligence**, deliberate default or reckless misconduct by the defaulting Party.”*
  - Gross negligence is now exempted from the cap



Promoting collaboration and  
reciprocity between the parties





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## Collaboration





## The 2017 FIDIC Rainbow Suite

### Collaboration Between the Parties

#### 8.4 Advance Warning:

“Each Party shall advise the other and the Engineer, and the Engineer shall advise the Parties, in advance of any known or probable future events or circumstances which may:

- (a) adversely affect the work of the Contractor's Personnel;
- (b) adversely affect the performance of the Works when completed;
- (c) increase the Contract Price; and/or
- (d) delay the execution of the Works or a Section (if any).

The Engineer may request the Contractor to submit a proposal under Sub-Clause 13.3.2 [Variation by Request for Proposal] to avoid or minimise the effects of such event(s) or circumstance(s).





## The 2017 FIDIC Rainbow Suite Collaboration Between the Parties

- 3.8 Meetings:  
“The Engineer or the Contractor’s Representative may require the other to attend a management meeting to discuss arrangements for future work and/or other matters in connection with execution of the Works.”
- 3.7.1 Consultation to reach agreement
  - encourage Parties to reach agreement within 42 days



# Promoting reciprocity between the parties



## The 2017 FIDIC Rainbow Suite

### Reciprocity Between the Parties

- SC 1.12 Confidentiality
  - equal requirements for the treatment of confidential information
- SC 1.13 Compliance with laws
  - Contractor to also provide assistance to the Employer in obtaining permits
    - compensation entitlement for both of the Parties if the other Party fails to assist
- SC 6.3 Recruitment of Persons
  - Neither Party may recruit staff from the other party's personnel





## The 2017 FIDIC Rainbow Suite

### Reciprocity Between the Parties

- SC 13.6 Adjustments for Changes in Laws
  - Contract price may be adjusted up or down
- SC 15.2 .1(h) [Employer] and SC 16.2(i) [Contractor]: Termination in case of fraud or corruption
  - If other party is found, based on reasonable evidence, to have engaged in corrupt, fraudulent, collusive or coercive practice at any time in relation to the Works or to the Contract.
- Clause 20 Employer's and Contractor's Claims
  - Same procedure for Employer's and Contractor's Claims
    - Including time limits





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# ENHANCED CONTRACT ADMINISTRATION







## The 2017 FIDIC Rainbow Suite Enhanced Contract Administration

- Variations
  - Sub-Clause 13.1 Right to Vary
  - Sub-Clause 13.3 Variation Procedure
    - Sub-Clause 13.3.1 Variation by Instruction
    - Sub-Clause 13.3.2 Variation by Request for Proposal



## The 2017 FIDIC Rainbow Suite Enhanced Contract Administration

- Variation by Instruction
  - Variations and instructions (SC 3.5 Engineer's Instructions):
    - If an instruction states that it constitutes a Variation, Sub-Clause 13.3.1 [Variation by Instruction] shall apply.



## The 2017 FIDIC Rainbow Suite

### Variation by Instruction

- The Engineer may instruct a Variation by giving a Notice (describing the required change and stating any requirements for the recording of Costs) to the Contractor in accordance with Sub-Clause 3.5 [Engineer's Instructions].
  - Sub-Clause 3.5: If an instruction states that it constitutes a Variation, Sub-Clause 13.3.1 [Variation by Instruction] shall apply.



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### Variation by Instruction

- The Contractor shall proceed with execution of the Variation and shall within 28 days...submit to the Engineer detailed particulars including:
  - (a) a description of the varied work performed or to be performed,
  - (b) a programme for its execution and the Contractor's proposal for any necessary modifications (if any) to the Programme according to Sub-Clause 8.3 [Programme ] and to the Time for Completion; and
  - (c) the Contractor's proposal for adjustment to the Contract Price by valuing the Variation in accordance with Clause 12 [Measurement and Valuation], with supporting particulars





## The 2017 FIDIC Rainbow Suite

### Variation by Instruction

- The Engineer shall then proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine:
  - (i) EOT, if any; and/or
  - (ii) the adjustment to the Contract Price (including valuation of the Variation in accordance with Clause 12 [Measurement and Valuation ]
- The Contractor shall be entitled to such EOT and/or adjustment to the Contract Price, without any requirement to comply with Sub-Clause 20.2 [Claims For Payment and/or EOT].





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### Variation by Instruction

- What if the Instruction does not state that it is a Variation? (Sub-clause 3.5)
  - If not so stated, and the Contractor considers that the instruction:
    - (a) constitutes a Variation (or involves work that is already part of an existing Variation); or
    - (b) does not comply with applicable Laws or will reduce the safety of the Works or is technically impossible
  - the Contractor shall immediately, and before commencing any work related to the instruction, give a Notice to the Engineer with reasons.
    - If the Engineer does not respond within 7 days after receiving this Notice, by giving a Notice confirming, reversing or varying the instruction, the Engineer shall be deemed to have revoked the instruction. Otherwise the Contractor shall comply with and be bound by the terms of the Engineer's response.





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### Variation by Instruction

- **Exceptions, SC 13.1**: The Contractor shall be bound by each Variation instructed under Sub-Clause 13.3.1 [Variation by Instruction], and shall execute the Variation with due expedition and without delay, unless the Contractor promptly gives a Notice to the Engineer stating (with detailed supporting particulars) that:
  - (a) the varied work was Unforeseeable having regard to the scope and nature of the Works described in the Specification;
  - (b) the Contractor cannot readily obtain the Goods required for the Variation; or
  - (c) it will adversely affect the Contractor's ability to comply with Sub-Clause 4.8 [Health and Safety Obligations] and/or Sub-Clause 4.18 [Protection of the Environment].







## The 2017 FIDIC Rainbow Suite

### Variation by Request for Proposal

- The Engineer may request a proposal, before instructing a Variation, by giving a Notice (describing the proposed change) to the Contractor.
- The Contractor shall respond to this Notice as soon as practicable, by either:
  - (a) submitting a proposal, which shall include the matters as described in sub-paragraphs (a) to (c) of Sub-Clause 13.3.1 [Variation by Instruction]; or
  - (b) giving reasons why the Contractor cannot comply (if this is the case), by reference to the matters described in sub-paragraphs (a) to (c) of Sub-Clause 13.1 [Right to Vary].





## The 2017 FIDIC Rainbow Suite

### Variation by Request for Proposal

- If the Contractor submits a proposal, the Engineer shall, as soon as practicable after receiving it, respond by giving a Notice to the Contractor stating his/her consent or otherwise. The Contractor shall not delay any work whilst awaiting a response.
- If the Engineer does not give consent to the proposal, with or without comments, and if the Contractor has incurred Cost as a result of submitting it, the Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to payment of such Cost.





## The 2017 FIDIC Rainbow Suite Enhanced Contract Administration

- Variations and Performance Bond
  - Whenever Variations and/or adjustments under Clause 13 [Variations and Adjustments] result in an accumulative increase or decrease of the Contract Price by more than twenty percent (20%) of the Accepted Contract Amount:
    - (a) in the case of such an increase, at the Employer's request the Contractor shall promptly increase the amount of the Performance Security in that currency by a percentage equal to the accumulative increase.
    - (b) in the case of such a decrease, subject to the Employer's prior consent the Contractor may decrease the amount of the Performance Security in that currency by a percentage equal to the accumulative decrease.





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# Thank You

