

# FIDIC Latin America Contract Users' Conference



## Panama City, 2-3 October 2018

**Main features of the 2017 Red, Yellow & Silver Books  
by**

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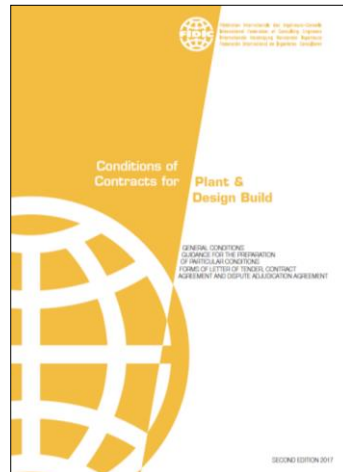
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Panama City, 2-3 October 2018



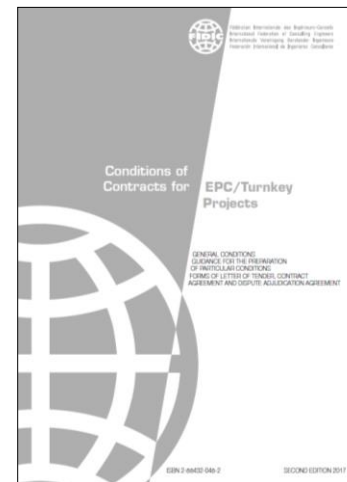
## YELLOW BOOK 2017

Conditions of Contract for Plant and Design Build, for Electrical and Mechanical Plant, and For Building and Engineering Works,  
**Designed by the Contractor**



## RED BOOK 2017

Conditions of Contract for Construction for Building and Engineering Works  
**Designed by the Employer**



## SILVER BOOK 2017

Conditions of Contract for **EPC\*/Turnkey** Projects





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## Underlying philosophies of the update of the FIDIC Rainbow Suite:-

- **by engineers for engineers**  
but ...FIDIC contract = a legal document => also used by *lawyers*
- enhance **project management** 'tools'/mechanisms
- reinforce the role of *the Engineer*
- **balanced** risk allocation: more reciprocity between the Parties
- reflect **current international best practice**
- address **issues/comments raised by Users**:  
for 18 years the 1999 contracts have been 'tried and tested'  
around the world
- incorporate **most recent developments** in FIDIC contracts







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## Improved clarity and certainty:

“ The **core aim of the majority of the changes** in FIDIC's 2017 contract updates is **increased clarity and certainty**, to reduce the risk of disagreements regarding the interpretation of contract terms and, as a result, **increase the probability of successful projects**.



Consistent with the above, FIDIC has improved the contract provisions by making them **more prescriptive** and introducing **step-by-step** project management and procedural mechanisms, by **setting out exactly what is expected from the Employer, the Contractor and the Engineer** during the performance of the Contract.”

“FIDIC Red, Yellow and Silver Books, second edition 2017: a Review of the updated General Conditions of Contract”

[http://fidic.org/sites/default/files/press%20release\\_rainbow%20suite\\_2018\\_03.pdf](http://fidic.org/sites/default/files/press%20release_rainbow%20suite_2018_03.pdf)





## Improved provisions for the timing of Parties' / Engineer's obligations:

- new specified time limits, if not met → **DEEMING PROVISIONS**



### Examples of time limits for action by the Engineer:

- ⇒ Engineer's **instructions**: no response < 7 days → deemed to have been revoked
- ⇒ if no Engineer's **Notice of agreement/determination** < 42 days (or >agreed by Parties): for a Claim – **deemed rejection**; for other matter – **deemed Dispute**
- ⇒ **consent** to subcontractors, QM system, replacement of Key Personnel, Contractor's proposal for remedial works, testing programme: no objection / Notice within stated time period → deemed consent / Notice of No-objection
- ⇒ **Contractor's programme**: no Notice of non-compliance < 21 days initial / < 14 days revised programme → deemed Notice of No-objection → **Programme**
- ⇒ **Performance Certificate**: if not issued < 28 days after expiry of latest DNP, then deemed to have been issued

### Example of time limits for action by Contractor:

- ⇒ Final Payment Certificate: no Notice of claim / referral to DAB < 56 days → deemed acceptance of FPC

### Example of time limits for action by Employer:

- ⇒ access after taking-over: no response < 7 days → deemed consent for Contractor's access during DNP



## Improved clarity and certainty: Unforeseeable Physical Conditions

### → Sub-Clause 4.12 [*Unforeseeable Physical Conditions*]

- **step-by-step provisions** => certainty for the Contractor and the Engineer when unexpected conditions are encountered
- what is expected by the Contractor, and when
- what is expected by the Engineer, and when



#### First paragraph of 4.12 [*Unforeseeable Physical Conditions*]

“**“physical conditions”** means natural physical conditions and physical obstructions (natural or man-made) and pollutants ... including sub-surface and hydrological conditions but **excluding climatic conditions at the Site and the effects of those climatic conditions.**”

#### Sub-paragraph (c) of 8.5 [*Extension of Time for Completion*]

The Contractor is entitled to EOT for: “**exceptionally adverse climatic conditions** ... shall mean **adverse climatic conditions at the Site which are Unforeseeable** having regard to climatic data made available by the Employer under Sub-Clause 2.5 ... and/or climatic data published in the Country for the geographical location of the Site”





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## 4.12.1 [Contractor's Notice]

After discovery, the Contractor is obliged to **give a Notice**

- “as soon as practicable and **in good time** to give the Engineer the opportunity to inspect and investigate ...”
- **describing** the physical conditions and how they will have an adverse effect on progress and/or Cost
- giving **reasons why** the conditions are Unforeseeable



## 4.12.2 [Engineer's Inspection and investigation ]

- Engineer's **obligation** to inspect & investigate **within 7 days** (or longer if agreed with the Contractor)
- Contractor's obligation to continue working but **allow Engineer** to inspect & investigate

## 4.12.3 [Engineer's instructions]

- Engineer **may** give instructions as to how to deal with the conditions
- Contractor's obligation to comply
- if the instruction is a Variation => Sub-Clause 13.3.1 [*Variation by Instruction*]





## 4.12.4 [Delay and/or Cost]

- **if** the physical conditions cause the Contractor to suffer **delay and/or Cost**
- **and** if the Contractor has: given **Notice**, and **allowed the Engineer** to inspect & investigate, **and complied** with Engineer's instructions
- *"the Contractor shall be entitled subject to Sub-Clause 20.2 ... to EOT and/or payment of such Cost".*

## 4.2.5 [Agreement or Determination of Delay and/or Cost]

- to include consideration of **extent** that the conditions were **Unforeseeable**
- the Engineer **may** review more favourable conditions elsewhere on the Site and make reduction in the Contractor's Cost entitlement
- the Engineer **may** *"take account of any evidence of the physical conditions foreseen by the Contractor by **the Base Date** ... but shall not be bound by any such evidence".*







## Improved clarity and certainty: agreement/determination by Engineer



Under Sub-Clause 3.2 [Engineer's Duties and Authority]:

*“There shall be **no requirement for the Engineer to obtain the Employer's consent** before the Engineer exercises his authority under Sub-Clause 3.7 [Agreement or Determination]. **The Employer shall not impose further constraints on the Engineer's authority.**”*

### → Sub-Clause 3.7 [Agreement or Determination]

- step-by-step provisions => certainty for the Engineer **and** both Parties
- **when** is the Engineer expected to 'broker' Parties' agreement or make a determination?
- not just for claims!



**13.3 Variations    13.5 Daywork    14.4 Schedule of Payments**  
**14.5 Plant and Materials intended for the Works**  
**14.6 Issue of IPC**



*“... the Engineer shall act **neutrally** between the Parties and shall **not** be deemed to act for the Employer...”*



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## 3.7.1 [Consultation to reach agreement]

Engineer obliged to:

- consult with both Parties *“jointly and/or separately”*
- *“encourage discussion between the Parties in an endeavour to reach agreement”*
- commence the consultation *“promptly to allow adequate time to comply with the time limit for agreement under Sub-Clause 3.7.3”*

- ## 3.7.2 [Engineer's Determination]
- a *“fair determination”*
  - in accordance with the Contract
  - *“taking due regard of all relevant circumstances”*

## 3.7.3 [Time Limits]

time limit for Engineer's Notice of agreement: 42 days

time limit for Engineer's Notice of determination: 42 days after the date of no agreement

*“or other period proposed by Engineer and agreed by both Parties”*





## 3.7.4 [Effect of Agreement or determination]

- binding unless and until revised by DAAB or in arbitration
- if payment, Contractor to include in next Statement and Engineer to include in next Payment Certificate
- if error found < 14 days → Engineer to correct < 7 days or advise no error

## 3.7.5 [Dissatisfaction with Engineer's determination]

dissatisfied Party to give **Notice of Dissatisfaction “NOD”** with reasons  
< 28 days after Engineer's Notice of determination (or corrected Notice of determination or deemed rejection) → proceed to DAAB



no NOD < 28 days: Engineer's determination (or deemed rejection) “*shall be deemed to have been **accepted** by both Parties and shall be final and binding on them*”

→ if only dissatisfied with **part(s)** of the determination: the part(s) “*shall be deemed to be severable from the remainder ... the remainder shall become final and binding*”

→ other Party's **non-compliance** with an agreement or final-and-binding determination: right to refer directly to arbitration



## Improved clarity and certainty: design and review

### Sub-Clause 5.1 [General Design Obligations]

→ **more explicit** requirements related to **designers**:  
qualified, experienced and competent; entitled under the  
applicable Laws to design the Works.



### Sub-Clause 5.2 [Contractors Documents]

- **step-by-step procedures for the Engineer's Review** of the Contractor's design

#### Sub-Clause 5.2.1 [Preparation by Contractor]

- language, right of Engineer to inspect preparation

#### Sub-Clause 5.2.2 [Review by Engineer]

Review Period: 21 days or as stated in Employer's Requirements

Notice of No-objection

or Notice that fails to comply → Contractor to revise and resubmit  
→ Employer can claim if additional costs

#### Sub-Clause 5.2.3 [Construction]

- no construction until Notice of No-objection
- procedure where Contractor wishes to modify design already submitted





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## Improved clarity and certainty: tests on completion

### Clause 9 [*Tests on Completion*]

#### Sub-Clause 9.1 [Contractor's Obligations]

→ new requirement for Contractor to submit test programme for Review

→ when tests passed, new requirement for Contractor to submit certified report of test results for Review

#### Sub-Clause 9.2 [*Delayed Tests*]

→ for Contractor delays: after second Notice the Employer's Personnel can carry out the tests and Employer can claim additional costs

#### Sub-Clause 9.3 [*Retesting*]

→ repeated tests "*shall be treated as Tests on Completion for the purposes of this Clause*"

#### Sub-Clause 9.4 [*Failure to Pass Tests on Completion*]

→ if rejection of Works or Section: requirement for Employer to follow claims procedure for reduction in Contract Price

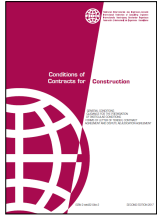




## Improved clarity and certainty: payment and valuation of the Works

### Red Book 2017: Clause 12 [Measurement and Valuation]

- Sub-Clause 12.1 [*Works to be Measured*]: if measurement is not agreed, Engineer to proceed under 3.7 [*Agreement or Determination*]
- Sub-Clause 12.2 [*Method of Measurement*]: as stated in the Contract Data
- Sub-Clause 12.3 [*Valuation of the Works*]: if “appropriate rate or price” is not agreed, Engineer to proceed under 3.7 [*Agreement or Determination*].
- Sub-Clause 12.4 [*Omissions*]: any cost no longer recoverable: to be included in Contractor’s proposal under 13.3.1 [*Variation by Instruction*]



### VARIATIONS: Sub-Clause 13.3 [Variation Procedure]

- 13.3.1 [*Variation by Instruction*]: where Variation is instructed, the Contractor required to submit a proposal (resources/methods, programme for execution & any EOT, adjustment to Contract Price)
  - Engineer to proceed under 3.7 [*Agreement or Determination*]
- 13.3.2 [*Variation by Request for Proposal*]: where Engineer requests a proposal before instructing Variation, the Contractor required to submit proposal **or** give reasons why cannot
  - Engineer gives consent: proceed under 3.7 [*Agreement or Determination*]
  - no Engineer’s consent: Contractor can claim cost of preparing the proposal





## Advance Payment – Sub-Clause 14.2:

14.2.1: Advance Payment Guarantee

14.2.2: Advance Payment Certificate

14.2.3: Repayment of Advance Payment



## Issue of Interim Payment Certificate (IPC) – Sub-Clause 14.6:

14.6.1 **The IPC:** amount that “*the Engineer fairly **considers** to be due*”

14.6.2: **Withholding (amounts in) an IPC:** Engineer to give Notice and “***detail his/her calculation** of the amount and state the **reasons** for it being withheld*”

14.6.3: **Correction or modification:**

→ Engineer can correct/modify previous IPC

→ Contractor can identify amount(s) not certified but to which he considers he is entitled → Engineer to correct in next IPC

If Contractor is not satisfied with next IPC, can refer it to the Engineer → proceed under 3.7 [*Agreement or Determination*].

## Payment – Sub-Clause 14.7:

Periods for payment **as stated in Contract Data**, but default periods

- advance payment: 21 days after Employer receives the Advance Payment Certificate
- interim payment: 56 days after Engineer receives the Statement
- final payment: default 56 days after Employer receives the FPC





## Care of the Works

### Clause 17 [Care of the Works and Indemnities]



sub-clause [*Limitation of Liability*] moved from Clause 17 under FIDIC1999 to become the last sub-clause of Clause 1 in FIDIC2017  
- Contractor's 'fit-for-purpose' indemnity **included** in the limitation!



**Sub-Clause 17.1 [*Responsibility for Care of the Works*]:** ~ wording of 17.2 of FIDIC1999, except liability for loss/damage - now addressed under 17.2

**Sub-Clause 17.2 [*Liability for Care of the Works*]:** sets out where the Contractor is liable and not liable for loss/damage caused to the Works  
Contractor to rectify all loss/damage

- if not liable, must give Notice → Engineer's Instruction → Sub-Clause 13.3.1
- if causes of loss/damage are combination of Employer's and Contractor's liability → Contractor can claim "*a proportion of EOT and/or Cost Plus Profit*"

**Sub-Clause 17.3 [*Intellectual and Industrial Property Rights*]:** ~ 17.5 of FIDIC1999

**Sub-Clause 17.4 [*Indemnities by Contractor*]:** ~ 1<sup>st</sup> paragraph of 17.1 of FIDIC1999  
plus for Contractor's design: indemnity for Works not being fit-for-purpose

**Sub-Clause 17.5 [*Indemnities by Employer*]:** ~ 2<sup>nd</sup> paragraph of 17.1 of FIDIC1999

**Sub-Clause 17.6 [*Shared Indemnities*]:** each Party's liability to indemnify the other Party to be reduced proportionately





## Insurances

### Sub-Clause 19.1 [General Requirements]

- where Contractor responsible: Employer's consent to the insurer & terms
- Contractor to notify insurers of changes to Works (in scope, nature, timing)
- Contractor responsible for adequacy and validity of insurances
- "*deductible limits*" of each insurance: as stated in Contract Data
- copies of insurance policies & receipts for payment of premiums to Employer
- failure by Contractor → Employer can take out/maintain insurance → deductions from payments due from Contractor
- one Party fails to comply with the terms of insurance policy → other Party indemnified
- shared liability → loss proportionate to each Party's liability under s-c 17 or 18



### Sub-Clause 19.2 [Insurance to be provided by the Contractor]

**Sub-Clause 19.2.1:** insurance for the Works: (= '*construction all-risks*')

**Sub-Clause 19.2.2:** insurance for Contractor's Equipment

**Sub-Clause 19.2.3:** insurance for "*Liability for breach of professional duty*" (= '*professional indemnity*') - **to include fit-for-purpose only if stated in Contract Data**

**Sub-Clause 19.2.14:** insurance for injury to persons and damage to property (= '*3rd party liability*')

**Sub-Clause 19.2.5:** insurance for injury to employees (= '*employer's liability*')

**Sub-Clause 19.2.6:** other insurances required by law / local practice

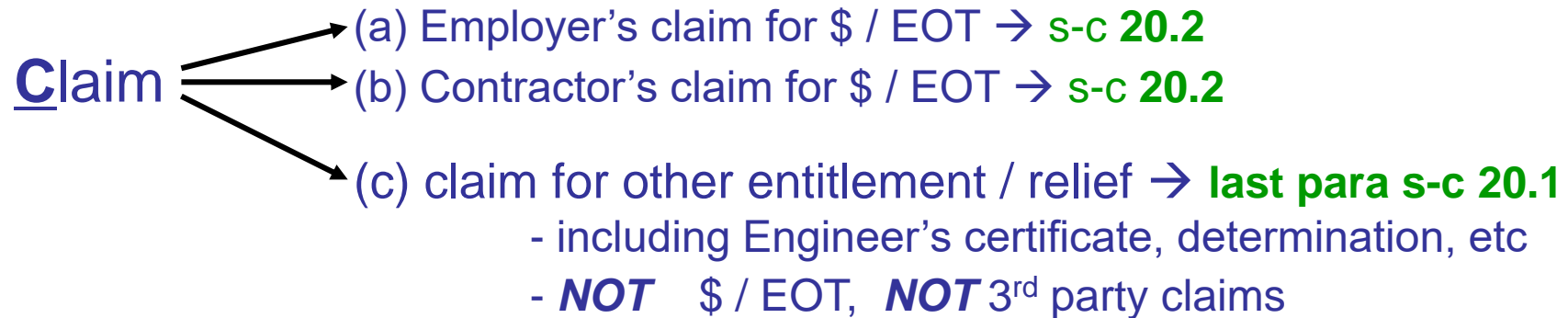


## Outline of amended CLAIMS provisions:

New definition: “**Claim**” - a **request or assertion** for an **entitlement or relief**

⇒ **ANY entitlement / relief .... not just for time and/or money**

### Claims – Sub-Clause 20.1



#### **last para s-c 20.1:**

→ where the other Party (or Engineer) has disagreed with the requested entitlement  
not a 'Dispute' → Notice to Engineer “**as soon as practicable** after the  
claiming Party becomes aware of the disagreement”  
+ details of claiming Party's case and the disagreement



## Sub-Clause 20.2 [*Claims for Payment and/or EOT*]

**20.2.1 [*Notice of Claim*]:** ~ wording 1<sup>st</sup> & 2<sup>nd</sup> paras of 20.1 of FIDIC1999 → **28 days**  
but: “Contractor” replaced with “claiming Party”

**20.2.2 [*Engineer’s initial response*]:** Engineer to give Notice < 14 days if claim is **time-barred**, with reasons. No Notice < 14 days: Notice of Claim deemed valid  
→ if Claiming Party disagrees with Engineer’s Notice or circumstances to justify late Notice: include in the fully detailed claim

**20.2.3 [*Contemporary Records*]:** “records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim”  
+ wording 4<sup>th</sup> paragraph of 20.1 FIDIC1999

**20.2.4 [*Fully detailed Claim*]:**

→ facts, law, records, quantum  
to be submitted < **84 days** after event / circumstance  
or other period agreed with the Engineer/Employer’s Representative



→ if **statement of contractual/legal basis** not submitted, claim can be **time-barred**.  
- Engineer to give Notice < 14 days if claim is time-barred, with reasons  
- no Engineer’s Notice < 14 days → Notice of Claim deemed valid  
- if claiming Party disagrees or circumstances to justify late: give Notice with details  
→ Engineer to review during agreement/determination of the Claim



## 20.2.5 [Agreement or determination of the Claim]:

→ by Engineer in RB2017 & YB2017 under 3.7

*by Employer's Representative in SB2017 under 3.5*

- if a Notice of time-bar previously given and claiming Party has disagreed or circumstances to justify late :

**the time-bar can be waived** in the agreement/determination of the Claim

- if Engineer asks for additional information: *“he/she shall nevertheless give his response on the contractual or other basis of the Claim within the time limit for agreement under Sub-Clause 3.7.3”*

## 20.2.6 [Claims of continuing effect]:

→ interim claims at monthly intervals

→ *“final fully detailed claim”* < 28 days after end of effects  
or other period agreed with the Engineer → 20.2.5 applies



## 20.2.7 [General Requirements]:

→ Engineer to include in IPC *“such amounts for any Claim as have been reasonably substantiated as due”*

→ Employer's entitlement to claim / set-off / deduction only by complying with 20.2

→ ~ wording last para of 20.1 of FIDIC1999





## Outline of Disputes provisions

as in FIDIC1999: dispute → DAAB → arbitration

...but **standing DAAB, separate Clause 21,**  
**new definitions: 'Dispute', 'DAAB'**



**Sub-Clause 21.1 [Constitution of the DAAB]:** ~ 20.2 of FIDIC1999

DAAB member(s) to be selected from 6 names in Contract Data:

**3 names by Employer, 3 names by Contractor**

**Sub-Clause 21.2 [Failure to Appoint DAB Member(s)]:** ~ 20.3 of FIDIC1999

new conditions for appointment of DAB member by appointing entity/FIDIC:

- if either Party fails to agree a member nominated by the other Party within stated time, or
- if Parties have agreed DAB member but one Party refuses / fails to sign the DAAB agreement  
<14 days after request by other Party

→ after appointment by appointing entity/FIDIC:

*“the Parties and the member so appointed shall be **deemed to have signed** and be bound by a DAB agreement under which:*

- (i) the monthly services fee and daily fee shall be as stated in the terms of the appointment; and*
- (ii) the law governing the DAB agreement shall be the governing law of the Contract defined in Sub-Clause 1.4 [Law and Language]. ”*



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## Sub-Clause 21.3 [Avoidance of Disputes]:

*“If the Parties so agree, they may jointly request ... the DAAB to provide assistance and/or informally discuss and attempt to **resolve any issue or disagreement** that may have arisen” or DAAB may invite the Parties to make a joint request*

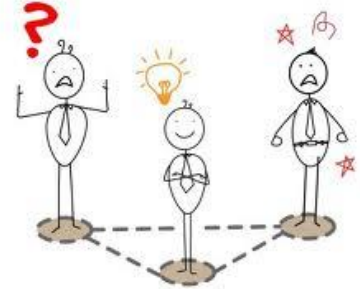
## Sub-Clause 21.4 [Obtaining DAAB's Decision]:

21.4.1 Reference of a Dispute to the DAAB

21.4.2 The Parties' obligations after the reference

21.4.3 The DAAB's decision

21.4.4 Dissatisfaction with DAAB's decision



## Sub-Clause 21.5 [Amicable Settlement]: ~ 20.5 of FIDIC1999, but **28 days**

## Sub-Clause 21.6 [Arbitration]: ~ 20.6 of FIDIC1999, but added:

*“In any award dealing with costs of the arbitration, the arbitrator(s) may take account of the extent (if any) to which a Party failed to cooperate with the other Party in constituting a DAAB under Sub-Clause 21.1 [Constitution of the DAAB] and/or Sub-Clause 21.2 [Failure to Appoint DAAB Member(s)]”*

## Sub-Clause 21.7 [Failure to Comply with DAAB's Decision]: amended in line with FIDIC Guidance Memorandum, dated April 2013

## Sub-Clause 21.8 [No DAAB in place]: ~ 20.8 of FIDIC 1999



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## Guidance Notes

-1999 contracts ~22 pages

-2017 contracts ~48 pages

→ new guidance!



In the Introduction to the Guidance Notes:

*“FIDIC strongly recommends that the Employer, the Contractor and all drafters of the Special Provisions take all due regard of **the five FIDIC Golden Principles** ...*

*... necessary to **ensure that modifications to the General Conditions:***

- are limited to those necessary for the particular features of the Site and the project, and necessary to comply with the applicable law;*
- do not change the essential fair and balanced character of a FIDIC contract; and*
- the Contract remains recognisable as a FIDIC contract.”*

And: *“Each **time period** stated in the General Conditions is what FIDIC believes is reasonable, realistic and achievable ... If consideration is given to changing any such stated time period ...care should be taken to ensure that the amended time period remains **reasonable, realistic and achievable in the particular circumstances.**”*



## Examples of new guidance:

- **Milestones:** FIDIC suggests an additional sub-clause under Clause 4
- **Limitation of Liability:** alternative wording for Sub-Clause 1.15 (1.14 in the SB2017)
- **Ownership of Plant and Materials:** additional text suggested for Sub-Clause 7.7
- **Amicable Settlement of disputes:** under Sub-Clause 21.5  
*“Rather than considering the 28 day period stated in this Sub-Clause as a ‘cooling-off period’, FIDIC recommends that the Parties ... **actively engage** with each other with a view to settling their Dispute ...”*

# Building Information Modelling - BIM:

→ new FIDIC “Advisory Notes”

BIM = “a mechanism to provide an environment where all parties have access to information relevant to their role in the design and construction of a project.”

***"FIDIC contracts are designed to be fair to all parties and are considered suitable for use with projects featuring the use of BIM - providing that the parties recognise the difference in approach and use the contract appropriately"***







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Thank You for  
Your Kind  
Attention

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