

MEMORANDUM

The New FIDIC Yellow Book – What Do You Need to Consider?

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#1 INTRODUCTION

1.1 THE NEW FIDIC EDITIONS AND THE AIM OF THIS MEMORANDUM

On 5 December 2017, new editions of the FIDIC Yellow, Red and Silver Book were released. These new editions, which are now slowly starting to be used, have been substantially changed compared to the previous 1999 editions.

It should be mentioned that the very well-known 1999 editions still are being sold. It can be assumed that both the new 2017 editions and the old 1999 editions will be in use during a rather long transitional period.

This memorandum is only focusing on the new FIDIC Yellow Book. However, many of the changes described herein also apply for the new FIDIC Red Book and the new FIDIC Silver Book. As before, the FIDIC Rainbow Suite will also in the future be a “matching set” wherever possible.

The aim of this memorandum is to:

- Provide a practical overview of the most important changes in the new FIDIC Yellow Book.
- Give general guidance to project managers with respect to the many new formal requirements for notification of claims in the new FIDIC Yellow Book.

1.2 ABOUT THE AUTHOR

Per Mildner is a Partner of Lindahl with key expertise in industrial and power projects. He has 25 years of experience in negotiating large and complex industrial and power contracts based upon FIDIC.

Per Mildner is each semester engaged by both the Faculty of Law at Lund University and the Faculty of Law at Stockholm University to lecture on FIDIC and how the FIDIC conditions differ from Swedish standard contracts such as AB 04, ABT 06 and ABA 99.

Questions regarding FIDIC? Please contact Per Mildner at +46 70 630 66 65 or per.mildner@lindahl.se.

#2 EXECUTIVE SUMMARY

The new FIDIC Yellow Book means:

- New formal procedures with an increased burden on the parties to follow specific requirements for notifications.
- An increased likelihood that a party that fails to strictly follow the formal procedures will lose the right to make a claim (both with respect to extension of time and cost compensation), also if the claim as such is justified.
- That the Employer’s claims will be subject to the same formal procedures as the Contractor’s claims.
- A substantially increased risk exposure for the Contractor in connection with the requirement that the design shall be fit for the purpose.
- That it is uncertain how some of the carve-outs from the limitations of liabilities shall be interpreted.

It can be highly recommended that all project managers, both on the Employer and the Contractor side, receive training in the new formal procedures before leading projects based on the new FIDIC Yellow Book. The risk to lose a right to a justified claim is otherwise substantial, see item 5 below.

#3 WHY HAS FIDIC CHANGED THE YELLOW BOOK?

Since the number of disputes in industrial plant projects continues to rise in an alarming manner, the core aim of the changes has been to achieve an increased clarity and certainty to reduce the risk of disagreements regarding the interpretation of the contract terms.

In line with the aforesaid, FIDIC has made the contract provisions more prescriptive but also, to reduce the risk for disputes, introduced step-by-step project management and procedural mechanisms, including time bars and an advanced warning obligation. Also the Dispute Adjudication Board - re-named the Dispute Avoidance/Adjudication Board - has been assigned a new complimentary role.

Other aims with the changes have been to obtain a clearer distinction between claims and disputes and to facilitate a better collaboration between the parties and the Engineer.

The general result of the aforesaid changes is a more precise and detailed contract – the length has increased from 63 to 109 pages - but with many more notification requirements. A party that fails to observe those requirements will suffer hard.

#4 SUMMARY OF THE MOST IMPORTANT CHANGES IN THE NEW FIDIC YELLOW BOOK

The most important changes in the new FIDIC Yellow Book can be summarized as follows.

4.1 DIFFERENT TERMINOLOGY

4.1.1 The Particular Conditions and the Special Provisions

In the 1999 editions, certain crucial contract information (governing law, level of the delay damages etc.) was inserted in a document called the “Appendix to Tender” and changes to the General Conditions were made in the “Particular Conditions”.

In the new FIDIC Yellow Book, the aforesaid crucial contract information shall be set out in the document “Contract Data” and changes to the General Conditions be made in the “Special Provisions”. Those two documents are now together called the “Particular Conditions”, which consist of Part A – Contract Data and Part B – Special Provisions.

It can be assumed that this change of terminology initially will cause some confusion and misunderstandings.

4.1.2 Claims and Disputes

To obtain a clearer distinction between claims and disputes, the new FIDIC Yellow Book has introduced definitions of a “Claim” and a “Dispute”. Further, Clause 20 of the 1999 edition has been divided into Clauses 20 (Employer’s and Contractor’s Claims) and 21 (Disputes and Arbitration).

However, the procedural rules of the new Clause 20 prescribe very different procedural paths for different kinds of claims without using separate definitions for those different kinds of claims, see further in item 5 below. It can be assumed that this initially will cause some confusion and misunderstandings.

4.1.3 May and Shall

There is in the new FIDIC Yellow Book a more enhanced separation of “may” and “shall” and it has in the definitions been clarified that (i) “May” means that the relevant Party has the choice whether to act or not, and (ii) “Shall” means that the relevant Party has an obligation to perform the duty referred to.

4.1.4 Force Majeure and Exceptional Events

The expression “Force Majeure” has been replaced by the expression “Exceptional Events”. Minor editorial changes have been made to the Force Majeure/Exceptional Events clause as such but it has basically the same content and application.

4.1.5 Dispute Adjudication Board and Dispute Avoidance/Adjudication Board

The Dispute Adjudication Board has been re-named the “Dispute Avoidance/Adjudication Board” (but the abbreviation is still “DAAB”). This highlights a new complementary role of the DAAB – to provide assistance and/or informally discuss and attempt to resolve an issue or disagreement. This can be initiated either by the Parties or by the DAAB, if it becomes aware of an issue or disagreement. Due to this new role of the DAAB, it shall in the new FIDIC Yellow Book be standing, i.e. its members shall be appointed very early after the formation of the contract.

The DAAB is not bound in any future dispute resolution by any advice given during the informal assistance process.

4.2 THE ENGINEER AND HIS/HER DETERMINATIONS

The Engineer is a distinctive feature of (most of) the FIDIC contracts. In the new FIDIC Yellow Book, the role of the Engineer has been developed.

The Engineer’s obligation to try to make the parties to agree has been extended but is also subject to a time limit of 42 days.

In case no agreement is reached, the Engineer shall, as before, make a determination. In addition to the well-known and remaining provision that the Engineer in connection with determinations shall make “fair determinations”, an initial provision stating that the Engineer shall “act neutrally between the Parties and shall not be deemed to act for the Employer” has been added. The intention is to clarify that the Engineer shall treat both Parties even-handedly, in a fair minded and unbiased manner.

It has in this context also been added that there shall be no requirement for the Engineer to obtain the Employer’s consent before the Engineer makes a determination. It can be assumed that some employers will try to change this provision by the Special Provisions.

The demands on the Engineer’s professional skills have generally increased – he or she must now be “a professional engineer” and “be fluent in the ruling language” of the Contract.

It has under the 1999 edition been acknowledged that the Engineer can be an employee of the Employer. It may be questioned if this will be possible with the new provisions regarding neutrality. The general loyalty principle in employment contracts, that apply in many countries, will probably also be difficult to adhere to for an Engineer that is an employee of the Employer.

When the Engineer shall make a determination, such determination is in the new FIDIC Yellow Book subject to a time limit of 42 days (after an initial 42 days period for trying to find an agreement). If no determination is made within the said time and the matter concerns a claim, the Engineer shall be deemed to have rejected the claim.

4.3 STEP-BY-STEP PROJECT MANAGEMENT AND NEW PROCEDURAL MECHANISMS

4.3.1 General

As set out above, the main reason for the increased length of the Yellow Book (from 63 to 109 pages) is that FIDIC has made many clauses more prescriptive and introduced step-by-step project management and new procedural mechanisms. Although this means that it is more exactly set out what is expected from the Employer, the Contractor and the Engineer, it has resulted in an increased burden on the parties to follow new administrative requirements and an increased likelihood that a party that fails to follow the rules will lose the right to make a claim.

4.3.2 Notices

The expression “Notice” has been defined and all notices to be sent under the new administrative requirements must be identified as a notice. However, there is no obligation to include reference to the sub-clause under which the notice is submitted.

When e-mail is used for notices, it must be sent to an e-mail address stated in the Contract Data and be transmitted by an electronic address uniquely assigned to an authorized representative of the submitting party. The purpose is to stop the – if a party at a late stage figures out that he might have a claim – not unusual hunt for old e-mails from anybody in the project organization that somehow might have mentioned the possible claim.

A notice sent by e-mail shall be deemed to have been received on the day after transmission, provided that no non-delivery notification was received by the sender. Thus, there is no requirement that the receiver actively must confirm the receipt as in the Swedish ABA 99.

4.3.3 The Programme

The demands on the Programme and on the record-keeping have been substantially increased and is now up to date with the requirements that many qualified employers have applied for some years. It means, among other things, that all activities in the Programme must be logically linked, showing the earliest and latest start and finish dates for each activity, and that the float shall be openly stated. This also applies to any revisions of the Programme.

4.3.4 Advanced Warning

The provision in the 1999 edition stating that the Contractor should give notice in case of probable future events or circumstances which adversely could affect the Works has been replaced with a NEC-inspired Advanced Warning clause.

The new Advanced Warning clause obligates both parties to notify in many different cases that could affect the Works. It has been inserted to promote the parties’ collaboration but unlike NEC, there is no specific remedy for a failure to do so. However, it should be kept in mind that neither the 1999 edition, nor the 2017 edition of the FIDIC Yellow Book are “sole and exclusive remedy” contracts. The governing law will always, within the boundaries of the general limitations of liability, apply and it has not been the intent of FIDIC to interfere with remedies available at law.

Thus, although no remedy is stated in connection with the new Advanced Warning clause, it is advisable for a party to comply with it rather strictly.

4.3.5 Claims

The formal requirements for claims now also apply for the Employer. Thus, unlike the 1999 edition, the Employer’s claims will in the new FIDIC Yellow Book also be subject to time bars.

The new provisions regarding claims are much more detailed with a very formalistic approach to notifications to be sent within certain time periods and with a specific content, all subject to time bars. Those new provisions regarding claims are accounted for in item 5 below.

4.4 FIT FOR PURPOSE – INCREASED RISK EXPOSURE FOR THE CONTRACTOR

Although the fit for purpose obligation as such has been slightly altered in favor of the Contractor, a rather substantially increased risk exposure for the Contractor in this respect has become the over-all result of the new FIDIC Yellow Book.

The fit for purpose obligation is no longer tied to the general “purposes for which the Works are intended as defined in the Contract”. The obligation is instead tied to the more specific “purpose(s) for which they are intended, as defined and described in the Employer’s Requirements (or, where no purpose(s) are so defined, fit for their ordinary purpose(s))”. Provided that the purpose is properly defined and described in the Employer’s Requirements, it will have a limiting effect for the Contractor.

However, the new FIDIC Yellow Book has also been amended with a new clause stating that “the Contractor shall indemnify and hold harmless the Employer against all acts, errors or omissions by the Contractor in carrying out the Contractor’s design obligations that result in the Works (or Section or Part or major item of Plant, if any), when completed, not being fit for the purpose(s) for which they are intended under Sub-Clause 4.1”.

Although subject to the general limitations of liability, the introduction of the aforesaid indemnity will of course increase the Contractor’s risk exposure.

4.5 THE EMPLOYER’S RIGHT TO TERMINATE FOR CONVENIENCE

In the 1999 edition, the Employer had the right to terminate the Contract for its convenience, provided that such termination was not made to execute the Works himself or to arrange for the Works to be executed by another contractor.

In the new FIDIC Yellow Book, the Employer has an unrestricted right to terminate the Contract for its convenience and execute the Works himself or to arrange for the Works to be executed by another contractor, provided that the Contractor has received the payment(s) to be made by the Employer in connection with the termination.

4.6 CONCURRENT DELAYS

A concurrent delay is a delay that is attributable to both the Employer and the Contractor and occur at the same time. The new FIDIC Yellow Book introduces a provision on how such concurrent delays shall affect the Contractor’s entitlement to extension of time.

The thought is that rules and procedures on how to assess such situations shall be included in the Special Provisions. If such rule and procedures are not included in the Special Provisions, the assessment shall be made “as appropriate taking due regard of all relevant circumstances”.

Although the fallback provision is vague, it serves as a reminder that a Contractor shall not, in case of concurrent delays, consider it self-evident that an extension of time for the full period of the Employer’s delay will be granted. It can also be assumed that Employers will make a harsh interpretation of the provision to the disadvantage of the Contractor.

4.7 THE REMEDYING OF DEFECTS

The structure of the provisions regarding defects is generally maintained but there are on a detailed level many differences between the 1999 edition and the new FIDIC Yellow Book. Some of the changes are:

- The Contractor is entitled to cost plus profit if there is an unreasonable delay by the Employer in permitting access to the Works.
- The Employer’s right to an extension of the Defects Notification Period has been over-all limited to a period of two years after the expiry of the Defects Notification Period stated in the Contract Data.
- In the 1999 edition, the Employer could fix a final date for the remedying of defects if the Contractor had “failed” to remedy, which has been suggested to be interpreted as regardless of the cause of the delay. In the new FIDIC Yellow Book, the Employer can fix such date if the remedying of a defect is “unduly delayed”.
- Due to changed wording in some reference clauses, it has been suggested that the Employer’s unlimited right in the 1999 edition to have any defects or damage remedied during the Defects Notification Period, also if the Contractor was not responsible for the defect or damage, could be questioned under the new FIDIC Yellow Book.

4.8 LIMITATIONS OF LIABILITY

Clause 17 was in the 1999 version named “Risk and Responsibility” and contained indemnities, care of the Works provisions and limitations of liability. In the new FIDIC Yellow Book, Clause 17 has been re-named “Care of the Works and Indemnities” and only covers the said issues. The limitations of liability have been moved to a separate Sub-clause 1.15 and partly been re-worded.

4.8.1 Indirect and Consequential Loss or Damage

It should initially be mentioned that as in the 1999 edition, also the new FIDIC Yellow Book contains the “*other than under*”-wording in the limitation, meaning that it gives the suffering party a contractual right to claim compensation for indirect and consequential loss or damage if any of the carve-outs are applicable. The underlying rules of the governing law – that might regulate the issue more restrictively – are by the said wording not applicable.

In the 1999 edition, there were two carve-outs from the limitation (exclusion) of liability for indirect and consequential loss or damage. In the new FIDIC Yellow Book, there are seven carve-outs.

Some of the “new” carve-outs are caused by more specific references. However, three new carve-outs should be highlighted:

- **Delay damages:** Although the purpose of this carve-out is to make sure that a Contractor not argues that predetermined Delay Damages include loss of profit etc. and therefore cannot be fully enforced, the over-all effect of the carve-out seems to result in a possibility for the Employer to argue that he is entitled to claim loss of profit etc. in case of a termination of the Contract for cause.
- **Variations:** If a variation means that any part of the Works is omitted by agreement and will be carried out by others, the Contractor will be entitled to claim loss of profit. This simple rule has obviously been FIDIC’s intention but the over-all wording might also give rise to the interpretation that the Contractor is entitled to loss of profit in many more variation situations.
- **Payments after termination for Employer’s convenience:** Although the Contractor is entitled to payment for loss of profit in connection with the Employer’s termination for convenience, it should be noted that any such payment shall, unless agreed, be determined by the Engineer and set out in a Payment Certificate. Only the amount set out in the Payment Certificate is subject to the carve-out.

4.8.2 The total liability of the Contractor

Although slightly re-worded to match other changes, the provision regarding the total liability of the Contractor essentially has the same meaning, with the same carve-outs, in the new FIDIC Yellow Book as in the 1999 version.

As before, the total liability of the Contractor shall be the amount set out in the Contract Data (before the Appendix to tender) or, if no such amount is stated, 100% of the Accepted Contract Amount.

#5 CLAIMS, NOTIFICATIONS AND TIME BARS

5.1 GENERAL

In the new FIDIC Yellow Book, the same provisions will apply for the Employer’s claims as for the Contractor’s claims. Thus, also the Employer’s claims will now be subject to notification obligations and time bars. This is of course an improvement for Contractors.

However, a new division between different kind of claims has also been introduced in the new FIDIC Yellow Book.

If (a) the Employer considers that it is entitled to additional payment, reduction of the Contract Price and/or an extension of the Defects Notification Period, or (b) the Contractor considers that it is entitled to additional payment or an extension of time (for the purposes of this memorandum all together the “**Main Claims**”), the very long and detailed Sub-clause 20.2 shall apply.

If the Employer or the Contractor considers that it is entitled to any other entitlement or relief of any kind whatsoever than the aforesaid (for the purposes of this memorandum the “**Other Claims**”), the claiming party shall by notice refer the claim to the Engineer for agreement or determination.

It should be noted that the aforesaid means that very different procedural paths for different kinds of claims are prescribed in the new FIDIC Yellow Book without the use of separate definitions for those different kinds of claims. Please observe that the definitions above are not included in the new FIDIC Yellow Book, they are only used for educational purposes in this memorandum.

5.2 THE MAIN CLAIMS

With respect to the Main Claims, a strict claims procedure, with content requirements, must be followed. The claim will otherwise be time-barred. The said procedure can be chronologically summarized as follows:

- A “Notice of Claim”, describing the event or circumstance giving rise to the claim, must be given to the Engineer as soon as practicable and in no event later than **28 days** after the claiming party became aware, or should have become aware, of the event or circumstance. If such Notice of Claim is not submitted, the claim will become time-barred.

- If the Engineer considers that the claiming party has failed to give the Notice of Claim within the 28 days period, the Engineer shall within **14 days** from receipt of the Notice of Claim give such notice to the claiming party.
- If the Engineer does not give notice in accordance with the aforesaid, the Notice of Claim shall be deemed to be valid, provided that the other party may object by a notice. In such case, the Engineer shall proceed to determine the matter.
- If the claiming party disagrees with a notice from the Engineer that a Notice of Claim has been submitted too late or considers that there are circumstances which justify late submission, the claiming party shall in its fully detailed claim (see below) include details of such disagreement or why such late submission is justified.
- The Contractor shall keep such contemporary records as may be necessary to substantiate a claim and the Engineer may monitor those records and instruct the Contractor to keep additional contemporary records.
- A fully detailed claim shall be submitted within **84 days** after the claiming party became aware of, or should have become aware, of the event or circumstance giving rise to the claim. Such fully detailed claim shall, among other things, include a statement of the contractual and/or other legal basis of the claim.
- If such fully detailed claim is not submitted within the said period, the Notice of claim shall be deemed to have lapsed, provided that the Engineer within **14 days** after the time limit of 84 days expired gives a notice to this effect.
- If the Engineer does not give such notice within the said 14 days, the Notice of Claim shall be deemed to be valid, provided that the other party may object by a notice. In such case, the Engineer shall proceed to determine the matter.
- If the claiming party disagrees with a notice from the Engineer that the fully detailed claim has been submitted too late or considers that there are circumstances which justify late submission, the claiming party shall in its fully detailed claim include details of such disagreement or why such late submission is justified.¹
- If the event or circumstance giving rise to the claim has a continuing effect, there is a provision regulating that the fully detailed claim shall be regarded as interim and that further fully detailed claims shall be submitted on a monthly basis. When the continuing effect has lapsed, the claiming party shall submit a final fully detailed claim **within 28 days**.

It should be particularly noted that it is not only the time periods for notices that are subject to time bars. **The time bars are also content orientated**, meaning that even if a notice is submitted in time, the claim can be time barred if the content of the notice is not in compliance with the applicable provision.

When the procedure above has been completed, the Engineer shall proceed to agree or determine the additional payment/reduction of the Contract Price (if any) and/or the extension of time/extension of the Defects Notification Period (if any) which the claiming party is entitled under the Contract. In case a party has objected to a notice from the Engineer that a Notice of Claim or a fully detailed claim has been submitted to late, also this issue shall be subject to agreement or determination.

When the Engineer proceeds to agree or determine a claim, the Engineer shall initially consult with the parties in an endeavor to reach agreement. If such agreement is not reached, the Engineer shall determine the matter. A notice of an agreement shall be given **within 42 days**, otherwise the Engineer has a **further 42 days** period to give notice of his or her determination. Thus, the claim must be decided upon **within 84 days** (from the date the Contractor's fully detailed claim was submitted). Please note, however, that how these time periods shall be calculated are subject to detailed provisions which, for reasons of space, cannot be accounted for here.

If the Engineer fails to give notice of agreement or determination within the above-mentioned time periods, **the Engineer shall be deemed to have given a determination rejecting the claim**. Thus, a claiming party must due to the below mentioned keep track of the time period(s) available to the Engineer.

As in the 1999 edition, the Engineer's determination is binding unless it is altered by the Dispute Avoidance/Adjudication Board. A party that is dissatisfied with a determination by the Engineer must give "Notice of Dissatisfaction" **within 28 days** after receiving the Engineer's notice with the determination. The determination will otherwise be final and binding. If a Notice of Dissatisfaction is given, the Dispute Avoidance/Adjudication Board shall give its decision **within 84 days**. The decision is binding unless altered by arbitration.

If a party is dissatisfied with a decision by the Dispute Avoidance/Adjudication Board, he must give Notice of Dissatisfaction **within 28 days** after receiving the Dispute Avoidance/Adjudication Board's decision. The Dispute Avoidance/Adjudication Board's decision will otherwise be final and binding. If such notice is given, both parties shall try to settle the issue within a **28 days period**. Thereafter, arbitration may be commenced.

The procedure described above will of course give the project organizations on both sides an increased burden and necessitate a more professional claims handling.

¹ If the fully detailed claim has been submitted after the 84 days period but before the Engineer's notice it seems unclear how the situation shall be handled.

5.3 THE OTHER CLAIMS

With respect to the Other Claims, the claiming party shall by notice refer the claim to the Engineer for agreement or determination. The Other Claims are not subject to the detailed procedure set out above but a notice, including the details of the disagreement, shall be given as soon as practicable from the claiming party became aware of the disagreement. The Engineer shall then, within the time limits set out above for the Main Claims (42 + 42 days), proceed to agree or determine the matter.

#6 MISCELLANEOUS

This memorandum is a short summary of the main differences between the 1999 edition and the new FIDIC Yellow Book. The account above is not complete and there are many other differences between the said contracts. It is also so that the matters accounted for above are not complete in every detail. Thus, this memorandum shall not be regarded as legal advice (neither generally, nor in any specific matter) and readers are asked to contact Per Mildner before acting on or relying upon the information herein.

Lindahl

