



ECV Consultancy Ltd

**ECV REVIEW**  
**No. 1**

**INDEPENDENT ASSESSMENT ON**  
***2022 CORRECTIONS AND AMENDMENTS TO***  
***THE 2017 EDITIONS OF FIDIC CONTRACT***  
***CONDITIONS FOR***

**CONSTRUCTION - RED BOOK**  
**PLANT & DESIGN-BUILD - YELLOW BOOK**  
**EPC TURNKEY PROJECTS - SILVER BOOK**

**BY**

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**COMMENTS ON PRINCIPAL CONTRACTUAL CHANGES  
IN 2022 REPRINT OF 2017 FIDIC CONTRACTS**

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- 4. Sub-Clause 15.21 Termination by Employer**
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## **A. GENERAL CONDITIONS**

### **1. Sub-Clause 1.1.6 Definition of Claim**

Clarifies that a Claim shall not be a matter to be agreed or determined under Sub-Clause 3.7 that is listed under new item a) in this Sub-Clause 3.7

The items listed refer to matters within the Contract where the Engineer is required to address the matter under Sub-Clause 3.7 and includes all Variations.

### **2. Sub-Clause 1.1.29 Definition of Dispute**

Definition totally replaced with a Dispute arising only through the procedures of Sub-Clause 3.7. Previous definition was misleading.

However, there are other reasons for a Dispute as set out in revised Sub-Clause 21.4 but these are not cross-referenced which may cause confusion

### **3. Sub-Clause 3.7 Agreement or Determination**

Major change as to application of this Sub-Clause which limits it to two issues only namely:

- a) list of Sub-Clauses within the Contract where it requires the Engineer to act under this Sub-Clause and
- b) any Claim as described in Sub Clause 20.1

### **4. Sub-Clause 15.2.1 Termination by Employer**

Clarifies that the condition of failures by the Contractor under item a) must also constitute a material breach of the Contractor's obligations under the Contract. However there is no clarification as to what a material breach means

### **5. Sub-Clause 16.1 (d) and 16.2 respectively Suspension and Termination by Employer**

Clarifies that if the Employer fails to comply with a binding agreement or a final and binding determination or a decision by the DAAB then such failure must constitute a material breach of the Employer's obligations under the Contract.

### **6. Sub-Clause 21.2 Failure to Appoint a DAAB Member (s)**

New condition of failure to agree relates to terms and fees of DAAB member. The issue of unresolved fees was in the DAAB Agreement but misplaced so makes sense to put here. However, it is not stated whether the potential DAAB member has to agree to this referral which would be necessary for it to become valid

In addition, the biggest change of all is to take from the Employer the right to select the Appointing Entity. Instead, this is deleted from the Contract Data and the new text imposes the President of FIDIC or his/her nominee

May be challenged by Member Associations as ante free market and against efforts to broaden adjudicator involvement regionally and at lower cost

### **7. Sub-Clause 21.4 Obtaining DAAB's Decision**

Although not referred to in the Definitions, under this revised Sub-Clause there are additional issues that constitute a Dispute where the Party may proceed immediately to refer the issue to the DAAB

The reasons for referral are:

- a) In respect of the Contractor when giving a Notice to Terminate under Sub-Clause 16.2
  - i) Engineer fails to certify IPC

- ii) The Employer fails to make payment

(Not clear why issue of non-receipt of “reasonable evidence” under Sub-Clause 16.2 (a) is not treated the same as is a termination issue?)

- b) In respect of the Contractor non-receipt of “financing charges” under Sub-Clause 14.8 with a time limit of 28 days.

(Not cross referenced to Sub-Clause 14.8 which is silent on payment period). Not sure why this issue is treated as an automatic Dispute issue. What about Engineer seeking never ending particulars and so avoiding dealing with a Contractor’s Claim, or a Party disagreeing with a Notice of an Exceptional Event by the other Party?

- c) In respect of either Party if Notices of intention to terminate or to terminate have been issued and the other Party disagree with first Party’s entitlement to give such Notice

With the requirement for some of these Notices to be justified as an undefined “material breach” of the Contract I imagine this will become a much used DAAB issue.

## **B. GENERAL CONDITIONS OF DAAB AGREEMENT**

### **1. Sub-Clause 4.1- Independence and impartiality**

The key change is to reduce from 10 years to 5 years the period of disclosure of being employed as a consultant or otherwise by the Employer, the Contractor etc.

No reason is given for this change. It purely benefits DAAB members and generally the amendments to the Agreement are as though they were written by an Adjudicators Union

## **C. GUIDANCE FOR THE PREPARATION OF PARTICULAR CONDITIONS**

### **C1. PARTICULAR CONDITIONS PART A -CONTRACT DATA**

#### **1. Sub-Clause 2.1 Right of Access to Site**

This is expanded to indicate availability of parts of the Site if not all the Site is available to the Contractor. The text still relates to availability from the Letter of Acceptance which may well cause confusion if the periods are prior to the Commencement Date which was relevant date from which access was given under the 1999 FIDIC Contracts

## **2. Sub-Clause 14.2.3**

Expanded to include for the minimum amount of certified interim payments to commence repayment of the Advance Payment (as percentage of the Accepted Contract Amount).

## **3. Sub-Clause 21.2 Failure to Appoint DAAB Member(s)**

Deleted and revision to be found in Sub-Clause text where FIDIC have unilaterally decided that any failure to agree a DAAB member must be sent to the President of FIDIC or his/her nominee

This undermines all the efforts of MAs to create national lists of Adjudicators which provides more cost effective and regionally knowledgeable members than the FIDIC Presidents list of Adjudicators

## **C2. PARTICULAR CONDITIONS PART B- SPECIAL PROVISIONS**

### **Guidance for Sub-Clause 21.1**

This refers to the removal of the independent “appointing entity” as in the 1999 and 2017 FIDIC Contracts to the contractual requirement for this to be the FIDIC President of person appointed by the President

The guidance attempts to justify this monopolistic requirement by implying only FIDIC has the “knowledge” to undertake this activity.

This view is not substantiated but does create income for the FIDIC Secretariat in undertaking the appointing duty and then allocating the DAAB appointment to an adjudicator on the Presidents list who has paid FIDIC to be on the list.

**Above assessment of 2022 Amendments provided as opinions of author without any liability but provided in good faith to assist those working with the 2017 FIDIC Contracts reprinted in 2022 with amendments**

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