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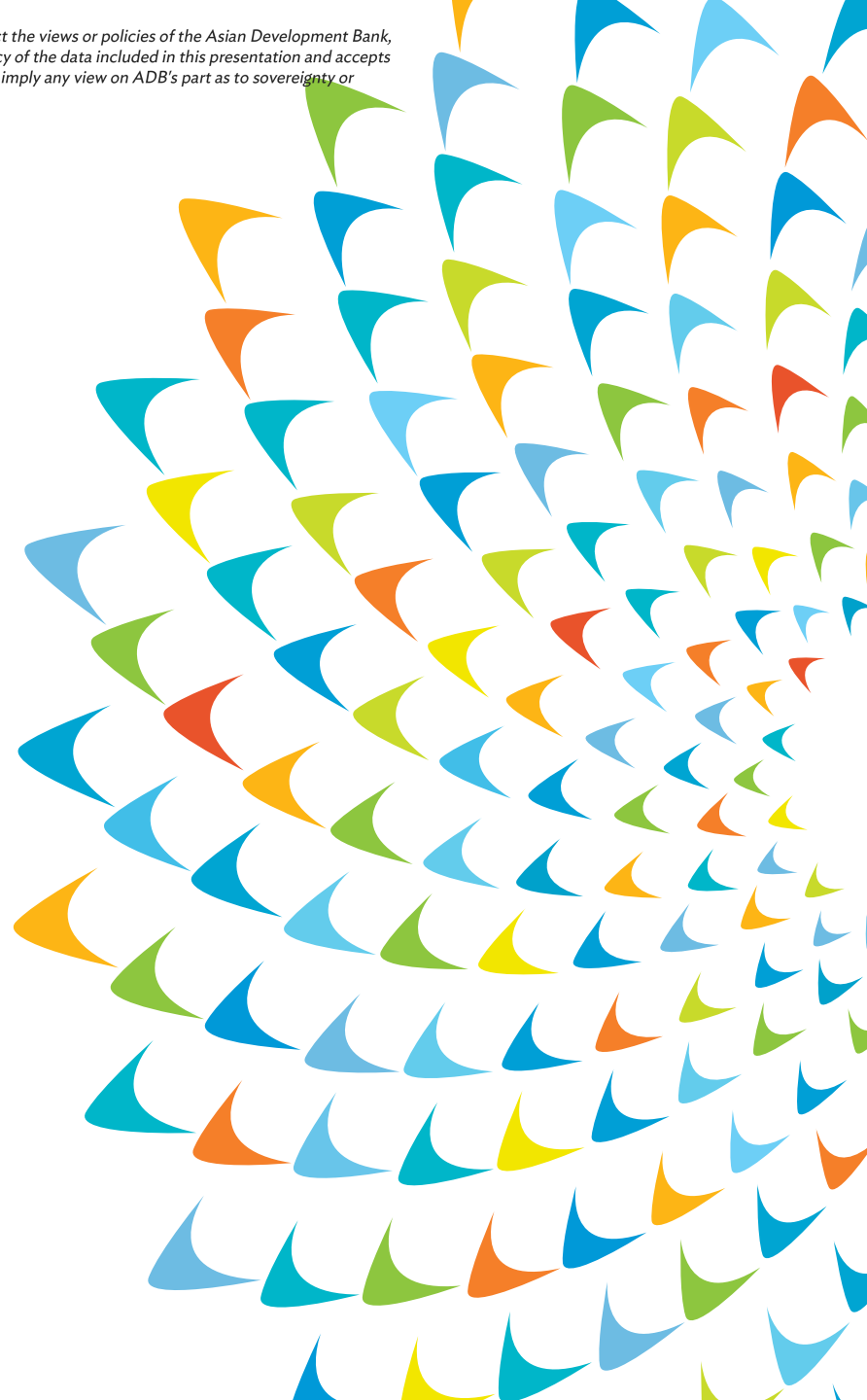


Session 1

Contract Management Transitioning from the Pink Book (June 2010) to FIDIC 2017 Red Book

Islamabad August 2023

Stephane BESSADI
**Procurement, Portfolio and Financial
Management Department**

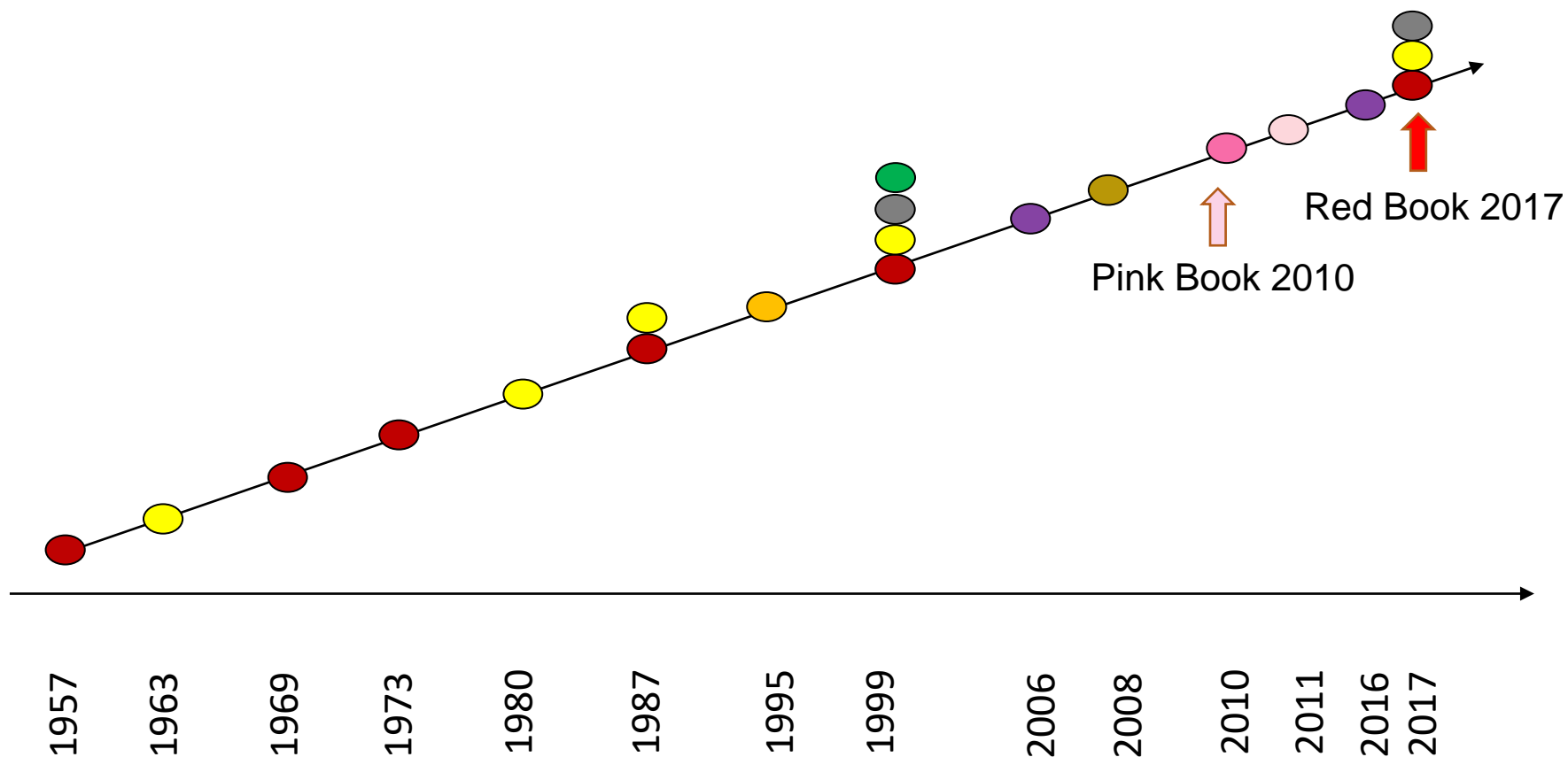




1- Why do ADB transition to the use of the FIDIC 2017 Red Book for the procurement of Large Works ?



FIDIC Contract edition before 1999

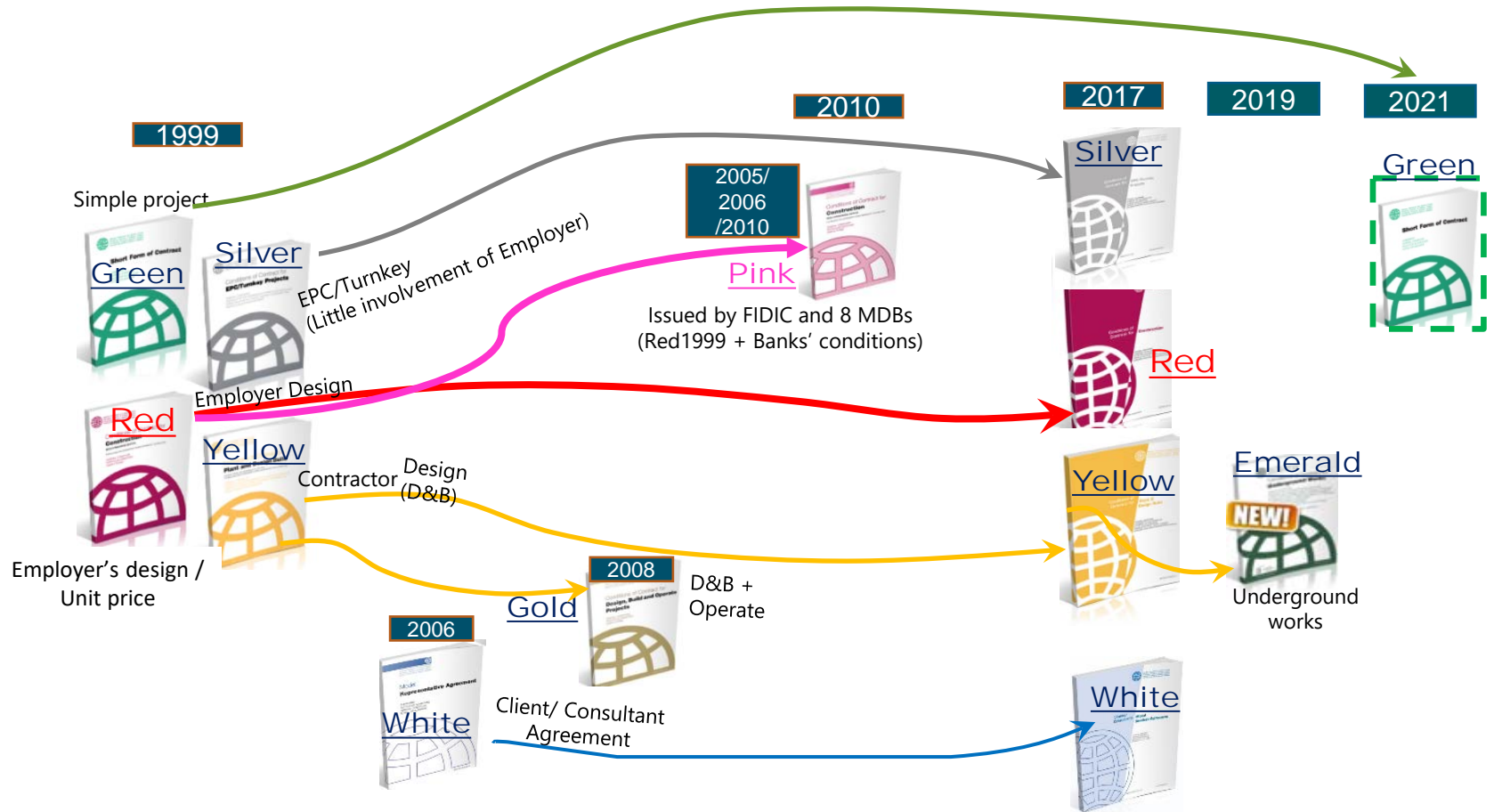


- Red Book
- Yellow Book
- Silver Book
- Pink Book





FIDIC Rainbow Suite of Contracts since 1999





FIDIC License Agreement with ADB: Key Points

License period 5 years starting on 11 Oct 2021, renewable by agreement

- License Type**
- Non-exclusive,
 - Right to refer to the FIDIC Books for ADB funded projects, where ADB SBDs are used (to be incorporated by reference)
 - Not authorized to publish any of the FIDIC Books on ADB's website or make it public in any other way due to FIDIC's copyright
 - ADB, Borrowers (consultants, contractors) required to purchase original copy of the FIDIC books from FIDIC



Go to FIDIC website (<https://fidic.org/bookshop>)

- EUR 63 (+postage fee) for hard copy version
- For electronic version

ELECTRONIC PRACTITIONER VERSION DISCOUNT RANGE

ELECTRONIC PRACTITIONER VERSION DISCOUNT RANGE

Volume Discount	Multiple Users	Nominal Price	Discounted Price per tier	Discounted Price per User
0	1	195 EUR	195 EUR	195 EUR
30%	3	585 EUR	410 EUR	137 EUR
35%	5	975 EUR	634 EUR	127 EUR
40%	15	2,925 EUR	1,755 EUR	117 EUR
50%	30	5,850 EUR	2,925 EUR	98 EUR

Working in partnership with:



FIDIC License Agreement with ADB: Licensed FIDIC Books

Short Name		Full Name	Edition
Red Book 2017		Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer	Second edition 2017
Yellow Book 2017		Conditions of Contract for Plant & Design-Build for Electrical & Mechanical Plant & for Building & Engineering Works Designed by the Contractor,	Second edition 2017
Silver Book 2017		Conditions of Contract for EPC Turnkey Projects,	Second Edition 2017
Gold Book 2008		Conditions of Contract for Design, Build and Operate Projects,	First Edition 2008
White Book 2017		Client/Consultant Model Services Agreement	Fifth Edition 2017
Green Book 1999		The Short Form of Contract,	First Edition 1999.



MDBs' License Agreement on FIDIC Books

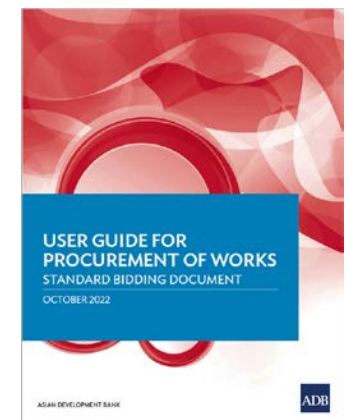
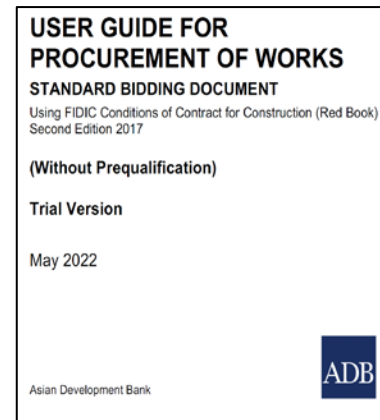
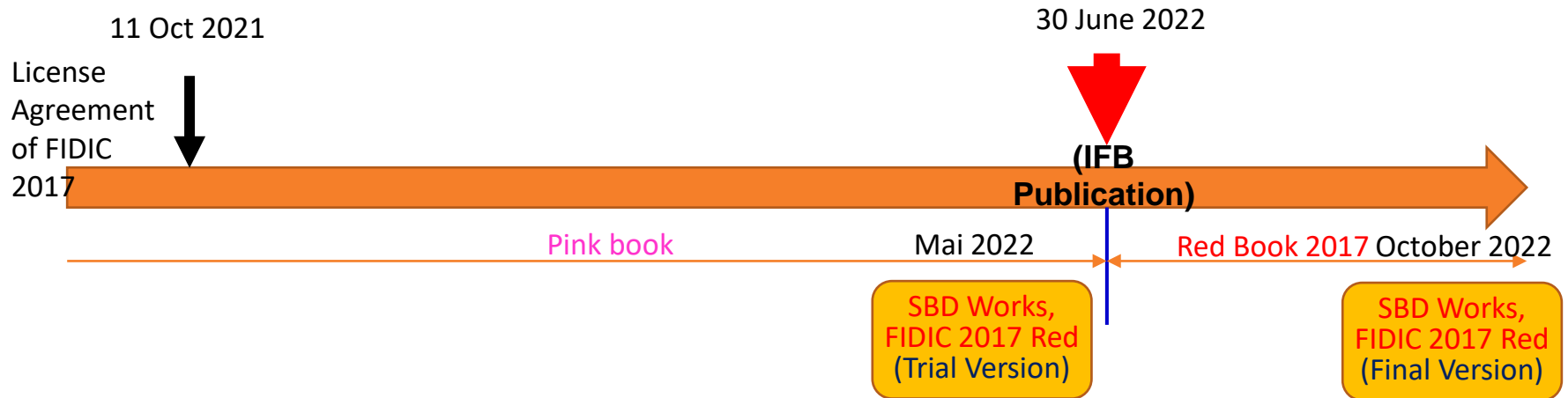
Book	WB	IDB	CDB	AfDB	AIIB	EBRD	ADB
1999 Suite - 1st Ed. (Red, Yellow, Silver)					😊	😊	
1999 Green - 1st Ed. (Short Form of Contracts)	😊	😊	😊	😊	😊	😐	😐
Gold 2008 (Design Build Operate)	😊	😊	😊	😊	😐	😊	😊
MDB 2010							
2017 Suite - 2nd Ed. (Red, Yellow, Silver)	😊	😊	😊	😊	😊	😊	😊
2017 White - 5th Ed. (Consulting Model SA)	😊	😊	😊	😊	😊	😊	😊

Whilst ADB has the license agreement on the indicated FIDIC books, this does not restrict EA/IA to use other FIDIC Books as well.

(Data Source: <https://fidic.org/multilateral-development-banks>)



Transition to FIDIC Red Book 2017: Timeline





2- What are the similarities and differences between the FIDIC Pink Book (June 2010) and the FIDIC Red Book (2017) ?



What has changed from 2010 Pink Book to 2017 Red Book ?

2010 Pink Book



85 pages



2017 Red Book



128 pages

Retained in 2017 RB

- Layout/Structure/Concept
- Risk sharing between the parties
- Same definitions, wording, language
- Harmonization across suite/versions

Enhanced in 2017 RB

- Fairness Principle
- Applicability in diverse civil/common jurisdictions

Significant changes in 2017 RB

- **Greater detail and clarity** on the Contract Requirements & Procedures
- **Enhanced provisions** for Quality and Contract Management
- **Detailed provisions** for Claims and Disputes resolution
- **MDB specific requirements** not included (because Red 2017 is based on Red 1999, which did not have MDB requirements)



Layout: **FIDIC 2010 Pink Book** vs **FIDIC 2017 Red Book**

FIDIC MDB 2010	FIDIC Red 2017
1. General Provisions	1. General Provisions
2. The Employer	2. The Employer
3. The Engineer	3. The Engineer
4. The Contractor	4. The Contractor
5. Nominated Subcontractors	5. Subcontracting
6. Staff and Labour	6. Staff and Labour
7. Plant, Materials and Workmanship	7. Plant, Materials and Workmanship
8. Commencement, Delays and Suspension	8. Commencement, Delays and Suspension
9. Tests on Completion	9. Tests on Completion
10. Employer's Taking Over	10. Employer's Taking Over
11. Defects Liability	11. Defects after Taking Over
12. Measurement and Evaluation	12. Measurement and Evaluation
13. Variations and Adjustments	13. Variations and Adjustments
14. Contract Price and Payment	14. Contract Price and Payment



Layout: FIDIC 2010 Pink Book vs FIDIC 2017 Red Book

FIDIC MDB 2010	FIDIC Red 2017
15. Termination by Employer	15. Termination by Employer
16. Suspension and Termination by Contractor	16. Suspension and Termination by Contractor
17. Risk and Responsibility	17. Care of Works and Indemnities
18. Insurance	18. Exceptional Events
19. Force Majeure	19. Insurance
20. Claims, Disputes and Arbitration	20. Employer's and Contractor's Claims
	21. Disputes and Arbitration

Note:

Clause 20 in the FIDIC 1999/Pink split into

- Clause 20 [Employer's and Contractor's Claims], and
- Clause 21 [Disputes and Arbitration].

Reason for the Split: to clearly distinguish and separate 'day-to-day' Parties' claims from Parties' disputes, and to highlight the distinction between how they are dealt with under FIDIC contracts.



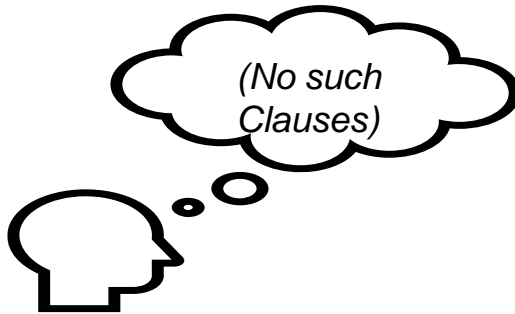
Red 2017- What has NOT changed: Core Concepts, Principles and Mechanisms

- FIDIC's fundamental principles of balanced risk sharing between the Employer and the Contractor (5 Golden Principles)
- Contract Participants and their rights/obligations
- Mechanisms:
 - Contract Administration,
 - Quality, Safety, Labour,
 - Measurement, Certification, Payment
 - Variations and Evaluation
 - Commencement, Completion, Suspension, Termination
 - Risk, Responsibility, and Insurance
 - Claims and Disputes Resolution



Quality Management: enhancement under 2017 Red Book

2010 Pink Book / 1999 Red Book



4.9 Quality Assurance

The Contractor shall institute a quality assurance system to demonstrate compliance with the requirements of the Contract. The system shall be in accordance with the details stated in the Contract. The Engineer shall be entitled to audit any aspect of the system

New Sub-Clauses: Quality Management

2017 Red Book

4.9.1 Quality Management System

The Contractor shall prepare and implement a QM System to demonstrate compliance with the requirements of the Contract. **The QM System shall be specifically prepared for the Works and submitted to the Engineer within 28 days of the Commencement date .**

...

4.9.2 Compliance Verification System

The Contractor shall prepare and implement a Compliance Verification System to demonstrate that the design (if any), Materials, Employer-Supplied Materials (if any), Plant, works and workmanship comply in all respects with the Contract.



Fairness principle: enhancement under 2017 Red Book

2010 Pink Book

Claim Notice

2017 Red Book

2.5 Employer's Claims

No implication indicated if the **Employer** fails to give claim notice within 28 days of event or circumstance

The notice shall be given as soon as practicable and no longer than 28 days after the Employer became aware, or should have become aware, of the event or circumstances giving rise to the claim.

20.1 Contractor's Claims

Claim void if the **Contractor** fails to give notice within 28 days of event or circumstance

If the **Contractor** fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and **the Employer shall be discharged from all liability** in connection with the claim.

20.2.1 Notice of Claim

Claim void if the **claiming Party**, whether the Contractor or Employer, fails to give notice within 28 days of event or circumstance

But there are circumstances when failure to give a notice within 28 day may not make the claim void.

The Contract provides detail procedures, requirements and timeline for action.

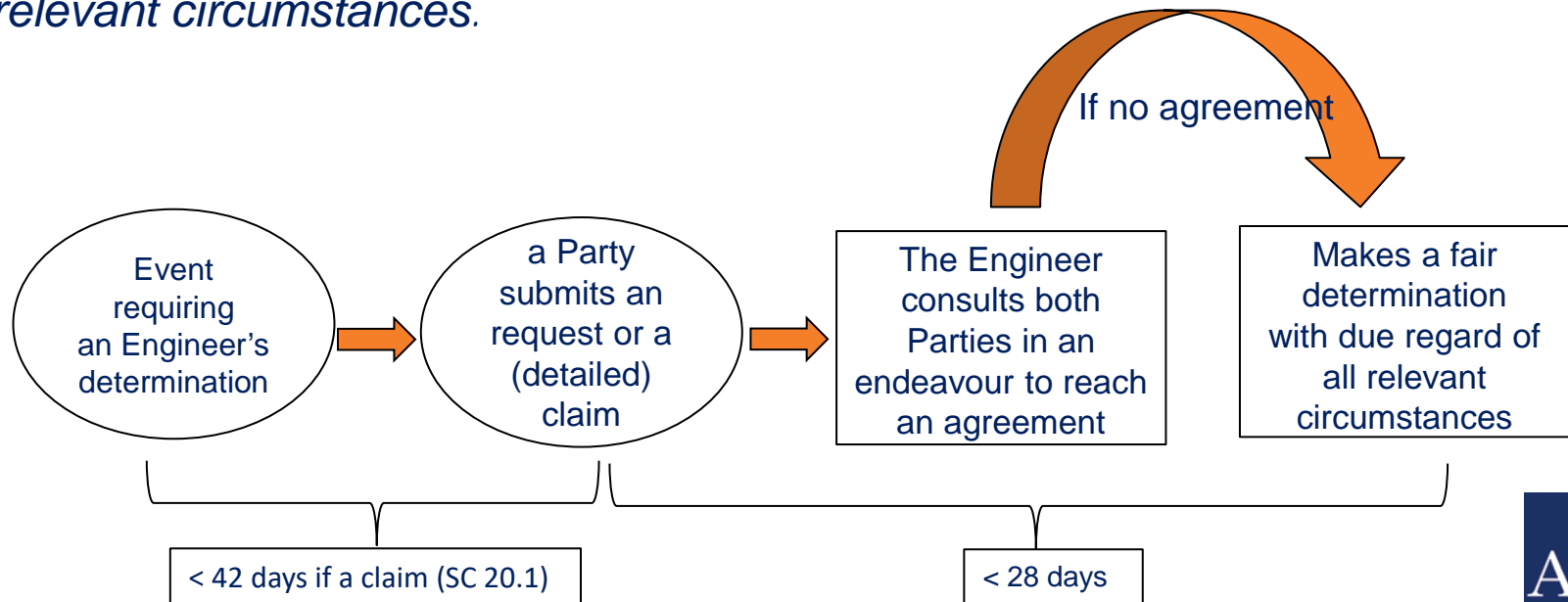


Greater detail and certainty under 2017 Red Book

Engineer's Determination under the Pink Book

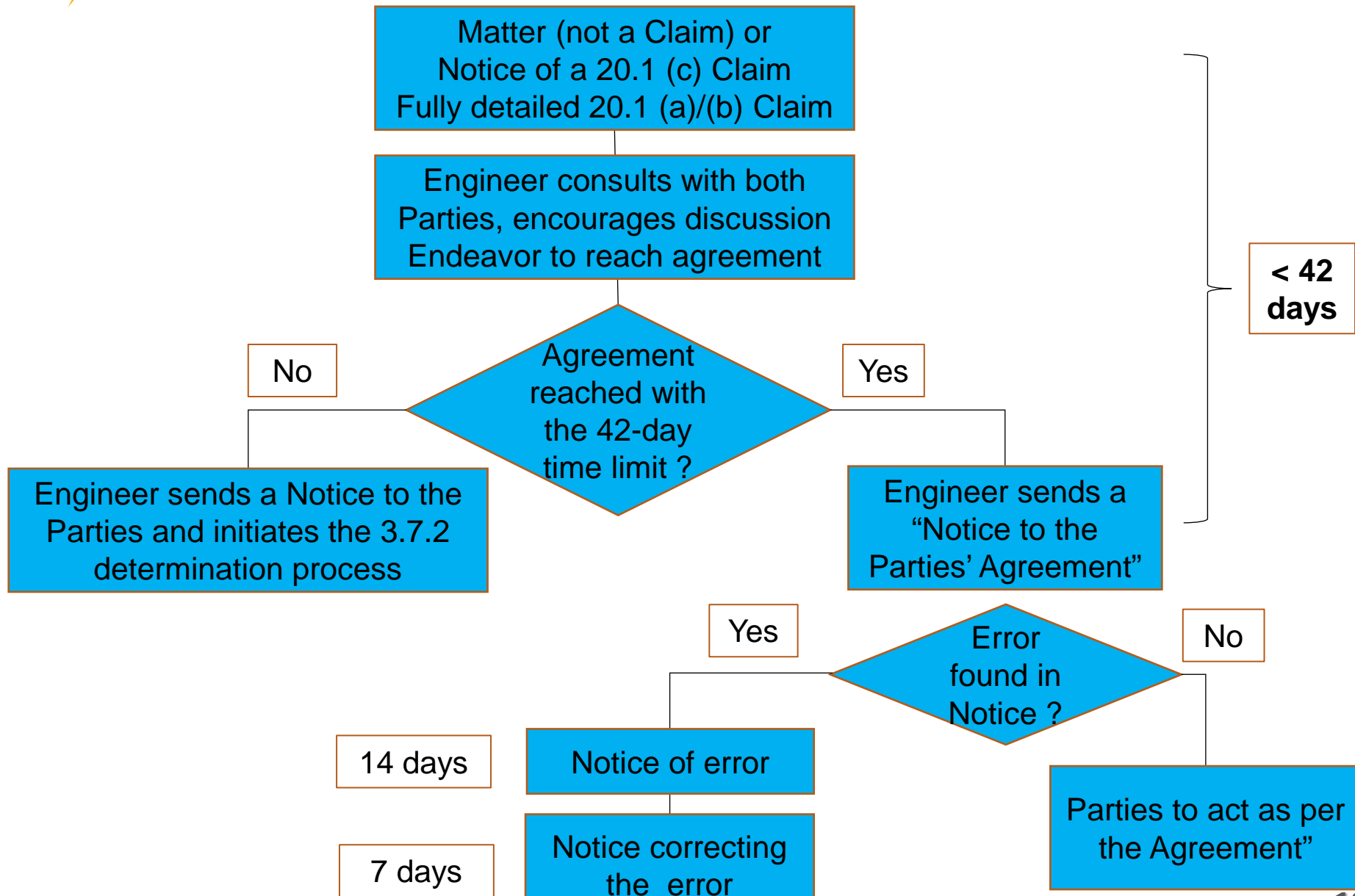
Sub-Clause 3.5

Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.



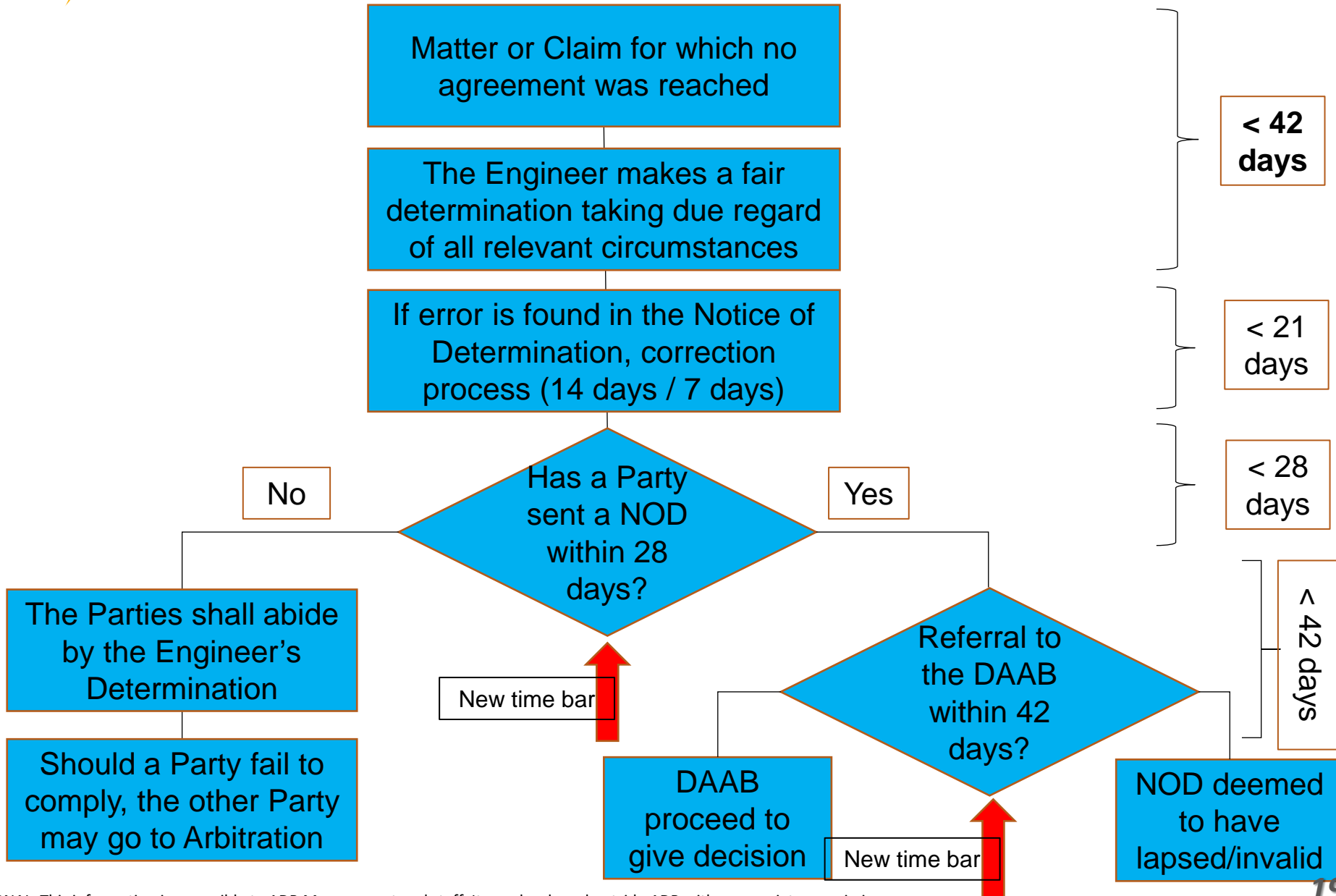


Engineer's Determination under the 2017 Red Book





Engineer's Determination under the 2017 Red Book





Dispute Avoidance/Resolution in FIDIC Red 2017: Highlights

Dispute Avoidance: Emphasis

- A **key theme** of the Second Edition is the increased emphasis on “dispute avoidance”
- **Standing DAAB (Dispute Avoidance/Adjudication Board)**

DAAB Decision:

- Within 84 days (no change),
- If no notice of dissatisfaction, final and binding (no change),
- Awarded amount **immediately payable** without any certification or notice,
- Whether **binding** or **final and binding decision**, “victim” Party entitled to take the **failure** itself **directly to arbitration**, if the **“losing” party does not give effect to the decision**,
- Entitled to **terminate** (Employer) or **suspend/terminate** (Contractor) **contract**, if a party fails to comply with Decision, which must however be **“material”**



Switching from Pink to 2017 Red : Challenges & Opportunities

Opportunities:

- **Certainty:** Greater detail and clarity on the requirements for notices and other communication
- **Fairness:** Employer's and Contractor's Claims treated equally and separated from Disputes
- **Less dispute:** Dispute avoidance mechanism
- **Enhanced quality management:** Detailed provisions for quality management & compliance verification

Challenges:

- **Voluminous:** more-words, more-loopholes, prescriptive, and difficult to comprehend.
- **No suitable for small contracts:** Too complex to apply for simple contracts.
- **Supervision cost:** Very likely to increase.
- **Bank requirements:** not included in General Conditions
- **Capacity Building necessary**

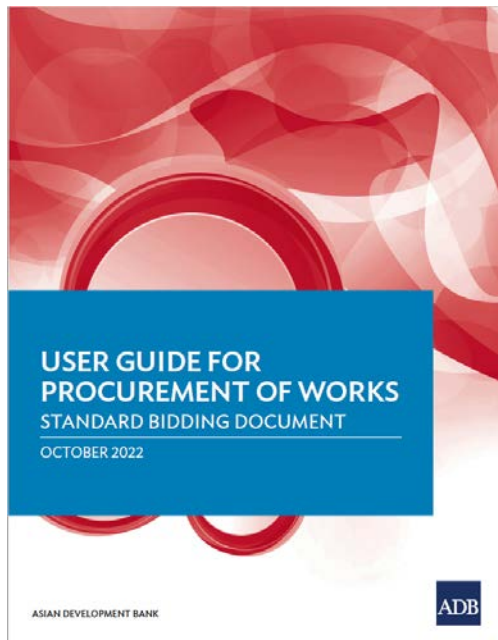


3 - Introduction to ADB Particular

Condition of Contract: Section 8



What you should have with you



Section 1 Instructions to Bidders (ITB)
This section specifies the procedures Bidders should follow when preparing Bids. Information is also provided on the submission, opening, evaluation of Bids.

Section 2 Bid Data Sheet (BDS)
This section consists of provisions that are specific to each procurement requirements included in Section 1 (Instructions to Bidders).

Section 3 Evaluation and Qualification Criteria (EQC)
This section contains the criteria to determine the lowest evaluated Bidder to perform the contract if the bidding was not preceded by a prequalification process.

Section 4 Bidding Forms (BDF)
This section contains the forms to be completed by the Bidder and submitted if the bidding was not preceded by a prequalification process.

Section 5 Eligible Countries (ELC)
This section contains the list of eligible countries.

Section 6 Employer's Requirements (ERQ)
This section contains the Specifications, Drawings, Supplementary Information, Personnel Requirements, and Equipment Requirements.

Section 7 General Conditions of Contract (GCC)
This section contains the general clauses that govern the Contract. The General Conditions of Contract for Construction, Multilateral Development Bank (FIDIC MDB Edition) is the Fédération Internationale des Ingénieurs-Conseil (FIDIC MDB Edition) subject to the variations and additions set out in Section 8 (Particular Conditions of Contract).

Section 8 Particular Conditions of Contract (PCC)
This section contains provisions that are specific to each contract and are subject to the General Conditions of Contract. Whenever there is a conflict, the provisions in the Particular Conditions of Contract prevail over the provisions in the General Conditions of Contract.

Section 9 Contract Forms (COF)
This section contains forms that, once completed, will form part of the Contract. The Security and Advance Payment Security, when required, shall only be used in accordance with the provisions in the Contract.



FIDIC Red 2017

ADB "COPA"





The “COPA” will constitute Section 8 of the SBD (37 pages)

- They are partly (but not fully) aligned with WB's
- They introduce a number of clauses that were specific to the Pink Book (as compared with RB)
- They also introduce ADB specific provision in areas such as Corrupt and Fraudulent Practices and safeguards
- They are structured in four parts:
 - Part A: Contract Data
 - Part B: Special Provisions
 - Part C: Corrupt and Fraudulent Practices
 - Part D: Environmental, H&S – metrics for progress reports



Priority of Documents forming the Contract

1.5 Priority of Documents (Pink Book)

The documents forming the Contract are to be taken as mutually consistent. If there is any conflict, ambiguity or discrepancy between the documents, the priority of the documents shall be in accordance with the following:

- (a) the Contract Agreement;
- (b) the Letter of Acceptance;
- (c) the Letter of Tender;
- (d) the Particular Conditions Part A – Contract Data;
- (e) the Particular Conditions Part B – Special Provisions;
- (f) these General Conditions;
- (g) the Specification;
- (h) the Drawings;
- (i) the Schedules;
- (j) the JV Undertaking (if the Contractor is a JV); and
- (k) any other documents forming part of the Contract.

SC 1.5 – FIDIC Red Book

1. Contract Agreement
2. Letter of Acceptance
3. Letter of Tender
4. Particular Conditions – Part A – Contract Data
5. Particular Conditions – Part B – Special Provisions
6. Particular Conditions – Part C – Corrupt and Fraudulent Practices
7. Particular Conditions – Part D – EHS Metrics for Progress Reports
8. List of Eligible Countries (BD Section 5)
9. General Conditions
10. Specification
11. Drawings
12. Schedules
13. Environment, Health and Safety Code of Conduct
14. Environment, Health and Safety Management Plan (EHSMP)
15. JV Undertaking (if any)
16. Any other documents forming part of the Contract



ADB COPA: why amending the Red Book? 3 main drivers

Driver 1: reflecting typical MDB requirements (PB)



Selected Examples:

- Audit and Inspection by the Bank (SC 1.7)
- Definition of « Bank » (SC 1.1.89) and « Borrower » (SC 1.1.90) introduced
- Limitation of Engineer's authority for Variations (SC 3.2)
- Clause 6 - Staff and Labour provisions: Recruitment of local staff (SC 6.1), HIV-AIDS prevention (SC 6.7), Forced Labour (SC 6.21) and Child Labour (SC 6.22), Respectful Work Environment (SC 6.28)
- The 4 conditions precedent to the Commencement Date (SC 8.1)



ADB COPA: why amending the Red Book? 3 main drivers

Driver 2: Adding specific ADB requirements

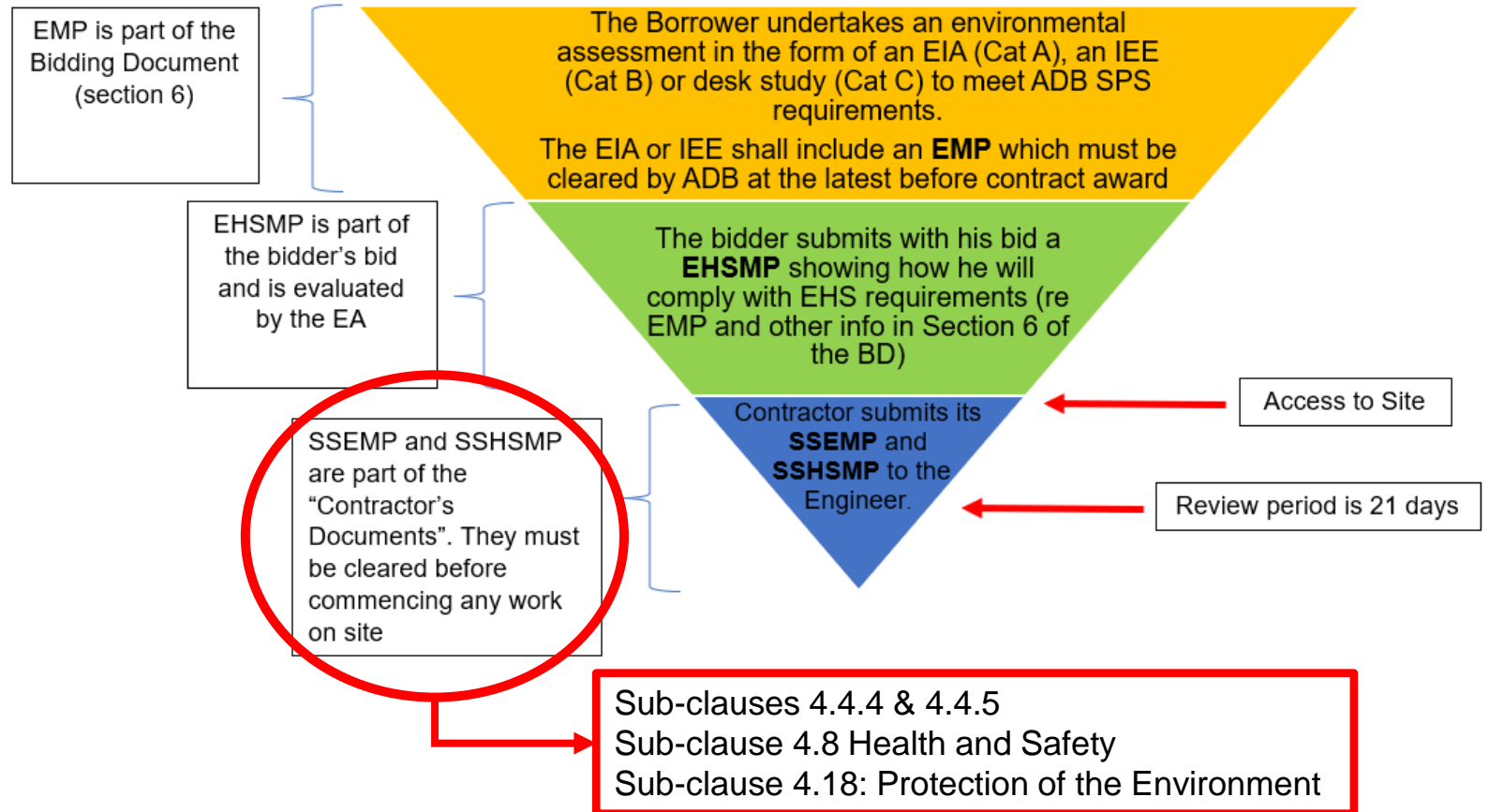


Selected examples:

- ADB EHS Requirements – EMP, EHS Code of Conduct, SSEMP, SSHSMP (see figure on next slide)



Clauses introducing safeguard provisions (EMP)





ADB COPA: why amending the Red Book? 3 main drivers

Driver 2: Adding specific ADB requirements



Selected examples:

- Contractor's design – possibility to account for climate change considerations, universal access...if required by the Specification (SC 4.1)
- Higher care of Contractor's Personnel – to be informed in a clear and understandable manner about the T&Cs of their employment, about their rights (SC 6.1), Contractor to accommodate their social and cultural needs (SC 6.6), Contractor's Personnel's grievance mechanism (SC 6.26), training (SC 6.27),
- Contractor can terminate the Contract-if Employer has engaged in integrity violations of ADB Anticorruption Policy (SC 16.2.1)





ADB COPA: why amending the Red Book? 3 main drivers

Driver 3: Reflecting FIDIC Errata to the RB



Selected examples:

10. Resignation and Termination	In Sub-Clause 10.3: "the DAA Agreement" is replaced with: "a DAAB member's DAAB Agreement".
11. Challenge	In Sub-Clause 11.1: on the second line, delete the text: ". or in the case of a three-member DAAB the Other Members jointly,". [Note: Errata to GCC.]
Annex- DAAB Procedural Rules	
Rule 4.2	On the fourth line, "chairman" is replaced with "chairperson". [Note: Errata to GCC.]
Rules 8.3	On the sixth line, "chairman" is replaced with "chairperson". [Note: Errata to GCC.]
Form of Dispute Avoidance/Adjudication Agreement	
	All instances of "DAA Agreement" are replaced with: "DAAB Agreement". In C (b): "chairman" is replaced with "chairperson". [Note: Errata to GCC.]

First errata issued in 2018,
 Second errata issued in 2019
 Third errata issued in Dec. 2022 (not reflected in SBD)





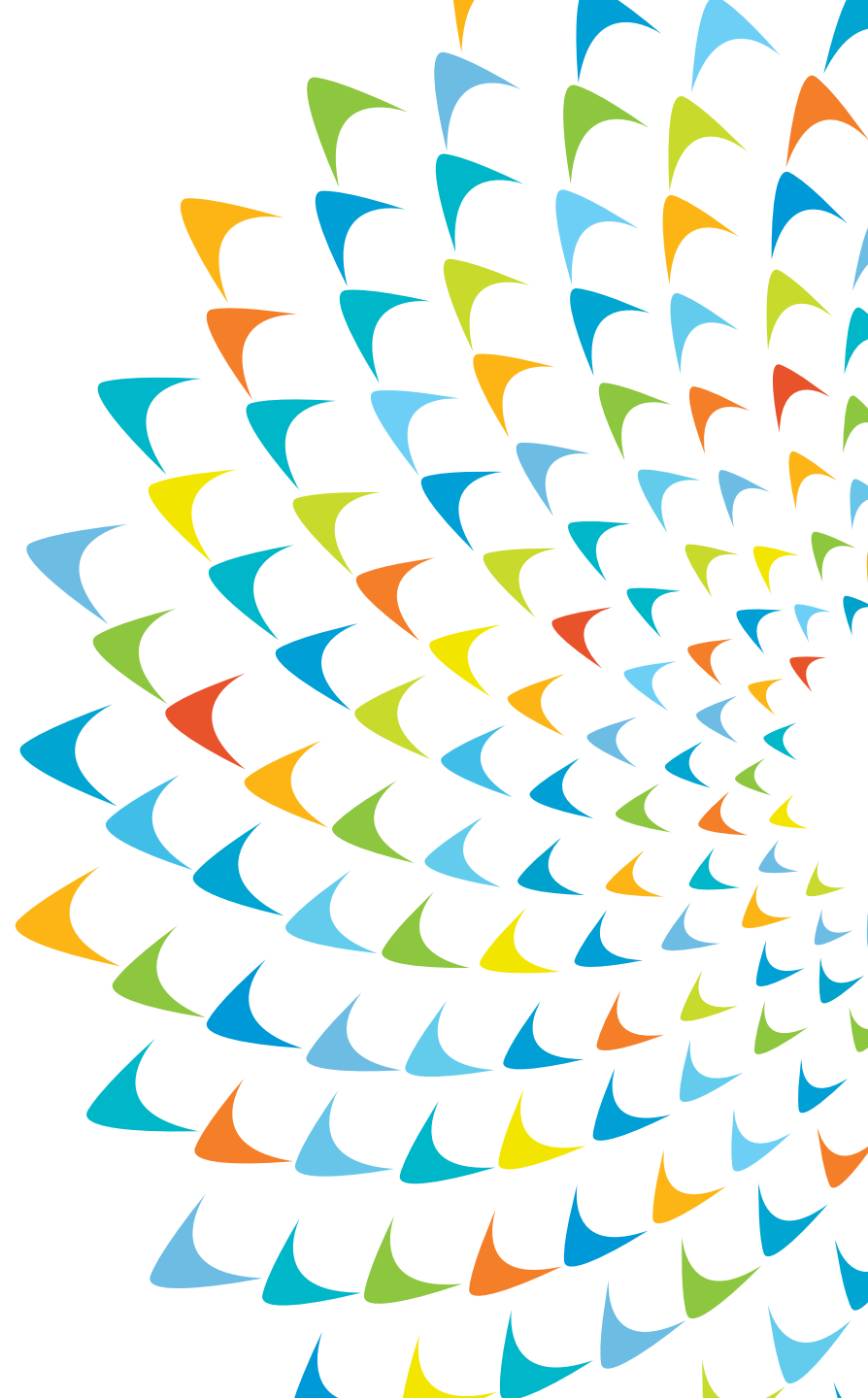
Example of errata to the Red Book → COPA

ERRATA to the FIDIC Conditions of Contract for Construction Second Edition 2017 [ISBN 978-2-88432-084-9]

The following significant errata **are not** included in the content of the Second Edition of the Conditions of Contract for Construction. Several minor typographical errors and layout irregularities **have been corrected and applied** to the content.

GENERAL CONDITIONS

Page 1	Sub-Clause 1.1.10:	On the third and fourth lines, delete “the Contractor’s Proposal,”.
Page 6	Sub-Clause 1.1.77:	On the second line after “Payment Certificate under”, add “Sub-Clause 14.2.1 [Advance Payment Guarantee] (if applicable), ”.
Page 7	Sub-Clause 1.1.81:	On the first line, delete “the Contractor’s Proposal,”.
Page 28	Sub-Clause 4.6:	On the second-last line of the first paragraph before “Contractor’s”, add “of the”.
Page 29	Sub-Clause 4.7.3:	In the second bullet-point of sub-paragraph (b) <ul style="list-style-type: none">- before “if the items of reference”, add “when examining the items of reference within the period stated in sub-paragraph (a) of Sub-Clause 4.7.2,”- on the second and third lines, delete “and the Contractor’s Notice is given after the period stated in sub-paragraph (a) of Sub-Clause 4.7.2”.
Page 37	Sub-Clause 4.22	On the third line of the second paragraph before “4.17”, add “Sub-Clause”.
Page 38	Sub-Clause 5.2.2:	In sub-paragraph (a) on the first line before “Subcontractor”, add “nominated”.
Page 70	Sub-Clause 14.2.1:	On the fifth and sixth lines of the first paragraph, replace “based on the sample form included in the Tender documents” with “in the form annexed



End of Session 1