



ADB

# Key Changes in 2017 FIDIC Red Book

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# New Features of the 2017 Red Book & ADB COPA

- General comments
- New definitions
- Revisions in the Claims procedure
- Revisions in the Engineer's determination
- Revisions in the DAAB Procedure
- Other key changes in FIDIC GCs
- Other Items from ADB COPA

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# New Features of the 2017 Red Book & ADB COPA

- **General Comments**
- 50% increase in volume
- From 2 time bars to 5
- Many new and complicated deeming provisions
- Employer's Claims and Contractor's Claims treated together

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# New Features of the 2017 Red Book & ADB COPA

- **New definitions**
- There are now 88 defined terms
- "Claim"

1.1.6 **"Claim"** means a request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works.

# New Features of the 2017 Red Book & ADB COPA

- **New definitions**
- “Dispute”

1.1.29 **“Dispute”** means any situation where:

- one Party makes a claim against the other Party (which may be a Claim, as defined in these Conditions, or a matter to be determined by the Engineer under these Conditions, or otherwise);
- the other Party (or the Engineer under Sub-Clause 3.7.2 [*Engineer’s Determination*]) rejects the claim in whole or in part; and
- the first Party does not acquiesce (by giving a NOD under Sub-Clause 3.7.5 [*Dissatisfaction with Engineer’s determination*] or otherwise),

provided however that a failure by the other Party (or the Engineer) to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAAB or the arbitrator(s), as the case may be, deem it reasonable for it to do so.

# New Features of the 2017 Red Book & ADB COPA

- **New definitions**
- “Notice”

1.1.56 **“Notice”** means a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [*Notices and Other Communications*].

- 1.3 Notices and Other Communications

(b) if it is a Notice, it shall be identified as a Notice.



# New Features of the 2017 Red Book & ADB COPA

- **New definitions**
- “Notice of Dissatisfaction” or “NOD”

1.1.57 **“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*].

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# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the claims procedure**

- Clause 20 Employer's and Contractor's Claims

Two sub-types of Claims

**Type I:** Money (additional payment) and/or time Claims

- For the Employer's Claims Sub-Clause 20.1(a) – covers any additional payment from the Contractor or reduction in the Contract Price and/or an extension of the DNP
- For the Contractor's Claims Sub-Clause 20.1(b) – covers additional payment from the Employer and EOT

# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the claims procedure**
- Clause 20 Employer's and Contractor's Claims


**Type II** : Other entitlement or relief of any kind claimed by either Party  
Sub-Clause 20.1(c) – covers Contract interpretation, ambiguity and discrepancy a declaration in favour of claiming Party, or anything at all not related to money or time.

Note that there is no 28 day time bar applicable to Claims under Sub-Clause 20.1(c)

# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the claims procedure**
- Sub-Clause 20.2.2 Engineer's initial response to a Notice of Claim


If the Engineer considers a Notice of Claim is time barred (i.e. issued outside of the 28 day period), the following applies:

- Within 14 days the Engineer must issue a Notice with reasons why the Claim is time barred
-  If the Engineer does not issue this Notice timely, the Party's Notice of Claim is deemed to be valid – i.e. not time barred
- If the other Party disagrees with the “deemed valid Notice of Claim”, the other Party must issue its own Notice to the Engineer with details why it considers the Notice of Claim to be time barred. No time limit is stated for this Notice.

# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the claims procedure**
- Sub-Clause 20.2.2 Engineer's initial response to a Notice of Claim
  - If a Party disagrees with an Engineer's time bar Notice, the Party can still submit a detailed Claim but must explain why the "late" Notice was justifiable.
  - The Engineer must still issue a full determination on the merits of the Claim but the determination is to include a review of the disagreement over the time bar issue (Sub-Clause 20.2.5).
  - In other words, the Engineer cannot just be satisfied by concluding the Claim is time barred.
- **⚠️ NOTA: All these Notice and time bar provisions apply to the Employer in the 2017 editions not just the Contractor. This includes Employer's Claims for Delay Damages**

# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the claims procedure**
- Sub-Clause 20.2.4 The fully detailed Claim
  - A fully detailed Claim is to be submitted within 84 days.
  - A Claim can now be time barred in a limited way for delay beyond 84 days in submitting the detailed Claim.
  -  However, a detailed Claim can only be time barred if it lacks a statement of the contractual or legal basis of the Claim. (Sub-Clause 20.2.4(b)).
  - If by day 84 this statement has never been included in any reiteration of the detailed Claim the original Notice of Claim shall be deemed to have lapsed and no longer valid.

# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the claims procedure**
- Sub-Clause 20.2.4 The fully detailed Claim
  - Here again however, the Engineer must issue a time bar Notice if a statement of the contractual/legal basis of the fully detailed Claim is not submitted within 84 days.
  - If the Engineer does not issue time bar Notice of the detailed Claim time by day 14, the Party's original Notice of Claim becomes valid again – i.e. no longer time barred.
  - However, the same cross Party time bar challenge rules apply to the detailed Claim as already described for the original Notice of Claim.
  - Likewise, the Engineer must nevertheless go on to issue a full determination on the merits and include a review of the time bar disagreement.



# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the claims procedure**



Sub-Clause 20.2.5 The Engineer's review of time bar disagreements

The circumstances which the Engineer may consider (but are not binding) may include:

- The extent of prejudice suffered by the other Party due to a late Notice.
- In the case of a late original Notice of Claim, any evidence of prior knowledge of the event or circumstances.
- In the case of a late Claim basis statement in regard to a fully detailed Claim, any evidence of prior knowledge of the contractual or legal basis of the Claim.

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# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the Engineer's determination**
- Sub-Clause 3.7 Agreement or Determination
- The Engineer must act neutrally when acting under Sub-Clause 3.7
- Reinforced Engineer's role to consult with the Parties to reach an agreement
- If agreement is reached within 42 days the Engineer is to give a Notice to the Parties of the agreement
- If both Parties advise the Engineer that no agreement can be reached or the 42 days expire, the Engineer gives a Notice of the failure and proceeds to consider its determination under Sub-Clause 3.7.2

# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the Engineer's Determination**
- Sub-Clause 3.7 Agreement or Determination
- Where there is no agreement, the Engineer normally has 42 more days to issue its "Notice of the Engineer's Determination"
- The Engineer must make a fair determination, acting neutrally between the Parties
- If the determination is not issued within 42 days, the Engineer is deemed to have given a determination rejecting the Claim or other matter (Effectively up to 84 days after the Notice old Claim)
- Different time limits may apply however as described later (SC 3.7.3)

# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the Engineer's Determination**

- Sub-Clause 3.7.5 Dissatisfaction with the Engineer's determination



A NOD must be issued within 28 days if a Party does not accept the determination

- A Party may issue a NOD in regard to just a part of the determination

- If no NOD issued in the time frame, the determination is deemed to be accepted and becomes final and binding



The above 28 day time bar applies even in the case of a deemed determination rejecting the Claim due to expiry of the 42 days

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# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the DAAB Procedure**
- Sub-Clause 21.1(a): Selection of DAAB members
- Each Party to include a list of three possible DAAB members in the Contract Data
- Either the sole member or all three members are to be selected from this list of six candidates
- COPA Sub-Clause 20.1: If the Contractor is foreign the DAAB members are to be of different nationalities from the Contractor and Employer

# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the DAAB Procedure**

- Sub-Clause 21.4.1(a): 42 day time bar to submit dispute to the DAAB



The Dispute must be submitted to the DAAB within 42 days of the NOD or the NOD will be deemed to be no longer valid.

- i.e. the Claim/Dispute is in effect time barred
- There is no provision allowing the DAAB to consider possible justification of a failure to refer the Dispute to the DAAB on time



# New Features of the 2017 Red Book & ADB COPA

- **Revisions in the DAAB Procedure**
- Sub-Clause 21.3: Informal assistance windows
- The option of using the DAAB's informal assistance role has been excluded during the period when the Engineer's determination procedure is engaged but can be used before and after the determination process up to the referral for formal DAAB decision, unless the Parties agree otherwise
- COPA Sub-Clause 13.4: Payment for DAAB members
- A specific Provisional Sum (PS) is to be included for the DAAB members
- However, use of the PS does not require an Engineer's instruction

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# New Features of the 2017 Red Book & ADB COPA

- **Other key changes**
- Sub-Clause 6.12 : Key Personnel
- If Key Personnel are stated in the Specifications the Contractor shall appoint the natural persons named in the Tender
- The Engineer's consent is required to make any changes to Key Personnel

# New Features of the 2017 Red Book & ADB COPA

- **Other key changes**
- Sub-Clause 8.3 : Programme
- Must now use programming software showing the critical path and each activity must be logic linked
- The Sub-Clause now refers to further information on Programme requirements in the Specifications and it is expected that the Specifications will have a section on programming requirements, level of detail etc...
- COPA Sub-Clause 8.3: Land acquisition issues per Resettlement Plan
- Sub-Clause 8.5 EOT: Concurrent delay shall be assessed in accordance with the rules stated in the Special Provisions (i.e. Part B of the Particular Conditions) If not stated to be assessed as appropriate taking due regard to all relevant circumstances

# New Features of the 2017 Red Book & ADB COPA

- **Other key changes**

- Sub-Clause 8.4 : Advance Warning

- Each Party shall advise the other of possible future events or circumstances which may delay the Works or increase the Contract Price

Or

- Adversely affect the Contractor's Personnel or affect the performance of the completed Works
- The Engineer may request a Contractor's proposal to mitigate effects
- Otherwise there is no express sanction for a failure to give advance warning

# New Features of the 2017 Red Book & ADB COPA

- **Other key changes**

- Sub-Clause 13.1 : Variation Procedure

- The Contractor can refuse an instruction if the varied work is Unforeseeable in comparison to the Contract Works

- The Contractor can refuse an instruction if the varied work affects its ability to comply with health and safety or environmental obligations



Sub-Clause 13.3.1: The Contractor has 28 days to submit detailed particulars after receiving a Variation instruction BUT there is no time bar for either EOT or additional payment. This is expressly stated in the Sub-Clauses 13.1.1 and 8.5(a)

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# New Features of the 2017 Red Book & ADB COPA

- **Other Items from ADB COPA**

- Many matters covered in the COPA are taken from the 2010 MDB Edition (the Pink Book) including the following themes
  - The Bank's rights and Contractor's obligations towards the Bank
  - Social (EGS) policies
  - Anti-corruption policies and sanctions. Part C – Corrupt and Fraudulent Practices
- Some errata from the 2017 edition has been corrected
- Profit is set at 5% as a default but can be modified in the Contract Data
- Tie-ins linking obligations to the Resettlement Plan



# New Features of the 2017 Red Book & ADB COPA

- **Other items from ADB COPA**
- Sub-Clause 3.2 : Engineer's Duties and Authority
- Engineer to obtain Employer's consent before instructing a Variation or accepting a Contractor's value engineering proposal
- Exceptions:
  - Variations for less than a percent of the Accepted Contract Amount in the Contract Data
  - Emergency situations
  - Same as the Pink Book restrictions

# New Features of the 2017 Red Book & ADB COPA

- **Other items from ADB COPA**
- Sub-Clause 3.1 : The Engineer
- The Engineer shall be a third party

# New Features of the 2017 Red Book & ADB COPA

- **Other items from ADB COPA**
- Sub-Clauses 4.4.4, 4.4.5 and 4.21 : Additional Contractor's Plans
- Site Specific Health and Safety Management Plan
- Site Specific Environment Management Plan
- Security Management Plan
- Part D- Environmental, Health and Safety (EHS) with detailed Metrics defined for inclusion in Progress Reports
- Sub-Clauses 4.8 : Additional Contractor's Plans
- Additional Health and Safety Obligations for the Contractor including procedure for reporting unsafe working conditions and HIV awareness and prevention programme

# New Features of the 2017 Red Book & ADB COPA

- **Other items from ADB COPA**
- Sub-Clauses 6.13 to 6.27 : Additional EGS obligations
- A series of additional health safety, environmental and worker's rights, professional development and protections have been added including:
  - Forced or child labour
  - Worker grievance mechanism
  - Non-discrimination and equal opportunity
  - Respectful work environment
  - Training
  - Etc.

# New Features of the 2017 Red Book & ADB COPA

- **Other items from ADB COPA**
- Sub-Clauses 8.1 : Commencement Date
- Four conditions precedent to the Commencement Date very similar to the Pink Book
  - Signature of the Contract Agreement
  - Evidence of the Employer's financial arrangements
  - Effective access to the Site
  - Receipt of the Advance Payment (ADB has changed the PB by stating that this condition is only valid if the Contractor's bank guarantee has been delivered within 28 days of the LoA)
- There is a Contractor's right to terminate if not achieved within 182 days (Sub-Clause 16.2.1)

# New Features of the 2017 Red Book & ADB COPA

- **Other items from ADB COPA**
- Sub-Clauses 14.9 : Release of Retention Money
- Same as the Pink Book
  - Possibility of substituting cash withholding against a guarantee
  - If Performance Security greater than half of the Retention Money, no further guarantee is necessary

# New Features of the 2017 Red Book & ADB COPA

- **Other items from ADB COPA**
- Sub-Clauses 15 and 16 : Additional termination features
- Employer termination rights as part of anti-corruption sanctions (similar to Pink Book)
- Accelerated Contractor suspension and/or termination rights in the event of non-payment if ADB suspends the loan and the Contractor has an overdue payment of more than 14 days



**Thank You!**