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# Migrating to FIDIC Red Book 2017 in ADB Standard Bidding Document for Works

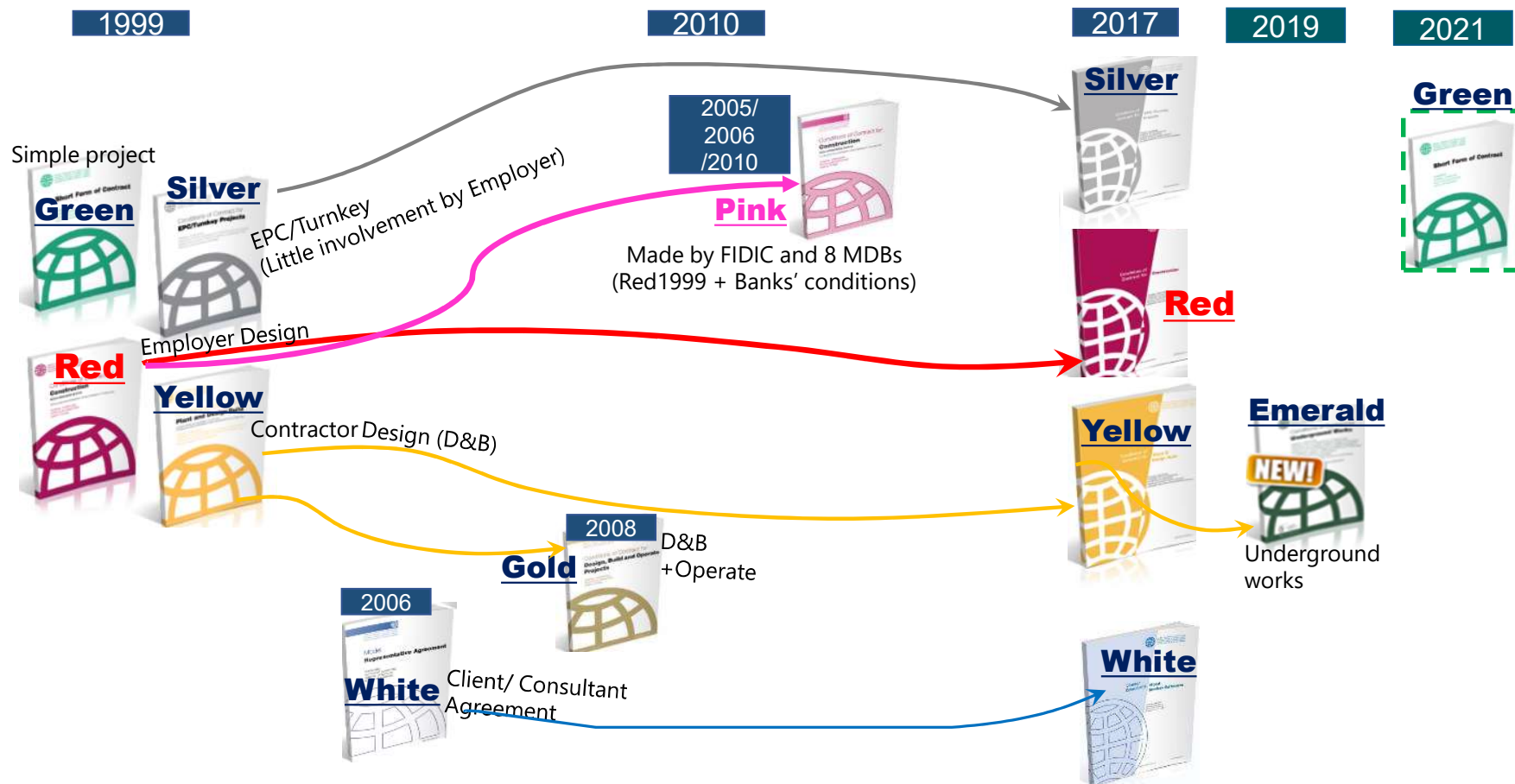
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Bisma Husen, Principal Procurement Specialist, ADB  
Islamabad, 28 August 2023

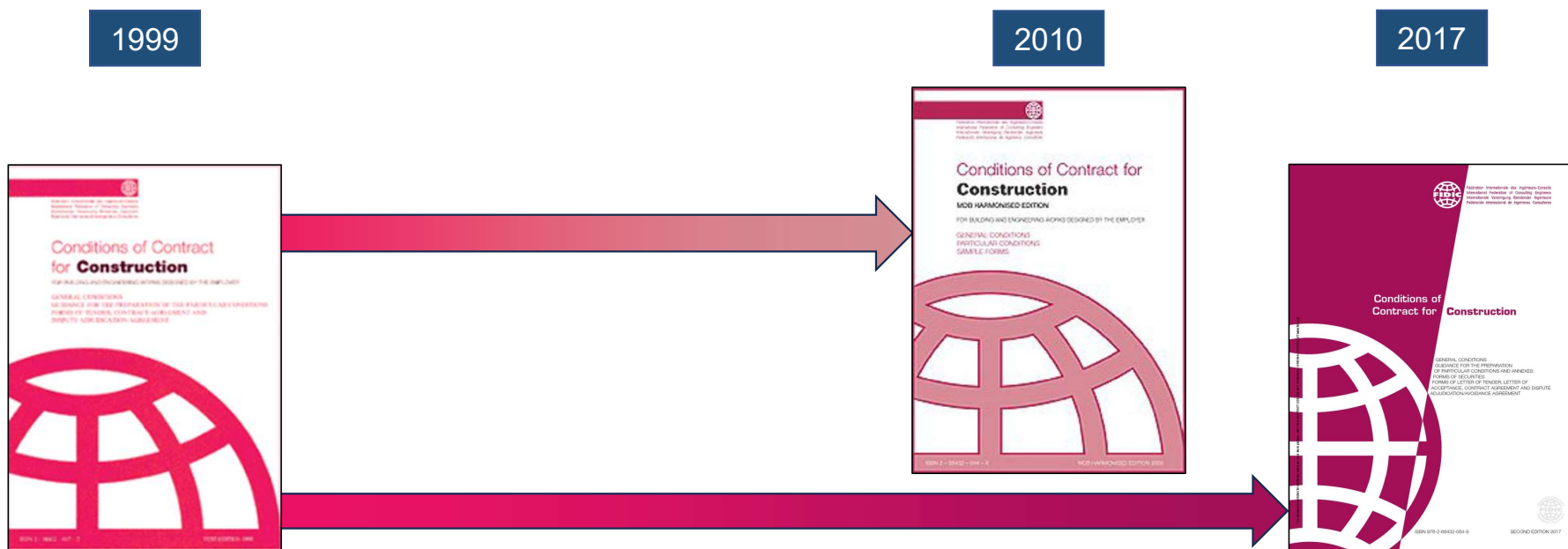
## Use of FIDIC Redbook 2017 in ADB Financed Project

- ❖ In 2017, FIDIC published Second edition of Conditions of Contract (Comprising Red Book, Yellow Book, Silver Book).
- ❖ On the requirements and main highlights of changes in the Second edition of the Red, Yellow & Silver Books, please refer to FIDIC's press release on its web site:  
[https://fidic.org/sites/default/files/press%20release\\_rainbow%20suite\\_2018\\_03\\_1.pdf](https://fidic.org/sites/default/files/press%20release_rainbow%20suite_2018_03_1.pdf)
- ❖ In Oct 2021, ADB signed a License Agreement with FIDIC for use of its Books in ADB funded projects.

# FIDIC Rainbow Suite of Contracts Since 1999



# FIDIC Red Book and MDB





# FIDIC License Agreement with ADB: Key Points

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

- License Type**
- Non-exclusive, to refer to the FIDIC Books for ADB funded projects, where ADB SBDs are used (to be incorporated by reference)
  - Any inclusion of physical or electronic copies of the FIDIC Books in the SBDs is subject to FIDIC's copyright
  - 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

## 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
<b>1999 Suite - 1<sup>st</sup> Ed.</b> (Red, Yellow, Silver)					●	●	
<b>1999 Green - 1<sup>st</sup> Ed.</b> (Short Form of Contracts)	●	●	●	●	●	●	●
<b>Gold 2008</b> (Design Build Operate)	●	●	●	●	●	●	●
<b>MDB 2010</b>							
<b>2017 Suite - 2<sup>nd</sup> Ed.</b> (Red, Yellow, Silver)	●	●	●	●	●	●	●
<b>2017 White - 5<sup>th</sup> Ed.</b> (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>)

# Switching From Pink to FIDIC Red 2017: Challenges & Opportunities

## Opportunities

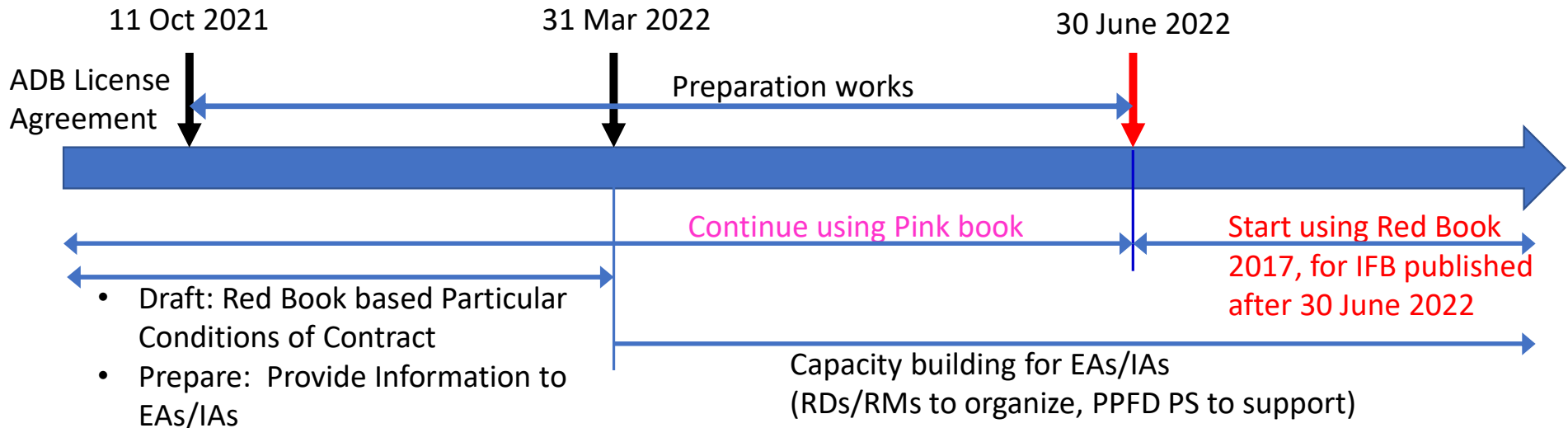
- Certainty: Greater detail and clarity on the requirements for notices and other communication
- Fairness: Employer's and Contractor's claims treated equally and separated from disputes
- Less dispute: Dispute avoidance mechanism
- Enhanced quality management: Detailed provisions for quality management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

## Challenges

- Voluminous: more-words more-loopholes, prescriptive, and difficult to comprehend.
- **Not 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: For EAs/IAs



# ADB Borrower Timeline for FIDIC Red Book 2017 in Large Works SBD



## Notes:

- Continue to use Pink Book for all procurement transactions where the Invitation for Bids (IFB) will be published on or before 30 June 2022.
- For IFB published after 30 June 2022, use of FIDIC Red Book 2017 in Large Works SBD

# Switching to FIDIC Red 2017

SBD incorporating ADB Requirements in Particular Conditions of Contract (PCC)

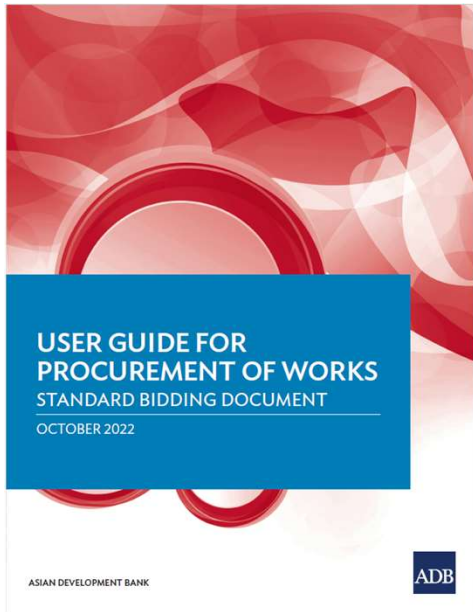
## Contents

- Bidding Procedure (Section 1 to 5): Substantially similar to Large Works SBD (Dec 2021)
- General Conditions of Contract (Section 7): Incorporate by reference to FIDIC Red 2017
- PCC (Section 8) : anti-corruption, integrity, respectful workplace, eligibility, audit, disclosure, labour, environmental health and safety requirements

# **ADB Particular Condition of Contract: Section 8 (Conditions of Particular Application – COPA)**



# 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 requirement 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 Edition, published by the Fédération Internationale des Ingénieurs-Conseil (FIDIC) MDB Edition, shall apply, subject to the variations and additions set out in Section 8 (Particular Conditions of Contract).

**FIDIC Red 2017**

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

**ADB "COPA"**

**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 ADB Procurement - FIDIC



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

- They are partly (but not fully) aligned with World Bank’s
- They introduce a few clauses that were specific to the Pink Book
- They 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

## Pink Book

### 1.5 Priority of Documents

#### 1.5 Priority of Documents

The documents forming the Contract are to be taken as mutually consistent. If there is any conflict, ambiguity or discrepancy 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.

## Red Book

### ❖ 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 (DB 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

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

In preparing Section 8, the Borrower (Employer) will have to:

- Part A: Contract Data → specify all relevant (project-specific) contract parameters in Part A
- Part B: Special Provisions → add in Part B any project-specific provisions, such as those that may be needed to resolve conflict with the applicable law or any other project-specific requirements
- Part C: Corrupt and Fraudulent Practices → should be left “as is”
- Part D: Environmental, H&S – metrics for progress reports → should be left “as is”

# ADB COPA: why amending the Red Book? 4 main drivers



## Driver 1: Reflecting Typical MDB Requirements (Pink Book)

### 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? 4 main drivers

## Driver 2: Specify ADB requirements for Integrity Principles and Guidelines

Sub-Clause 15.8.1 The Bank requires compliance with the Bank's Anticorruption Policy and Integrity Principles and Guidelines (both as amended from time to time), as set forth in Particular Conditions - Part C- Corrupt and Fraudulent Practices.



# ADB COPA: why amending the Red Book? 4 main drivers

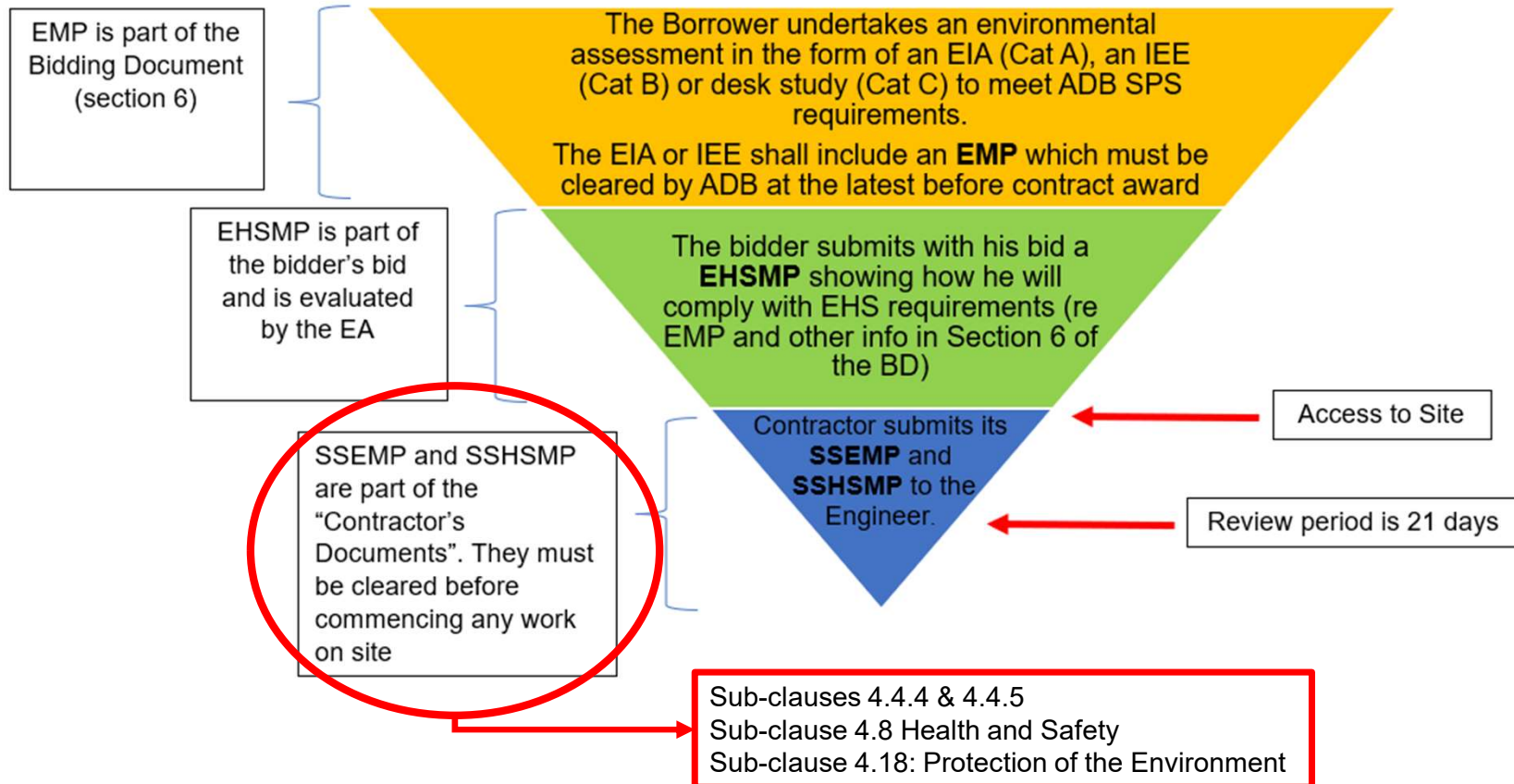
## Driver 3: Adding Specific ADB Requirement

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? 4 main drivers

## Driver 3: Adding Specific ADB Requirement (cont'd)



### 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? 4 main drivers

## Driver 4: Reflecting FIDIC Errata to the Red Book



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.]
<b>Annex- DAAB Procedural Rules</b>	
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.]
<b>Form of Dispute Avoidance/Adjudication Agreement</b>	
	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 <b>are not</b> included in the content of the Second Edition of the Conditions of Contract for Construction. Several minor typographical errors and layout irregularities <b>have been corrected and applied</b> to the content.		
<b>GENERAL CONDITIONS</b>		
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"> <li>- 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,"</li> <li>- 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".</li> </ul>
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

## FAQ

### 1. Can EAs/IAs still use MDB Pink Book after 30 June 2022?

- License agreement between ADB and FIDIC to use the Pink Book expires on 30 June 2022, so ADB will no longer use the Pink Book as a part of Large Works SBD.
- Use of FIDIC Red Book 2017 is mandatory starting 1 July 2022, for Large Works SBD, unless otherwise approved by ADB.
- New transactions: During transition, if deemed necessary by the EA/IA to use Pink Book for new procurement transactions, EA/IA may purchase Pink Book directly from FIDIC.
- Ongoing transactions and existing contracts: Continued use of the Pink Book is okay for all ongoing contracts and for all bidding packages whose Invitation for Bid (IFB) have been or will be published on or before 30 June 2022.

## FAQ

2. Can EAs/IAs use other FIDIC Books for which ADB has not signed license agreement?

- Yes. EAs/IAs can use other FIDIC Books for which ADB has not signed license with FIDIC, as per existing practice.
- Using other FIDIC Books, where ADB SBDs are nonexistent, may require additional time for preparation and review of the bidding documents.



## FAQ

### 3. How will ADB support in providing training to EAs/IAs on FIDIC Red/ Yellow Books 2017?

- Briefing material highlighting summary of key changes from Pink Book to FIDIC 2017 is provided by PPF/ADB. PPF staff may support RDs/RMs in delivering such presentations to EA/IAs. PPF staff may also support in organizing FIDIC training.
- As usual, as part of capacity building efforts, RDs/RMs are expected to arrange FIDIC training for EA/Is through FIDIC accredited trainer.

## FAQ

4. How many numbers of FIDIC Red Book 2017 EAs/IAs must purchase in a project?
  - The number to be purchased depends on the number of persons who will need to hold it in the project.
5. Can EAs/IAs purchase FIDIC Book under relevant loan/ TA?
  - Yes, in principle, this is permitted.
6. How much will it cost to buy one print copy of FIDIC Red Book 2017?
  - Please check [www.fidic.org/bookshop](http://www.fidic.org/bookshop)

## FAQ

7. How much will it cost to buy one electronic copy of FIDIC Red Book 2017?

- Please check [www.fidic.org/bookshop](http://www.fidic.org/bookshop)

8. What are the advantages and limitations of electronic copy of Red Book 2017?

- Advantages: It can be accessed immediately through “internet delivery” and is therefore not dependent on postage delivery period.
- Limitations: Electronic copy can be installed on one system only and only once. It has an expiry period of one year only after which the document is no longer accessible.

## FAQ

9. Is it allowed to include physical copy of FIDIC Red Book in Bidding document?
- If the EA wishes to include physical copy of the FIDIC Book, the EA will be required to buy the Book in bulk and include each of so purchased Book in each bidding document.
  - In this situation, buying of electronic copies could be beneficial to purchase (since electronic version allows 10 print-outs).
10. Should you advise a bidder to buy the FIDIC Book?
- Yes, each bidder must have copy of FIDIC Book, for its own use.
11. Has ADB got the copyright of Red Book 2017? And will provide free copies of FIDIC Books to EA/IAs?
- No. ADB has got no copyright of FIDIC Red Book 2017.
  - ADB will not provide a free copy. Each user (EA/IA, Contractors and Consultants) is required to purchase it directly from FIDIC.

## FAQ

12. Does ADB has obligation to check EA/IA's license from FIDIC? If an EA has two projects, can the EA use the license for one project to the second project?
- ADB has neither mandate nor obligation to check third parties' proper compliance of FIDIC copyright.
  - EA may use its own copy of FIDIC book, purchased from FIDIC, for more than one project.
13. Will EA will need to enter into any license agreement with FIDIC for use in ADB funded project?
- There is no requirement to have any specific license agreement for use in any project.
14. Can the EA purchase the license for the Red Book and use it across all its projects?
- For ADB financed projects, the requirement is to use the FIDIC Book purchased from FIDIC.

**FIDIC MDB → FIDIC RED BOOK**





### Retained in 2017

- Layout/Structure/Concept
- Risk sharing between parties
- Re-use the definitions, wordings, languages
- Harmonization across suite/versions

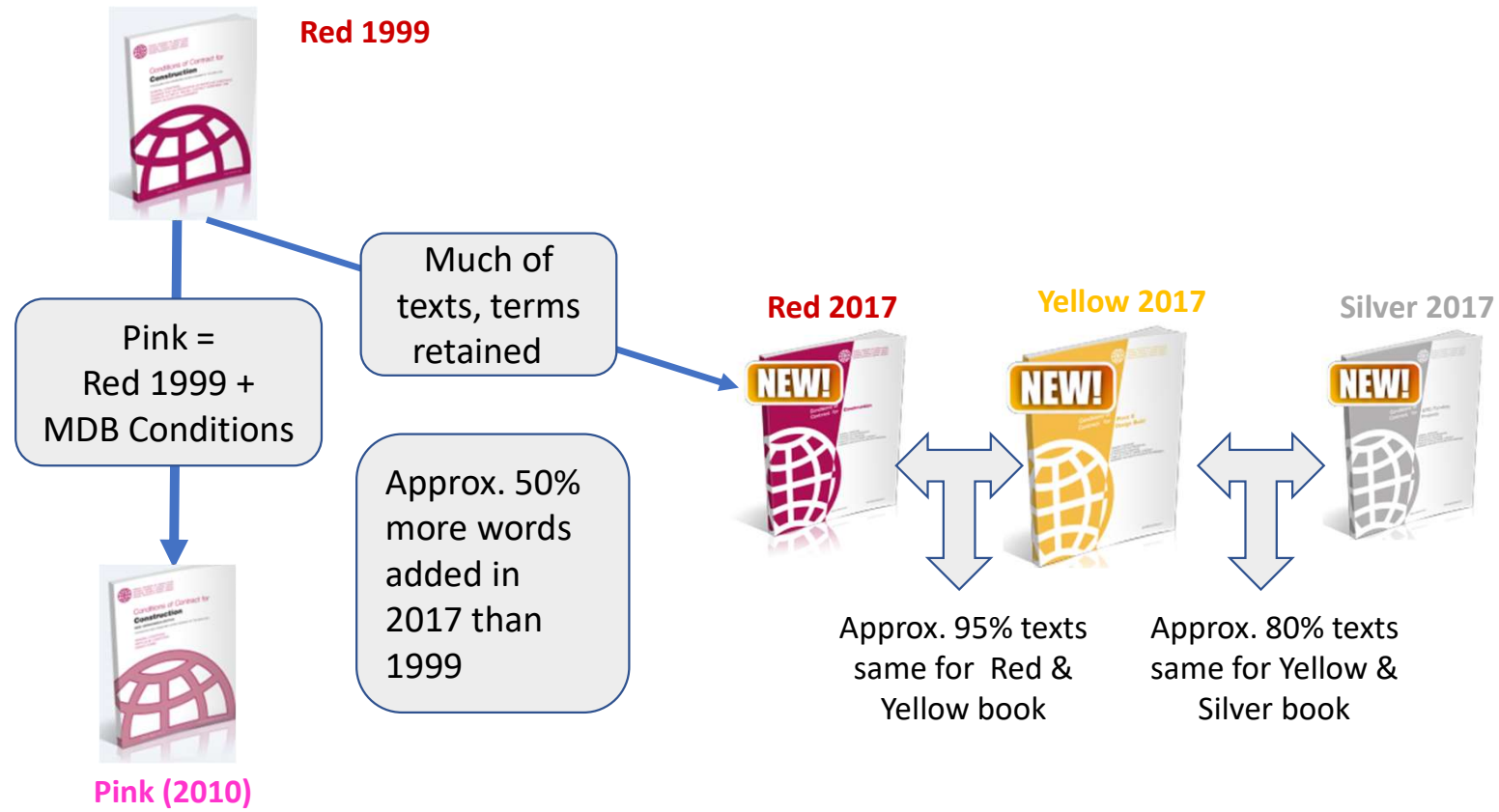
### Enhanced in 2017

- Fairness Principles
- Applicability in diverse civil/common jurisdictions

### Significant Changes in 2017

- **Greater detail and clarity** on the Contract Requirements & Procedure
- **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)

## Example- Retained from 1999 to 2017: Harmonization of terms in Red, Yellow, Silver





## Layout: FIDIC Pink 2010 vs FIDIC Red 2017

FIDIC MDB 2010 (Pink)	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 Pink 2010 vs FIDIC Red 2017

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, Labor
  - ❖ Measurement, Certification, Payment
  - ❖ Variations and Evaluation
  - ❖ Commencement, Completion, Suspension, Termination
  - ❖ Risk, Responsibility, and Insurance
  - ❖ Claims and Disputes Resolution

-----  
\*(1) participants' rights and duties generally as implied in the General Conditions (GC), (2) Clarity in drafting Particular Conditions (PC), (3) PC not to change balance of risk reward provision in GC, (4) All time period to perform obligations by participants to be reasonable, (5) Formal disputes to be referred to DB/DAB/DAAB for provisionally binding decision before rereferring to arbitration.

## Example- Enhanced Fairness Principles: Contractor's & Employer's Claims Procedure Unified

### Claim Notice

Pink (2010)

#### 2.5 Employer's Claims

No implications 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.

Red 2017

#### 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.

Example-Applicability in diverse jurisdiction enhanced  
Force Majeure → Exceptional Event

Pink (2010)

Red 2017

**19.1 Definition of Force Majeure**

In this Clause, “Force Majeure” means an exceptional event or circumstance:

- (a) which is beyond a Party’s control,
- (b) which such Party could not reasonably have provided against before entering into the Contract,
- (c) which, having arisen, such Party could not reasonably have avoided or overcome, and
- (d) which is not substantially attributable to the other Party.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

- (i) war, hostilities, ...
- (ii) Rebellion, ...

**18.1 Exceptional Event**

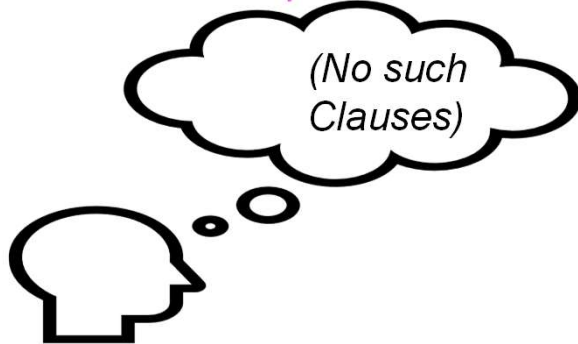
“Exceptional Event” means an event or circumstance which:

....

An Exceptional Event may comprise but is not limited to ...

## Example- Enhanced Quality and Contract Management

Pink 2010 / Red 1999



## New Sub-Clauses: Quality & Contract Management

Red 2017

### 3.8 Meetings

Management Meeting is now a part of contractual obligation, under which not only the Engineer but also the Contractor may request for such meeting to discuss to discuss relevant matters.

...

### 8.4 Advance Warning

**Not only the Contractor but also the Employer is required to** advise in advance the other party and the **Engineer**, of any known or probable event or circumstance.

### 8.3 Programme

**The Contractor** shall give notice to the **Engineer** of specific probable future events or circumstances which may

- (a) adversely affect the work...

- (b) increase the Contract Price; and/or
- (c) delay the execution of the Works...

...

## Performance Security

Pink 2010/ Red 1999

### 4.2 Performance Security

...

If the terms of the Performance Security specify its expiry date, and the Contractor has not become entitled to receive the Performance Certificate by the date 28 days prior to the expiry date, **the Contractor shall extend the validity of the Performance Security until the Works have been completed and any defects have been remedied.**

...

Red 2017

### 4.2 Performance Security

...

The Contractor is required to extend the Performance Security validity **until the issuance of the Performance Certificate**, and until the Contractor satisfies its Site Clearance obligations.

...

## Example- Greater Procedural Clarity & Procedural Details

**Pink 2010/ Red 1999**

### **15.1 Notice to Correct (1 sentence)**

If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.

### **Termination by Employer**

**Red 2017**

### **15.1 Notice to Correct (4 paragraphs)**

This sub-clause has been elaborated into 4 paragraphs, stating

- condition under which the Engineer may issue a Notice to Correct,
- substance requirements of the Notice to Correct,
- subsequent response requirements by the Contractor, and
- clarification on implication of time specified for corrective action on extension of Time for Completion.



## Example: Greater Procedural Clarity & and Time bound Action

### Agreements or Determinations

Pink 2010/ Red 1999

#### 3.5 Determination (2 paragraphs)

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.

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars, within 28 days from the receipt of the corresponding claim or request except when otherwise specified. Each Party shall give effect to each agreement or determination unless and until revised under Clause 30 [Claims, Disputes and Arbitration].

Red 2017

#### 3.7 Agreement or Determination (18 paragraphs, 5 sub-clauses)

While discharging duties under this Sub-Clause, the Engineer has obligation to act neutrally, and not is not deemed to act for the Employer.

The procedural requirements for Agreement or Determination have been provided under the following 5 Sub-Clauses:

3.7.1 Consultation to reach agreement

3.7.2 Engineer's Determination

3.7.3 Time limits

3.7.4 Effect of the agreement or determination

3.7.5 Dissatisfaction with Engineer's determination

## Engineer's Determination in Red 2017: Highlights

Fair determination	Step-by-step time-bound procedure	Effect of determination
<ul style="list-style-type: none"><li>• Duty to act neutrally</li><li>• not deemed to act for Employer</li></ul>	<ul style="list-style-type: none"><li>• Consultation,</li><li>• Agreement or Determination</li><li>• Failure to determination on time = deemed rejection</li></ul>	<ul style="list-style-type: none"><li>• Binding</li><li>• If dissatisfied, must give notice of dissatisfaction (NOD) within 28 days of the determination Notice and must refer the dispute to DAAB within 42 day of NOD</li><li>• If no NOD given on time, determination can be final and binding</li></ul>

### Failure to comply with Agreement or Final and Binding Determination

Failure to comply by a Party will entitle the “victim” Party to

- take the failure itself directly to arbitration
- suspend/terminate (contractor) or terminate (employer) the contract, if the failure constitutes a material breach

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## Dispute Avoidance/Resolution in FIDIC Red 2017: Highlights

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### 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**”