

1

Clause 1 General Provisions

1.1 Definitions

Of the 58 definitions included in the First Edition, 34 have been included unchanged in the Second Edition and a further 18 included with minor changes only. Just one item, Sub-Paragraph 1.1.6.4 (Force Majeure), included in the First Edition, has been deleted from its original position and is now included in Clause 18 of the Second Edition under the revised heading 'Exceptional Events'.

There are 37 new or revised definitions included in the Second Edition and are listed below:

1.1.10 The Contract

The definition has been broadened to include two additional documents:

- (a) 'The Contractor's proposal', which itself is not a defined term. It is assumed to be a general statement of how the Contractor intends to proceed with the execution of the Works. Conventionally, this is provided as part of the Contractor's tender.
- (b) 'The JV Undertaking, if any'. A grouping of Contractors intending to tender as a Joint Venture will enter into a Pre-Bid Joint Venture Agreement to ensure that each member is committed to the Joint Venture. If the Employer requires a pre-bid qualification process, then the Pre-Bid Joint Venture Agreement can be used to support the JV qualification, otherwise it shall be included in the Joint Venture tender offer. The full JV Agreement will be finalised immediately after award should the tender be successful. An example of a Joint Venture Agreement is provided in Appendix G.

1.1.12 Contract Data

In the First Edition, 'Contract Data' was referred to as 'Appendix to Tender'. In the Second Edition the number of items included under this heading has been significantly increased (these are discussed later in Appendix A, 'Guidance for the Preparation of Particular Conditions').

1.1.13 Contract Price

This definition is minimal. A full definition is included in Sub-Clause 14.1 (The Contract Price).

1.1.15 Contractor's Documents

This definition has been enlarged seemingly to ensure every potential item has been included. Considering that the sub-clause ends '*and other documents of a technical nature*', an extensive listing is hardly required.

1.1.20 Cost Plus Profit

This definition has been significantly improved from that given in the First Edition and provides clarity on an issue that has led to disputes in the past.

- The percentage for profit shall be as stated in the Contract Data.
- The percentage for profit shall be 5% if not otherwise stated in the Contract Data.

The Contractor should note that there have been instances where the Employer has failed to add any percentage for profit in the Contract Data. At a later date, the Employer could claim that because no percentage was given, the Contractor was not entitled to any payment under this item.

1.1.22 DAAB

'Dispute Avoidance/Adjudication Board' (DAAB) replaces the "Dispute Adjudication Board" described in the First Edition, as it more accurately defines the purpose of the Board as stated elsewhere in Clause 21 of the Second Edition.

1.1.23 DAAB Agreement

An updating of the DAB wording used in the First Edition.

1.1.24 Date of Completion

This is a new sub-paragraph not used in the First Edition and is self-explanatory.

1.1.26 Daywork Schedule (If Included)

This is a new definition not used in the First Edition but arguably should have been included. For further comment refer to commentary on Sub-Clause 13.5 (Daywork).

If a Daywork Schedule is not included in the Contract, it would be appropriate to query this omission in the Tender period.

1.1.27 Defects Notification Period (DNP)

The wording has been slightly modified but has the same intent as that stated in the First Edition.

1.1.28 Delay Damages

In the First Edition, the Delay Damages were specified in the (then) Sub-Clauses 8.2 and 8.7 and valued as stated in the Appendix to Tender. In the Second Edition, the relative clause numbers are Clauses 8.2 and 8.8 and any Delay Damages are to be valued as stated in the Contract Data (which is the retitled 'Appendix to Tender' – see Sub-Paragraph 1.1.12 above).

1.1.29 Disputes

This is a new definition not included in the First Edition. It is a very important topic and is to be referenced to Clause 21.

1.1.37 Exceptional Events

Clause 19 of the First Edition (headed 'Force Majeure') defined Force Majeure as an '*exceptional event or circumstance*'. In this edition, the wording 'Force Majeure' has been retitled as 'Exceptional Events' with only very minor changes to the contents of the clause. The clause number is changed from Clause 19 to Clause 18.

1.1.38 Extension of Time (EOT)

This is a new definition. Sub-Clause 8.4 of the First Edition has been replaced by Sub-Clause 8.5 in the Second Edition. Refer to Sub-Clause 8.5 for further discussion. Note that the abbreviation EOT is now regularised.

1.1.40 Final Payment Certificate (FPC)

The wording is unchanged from the wording in the First Edition. Note that the abbreviation FPC is now regularised.

1.1.43 General Conditions

This is a new definition added presumably for the sake of completeness.

1.1.45 Interim Payment Certificate (or IPC)

Text is slightly modified with same intent as in the First Edition. Note that the abbreviation IPC is now regularised.

1.1.46 Joint Venture

This is a new definition. The First Edition did not contain this definition even though it is a frequently used term to describe a well-recognised Contractor's business structure. Note that the abbreviation JV is now regularised. It is observed that this Second Edition does not make reference to other Contractor's business structures such as a 'Consortium'.

1.1.48 Key Personnel

This is a new definition added presumably for completeness. Note that it specifically refers to the Contractor's personnel excepting only the Contractor's Representative.

1.1.49 Laws

This is a new definition added to reflect the changed heading of Sub-Clause 13.6 (Adjustment for Changes in Laws).

1.1.54 Month

This is a new definition. 'Month' is a word used occasionally in the Conditions of Contract.

1.1.55 No objection

This is a new definition and is a wording occasionally used in the Conditions of Contract.

1.1.56 Notice

This is a new definition. When read in conjunction with Sub-Clause 1.3 (Notices and Communications), this definition will have an important impact on the day-to-day management of the project. More than 100 instances where a Notice is required to be issued are identified in Appendix D of this book.

1.1.57 Notice of Dissatisfaction (or NOD)

This is a new definition and refers to the Notice one Party may give to the other Party if he is dissatisfied with either an Engineer's determination (Sub-Clause 3.7) or with a DAAB decision (Sub-Clause 21.4).

1.1.59 Particular Conditions

This is a new definition. No definition of 'Particular Conditions' was included in the First Edition, although the wording 'The Particular Conditions' was included in Sub-Clause 1.5 of the General Conditions. The same wording is included in the Second Edition, Sub-Clauses 1.5(a) and (b). This definition is solely a tidying up exercise.

1.1.62 Performance Certificate

This issue of the Performance Certificate is conditional on the Contractor having completed all his obligations, i.e. at the end of the expiry date of the last Defects Notification Period.

1.1.65 Plant

The wording of this definition has been slightly enlarged in the Second Edition. The definition refers to '*apparatus, equipment, machinery etc.*', intended to form part or forming part of the permanent works.

1.1.66 Programme

This is a new definition. Although Sub-Clause 8.3 of the First Edition described the Contractor's general obligations in respect of programming, no specific definition of the word "Programme" was provided. A much-enlarged Sub-Clause 8.3 (Programme) is included in this Second Edition.

1.1.68 QM System

This is a new definition. The First Edition Sub-Clause 4.9, headed 'Quality Assurance', contained only a brief description of the Contractor's obligations. In this Second Edition, Sub-Clause 4.9, headed 'Quality Management and Compliance Verification Systems', contains a much more detailed description of the required QM system.

1.1.70 Review

This is a new definition. The word 'review' was variously used in the First Edition. However, a clear definition was not provided.

1.1.71 Schedules

The wording of this definition has been slightly amended.

1.1.75 Special Provisions

This is a new definition. The Second Edition has a number of annexures, including a document entitled 'Guidance for the Preparation of Particular Conditions'. Pages 13–52 of that document are subtitled 'Notes on the Preparation of Special Provisions', which is intended to provide guidance to the Employer and his advisors when preparing the Particular Conditions of Contract Part B for inclusion in the Contract Documents. There is no direct involvement of the Contractor in this matter.

1.1.77 Statement

This sub-clause has been expanded to make it clear that in addition to Statements for Applications for Interim Payments, the Contractor shall also provide Statements at Completion (Sub-Clause 14.10) and Statement at Final Completion (Sub-Clause 14.11).

1.1.78 Subcontractor

The term 'Subcontractor' is extended to include any designer appointed by the Contractor.

Note: Nominated Subcontractors are defined in Sub-Clause 5.2.1.

1.1.81 Tender

The definition contained in the First Edition has been extended to include:

- The Contractor's proposal
- The JV Undertaking (if applicable)

1.1.82 Tests After Completion

The definition has been rewritten with the same intent as in the First Edition.

1.1.85 Unforeseeable

The wording in the First Edition '*... by the date for submission of the Tender*' is amended to '*... by the Base Date*'. Base Date is defined in Sub-Paragraph 1.1.4.

1.2 Interpretation

This sub-clause contains legal statements confirming (except where the context requires otherwise):

- (a) words indicating one gender – includes all genders
- (b) words indicating the singular also include the plural and vice versa
- (c) "Agreements" have to be recorded in writing
- (d) where something is stated to be written or in writing, this shall result in a permanent record

Two additional sub-clauses have been added in the Second Edition:

- (e) '*may*' means that the Party or person has a choice of whether to act or not
- (f) '*shall*' indicates an obligation to perform.

1.3 Notices and Other Communications

In the First Edition, this Sub-Clause was headed 'Communications'. In this Second Edition, the sub-clause has been significantly expanded and its application requires a much greater degree of formality between the Parties.

The opening paragraph contains an extensive listing of all potential types of communication and content which could arise during the course of executing a contract. Most items in the listing relate to routine matters arising during the performance of the contract and will be familiar to those directly engaged in its execution.

However, this Second Edition now introduces two related new items which require special attention, namely 'Notice' (refer Sub-Paragraph 1.1.56) and 'Notice of Dissatisfaction' (refer Sub-Paragraph 1.1.57).

A Notice is a written communication identified as a Notice which is sent by one Party to another.

Examples of Notices are:

Clause 8.1	The Engineer shall give a Notice to the Contractor stating the Commencement Date.
Clause 3.7.2	The Engineer shall give a "Notice of the Engineer's Determination" to both Parties of his determination of any claim.
Various Clauses	All claims submitted by the Contractor shall require a heading "Notice of Claim".

The general requirements of this sub-clause are:

- a Notice or communication must be in writing and a paper original signed by the Contractor's Representative (or authorised representative)
- an electronic original to be transmitted to/from the electronic addressees of the authorised representatives or
- delivered by hand against receipt,
- delivered, sent or transmitted to the address for the recipient's communications as stated in the Contract Data.

The management of 'Notices and Other Communications' is a burden on site staff and will require careful handling, especially if time related issues are involved. This subject is discussed further in Appendix D of this book.

1.4 Law and Language

The law governing the Contract shall be that of the country where the Contract is to be executed.

The wording of the First Edition has been upgraded. Both the ruling language and the language for communications are intended to be stated in the Contract Data. If not stated, then the language of these Conditions of Contract shall be the ruling language and the language for communications shall be the ruling language.

Should the stated governing law be not that of the country where the contract is executed, it may happen that the local courts may claim jurisdiction regardless of the wording of the Contract. Legal advice should be sought if such a situation arises.

1.5 Priority of Documents

Engineer or Contractor to give Notice of any discrepancy which may lead to Notice of Claim by Contractor.

The listing provided in the First Edition has been extended in the Second Edition as follows:

- (a) the Contract Agreement }
- (b) the Letter of Acceptance } unchanged in the Second Edition
- (c) the Letter of Tender }
- (d) The Particular Conditions item (d) of the First Edition has been amended. The First Edition Sub-Paragraph 1.1.1.9 describes a document titled 'Appendix to Tender', which is a listing of additional information pertinent to the Tender (and to be included in the signed Contract), and which are to be provided by the Employer.
In this Second Edition, this document is now re-titled 'Particular Conditions Part A – Contract Data'.
- (e) The previous format of the Particular Conditions in the First Edition is retained and re-titled 'Particular Conditions Part B – Special Provisions'.
- (f) the General Conditions }
- (g) the Specifications } Re-numbered but otherwise unchanged
- (h) the Drawings }
- (i) The Schedules }
- (j) the JV Undertaking (if the Contractor is a JV) – New item (refer to Appendix G of this book)
- (k) any other documents forming part of the contract – unchanged

'If a Party finds an ambiguity or discrepancy on the documents, that Party shall promptly give a Notice to the Engineer, describing the ambiguity or discrepancy'.

1.6 Contract Agreement

This Second Edition follows the same procedures given in the First Edition. The Employer is required to provide the Contractor with a Letter of Acceptance, which the Contractor should acknowledge in writing with the date of receipt duly noted. From the date of receipt of the Letter of Acceptance by the Contractor, a binding contract exists between the Parties. Within 35 days (was 28 days in the First Edition) after receipt of the Letter of Acceptance by the Contractor, the Parties shall sign a Contract Agreement based on the standard form annexed to the Particular Conditions of Contract.

It is preferable that the full contract documentation, including the Contract Agreement and those documents described in Sub-Clause 1.5, are all brought together in one comprehensive bound document. The various annexures need only be initialled by the signatories.

The signatories of both the Employer and the Contractor will have to be legally authorised to do so by their respective Board of Directors (or equal).

1.7 Assignment

The wording of the First Edition is unaltered.

'Neither Party is permitted to assign or transfer the whole or any part of the Contract or any benefit or interest in or under the Contract without the agreement of the other Party'.

Either Party may, as security, assign its right to any money due under the Contract to a bank or financial institution. Contractors generally will finance their activities with loans from their bankers. A typical condition of the provision of such loans is that the Contractor's income is to be channelled through these banks, thus providing a high degree of financial stability.

Government bodies may be reorganised and retitled from time to time, but this would not lead to reassignment.

However, if the Employer is not a government body, then events such as taking over by others, re-organisation, change of ownership etc. may occur. The Contractor is advised to obtain a legal review should these circumstances arise.

1.8 Care and Supply of Documents

Parties and Engineer are required to give Notice of errors or defects which may give rise to Notice of claim by Contractor.

In both the previous and Second Editions, the Specification and Drawings are to be in the custody of the Employer.

The Employer is required to provide the Contractor with two copies of the Contract and each subsequent drawing at no cost to the Contractor. Further copies may be provided if requested by the Contractor and at the Contractor's expense.

The Contractor is to retain the custody of the Contractor's Documents, unless and until taken over by the Employer.

In the Second Edition, the requirements of the First Edition have been partly amended. The Contractor is now required to provide the Employer with one paper original of each of the Contractor's Documents, together with

'one electronic copy (in the form stated in the Specifications or, if not so stated, in a form acceptable to the Engineer) and additional paper copies (if any) as stated in the Contract Data for each of the Contractor's Documents'.

One wonders if it would not be more efficient and less costly if both Parties were to exchange copies of drawings by electronic means, allowing each Party to decide the number of copies required at their own convenience.

1.9 Delayed Drawings or Instructions

The wording of this sub-clause in the Second Edition is broadly similar to the provisions stated in the First Edition.

Concerning the supply of drawings there are two possible scenarios:

1. The Employer will have appointed an Engineer responsible for both the design and supervision of the construction of the Works.

The Employer must ensure that:

- (a) Drawings of sufficient quality and quantity are available for inclusion in the tender document package.
- (b) Updated drawings are progressively issued for use as “drawings for construction”. The first package of drawings will be required as soon as possible following the Contractor’s receipt of the Letter of Acceptance.

Thereafter the Engineer and the Contractor should agree a schedule for the continuing supply of drawings which will reflect the Contractor’s Programme of Works (which for this purpose can be assumed to approximate to the Programme of Works included in the Contractor’s Tender offer). As a general indicator the Contractor will require drawings for construction at least two months prior to commencement of each segment of the Works in order that key materials (re-bar, embedments, etc.) can be ordered and delivered to Site. Due allowance should be made, where applicable, for shipping times and customs clearance. Drawing revisions are a common feature of any significant project and a late supply may delay Contractor activities. However, with good communication systems this possibility can be minimised. If the Contractor is delayed, he is entitled to give a Notice of Claim (all subject to Sub-Clause 20.2) to be given within 28 days.

2. The Employer may (for a number of reasons) decide to employ a design specialist to prepare the design of the Works and the Tender Documents (which implies that the Employer is satisfied with the design).

Thereafter, the Employer may engage the services of another engineer to supervise the construction stage of the project (the FIDIC Engineer of these Conditions of Contract). Any decision to separate the design of the Works from the supervision of construction frequently arises of separate financing packages for the two stages. However, occasionally, this separation can have unintended consequences.

The Author has experience of a modest road rehabilitation project in Eastern Europe which was designed by an external consultant using funding from an initial external financing package. After a further five years, the Employer was able to access a second financial package for the physical reconstruction of the road. A supervising engineer (the “Engineer”) was duly appointed.

Soon after commencement of the work, the Engineer discovered that in the intervening five years the road had significantly deteriorated further, requiring significant changes to the design and the execution of additional quantities of work. The Employer had not taken this possibility into consideration when awarding the construction contract. The available funding package was inadequate to cover the resulting additional costs.

Further, the modified Red Book FIDIC 1999 contract document contained additional wording which inter alia stated that the Engineer could not order additional work without first obtaining the permission of the Employer. Due to a lack of funding the Employer was unable to provide the requested permission. The administration of the contract fell into disarray. After a prolonged delay, additional funding was eventually obtained to finish the contract which was delivered well over budget and very late.

Note:

Concerning restrictions on the Engineer’s authority to order additional work, students of these FIDIC Contract Forms are invited to read the FIDIC publication ‘THE FIDIC GOLDEN PRINCIPLES – First Edition 2019’ which is available on the FIDIC website.

1.10 Employer's Use of Contractor's Documents

Although the Contractor retains the copyright and other intellectual property rights in the Contractor's Documents, the Employer has a free licence to use this information for the operation and maintenance of the relevant portion of the Works.

Item (c) refers to electronic or digital files, computer programmes, and other software which may be used at the on-site locations of the Employer and the Engineer.

Item (d) is a new item which describes the Employer's use of Contractor's Documents in the event of Termination for Contractor's Default (Sub-Clause 15.2) and Termination for Employer's Convenience (Sub-Clause 16.2) or Optional Termination (Sub-Clause 18.5).

In the First Edition there was a reference to '*. . . replacements of any computers supplied by the Contractor*', which obligation has been deleted from this Second Edition.

1.11 Contractor's Use of Employer's Documents

As in the First Edition, the Contractor is entitled to use Employer's Documents solely for the purpose of executing the Contract and for no other purpose without the written permission of the Employer.

1.12 Confidentiality

The corresponding sub-clause of the First Edition was titled 'Confidential Details' and consisted of one sentence.

In the Second Edition, this sub-clause has been considerably enlarged and re-titled 'Confidentiality', reflecting a more detailed, broader scope of the obligations of the Parties.

1st Paragraph

As in the First Edition, the Contractor is required to disclose all information (confidential or otherwise) to the Engineer, which is necessary to ensure Contractor's compliance.

2nd Paragraph

The Contract Documents may be used only for the execution of the Works. The Contractor is prohibited from publishing or disclosing '*any particulars of the Contract*'. The Contractor, including his head office, is advised not to give press or media interviews, but refer such issues to the Employer.

3rd Paragraph

Any information provided by the Contractor to the Employer and/or the Engineer and which is marked "Confidential" shall not be disclosed to third parties.

4th Paragraph

The above obligations do not apply if the confidential information is already in the public domain or readily available from other sources.

1.13 Compliance with Laws

The Parties have a general obligation to comply with ‘*all applicable laws*’.

- (a) The Employer is required to obtain planning permits, zoning regulations, and similar regulations required for the execution of the Permanent Works together with any other permits etc. which are identified in the Specification. The Contractor has a general obligation to assist the Employer to obtain the required permits and other documentation including that which is identified in the Specification. The Contractor is required to comply with the permits etc. obtained by the Employer.
- (b) The Contractor shall give all notices, pay all taxes, duties and fees required by Law in relation to the execution of the Works and shall indemnify the Employer in respect of a failure by the Contractor to comply with these requirements.

In preparing his tender, the Contractor should examine the Site in sufficient detail in order to determine if additional land is required for the siting of crushers, concrete plants, accommodation for personnel, etc., all of which may be subject to local planning regulations. The acquisition of land for quarrying purposes, borrow areas and waste areas which may be located at a distance from the Site, will also require the Contractor to obtain the appropriate permissions, licenses, etc. from the local authorities.

Royalties may be payable in respect of any excavated materials. This potential additional tax may be significant. The legal requirements are to be clarified and the Cost included in the Tender price. Sub-Clause 2.2 (Assistance), sub-paragraph b(i) states that ‘*If requested by the Contractor, the Employer shall promptly provide reasonable assistance to the Contractor to enable him to obtain permissions, licences etc.*’.

‘Should the Contractor suffer delay and/or incurs Cost as a result of the Employer’s delay or failure to obtain any permit, permission etc. (see paragraph (a) above), the Contractor shall be entitled, subject to Sub-Clause 20.2, to EOT and/or payment of such Cost plus Profit.’

‘If the Employer incurs additional costs as a result of the Contractor’s failure to comply with any of his obligations given above, then the Employer shall be entitled, subject to Sub-Clause 20.2, to payment of these costs by the Contractor.’

1.14 Joint and Several Liability

- (a) This sub-paragraph is a brief definition of a JV. If a grouping of contractors intends to submit a tender as a JV, then their intention will be made clear in a Pre-Bid Joint Venture Agreement submitted as part of the tender. This Pre-Bid Joint Venture Agreement will legally bind the contractor grouping and will be replaced by a full Joint Venture Agreement if the tender is successful.
- (b) In complying with sub-paragraph (a), the authority of the JV leader will automatically be included in the JV Agreement.
- (c) The members of the JV will be ‘known’ to each other prior to prequalification or at the latest prior to preparation of the tender. The JV will have its own legal identity at the date of submittal of tenders, usually with its own title such as (name of project) Joint Venture.

In a conventional JV, each of the JV members will provide a share of resources including Contractor's Equipment and senior staff to a pre-agreed plan. The Contractor's Representative (Sub-Paragraph 1.1.18) will almost certainly be provided by the lead company of the JV. The site organisation of administration, workshops, stores, technical support, and field crews will be a blend of the resources of the JV members. Exceptionally, it may happen that one member of the JV is to be engaged in a specialist activity. In the event of that specialist becoming bankrupt or otherwise unable to continue with the allotted work, then the JV would need to obtain consent of the Employer for the engagement of a replacement specialist company. To avoid such a possibility occurring, it is probably more manageable if the specialist were to be engaged as a subcontractor to the JV.

Should a member of the JV become bankrupt or otherwise unable to continue, the remaining members of the JV are obliged to share the share portion of the failed member between them. The share portion of the failed member is conventionally reduced to a nominal 0.01% of the total. This share portion becomes extinct only when the JV is wound up after completion of all activities, including settlement of all matters between the members of the JV.

Finally, if a grouping of contractors intends to tender for a project with the intention of independently constructing the total project in distinctly separate parts, this would constitute a Consortium and not a JV, requiring a different form of documentation.

1.15 Limitation of Liability

This is a new sub-clause, not included in the First Edition.

The opening sentence effectively states that neither Party is liable to the other Party for any loss of profit, consequential losses, etc. unless they are included in a listing of items provided in this sub-clause.

Key items are:

- (a) Sub-Clause 8.8 (Delay Damages)
- (b) Sub-section (c) of Sub-Paragraph 13.3.1 (Variation by Instruction)

1.16 Contract Termination

This is a legal statement. Subject to the requirements of the governing law, a termination of the Contract requires no other action than that given in the relevant sub-clause(s) of these Conditions of Contract.

Further details concerning Termination by Employer are provided in Clause 15 (Termination by the Employer) and details of Suspension and Termination by Contractor are provided in Clause 16 (Suspension and Termination by the Contractor). Optional Termination is the subject of Sub-Clause 18 (Optional Termination).

