



## FIDIC: Red Book (1999) and MDB Harmonised Edition (Pink Book) compared

by Frederic Gillion

The table below reviews differences between the FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 1999 Edition (the 1999 Red Book) and the Multilateral Development Banks (MDB) Harmonised Edition of the 1999 Red Book (FIDIC Conditions of Contract for Construction), revised June 2010, also known as the MDB Harmonised Edition (the Pink Book), highlighting the effect of the changes on the parties. This note includes the “key changes” identified in the following note, FIDIC Pink Book: The MDB Harmonised Edition of the Red Book, by Frederic Gillion, available to view at <http://www.fenwickelliott.co.uk/articles/contract-issues>. For ease of reference, the entries that are repeated in this note are shown in bold.

### Clause 1: General provisions

Sub-Clause	Amendment
1.1: Definitions	<p>The Pink Book changes some definitions from those used in the 1999 Red Book. For example “Appendix to Tender” becomes “Contract Data” and “Dispute Adjudication Board” becomes “Dispute Board”, to reflect the wording favoured by the World Bank.</p> <p>The definition of “Tests after Completion” in the Pink Book requires tests specified in the Contract to be carried out in accordance with “the Specification” rather than “the provisions of the Particular Conditions” referred to in the 1999 Red Book.</p> <p>The definition of “Defects Notification Period” in the Pink Book, for notifying defects in “the Works or a Section”, now “extends over 365 days except if otherwise stated in the Contract Data”. The 1999 Red Book refers to the period “as stated in the Appendix to Tender”.</p> <p>The definition of “Plant” in the 1999 Red Book has been extended from “apparatus, machinery and vehicles intended to form or forming part of the Permanent Works” to include “vehicles purchased for the Employer and relating to the construction or operation of the Works” in the Pink Book.</p> <p>The definition of “Site” in the 1999 Red Book has been extended so that “the places where the Permanent Works are to be executed” include “storage and working areas” under the Pink Book.</p>



1.1.4.3 and 1.2: Cost and Profit	In the Pink Book, the definition of "Cost" in sub-clause 1.1.4.3 no longer refers to the "reasonable profit" referred to in the 1999 Red Book: it only refers to "profit". This is because sub-clause 1.2 provides that "profit" is fixed at 5% unless otherwise indicated in the Contract Data. Although contractors might consider this profit to be low, the change is certainly welcomed by employers and banks as it provides some clarity. (For more information on "Cost" in the FIDIC suite of contracts, see note by Tom Young FIDIC: "Cost" and profit in FIDIC contracts at <a href="http://www.fenwickelliott.co.uk/articles/contract-issues">http://www.fenwickelliott.co.uk/articles/contract-issues</a> )
1.1.6.10: Notice of Dissatisfaction	The Pink Book introduces a definition of "Notice of Dissatisfaction" which requires the Party to indicate its "intention to commence arbitration".
1.6: Contract Agreement	The Pink Book only allows deviation from the requirement to enter into the Contract Agreement within 28 days if the "Particular Conditions establish otherwise".
1.8: Care and Supply of Documents	This sub-clause determines the rights and obligations of the Employer and Contractor in relation to the custody and care of the Contract, Specifications, Drawings and Variations. In the final paragraph of the sub-clause in the 1999 Red Book, either Party is required to give notice to the other Party if it becomes aware of a defect "of a technical nature" to one of the documents. Under the Pink Book, this requirement is widened to require the Parties to give notice of any defect in the documents.
1.9: Delayed Drawing or Instructions	The 1999 Red Book requires the Contractor to give the Engineer notice whenever the Works are to be disrupted due to a failure to issue drawings or instructions within a particular time. The Pink Book deletes the requirement to provide "the details" of the nature or amount of the delay likely to be suffered.
1.13: Compliance with Laws	Sub-paragraph (a) of the 1999 Red Book requires the Employer to obtain planning, zoning and other permissions for the Permanent Works and indemnify the Contractor for its failure to do so. In the Pink Book "building permit" has been added to the list of permissions that have to be obtained by the Employer. Sub-paragraph (b) of the 1999 Red Book requires the Contractor to take all actions required for compliance with applicable Laws and to indemnify the Employer for his failure to do so. In the Pink Book the indemnity is qualified by the following wording "unless the Contractor is impeded to accomplish these actions and shows evidence of its diligence."



1.15: Inspections & Audit by the Bank	The insertion of this new sub-clause in the Pink Book allows representatives of the Bank to inspect the Site and/or to inspect and audit the Contractor's accounts and records relating to the Contract.
---------------------------------------	--

## Clause 2: The Employer

2.1: Right of Access to the Site	The Pink Book amends the 1999 Red Book to require the Employer to grant access to and possession of the Site to the Contractor so that the Programme can proceed "without disruption".
2.2: Permits, Licenses or Approvals	The Pink Book deletes "where he is in a position to do so" from the Employer's obligation, under the 1999 Red Book, to provide reasonable assistance in obtaining permits and licences for the project. This removes a ground for the Employer to refuse to assist in this regard. Changes to sub-paragraphs (a) and (b) reflect this amendment.
2.4: Employer's Financial Arrangements	Under the 1999 Red Book, the Employer is required to submit reasonable evidence that financial arrangements have been made and are being maintained to enable the Employer to pay the Contract Price, within 28 days of the Contractor's request to do so. The Pink Book requires the Employer to submit the reasonable evidence "before the Commencement Date" as well as within 28 days of the Contractor's request. In addition, the evidence that the Employer provides must demonstrate that it is able to pay the Contract price "punctually".
2.5: Employer's Claims	The amendment to the 1999 Red Book concerns the service of the Employer's notice of claim. Under the Pink Book, the Employer must still give notice as soon as practicable, but (in any event) the notice must be given within 28 days of the Employer becoming aware, or when it "should have become aware", of the circumstances giving rise to the notice. This appears to be a more onerous provision for the Employer. However, the words "should have become aware" makes it difficult to operate as a condition precedent.

## Clause 3: The Engineer

3.1: The Engineer's duties and authority	Under the Pink Book, the Employer is allowed to change the authority of the Engineer without the agreement of the Contractor. In contrast, under the 1999 Red Book, the Employer has an obligation not to impose "further constraints on the Engineer's Authority except as agreed with the Contractor." This change may be seen as potentially affecting the balance of risk. The second amendment under sub-clause 3.1 requires the Engineer to obtain the Employer's approval before taking action under sub-clauses 4.12, 13.1, 13.3 and 13.4.
--	--



3.5: Determinations	In both the 1999 Red Book and the Pink Book, the Engineer is required to give the Contractor and the Employer notice of its determination of any matter not agreed between the parties. However, the Pink Book is more onerous for the Engineer as it now fixes a time limit for the determination (28 days from receipt of the corresponding claim or request).
------------------------	--

## Clause 4: The Contractor

4.1: Contractor's General Obligations	The Pink Book adds to the 1999 Red Book by requiring the contractor to source all equipment, material and services for use on the Works from an eligible source country (as defined by the Bank). For more information, see the IBRD Guidelines of Procurement under IBRD Loans and IDA Credit.
4.2: Performance Security	<p>The Pink Book requires the Performance Security to be issued by "a reputable bank or financial institution" selected by the Contractor. Unlike the Red Book there is no requirement for the Employer to approve the entity and country (or other jurisdiction) from which it is issued</p> <p>Sub-paragraphs (a) to (d) of the 1999 Red Book contain a list of circumstances under which the Employer is entitled to make a call under the Performance Security provisions. The Pink Book removes this list.</p> <p>The Employer is now able to make a call in respect of amounts to which it is entitled under the Contract. This may be seen as an extension of the Employer's rights. However, the recommended text for the performance (which stipulates that the ICC Uniform Rules for Demand Guarantees, Rule 458, shall govern the guarantee) should provide sufficient protection as this lists the events giving rise to a call as well as the reasons for such a call.</p> <p>The Pink Book adds a new paragraph to the end of the sub-clause, allowing the Engineer to request a prompt increase or decrease of the Performance Security, where a Variation or determination results in a reduction of the Contract Price by more than 25% of the portion of the Contract Price payable in a specific currency.</p> <p>The adjustment to the Performance Security will be the equivalent of the percentage change to the Contract Price.</p>



4.3: Contractor's Representative	The second paragraph in this sub-clause requires the Contractor to submit the name and particulars of the person who it proposes to be the Contractor's Representative (if not named in the Contract). This process must be repeated where the Engineer withholds or revokes consent for the Contractor's appointee, or where the appointee fails to act as the Contractor's Representative. The Pink Book reiterates that the Engineer's withholding or revocation of consent for the Contractor's Representative must be based on the grounds in sub-clause 6.9.
4.4: Sub-contractor	The Pink Book: <ul style="list-style-type: none"><li>• Expands confidentiality requirements to cover this clause.</li><li>• Encourages the use of sub-contractors from the country in which the project is being constructed.</li></ul>
4.15: Access Route	The Pink Book now includes the words "Base Date", to provide certainty on when the Contractor should have been deemed satisfied as to the suitability of the Access Route.

## Clause 5: Nominated Subcontractors

5.2: Objection to Nomination	The Pink Book has a number of additional grounds upon which the Contractor can object to a Nominated Sub Contractor.
------------------------------	--

## Clause 6: Staff and labour

6.1: Engagement of Staff and Labour	The Pink Book amends the 1999 Red Book to try to encourage Contractors to employ staff and labour from the country where the Works are carried out. This is not an obligation, but reflects the MDB's desire to encourage local enterprise.
6.2: Rates of Wages and Conditions of Labour	The Pink Book obliges the Contractor to inform all Contractor Personnel about their liability to pay personal income taxes in the Country.
6.7: Health and Safety	The Pink Book includes a specific provision whereby the World Bank tries to reduce the transfer of AIDS through HIV-AIDS awareness campaigns.



6.12 to 6.22: Particular locality sub-clauses	<p>These sub-clauses, which used to be found in the 1999 Red Book's Particular Conditions to take account of local labour and health and safety regulations, are no longer optional under the Pink Book. They cover issues such as:</p> <ul style="list-style-type: none"> <li>• Foreign personnel.</li> <li>• Supply of foodstuffs.</li> <li>• Supply of water.</li> <li>• Measures against insect and pest nuisance.</li> <li>• Alcoholic liquor or drugs.</li> <li>• Arms and munitions.</li> <li>• Religious customs.</li> </ul> <p>The impact of these sub-clauses is to increase the Contractor's administrative costs, in particular sub-clause 6.22 (which deals with employment records of workers and requires "complete and accurate records of the employment of labour").</p>
6.23: Workers' Organisations	<p>The Pink Book introduces a provision that recognises the workers' rights to form and to join workers' organisations of their choice, and to bargain collectively, without interference by the Contractor.</p>
6.24: Non-Discrimination and Equal Opportunity	<p>The Pink Book introduces a provision requiring the Contractor to base the employment relationship on principles of "equal opportunity and fair treatment".</p>

## Clause 7: Plant, materials and workmanship

7.7: Ownership of Plant & Materials	<p>Under the Pink Book, any Plant or Materials become the property of the Employer either when they are incorporated into the Works or when the Contractor is paid for them.</p>
-------------------------------------	--

## Clause 8: Commencement, delays and suspension

8.1: Commencement of Works	<p>The first paragraph of the 1999 Red Book has been replaced in the Pink Book: the Project cannot commence unless the Contract Agreement has been signed by both parties, the Contractor has reasonable proof that the Employer can fund the Project and the Contractor has received any advance payment to which it is entitled. However, it is less clear when the actual commencement date is, as the maximum 42 day limit has been removed.</p>
8.4: Extension of Time for Completion	<p>Under the Pink Book, the Contractor is now entitled to an extension of time for delays caused by the Employer's other contractors anywhere (not just restricted to the Site).</p>



8.6: Rate of Progress	The Contractor is entitled to payment for the costs of acceleration. However, in the Pink Book, the sub-clause states that the Contractor is not entitled to "any other additional benefit". It is not clear if this means profit.
8.12: Resumption of Work	Under the Pink Book, following suspension, the Contractor should only make good any deterioration or defect in or loss to the Works, Plant or Materials after having received an instruction from the Engineer.

## Clause 11: Defects liability

11.3: Extension of Defects Notification Period	Due to an amendment in the Pink Book (compared to the 1999 Red Book), it would appear that the Employer can only claim for an extension to the Defects Notification Period, if the damage can be attributed to the Contractor.
--	--

## Clause 12: Measurement and evaluation

12.1: Works to be Measured	The Pink Book requires the Contractor to show, in each application for payment (both interim and/or final), quantities or particulars detailing the amounts which the Contractor considers itself to be entitled to.
12.3: Evaluation	The thresholds for the rates that can trigger the use of rates other than those specified in the Contract have been increased in the Pink Book, compared to the 1999 Red Book. Furthermore, any item that was not priced in the Bill of Quantities is to be included in other rates and prices in the Bill of Quantities and will not be paid for separately. This could mean that the Contractor is responsible for additional costs accruing from any omission.

## Clause 13: Variations and adjustments

13.1: Right to Vary	Under the Pink Book, the Contractor is not bound to execute a variation if it would "trigger a substantial change in the sequence or progress of the Works." The Contractor has the obligation to demonstrate the substantial change.
---------------------	---



13.7: Adjustments for Changes in Legislation	Under the Pink Book, the Contractor is not entitled to an extension of time and/or costs under this sub-clause, if they have already been taken into account elsewhere.
--	---

## Clause 14: Contract price and payment

14.1: The Contract Price	Under the Pink Book, Construction Equipment is now exempt from import duties when imported.
14.2: Advance Payment	The Pink Book requires the guarantee to be issued by "a reputable bank or financial institution" selected by the Contractor. Unlike the Red Book, there is no requirement for the Employer to approve the entity and country (or other jurisdiction) from which it is issued. In the event of a termination of the contract by the Employer for convenience, the Contractor is not required (unlike under the Red Book) to repay the balance of the advance payment.
14.7: Payment	The Pink Book amends the 1999 Red Book, to take account of the event where a Bank loan or credit is suspended.
14.9: Payment and Retention Money	Under the Pink Book, a bank guarantee can be provided in lieu of a retention.

## Clause 15: Termination by Employer

15.5: Employer's Entitlement to Termination for Convenience	The Pink Book imposes limits on the Employer's right to terminate at his own convenience: the Employer cannot terminate the Contract just because he wants to pre-empt the Contractor's termination.
15.6: Corrupt or Fraudulent Practices	A new clause dealing with corrupt or fraudulent practices has been inserted into the Pink Book. The amendment is consistent with the global trend to seek to prevent fraud and corruption. The contractual sanction is that the Employer may terminate the Contract if it determines "based on reasonable evidence" that the Contractor has engaged in a fraudulent practice. The definition of "fraudulent practice" is very broad ("misrepresentation or omission of facts in order to influence a procurement process or the execution of a contract") and may have far-reaching implications for the Contractor in the administration of the Contract.





## Clause 16: Suspension and termination by Contractor

16.1: Contractor's Entitlement to Suspend Work	If the Bank suspends payment of the funds from which the Contractor is paid, and no alternative funds are available, the Contractor can suspend or reduce the rate of work it performs at any time (having received a notice from the Bank).
16.2: Termination by Contractor	<p>The grounds on which the Contractor can terminate the Contract have been amended in the Pink Book. It is not enough for the Employer to fail to perform its obligations under the Contract. The Employer's breaches must "materially and adversely affect the economic balance of the Contract and/or the ability of the Contractor to perform the Contract."</p> <p>The Pink Book includes two new grounds for termination:</p> <ul style="list-style-type: none"><li>• If the Bank suspends the loan or credit from which the Contractor is paid and 14 days after the Contractor has followed the payment mechanism under sub-clause 14.7, it has still not received the sums due to it, the Contractor can suspend work, reduce its rate of work or terminate the Contract.</li><li>• If the Contractor does not receive the Engineer's instruction to commence work 180 days after the Letter of Acceptance, the Contractor may terminate the Contract.</li></ul>

## Clause 17: Risk and responsibility

17.1: Indemnities	The Pink Book's indemnity from the Contractor is enlarged (compared to the 1999 Red Book) from that caused by the Contractor to cover all damage or loss however arising, except that only attributable to the Employer.
17.3: Employer's risks	The Employer's risks under the Pink Book have been amended slightly from the 1999 Red Book and are less onerous for the Employer.
17.6: Limitation of Liability	The limitation of liability under the Pink Book clarifies the liabilities that are not covered by the limitation. The cap contained in the 1999 Red Book is replaced by a multiplier.

## Clause 18: Insurance

18.1: General Requirements for Insurances	Under the Pink Book, the Contractor must approve any insurance taken out by the Employer. When the Contractor is the Insuring Party under clause 18, it is entitled to take out insurance with insurers from any eligible country.
---	--



## Clause 19: Force Majeure

19.1: Definition of Force Majeure	The Pink Book expands "Force Majeure" to include sabotage by any persons other than the Contractor's Personnel.
19.2: Notice of Force Majeure	In order to claim Force Majeure, the claiming party must have been prevented from performing "its substantial obligations."
19.4: Consequences of Force Majeure	The Contractor's entitlement, if Force Majeure is demonstrated, has been expanded under the MDB Harmonised Edition. 19.6: Optional Termination, Payment and Release The Pink Book has been amended so that the Contractor can only claim amounts reasonably and necessarily incurred by the Contractor.

## Clause 20: Claims, disputes and arbitration

20.2: Appointment of the Dispute Board	The Pink Book does not significantly amend the Dispute Resolution Procedure under clause 20. The main amendments relate to the Dispute Adjudication Board, now described as Dispute Board (DB). One of these amendments is that the DB members need to be fluent in the language for communication of the Contract and be professionals experienced in the work of the Contract.
20.4: Obtaining Dispute Board's Decision	Under the Pink Book, if any party issues a Notice of Dissatisfaction, the notice should state that, if an amicable settlement is not reached, the Party has the "intention to commence arbitration".
20.6: Arbitration	Under the Pink Book, if the Contract is with a foreign contractor, the rules applicable to the arbitration will depend on the entity providing the financing: <ul style="list-style-type: none"> <li>• "For contracts financed by all participating Banks (except the Asian Development Bank)" the arbitration is to be administered (1) by the institution specified in the Contract Data, under the rules of that institution, or (2) if specified in the Contract Data, arbitration in accordance with UNCITRAL rules, or (3) if neither are specified in the Contract Data, proceedings are to be administered by the ICC under ICC rules.</li> <li>• "For contracts financed by the Asian Development Bank", the arbitration is to be administered (1) by the institution specified in the Contract Data, under the rules of that institution, unless it is specified that the arbitration is to be conducted in accordance with UNCITRAL rules, or (2) if an arbitration institution is not specified in the Contract Data, proceedings are to be administered by the Singapore International Arbitration Centre ("SIAC") under SIAC rules.</li> </ul>

Reproduced from PLC with the permission of the publishers. For further information visit [www.practicalaw.com](http://www.practicalaw.com) or call 020 7202 1200.