FIDIC has long been the contract of choice for use on international construction and engineering projects, and is used in Ireland, notably on infrastructure and energy projects. FIDIC produced a core ‘Rainbow Suite’ of 4 contracts in 1999: the Red Book (for Building and Engineering Works), the Yellow Book (Plant and Design-Build), the Silver Book (EPC/Turnkey Projects) and the Green Book (short form contract).

In December 2017, the FIDIC Contracts Committee unveiled the much anticipated new suite of “Rainbow” Contracts, with the publication of amended Red, Yellow and Silver books. The last update to these contracts was 18 years ago, and the revisions to these contracts has been the subject of much discussion and debate in the construction industry. This article focuses on some of the main changes to the Yellow Book, many of which changes are also reflected in the revised Red and Silver Books.

**SO, WHAT HAS CHANGED?**

**Defined terms**

The 2017 YB brings greater clarity to the defined terms used throughout the contract, and these are now listed in alphabetical order, where previously they were grouped by topic. This should have the effect of making the 2017 edition of the YB more user-friendly particularly for new users. Notably, there has also been an increase in the number of defined terms, for example, the concept of “reasonable profit” from the 1999 Edition (which was open to interpretation) is now defined, with the entitlement now to recover “Cost Plus Profit”, with the profit element listed as 5% unless otherwise specified in the Contract Data.

The use of FIDIC internationally in a diverse range of countries has driven many of the changes, which are aimed at improving contracting practices across the globe. For this reason, however, many of the changes may appear unnecessary or, indeed, unhelpful to Irish users. For example, this is the case with certain of the terms which are now defined.
Significantly, there is a new defined term of a “Notice” such that where the contract requires the service by one Party of a “Notice” on the other, such notice must fulfil certain requirements (e.g. be in writing, correctly labelled etc.). This has been included to ensure that informal notices (for example, by email) will no longer constitute validly served notices under the contract.

**The Role of the Engineer**

Greater clarity is given to the role of the Engineer. The 2017 YB specifies that the Engineer must be fluent in the ruling language of the contract, and must be a professional engineer holding suitable qualifications, experience and competence to act as the Engineer. The Engineer can also appoint an Engineer’s Representative and delegate to him/her the authority to act on the Engineer’s behalf. If appointed, the Engineer’s Representative is required to remain on site for the duration of the works. Save for the Engineer’s role in relation to determinations or agreements regarding claims, and issuing notices to the Contractor to correct breaches, the Engineer can still delegate the discharge of its duties to assistants and must issue a formal Notice to the Employer and Contractor for such delegation to be effective.

There is a reminder now included in the drafting that when making a determination, the Engineer is obliged to “act neutrally” as between the Parties, and shall not be deemed to act for the Employer.

As set out in further detail below in relation to determinations and claims, overall, the manner in which the Engineer is required to administer the contract has become more prescriptive in the 2017 YB and a greater onus is placed on the Engineer to administer claims efficiently.

**Claims and Engineer’s Determinations**

The procedure for Contractor and Employer Claims is one of the most significant areas of change in the 2017 YB.

The provisions from the 1999 YB which set out separate claims provisions for each of the Employer and the Contractor has been abolished, and in the 2017 YB, there is a single claims procedure which applies to both the Employer and the Contractor.

**Notification of Claims**

Previously, the 28 day time bar for notification of claims applied only to the Contractor (running from the date the Contractor became aware of the event or should have become aware of the event). This time bar now applies to both parties under the 2017 YB, such that if the Employer wants to make a claim (e.g. for a reduction of the Contract Price or an extension of the Defects Notification Period) it is also subject to the 28 day limitation period. This is very unusual and arguably does not reflect the nature of Contractor ‘claims’ under a construction contract as distinct from an Employer’s entitlements to apply deductions, say. This change, however, reflects practices encountered in the international market.

There is also a requirement for a formal Notice (defined term) to be provided in respect of any Claims, and to be valid, the Notice must describe itself as a “Notice of Claim” and refer to the relevant clause, in addition to complying with the other notice requirement in Sub-Clause 1.3. This has the effect of bringing greater clarity to the claims process, and means Parties will not be able to rely upon ‘informal’ notices, such as references in emails or meeting minutes. If the Engineer considers the Notice of Claim to be out of time, s/he must duly notify the claiming party within 14 days of receiving the notice or the Notice of Claim will be deemed valid.

The time periods for claims has become more prescriptive. The Claiming Party must submit a “Notice of Claim” within 28 days of the circumstance giving rise to the claim arising. Thereafter, a “fully detailed” claim must be submitted within 84 days (under the 1999 YB, this period was 42 days), which includes:

a. a detailed description of the event or circumstance giving rise to the Claim;

b. a statement of the contractual or legal basis for the claim;

c. all contemporary records on which the claiming Party relies; and

d. detailed supporting particulars of the amount of additional payment (or reduction in the Contract Price if the Employer is the Claiming Party), extension of time or extension of the defects notification period claimed.

If fully detailed particulars are not provided within the 84 day time period, the Notice of Claim lapses and will no longer be valid.

**Determining Claims**

Under the 2017 YB, the Engineer has a significantly expanded role in determining claims and disputes, and in encouraging greater collaboration between the Parties. Where the Engineer is required to determine any matter or claim, the Engineer is obliged to consult with both Parties and encourage the parties to reach agreement within 42 days. If no agreement is reached within the 42 day time period, the Engineer has a further 42 days to make a ‘fair’ determination on the matter or claim. If the Engineer fails to make a determination within this period, the Claim will be deemed to be rejected.

**Variations**

Under the 2017 YB, the variations procedure has now been split into two parts. The first is a Variation by Instruction; whereby the Engineer may instruct a Variation by giving a Notice (which must be in writing and labelled “Variation”) to the Contractor and the Contractor must submit a proposal. This is a significant departure from the 1999 YB, where the Engineer was not obliged to issue variation instructions in writing. This change should result in greater clarity as to when a variation has actually been instructed.

Significantly, if the Engineer issues the Contractor with a Notice which is not labelled as a “Variation”, and the Contractor considers that it is in fact a Variation, the Contractor can immediately (before commencing any work) notify the Engineer that...
it considers that a Variation has been instructed. If the Engineer does not respond to either confirm or revoke the instruction within 7 days, the Engineer will be deemed to have revoked the instruction. This is an important demonstration of the enhanced contract management role that the Engineer has under 2017 YB.

The second procedure under the 2017 YB is a Variation by Request for Proposal procedure. This is essentially the same as the variations procedure in the 1999 contract; the Engineer may request a proposal, prior to instructing a Variation, by giving a Notice to the Contractor and the Contractor must submit a proposal or give reasons as to why it can or cannot perform the Variation.

**Fitness for Purpose**

In the 2017 YB, the fitness for purpose provision (in Sub-Clause 4.1) now states “When completed, the Works shall be fit for the purpose for which they are intended, as defined as described in the Employer’s Requirements (or, where no purpose(s) are so defined and described, fit for their ordinary purpose(s)).” This is a departure from the 1999 YB, which simply stated that “the Works shall be fit for the purpose for which they are defined in the Contract.”

From the Employer’s perspective, this change poses the question as to whether if a purpose is stated elsewhere in the contract (outside of the Employer’s Requirements), such purpose should be disregarded from the perspective of the fitness for purpose warranty. From the Contractor’s perspective, this amendment means the Contractor’s review of the Employer’s Requirements document should be thorough and comprehensive, to ensure that it is very clear from the document what the “purpose” of the Works is intended to be.

A further significant change introduced by the 2017 YB is that the fitness for purpose obligation is backed up by an indemnity in Sub-Clause 17.4 – the Contractor is now required to indemnify the Employer for loss suffered by the Employer as a result of the works not being fit for purpose (albeit that indirect and consequential losses are excluded from this indemnity). The inclusion of this indemnity is likely to cause Contractors problems, particularly in light of debates about whether and the extent to which the Contractor can assume a fitness for purpose obligation on the basis of recent case law.

**Dispute Adjudication / Avoidance Board (DAAB)**

The new Clause 21 in the 2017 YB requires the Parties jointly to appoint a ‘standing DAAB’; that is, a Dispute Adjudication / Avoidance Board that is appointed at the start of the Contract, which visits the Site on a regular basis and remains in place for the duration of the Contract to assist the Parties in the avoidance of disputes, and in the ‘real-time’ resolution of Disputes, if and when they arise.

**CONCLUSION**

The above changes reflect only some of the key changes introduced by the revised 2017 FIDIC Contracts. It is fair to say that the changes introduced in the new suite of contracts are significant, and undoubtedly it will take some time for contracting parties to become familiar with the revised contracts. The revisions are intended to bring greater clarity to the contracts, and to encourage increased collaboration between the Parties, albeit that it is possible that the more prescriptive nature of many of the provisions may result in a greater burden on the Parties in administering the contract.

It remains to be seen how the 2017 suite of contracts will be viewed by Employers, Contractors and Engineers, and the extent to which the changes will be incorporated into contract documents going forward.