

# MDA PRESENTS



## FIRST AID FOR CONTRACTS



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### A NOTE ON THE DIFFERENCE BETWEEN RED AND PINK

+ *Author: Kelly Stannard*

**No, this is not an article about colours but rather a note on the differences between the Red and Pink editions of the FIDIC contract.**

Essentially the Pink Book is the Red Book adapted to suit Multilateral Development Banks (“MDBs”). MDBs are supranational institutions set up by sovereign states, which are their shareholders. They have a common task of fostering economic and social progress in developing countries by financing projects, supporting investment and generating capital.

When an MDB finances a project, it understandably has several of its own particular conditions that need to be agreed to in order for it to do so. Prior to the conception of the Pink Book, MDBs commonly adopted the FIDIC General Conditions of Contract, including the Red Book, and heavily amended them to suit their

requirements. A group of MDBs (the “*participating Banks*”) realized that it would be useful to streamline their amendments into a standard form of contract. Accordingly, the participating Banks and FIDIC teamed up, amending the Red Book to suit, finally resulting in the Pink Book.

So what changes were made to the Red Book to suit the MDBs?

Firstly, there are some changes to the layout and the wording. For example, the Appendix to Tender is renamed the Contract Data and is Part A of the Particular Conditions - the Bank and Borrower are defined in this Contract Data. Also, the DAB is renamed the Dispute Board (“DB”).

Secondly, there are some changes to specifically incorporate the role of the Bank in the project including:

- Clause 1.15 [Works and Goods] – The Contractor shall permit the Bank to inspect the Site and audit the Contractor's accounts / records.
- Clause 2.4 [Employer's Financial Arrangements] – Obliges the Employer to give notice to the Contractor where the Bank has suspended disbursements under its loan. Clauses 16.1 and 16.2 have also been amended to allow the Contractor to suspend or terminate where the Employer fails to provide evidence of its financial arrangements.
- Clause 4.1 [Contractor's obligations] – The Contractor is obliged to procure equipment, materials and services from an eligible source country as defined by the Bank.
- Clause 8.1 [Commencement of Work] – The Commencement Date is the date at which certain prescribed conditions precedent are fulfilled and the Engineer's instruction to commence has been received by the Contractor. Conditions precedent include the signed contract agreement, receipt by the Contractor of evidence of the Employer's financial arrangements and access to and possession of the Site has been provided in accordance with the Contract Data.
- Clause 14.7 [Payment] – The Employer is obliged to pay the Contractor within 14 days of receipt of its statement when the Bank's loan or credit (from which payments to the Contractor is being made) is suspended.
- Clause 15.6 [Corrupt or Fraudulent Practices] – A

new clause. It is produced in six different versions for each of the participating Banks. The Employer may terminate the Contract if it determines that the Contractor is engaged in corrupt or fraudulent practices in executing the Contract.

- Clause 20.6 [Arbitration] – Different rules apply for foreign contractors and domestic contractors. Also, if the UNCITRAL rules are not specified in the Contract Data, the ICC rules shall apply if the dispute involves most of the participating Banks, except for the Asian Development Bank where the SIAC rules will apply.

Thirdly, there are some general changes. Of these, quite a few have been carried through to the 2017 edition of the Red Book.

- Clause 2.5 [Employer's claims] – Introduces an obligation on the Employer to give notice of its claim within 28 days of becoming aware or should have become aware of the event / circumstances giving rise to the claim.
- Clause 3.1 [Engineer's Duties and Authority] – Introduces an obligation on the Engineer to act within 28 days of receipt of a request from the Contractor
- Clause 6.1 [Engagement of Staff and Labour] – A new paragraph is added which encourages the use of local labour and staff.
- Clause 6.7 [Health and Safety] – New requirements are added concerning HIV/AIDS prevention. The Contractor is obliged to implement awareness programmes and assist affected individuals.

- Clauses 6.12 to 6.25 – New clauses dealing with foreign personnel, food stuffs, water, alcohol and drugs, arms, religious customs, funerals, forced labour, child labour, employment records, workers' organisations and non-discrimination are included.
- Clause 8.4 [Extension for Time for Completion] - The phrase "on the Site" is deleted. The Employer will take responsibility for delays caused by other contractors, whether or not they are working on the same Site.
- Clause 12.3 [Evaluation] – A new paragraph is added to the effect that any item of work included in the BoQ for which no rate or price was specified shall be considered included in other rates / prices and will be paid for separately. Also, the percentages for new rates and prices are amended.
- Clause 14.1 [Contract Price] - A new paragraph is added providing that the Contractor's Equipment which has been imported for the sole purpose of executing the Contract shall be exempt from import duties and taxes.
- Clause 15.5 [Employer's Entitlement to Termination for Convenience] – Includes an additional restriction on the Employer, namely, the Employer may not terminate to avoid a Contractor's termination.
- Clause 16.4 [Payment on Termination] – The Contractor's entitlement to profit or other loss is removed.
- Clause 17.6 [Limitation of Liability] – The exceptions on the limitation have been extended by the addition of clauses 8.7 (Delay Damages), 11.2 (Cost of Remedying Defects), 15.4 (Payment after Termination), 17.4b (Consequences of Employer's Risks) and 17.5 (Intellectual and Industrial Property Rights).
- Clause 19.1 [Definition of Force Majeure] - "Sabotage by persons other than the Contractor's personnel" is now included.
- Clause 20.1 [Contractor's Claims] – A deemed rejection by the Engineer is included in the event that the Engineer fails to respond to the claim within 28 days.
- Clause 20.2 [Appointment of Dispute Board] – Now provides for a "dispute board" rather than a "dispute adjudication board". The dispute board, like a DAB, is still one or three suitably qualified persons appointed by the parties. However, a new requirement is that the members must be professionals experienced in the type of construction involved in the Works.
- Clause 20.7 [Failure to Comply with the Dispute Board's Decision] - A failure to comply with a Dispute Board's decision which has become final and binding, can be referred to arbitration, whether or not a notice of dissatisfaction has been issued.

This article just highlights some of the differences between the Red and Pink books. It is evident that the Pink book is a more onerous on the Contractor than the Red book. Contractors should ensure they are aware of the additional obligations required for compliance with the Pink book. For example, fulfilling the conditions precedent, procurement of equipment and materials from an eligible source country defined by the Bank, supply of food and water and protection against insects, responsibility for funeral arrangements and the like. But it's not all bad news; some of the additions actually assist the Contractor. For example, the time limit introduced on Employer's claims and Engineer's determinations.