

CONSTRUCT

FIDIC 2017 RED BOOK CONTRACT

EDT. 1

THE DETERMINATION CLAUSE



Construction & Technology Attorneys

In the previous two editions of the MDA Attorneys Construct Journal, we considered and discussed various key aspects of the JBCC Principal Building Agreement and the NEC3 and NEC4 Engineering and Construction Contract.

In the 2026 MDA Attorneys Construct Journal we will critically consider certain key mechanisms and features of the 2017 FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (the 2017 Red book) across six separate editions.

In this first edition of 2026, MDA Attorneys will review the determination clause which is the central feature to the 2017 Red Book in the context of its approach to change management.

A comparison of old and new

The genesis of the determination provision which appears in the 2017 Red Book can be traced back to Sub-Clause 2.6 of the 1987 FIDIC Contract for Works of Civil Engineering Construction. This provision provided broadly that where the Engineer was required to make a decision, opinion or provide consent, or was required to determine a value, or otherwise take action which affected the rights and obligations of the parties, he was required to exercise such discretion impartially, within the terms of the contract and having due regard to all the circumstances.

The 1999 FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (the 1999 Red Book) introduced Sub-Clause 3.5 which sets out the procedure to be followed where the Engineer was called on to make a determination. The situations where the Engineer was required to make a determination related to those which involved assessing any time or monetary implication. These were extensive with there being close to 30 cross references to Sub-Clause 3.5 throughout the 1999 Red Book.

Sub-Clause 3.7 of the 2017 Red Book has expanded the Engineer's determination function from that set out in the 1999 Red Book, by now expressly incorporating the determination function into several aspects of the variation procedure (it now applies expressly to variations by instruction and variations by proposal) and a new category of claims catered for in Sub-Clause 20.1(c).

Do these latest changes enhance the 2017 Red Book? Are they easier to understand and apply? The short answer: We think not. The provisions are complicated and do not lend themselves to convenient contract administration. We elaborate further below...

Timeline / Step Guide

Sub-Clause 3.7 of the 2017 FIDIC now includes a far more detailed (and time sensitive) step by step procedure to be followed by the parties and the Engineer in progressing a matter through the determination process. We provide the following flowchart which explains this process:

TRIGGER EVENT:
Whenever the Contract requires the Engineer to proceed under Clause 3.7

Promptly

Engineer consults with the Parties

Within
42 Days

Agreement is achieved and Engineer gives Notice of the Parties' Agreement to both parties, which must attach the agreement, and the agreement must be signed by both parties

Within
14 Days

Notification of any error of a typographical or clerical or arithmetical nature

Within
7 Days

Engineer corrects the error of a typographical or clerical or arithmetical nature

OR

No agreement is achieved or both parties advise that no agreement can be achieved, whichever is earlier, and the Engineer gives Notice and proceeds with his/her determination

Within
42 Days

Engineer makes a fair determination, giving Notice of the Engineer's Determination with reasons and supporting particulars

OR

Within
14 Days

Notification of any error of a typographical or clerical or arithmetical nature

Within
7 Days

Engineer corrects the error of a typographical or clerical or arithmetical nature

Within
28 Days

Dissatisfied Party issues a Notice of Dissatisfaction

Within
28 Days

The “how to” Aspect

The Engineer is only required to follow the Sub-Clause 3.7 process to agree or determine an issue if one of the provisions elsewhere in the 2017 Red Book states that s/he must do so. These issues will either be a claim made under Sub-Clause 20.1 or another issue that is not a claim that requires agreement or determination. We've listed examples of these other issues below:

Whether or not there is an error in an item of reference, if it was notified timeously and what measures are to be taken to rectify the error (Sub-Clause 4.7.3).

- A reduction in Delay Damages after Taking-Over of a part of the Works (Sub-Clause 10.2).
- The cause of defects (Sub-Clause 11.2).
- Measurement of the works (Sub-Clause 12.1).
- The rate or price for an item of work (Sub-Clause 12.3).
- An extension of time and adjustment to the Contract Price following an instruction to vary (Sub-Clause 13.3).
- The resources used for daywork (Sub-Clause 13.5).
- Revised instalments in the schedule of payments (Sub-Clause 14.4).
- Amounts to be added for plant and materials (Sub-Clause 14.5).
- Corrections or modifications to an interim payment certificate (Sub-Clause 14.6).
- Valuation on termination due to Contractor's default (Sub-Clause 15.3).
- Valuation on termination for Employer's convenience (Sub-Clause 15.6).
- Valuation on optional termination (Sub-Clause 18.5).

Once a trigger event occurs, the Engineer must promptly consult with both Parties in an attempt to reach agreement.

The contract doesn't specify how this consultation must be conducted other than to require the Engineer to act neutrally between the Parties, to consult with both Parties either jointly or separately or both, and to encourage discussion between the Parties in an endeavour to reach agreement. This means that this consultation could be done by way of meeting, telephonic or online discussion or even a written exchange of submissions.

Any agreement achieved as a result of the consultation process must be recorded in writing and signed by both Parties.

If an agreement is not reached within 42 days of the trigger event, the Engineer (still acting neutrally) must make a fair determination giving details reasons and supporting documents. If the Engineer does not give his/her determination within another 42 days of the end of the consultation period, then the Engineer will be deemed to have given a determination rejecting any Sub-Clause 20.1 claim and the dissatisfied Party must issue a Notice of Dissatisfaction within 28 days of the date the Engineer's determination was due. If they do not, then the Engineer's determination is deemed to be accepted by both Parties and is final and binding.

Interestingly, if the issue to be determined is not a Sub-Clause 20.1 claim and the Engineer doesn't timeously issue a determination, it is deemed to be a dispute and may be referred to the Dispute Avoidance / Adjudication Board (DAAB) without the need for a Notice of Dissatisfaction. The usual time limit for such reference (under Sub-Clause 21.4.1(a)) doesn't apply in this instance.

In circumstances where the Engineer does issue his/her determination timeously, there is a 14 day period where typographical, clerical or arithmetical errors can be notified. The Engineer then has 7 days to correct such an error. If either Party is dissatisfied with the Engineer's determination they have 28 days from the date of issue of the determination (or the issue of the corrected determination as the case may be) to deliver a Notice of Dissatisfaction. If a Notice of Dissatisfaction is not delivered, the Engineer's determination is final and binding on the Parties.

A Critique

But we agreed...

As set out above, Sub-Clause 3.7.1 requires that where the parties reach an agreement, the Engineer must record such agreement and issue a notice thereof to the parties. In essence, the Engineer is now required to adequately draft the agreement reached between the parties, a task which is typically reserved for the legal profession, with good reason.

Once issued by the Engineer, the Parties are required to sign the agreement. If the Parties or Engineer discover a typographical, clerical or arithmetical error, Sub-Clause 3.7.4 sets out a process for its correction. The contract is, however, silent about what happens when one or both of the Parties fail to sign the agreement after issue by the Engineer. Is it still contractually binding on the Parties? This seems unlikely given the express requirement for signature contained in this sub-clause. What seems more likely is that a failure or refusal to sign the agreement by one or both of the Parties will be taken as an indication that no agreement has been achieved and the Engineer will be required to proceed with the determination process – however as is seen above this is not altogether clear?

There is a further obvious criticism in this step in the determination process – there are no clear safeguards should the Engineer fail to accurately record the agreement reached between the parties.

The regular legal difficulties with ascertaining precisely when agreement is reached apply equally to this step. For example, can the Engineer infer that agreement is reached by the conduct of one or both of the parties. This difficulty cuts both ways – an engineer may issue a notice without an agreement being reached – or she may refuse to issue a notice where there has been an agreement, albeit not expressly defined by the parties.

Given the level of detail incorporated into the 2017 edition, the drafters could have provided greater clarity here. For example, they could have required that any agreement reached between the parties be recorded in writing by the parties and that such agreement then be confirmed in a notice of agreement. Instead, it is the Engineer who is now responsible for deciding when agreement was reached and what the terms of such agreement are.

Another clear omission in this sub-clause is that it does not deal with the situation where the parties reach agreement, but the Engineer fails to issue a notice of agreement.

A slippery slope?

Sub-clause 3.7.4 introduces the quasi-slip rule mentioned above (the correction of typographical, clerical and arithmetical errors) into the determination process. The slip rule is typically found in adjudication and arbitration processes where clerical and other obvious errors are capable of being rectified following publication of the decision or award.

In adjudication and arbitration processes the slip rule has clearly defined limits which are supported by relevant legal authority. Even with these limits, it is not uncommon for one of the parties to attempt to extend the limited ambit of this rule by arguing that an adjudicator or arbitrator failed to consider an important point in that party's case, suggesting that this is an obvious error which should be reconsidered. Such an abuse has been addressed decisively in case law.

A determination made by the Engineer under this sub-clause is neither a decision nor an award. Further, the Engineer is not a practicing adjudicator or arbitrator and is unlikely to be conversant in the application and extent of the slip rule. This could create issues where either party places pressure on the Engineer to revisit and reissue the determination. If s/he does so, this will create greater uncertainty regarding the nature of the determination. For example, if a correction is made which goes beyond the slip rule, is the determination binding?

Slice and Dice

Sub-Clause 3.7.5 allows for a dissatisfied party to pick and choose aspects of a determination with which it is dissatisfied. Such disputed aspects are severable from the balance of the determination and are then referred to the dispute resolution process.

The ability to refer only limited aspects of a determination will create complexity in the jurisdiction of the DAAB and arbitration.

Essentially a party can sever parts of a wider dispute – with limited issues – and refer that as a discrete dispute to the DAAB. The other party would then possibly be prevented from dealing with other parts of the dispute – or other disputes – altogether. This type of provision may in fact increase the number of disputes – as opposed to reduce the number, with parties both notifying disagreements with determinations simply to ensure that they are not excluded from raising other aspects of the dispute – or other disputes – in the subsequent proceedings.

Conclusion

In seeking to spell out and mandate the steps to be followed in the determination process, FIDIC appear to have inadvertently introduced complexity and several uncertainties.

Sub-Clause 3.5 under the 1999 Red Book was two paragraphs. Sub-Clause 3.7 under the 2017 Red Book is almost three pages. It introduces new procedures, new notices and new time bars, adding, in our view, unnecessary and cumbersome bureaucracy to the contract administration process.

While becoming acquainted with this provision may appear a daunting task, given its broad application and direct links to the dispute resolution provisions, it will be unavoidable for any Party who wishes to successfully navigate a project using the 2017 Red Book.