

Update to the Determinations Provisions Under the 2017 FIDIC Silver Book: EPC/Turnkey Projects

The 2017 FIDIC Suite of Contracts contain new versions of the Yellow, Red and Silver books, which are updates of the 1999 editions. The 2017 FIDIC Suite of Contracts contain more detailed and prescriptive provisions compared to the 1999 editions. Some may find such changes burdensome and inflexible. However, one of the benefits of the 2017 FIDIC Suite of Contracts is greater certainty and clarity for both the Employer and the Contractor.

In particular, under Clause 3.5 [Agreement or Determination] (2017 FIDIC Silver Book: EPC/Turnkey Projects) (“Second Edition”), the Contractor benefits from the increased clarity and certainty, as Clause 3.5 now prevents the Employer from delaying (indefinitely) the issuance of a determination. The determinations under Clause 3.5 are particularly important to the Contractor, as some of the matters that are referred to determination under Clause 3.5 include claims for EOT and adjustments to the contract price in the event of a variation.

Clause 3.5 [Determination] (1999 FIDIC Silver Book: EPC/Turnkey Projects) (“First Edition”)

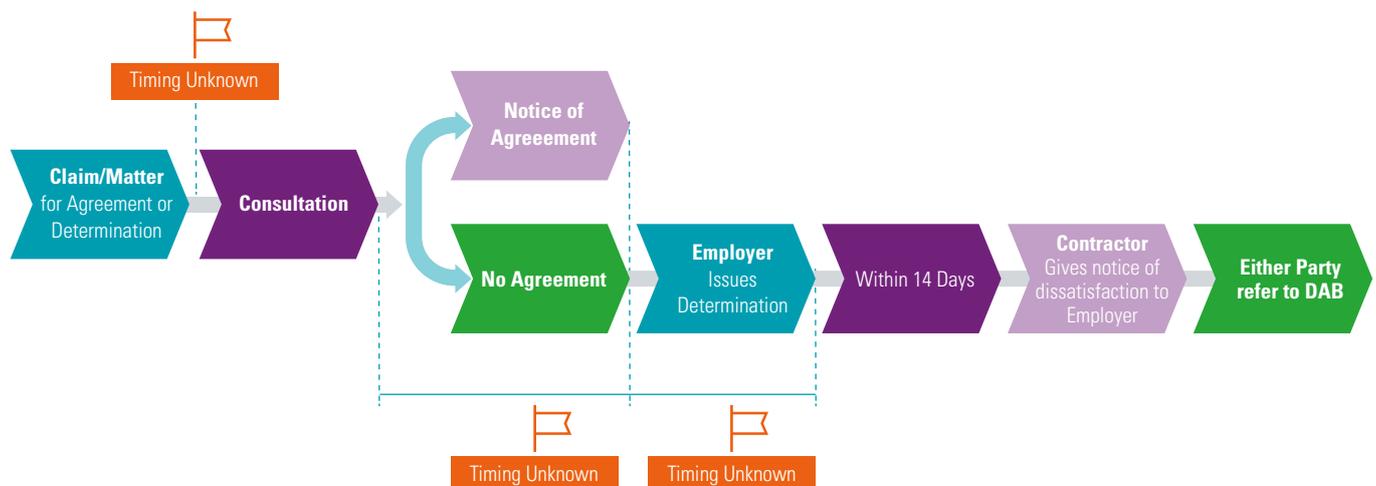
Under the First Edition, the Employer is required to consult with the Contractor to endeavor to reach agreement. If no agreement is achieved, **the Employer** is required to make a fair determination and give notice (with supporting particulars) of such determination.

Two key concerns arise with the above:

First, it is somewhat illogical to expect the Employer to provide an impartial and objectively fair determination that will be acceptable to both parties, and such determination would more than likely end up as a dispute referred for resolution by the Dispute Adjudication Board (DAB).

Second, there is no time limit set upon the Employer to conduct the consultation with the Contractor and/or issue its determination. An anticipated consequence of this is an errant Employer who impedes the resolution of an issue by delaying the issuance of its determination (for example, by not responding to the Contractor for an extended period of time), which creates unfair uncertainty and difficulty for the Contractor.

Clause 3.5 [Determination] (First Edition) – Key Steps and Timeline



Clause 3.5 [Agreement or Determination] (Second Edition)

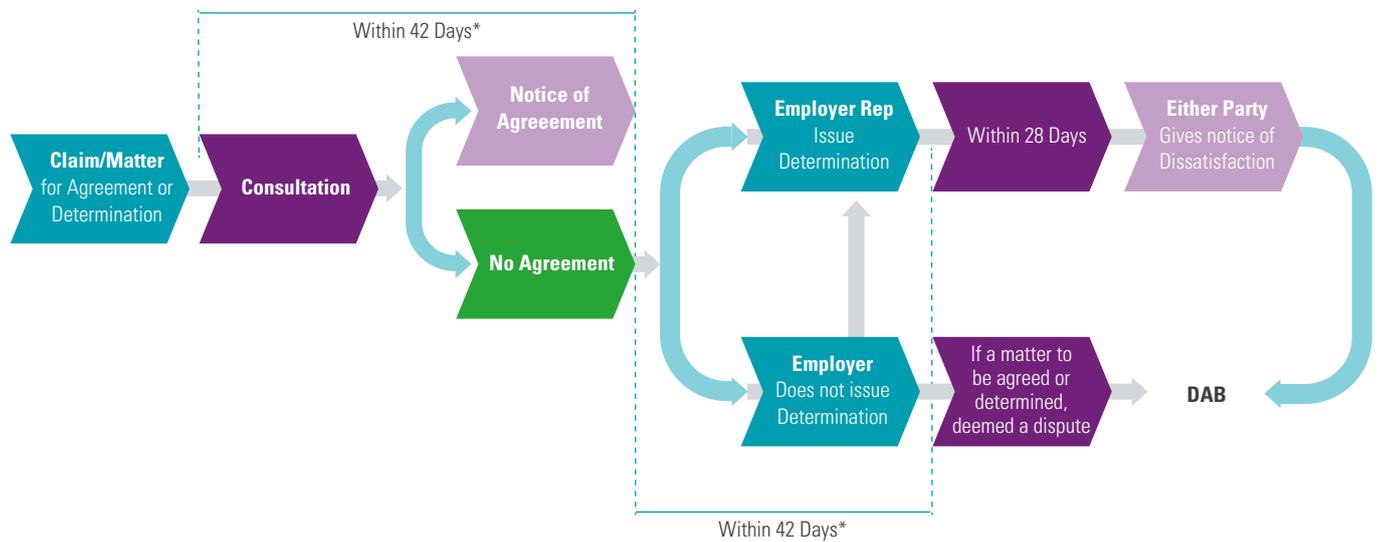
Under the Second Edition, if the Employer and the Contractor cannot reach agreement on a matter or Claim to be agreed upon or determined under Clause 3.5, the Employer’s Representative shall make the determination on such matter or Claim. It is also stated, in what appears to be an attempt to facilitate impartiality on the part of the Employer’s Representative, that in exercising his/her duties under this clause, the Employer’s Representative shall not be deemed to act for the Employer.

There are now time limits for the agreement or determination under Clause 3.5 – 42 days for agreement, failing which 42 days for determination (“Time Limits”). The consultation must commence promptly to allow adequate time to meet the Time Limits.

There are also deeming provisions – if the Employer’s Representative does not give notice of agreement or determination within the relevant Time Limits, the Employer’s Representative is deemed to have rejected the claim (if the matter is a Claim) or the matter is deemed to be a dispute (if the matter is to be agreed/determined) and may be referred for resolution by the DAB.

In addition, the Contractor now has more time to consider the determination made pursuant to Clause 3.5, and to issue a notice of dissatisfaction – under the Second Edition, both parties have 28 days to issue a notice of dissatisfaction (compared to 14 days under the First Edition).

Clause 3.5 [Agreement or Determination] (Second Edition) – Key Steps and Timeline



* Refer to Clause 3.5.3 for start date

Contractors should pay attention to the determination clause used in its EPC/turnkey contracts and incorporate the Second Edition version of Clause 3.5 (in particular the provisions on the Time Limits). Parties should consider whether, based on the project schedule and the nature of the determinations that may be required, the 42 days’ time limits are excessive or insufficient and amend the time limits accordingly.

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