The FIDIC Rainbow Suite: what's new in 2017?

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In an article prepared for the Centre of Construction Law Open Forum, King's College, London, 30 March 2017

At the International Contract Users Conference held in London on 6—7 December 2016, FIDIC finally unveiled its proposed revisions to the 1999 Rainbow Suite. More specifically, FIDIC issued a pre-release version of the Yellow Book, the Contract for Plant & Design Build. The contract was said to be "for viewing only". A similar version was provided at the Middle East Users Conference held in Abu Dhabi in February 2017.

FIDIC said that the Yellow Book second edition would be formally published by them during 2017. FIDIC also said that they intended to issue second editions of all three contracts that form part of the original 1999 Rainbow Suite, namely the Red, Yellow and Silver Books, together in 2017. The exact date of that release is not yet known. In Abu Dhabi, representatives from FIDIC suggested it would be no earlier than June 2017.

Why are the Contracts being amended?

FIDIC have explained that the underlying philosophy behind the update is as follows:

- To enhance project management tools and mechanisms;
- To reinforce the role of the Engineer;
- To achieve a balanced risk allocation. This is being achieved through more reciprocity between the parties;
- To achieve clarity, transparency and certainty;
- To reflect current international best practice;
- To address issues raised by users over the past 17 years arising out of use of the 1999 Suite; and
- To incorporate most recent development in FIDIC contracts, in particular the Gold Book.

This is why a key theme of the revised Yellow Book is the increased emphasis on dispute avoidance.

Dispute Avoidance

FIDIC is seeking to promote dispute avoidance in a number of ways:

- Distinguishing claims from disputes;
- Changes to the role of the Engineer;
- Emphasising the avoidance processes that Dispute Adjudication Boards can offer; and

- Introducing an early warning mechanism.

(a) Splitting Clause 20

As FIDIC had made clear during 2016, they have split clause 20 in two.

The reason for this is to try and make clear that making a Claim is not the same as a Dispute. To put forward a Claim is to make a request for an entitlement under the Contract. A Dispute arises if that Claim is rejected (in whole or in part) or ignored.

- Clause 20 is now entitled:

"Employer's and Contractor's Claims"

- Clause 21 is now entitled:

"Disputes and Arbitration"

(b) Changes to the role of the Engineer

The Engineer will continue to have a pivotal role in administration of the project. Clause 3 now has eight sub-clauses. Indeed it is a feature of the new Yellow Book that it is longer than its predecessor. FIDIC said at the London Conference that the word count had increased by approximately 50%. The reason for this was to achieve a contract that was more structured, with clear processes and procedures. FIDIC say that if this can be achieved, then the contract as a whole can be better understood by everyone.

Under the new Yellow Book:

- The Engineer shall continue to be deemed to act for the Employer, save that new sub-clause 3.2 says that the Engineer is not required to obtain the Employer's consent before making a Determination under new sub-clause 3.7.
- There is a new role for an "Engineer's Representative" – who is based on site for the whole time of the Project.
- New sub-clause 3.7 is headed "Agreement or Determination" which reflects the fact that the Engineer is under a positive obligation to encourage agreement of claims.
- The Engineer must also provide the parties with a record of any consultation that takes place when trying to reach such agreement.
- If the Engineer fails to make a Determination within the stated time limits, then they are deemed to have rejected the claim. This means that it can be referred to the Dispute Avoidance Board.

- When acting to seek to reach an Agreement or to make a Determination under new sub-cause 3.7, the Engineer is said not to be acting for the Employer but to be acting "neutrally" between the parties.

The word "neutrally" is new, though it is not defined. It is not an easy word to define and it was the subject of much discussion at the London Conference. FIDIC said that in choosing the word, it did not mean "independent" or "impartial". A better interpretation might be "non-partisan" and the word "neutral" has been chosen to make it clear that when making a Determination the Engineer is not, as noted above, acting on behalf of the Employer. This is something which will undoubtedly be the subject of much further debate.

(c) Dispute Adjudication/Avoidance Boards ("DABs")

The change in name alone is a clear reference to the new role of DABs.

In new clause 21, all DABs will be standing DABs, although the Guidance Notes will include an option for the use of an ad hoc DAB, as and when a dispute arises. The primary purpose of Dispute Boards, preventing claims from becoming disputes, is easier to achieve if there is a standing board which can act as a sounding board to guide the project.

The DAB rules are not currently included as part of the revised Yellow Book. When the second edition is published they will form part of the contract. The intention behind doing this is to ensure that the rules and the DAB itself are an integral part of the FIDIC Contract.

We understand that although FIDIC did give serious consideration to adopting the updated ICC Dispute Board Rules, they have decided to retain the FIDIC DAB Rules. Again, these are likely to follow the Rules to be found in the FIDIC Gold Book, albeit with added focus on dispute avoidance.

By new sub-clause 20.3, the parties may if they so agree:

> "*jointly refer a matter to the DAB in writing (with a copy to the Engineer) with a request to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract*".

To those familiar with English adjudication enforcement cases, this clause may raise some concern about asking someone who is tasked with adjudicating a dispute to undertake the dual role of formally trying to mediate a settlment. In the case of Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd[1], following the commencement of adjudication proceedings, a meeting was held between the parties. The parties reached some measure of agreement in relation to the dispute but a number of issues remained outstanding. The adjudicator was asked by both parties to mediate in order to try and finalise an agreement. Following a day long mediation complete agreement on all outstanding issues was not reached and the adjudicator therefore confirmed that the adjudication would have to continue.

HHJ LLoyd QC said that the conduct of the adjudicator meant that this was a case of "apparent bias" in that he appeared to lack impartiality. In his view, the circumstances would lead a fair minded and informed observer[2] to conclude that there was a real possibility or a real danger, the two being the same, that the adjudicator was biased. The dilemma posed but this new clause can be demonstrated by reference to comments made by the Judge in his decision:

> "*There are clearly risks to all when an adjudicator steps down from that role and enters a different arena and is to perform a different function. If a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking*."

One difficulty is that in any mediation process, a mediator will be often become privy to confidential and other commercial considerations of the parties[3]. A mediator is there to facilitate a settlement. This role is not really incompatible with that of an adjudicator who is there to decide upon the parties' legal rights and obligations. Under the FIDIC form, the parties must agree to the DAB adopting such a course. It is likely to be the type of clause that is only used gradually at first. If "informal assistance" works and it helps avoid formal disputes, and if this becomes known, parties are likely to be more willing to give it a try.

The DAB also has the power to invite the parties to make such a referral if it becomes aware of any such issue or disagreement. This positive obligation might become a very useful dispute avoidance tool indeed.

(d) Early warning

Another feature of dispute avoidance is the concept of advance warning, giving early notice of a potential problem. By encouraging the parties to do this, it is hoped that they can then work together to resolve the potential difficulty at an early stage when it is relatively minor and thereby prevent it from escalating into something altogether more serious.

The new sub-clause 8.4 follows the Gold Book, by providing that each party (and the Engineer) shall endeavour to advise the other party in advance of any known or probable future events or circumstances which may adversely affect the work.

The Programme and Extension of Time Claims

In keeping with the trend in international contracts, and in line with the Red Book subcontract, there are increased programming obligations (16 are listed) within new sub-clause 8.3.

Although FIDIC have retained their position that the programme does not become a contract document, the Engineer is required to review the programme and say if it does not comply with the contract. If the Engineer does not do this within 21 days, then the programme is deemed to comply.

There is also a positive obligation on the Contractor to update the programme whenever it ceases to reflect actual progress.

There is an interesting reference to concurrent delay, with new sub-clause 8.5 saying that if a delay caused by the Employer is concurrent with a Contractor delay, then the entitlement to an extension of time shall be assessed:

> "*in accordance with the rules and procedures stated in the Particular Conditions*".

This rather neutral comment will of course have the effect of raising the issue of concurrency as a matter that needs to be dealt with by the parties when they negotiate and finalise the contract.

BIM

There is no specific mention of BIM.

It is perhaps the case that the adoption and use of BIM is something that is more likely to be dealt with in either the Particular Conditions or as additional contract documents, through for example, the adoption of a BIM Protocol and Execution plan.

Risk Allocation, Force majeure and Exceptional Risks

As was flagged in advance, here FIDIC has followed the Gold Book which is considered to represent a more collaborative, risk-sharing approach than the 1999 suite of contracts. The new Yellow Book does not follow the 1999 clause 19 force majeure provisions. Instead, it drops clause 19 completely in favour of a new clause 18 that is headed "Exceptional Risks", and clause 17 (which was formerly risk and responsibility) has been renamed "Risk Allocation". The definition of exceptional risks is very similar to the force majeure definition previously to be found in clause 19.

However, new clause 17 is rather different, setting out the risks that the Employer and Contractor are to bear in a very detailed manner, with the Contractor being entitled to an extension of time and its costs if there are any exceptional risks or Employer risks during the design/build period.

The new sub-clause 17.1 specifically lists the Employer's Risks and the sub-clause continues that "all the risks other than those listed under sub-clause 17.1" shall be Contractor's Risks. This provision is a change, moving to the Contractor all unidentified and residual risks. Here with the new Clause 17 seems, FIDIC appear to have adopted the same approach to be found in the NEC suite of contracts. There, the Employer's risks are set out and the contract then simply states that all other risks are the Contractor's. The new FIDIC wording is almost identical.

The EIC have pointed out that new sub-clause 17.7 requires the Contractor to "…indemnify and hold harmless the Employer against all errors in the Contractor's design of the Works

and other professional services which result in the Works not being fit for the purpose(s) intended in accordance with sub-clause 4.1 [Contractor's General Obligations] or result in any loss and/or damage for the Employer (including legal fees and expenses)". This appears to be a wide ranging provision which might well entitle the Employer to recover all its losses regardless of whether or not the Employer has contributed by its own actions to the loss arising from an error in the design. It appears that the Contractor's liability is unrestricted both as to the amount or the type of loss that may be claimed because neither the limitation on liability in sub-clause 17.6, nor the exclusion of liability for any indirect or consequential loss apply to the indemnity.

This too may raise a question about insurance. Professional indemnity policies (in relation to design) cover the design using "reasonable skill and care". Those policies exclude liability entirely where there is a fitness for purpose obligation. In other words, the insurance policy is void if the designer takes on the fitness for purpose obligation. Even if a project appears to have relevant cover in place, many Employers will not be adequately covered, (and indeed cannot be adequately covered), if they demand insurance on a fitness for purpose basis.

Notices, the Claims Procedure and the FIDIC Time Bar

FIDIC have made it clear that a notice given under the new contract must clearly state that it is a notice and make reference to the sub-clause under which it is issued. This is to try and reduce disputes about what is a notice where parties try and argue that references in a programme or progress report actually constitute notice of a claim. There is an obvious benefit in defining a notice as being one that needs to be identified as a notice and including the sub-clause. However, it is equally true that this is not the type of provisions that is strictly followed. A failure to identify notices will then mean that there will be arguments about whether a particular notice is a notice or not . Any such arguments will not simply be answered by the new FIDIC definition, as local law, and the factual matrix surrounding event may well still come in to play.

Disputes as to whether a notice is a notice or not may well continue despite FIDIC's best intensions. Indeed, the new sub-clause 20.3 does provide the DAB with the power to waive a failure to follow a time bar requirement, albeit there is a 14-day time limit on a party seeking relief for the refusal of an Engineer to consider a claim because it is said to be time barred.

The DAB can take the following into account:

- Whether the other Party would be prejudiced by acceptance of the late submission;
- Whether the other Party had prior knowledge of the event in question or basis of claim; and
- The extent to which, if at all, the Engineer may already have proceeded to make a determination, or more likely sought to negotiate an agreement.

The FIDIC Form currently requires both the Employer and Contractor to submit claims. This has continued as part of new clause 20 which is clearly headed "Employer's and Contractor's Claims". This closer alignment of parties' claims is a key part of FIDIC's attempts to achieve balance and reciprocity between the parties.

FIDIC's intention is that if there is a clearly defined process, then that can help maintain relationships as both parties will know exactly where they stand and why the other is taking the steps they are to submit their claim. That said, new clause 20.2, which sets out the claims process, is one of the longest clauses in the Contract and sets out a detailed procedure. It is one reason why the new edition is 50% longer than the first. The length of the new sub-clause is a signal that the process may not be a simple and straightforward one to follow.

FIDIC are clearly trying to move towards "real time" claims management. This is a good thing, and fully in keeping with current contract trends. It is sensible to encourage the notification and early review of issues relating to extensions of time and the financial impact of change in delay as the work progresses. It is fresh in everyone's minds and it should be easy to assess. There should be benefits for everyone. For the Employer, they will be better informed about the moving contract price and likely completion date. In theory, the Contractor should then also obtain better cash flow.

The proposed notice and claims procedures will undoubtedly place an increased burden on both the Employer and Contractor to follow these new administrative requirements. This is especially the case as the 28-day time bar has been retained. In fact, as a whole, there are more specified time limits within the revised Contract, the failure to follow which will lead to sanctions. The submission of the "particulars of the contractual and/or other basis of the Claim" is now subject to a 42-days limit. Failing to submit the particulars within this time frame will eliminate the Contractor's entitlement for an extension of time and/or additional payment. Further, it is often the case that save for the simplest of claims, the preparation of a fully substantiated claim might not be possible within the timescales now proposed.

There are likely to continue to be disputes about the scope of the notices, whether they were given on time, and whether a claim is detailed or otherwise. Further it is quite possible that parties in trying to comply with the increased number of condition precedent requirements (for example the obligation to submit a NOD within 28 days of an Engineer's Determinations and the duty to commence DAB proceedings within another 28 days from the NOD) may actually serve to prevent the parties from taking the opportunity to settle a dispute amicably.

This was certainly the view of the London Conference in December 2017. Together with Nicholas Gould we led a session entitled "Managing Claims and Avoiding Disputes". As part of that session we asked the audience for their views on the likely impact of the revisions to the number of claims in the new Yellow Book. Their reply was revealing:

- Less claims? 24%
- No change? 26%

- More claims? 50%

Of course more claims do not necessarily mean more disputes, one reason no doubt for the increased emphasis on dispute avoidance.

The Dispute Board's Decision & Arbitration

New sub-clause 21.4.3 states that the decision of the DAB:

> "*shall be binding on both Parties and the Engineer, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub-Clause.*
>
> *If the decision of the DAB requires a payment of an amount by one Party to the other Party.*
>
> *(a) subject to sub-paragraph (b) below, this amount shall be immediately due and payable after the payer receives an invoice for this amount from the payee, without any certification or Notice (including any requirement to comply with Sub-Clause 20.2 [Claims For Payment and/or EOT]); and*
>
> *(b) the DAB may, at the request of a Party and as part of the decision, require the payee to provide an appropriate security in respect of such payment.*"

The Notice of Dissatisfaction (NOD) procedure has been amended. A NOD may be given within 28 days after receiving the DAB's decision. Otherwise, this decision becomes final and binding on both parties. If a NOD is issued, but neither party commences arbitration within 182 days after the giving or receiving of the NOD then the NOD shall be deemed to have lapsed and no longer be valid. Previously, there was no mandatory contractual time limit within which an arbitration had to be commenced. Parties will therefore have to commence arbitration (potentially in a piecemeal manner) during the course of the project if they serve an NOD. This may lead to a series of practical problems and actually serve to increase the number of disputes referred to arbitration.

Finally, sub-clause 21.7 attempts to deal with the so-called "Persero Problem" in the following way:

> "*In the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [Arbitration] and Sub-Clause 21.4 [Obtaining DAB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 21.6 [Arbitration]) shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.*
>
> *In the case of a binding but not final decision of the DAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award.*

Any interim or provisional measure or award enforcing a decision of the DAB which has not been complied with, whether such decision is binding or final and binding, may also order or award damages or other relief."

The key words are: "In the case of a binding but not final decision of the DAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award". Whilst they seem to be clear, no doubt parties will continue try and avoid having to give effect to DAB Decisions, even where interim arbitration awards are made to try and enforce them.

Reaction to the Second Edition

It is still early days and not many comments have been made about FIDIC's proposals. One group however who have made their views crystal clear are the contractors. The traditional view of the international contractors of the 1999 Rainbow Suite was that FIDIC with the Red Book at least had historically allocated the construction risk fairly, i.e. on the basis of which party is best placed to assume individual risks. That view has changed.

The global construction umbrella federation, CICA, and the three international contractors' associations from Europe, Japan and Korea, EIC, ICAK and OCAJI, wrote an open letter dated 26 January 2017, calling upon FIDIC to maintain an equitable contractual standard[4]. The Open Letter noted that:

"*the proposed contract administration under the updated FIDIC standard will become highly bureaucratic and carry the risk that the parties are drawn into time-consuming, costly and labour-intensive dispute settlement alongside the ongoing project*."

There was also concern that FIDIC intended to introduce another major risk shifts to contractors:

"*The four federations are particularly concerned that the updates of the FIDIC "Red, Yellow & Silver Books" will impose major additional risk upon contractors and thus modify the current industry standard to the disadvantage of contractors. For instance, FIDIC intends to oblige contractors to assume an unlimited liability for design errors thus entitling employers to recover all losses however unexpected or unforeseen and irrespective as to whether or not employers have contributed by their own failings to the loss arising from an error in the contractor's design. Such a liability is completely unacceptable for EIC and its partner federations as it may prove uninsurable and may lead to significant losses and even insolvencies….*

If the current wording is allowed to stand, it will impose a major additional risk upon international contractors and, in the case of major infrastructure works or plants, the losses that may be recovered could easily run into billions of euro and lead to insolvency, as claims under the indemnity will be uninsurable."

Conclusions

It is, of course, too early to make any definitive conclusions on the new revisions. The devil, as they say, is in the detail. However, the increased emphasis on dispute avoidance, which is perhaps the most striking change within the revised contract, is to be welcomed.

Will the contract change again before it is issued in final form for use? A good question: the impression gleaned from the London and Abu Dhabi Conferences was that the intention of FIDIC was certainly not to make any major changes, but we shall see when the final forms are released.

Footnotes

1 [2001] BLR 207. This was an adjudication carried out in accordance with the Housing Grants, Construction and Regeneration Act 1996, not a FIDIC DAB determination.

2 And in England & Wales following the case of Porter v Magill [2002] 2.A.C. 375, this is the test to be adopted. There was in the Glencot case no question in the Judge's mind that the adjudicator had acted in any way other than completely properly.

3 In the Glencot case, the adjudicator was privy to a number of without prejudice offers and it would seem he was also privy to some rather heated discussions.

4 http://www.eic-federation.eu/news/joint-federation-letter-fidic/ [Accessed 2 March 2017]