

# Insight

*Insight* provides practical information on topical issues affecting the building, engineering and energy sectors.

## Inside this issue

This issue examines the proposed new changes to the FIDIC Form of Contract



In November's Insight we reviewed the key amendments made by the JCT to their Design and Build Contract 2016. It is not just the JCT who are reviewing their contract terms and conditions.

This month, FIDIC finally outlined its proposed revisions to the 1999 Rainbow Suite. In this edition of Insight we consider some of the most important changes and consider their likely impact on those who use them.

## Changes to the FIDIC Form of Contract

At the International Contract Users Conference held in London on 6 - 7 December 2016, FIDIC 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".

FIDIC further said that the Yellow Book second edition would be formally published by them during 2017. The date of that release is not yet known. 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.

Whilst the FIDIC form of contract is rarely used in the UK<sup>1</sup>, it is by far the most widely used form of contract across the globe. Therefore any changes that are made to its contract suite are of general importance at least, as they highlight prevailing trends in contract drafting.

This month's Insight accordingly provides a summary of the key themes and issues arising out of the new draft contract.

### *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 which was released in 2008.

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:

#### (a) Splitting claims from disputes

- Clause 20 is now entitled: "Employer's and Contractor's Claims"
- Clause 21 is now entitled: "Disputes and Arbitration"

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.

#### (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. 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-clause 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 which are supposed to sit from the outset of a project, 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.

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.”*

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 Claims Procedure and the FIDIC Time Bar**

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. That said the length of the new sub-clause is perhaps a signal that the process may not be a simple and straightforward one to follow.

This 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 as a whole within the revised Contract, the failure to follow which will lead to sanctions.

As a result this may actually lead to an increased number of claims, as both Parties will need to try and ensure that they do not lose the right to make a claim.

This was certainly the view of the London Conference. Nicholas Gould and Jeremy Glover lead a session entitled “Managing Claims and Avoiding Disputes”. As part of that session they 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.

**Notices**

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.

That said, 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 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.

### ***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 re-named “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.

### ***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. Certainly the increased emphasis on dispute avoidance, which as we have said is perhaps the most striking change within the revised contract, is to be welcomed.

Both the Engineer and Dispute Adjudication/Avoidance Board have an increased role to play in this. From a UK perspective, the proposal that the Dispute Board has a dual role whereby it can, with the agreement of the parties, both engage in attempts to resolve disputes and then if that fails make a (temporarily) binding decision on the issues in dispute, might well be greeted with some caution.

Another feature of the new contract is the increased emphasis on process and procedures. This is something which will undoubtedly increase the administrative burden of those operating the contract. As with any project, those using or administering the new contract, (albeit it will be a while before the new revisions come into operation), should familiarise themselves with these changes prior to signing up to the contract.

Will the contract change again before it is issued in final form for use? This is a good question. Unlike with the JCT 2016, the new Yellow Book is a draft and has not yet been issued in its approved final form for use. The impression we gleaned from the London Conference was that the FIDIC certainly did not intend to make any major changes, but we shall see. It is likely that some changes will be made, but we suspect there will not be many.

This is one of the many things we will follow with interest during 2017.

### ***Footnotes***

1. In the NBS National Construction Contracts & Law Survey, November 2015, 7% of respondents said that the FIDIC Contract Agreement was the form they had used the most, compared with 60% for the JCT.

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