



The New 2017 FIDIC Red, Yellow and Silver Books

Society of Construction Law (Gulf)

Tuesday 16 January 2018
Waterfront Suite, The Club, Mina Zayed
Abu Dhabi, UAE

Wednesday 17 January 2018
DIFC, Auditorium
Dubai, UAE

Nicholas Gould
Partner, Fenwick Elliott LLP
Visiting Professor, King's College London

Introduction

- Overview and fundamental FIDIC principles;
- The increased role of the Engineer;
- Quality management and compliance;
- Advanced warning;
- Risk and insurance;
- Design and its relationship to insurance;
- Notices, time bars and claims procedure;
- The expanded role of the dispute board; and
- Arbitration and enforcement of dispute board decisions.

Introduction and FIDIC Core Principles

- Second Edition 2017 (first Ed 1999):
 - Red Book – Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer;
 - Yellow Book 1999 – Conditions of Contract for Plant and Design Build, for Electrical and Mechanical Plant, and for Building and Engineering Works Designed by the Contractor; and
 - Silver Book 1999 – Conditions of Contract for EPC/Turn Key Projects.
- 1999 *Pre-Release Version* Yellow Book unveiled 6-7 December 2016 at the International Contract Users Conference in London.
- Before this there was only the FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract (1 April 2013).

FIDIC Core Principles

- FIDIC's Task Group TG 15 Golden Principles:
 - GP1: Duties, rights, obligations, roles and responsibilities are generally as defined in the GCs;
 - GP2: Clear and unambiguous drafting;
 - GP3: Fair and balanced risk allocation;
 - GP4: The parties have a reasonable time to perform their obligations and exercise their rights; and
 - GP5: Disputes to be referred to a DB for a provisionally binding determination as a condition precedent to arbitration or litigation.

FIDIC's Philosophy Behind the Update

- To enhance project management tools and mechanisms.
- Drafted by engineers experienced in design and construction.
- To reinforce the role of the “Engineer”.
- To achieve a balance risk allocation. The aim here is more reciprocity between the parties.
- To achieve clarity, transparency and certainty (sounds like the NEC philosophy).
- To reflect current international best practice.
- To address issues raised by users over the past 17 years arising out of the use of the 1999 suite.
- To incorporate the most recent developments in FIDIC contracts, in particular the Gold Book, which was published in 2008.

The New Contracts: Overview

- The 63 page 1999 Yellow Book is now 119 pages (69 to now 126 with Appendices including the DAAB rules).
- Prescriptive.
- Particular Conditions, Contract Data and Special Conditions.
- Definitions:
 - “Claim” – request or assertion
 - “Dispute” – claim made, and rejected, and first party does not acquiesce (submit or comply silently or eg by serving a NOD);
 - “Cost Plus Profit” default is 5%;
- Interpretation:
 - “shall” is mandatory
 - “may” is optional
 - “include” is a non-exhaustive list.

Termination

- Clause 15 Termination By Employer.
- Clause 16 Suspension and Termination by Contractor.
- UAE Civil Code Article 892 states that a contract of Muqawala shall terminate:
 - on completion of all the agreed works or services;
 - by mutual consent; or
 - by court order.
- Termination Clause 1.16:
 - “Subject to any mandatory requirements under the governing law of the Contract, termination of the Contract under any Sub-Clause of these Conditions shall require no action of whatsoever kind by either Party other than that stated in the Sub-Clause.”

Dispute Avoidance

- A key theme in the revised Yellow Book is the increased emphasis on dispute avoidance. This follows FIDIC's philosophy.
- Dispute avoidance is promoted in several ways:
 - distinguishing claims from disputes;
 - changes to the role of the Engineer;
 - emphasising the avoidance processes that dispute boards can offer; and
 - early warning.
- There are also changes to:
 - Claims procedure and time bar (to encourage early recognition of claims);
 - Notices (they must be given);
 - Programme emphasis and extensions of time;

Reciprocal Rights

- Confidentiality.
- Permits and permissions.
- Claims relating to permits etc.
- Removal of personnel engaged in corrupt practices.
- Prohibition of recruitment of the other's personnel.

Employer's Financial Arrangements

- Sub-Clause 2.4 has been amended.
- Financial arrangement to be detailed in the Contract Data.
- The Employer must give Notice with supporting particulars if the Employer:
 - intends to make a “Material Change”; or
 - has to amend the financial arrangements because of “changes in the Employer’s financial situation”.
- The Contractor can request reasonable evidence that financial arrangements have been made and are being maintained for the Employer to pay the balance of the Contract Price if:
 - a Variation exceeds 10% or the cumulative value of Variations exceed 30% of the Accepted Contract Amount;
 - does not pay in accordance with Sub-Clause 14.7; or
 - there is a material change in the Employer’s financial arrangements.

The Increased Role of the Engineer

- A new requirement that the “Engineer”:
 - may be a legal entity rather than an individual;
 - is a professional engineer, suitably qualified and experienced; and
 - fluent in the language of the Contract.
- The Engineer may appoint a “nature person” to act.
- However, the Engineer could be represented on Site by a named individual (Sub-Clause 3.3 [*The Engineer’s Representative*]).
- The Engineer is appointed to carry out the role and duties of the Engineer assigned to him under the Contract.
- The Engineer cannot amend the terms of the Contract.
- If the Engineer exercises any authority for which the Employer’s approval is required then deemed approval has been given.
- The Engineer may delegate to suitably qualified assistants.

The Engineer: Variations

- Instructions:
 - the Engineer can issue instructions to the Contractor at any time including issuing additional or modified drawings necessary for the execution of the Works; and
 - the Contractor must comply, and may only take instructions from the Engineer or a delegated assistant with the appropriate authority.
- If an instruction is a Variation then Clause 13 [*Variations and Adjustments*] applies.
- If the Employer wants to replace the Engineer:
 - the Employer is to give the Contractor 42 days' notice before the intended date of replacement identifying the replacement Engineer; and
 - the Contractor may raise reasonable objections (Sub-Clause 3.4).

Engineer's Determination

- Now Sub-Clause 3.7 (was 3.5)
- The Engineer shall act “neutrally” and “... shall not be deemed to act for the Employer.” Neutrally is not defined, but FIDIC did not mean “*independent*” or “*impartial*” but rather “*non-partisan*”.
- Consultation (Sub-Clause 3.7.1):
 - consult promptly jointly and/or separately to endeavour to encourage Parties to agreement: and
 - write it down and the Parties to sign.
- Within 42 days, or proceed to make a determination.
- Make a fair determination taking account of all relevant circumstances within 42 days.
- If the Engineer does not issue a Notice of agreement or determination:
 - the claim is deemed rejected; or
 - the “matter” is deemed to be a Dispute and may be referred to the DAB (no NOD is required).

The Increased Role of the Engineer

- Agreement and determination under Sub-Clause 3.7 also applies to:
 - measurement of the Works;
 - rates and prices;
 - Variations; EOT and adjustments of the Contract price and Schedule of Payments;
 - Daywork;
 - amount to be paid for plant and materials off Site;
 - amounts not certified in an IPC; and
 - disagreement as to the cause of a defect.
- In the 1999 version Determinations just applied to claims.

Management Meetings

- Management meetings under Sub-Clause 3.8 provide that:
 - the Engineer or CR may require the other to attend management meetings;
 - others may also attend (Employer's other contractor, suppliers etc); and
 - the Engineer is to keep a record.

Quality Management and Compliance

- Quality Management Sub-Clause 4.9:
 - the Contractor to prepare and implement a QM System within 28 days of the Commencement Date;
 - to ensure Notices, as-built records etc “can be traced”;
 - to ensure proper coordination and interface; and
 - for submission of documents for review.
- Engineer may Review the QC system within 14 days.
- Deemed acceptance after 21 days.
- Failure to implement – Engineer may issue a Notice.
- Internal audits – once every 6 months.
- External audits – Contractor to notify Engineer of any failings.
- Compliance Verification System to demonstrate design, materials, workmanship etc all comply with the Contract (Sub-Clause 4.9.2).

Design and Errors in the ERs

- Design Clause 5:
 - Contractor to design the Works using designers that “are engineers or other professionals, qualified, experienced and competent in the discipline of the design for which they are responsible.”
 - Promptly after Commencement to scrutinise the ERs.
- Errors in ERs Sub-Clause 1.9:
 - Scrutinise and report within 42 days (and after) from the Commencement date;
 - Engineer proceeds under Sub-Clause 3.7 to agree or determine if there is an error and its cost and time implications;
 - If an experienced contractor would not have discovered the error then a Variation shall apply; and
 - Money and time claims will require a Sub-Clause 20.2 Notice.

Design Review

- Sub-Clause 5.2 [*Contractor's Documents*]:
 - Contractor's Notice issued with documents for review;
 - Engineer reviews within 21 days, and may issue a Notice:
 - of No-objection (with minor comments); or
 - stating documents fail (with reasons).
 - Deemed acceptance if no Notice issued in time.
 - Engineer may require documents to be revised.
 - If so any money and time claims will require a Sub-Clause 20.2 Notice.

Contractor's Programme

- Revised Sub-Clause 8.3:
 - initial programme within 28 days after receiving the Notice stating the Commencement Date;
 - using software identified in the ERs or acceptable to the Engineer;
 - Contractor to revise whenever programme “ceases to reflect actual progress or is otherwise inconsistent with the Contractor’s obligations.”;
 - detailed, all activities, sequence and timing of inspections and tests, all key dates, logic linked, float, rest days and holidays, delivery of materials; and
 - supporting method statement.
- No need to follow the Sub-Clause 20 procedure for an EOT arising from a Variation (see Sub-Clause 8.5).

Advanced Warning

- FIDIC introduced the concept of advanced warning in the Dec 2016 version. An early warning notice is issued in relation to a potential problem.
- The parties are then to work together in order to try to overcome the difficulty.
- New Sub-Clause 8.4 follows the Gold Book. New Sub-Clause 8.4 provides:

“Each Party shall advise the other and the Engineer, and the Engineer shall advise the Parties in advance of any known or probable future events or circumstances which may:

- a) adversely affect the work of the Contractor’s Personnel;
- b) adversely affect the performance of the Works when completed;
- c) increase the Contract Price; and/or
- d) delay execution of the Works or a Section (if any).

The Engineer may request the Contractor to submit a proposal under Sub-Clause 13.3.2 [*Variation by Request for Proposal*] to avoid or minimise the effects of event(s) or circumstance(s)”.

Risk and Insurance

- Limitation of liability moved from Sub-Clause 17.6 to Sub-Clause 1.15
 - Neither Party liable to the other for any loss of use of the Works, loss of profit, indirect or consequential loss; and
 - Contractor's total liability set out in Contract Data or by default the Accepted Contract Sum.
- Care of the Works and Insurance (including Insurance after Taking Over) covered by Clauses 17 and 19;
 - Indemnities for personal injury, death and property damage, and insurance;
 - PI insurance for any "act, error, or omission ... in carrying out the Contractor's design obligations" Amount in Contract Data or to be agreed with Employer; and
 - Optional PI insurance for the fitness for purpose obligations.

Claims and Dispute Resolution

- Claims – Clause 20:
 - Claims (time, money and another relief) are just disagreements;
 - Notice of a Claim (condition precedent), Engineer's initial response;
 - Fully detailed Claim (legal basis CP) contemporary records;
 - Agreement or Engineer's determination; and
 - Monthly updates, assessment and payment.
- Disputes - Clause 21:
 - Formation of Dispute;
 - Referral of Dispute to the DAAB;
 - 84 day procedure;
 - Written DAB decision;
 - Notice of Dissatisfaction – 28 days; and
 - Arbitration:
 - NOD – Amicable Settlement - Arbitration (Sub-Clause 20.7); and
 - DAAB compliance – Arbitration, and interim measures.

Sub-Clause 20.1 - Claims

- Applies to the Employer and Contractor equally for:
 - additional payment and/or EOT or extension of the DNP; or
 - a further category of “another entitlement or relief ... whatsoever including in connection with any certificate, determination, instruction, Notice, opinion or valuation of the Engineer ...”
- Disagreement in relation to another entitlement or relief does not lead to a Dispute.
- Engineer determines disagreements under Sub-Clause 3.7.
- A Notice referring the disagreement to the Engineer should be given as soon as practicable.

Clause 20.2.1 – Notice of Claim

- Time and money claims require a Notice of Claim under Clause 20.2.1 in the following terms:

“The claiming Party shall give a Notice to the Engineer, describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware of the event or circumstance (the “Notice of Claim” in these conditions).

If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.”

- While there is an overlap between the scope of a Claim as defined in Sub-Clause 20.1 it is time and money claims that are caught by Sub-Clause 20.2.

Clause 20.2.1 – Notice of Claim

- Requires:
 - a written communication (Definition of Notice at Sub-Clause 1.1.56 and Sub-Clause 1.3 [*Notices and Other Communications*]);
 - a paper original signed by the CR, Engineer or authorised representative of the Employer OR electronic original in compliance with the Contract Data (Sub-Clause 1.3(a)(i)&(ii));
 - identification as a Notice (Sub-Clause 1.3(b)). Note “another form of communication..” requires identification of the applicable Contract provision; and
 - delivery to the Engineer and copied to the other party (Sub-Clause 1.3 (c)&(d)).
- Within 28 days of the event or circumstance, otherwise the claiming Party is not entitled to any additional payment or time.
- Discharge of liability is also included.

Clause 20.2.2 – Engineer’s Initial Response

- The Engineer considers whether a Notice of Claim was issued within 28 days. There are two main possibilities:
 - the Engineer shall within 14 days reject, in a Notice with reasons, the Notice of Claim; or
 - if the Engineer does not give a Notice, then the Notice of Claim is deemed to be valid.
- And so two possible responses (apart from acceptance):
 - if the “other” party disagrees with the deemed valid Notice of Claim that “disagreement” is reviewed by the Engineer under Clause 20.2.5 (not Sub-Clause 3.7); or
 - if the claiming party disagrees with the Notice from the Engineer and considers there are “circumstances which justify late submission” that party shall submit a fully detailed claim under Sub-Clause 20.2.4 for review by the Engineer.

Sub-Clause 20.2.3 – Contemporary Records

- “Contemporary Records” means records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim”.
- Engineer may monitor the contractor’s contemporary records without admitting any Employer liability.
- In respect of FIDIC 4th Sub-Clause 53.4 (*Att General for the Falkland Islands v Gordon Forbes Construction (Falklands) Ltd* [2003] 1 BLR 280):
 - “original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to a claim, whether by or for the Contractor or the Employer.”
- Similar approach and lack of contemporary records undermines credibility (see *Van Oord UK Ltd & Anor v Allseas UK Ltd* [2015] EWHC 3074).

Clause 20.2.4 – Fully Detailed Claim

- A “fully detailed Claim” includes:
 - “(a) a detailed description of the event or circumstance giving rise to the Claim;
 - (b) a statement of the contractual and/or other legal basis of a Claim;
 - (c) all contemporary records on which the claiming Party relies; and
 - (d) detailed supporting particulars of the amount of additional payment claimed (or amount of reduction of the Contract Price in the case of the Employer as the claiming Party) and/or EOT claimed (in the case of the Contractor) or extension of DNP claimed (in the case of the Employer).”

Clause 20.2.4 – Fully Detailed Claim

- A fully detailed Claim is due within 84 days after the claiming Party became aware of or should have become aware of the event or circumstance giving rise to the claim.
- The Parties can agree with the Engineer to extend that period.
- Note that if a party fails to set out the contractual and/or other legal basis (i.e comply with Sub-Clause 20.2.4(b)) within 84 days then the original Notice of Claim is deemed to have lapsed.
- This can once again be challenged by reference to the Engineer under Sub-Clause 20.2.5.
- Fully detailed Claims might be: first, interim or final fully detailed Claim.
- The Engineer is to attempt to agree or determine (Sub-Clause 3.7).
- The Engineer should identify any additional payment and extension of time for completion or to the DNP

“Circumstances” defined

- If the fully detailed Claim relates to a disagreement about the lateness of a Notice of Claim then the late submission must be justified.

“The circumstances which may be taken into account (but shall not be binding) may include:

Whether or to what extent the other Party would be prejudiced by acceptance of the late submission;

In the case of the time limit under Sub-Clause 20.2.1 [*Notice of Claim*], any evidence of the other Party’s prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars; and/or

In the case of the time limit under Sub-Clause 20.2.4 [*Fully detailed Claim*], any evidence of the other Party’s prior knowledge of the contractual and/or other legal basis of the Claim, which the claiming Party may include in its supporting particulars.”

Additional Particulars

- An Engineer may require additional particulars in relation to fully detailed Claim.
- Engineer to promptly give Notice describing the additional particulars required (with reasons).
- However, the “... contractual and/or other legal basis” must be determined by the Engineer regardless (Sub- Clause 3.7.3).
- Interim fully detailed Claims are made on a monthly basis identifying the accumulated amount of additional money or adjustments to time.
- A final fully detailed Claim is due “within 28 days after the end of the effects resulting from the event or circumstance ...” (the parties can agree to extend this).

Sub-Clause 20.2.7 – General Requirements

- Whilst a Claim is being agreed or determined the Engineer shall include any amounts reasonably substantiated as being due in a payment certificate.
- The Employer can only claim a payment from the Contractor and/or adjust the DNP or set off any money or make any deductions if they comply with Sub-Clause 20.2.
- Sub-Clause 20.2 is in addition to any Sub-Clauses in the Contract (so the dual notice provision remains).
- A failure to provide information is to be taken into account by the Engineer. If the failure prevents or prejudices a proper investigation of the claim then this may have an impact on the assessment.

Clause 21 - Disputes and Arbitration

- Dispute Avoidance/Adjudication Board (DAAB):
 - A “Standing” DAAB in all contracts;
 - One or three members;
 - Default appointment by FIDIC;
 - Parties are deemed to have signed the DAAB member agreements (law of appointed same as the law of the Contract);
 - Avoidance of disputes;
- Referral of a Dispute to the DAAB:
 - If Sub-Clause 3.7 “applied” within 42 days of a Sub-Clause 3.7.5 NOD, ref to Sub-Clause 21.4.1, in writing to everyone;
 - Both parties to make all information available inc access to the Site;
 - Decision within 84 days of the reference (unless DAAB invoices not paid);
 - “binding on both Parties, who shall promptly comply...”

Compliance with a DAAB Decision

- DAAB Decision under Sub-Clause 21.4.3 states:

“The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub-Clause. The Employer shall be responsible for the Engineer’s compliance with the DAAB decision.

If the decision of the DAAB requires a payment of an amount by one Party to the other Party:

- i. Subject to sub-paragraph (ii) below, this amount shall be immediately due and payable without any certification or Notice; and
- ii. The DAAB may (as part of the decision), at the request of a Party but only if there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amount in the event that the decision is reversed under Sub-Clause 21.6 [*Arbitration*], require the payee to provide an appropriate security (at the DAAB’s sole discretion) in respect of such amount.”

Dissatisfaction with a DAAB Decision

- Sub-Clause 21.4.4.
- Either party can serve a NOD:
 - stating clearly that it is a NOD;
 - with reason(s);
 - within 28 days after receiving the DAAB Decision; and
 - may dispute all or part.
- After 28 days the DAAB Decision “... shall become final and binding on both Parties.”.
- Note that “... neither party shall be entitled to commence arbitration of a Dispute unless a NOD in respect of that Dispute has been given ...”
- There are some exceptions.

Arbitration

- If a NOD has been served [Sub-Clause 21.5]:
 - amicable settlement for 28 days after the date on which the NOD was given; but
 - no attempt to amicably settle need be made;
- ICC Arbitration [Sub-Clause 21.6]:
 - one or three arbitrators;
 - language of the Contract applies;
 - may open up review, revise etc.;
 - costs; tribunal may take account a Party's failure to cooperate with the other in constituting a DAAB;
 - not limited to evidence put before the DAAB;
 - may commence before or after completion of the Works; and
 - if award requires payment then this is immediately due (no need for a certificate etc).

Failure to Comply with the DAAB's Decision [Sub-Clause 21.7]

- Either Party may refer the matter directly to arbitration (whether the Decision is binding or final and binding).
- Amicable Settlement does not apply.
- The arbitral tribunal may by way of “summary or other expedited procedure” order or issue an award to enforce the DAAB’s decision.
- The merits are reserved under Sub-Clause 21.7:

“In the case of a binding but not final decision of the DAAB, 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”.
- Pay now and review the detail in the full arbitral procedure.
- The tribunal may also order or award damages or other relief in relation to a DAAB’s decision.

No DAAB in Place

- Sub-Clause 21.8.
- If a DAAB has not been appointed, then:
 - the requirement to obtain a DAAB's decision and to attempt settlement do not apply; and
 - either Party can refer any Dispute directly to arbitration without prejudice to any other rights they may have.
- What impact does this have on the mechanics of the Contract in particular Clause 20?

Conclusions

- The importance of communication.
- Familiarity of FIDIC approach, language and demands is essential
- Use the correct terminology.
- Effective pro-active contract administration.
- Claims under FIDIC Sub-Clause 20.2 – the condition precedents.
- The importance of a clear detailed programme.
- Record keeping.
- Deal with change contemporaneously.
- Manage time and cost changes every month.
- Manage claims.
- Resolve disputes early if possible.



Questions?

Nicholas Gould

Partner, Fenwick Elliott LLP Dubai
Visiting Professor, King's College London

ngould@fenwickelliott.com
M UAE +971 56 971 5993

1A (First Floor), Silver Tower, Cluster i,
Jumeirah Lake Towers,
Dubai, UAE
PO Box 283149