

The Second Edition of the FIDIC Rainbow Suite has arrived

At a packed International Contract Users' Conference held in London on 5-6 December 2017, FIDIC finally unveiled the Second Edition of the 1999 Rainbow Suite, Red, Yellow and Silver Books. Whilst the Second Edition largely follows the 2016 pre-release version of the Yellow Book, FIDIC have taken on board some of the comments made by the friendly reviewers, and made a number of important changes.

Why have the Contracts been amended?

FIDIC have explained that the underlying philosophy and core aim behind the update is to achieve increased clarity, transparency and certainty which should lead to fewer disputes and more successful projects. Unsurprisingly, the update also addresses issues raised by users over the past 18 years arising out of use of the 1999 Form and reflects current international best practice. This is why a key theme of the Second Edition is the increased emphasis on dispute avoidance. And the way that FIDIC have chosen to address this is to make many of the contract provisions more prescriptive, setting out step-by-step what is expected from the Employer, Contractor and Engineer.

Dispute Avoidance

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

(a) Splitting Clause 20

As FIDIC had previously made clear, they have split Clause 20 in two. The reason for this is to help 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. As a result, Clause 20 is now entitled "Employer's and Contractor's Claims", whilst the heading of Clause 21 is "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. In fact, that role has expanded. Clause 3, which outlines the role of the Engineer, is now longer having eight sub-clauses. Under the Second Edition:

- The Engineer shall continue to be deemed to act for the Employer, save that 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, importantly, should be based on site for the whole duration of the Project. By doing this, this should increase the Employer's and Engineer's overall understanding of how the project is progressing;
- The 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;
- If the Engineer fails to make a Determination within the stated time limits, then the Engineer will be deemed to have rejected the claim, with the result that the claim can be referred to the Dispute Board; and

- 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. FIDIC have said that in choosing the word, it did not mean “independent” or “impartial”. A better interpretation might be “non-partisan.” 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 Dispute Boards. Under the new contract, all DAABs will be standing DAABs, although the Guidance Notes include an option for the use of an ad hoc DAAB 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 21.3, the Parties may if they so agree:

“jointly request (in writing, with a copy to the Engineer) the DAAB 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 DAAB 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, in time, become a rather useful dispute avoidance tool.

(d) Early warning

Another feature of dispute avoidance is the concept of advance warning, giving early notice of a potential problem. The new sub-clause 8.4 here is one of the new clauses which follow the lead given by the 2008 Gold Book. However, whilst the 2016 pre-release Yellow Book said that the Employer, Contractor and Engineer should “endeavour to advise” each other in advance of any known or probable future events or circumstances which may adversely affect the work, that obligation has been tightened to simply “shall” under the 2017 Second Edition.

By encouraging (or in fact requiring) the Parties to do this, FIDIC anticipate 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. This is all part of FIDIC’s decision to adopt enhanced project management procedures to promote more effective communication and reduce disputes.

The Programme and Extension of Time Claims

In keeping with the trend in international contracts, and in line with the Red Book subcontract, sub-clause 8.3 contains increased programming obligations. Every payment application must include the monthly Progress Report including a detailed description of progress. There is also a positive obligation on the Contractor to update the programme whenever it ceases to reflect actual progress. Further, by sub-clause 8.3(k)(v), the Contractor is required to provide proposals to overcome the effects of any delays to progress, perhaps another example of the movement towards transparency. It is also something that the Contractor may need to do, as part of the consultations following any advance warning given under sub-cause 8.4.

Although FIDIC have retained their position that the programme does not become a contract document, the Engineer (or Employer under the Silver Book) is required to review the programme and say if it does not comply with the contract. If this is not done

within 21 days, then the programme is deemed to comply. This is a good example of a notable new feature of the Second Edition, the “deeming provision”, which can be found throughout the contract. There are deeming provisions which apply to all parties, but this is something which will primarily affect the Engineer.

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 Special Provisions”.

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.

Special Provisions

Whilst the Particular Conditions have been retained, they have now been split into two. Part A consists of the Contract Data, and Part B, which is headed Special Provisions. In part these are the Particular Conditions which one would expect to see as part of the 1999 Form. However, there are a number of additions.

For example, they now include reference to the five FIDIC Golden Principles. There was a lot of discussion at the conference, about the Golden Principles and how, if at all, they can be incorporated into the Contract. At the moment, they are not. Within Part B of the Particular conditions, FIDIC “strongly recommend” that all Parties, when modifying the General Conditions, take “due regard” of the five “FIDIC Golden Principles.” In short, the Golden Principles are best viewed as an expression of FIDIC’s balanced risk sharing philosophy. They include that the Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions and that time periods for the Parties to perform their obligations must be reasonable. The extent to which this advice is followed will be interesting from a practical, commercial and legal point of view.

BIM

There was no mention of BIM at all in the 2016 pre-release Yellow Book. In 2017, whilst there is no specific mention of BIM in the General Conditions, there is a now special Advisory Note within the Special Provisions which deals with the use of BIM. FIDIC note that the successful use of BIM is founded on a collaborative team approach, which should start with proper planning at the outset of the project. FIDIC too are intending to publish Technology Guidelines to provide further detailed support for the use of BIM on projects which use the FIDIC form.

Force majeure and Exceptional Risks

It was Clauses 17-19 of the 2016 pre-release Yellow Book that came in for perhaps the most comment. They represented a major change from the 1999 Rainbow Suite. It is clear that in 2017 some changes have been made. Clause 17 is now called “Care of the Work and Indemnities” rather than “Risk Allocation”, and sub-clause 17.6 which set out the Limitations of Liability has been moved to become sub-clause 1.15, as part of the Definitions Section. Further, and more importantly, the requirement that the Contractor’s indemnity that the works will be fit for their purpose (where the Contractor undertakes a design obligation) is now subject to the limitation of liability cap contained at sub-clause 1.15. These clauses will need careful consideration and may need to be reviewed with insurance providers.

Notices

FIDIC have made it clear that a notice given under the new contract must clearly state that it is a "Notice". 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 20.2.5 does provide the Engineer with the power to waive a failure to follow a time bar requirement. This was a change from the 2016 pre-release Yellow Book which gave this role to the DAAB. The Engineer can take the following into account:

- Whether the other Party would be prejudiced by acceptance of the late submission; and
- Whether the other Party had prior knowledge of the event in question or basis of claim.

The Claims Procedure and the FIDIC Time Bar

The FIDIC Form requires both the Employer and Contractor to submit claims as part of Clause 20. This closer alignment of Parties' claims is a key part of FIDIC's attempts to achieve balance and reciprocity between the Parties.

The FIDIC approach 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 sub-clause 20.2, which sets out the claims process, is one of the longest clauses in the Contract and sets out a detailed procedure. On one view, the length of the new sub-clause is 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 as they 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. Virtually every speaker on the first morning of the Conference noted that the new contract was more "prescriptive". For example, there is another time bar you have to consider when preparing a fully detailed claim. Under sub-clause 20.2.4, you must provide a statement of the contractual or legal basis of your claim within 84 days.

One result of this approach may be 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. That said, this was not the view of the London Conference in 2017, where Nicholas Gould and Jeremy Glover led a session looking at these enhanced claims provisions. As part of that session we asked the audience for their views on the likely impact of the changes made to the Rainbow Suite in terms of the number of claims. Their reply was revealing:

- Less claims? 46%
- No change? 29%
- More claims? 25%

Time will tell. Of course more claims do not necessarily mean more disputes, one reason no doubt for the increased emphasis on dispute avoidance to be found throughout the new contract.

The DAAB and Arbitration

Parties must take note of certain new deadlines. A Party who is dissatisfied with the Engineer's Determination must issue a Notice of Dissatisfaction within 28 days, otherwise that decision becomes final and binding. Following that, the Party must also commence DAAB proceedings within 42 days. Otherwise, again, the decision becomes final and binding.

FIDIC too have taken steps to try and ensure that DAAB decisions can be enforced through separate arbitration proceedings. The wording of new sub-clause 21.7, largely follows, the Guidance issued by FIDIC in April 2013. This is intended to deal with the uncertainty to be found in the 1999 Rainbow Suite. However, this is very much an issue which will only become clearer over time, as parties make use of the new sub-clause.

Conclusions

Whilst, as with any contract revision, it will take time before it comes into general use, it is striking that the Second Edition of the Rainbow Suite is considerably longer than the 1999 version. The General Conditions of the Yellow Book have increased from 63 to 106 pages. One reason behind this change in length is the increased emphasis on dispute avoidance, which is something that is certainly to be welcomed. It was also with this in mind that FIDIC have set out to produce a contract that was more clearly structured, with a number of step-by-step processes and procedures. Parties should take note that the introduction of these processes will in turn increase the importance of maintaining effective project management tools to ensure that the notice (and other) requirements of the contract are followed.



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