

New FIDIC 2017 Yellow Book – A New Claims Procedure

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The pre-release second edition of the FIDIC Yellow Book (“Second Edition”) was provided to delegates at the FIDIC International Contract Users Conference in London late last year.

Although FIDIC confirmed that it is intended for the Second Edition to be in the market later this year, the official release date has yet to be confirmed (and it is possible that FIDIC may make further amendments to the pre-release version). In addition to the Second Edition, FIDIC is scheduled to release new editions of the Red Book and the Silver Book this year, and publish some other new forms of contract.

FIDIC have taken the opportunity to update the first edition of FIDIC Yellow Book (published in 1999) (“First Edition”) to reflect how the international construction industry has evolved over the past 17 years. In particular, the Second Edition significantly bolsters the contract administration procedures (which makes the Second Editions about 50% longer than the First Edition) and seeks to rebalance some of the risk allocation under the First Edition, with the objective of creating a more collaborative approach.

Throughout 2017, we will keep you informed of key changes made to the contract suite and of new contracts that are published.

One of the key changes is the new claims/dispute resolution procedure under the Second Edition, which focuses on effectively managing claims from the outset so that they do not evolve into disputes.

Advance Warning

Sub-clause 8.4 of the Second Edition sets out a new ‘early warning’ mechanism requiring either party to inform the Engineer of any event (known or probable) which may, among other things, adversely affect the Works, increase the Contract Price or cause a delay. This type of procedure is found in other forms of standard contracts, is an industry norm and is consistent with acting in good faith.

Upon receipt of an advance warning, the Engineer may instruct the Contractor to submit a proposal to avoid or mitigate the effects of the event in question and this may give rise to a variation. This drafting is consistent with the dispute avoidance theme which runs throughout the Second Edition and is a sensible addition.

Claims/Dispute Resolution

The distinction between Employer claims and Contractor claims has been removed. All claims are now made under Sub-Clause 20.1 of the Second Edition. The Sub-Clause divides claims into two categories; claims for payment and extensions of time on one hand and ‘other claims’ on the other.

This is noticeable departure from Sub-Clause 20.1 of the First Edition, which concerned only Contractor’s claims and did not make any distinction regarding the nature of the claim. Sub-Clause

2.5 of the First Edition (which addressed Employer's claims) has been deleted from the Second Edition.

Having both party's claims determined under the same provision is indicative of FIDIC's intention for the Second Edition to deal with both the Employer and the Contractor in a consistent and even-handed way.

Claims not for payment/EOT

Sub-Clause 20.1 of the Second Edition provides that if either party (i.e. the Employer or the Contractor) considers that it has a claim which relates to any matter other than to payment or an extension of time, the claiming party shall notify the Engineer of the claim "*as soon as practicable after the claiming Party becomes aware of the other Party's disagreement with the requested entitlement*".

It is important to note that this time frame is not from when the party becomes aware of the claim but is from when they become aware that the other party disputes the claim.

The Engineer is then to make a determination under Sub-Clause 3.7. This Sub-Clause is significantly more detailed than Sub-Clause 3.5 of the First Edition and contains some key new features.

Among the new features is that the Engineer is to act neutrally under Sub-Clause 3.7. "*Neutrally*" has not been defined but can probably be taken to require the Engineer to act impartially. This interpretation is strengthened by the fact that Sub-Clause 3.2 states that the Engineer may issue determinations under Sub-Clause 3.7 without reference to the Employer. This is a significant change from Sub-Clause 3.1 of the First Edition which provided that the Engineer is deemed to act as the agent of the Employer.

Sub-Clause 3.7 of the Second Edition encourages the parties, over a period of 42 days, to seek an amicable settlement of the claim and the drafting of clause 3.7.1 envisages that the Engineer is required to play a far more 'hands on' role in achieving this than was previously the case.

Under Sub-Clause 3.5 of the First Edition, it was envisaged that the Engineer would liaise with each party individually but the drafting of Sub-Clause 3.7 of the Second Edition expressly refers to the Engineer consulting with the parties "*jointly*" while the Engineer is required to "*encourage discussion between the Parties in an endeavour to reach an agreement*". The intention of greater involvement from the Engineer (particularly in the context of encouraging dialogue between the parties) is to prevent claims from developing into disputes.

If no agreement can be reached between the parties (notwithstanding the Engineer's efforts to reach an amicable settlement), the Engineer is required to make "*a fair determination*". This is consistent with the terminology of Sub-Clause 3.5 of the First Edition.

As with the First Edition, the Engineer's determination will be binding on the parties unless either party issues a Notice of Dissatisfaction within 28 days. This is the first of several time bars to the claims and disputes procedure under the Second Edition.

Payment/EOT claims

Claims regarding payment and extension of time are addressed under Sub-Clause 20.2 and are subject to a more prescriptive procedure (no doubt on account of the complexity and volume of documents that typically concern claims of this nature).

If either party has a claim, it shall notify the Engineer of this within 28 days. Failure to comply with

this timeframe will result in the claiming party losing its entitlement to compensation.

In accordance with the new focus on effective contract/claims management in the Second Edition, sub-clause 20.2.3 imposes a new express obligation on the claiming party to “*keep such contemporaneous records as may be necessary to substantiate the Claim*”. The sub-clause also entitles the Engineer to monitor the Contractor’s record keeping and to even instruct the Contractor to keep additional records (but does not extend to the Employer’s records).

Within 42 days of a party becoming aware of a claim (or 14 days after the last date for making an initial notification), the claiming party is required to provide the Engineer with a “*fully detailed Claim*”. This shall set out a description of the factual events giving rise to the claim, the contractual basis of the claim, the contemporaneous records upon which the claiming party relies as well as details of the relief sought. As with the initial notification, a time bar applies if the claiming party fails to submit the detailed claim within the prescribed timeframe of 42 days., being that the initial notification is deemed to have lapsed.

For late claims for payment and extensions of time (but not ‘other claims’), the Second Edition departs from the strict position under the First Edition regarding time bars and allows the claiming party to apply, within 14 days of receiving the relevant notice from the Engineer, to the Dispute Avoidance/Adjudication Board (“DAB”) for a waiver of the time limits for either the notification of the claim or for the provision of details regarding the claim. The DAB shall, within 28 days, determine whether a waiver should be granted in the relevant circumstances.

This right only applies where you have been given an Engineer’s notice within the required time frame. If this notice is not received then the party does not have a right to seek a waiver of the time bar. This right will also be extinguished where the DAB is deleted from the contract.

Upon receipt of the detailed claim, the Engineer shall make a determination under Sub-Clause 3.7 (as discussed above) regarding the claiming party’s entitlement to payment or to an extension of time.

Disagreement with the Engineer’s Determination

If either party disagrees with the Engineer’s determination (whether regarding a claim for an extension of time/payment or an ‘other claim’), it is, within 28 days, entitled to issue a Notice of Dissatisfaction (which is called an “NOD”) to the other party (with a copy to the Engineer) setting out its reasons for disagreement.

The disputed claim shall be referred to the dispute resolution procedure under Clause 21. However and as with the First Edition, the Engineer’s determination shall remain binding on the parties until the dispute resolution process has run its course.

In terms of the formal dispute resolution procedure, the Second Edition provides for disputes to be referred to a DAB, which may consist of either one member or three members (which is the default position).

As with the First Edition, the Second Edition does not include prescribed rules regarding the DAB. Procedural rules regarding the DAB are throughout Clause 21, including the requirement for the DAB to give its decision within 84 days after receiving its reference. The DAB’s decision shall be binding unless disputed by either party within 28 days. If no DAB is in place, any disputes are directly referred to arbitration.

Any disputed decisions of the DAB (which has not been amicably settled within 28 days following issue of a notice by a party of dissatisfaction with the DAB’s decision) may be finally settled by arbitration.

As is the case with the First Edition, the Second Edition refers to the Rules of Arbitration of the International Chamber of Commerce as the default arbitral rules and the Tribunal has full power to review and revise the determinations of the Engineer and the DAB.

Position Regarding Timebars

In the UAE the contractual time bars in the Second Edition are vulnerable to challenge. We recommend that the Second Edition is subject to certain amendments so that it is compatible with UAE law.

Notwithstanding the question on the enforceability of time bars, we recommend that the parties seek to adhere to such time periods. Time bars encourage efficient contract administration (meaning that potential disputes are addressed early and do not fester) and this is in the interest of both parties. Further, failure to adhere to a contractual time bar constitutes a breach of contract (which could potentially give rise to a damages claim) while any application to have a time bar set aside incurs cost as well as time which would be best avoided.

Concluding Thoughts

There is a clear focus in the Second Edition on dispute avoidance, with the Engineer being required to take a more proactive approach in seeking to facilitate the resolution of disputes as early (and therefore as cost effectively) as possible. This is a positive development. Given the pivotal role of the Engineer, it is also important that Engineers take note of and fully embrace the obligation to take the lead on seeking an amicable resolution to disputes in their initial stage (and typically before positions have become entrenched). This is in the clear interests of all stakeholders and it will be interesting to see whether this drafting will have an impact on Engineers' fees.

Finally, the Second Edition contains key changes which both Employer's and Contractor's will need to know and manage or risk losing entitlements to claim.

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