An Update to the Rainbow – Second Editions released of the FIDIC Red, Yellow and Silver Books

by Jeremy Russell - -

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The Federation Internationale Des Ingenieurs-Conseils (FIDIC) Rainbow Suite of contracts is the pre-eminent standard form of contract governing all manner of construction works within the UAE and the wider Gulf region. With the launch of the Second Editions of the Red, Yellow and Silver Books (Second Editions) in December 2017 at the International Contract Users Conference in London, we have seen some significant changes to these standard forms. While it may be some time before we see the Second Editions become the contract of choice in the market, we anticipate the Second Editions, or at least parts thereof, will begin to influence the drafting of contracts in respect of many projects within the region. As such, this article provides a brief overview of some key changes to note.

Why was change needed?

With the release of the First Edition of the Rainbow Suite of contracts in 1999, it has been some 18 years since the contracts have seen any significant amendments. FIDIC sought to address in the Second Editions many of the issues raised by users over the years with the intention of providing a balanced contract suite that meets industry best practices.

Key Changes

The Second Editions of the FIDIC Red, Yellow and Silver forms of contract are significantly longer; a change that is hard to miss with each of the books containing roughly 50% more words than their previous iterations.

This increase in length is mainly attributable to the inclusion of more prescriptive contract administration provisions rather than any notable difference in the risk allocations however, where there is an increase in words, Parties should take care as there is an increase in the risk of misinterpretation and mismanagement.

FIDIC has also made a deliberate effort to focus on dispute avoidance, a theme that runs throughout the Second Editions.

Engineer’s Duties

The general increase in length of the contracts is most notable as it applies to the role of the Engineer in the Red and Yellow books. As an example, the role of the Engineer has been amended by Sub-Clause 3.7 so as to provide a more rigid procedure for the Engineer to follow if it is called on to determine any matter or Claim. Interestingly, the Engineer is under a positive obligation to act

“neutrally” between the Parties. The standard position will no longer be that the Engineer is deemed to act for the Employer when issuing determinations.

When we enquired as to what the undefined term “neutrally” actually meant, FIDIC stated that the word does not mean “independent” or “impartial” but no ‘positive’ explanation was provided. What impact the largely untested meaning of “neutrally” will have is yet to be determined but we recommend it should be viewed with some caution and, to avoid this uncertainty, Parties may wish to amended the drafting of Sub-Clause 3.7.

Another subtle but important change to the Engineer’s duties, previously under Sub-Clause 3.5 of the First Edition, is in relation to the Engineer’s duty to seek an amicable settlement of any claims between the Parties. Previously it was envisaged that the Engineer would simply liaise with each party individually however the drafting of Sub-Clause 3.7 of the Second Editions expressly refers to the Engineer consulting with the Parties “jointly” while also requiring the Engineer 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) aims to prevent Claims from developing into disputes, a clear continuation of the dispute avoidance theme that runs throughout the Second Editions. We consider this to be a positive development.

Notices

The definition of a notice given under the Contract has been clarified. Where a party is issuing a notice under the Contract, it must state that it is in fact a “Notice”. The clause of the contract under which the Notice is issued must also be stated, with the intention of assisting the contract administration process.

In practice, it will be interesting to see how Contractors address this additional information requirement and whether more scrutiny will be placed on if a notice was served in accordance with the contract at the formal dispute stage.

The introduction of this new requirement is likely to be looked at favourably by Employers as it will limit a Contractor’s ability to search through written correspondence between the Parties in order to point to a contract document, such as a programme update or monthly report, as evidence of giving notice to the Employer of an entitlement to a time or cost claim. Contractors should be alive to this risk.

Claims

FIDIC has taken the interesting step to separate the Claims procedure away from that of Disputes. It is hoped that, by separating the contractual procedures for issuing a Claim from those setting out the procedures relating to Dispute, the Parties may be both, contractually and psychologically , less entrenched in their positions and the hopes of resolving the matter amicably may be increased. Ultimately time will tell whether this approach has any meaningful impact on dispute avoidance however we consider it to be a positive development.

Another interesting and important change is that the Claims procedure provided at Clause 20 is now applicable to both Employer and Contractor Claims, meaning that Employer Claims are now subject to the same express timebars as those applicable to the Contractor. FIDIC has said this is an attempt to achieve more balance and reciprocity between the Parties, with both Parties

entitlement to Claim now being governed by the same clause.

This departure from the old Employer's Claim clause at 2.5, and the arguably more onerous obligations that used to accompany the Contractor's Claims procedure at Clause 20.1, is likely to be welcomed by Contractors however it will be interesting to see whether the new Clause 20 is adopted by Employers in the region.

As alluded to earlier, the new Clause 20 has also been significantly expanded to provide additional contract administration obligations on any Party who is seeking to submit a Claim. This is one of the largest clauses in the Contract and as to be expected, the amendments will increase the administrative burden on the Engineer, Employer and Contractor.

Dispute

As a standard position, the Second Editions continues the requirement if its predecessor for the Parties to appoint a standing Dispute Adjudication/Avoidance Board (DAAB). It is intended that the DAAB is to be appointed at the beginning of the Contract and will be required to visit the Site throughout the term of the Contract until the completion of the Works. The DAAB is to consist of either one or three members (three members being the default position).

The standing DAAB will be used as a mechanism for dispute avoidance, as well as to settle any disputes as and when they arise. While there are benefits to the appointment of a standing DAAB, many Employers and Contractors in the region see a standing DAAB as a cost centre which they have been previously happy to forgo.

The usual practice within the GCC is to avoid the appointment of a standing DAAB however time will tell if the market will eventually accept the appointment of standing DAABs (which are frequently used in other regions). It is our view that this is unlikely to occur within the immediate future.

Other Amendments

Another curious change is that of the Force Majeure provisions, with the title being completely replaced by a new clause titled 'Exceptional Events' (provided at the new Clause 18). While the definition of Exceptional Events is largely the same as the Force Majeure provisions of the First Editions, the amendment may cause some confusion given how well understood Force Majeure is in the region.

The amendments to the Second Editions also include a change to the guidance notes wherein FIDIC strongly recommends the Employer, the Contractor and all drafters to have regard to the following five 'Golden Principles'

1. Duties, rights, obligations, roles and responsibilities are generally as deigned in the General Conditions;
2. Clear and unambiguous drafting;
3. Fair and balanced risk allocation;
4. The Parties have a reasonable time to perform their obligations and exercise their rights;
5. Disputes must be referred to a Dispute Board for a provisionally binding determination as a condition precedent to arbitration or litigation.

FIDIC justifies this position on the basis that has taken great care in the risk allocation between the

Parties and is therefore discouraging Parties from using the particular conditions of contract to fundamentally change the risk allocation and therefore the very nature of a FIDIC Contract. Notwithstanding the above, we expect the Second Edition will be amended so align with prevailing market standards in the UAE.

Concluding Thoughts

There is a clear focus in the Second Editions 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.

Given the impact a well managed dispute avoidance mechanism can have on the outcome of a project, it will be interesting to see if Engineers take note of, and fully embrace, the new obligations.

It will also be interesting to see the position Engineers take on seeking an amicable resolution of disputes in their initial stage (and typically before positions have become entrenched).

While amicable resolution is in the clear interests of all stakeholders, given the Employer friendly market conditions within the GCC, time will tell how many of these amendments are taken up and whether these drafting changes will have a significant impact on Engineers' fees.

Finally, the Second Editions contain 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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