

Insights

FIDIC CONTRACTS – 110 YEARS - CONFERENCE UPDATE

Dec 13, 2023

SUMMARY

The FIDIC International Users' Conference took place on the 28 and 29 November in London and celebrated 110 years of the organisation. However, the conference was very much focussed on looking forward, as opposed to dwelling on past glories and the theme of the conference was definitely green – and not only in the environmental sense of the word (though some of that too).

FIDIC'S TUNNELLING JEWEL: THE EMERALD BOOK 2019

FIDIC's Emerald Book (EB) was released in 2019 in collaboration with the International Tunnelling Association. In essence it is based on the 2017 Yellow Book (YB 2017) with tailored provisions for underground works. It is a unique standard form that includes a contractual GBR (Geotechnical Baseline Report) – making a technical document into a contractual tool for the purposes of calculating time and cost allowance for unforeseeable or unexpected subsurface physical conditions. It is a lump sum D&B contract with a remeasurement element for underground works.

As with the 2022 reprints of the 2017 Red, Yellow and Silver Books, this year's conference saw the release of the 2023 EB reprint containing a number of amendments, corrections and clarifications to the 2019 release. The amendments are in two parts: the first set of amendments (over 80%) being those that were made to the YB 2017 last year. The second part are EB specific amendments, being minor changes in procedure plus some clarifications. All of the amendments can be downloaded from the FIDIC website.

Additionally, the conference saw the release of the Contract Guide for the EB conditions of contract. This provides practical information for using the EB, the basic principles governing the formation of the EB and step by step guidance, including setting out the Engineer's role in monitoring the underground works subject to remeasurement, and the process for the Contractor to undertake the measurement itself. It also sets out the amended sub-clauses and helpfully highlights the difference between the EB and the YB 2017. As with the FIDIC Contracts Suite Guide (covering the 2017 Red, Yellow and Silver Books, released in digital format at the end of 2022 and in hard copy earlier this

year) this looks to be a really helpful tool for practitioners. While it is significantly shorter than the full guide, it is not a shortcut as it should be read alongside the main Guide for the 2017 suite.

The EB has certainly created ripples in the tunnelling industry and there was significant interest in the contract and discussion about it among conference attendees. It has been endorsed by several multilateral development banks (MDBs), including the World Bank, and used in a handful of significant projects worldwide. It is probably not yet dominating the tunnelling landscape, but the principle of a dual approach to payment terms seems to be a popular one gaining traction in the market.

MOST POPULAR: GREEN BOOK 2021

The EB is not unique in taking time to gain traction in the market. It is fair to say that the FIDIC 1999 rainbow suite (RB, YB and SB) first editions remain ever popular 6 years after their successors' release, although the 2017 suite is now gaining momentum with more widespread use. However, the second edition of the Green Book, FIDIC's short form contract, seems to have bucked this trend and has received a warm welcome almost immediately (by FIDIC contract standards).

I have written before about my view of this contract ([FIDIC Contracts – What's New for 2022?](#) and [FIDIC Contracts – A preview of what is to come](#)). It seems I am not alone, with many delegates and speakers singing its praises. It is reported to have been used in 84 countries since its release just two years ago.

Also of significance is its impact upon future FIDIC releases with the Collaborative Contract Task Group calling the Green Book 2021 "inspirational".

COLLABORATION IS COMING...

The FIDIC Collaborative form of contract has long been talked about but we were given a few more details of what to expect with its intended release in 2025.

"Snappy and flexible" inspired by the Green Book 2021, the contracts will provide building blocks incorporating the whole supply chain. It will be a bilateral contract but with the flexibility to replicate provisions in a flow through the supply chain. It certainly sounds interesting to take a "whole project" approach and is expected to be more than a pithy "duty to act in good faith".

... AND IS ESSENTIAL FOR NET ZERO

FIDIC's recently formed Task Group for Net Zero has, similarly to the Collaborative Contract Task Group, taken an holistic approach to contracting, recognising that results cannot come from just the delivery phase of a contract, but must be engendered throughout the project; pre and post contract and at all levels of the project team.

The Net Zero Task Group is expecting to publish (in 2024) useful add-on clauses (not just ideas and aspirations) that can be used with FIDIC's contracts across multiple jurisdictions. Their aim is to produce ready-made clauses that have a tangible meaning. In the procurement process for example this could include "Eligibility Requirements" (that can be tailored to particular environmental requirements) and "Evaluation Rated Criteria" to encourage contractors to assist setting technical performance and design targets.

Another development intended to support global net zero objectives is a specific contract for off-shore wind projects. Given the huge potential for off-shore wind energy and the unique contracting conditions (physical site conditions, size and location), a FIDIC task group started work this year on producing a standard form FIDIC contract to better support this huge growth industry. Typically, there is no single EPC wrap for off-shore wind projects and they are often procured using a multi-contracting approach. A modified YB contract dominates the market but such contracts are heavily amended to address the significant interface and risk allocation issues, not to mention the need to operate in a quasi-maritime environment. Recognising this, FIDIC are looking to standardise the approach.

Many people involved in current off-shore wind projects (including the FIDIC Off-Shore Wind Task Group) also consider that in order to develop and exploit this enormous capability, standardised contracts (along with standardisation of technology, and improvements in infrastructure and supply chain capability) can play a critical part in de-costing such projects.

It is an admirable aim and I think it will be an extremely useful addition to the FIDIC suite. Given the multi-contracting approach and interface risk between numerous contractors, standardisation could enable more effective alignment of contracts and allocation of risk in a "knock-for knock" risk environment, a concept that is common in the oil and gas industry but not generally used in the construction industry. FIDIC's intention is for the new contract to reflect FIDIC contracts' long-standing core principles of fair and balanced risk allocation while also reflecting the differing risk bearing capabilities, objectives and obligations of wind farm project key stakeholders. In order to achieve the benefits already outlined, FIDIC's new off-shore contract will need to address the unique features of off-shore contracting and recognise current market practice and risk allocation, otherwise it runs the risk of being modified in the same way as the YB 2017 is currently modified to "fit" the challenging contractual environment facing this type of project.

The target date for publication of the off-shore wind contract is late 2025.

GREEN FUTURE

This was a really interesting conference. It felt like we could finally stop talking about the pandemic and focus on present and future global issues. The experience of panellist speakers demonstrated how FIDIC contracts are used on numerous projects throughout the world for renewable energy (wind, solar, hydro-electric), infrastructure, water security, nuclear power, nuclear research, rural and

agricultural development in developing countries (I could go on). FIDIC contracts are already widely used and adapted for such projects. It will be very interesting to see the extent and speed of uptake of the forthcoming releases and the sectors in which they are used.

I promise I did not select my green shirt to fit in with the green theme. Thank you to FIDIC for recognising the hard work of my team and awarding BCLP Highly Commended Legal Firm of the Year at the FIDIC Contract Users' Awards. For more information, see the FIDIC press release – [Best practice in construction contracts showcased as 2023 winners of FIDIC Contracts Users' Awards unveiled](#).

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MEET THE TEAM



Natalie Wardle

Paris

natalie.wardle@bclplaw.com

[+44 \(0\) 20 3400 4623](tel:+44(0)2034004623)

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