

Insights

FIDIC 2017: TWO YEARS ON

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SUMMARY

Last month I attended the FIDIC International Contract Users' Conference in London, two years after the formal launch of the *2017 Red, Yellow and Silver Books*. I wanted to find out whether anyone was using them and if so, what did they think? In my *blog following the 2017 launch*, I made some initial observations. In this blog post, I consider how far these hold true.

Would the density of the 2017 forms put users off?

I originally likened the 2017 forms to a “three kilo Christmas present”. At roughly 150% longer than the 1999 versions, I observed there was no half way house between the short, 12 page, 1999 Green Book (FIDIC's short form contract) and the 128 page, *2017 Red Book*.

The density of the forms remain a live concern. Some attendees felt that employers and contractors are not ready for the sheer volume of obligations that the 2017 suite places on them and that it might be a bit too complicated with its procedures and time bars. Certainly, many have commented that the complexity is not suitable for smaller projects. The European International Contractors body (EIC) expressed concern that the length and language may be difficult to manage in FIDIC's core international market where developing countries may find the contracts unclear and their prescriptive conditions difficult to follow.

At the conference, FIDIC acknowledged this in two ways:

- It announced that an updated Green Book will soon be released. This will remain short, clear, for use on low risk projects and be without significant contract administration processes (not a claim that can be made for the rest of the 2017 suite). FIDIC stressed this would not be a replacement for the 2017 Red or Yellow Books, but an alternative.
- It confirmed that the 1999 suite may still be more appropriate for use on particular projects. In support of this, the 2019 conference saw the *launch of the 2019 Conditions of Subcontract for Plant and Design-Build* (Yellow Book Subcontract) – a form which is not drafted to be

compatible with the *2017 Yellow Book*, but with the *1999 Yellow Book*. The Yellow Book Subcontract follows the same principles and balance as the *2011 Red Book Subcontract* (for use with the 1999 Red Book) and is for use with design and build projects.

No longer a contract to leave in the drawer

In Sir Vivian Ramsey's conference opening "fireside chat" he commented that FIDIC has now given contract administrators a contract management tool. In so doing, FIDIC has responded to market requirements and provided a "real alternative to the NEC".

However, it was widely acknowledged at the conference that engineers require a new skill set to manage the 2017 suite, not least the ability to act "neutrally" in the face of pressure from forceful employers. Others commented that the cost of properly administering these contracts is becoming more evident and concerns were raised that there needs to be proper budgeting in order for engineers to administer the process heavy contracts properly. Costs were also a concern for dispute resolution.

Claims – dealt with as they arise

The standing Dispute Avoidance/Adjudication Agreement Board (DAAB), which aims to resolve disputes as they arise, is a key aspect of the 2017 suite and it was generally applauded by conference goers although some reservations were voiced.

For example, the constitution of the DAAB requires a tripartite agreement incorporating the Dispute Avoidance/Adjudication Agreement (DAA) between the employer, contractor and the DAAB itself. If the parties fail to agree the DAA, a deeming provision is triggered: the parties are deemed to have entered into the DAA. An interesting result, that a party is deemed to be party to an agreement it has not agreed, which includes an obligation to pay fees.

It's clear that FIDIC does not want these forms to be used without the DAAB. Many lawyers commented that it would be difficult to amend the 2017 forms to work without a DAAB because it is such a central premise of the revised forms. Indeed one of *FIDIC's Golden Principles 2019* is that unless applicable law requires otherwise, formal disputes must be referred to a DAAB for a provisionally binding decision as a condition precedent to arbitration.

There may also be jurisdictional issues with such heavy reliance on the DAAB's role. For example, in Switzerland a DAAB decision is not directly enforceable and in the UAE an arbitration award is required for enforcement of the DAAB decision.

The EIC commented that the prescriptive nature of the claims, disputes and arbitration provisions means that resourcing will need to change when compared with the 1999 forms – not necessarily a bad thing, but it will be costly. One of the speakers commented that while the concept of a standing

DAAB is welcome, in his experience it is often the case that employers and contractors won't agree to pay for it.

Commentary from the multilateral development banks (MDBs), including the World Bank, supported the increased use of DAABs, particularly in the Middle East and Africa where this has not been the norm. As I mention later in this blog, the MDBs are moving towards mandating the use of the 2017 suite on their projects and given that it is an intrinsic part of these contracts, we may begin to see more and more projects adopt standing DAABs.

In reality, in order to use the 2017 suite, the parties will need to embrace the hands-on approach of the DAAB, and be ready to pay for the benefit of it.

Variations – dealt with as they arise

Perhaps the most praise for the 2017 forms was for the revised variation procedure and the clarity that is required for changes in the works to be classed as a Variation (variations must be named in a “Notice” as such or called out by contractors at the time of the instruction or works, or they will not be classed as a Variation).

Notwithstanding the generally positive reception for the reworking of these procedures, case studies examined at the conference show that amendments are still being made to these clauses.

Employers still don't like the fact that contractors have a right to reject their requests for variations, particularly those that are “Unforeseeable”. Contractors don't like that the definition of a Variation doesn't include a change to the Employer's Requirements (as in the *1999 Silver and Yellow Books*), only a change to the Works.

In the 1999 forms there are no formal requirements for a variation instruction. The character of an instruction is determined by its effect and therefore, at the end of a project, there is an almost inevitable horse trading over a pile of “instructions”. The revised procedures and deeming provisions in the 2017 suite have done away with this and any arguments that are going to occur over variations must be raised at the time of instruction. While this may mean that in some instances, the benefit of time as a great healer will be lost, the general consensus among attendees is that real time resolution is a benefit of the new forms.

Final thoughts

Two years in and there is an illuminating trickle of early adopters' experiences. Everybody acknowledges that the 2017 prescriptive approach is better suited to certain works and parties than others. However, there are some parts of the 2017 suite that are welcomed by the market for larger projects that have the budget and sophistication for the required hands-on approach.

Not everyone is a convert. EIC does not regard the 2017 suite as an improvement on the 1999 suite and does not endorse its use without amendments. In their view, the 2017 suite is too process

heavy, prescriptive and long and the regressions outweigh the progress made by the new forms of contract. EIC is planning to publish its Contractor's Guide to the 2017 Yellow Book in January 2020, followed by separate guides for the 2017 Red and *Silver Books* later in 2020.

With the introduction of the Yellow Book Subcontract, FIDIC are not relinquishing the 1999 suite just yet. Having said that, the *Pink Book* (the MDBs version of the 1999 Red Book) is being withdrawn and six MDBs (including the World Bank, European Bank for Reconstruction and Development (EBRD) and the Asian Infrastructure Investment Bank (AIIB)) have entered into bilateral agreements with FIDIC to use the full 2017 suite. Each MDB will adopt the standard form with their own particular conditions of application. A more widespread move towards the 2017 suite feels inevitable.

New releases to look out for include the *Emerald Book*, a tunnelling contract released in May 2019. This is based on the 2017 Yellow Book, but with ground condition risk sitting with the employer and payment being part measurement (for excavation and lining) and part lump sum for everything else. Not surprisingly, the contractors present gave it a big thumbs up. There is also risk share with the ability for the time for completion not only to be extended but also reduced if the contractor encounters more favourable subsurface conditions. This was one of the reasons that some conference attendees considered the Emerald Book is probably best suited for simple linear tunnelling.

2020 should also see the release of a new "Bronze Book", an Operate-Design-Build-Operate contract for upgrading existing facilities.

This [blog](#) was first published on PLC Construction Blog on 27 January 2020.

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