

Insights

FIDIC CONTRACTS – A PREVIEW OF WHAT IS TO COME

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SUMMARY

Last month, in what feels like a lifetime ago (when there was no third lockdown or even Tier 4, no new COVID variant and no Brexit deal), I attended the digital FIDIC International Contract Users' Conference from the comfort of my home. Top marks for effort by the organisers and for the virtual networking possibilities available, but it was very different! The content was however, in my opinion, excellent (and the audio significantly better in my office than in a big auditorium) and there are some interesting developments to report.

COVID-19 test

With a brief look back over the past year, there was appreciation and (self?) congratulation that the FIDIC suite of contracts has stood up very well to the unprecedented stress test of the pandemic, with many reports of the contracts having performed effectively. The FIDIC COVID-19 Guidance Memorandum (released in April 2020) was widely and rightly praised. However, it will be interesting to see whether this continues to hold for 2021. There is concern globally that the ongoing negative impact of COVID-19 during 2021 may result in an increasing number of disputes as projects come to completion and the final accounting exercise is carried out.

Predominant use of the FIDIC contracts still seems to be firmly on the side of the 1999 suite, though uptake of 2017, primarily among the multilateral development banks, is slowly increasing.

Greener pastures – the new Green Book

The main new release headline is the Green Book, second edition, 2021 due to be published this Spring, with Conference attendees given a pre-release version for early review.

The Green Book is FIDIC's Short Form of Contract, which does what it says on the tin, with the general conditions of the first edition, published in 1999, covering only 10 pages. I'm very fond of this contract. I think it is snappy and simple to use where its brevity is appropriate, although in some

places it is so brief that additional provisions have to be drafted. In the new edition, FIDIC has sought to address this.

No longer “short”

The new version, following the theme of the rest of the 2017 suite of “upgrades”, is significantly longer and more detailed than its predecessor. It runs to 26 pages of general conditions which is more than 2.5 times the length of the original. In fact, it’s pretty unrecognisable as the Green Book. But I find that I still like it (perhaps because of its reflection of the 1999 Red and Yellow Books, with just a splash of 2017, and all under 30 pages).

It has clearly been sharpened up and FIDIC suggests that this is the form to use for low risk projects and/or where the parties require a simple to use contract that does not require significant contract administration and management resources (which can’t be said of the rest of the 2017 suite!).

The World Bank’s suggested use is for contract value up to \$10 million USD although FIDIC states that this should not be viewed as a limit (in fact 18% of the first edition Green Books were reported for projects in excess of \$10m USD – and as we see below, the second edition is significantly more comprehensive than the first edition).

Beefing up the brevity

The pre-release second edition contains some new (to Green Book) but familiar FIDIC provisions including:

- Taking Over Certificate
- Defects Notification Period
- Intellectual property
- Confidentiality
- PI Insurance (although note to FIDIC, the parties cannot be jointly insured for this as is currently required)
- Assignment
- Limit of liability
- Employer’s financial arrangements
- Site data
- Responsibility for subcontractors

- Indemnities (although a query for FIDIC is why the employer indemnifies the contractor in respect of personal injury/death, damage to property or copyright infringement that arise by reason of any of the Employer's Risks (clause 11.3(ii))? Is the indemnity really intended to cover those EOT-only events that are included in the definition of Employer's Risks, when the indemnity extends to covering the contractor's losses and expenses? This appears wider than the 2017 contracts, (which is limited to limb (a) of the Employer's Risks definition in respect of loss to property only).
- Claims and Variations separated (as in the 2017 contracts) and a theme of reciprocity in employer's and contractor's claims (but without time bars).

More for engineers to do

Perhaps more controversially, the role of the Engineer ("acting neutrally" as with 2017) has been introduced as a central tenet to the administration of the contract. FIDIC's reasoning is that often employers don't have in-house capacity to manage projects and that certain countries require the appointment of an architect for even very small projects (note that FIDIC is an association of engineers!). A number of the Engineer provisions replicate almost exactly the equivalent provisions of the 1999 Red and Yellow Books.

Liquidated damages

It also contains some provisions that are a bit more radical and would need to be considered carefully, particularly where the governing law is English and Welsh or similar.

The new form introduces a liquidated damages (LDs) provision for the contractor's "Prolongation Costs" where an event occurs that entitles the contractor to an extension of time (EOT).

Prolongation Costs are stated to be:

"the only compensation due from the Employer to the Contractor for an EOT resulting from compensable delay." (clause 1.1.35)"

However, the contractor is still entitled to claim other Costs or Costs Plus Profit, as the case may be, arising from the relevant delaying event (clause 11.1.3). Prolongation Costs are payable by the employer for the duration of the EOT at a daily rate calculated in accordance with a (not entirely straightforward) formula that multiplies the average "Weight" of on and off-site overheads per day. The calculation is based on the certified value of the works carried out and the multiplier varies depending on when the event occurs.

As with the 1999 Green Book, termination costs are pre-determined and expressed as LDs. The LDs available to an employer on termination for contractor default or insolvency remain at 20% of the value of unexecuted Works, but the second edition now clarifies that this is an exclusive remedy. Where the contractor is entitled to terminate, it remains entitled to its demobilisation costs, any

other cost or liability reasonably incurred in expectation of completing the works plus 10% of the value of the uncompleted Works. However, the second edition now also entitles the employer to terminate for convenience with the cost consequences being the same as termination by the contractor for employer default. If the employer chooses to omit part of the work, it must pay the contractor the Cost relating to the omission plus 10% of the value of the omitted work. Again, these remedies are stated to be exclusive.

While this is an unusual approach to calculating termination costs and it seems unlikely that the employer would be able to recover its full “cost to complete” from the contractor if it terminates for contractor default, it may be appropriate for low risk and lower value projects, where the employer can assess this risk and take a view. However, if the more comprehensive 2021 Green Book is used for more complex, higher value projects, the employer may prefer to adopt a more traditional approach to calculating the cost of termination.

Some new ideas

Structurally, there are some interesting ideas in the new Green Book. There is an Employer’s Risks table setting out all of the Employer’s Risks and their consequences in one place. The payment valuation method is a simple box tick selection. A new feature that FIDIC is hoping to replicate in its other contracts is the inclusion of a raft of sample forms including sample forms of communication (approx. 40 forms) to ease the burden of administration. Their use isn’t obligatory.

A good thing?

In conclusion, to me, the second edition of the not-quite-so-Short Form Green Book is a welcome addition, bridging a gap between the 1999 Green Book and the 1999 Red and Yellow Books, but with a nod to 2017 themes. It reminds me slightly of the sizing up of small cars – now the VW Polo is the same size as the VW Golf of the ’90s, and the new VW Golf isn’t really a small car anymore. The final version will be available in Spring 2021.

Other New Releases

Other upcoming releases in 2021 of note are:

- An enormous Guide to the 2017 Red, Yellow and Silver books (due first quarter 2021).
- A new Bronze Book (originally scheduled for 2020) which is an Operate-Design-Build-Operate contract (as the Gold Book) but for brownfield sites that include an upgrade for existing facilities, making allowances for existing plant that is unknown or un-surveyed at the outset.

In the longer term, other contracts to look out for are:

- Subcontracts for the 2017 Suite by end 2022;

- A form for PPP projects (2023) including concession agreements and direct agreements not covered by the Silver Book;
- A collaborative contracting form (end 2023) with optional payment provisions such as Target Price; and
- An EPCm form (end 2023).

Final thoughts

I enjoyed the Brave New World format of an online conference as I chatted with fellow attendees in Botswana and Russia simultaneously. It made for a more inclusive gathering with people able to attend that could not in person even in normal circumstances. It wouldn't surprise me if we see more of these events in future, even where a global pandemic isn't mandating an online platform. I do however hope that we will all be able to physically reunite in the not too distant future, if only for the post-conference prosecco.

This article first appeared on the Practical Law Construction blog dated 13 January 2021.

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Natalie Wardle

Paris

natalie.wardle@bcplaw.com

[+44 \(0\) 20 3400 4623](tel:+442034004623)

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