

Insights

FIDIC CONTRACTS – WHAT’S NEW FOR 2022?

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The title of my review of the last online FIDIC conference a year ago, *FIDIC contracts – a preview of what is to come*, now has a somewhat ominous ring to it as for the second year running the International Users’ Conference had to convene online in December 2021 due to the current COVID-19 situation.

It felt a bit more “down to business” than last year with no online networking platform between Zoom sessions, but instead included some excellent, hosted, breakout discussion rooms, which I thought was a great addition. I particularly enjoyed the very open (collaborative) discussion around the new FIDIC Collaborative Contract that is a work in progress. More of that below.

Green Book Second Edition 2021

The main event at this year’s conference was the launch of *FIDIC’s new “short form” contract* (delayed from Spring 2021).

Last year I *reviewed the test release* version of this contract in detail and I don’t propose to repeat my analysis of its key features as it’s all still valid (the updates to the General Conditions being described as “refinement” only).

Issues addressed

For completeness, I should mention that the issues that I flagged in the test version have been resolved by FIDIC:

- the issue of the employer indemnity for all Employer’s Risks has been resolved with employer indemnities narrowed to broadly match those of the 2017 Yellow Book; and
- the requirement for the employer to be jointly insured under the contractor’s PI insurance has been removed.

User friendly tools

The biggest change from the test edition comes with the addition of a number of user-friendly tools, including extensive guidance notes, flow charts, and sample forms for managing the contract.

These all look helpful and were well-received by the representative contractor and employer groups present.

One might question, however, why so much user advice is required when FIDIC has billed the 2021 Green Book as the simple user-friendly alternative to the 2017 *Red* and *Yellow* Books that does not require significant contract administration and management resources. It is a bit surprising that it now runs to a whopping 155 pages (although in its defence, the General Conditions are still short(ish) and only account for 26 of those pages).

Prolongation Costs?

I think it would be fair to say some hesitancy remains over the new innovative concept of fixed “Prolongation Costs” for the contractor– a *liquidated damages provision for compensable delays*. FIDIC was keen to point out that the calculation provided is only a starting point and there is nothing to stop parties from agreeing different percentages and timing values within the calculation, tailored to individual projects.

Reception of this new liquidated damages provision was mixed with employers voicing concern that there may be a risk of double recovery by contractors, whereas contractors welcomed the certainty of such liquidated damages. It will be a task for engineers to be very clear on the separation of prolongation costs from disruption costs.

Overall

I look forward to working with this contract. I hope that it will be more widely used than its 1999 predecessor. Given the addition of the familiar contract mechanisms and more robust contract management approach, I expect this will be the case.

Other New Releases

This year has seen a further *COVID-19 Guidance Memorandum* covering primarily the White Book (services contract) and other consultancy agreements. This follows last year’s well-received COVID 19 Guidance Memorandum for the Works Contracts.

In addition, five *FIDIC standard contracts* (Red, Yellow, Silver (1999 and 2017 editions), *Gold* and *White*) are now available in the Chinese language, with upcoming translations for the 2017 Suite (Red, Yellow and Silver Books) in French, Spanish, Portuguese and Mandarin.

Given the Green Book’s delay, it’s perhaps not surprising that we haven’t yet seen the other FIDIC forms that were previously billed for release in 2021. These include the Guide to 2017 Suite which is now due to be released in April 2022 and the Bronze Book (Operate-Design-Build-Operate Contract, as the Gold Book but for brownfield projects) which has been downgraded to a test edition for 2022.

Of significant interest is that the 2017 Suite of contracts are all to get a reprint in Q1 2022, which will incorporate three sets of amendments made in 2018, 2019 and 2021.

In the longer term, other contracts in the pipeline include:

- Subcontracts and a JV Agreement (for Contractors) for the 2017 Suite by end 2022/Q1 2023.
- A form for PPP Projects (2024) including concession agreements and direct agreements not covered by Silver Book.
- A Collaborative Contracting form (end 2023) with optional payment provisions such as Target Price.
- An EPCm Contract (2024).

Time to Collaborate

The round table discussion of the new collaborative contract was hugely interesting. With FIDIC being a truly global federation, *collaborative contracting* means vastly different things to people of different jurisdictions and across civil and common law systems. The Task Group creating this contract will be looking to develop a contract with cross-jurisdiction appeal while also suiting the FIDIC brand.

In a collaborative way, the task group will be circulating a survey in January 2022 to ask users what they want and expect from this contract. Users are also invited to provide any views directly to FIDIC.

Similarly, the PPP Contract task group is also in scoping mode. The task group is asking itself: what can FIDIC do in this market to provide the most useful form of PPP contracts to its users? Should it be providing a bolt on to other FIDIC contracts, or a complete new suite of contracts from funder to sub-contractor? A strategic committee is being formed to liaise with employers, contractors, the world banks and other interested parties. Applications to FIDIC for those interested.

Looking forward

I hoped to be able to meet in person and catch up with colleagues over a glass of prosecco at this year's conference but that didn't happen. FIDIC confirmed that it intends next year's International Users' Conference to be in London, in person, at the end of November 2022. If it is, I'm changing my order to champagne.

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