At the International Contract Users Conference held in London from 6 to 7 December 2016, FIDIC unveiled its proposed revisions to the 1999 Rainbow Suite of standard form contracts including the issuance of a pre-release version of the second edition of the Yellow Book, the contract used for the provision of electrical and/or mechanical plant and for design and execution of building or engineering works (Plant & Design Build). This pre-release version is stated as “intended only for viewing”. Therefore, although it is not possible to know with any certainty if all of the changes that have been proposed in the pre-release version will make it into the final version of the second edition they provide a good indication of the changes to come.

FIDIC intend to formally publish the second edition of the Yellow Book later this year, along with the second editions of the other two contracts that form part of the original 1999 Rainbow Suite, namely the Red Book, the contract used for building or engineering works designed by the Employer (Construction) and the Silver Book, the contract used on projects where the Contractor carries out all Engineering, Procurement and Construction (EPC/Turnkey Projects). As such, it is intended that the second editions of the Red and Silver Books will take a similar form to the pre-release version of the second edition Yellow Book.

The FIDIC standard forms of contract are the predominant standard form of contract on international projects, particularly in Eastern Europe, Africa, the Middle East and Asia. Their popularity stems from the suite of contract’s flexible nature, in particular the ability of users to be able to adopt the suite of contracts across a wide variety of legal systems. Although the FIDIC suite of contracts are rarely used in the UK, any changes will be of general importance at least, to the extent that they reflect current trends in contract drafting and international best practice.

Proposed changes to the Yellow Book

The pre-release version of the second edition of the Yellow Book is now 50% longer than the first edition and the content has been substantially changed,
with some clauses being re-drafted in their entirety. This note summarises some of the key changes that have been proposed.

FIDIC’s rationale behind the proposed changes include an increased focus on 1) project management tools and mechanisms including the reinforcement of the role of the Engineer and a greater emphasis on pro-active management and; 2) the balance of risk allocation between the Parties by encouraging reciprocity; and 3) dispute avoidance through greater clarity, visibility and certainty.

The Engineer

A new role of the “Engineer’s Representative” has been introduced (sub-clause 3.3 of the pre-release second edition). Pursuant to this provision the Engineer may appoint an Engineer’s Representative and delegate to him the authority necessary to act on behalf of the Engineer, except to replace the Engineer’s Representative. The Engineer’s Representative is required to be based on Site throughout the duration of the project. It is hoped that this change will ensure effective and timely management of claims.

Whilst the Engineer will continue to act for the Employer as it did in the first edition, the Engineer is no longer required to obtain the Employer’s consent prior to making a Determination under the Contract (sub-clause 3.2 of the pre-release second edition). The title of sub-clause 3.7 of the pre-release second edition (sub-clause 3.5 in the earlier version) has been changed from “Determination” to “Agreement or Determination” in a clear attempt to reflect that the Engineer is under a positive obligation to encourage agreement of claims. If the Engineer fails to make a Determination within the time frame specified within the contract then he will be deemed to have rejected the claim and the claim can be referred to the re-named “Dispute Avoidance / Adjudication Board” (the “DAB”). When acting to seek Agreement or Determination, the Engineer is said not to be acting for the Employer, but to be acting “neutrally” between the Parties.

The Programme

One attempt to encourage pro-active management is the significant increase in programme obligations (sub-clause 8.3 of the pre-release second edition) requiring the Contractor to include numerous additional items (11 items are listed in the pre-release second edition compared to the 4 items that are listed in the first edition) to be shown on each programme. These additional items include the Commencement Date and the Time for Completion, of the Works.

If the Engineer fails to make a Determination within the time frame specified within the contract then he will be deemed to have rejected the claim and the claim can be referred to the re-named “Dispute Avoidance / Adjudication Board” (the “DAB”).
If the site is to be constructed in sections, the date of right of access to and possession of each section of the Site must be included in the Contract Data. The Contractor must also ensure that all activities in the programme are logically linked and show the earliest and latest start and finish dates for each activity, as well as any float. The Contractor must also identify the critical path.

Although the current position, that the programme does not form part of the contract documents has been maintained in the pre-release second edition, a new obligation has been placed on the Engineer to review the programme and state whether or not it complies with the contract, within 21 days of receipt of the initial programme or 14 days of receipt of a revised programme. If the Engineer fails to comply with this obligation, then the Engineer will be deemed to have given a Notice of No-Objection and the initial or revised programme will be deemed to be contract compliant. There is also a positive obligation on the Contractor to submit a revised programme which accurately reflects the actual progress of the Works.

Advance Warnings

Another attempt to encourage pro-active management are the changes introduced to the Advance Warning provisions. In the first edition the Contractor is required to give advance warnings of any probable future events or circumstances which may adversely affect the works. However, in the pre-release second edition the proposed changes place an obligation on both Parties to “endeavour to” give advance warnings of any matter which may (a) adversely affect the work of the Contractor’s Personnel; (b) adversely affect the performance of the Works when completed; (c) increase the Contract Price; and / or (d) delay the execution of the Works or a Section (if any). By encouraging both Parties to give these warnings it is hoped that this will increase openness and visibility, and avoid disputes (sub-clause 8.4 of the pre-release second edition).

Extensions of Time

In terms of the causes which may entitle the Contractor to an Extension of Time in the pre-release second edition, these largely remain unchanged from those listed in the current edition. One notable change, however, is the narrowing of the scope of the Contractor’s ability to claim an Extension of Time for exceptionally adverse climatic conditions. Pursuant to sub-clause 8.5(c) of the pre-release second edition any entitlement of the Contractor to make a claim for an Extension of Time for exceptionally adverse climatic conditions will be limited to climatic conditions at the Site which are
“Unforeseeable” having regard to climatic data made available by the Employer and / or published by the Country for the geographical location of the Site.

At the end of sub-clause 8.5 of the pre-release second edition a new provision has been introduced in an attempt to deal with concurrent delay. This new provision provides that the Contractor’s entitlement to an Extension of Time shall be assessed “in accordance with the rules and procedures stated in the Particular Conditions”. It is clearly hoped that this new provision will force the Parties to address the issue of concurrent delay at the time of negotiating and finalising the contract and consequently reducing the risk of disputes arising in respect of concurrent delay over the duration of the project. However, no suggestion on how the Parties should address the issue of concurrent delay has been included.

**Claims**

FIDIC seeks to make a clear distinction between claims and disputes in the proposed second edition of the Yellow Book. Whereas in the first edition, claims and disputes were dealt with under the same clause (clause 20), the second edition deals with claims and disputes under two discrete clauses (clauses 20 and 21 respectively) therefore placing an emphasis on the difference between the two. In the pre-release second edition a Claim is defined as a request by one Party to the other Party for an entitlement or relief under the Contract and a Dispute is defined as any situation where a Claim is otherwise rejected or ignored.

The procedural mechanism for both the Employer and Contractor to submit claims under the current edition of the Yellow Book are outlined in two discrete clauses (sub-clauses 2.5 and 20.1 respectively). However, under the pre-release second edition the procedural mechanism for both the Employer and the Contractor to submit claims has been merged together in an expanded sub-clause (20.1 and 20.2 of the pre-release second edition). The claim procedure is now much more detailed, with the procedure in Sub-Clause 20.2 alone being almost 3 pages in length.

Under the new procedure both the Employer and the Contractor are now subject to the same 28-day time bar for making claims. In the current edition it is only the Contractor that is subject to this time bar, whereas the Employer is simply required to give notice as soon as reasonably practicable. As well as a time bar in respect of notifying the claim there is a 42 day time bar relating to submission of fully detailed particulars in support of the claim. The 42 days
running from the time that either the Employer or the Contractor became aware or ought to have been aware of the event or circumstance giving rise to the claim. The Parties are also required to give Notice, which has now been defined as a written communication identified as a Notice. The Notice must also include reference to the Sub-Clause of the Contract under which it is issued. This is all as set out in Sub-Clause 1.3 of the pre-release second edition. This change has been introduced in attempt to avoid disputes arising between the Parties in respect of what constitutes valid notice.

The Engineer has a positive obligation on receipt of the notice to give a preliminary response within 14 days if it considers the claim is time barred. In the event that the Engineer issues such a response, the claiming party may, if it believes there are circumstances which justify the late submission of its claim, apply to the DAB the time bar waived. When deciding whether or not to waive a time bar the DAB will consider whether the other Party would be prejudiced by acceptance of the late submission, whether the other Party had prior knowledge of the event in question or basis of claim and the extent to which, if at all, the Engineer may already have proceeded to make determination, or more likely sought to negotiate or agree.

It is thought that these changes have been introduced in an attempt to achieve balance and reciprocity between the Parties. However, this longer and more detailed procedure is likely to lead to a greater administrative burden being placed on the Parties.

Dispute Avoidance / Adjudication Board (the “DAB”)

The change in the definition of the DAB from the “Dispute Adjudication Board” to the “Dispute Avoidance / Adjudication Board” in the pre-release second edition is telling of FIDIC’s intention to encourage the DAB to adopt a more pro-active role in dispute avoidance and resolution. The changes proposed in the second edition require the DAB to be a standing DAB. This will mean DABs being constituted from the outset of a project, as in the current edition of the Red Book. The pre-release second edition provides that the Parties may jointly refer a matter to the DAB with a request for assistance and / or to formally discuss and attempt to resolve any disagreement between them. The DAB also has the power to invite the Parties to refer an issue in dispute if it becomes aware of it. The primary purpose of the DAB is to prevent claims from becoming disputes.
Impact

The proposed changes to the second edition of the Yellow Book are substantial and if published will have a wide reaching impact on those in the industry. Of the most significance, is the increased emphasis on process and procedure. Whilst the rationale, to re-balance risk between the Parties by encouraging reciprocity, will no doubt be welcomed by the industry and in particular contractors, these changes will no doubt place a greater administrative burden and cost on the Parties.

Additionally, the impact of these changes on international projects, particularly those in the Middle East (where the 1987 and 1999 suite of contracts are still widely used) is unlikely to be seen for some time. In a “take it or leave” type of market such as the Middle East it is hard to envisage Employer’s seeking to adopt the new 2017 editions any time soon. It also remains to be seen how the strict notice provisions that have been proposed in the pre-release second edition will fit in with the laws of certain civil law jurisdictions where contractual notice provisions are not enforced as stringently as in common law jurisdictions.

It is of course important to remember that FIDIC has not yet published the final version of the new edition of the Yellow Book, which as mentioned above they have promised to do later this year. Therefore, they will no doubt be taking soundings between now and then and this may result in them revisiting the changes proposed in the pre-release edition.

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For further information please contact:

Natalie Ledger
Solicitor
T: +971 (0) 4 356 3900
E: n.ledger@beale-law.com