NEW FIDIC CONTRACTS

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New FIDIC contracts

After 8 years of preparations, FIDIC has finally published the updated versions of the contracts Red Book, Yellow Book and Silver Book at the annual “FIDIC International Contract Users’ Conference” in London on 5 and 6 December 2017. The new contracts are expected to be broadly applied similarly to the previous versions. In this Insight, we introduce the most significant changes to the commonly used FIDIC Yellow Book and point out some of the new provisions which employers, contractors and engineers should keep particularly in mind. Furthermore, we include some remarks from the conference speakers.

The FIDIC Red Book, Yellow Book and Silver Book

Fédération Internationale des Ingénieurs-Conseils (“FIDIC”) is an international federation of consulting engineers founded in 1913 with members in close to 100 countries. FIDIC publishes various standard contracts to be used for e.g. construction works, large-scale machinery supplies, infrastructure projects, consultancy services, etc. Each contract applies to a specific area and is characterised by an individual colour label. The contracts aim at distributing liabilities and risks on the relevant parties, but they are not “agreed documents”, i.e. contracts negotiated and agreed between representative organisations (contrary to e.g. AB92, the Danish general conditions for the provision of works and supplies within building and engineering).

The new versions of the FIDIC Red Book, Yellow Book and Silver Book were issued on 5 December 2017 and constitute updates of the former editions from 1999, which can still be used. All three contracts have been significantly amended with the core aim of the majority of the changes being increased clarity and certainty.

FIDIC Red Book is primarily intended for building and engineering works where the employer bears the design responsibility. FIDIC Yellow Book is primarily intended for contracts on electrical/mechanical installations where the contractor bears the design and project planning responsibility, while FIDIC Silver Book is a turnkey contract. All three contracts have been prepared for the purpose of tenders but may also, with a few adjustments, be applied without a preceding tender. The advantage of applying the contracts is that they are all structured in the same way. It is therefore easier for the tenderers to obtain an overview of the contracts and any deviations from the standard wording and, consequently, to quickly prepare a tender.

In addition to the three contracts mentioned above, an updated FIDIC White Book to be applied for consultancy/advisory services was published in the spring of 2017. FIDIC also offers a wide variety of other standard contracts. We find that the FIDIC Yellow Book and the FIDIC Silver Book are the ones applied most often, especially within the wind industry, for infrastructure projects and in large-scale machine supplies, and also in contexts which they are not originally intended for (e.g. where there is no design obligation).

Our comments in this Insight are based on the FIDIC Yellow Book, but the contracts are very similar in their regulation.

Main changes to the Yellow Book

The 2017 Yellow Book is an update of the 1999 edition, and there are many similarities and maintained provisions. The numbering is largely maintained, except that a few clauses have been moved and clause 20 has been divided into two clauses: Clause 20 being “Employer’s and Contractor’s Claims” and clause 21 being “Disputes and Arbitration”. According to FIDIC, the intention of this division is to obtain a clearer distinction between “claims” and “disputes”.

Below, we will explain some of the most significant changes to the FIDIC Yellow Book, namely in respect of:

1. The Engineer
2. Formalities
3. Fit for Purpose
4. Delays
5. Defects
6. Care of the works, indemnification and limitation of liability
7. Other changes to consider.

1. The Engineer

The engineer is a key person in the FIDIC Yellow Book and Red Book (whereas the FIDIC Silver Book has an “Employer’s Representative” instead). The engineer is appointed by the employer and acts on behalf of the employer. The engineer is not a party to the contract, and the engineer’s liability is therefore not governed by the FIDIC Yellow Book (but should be handled in the contract between the employer and the engineer). The engineer plays an even more important part and has been given considerably more tasks and powers in the 2017 edition.
The engineer inspects, certifies, instructs, assesses, approves, mediates, makes decisions, etc.

Despite the fact that the engineer is appointed and remunerated by the employer and, in most cases, acts on behalf of the employer, the engineer has an obligation to act neutrally. In addition to the 2017 edition maintaining the engineer’s obligation to make fair determinations (“The Engineer shall make a fair determination of the matter or claim, in accordance with the Contract, taking due regard of all relevant circumstances”), it thus also adds yet another general obligation for the engineer to act neutrally (“When carrying out his/her duties under this Sub-Clause, the Engineer shall act neutrally between the Parties and shall not be deemed to act for the Employer”).

This raises the question if the engineer can be one of the employer’s employees? There is no requirement in the FIDIC Yellow Book for the engineer to be an independent third party, so in principle there is nothing to prevent the engineer from being employed by the employer. However, it seems questionable whether an employee of the employer could de facto meet the new neutrality requirement. Furthermore, the neutrality requirement is a very vague criterion, giving rise to e.g. the question of which past experiences the engineer may rely on. According to the FIDIC speakers, the word “neutrally” was the best suited as for instance “impartial” conflicted with the fact that the engineer is hired by the employer, although it was debated if there were better terms to be used. The guidance to the Yellow Book states that “... when acting under this Sub-Clause the Engineer treats both Parties even-handedly, in a fair-minded and unbiased manner”.

CONSIDERATIONS

Employer
It is recommendable to leave out the requirement of neutrality if the employer intends to appoint an engineer from the employer’s own organisation. Given the vagueness of the criterion, it should in all circumstances be considered whether to leave it out.

Engineer
Special attention should be paid to the substantial increase in responsibilities and deadlines (and thus the increased risk of making mistakes), also when concluding the agreement with the employer.

2. Formality provisions

The extent of the contract has increased significantly, primarily as a result of the inclusion of further details in the individual provisions, but also, however to a lesser extent, due to the introduction of new provisions. Many additional deadlines and procedures have been included which are important to keep in mind, especially with regard to the noticing of claims, which has become very formalistic and detailed. For example, going forward a notice must be identified as such and all formalities in sub-clause 1.3 shall be complied with. Also, the handling of variations in clause 13 has become much more detailed.

FIDIC’s intention is to obtain a much better claims procedure, in which respect it should also be noted that the 2017 edition contains a provision of “advance warning”.

Employer’s claims

The former (1999) provision in sub-clause 2.5 on the employer’s right to claim payment or extension of the defects notification period has been deleted in the 2017 edition. According to that provision, the employer had to raise its claim “as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim”.

Instead, clause 20 now (in the 2017 edition) covers both the employer’s and the contractor’s claims, and consequently the employer shall also give notice of a claim within 28 days after the time when the employer became aware or should have become aware of the event or circumstance resulting in a claim for payment (or reduction of the contract price) or an extension of the defects notification period. In addition, both the employer and the contractor must submit a fully detailed claim within 84 days (calculated from the same date of commencement).

No specific deadline is set out in clause 20 in respect of other claims than mentioned above but if there is a disagreement in respect of such other claim, the claiming party may refer the claim to the engineer, which shall be done “as soon as practicable after the claiming party becomes aware of the disagreement”.

These new provisions thus make it very important to distinguish between claims for additional payment, reduction in contract price and extension of the defects notification period on the one hand and other claims on the other hand. Such distinction does not always seem clear to us.

The new deadline of 28 days calculated from the point in time when the employer should have become aware implies a significant tightening of the employer’s obligations, which will be welcomed by some considering the fact that the contractor and the employer will now be on equal footing (an equally risky footing, one could say). Others will probably find this unreasonable based on the view that the employer’s claims are often more complex than the contractor’s. In any case, many people would probably agree that either there will be an additional item on the agenda for the negotiation meeting, and/or there will be a (significant) increase in the claims considering that it is better to raise
3. Fit for purpose

The fit for purpose provision in sub-clause 4.1, to which many contractors are typically reluctant, has been maintained in the 2017 edition with a change:

The 1999 edition of the FIDIC Yellow Book states that: “When completed the Works shall be fit for the purposes for which the Works are defined in the Contract” while the 2017 edition states that: “When completed, the Works (or Section or Part or major item of Plant, if any) shall be fit for the purpose(s) for which they are intended, as defined and described in the Employer’s Requirements (or, where no purpose(s) are so defined and described, fit for their ordinary purpose(s))”.

This naturally poses the question whether the intention of the above is to obtain a factual change, including whether a purpose expressly stated elsewhere in the contract (except in the Employer Requirements) should be disregarded, which will probably be considered the general rule, and which is also in line with the opinion of the FIDIC speakers; thus, a change in the contractors’ favour.

In addition to the above change, the 2017 edition introduces an indemnification obligation for the lack of fitness for purpose of the works, see further details below under item 6.

Engineer’s determination

If the deadlines are not met, the right to enforce the claim will generally be forfeited. However, the 2017 edition contains provisions in respect of the engineer nevertheless determining the (late) claim and which circumstances may be taken into account in such respect. In our opinion, clause 20 contains contradictory wording in respect of the consequences of failure to comply with a specific time limit, and there also seemed to be a certain misalignment among the FIDIC speakers in this respect. Should the wording of the 2017 edition be used without modifications, it would be wise to consider the time limits as firm time bars and not rely on a justification of a late claim by the engineer.

The engineer shall make a determination of the matter or claim pursuant to sub-clause 3.7 (the former sub-clause 3.5), and the 2017 edition contains a number of new requirements as to how and how quickly the parties must react if they disagree with the engineer’s determination. Attention should be paid to the fact that if the engineer does not make a determination within the time limit concerning a claim, the claim will be deemed rejected which, for the sake of clarification, also applies in respect of the employer’s claims. If a party wants to file a notice of dissatisfaction with the determination with the DAAB, such notice must be filed within 28 days calculated from the date of the deemed rejection, which definitely places heavy demands on the parties’ claims procedure. This is further complicated by the fact that in other parts of the contract, the engineer’s failure to react is considered a “notice of no objection”, i.e. a tacit approval. The DAAB is a “Dispute Avoidance/Adjudication Board” consisting of one to three members. Contrary to the 1999 edition of the FIDIC Yellow Book, the DAAB is now set up from the beginning as a standing DAAB.

CONSIDERATIONS

Employer and Contractor
Attention should be paid to the many new requirements for processing claims, including time bars and whether the engineer’s failure to react is deemed an approval or a rejection. It should be considered making it clear what the consequences are of failure to comply with a time limit.

Engineer
Attention should be paid to the excessive number of deadlines and procedures for handling claims and the difficulties in reading clause 20 and sub-clause 3.7.

CONSIDERATIONS

Employer
It is recommended to include a separate clause on the purpose of the works in the Employer Requirements and (at least under Danish law) to clarify the understanding of a fit for purpose provision. Furthermore, it is generally (as usual) recommended to ensure that the purpose and requirements are described as precisely as possible, e.g. in respect of lifetime, requirements for maintenance, etc.

Contractor
Instead of relying on the “ordinary purpose”, it is recommended to ensure that the purpose of the works is described in detail and preferably that the understanding of the fitness for purpose clause is clear. E.g. instead of stating that the works “shall require a minimum of maintenance”, it should be stated how often and to what extent maintenance is required.

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4. Delays

Time schedules and delays are, obviously, very important aspects of a construction contract and the provisions hereon have been detailed even more in the 2017 edition of the FIDIC Yellow Book. As an example, the programme (i.e. the time schedule) is subject to many more requirements, and sub-clause 8.5 introduces a provision on concurrent delays (i.e. delays attributable to both the employer and the contractor occur at the same time). The provision is relevant, but is nonetheless close to empty, as it only refers to what has been agreed in the Particular Conditions, and if nothing has been agreed there, all relevant circumstances must be taken into consideration. The provision does, however, serve as a reminder for the parties to regulate the matter, which is often neglected. Along this line is a new provision in sub-clause 17.6 regarding “shared indemnities”; i.e. the scenario that both parties have contributed to an event for which one of the parties shall indemnify the other.

Time extension for weather has been tightened so that it is limited to unforeseeable climatic conditions at the site. If the construction of the works is sensible to adverse weather (e.g. due to offshore works where the Yellow Book is often applied), the provision should be adjusted and be much more detailed.

CONSIDERATIONS

Employer
It could be worthwhile considering an incentive scheme / upside sharing programme, especially in respect of contracts on production plants where the value increase of early delivery is considerable.

Contractor
It should be considered if the provisions on extension of time are sufficient, especially in respect of adverse weather (if relevant to the project).

5. Defects

The defects liability is generally maintained as hitherto but with slight changes in the 2017 edition. For example, it now appears from sub-clause 11.4 that the employer may fix a date on or by which the contractor must remedy defects if the contractor’s remedial work is “unduly delayed”, whereas the criterion in the 1999 edition was “fails to remedy within reasonable time”. Again, this may give rise to doubts as to whether the intention of this changed wording is to obtain a factual change, and it does not seem clear from which point in time the undue delay is calculated. Further, the reference in sub-clause 11.1 to sub-clause 7.5 seems difficult to follow.

Contractors should be aware that sub-clause 11.7 (“Right of Access after Taking Over”) introduces a procedure for the contractor’s access to the works to remedy defects: the contractor must request access on a certain, preferred date, and the employer must respond within 7 days by either stating its consent or by proposing a new date. Only if the contractor incurs additional costs as a result of any “unreasonable delay” by the employer in permitting access to the works, the contractor will be entitled to payment of such costs (again it is not clear from which point in time such delay is calculated).

There are still no provisions in the contract on serial defects, which - depending on the nature of the delivery - should be considered by the employer.

CONSIDERATIONS

Employer
It should be considered whether to use the 1999 wording of the provisions mentioned above or at least make it clear from which point in time certain deadlines are calculated. Protection in respect of serial defects are also worthwhile considering.

Contractor
Sub-clause 11.7 should be considered carefully, especially if the contractor has provided an uptime or availability guarantee or is liable for production losses in general.

6. Care of the works, indemnification and limitation of liability

Clause 17 has been changed in the 2017 edition of the FIDIC Yellow Book, however not as substantially as in the draft circulated a year ago. Clause 17 is now entitled “Care of the Works and Indemnities” and holds many of the provisions of the 1999 clause 17. Clause 18 is now entitled “Exceptional Events” which replaces the 1999 clause 19 concerning force majeure. The term “force majeure” is no longer used in the 2017 edition. The changes made to these clauses do not, in our view, contribute much to an easy understanding of this very important issue, and the wording seems unclear in some places despite the intention by FIDIC to obtain a much clearer language.
The obligation of the parties to indemnify each other for certain claims has been extended by a new provision in sub-clause 17.4 of the 2017 FIDIC Yellow Book, which has resulted in many objections in connection with the review of the draft contract. The provision implies that the contractor shall indemnify and hold harmless the employer “against all acts, errors or omissions by the Contractor in carrying out the Contractor's design obligations that result in the Works (or Section or Part or major item of Plant, if any), when completed, not being fit for the purpose(s) for which they are intended under Sub-Clause 4.1 [Contractor’s General Obligations]”.

This extensive obligation to indemnify the employer was - in the draft version of the FIDIC Yellow Book circulated about a year ago - further exempted from the limitations of liability in sub-clause 17.6 (now 1.15) resulting in this indemnity obligation not being subject to a liability cap or an exemption for indirect losses. However, in the final version this is no longer the case and FIDIC seems to have listened to the many objections against that provision.

As mentioned above, the limitations of liability are now found in sub-clause 1.15. Some changes have been made to the exceptions of the overall liability cap and the exclusion of indirect loss, which seem to be correcting the provision in the 1999 edition.

**CONSIDERATIONS**

**Employer**

Clause 17 and 18 should be read and considered carefully. If the employer has an obligation to supply anything under the contract (other than the contract price), e.g. material, personnel etc., clause 18 should be modified to also properly cover the employer.

**Contractor**

The last paragraph of sub-clause 17.7 regarding the indemnification obligation in respect of fitness for purpose should be considered and increases the need to have a clear description of the purpose.

**Final remarks**

The changes to the 2017 FIDIC Yellow Book as described above naturally constitute only some of the many, significant changes that have been made and many other provisions could have been mentioned.

All things considered, it is our opinion that the FIDIC Yellow Book 2017 edition has many advantages in that its provisions are more detailed and make higher demands on the parties’ handling and avoidance of disputes and on the focus on project management; however, the contract also seems unnecessarily heavy seen from a contract management perspective, and it is on many points difficult to read, inter alia due to a large number of cross references to other clauses.

Nevertheless, it is the general expectation that the new editions of the FIDIC Yellow Book, Red Book and Silver Book will achieve great penetration in the market of (international) construction, infrastructure and large-scale machinery projects and the updated contracts are indeed welcome in this regard.

Kromann Reumert offers advice on all the various FIDIC contracts.

**7. Other considerations**

**Contractor**

It should be considered if it is acceptable that the employer may now (as opposed to the 1999 edition) terminate the contract for convenience and employ another contractor for the execution of the works, provided that the original contractor receives compensation for loss of profit.
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