

True colours

With the second editions of FIDIC's Rainbow Suite published late last year, **Ellis Baker**, **Anthony Lavers** and **Rebecca Major** look at the significant changes that have been made

The publication last December of the second editions of FIDIC's contracts for international construction and engineering projects marks the 60th anniversary of its first construction contract, the FIDIC Red Book, issued in 1957. The new editions also arrive 18 years after FIDIC's first Rainbow Suite from 1999 – so-called because it comprises the Red, Yellow and Silver Book forms of contract.

Reflecting significant experience from almost two decades of widespread international use, the second editions introduce substantial changes and are much more comprehensive than their predecessors, with the General Conditions each spanning more than 100 pages and containing 21 clauses. This article looks at some of the significant changes.

Describing the rainbow

The Red Book is based on the traditional employer-design procurement model and embodies the measurement and valuation payment mechanism, with alternative provision being made for payment on a lump-sum basis. Historically, it has been FIDIC's most widely used contract.

The Yellow Book is FIDIC's design and build contract and is intended for use on a wide variety of projects, for instance for the provision of electrical and mechanical plant or the design and execution of building and engineering projects. Payment is on a lump-sum basis.

The Silver Book is an engineering, procurement and construction or turnkey contract, under which the Contractor assumes considerable responsibility for the completion of a functioning plant or facility and the achievement of agreed performance standards; as such, the Employer is afforded a greater degree of

certainty of the final price and time. Also a lump-sum contract, it is characterised by the allocation of much greater risk to the Contractor.

Contract administration

Of note in the Red and Yellow Books is a new Sub-Clause 3.7, which requires the Engineer to consult with and encourage discussions between the Parties to reach agreement as a mandatory preliminary to any Engineer's determination. This Sub-Clause also stipulates specific time periods for the consultation process and issue of determinations.

Additionally, it imposes a positive obligation on the Engineer to act "neutrally" between the Parties when working under the Sub-Clause, and provides that they shall not be deemed to act for the Employer when exercising those functions. This duty is described in the contract guidance as requiring the Engineer to treat both Parties even-handedly, in a fair-minded and unbiased manner.

By contrast, the Silver Book was conceived on the basis that the contract would be administered by the Employer without appointment of an independent Engineer. The new edition differs somewhat with the mandatory appointment, in Sub-Clause 3.1, of an Employer's Representative. Under Sub-Clause 3.5, there is no obligation on this representative to act "neutrally" when consulting with and encouraging discussions between the Parties or issuing determinations, as there is in the Red and Yellow Books under Sub-Clause 3.7; however, the representative shall not be deemed to act for the Employer when exercising these functions.

Product performance

New Sub-Clause 4.1 in all three books places the Contractor under an obligation to ensure that the Works are fit for the



purpose or purposes identified in the Employer's Requirements or, where this is not specified, fit for their ordinary purpose; under the Red Book, this applies to the extent, if any, that the Contractor is responsible for part of the design of the Permanent Works.

New Sub-Clause 17.4 requires the Contractor to indemnify the Employer against all acts, errors or omissions it has made in fulfilling its design obligations that result in the Works not being fit for the purpose intended under Sub-Clause 4.1. New Sub-Clause 19.2.3 meanwhile obliges the Contractor to take out and maintain professional indemnity insurance sufficient to cover this obligation, if stated in the Contract Data.

In the Yellow and Silver Books, new Sub-Clause 12.4 clarifies the Employer's entitlement to Performance Damages from the Contractor in the event that the Works, or a section of them, fail to pass any or all of the Tests after Completion. Performance Damages are also an express remedy under new Sub-Clause 9.4, which deals with the Contractor's failure to Pass the Tests on Completion, and new Sub-Clause 11.4, concerning the Contractor's Failure to Remedy Defects.

Claims procedure

The new Clause 20 in all three books



prescribes a procedure that applies to both Employer and Contractor Claims. New Sub-Clause 20.2 goes on to impose greater administrative requirements on a Party when issuing a Claim, meaning that proactive contract administration will be needed to prevent such claims being lost.

Important changes include a requirement for the Employer, as well as the Contractor, to submit a Notice of Claim to the Engineer within 28 days of the date on which it became aware, or should have become aware, of the event or circumstance giving rise to the Claim. A failure to comply with this time limit will result in a Claim being time-barred, unless the Engineer determines that circumstances justify late submission of the Notice.

Dispute provisions

New Clause 21 requires the Parties to appoint a standing Dispute Avoidance/Adjudication Board (DAAB) within the time stated in the Contract Data; if no such time is stated, this must be done within 28 days of receipt of the Letter of Acceptance, under the Red and Yellow Books, or the Contract Agreement, under the Silver Book. Under new Sub-Clause 21.3, if the Parties jointly request it then the DAAB has the power to provide assistance and/or discuss

informally and attempt to resolve any issue or disagreement that may have arisen between the Parties during the execution of the Contract.

The contract guidance for the second editions also provides a number of alternative clauses that the Parties may choose to adopt to suit the needs of a particular project, such as the following.

1. Limitation of liability: FIDIC has suggested an alternative provision in which separate limits of liability for consequential losses and insured losses are included.

2. Milestones: FIDIC has suggested that if the Employer wishes to have certain parts of the works completed by certain times but does not wish to take these over when they are completed, such parts ought to be described in the Specification as "Milestones". In such circumstances, FIDIC recommends that alternative provisions be added that would entitle the Employer to Delay Damages if the Contractor fails to complete the works on the Milestone within its time for completion – subject, of course, to any Extension of Time.

3. Amicable settlement: FIDIC recommends that the Parties consider agreeing a longer time period than the 28 days stated in new Sub-Clause 21.5 of the General Conditions to arrive at an

amicable settlement procedure. Parties should actively engage with each other during this settlement period by direct negotiation between senior executives from each, by mediation, by expert determination or by another form of alternative dispute resolution.

Contract care

The second editions are a landmark in the development of international contracting for major infrastructure projects. For many years, FIDIC contracts have been widely used in the Middle East, Eastern Europe, Sub-Saharan Africa and South-East Asia, and this widespread usage will no doubt continue.

When using the second editions, care will be required in the preparation of the Particular Conditions to ensure that the terms agreed are appropriate for the needs of the individual project. In light of the introduction of highly prescriptive procedures, the new contracts will require rigorous and proactive administration to ensure projects are carried out effectively. ●



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Ellis Baker and Anthony Lavers co-authored *FIDIC Contracts: Law and Practice* (Informa, 2009), which provides detailed commentary and analysis of the Rainbow Suite, the MDB Harmonised Pink Book and the DBO Gold Book.
<http://bit.ly/2EYJK4I>



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