

Resolving the issues with FIDIC

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Joe Colgan, senior project manager, EC Harris, follows up on the problems associated with FIDIC's nomination clause.

FIDIC '99 provides for a right of objection under Clause 5.2 that is conditional upon the contractor's receipt of an indemnity from the proposed nominated entity.

Sounds straightforward doesn't it? However, the actual words 'indemnify the contractor against and from any negligence or misuse of goods...' import a whole raft of possible options and ramifications for both the indemnifier and the indemnified.

As ever, cooperation and teamwork go a long way

Notwithstanding that the term 'goods' isn't defined, indemnifications such as this oblige the party to accept and bear the consequences of risk and it can choose to do so either by procuring cover or 'self insuring'. But what does the party insure against?

The range of potential losses is great, the breadth of the indemnity is huge: 'any negligence' covers almost all bases and the clause is silent as to what that may mean.

It is also silent on other salient points, such as:

- What the key provisions of an indemnity requirement are?
- How it is called or triggered?
- Is there any limit on liability?
- For how long does it last?
- What about contributory negligence?
- Does the Engineer administer the process? (clearly not in the absence of clauses saying so) therefore;
Who decides on the allocation of monies?
- If the contractor effectively 'self insuring' and if so, is the company financially sound enough to do that?

There are numerous problems arising from this simple requirement and this article barely scratches the surface of them. Even though the employer is obligated to indemnify the contractor should the nominated entity fail to provide the indemnity, the same questions are raised again from the employer's perspective.

Clearly any contractor is going to prescribe the terms of any indemnity it seeks and object if the form required is not forthcoming.

This is a positive disincentive for contractors to even consider tenders where there is any significant degree of nomination and in a market such as the UAE, it behoves employers to be wary of setting conditions that may deter receipt of competitive tenders.

There are also problems with termination; Clause 15.2 FIDIC '99 and Clause 63.1. Aside from some specific condition precedents to allowing employer termination relating to insolvency and bankruptcy, one key precedent is failure to comply with Clause 8 under FIDIC '99 and Clause 46.1 under FIDIC '87.

The general obligation in these clauses being to complete the works in accordance with the agreed programme and to progress the works promptly.

Giving the employer the right to terminate upon breach of this obligation, is in my view wrong for one simple reason; the contractor is fully entitled to be late of his own volition!

Should the project be delivered late, then liquidated damages will be levied but that will not end the contract. Usually, only a breach of a fundamental condition of the contract that cannot be remedied will allow termination, but that is not usually the case when a contract term is broken and a remedy is prescribed or readily available.

This 'optional' remedy, (termination for breach of a term) begs the question, 'does the right to receive LADs survive termination of the contract?' The answer (in FIDIC '99) on the face of it, is 'yes,' as written in the fourth from last paragraph of Clause 15.2 which states; 'the employer's election to terminate the Contract shall not prejudice any other rights of the employer, under the Contract or otherwise'.

But does that statement really preserve the right to LADs under the contract when said contract is no longer in existence by virtue of simply saying so?

Well, contractually speaking, again the answer is again 'yes,' the parties have signed a contract saying so but logically the answer would be 'no;' the whole premise of recovering the LADs is by offsetting them from amounts otherwise due to the contractor and this opportunity falls away upon termination although they are still due.

Certainly, deduction of LADs from an interim application is significantly easier than attempting to wring them out of a contractor no longer employed by the employer but if litigation follows termination, then they would cease to be a head of cost recoverable and be subsumed by the general claim made by the employer.

I would conclude that they survive the termination but not in reality, succeeding litigation.

So, FIDIC's not perfect, but then nor are any other forms; it has its problems but they are no more or less severe than other forms and can and often are, readily resolved as can be seen by the many successful projects undertaken on it throughout not only the UAE but the rest of the world.

As ever, co-operation and teamwork often go a long way to resolving problems that on the face of it, require a judge to determine and it is a tribute to all of us working to resolve them on a daily basis that, for the most part, we do.