

February 2010

## Projects

### FIDIC Update

**Last year was a busy year for the FIDIC Contracts Committee, and with further updates due in 2010, here is a brief update on FIDIC publications.**

#### Conditions of Subcontract for Construction

FIDIC have just published a new Subcontract form (termed the Conditions of Subcontract for Construction). This is specifically designed as a construction only subcontract to be used by main contractors operating under the current 1999 FIDIC Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (known as the "Red Book") and under the Multilateral Development Bank Harmonised Edition of these FIDIC Conditions of Contract. The Subcontract is drafted very much on the basis of a "total pass down of risk" although there are some interesting features (particularly from an English law perspective). For example, the payment provisions are effectively tied to payment under the Main Contract and include "pay when paid" clauses (Sub-Clause 14.6 (c)) in that the Contractor can withhold monies where "the Employer has failed to make payment in full to the Contractor in respect of those amounts..." Of course, this protection will not apply where the reason for non-certification under the Main Contract is because of Contractor default or insolvency of the Employer.

Whilst common in subcontracts in Europe, any construction contract signed in England and Wales would be subject to the UK Housing Grants, Construction and Regeneration Act and this prohibits pay when paid provisions. It will be interesting to see how this plays out in the market, particularly in light of the harsher conditions for Contractors generally; this may be more palatable to subcontractors in these straitened times. What it means in practice is that subcontractors will have to take a good deal more notice of what the main contract says about payment and certification of payments to ensure they are comfortable with these risks flowing down into their subcontracts.

Other key features are:

- Whilst the underlying principle is direct risk pass down, there is no general provision (as appears in many "pass-down" subcontracts) saying, for example, that the Sub-Contractor shall carry out the Subcontract Works such that he does not put the Contractor in breach of the Main Contract.
- The Subcontract assumes that the "Main Contract" will be the FIDIC Red Book and directly refers to "Main Contract Clauses 2". Of course, the numbering will not necessarily work if the "Main Contract" is either not FIDIC or is an amended form of FIDIC.
- Not surprisingly, there are provisions allowing for immediate termination where the Main Contract terminates (Clause 15). Where the Main Contract is terminated for default the Subcontractor only gets the value of work and documents produced up to the date of termination (less amounts recovered by the Employer and any other losses and damages incurred by the Contractor and other Subcontractors). If not in breach, the Sub-Contractor gets paid the value of works/documents to date, demobilisation and reasonable repatriation costs, any other costs "reasonably incurred" in expectation of completing the Subcontract Works plus loss of profit. This is all fairly standard, although we may see a number of main contractors attempting to curb the "loss of profit" claim. However, the biggest potential issue is probably Sub-Clause 15.6. This simply refers to the termination events in the Main Contract equally applying to the Subcontract. Whether or not this makes the Contractor's other termination rights sufficiently clear is open to question. It would be preferable to spell them out for such an important clause.

## New User Guide to Gold Book

FIDIC is proposing to issue a new user guide to accompany the Design Build and Operate form (Gold Book) which will include provisions allowing this to be used for brown field sites. The current form (first published in September 2008) covers design, build and long term operation of facilities on green field sites (and with no provision for funding by the Contractor).

## Review of the "1999 Rainbow Suite"

At the same time FIDIC are proposing to review the current suite of contracts in the "1999 Rainbow Suite" (i.e. the Red, Yellow and Silver Books) and to amend these in line with current business practices and in response to requests for amendments over the last decade. For example, one likely amendment is to include within the amendment FIDIC has already made to Sub-Clause 20.1 dealing with the procedure for Contractor's claims. Sub-Clause 20.1 has always been a sticking point for Contractors as it essentially precludes any entitlement to claim for time/money if the conditions of

this clause are not strictly complied with. What the Gold Book has introduced is a slight relaxation of this absolute notice bar allowing the Contractor to apply to the Dispute Adjudication Board for a ruling if he considers that there are circumstances which justify the late submission of a notice. If the DAB agrees that in all the circumstances "it is fair and reasonable that the late submission be accepted", it can overrule the 28 day notice limit.

FIDIC canvassed views at the annual FIDIC conference held in London last December as to what other clauses should be amended. There were a number of requests for a review of the variations clause (Sub-Clause 13) and in particular to the right of the Contractor to payment for value engineering changes. Currently under all the forms, the Contractor bears the cost of any proposal and only if it is accepted by the Employer does he then get remunerated. This has always been something of a disincentive to propose value added changes.

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Should you have any questions please contact [Sarah Thomas \(sarah.thomas@pinsentmasons.com\)](mailto:sarah.thomas@pinsentmasons.com) or your usual Pinsent Masons adviser who will be able to assist you further.

**This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.**

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