

FIDIC's 1999 Edition of Conditions of Contract for "Plant and Design-Build" and "EPC Turnkey Contract": Is the "DAB" still a Star ?

Gordon L. Jaynes

Whitman Breed Abbott & Morgan

Published in The International Construction Law Review (ICLR) 2000 and reproduced with permission.

To borrow, and amend, the title of a well-known musical. "A Funny Thing Happened on the Way to these First Editions"! To continue theatre terminology, the scripts of these First Editions were given last-minute rewrites, in which the role of the Dispute Adjudication Board (DAB) was cut heavily.

The DAB first appeared on the FIDIC stage in 1995, in the "Orange Book" (Conditions of Contract for Design-Build and Turnkey). Subsequently, DAB provisions were added, by Supplements, to the Red Book (Conditions of Contract for Works of Civil Engineering Construction) and the Yellow Book (Conditions of Contract for Electrical and Mechanical Works).

The DAB thereafter played its usual role in the three 1998 Test Editions of FIDIC's new Red, Yellow, and Silver Books. Those Test Editions were the subject of learned comment in, *inter alia*, the January 1999 issue of *ICLR*. The principal drafter of these three main documents presented an excellent introduction to them, in which he noted the DAB provisions (1). In the same issue, four other learned authors also presented comments and constructive criticisms of the new Books, but no criticisms were made of the Test Editions' planned use of DABs for dispute resolution.(2)

It seemed that the stage was set for the usual role of DABs to feature in the 1999 production of the Red, Yellow, and Silver Books. However, when the curtains parted on the premiere, at FIDIC's September 1999 Annual Conference, the scripts of both the Yellow and Silver Books had been changed and, surprisingly, in both the role of DABs was made optional.(3)

No explanation for this script revision has been given publicly yet by FIDIC, and it remains to be seen what, if anything, will be said when the FIDIC Guide to these new Conditions is published.(4)

In discussions among various persons,* some possible explanations have been suggested as reasons for this change in role, discussed below.

MOST USE OF THE NEW YELLOW BOOK WILL BE FOR PROCUREMENT OF PLANT, AND THUS IT IS LESS LIKELY THAT A DAB WILL BE NEEDED

This explanation is premised on two assumptions: (i) the new Yellow Book will be used mostly for procurement of plant; (ii) in procurement of plant, it is less likely that disputes will arise than, say, in procuring construction, and so a DAB is not apt to be needed. Addressing the latter premise first, it is contradicted by the fact that in the past what is now called "Plant" was to be procured using the former Yellow Book, the latest amendment of which was made solely to introduce the use of a DAB for contracts for "Plant". The first premise also seems contradicted by the "Foreword" to the new Yellow Book, which states that the new Conditions are recommended for *both* " ... the provision of electrical and/or mechanical plant, and for the design and execution of building or engineering works". (5)

BOTH THE NEW YELLOW BOOK AND THE NEW SILVER BOOK FORESEE AN INITIAL PHASE INVOLVING DESIGN, DURING WHICH IT IS UNLIKELY THAT A DAB WOULD BE USEFUL

With respect to procurement of "Plant", whether it is done under the former Yellow Book or the new Yellow Book, the fundamental responsibilities of the contractor are the same: if the former Yellow Book presented the DAB as useful from the outset of the Contract, why is it not still useful from the outset for the same type of procurement under the new Yellow Book? The same question applies to the design-build use of the new Yellow Book; if a DAB was useful for design-build procurement under the Orange Book, why does the usefulness disappear just because the colour of the Book is changed?

As for the design phase of design-build and EPC Turnkey contracts being immune from the disease of disputes, experience suggests that such a suggestion reflects more hope than reality.

IF DISPUTES DO ARISE UNDER EITHER SET OF CONDITIONS, A DAB COULD BE ESTABLISHED AT SUCH TIME, AND MEANWHILE MONEY WOULD BE SAVED BY NOT HAVING A DAB ACTIVE FROM THE OUTSET OF THE CONTRACT

This explanation ignores the fact that, once disputes have reached the point that negotiations have failed, it is likely to be difficult or impossible to agree to establish a DAB. Also, it has not been established that any ultimate financial saving is achieved by delaying the introduction of the DAB; in fact, the contrary can be shown from several projects which have delayed introduction of Dispute Boards.

If none of the above suggested explanations make much sense, what is the reason for the reduced role of the DAB in the new Yellow and Silver Books?

Perhaps the explanation lies somewhere in the rearrangement which have followed from the apparent "retirement" of the Orange Book. The titles of the three Books indicate that "retirement" is intended: the Orange Book was titled "Conditions of Contract for *Design-Build and Turnkey*"; the new Yellow Book is

titled "Conditions of Contract for Plant and *Design-Build*, and the new Silver Book, "Conditions of Contract for EPC *Turnkey* Projects" (emphasis added). The Orange Book seems intended to exit the FIDIC stage.

There are also other indications that FIDIC is "retiring" the Orange Book and reassigning its role to the new Yellow and Silver Book scripts. According to the 1995 Guide to the Orange Book, the Book was to be:

"the basis for all contracts which involve the provision of facilities designed by the Contractor, whether such facilities comprise building, civil engineering, chemical engineering, electrical engineering, mechanical engineering, or any combination.

The Orange Book was distinguished from the then-Yellow Book, the latter being for contracts for " ... the supply and erection of major plant, *where usually most of the detailed design is the responsibility of the contractor ...* , (7) but for which the employer nevertheless utilises an "engineer", in the FIDIC sense. (8)

The Foreword to the new Yellow Book states that its Conditions: "are recommended for the provision of electrical and/or mechanical plant, and for the design and execution of building or engineering works... [where] ... the Contractor designs and provides, in accordance with the Employer's requirement, plant and/or other works, which may include any combination of civil, mechanical, electrical and/or construction works. (9) The "Introductory Note" to the new Silver Book states that its Conditions are:

"intended to be suitable, not only for EPC Contracts within a BOT or similar" venture, but also for all the many projects, both large and smaller, particularly E&M (Electrical and Mechanical) and other process plant project, being carried out around the world by all types of employers ... on a fixed-price turnkey basis." (10)

Also, its Foreword says that the Conditions "may be suitable for the provision on a turnkey basis of a process or power plant, of a factory or similar facility, or of an infrastructure project or other type of development." (11)

From these comments it seems that there is little, if any, likely future, role for the Orange Book on the FIDIC stage. (12)

Perhaps in the course of assimilating comments on the Test Editions of the new Yellow and Silver Books, phasing out the Orange Book, and preparing the final scripts for these two new Books, the importance of the DAB being in place at the outset was somehow obscured.

Whatever the explanation for the change in scripts, the following points are clear:

1. The Dispute Board concept has achieved its remarkable record of avoiding arbitration or litigation by being in place at the outset of the contract, before there are any disputes. The Board thereby is able to have personal and contemporaneous familiarity with the development of the work under the contract. The Board has continuing contact with the parties from the beginning of the contract work, and establishes regular communication with them. This enables the Board to assist by giving the parties an acceptable Independent perspective on disagreements between them at an early stage, before they become acrimonious. These invaluable characteristics are what distinguish a Dispute Board from all other forms of dispute resolution available to engineering and construction projects, and they are lost by creating a "post-dispute" DAB.
2. A "post-dispute" DAB necessarily is largely reliant on records and witnesses instead of its own contemporaneous observations of the circumstances surrounding the dispute. Its proceedings thus tend to lack the informality of the typical Board, and to acquire the more formal character of an arbitral tribunal. This is a significant impairment, and can lead to the DAB being almost a "pre-arbitral arbitration tribunal". It is not an exaggeration to say that a "post-dispute" DAB is no longer a true DAB.
3. The FIDIC forms traditionally are used as the Conditions of Contract for the procurement forms recommended (or required) by the international development banks. Therefore, those Conditions of Contract frequently are used on projects organised by developing country governmental agencies, which often lack previous experience with DABs. and thus can fail easily to appreciate the value obtained by opting for their use. This increases the likelihood that, for developing country projects using either of the new Yellow and Silver Books, DABs will not be used and therefore that disputes unresolved by negotiation will proceed directly to arbitration, even though the arbitral process is more expensive than the use of a DAB.

Obviously, the reader who uses the new Yellow or Silver Book is urged to try to establish the DAB at the outset of the contract, so that the DAB can arrive onstage in its original costume, and perform in accordance with its original script, keeping the role which has made the DAB such a popular star in the dramas of engineering and construction projects around the world.

References

1. (1999) *ICLR* 5.

2. (1999) *ICLR* 27, 39 and 47
3. The DAB keeps its star role, however, in the 1999 First Edition of the Conditions of Contract for Construction (the new Red Book).
4. From materials distributed at the launch to the 1999 editions, it appears that Peter Booen, principal drafter of the new major Books, is presently writing a *Guide* to them. Apparently a single *Guide* for the three books is planned.
6. P.7.
7. Guide to the Use of FIDIC Conditions of Contract for Electrical and Mechanical work, Third Edition (1998) "Forword", pp.5.
8. Ibid. "Introduction", p.15
9. "Forword", first page (unnumbered)
10. Final page (unnumbered).
11. First page (unnumbered).
12. FIDIC's comments also indicate "overlap" between these two new Books regarding the type of projects for which they are intended; see, generally, "FIDIC Design-Build, Turnkey and EPC Contracts", Joseph A Huse and Jonathan Kay Hoyle, (1999) *ICLR* 27, and especially at pp. 36 (starting at section 4 of the article) through 38.