

Subcontract Forms

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1. Relevant Factors

As mentioned earlier, one of CC's Task Groups is being formed to develop a standard form of Subcontract for use with the 3 major Contract forms. It will of course be for use between the main contractor and his subcontractor(s).

FIDIC is embarking on this initiative with a certain amount of trepidation. A form of Subcontract was produced for use with the existing Red Book. A great deal of trouble and time went into its production, and when it had been produced not a great number of copies were sold. The reason may have been that it was published so long after the Red Book had been in operation that parties had long since arranged their subcontract conditions. In any case, as far as FIDIC was concerned, the Red Book Subcontract form was not a financial success. Obviously FIDIC does not have the wish to produce a new standard form if the demand is not sufficient to warrant the work and cost involved.

The second cause for consideration is whether FIDIC should really be involving itself in such a document, which is really an internal matter between contractors and their subcontractors. Surely it is a matter to be sorted out between contractors' organisations and subcontractor and/or supplier organisations. In fact FIDIC has sounded out the EIC (the European International Contractors' Association) as regards FIDIC's embarking on this task. The initial reaction of EIC was negative, virtually telling FIDIC that such a form was not the business of a Consultants' organisation and we should not interfere.

However, since the publication of the 1999 Forms, FIDIC has received a steady stream of requests for a form of Subcontract to be prepared. FIDIC prepared one for the Old Red Book, why is there not one for the New? Requests have come from Consultants and from those working on behalf of Contractors and others. The most insistent request of about 2 years ago came from South African Consultants, perhaps because the employer wished to monitor the subcontracts being used between his contractors and their subcontractors, presumably to ensure that the subcontractors were being reasonably treated. It is understood that those Consultants were forced to produce their own Subcontract document. Since then we have noticed an ever-increasing demand for FIDIC to prepare a suitable form to tie in with the major 1999 forms. Most recently we have been approached by a Consultant preparing documentation for a European contractor engaged in large infrastructure projects in Africa. As outside financing is being used, the Employer's contract documents specify FIDIC 1999, and so the subcontracts should obviously tie in with the main contractor's obligations under FIDIC 1999.

2. Within FIDIC's Domain?

And then FIDIC has come in contact with a number of subcontractors who feel, rightly or wrongly, that they are being treated badly by their main contractors, even when the main contract is based on a FIDIC form. I think it is a well-known fact that some large

contractors do have a tendency to treat their subcontractors unduly harshly. Many of the subcontractors are smaller organisations who rely entirely on the much larger and more powerful main contractors. They are sometimes forced to accept harsher - and sometimes unreasonable - conditions by their employers, i.e. the main contractors, and they have little chance of redress. If, for example, the main contractor delays or reduces their rightful payment they have very little recourse. They do not have the financial backing or muscle or desire to take legal action for redress, and, if they did, they probably would not get further work.

Whereas FIDIC is loathe to interfere in areas outside its domain, if the main contract is under a FIDIC standard form, is it really outside of FIDIC's domain to have an interest in how the subcontract is formulated? Particularly if the subcontractor comes to FIDIC or the financier and complains that the main contractor is working under a fair FIDIC contract, but the subcontractor is working under a much harsher set of conditions? Do large employers, and particularly major financing organisations, not nowadays have an ever-increasing wish to see that the 'little men' are also being fairly treated? FIDIC has noticed increasing interest from morally-minded employers, financiers and institutions to ensure fair treatment right down the line from main contractors, to subcontractors and suppliers, to the workmen and local labourers on the site.

Whereas FIDIC would not like to be classed with the 'do-gooder' mentality, as a champion of the 'underdog', FIDIC has always been considered as a fair and impartial organisation, working for the long-term best of the construction industry as a whole. The FIDIC Books are all about fair treatment for all involved, and - if it were not so - the FIDIC Books would never have achieved the universal acceptance that they have. Consequently, where FIDIC sees unfair practices in the construction field, FIDIC should do what it can to correct the situation, just as FIDIC has joined in the fight against corruption. If main contractors are intent upon following fair practices towards their subcontractors - as I am sure most main contractors are - then they should have nothing to fear from FIDIC's production of a fair subcontract form. Furthermore we believe major employers and international financiers will welcome this initiative from FIDIC, not to mention to use it will be to contractors, consultants and others preparing subcontract documents. It is possible that FIDIC may - when the Subcontract form has been published - include a clause in the main Contract forms that requires the main contractor to use the Subcontract form in his subcontracts.

3. Issues for Consideration

After consideration of the above aspects, and in view of the persistent demand, FIDIC is of the opinion that a Subcontract form would be a desirable addition to FIDIC's publications.

However, the question still arises as to who and how many will purchase the Book. As mentioned the previous Subcontract form was no financial success. The persistent requests indicate that there will be a significant demand, but obviously not the same demand as for the major Books themselves. Possibly a requirement in the main Books that contractors utilise the Subcontract form may increase the sales.

Then there is always the question of human resources. First, there is the existing FIDIC

Subcontract form for use with the Old Red Book that will provide the basis for the New Book. Then it is hoped that those who themselves have already been forced to draft a subcontract form may be willing to allow their work to be used, and of course there are various other subcontract forms in existence which will be studied. So it is not a question of reinventing the wheel!

In addition an approach has been made to EIC to assist with the work. Obviously it is in the interest of all concerned that the Contractors' organisations takes part in the logic discussions and in due course accepts the final product. Similarly it is of paramount importance that subcontractors' and suppliers' organisations accept and bless the final product, and it is intended to get them involved.

4. Initial Decisions

CC's first task is to locate suitable persons and try to establish a competent Task Group who are prepared to take on this difficult project. At the same time the Terms of Reference and budget are to be prepared for final approval of the Executive Committee.

Major initial considerations include whether there should be one book for use with each of the 3 major Books, or whether there should be 3 separate Subcontract Books: or perhaps one basic book with alternative clauses customised to suit the different Books.

The work will presumably commence with the identification and study of the forms of subcontract currently being used in the industry by various stakeholders. Thereafter there will be major principal decisions to be taken by the Task Group on such issues as 'pay-whenpaid' provisions, extent of 'back to back' or other allocation of risks, limit of liabilities, and so on.

CC will welcome all relevant useful tips and comments concerning current forms in use, suitable persons to serve on the TG or who have suitable knowledge and experience who may at least be contacted in this regard, and any other aspects.

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