

FIDIC Contracts Update

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Faithful followers of FIDIC (the International Federation of Consulting Engineers) gathered in London in December 2009 for their Users' Conference.

Below are some of the points of interest that emerged.

FIDIC has cleared out its Contracts Committee. The chairman is now Philip Jenkinson (UK) of Atkins, Christophe Theune (Germany) and Zoltan Zahoni (Hungary). ICP's Chris Seppälä continues in his role as legal adviser.

The Update Task Group has started work on revising the 1999 Red, Yellow and Silver contract books, starting with the Yellow. The task group comprises Svend Poulsen (Atkins, Denmark), Aisha Nadar (Queen Mary University, London) and Zoltan Zahoni (Hungary).

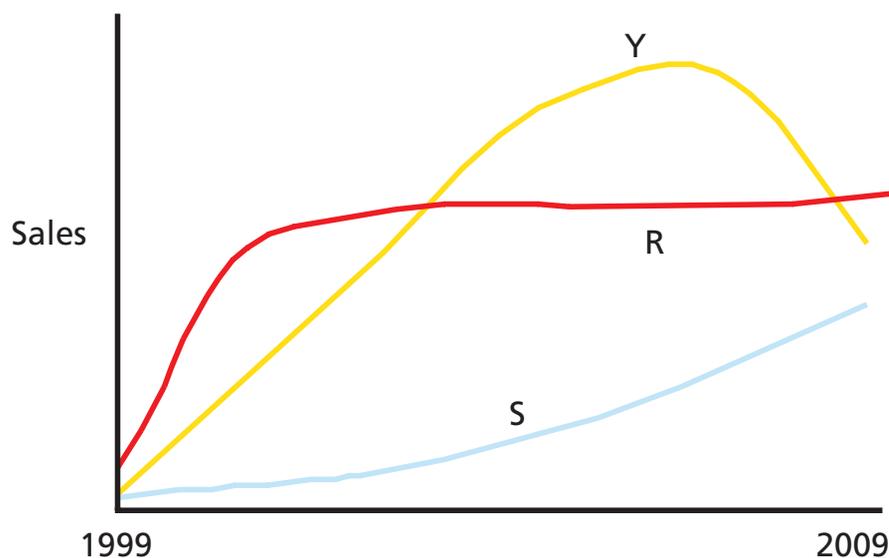
The experience of the old guard of Chris Wade, Michael Mortimer-Hawkins, Nael Bunni and Axel Jaegar will not be wasted as they will remain on tap as special advisers.

As well as updating the 1999 suite, FIDIC is also planning:

- A brown-field version of the Gold Book (Design-Build Operate);
- An update of the Dredging and Reclamation (Blue Book);
- An update of the Short Form;
- A subconsultancy agreement;
- A consultants' JV agreement;
- A new version of the Pink MDB form, currently being discussed with the multi-lateral development banks; and
- A first edition of the subcontract for use with the Red Book, the test edition of which was launched at the conference (see below).

Sales of FIDIC contracts

The sales, an unreliable indicator of market share of the various 1999 forms, show that the Red Book has regained top spot after many years of Yellow domination. The decline in recent Yellow sales has been matched by an increase in demand for the Silver. If present trends continue, Silver will soon be the more popular contractor-design contract.



A show of hands of the 140 people at the conference demonstrated that very similar numbers of people were currently working with Red and Yellow contracts, with far fewer involved with Silver Book projects.

Update Task Group

The Group is starting with the Yellow Book because the recent work done on the Gold Book 2008 applies most naturally to the Yellow Book. Many of the changes in the Gold Book, such as 'Exceptional Risks' in place of *force majeure* and contract data in place of the Appendix to Tender, will be retained. The issues that the Task Group is concentrating on first are as follows:

- whether to retain the Engineer or to stick to the Employer's Representative used in the Gold Book. It seems likely that the Engineer will be retained;
- the definition of 'Works' is to include design more clearly and the design requirements are to be set out more extensively;
- programming obligations are to be dealt with more thoroughly. This is viewed as an area where dispute avoidance can be achieved by better programming provisions;
- standing or ad hoc Dispute Adjudication Board (DAB): the views at the conference were overwhelmingly for standing DABs. The Task Group seem likely to retain the Gold Book idea of giving the DAB a discretion to order the provision of a bond in exchange for payment of the Decision;
- 'may' and 'shall' may (or shall?) be defined to resolve uncertainty in some parts of the world as to their meaning;
- the Gold Book definition of 'Dispute' is being reconsidered, presumably because it assumes a claim, but disputes can arise without a claim;
- the new Yellow Book will make it clearer that notices and other contractual communications will need to specify the clause under which they are given;
- operation and maintenance manuals will be provided for with greater precision;
- extension of time and advance warning provisions will follow the Gold Book;
- the detail of the escalation provision will be relegated to a schedule; and
- Clause 20.1 time barring will be subject to the DAB's discretion to admit late notification where just to do so.

MDB conditions

Chris Wade said that the majority of the proposed amendments were minor. However, he regretted that the authority of the Engineer was reduced by the Clause 3.1 approval regime required by the banks. It was also a pity, in his view, that the consensus among the banks

which led to the harmonised edition was fading so that each bank now required their own definitions and provisions for corruption, audit and arbitration.

Frank Kehlenbach of the EIC (European International Contractors) acknowledged some aspects of the current 2006 version of the MDB as being fairer or otherwise improved. He highlighted:

- the now mutual confidentiality obligations;
- the now clear obligation of the Employer to provide the building permit and special rights of way;
- Employer's claims are subject to 28 day limit – although no sanction is attached;
- the Contractor's right to reject a nominated subcontractor that will not accept pay-when-paid provisions;
- conditions that have to be fulfilled by the Employer before notice to commence can be given, including the obtaining of permits, the granting of access, advance payment and evidence of ability to pay. (Your reporter cannot but comment that it is strange to allow the Contractor to control the commencement date: until it provides the advance payment guarantee, the advance payment cannot be made so notice to commence cannot be given); and
- the performance bond no longer has to be from an institution approved by the Employer provided that it is 'reputable'. Surely a source of much future debate.

EIC are less happy with the ability of the Employer unilaterally to replace the Engineer and with the removal from Clause 4.2 of the list of grounds on which an Employer may call the performance bond. Frank Kehlenbach also noted difficulties with the dispute resolution clause that distinguished between local and foreign contractors, given that many foreign contractors are obliged or advised to set up local companies.

Cyril Chern highlighted some common and sometimes underhand amendments that he has seen in MDB contracts. Some examples were:

- Clause 2.4 amended so that the Contractor has no right to evidence of ability to pay after the contract is signed;
- in Clause 3.1, the word 'no' being removed so that a key sentence reads: 'The Engineer shall have authority to change the contract';
- Clause 4.10 being amended so that the Contractor has the obligation to provide all information regarding the site, ground conditions etc; and

- in Clause 20.4, the DAB being given 84 days from the final submission of the parties to deliver their Decision, potentially elongating the DAB process indefinitely.

DBO Gold Book

It was pointed out by Sarah Thomas of Pinsent Masons that Clause 4.1 imposed a fitness for purpose obligation that lasted the full duration of the operation period, perhaps 20 years. She suggested that this was not reasonable. Michael Mortimer-Hawkins, who chaired the DBO Task Group, defended the clause, saying that of course the plant should work properly at all times.

Jim Perry of PS Consulting, Paris drew attention to a new law in France, namely Article 2255 of the Civil Code, introduced in June 2008. Although it appeared to say that parties may not agree to reduce limitation periods to less than one year, it probably did not nullify the time-barring provisions of Clause 20.1 as a distinction was to be made between limitation clauses and

'foreclusions' which prevented a right arising in the first place.

Levent Irmak (Turkey) argued persuasively for an Employer's right of partial termination in the event of Contractor default. He pointed out that full termination is often too drastic to be a practical solution. He was addressing the Silver Book but made clear that the same reasoning applied to all the FIDIC forms. He also suggested – to this listener's ear, less convincingly – the involvement of the DAB to confirm or prevent terminations.

Altogether the Users' Conference demonstrated that FIDIC is busy and continues to generate much interest.

Edward Corbett is the Managing Director of Corbett & Co International Construction Lawyers Ltd based in London, UK, the Editor-in-Chief of *CLInt*, a FIDIC Adjudicator, the author of *FIDIC 4th – A Practical Legal Guide* and a member of the FIDIC Subcontracts Task Group.

COMMENT

Does a contractor's delay always involve its liability?

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Delays to the completion of a project usually result in sanctions against the contractor, the most common of which is liquidated damages. It is not suggested that concerns about such sanctions be disregarded, but there are certain circumstances in which a delay may not result in sanctions against the contractor.

Concurrent delays

Often a delay caused by the contractor occurs at the same time as a delay caused by the owner. In this event, the concurrent

delay by the owner may override the non-compliance with the programme by the contractor. If so, unless it involves other negative impacts on the project, the contractor may not be held liable for his own delay. In theory the owner might seek to prove a breach of contract by the contractor in any event, even if this should not result in any further sanctions, but the contractor might counterclaim that the owner is itself in breach of contract. The possibility of these two findings would probably not make it worth either party pursuing such a limited course of action.