Driver Consult

SHIFTING SANDS

Earlier this year, FIDIC produced a Standard Form of Contract for Dredging and Reclamation works. In terms of the Rainbow Suite this is known as the Turquoise Book.

Prior to the introduction of this form those wishing to place dredging contracts would have little to choose from in the way of standard forms. In my experience, it was common practice to use the FIDIC Red Book or the UK ICE Civils form contract (together with their respective subcontracts) or rely on in-house forms, with all the problems that that entails. On the face of it, a new form specific to dredging works is welcome.

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Scope of the contract

For those with experience of dredging works let under the Red Book or the ICE contracts the first thing that strikes you about this contract is its brevity. Alarm bells immediately start ringing.

The foreword says that the contract can be used for all types of dredging and reclamation work but the Guidance Notes clearly state that by combining Offer and Acceptance in one document the contract is intended for relatively straightforward projects. They cannot both be right.

Many dredging contracts are very complex undertakings allied to other major civils work such as dredging channels for the submersion of road and rail tunnel sections and subsequent protection and reinstatement, dredging for pipelines or foundations to major structures etc. Often these works are carried out in very difficult working environments such as fast flowing rivers, or in waters with high tidal ranges etc. These contracts are anything but "relatively straight forward".

Structure of the Contract

As intimated above the contract comes into being by means of acceptance of an Offer, all of which is recorded in the Agreement. This is a somewhat novel approach but is one perhaps that reinforces the fact that this contract is best suited to very simple works only.

The conditions themselves are brief, stretching over 15 clauses and 11 pages. There are no particular Conditions and the intention is that all necessary information should be provided in the Appendix or, as we shall see, in the Drawings and Specification.

Brevity is a wonderful quality, but too much of it can be a bad for your health. Dredging contracts are complex undertakings and the conditions of contract need to cater for the numerous problems and difficulties that may arise. If a contract does not provide a remedy for a particular situation then disputes are certain to follow when that situation arises.

The problem of leaving key contractual provisions to be dealt with in the Appendix or Specification is that the chances of the provisions being overlooked or inadequately drafted are dramatically increased. It is often the case, in my experience, that lawyers or in house legal team prepare the conditions of Contract and Engineers prepare the Specifications. Understandably the Engineers focus on engineering aspects of the works and are not necessarily aware of the contractual provisions that need to be dealt with in the specification. Before you know it something has been missed, or there is duplication or even worse conflicting provisions within the documents. In my opinion, important contractual matters should be dealt with in the Conditions and not be relegated to the Appendix or elsewhere.

Completion and Claims

" …the loose drafting only adds fuel to the fire".

Completion

Completion is evidenced by the issue of a Taking-Over Certificate by the Engineer, which is issued within 21 days of a notice from the Contractor advising that he considers that the works are complete. If the Engineer does not think that the works are complete then he rejects the notice with reasons. The trouble is there is no qualification of the meaning of completion such as "substantially" complete. It is open therefore for the Engineer to argue that he does not have to issue his certificate until absolutely everything is complete. Is this the intention? In the absence of more specific wording different jurisdictions may take a different view as to what constitutes "completion", but why leave it to the courts to resolve and not provide more precision in the contract, such as clause 48.1 of the Fourth Edition of the FIDIC civils contract.

Late completion without a corresponding extension of time will expose the Contractor to paying the amount stated in the Appendix for each day of delay. The term liquidated damages is not used and interestingly the wording of the Appendix seeks to limit the amount that has to be repaid to 10% of the sum stated in the Agreement. Again, in my opinion, the provision for a cap on the payments should be dealt with in the conditions themselves and not brought in through the back door of the Appendix.

Claims.

The contract introduces the concept of "early warning" at clause 10.3, a first for FIDIC. I suspect that this concept has bee taken from the ECC forms of contract. Essentially if the contractor does not give early warning of any matter which may delay or disrupt the works or give rise to a claim for additional payment then any extension or monies otherwise due him can be reduced if early warning was not given, to the extent that the circumstances could have been mitigated had early warning been given.

This type of provision is fraught with difficulty at the best of times but once again the loose drafting only adds fuel to the fire. The obligation is for one party to notify the other but the contract is silent as to what happens next. There is no requirement that the parties meet or that they should correspond further on the matter. All the contract says is that the parties shall take reasonable steps to minimise the effects. What are reasonable steps? Does it mean that the contractor has to spend money to minimise a delay caused by the Employer, rather than simply be entitled to an extension of time? It gets worse, the second paragraph of clause 10.3 provides that the Contractor will only recover such extension of time and costs as would have been due had he given prompt notice and taken reasonable steps. So, it appears that the costs of taking reasonable steps cannot be claimed under clause 10..3. It is possible such cost could be claimed under clause 10.4, but this right is "subject to any more specific provision in the contract" of which clause 10.3 is one.

These provisions also have the perhaps unintended consequence of relieving the Employer from liability for his failures. Let's say the Employer fails to provide access to a part of the works and this delays completion. If the Contractor did not give notice, but if he had the Employer could have taken mitigating measures to avoid the delay the Contractor will not get an extension of time, despite the fact that the it was the Employer who was at fault in the first instance. The risk for Employer delays and those caused by neutral events is thus transferred to the Contractor if he fails to give notice at the earliest opportunity. .

Executing the Works

"There are seventeen items listed but the definition of Force Majeure suggested in the Guidance Notes..."

The danger is that so much is left to be included in the Appendix that it becomes another set of contract conditions in its own right. For instance in this contract the names of the documents forming the contract and their priority are to be specified in the Appendix. These are essential matters which should be dealt with in the Form of Agreement or in the Conditions themselves, not hidden at the back of the Contract in the Appendix.

Executing the Works

Another problem with brevity is that a number of the provisions lack precise definition. For instance, the Employer is obliged to provide the Site and right of access thereto. What does this mean? Does this mean that the Contractor gets exclusive use of the Site? The Guidance Notes state that matters of use of the Site by others should be dealt with in the Specification. It is highly unusual for a contractor to be given exclusive possession of any site. Whilst it is acceptable to deal with the degree of possession in the Specification the conditions should state that possession is not exclusive.

Clause 4.3 provides that the contractor shall not subcontract any of the Works without the Engineer's consent. But on the assumption that permission is given there are no provisions dealing with the Contractor's liabilities for subcontracted work, as there are in the Red, Yellow and Silver Books.

The contract allows for Contractor to execute anything between zero and one hundred percent of the design to the extent stated in the Appendix. The Engineer does not approve the design but merely comments on designs submitted. But again the contract lets itself down. The Contractor's design obligation is one of fitness for the intended purpose inferred from the Contract. What does "intended purpose inferred from the Contract" mean? Fitness for purposes in an onerous obligation and if the contract is not absolutely clear as to the purpose then Employers may well face difficulty enforcing such an obligation. The lack of precision in words such as "intention" and "inference" is not helpful.

Risks

Clause 6.1 lists all the risks for which the Contractor is not liable. The list is extensive and removes the problem of having to analyse each clause to understand, for instance, the grounds on which the Contractor can claim an extension of time, additional costs and the risks which the Contractor does not have to indemnify the Employer. FIDIC is to be applauded for this straightforward approach.

There are seventeen items listed but the definition of Force Majeure suggested in the Guidance Notes would introduce another three namely; strikes and lock-outs, munitions of war and explosive materials and natural catastrophes.

Payment

Payment

Finally, on the subject of money the contract is not prescriptive as to the type of contract and the method of payment. The details of the type of contract are left to be completed in the Appendix. The options given are:

1. Lump Sum;
2. Lump Sum with Schedule of rates;
3. Lump Sum price with Bill Of Quantities;
4. Re-measurement with Bill of Quantities;
5. Cost plus.

The details are to be written in to the Appendix. The Appendix is already shaping up to become a sizeable document.

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For some inexplicable reason, the Contractor has no obligation to remedy defects in the dredging works notified after the date in the Take-Over Certificate and consistently there is no retention held after Take-Over. Many dredging contracts include detailed and difficult reinstatement works which must stand the test of time. Why should the contractor not have to rectify any defects in such works? These provisions, which are highly unusual, reinforce the view that this contract is only to be used for then simplest form of dredging such as keeping shipping lanes clear or shifting sand but it does not say this on the tin.

I would urge extreme caution if it was to be intended to be used for anything else.

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