FIDIC 2017 – First Impressions of the 3-Kilo Suite

Written by Edward Corbett | 12/12/2017

In London this week, FIDIC launched its Second Editions of the Red, Yellow and Silver Books. They are big, weighing in at almost a kilo each. The general conditions cover 106 pages with more than 50,000 words, over 50% longer than the 1999 forms.

- **1987 4th Edition – 23,600 words**
- **1999 1st Edition – 30,400**
- **2017 2nd Edition – 50,000+**

The additional words are spread through just 7 more clauses – 174 compared to the 167 of 1999.

The word used most often at the launch conference was "prescriptive" as the drafters tried to set out in detail every step in every process. Controversially, new time-bars have been added to enforce more of these processes.

Many improvements have been made, addressing issues that have emerged since 1999. Fans of Dispute Boards will be pleased to see that all three books now have standing boards with more emphasis on dispute avoidance; and that appointment of DB members and enforcement of their decisions have been made easier. Disputes and Arbitration are now dealt with in a separate chapter 21.

Here are the most interesting changes to the Yellow Book.

Chapter 1 – Lots of definitions, including "Notice", "Claim" and "Dispute"

- There are now 88 defined terms, including "year means 365 days" for those users in doubt on the subject.
- • A "Notice" is called for in some 80 clauses. It has to call itself a notice and comply with the specified form of communication. It does not have to identify the clause under which notice is being given.
- • A Notice of No-objection has been introduced to replace approvals and consents. It has not been abbreviated to NONO, sadly.
- • "Claim" and "Dispute" are defined and then re-addressed in cl.20.1.
- • Reasonable profit has become "Cost Plus Profit" which is defined by default at 5%.
- • "shall" and "may" are to be interpreted as mandatory and optional respectively.
- • "include" is stated to be non-exhaustive resolving doubt such as that created by 13.3 of the 1999 Red Book which said that variations "may include" (a) to (f): it was debated whether variations had to fit into one of the listed items.
- • The Particular Conditions now comprise Contract Data and Special Provisions, the latter being the amendments to the FIDIC conditions.
- Errors in the Employers Requirements continue to be dealt with at cl.1.9 rather than in the more logical place, Chapter 5 Design. The good news is that the two 1999 provisions at 5.1 and 1.9 have now been combined. The effect is largely the same.
- For some reason, the limitation of liability clause is now at 1.15 rather than at 17.6 as before. It is in similar, very broad terms but "gross negligence" has been added to the list of exceptions.
- Another strange addition is at 1.16, dealing with an aspect of termination. A short clause tries to deal with the arguments in some countries that termination can only take place with the approval of the courts. It says that unless reference to the courts is mandatory law, the contract mechanisms are enough to end the contract.

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

Chapter 2 – Less Proof of Ability to Pay

Under cl.2.4, Employers will set out their financial arrangements in the Contract Data and these may not be questioned unless variations reach 30%, there is non-payment or a material change to the funding.

Chapter 3 – Determinations and Time-bars

FIDIC wants Engineers making determinations to do so freely. Cl.3.2 says that the Employer may not require the Engineer to obtain prior approval for determinations. Cl.3.7, the determinations clause, requires the Engineer to act "neutrally", a good new word. The Engineer is the Employer's agent at all times other than under cl.3.7.

Cl.3.7 covers three pages and is at times very difficult to understand, particularly regarding time-limits. There is a strange power for the Engineer to correct agreements arrived at and signed off by the Employer and Contractor.

The new time-bar requires a NOD (Notice of Dissatisfaction) to be given by either party within 28 days of the determination, failing which it is final and binding. Unlike the claims Notices (see Chapter 20 below), this time-bar is not waivable. No explanation has been given as to why not. However, as a determination must state that it is a "Notice of the Engineer's Determination", there should be little room for doubt as to when the 28-day period starts and finishes. This NOD then starts a further time-bar: unless the dispute is referred to the DAAB within 6 weeks, the NOD lapses, the determination becomes final and binding and the claim is lost. Again, no waiver.

Some curiosities at cl.3.5: if the Engineer issues an instruction which the Contractor thinks is a Variation, he gives Notice immediately and before complying. If the Engineer does not respond within 7 days, the instruction is deemed to be withdrawn. The Engineer's answer does not need to address the Variation question, it just needs to confirm, alter or withdraw the instruction.

Is cl.3.5 a time-bar clause? It provides an "immediately" obligation on the Contractor but does not say what happens if the variation is claimed later. The 1999 editions omitted any notice requirement for payment for variations (although time was covered by cl.8.4). This clause appears to be the correction of that omission.

Chapter 4 – Fit for Purpose?

This chapter appears to make few significant changes but does spell out procedures at great length. One gap has been filled in relation to fitness for purpose. The purpose had to be defined which was impossible in practice as no one is going to define the purpose of every wall, item of plant and door-handle. Cl.4.1 now says that if no purpose is defined and described, it must be fit for its "ordinary purpose(s)". Good but the drafters then ruined the improvement by saying not just that the Works had to be fit for purpose but "the Works, Section or major item of plant". When it referred to the Works, it would be interpreted as being the Works and every part of the Works, big or small. The new language suggests a limitation to major items only.

The performance security under cl.4.2 can now be increased if variations exceed 20%. There is a decrease provision for omissions of 20% but this is likely to be redundant as the Employer's consent to the reduction is required.

Chapter 5 – Design development

"Review" has been defined as part of an effort to get away from approval. No-objection or deemed no-objection is given in the 21-day Review period provided in cl.5.2. The drafting seems to say pretty much the same as 1999 5.2 but at far greater length.

The scope for no-objection with comments, allowing work to proceed but subject to the obligation to comply with comments, has been needlessly restricted. Instead of an A/B/C system, where B was approval with comments and C was rejection, we now have A and C. A no-objection can be accompanied by "comments concerning minor matters which will not substantially affect the Works". This seems like a recipe for argument and pointless delay.

Chapter 8 – Times they are a-changing

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

Advance warning clause 8.4 requires both parties to advise of known or probable future events or circumstances which could delay or disrupt or impact the performance of the completed work. This gives the obligation, previously buried in 1999 8.3 its proper prominence. There is no time limit nor an explicit sanction for failing to warn.

EOT clause 8.5 has the same list of grounds but defines exceptionally adverse weather as conditions which are Unforeseeable having regard to data provided by the Employer or published locally. (Incidentally, the defined Unforeseeable is used in 6 clauses in the 2017 edition.)

Concurrency is addressed in cl.8.5 only by referring to any rules set out in Special Provisions. The Guidance section gives little help other than referring to the SCL Protocol and recommending that the Employer takes advice. For more on concurrency, see Chapter 17 below.

Delay Damages will not be capped in any case of "fraud, gross negligence, deliberate default or reckless misconduct by the Contractor": cl.8.8. In other words, a Contractor who has maxed out the delay damages must keep going or risk uncapped liability.

Chapter 10 – Good in Parts

A part becomes a Part when it is deemed to be taken-over due to use by the Employer: cl.10.2. It is a pity that no clarity has been given to what use is permitted without taking-over, a problem area where other contractors or traffic makes use of partly completed work. A Part now has its own DNP expiry date, something missing from 1999.

However, a part is not a Part if the Employer does what he is supposed to do and issues a TOC prior to use. This is presumably unintentional and will lead to odd results.

Chapter 11 – Lengthy repairs

The 1999 had 2.5 pages for defects liability; 2017 has doubled this without covering any significant new ground. An often important issue of when repairs may be carried out is not addressed, leaving the well-known conflict of interest between a contractor often wanting to repair as soon as possible; and an owner who may want to await a scheduled shut-down.

A new limitation period has been introduced for Plant in cl.11.10: no liability after DNP + 2 years unless there has been fraud, gross negligence, deliberate default or reckless. misconduct.

Chapter 13 – Important Variations

Cardinal change has arrived (sort of)! The Contractor can now object that "the varied work was Unforeseeable having regard to the scope and nature of the Works described" in the ERs. This presumably is intended to mean where the variation is well beyond the original scope. The trouble is that even if the test is satisfied, the Engineer can confirm the Variation. So the objecting Contractor is worse off than if nothing had been said.

Value engineering under the Yellow and Silver Books was thankless under the 1999 forms. Under the Red Book, the Contractor could earn 50% of the net benefit. Here all the forms leave it to the Special Provisions to set out any sharing of "the benefit, costs and/or delay". No entry in the Contract Data is provided for.

Provision for the valuation of variations was scanty in the 1999 Yellow Book. The main improvement is that where there is a Schedule of Rates and Prices, it is to be used for valuing variations. The glaring omission is that the contracts still do not state clearly that the valuation should include for prolongation and disruption if those are caused by the variation.

Cl.13.7, the escalation clause, is actually shorter than its 1999 counterpart. A rare example.

Chapter 14 – Paying the Price

The Engineer no longer fairly determines what is due in an IPC; instead he fairly considers. This removes an ambiguity. However, if the Contractor is unhappy with the IPC, he can demand that they be included in the next IPC. If that does not happen, he can ask for a cl.3.7 determination.

There is no explicit requirement in cl.14.6 that the Engineer certify the amounts decided by the DAAB;

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

but see how suspension and termination can follow non-compliance under cl.15 and 16 below.

Chapter 15 – Termination by the Employer

The Notice to Correct mechanism in cl.15.1 has been changed for no apparent reason. The Engineer no longer specifies what remedial action is required but nevertheless has to specify a reasonable time. It is left to the Contractor to respond to the Notice "immediately ... describing the measures the Contractor will take to remedy the failure". So whereas the requirement of the Engineer is currently certain and argument usually revolves around whether the time for compliance is reasonable, the argument under the 2017 edition will be whether the remedial steps proposed by the Contractor to be done in the specified time are good enough. Termination just became even more risky and difficult.

Non-compliance with a DAAB decision by the Contractor is a new ground.

Maxing out the Delay Damages has also been added as a ground for termination. This raises the thorny question: if the Contractor claims an EOT and it is granted by a DAAB or arbitrator after termination so that the Delay Damages are reduced below the cap, is the termination then unlawful? No answer is provided.

Cl.15.2 makes clear that termination requires two notices, not just one; and that remedying the default within the 14 days removes the right to terminate. This resolves ambiguities in the 1999 version.

Contractors will be pleased to read cl.15.6 which gives them loss of profit following termination for convenience under cl.15.5. They will be less happy to see that the Employer is now entitled to terminate for convenience and give the work to another contractor. The restrictions on this are firstly the liability for profit to C1 which may make a switch too expensive; and secondly that C2 may not start work until C1 has been paid. The second restriction may not work in practice.

Chapter 16 – Stopping work

Finally, the Contractor can suspend or terminate if the DAAB's decision is not paid. This is regardless of whether it is interim binding or final and binding. This should give a significant boost to enforcement of DAAB decisions, not least by removing any argument that a NOD removes the obligation to comply.

However, the ground of non-compliance is qualified: the failure has to be a "material breach of the Employer's obligations under the Contract". Perhaps some DB decisions have included trivial matters which should not found a termination. These must be rare. We can expect argument about what is a "material breach".

Chapter 17 – Taking Care

"Employer's Risks" are no more. This is a good move as many users were misled by 1999 cl.17.3. The risk allocation seems to be the same but the drafting is now clearer.

Concurrency is addressed again in cl.17.2. Instead of ducking the issue with a reference to Special Provisions, this time a combination of an Employer-risk event and a cause of damage for which the Contractor is liable, gives the Contractor an entitlement to "a proportion of EOT and/or Cost Plus Profit to the extent that any of the above events have contributed to such delays and/or Cost". The losses are somehow apportioned, in other words.:

Chapter 18 – Exceptional drafting

Force majeure has been replaced with Exceptional Event. This should enable users who have the doctrine of force majeure in their national law to read the clause without preconceptions. The risk allocation remains the same.

Chapter 19 – Cover up

The insurance chapter has been placed after the risk allocation clauses for good, logical reasons. It spells out in more detail the cover required. This now includes professional indemnity cover for the Contractor's design.

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Fax: + 44 (0)20 8614 6222
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www.corbett.co.uk

Chapter 20 – Symmetrical Claims

Claims and Dispute resolution are now separated and this seems entirely sensible. The incorporation of Employer's Claims into the claims chapter also makes sense. However, cl.20 dealing only with claims is now longer than 1999 cl.20 which dealt with both claims and disputes.

Did we need an elaborate explanation of how a Claim may arise? The utility of cl.20.1 may be doubted.

Many people will see the fairness in the Employer being subject to the same time limits and the same time-bars as the Contractor in the claims process. There are two time-bars: the familiar 28-day notice and a new one for the statement of the basis of claim.

The drafters have not fixed any of the well-known issues and ambiguities that have complicated the 1999 cl.20.1 notice regime. The gap in the 1999 forms in relation to notice for payment for variations is not resolved in cl.20 but see cl.3.5 above.

Cl.20.2.4 contains this gem: "If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement." So the deeming can then be un-deemed, presumably. (Incidentally, the 2017 form contains a lot of deeming: 7 definitions and 51 other clauses in the Yellow Book have deeming provisions. This increase from 0 definitions and 26 clauses in the 1999 forms is not good.)

The second time-bar for the fully detailed claim only applies if the contractual or legal basis of claim has not been stated within 12 weeks. One result of this appears to be that if the initial claim notice specifies the clause that the claim arises under, the time-bar will not apply.

These two time-bars can be waived by the Engineer who may consider prejudice and any prior knowledge of the receiving party. Any waiver by the Engineer can be challenged at DAAB and even at arbitration. (As noted above, these two time-bars can be waived; three others - NOD with a determination, start of DAB and NOD with DAAB decision - cannot be waived.)

Chapter 21 – Avoidance and Resolution

Avoidance of disputes gets greater emphasis. The DAB has become the DAAB or Dispute Avoidance/Adjudication Board whose first stated objective at Procedural Rule 1.1 is "to facilitate the avoidance of Disputes". The trouble is that cl.21.3, the main provision dealing with avoidance starts "If the Parties so agree ...".

Perhaps this reflects the fact that the dispute avoidance function of the Dispute Board is rather intangible and does not lend itself well to legal definition. Often, the mere fact that the Board will arrive on site and meet with the parties causes them to behave reasonably and resolve problems. Sometimes, the airing of issues and grievances with the Board can relieve tensions between project participants.

It is for this reason that the decision to have standing boards for all of the 2017 suite is to be welcomed.

Also welcome are the efforts to tackle the difficulties with appointment of DBs and the enforcement of their decisions. Three signatures on the Dispute Adjudication Agreement are no longer necessary as cl.21.2 states that the parties are deemed to have signed the DAA

Enforcement of DAAB decisions is boosted in clauses 15 and 16 by making non-compliance a ground for suspension by the Contractor or termination by either party.

Much less welcome is the unwaivable time-bar if the referral of the Dispute to the DAAB is not made within 42 days of a NOD with an Engineer's determination. It cannot be good for a project to force the parties to switch focus to DAAB proceedings within an arbitrary period rather than at a time of their own choosing. The parties could agree to suspend or defer the referral but agreement can be rare in dispute situations.

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

The ability of the DAAB to make payment of a decided amount conditional on the provision of "appropriate security" seems wrong in principle, even if it only applies where the ability of the payee to repay is in real doubt. If a DB has decided that a sum is payable, it should already have been paid under the contract or by way of damages. Why should the liable party be better off as a result of failing to pay the sum due?

The time for amicable settlement has been halved to 28 days. ICC arbitration remains in place.

Conclusion from First Impressions

There are many good things buried in the mass of new wording. The question remains: could these good things have been added to the 1999 form in far less than 20,000 words? Plainly, yes.

Have all these prescriptive procedures and time-bars really made it easier for FIDIC users? Or does this really only make sense for more sophisticated parties who are very familiar with the conditions? In my view – and many at the launch conference said the same – there will be a lot of users, particularly those with English as a second language, who will struggle with such a massive and complex document.

Will the 2017 editions be adopted or will the 1999 forms remain the market favourite? There was interest at the conference in the Green Form and in some new "Red book lite" as a reaction to the size and complexity of the new forms. However, some speakers from the MDBs said that their Banks would adopt the new suite. So we have to wait and see. This could take some years as it did with the 1999 forms.

If FIDIC were to produce a mid-sized contract for mid-sized projects written in simple language, it is clear that there would be a lot of interest.

Article Author

Edward Corbett

Email: edward.corbett@corbett.co.uk

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk