FIDIC has long been renowned for its flexible suite of standard forms of contract for use on international construction and engineering projects. FIDIC is the “contract of choice” for international infrastructure and process plant projects, particularly in Eastern Europe, Africa, the Middle East, and Asia.

Two of the key strengths, or attractions, of the FIDIC suite of contracts are, firstly, that they are capable of use across a diverse range of legal systems and, secondly, that they have been pro-actively updated and added to over time to respond to the needs of the industry.

By way of background to this last point, FIDIC produced a core ‘Rainbow Suite’ of 4
contracts in 1999: the Red Book (for Building and Engineering Works), the Yellow Book (Plant and Design-Build), the Silver Book (EPC/Turnkey Projects) and the Green Book (short form contract). Additional forms have subsequently been added to the Rainbow Suite, including the White Book consultant’s appointment in 2006 and the Design-Build-Operate Gold Book form in 2008. In early 2016, FIDIC formed a working group to focus on updating its existing suite of contracts and to add entirely new forms of contract (including sector-specific tunnelling and renewables forms); with intentions to release such new and updated contracts over the course of the next two years.

Following the FIDIC International Contract User’s Conference in December 2016, at which K&L Gates partners, Matthew Smith, Kirk Durrant and Rafal Morek, spoke on trends in amending FIDIC contracts, attendees were able to obtain a copy of the much anticipated “special pre-release version” of the 2nd Edition of the Yellow Book (2017) and the 5th Edition of the White Book (2017).

This article provides a high-level overview of the changes which will be made to the Yellow Book, its first update in over 15 years. The 2017 Yellow Book 2nd edition changes are likely to have wide-reaching impact as the Yellow Book remains the most commonly used contract in the Rainbow Suite. Some of these provisions reflect innovations introduced in the Gold Book 2008 which are now being integrated into the new versions of the ‘1999 suite’ (Red, Yellow and Silver) but many other changes are completely new.

One thing that is clear is that the changes are very extensive indeed, both in terms of length and effect, and whether you are an Employer or Contractor or an Engineer or another consultant, it is essential that you are fully aware of these changes when the final versions of the new contracts are issued this year.

Yellow Book 2nd edition changes

Although the basic nature of the Yellow Book as a lump sum contract on which the contractor designs the works and assumes the risk for quantities is unchanged, the quantity (45 additional pages) and substance of the changes which have been made mean that the Yellow Book as we have known it will now be extensively different.

Many clauses are almost completely redrafted from the 1st edition text and many clauses are considerably longer than they were before, with entirely new concepts added. The 20 General Conditions now run to 108 pages, compared to the earlier 63 pages.

The main substantive changes include:

- greater definitional complexity
- changes to the role of the Engineer
- additional project management tools
- treatment of extensions of time
• the variation procedure
• tightened interim payment application procedure
• enhanced performance security provisions
• limitations of liability
• extensive changes to claims procedure
• much more extensive use of ‘time bars’ some of which ‘bite’ against the Employer and the Engineer as well as the Contractor
• changes to agreement/determination by the Engineer and Disputes Adjudication Board (DAB)

Greater definitional complexity

The 2nd edition takes a more complex approach to drafting and includes numerous new definitions to reflect this, including an NEC-style ‘Contract Data’ as a new subsection of the Particular Conditions, which takes the place of the old Appendix to Tender. Unlike the 1999 edition, the definitions are now listed alphabetically rather than topically, which makes them easier to follow for novice-users, but the greater complexity and inter-linkages between definitions and associated clauses increase the need for great care to be taken when completing the Yellow Book form. Notably, there has been a departure from the earlier “reasonable profit” position (for example within the Variation procedure, Sub-Clause 13.3 1st edition) by way of the insertion of a newly constituted definition, Cost Plus Profit. This is defined to mean Cost plus the applicable percentage for profit stated in the Contract Data, which is to be 5% if not otherwise stated. Further, Force Majeure has been re-named “Exceptional Risk”.

The Engineer’s role

It is also noteworthy to mention that amendments have been made to the role of the Engineer, with Sub-Clause 3.1 requiring a professional engineer not only to have suitable qualifications, experience and competence in the main engineering discipline but also to be fluent in the ruling language (as defined in Sub-Clause 1.4). An Engineer’s Representative has also been introduced. Sub-Clause 3.3 provides that the Engineer can appoint a representative and delegate to him the authority necessary to act on the Engineer’s behalf at the site, except to replace the Engineer’s Representative. The Engineer’s determination provisions in Sub-Clause 3.5 of the ‘old’ Yellow Book have been substantially amended and ‘beefed up’. Detail has been inserted to deal with a situation where the Contractor believes an Engineer’s instruction constitutes a Variation (but has not been stated to be so) and a mechanism has been put in place to allow the Contractor to give Notice to the Engineer with reasons why he cannot execute the Variation expeditiously or at all.

Additional project management tools

FIDIC has made considerable efforts to strengthen the project management tools and
The programme requirements in Sub-Clause 8.3 have been significantly increased with numerous additional matters required to be shown on each programme, and the programming software specified. The programme must also be logically-linked, show the earliest and latest start and finish dates for each activity, the float and critical path(s). The record-keeping requirements in Sub-Clause 6.10 have been expanded and are now required to be included with each Sub-Clause 4.20 progress report. These changes appear supported by the provision now made in new Sub-Clause 3.6 for the Engineer or the Contractor’s Representative to call for meetings to discuss future work or any other matter connected with the Works.

Whilst these are two examples of expansion of existing FIDIC concepts, the 2nd edition also contains a number of additional project management tools, such as the inclusion of NEC3-style advance warning obligations in Sub-Clause 8.4.

Sub-Clause 8.3 of the ‘old’ Yellow, Red and Silver Books required the Contractor to give advance warnings of any probable future events or circumstances which may adversely affect the works. The ‘new’ Yellow Book would require both parties to “endeavour to” give advance warnings of various matters including those which may increase the Contract Price, cause delay or affect the performance of the works when completed. This reflects the approach in the UK NEC contracts of encouraging greater openness and visibility, but stops short of specifying any specific sanction for failure to give advance warning. In contrast, the NEC contracts provide that failure to give an advance warning may be brought into account in assessing Contractor’s claims.

The general quality assurance provisions in Sub-Clause 4.9 now provide for detailed Quality Management Systems and Compliance Verification Systems.

These changes are consistent with a much greater focus in standard form contracts providing tools to assist project delivery, in addition to allocating legal and contractual risks.

**Extensions of time**

The extension of time (EOT) provisions have been moved from Sub-Clause 8.4 to 8.5 and are largely unchanged in terms of the causes which may entitle the Contractor to an extension of time (although the exceptionally adverse climatic conditions limb has been tightened up to be limited to Unforeseeable climatic conditions at the Site).

A new paragraph has however been added which attempts, in a limited way, to address the issues of concurrent delay by providing that the Contractor’s entitlement to an EOT “shall be assessed in accordance with the rules and procedures stated in the Particular Conditions”. This serves to highlight the issue of concurrency as a matter to be addressed by the Parties, but does not propose any particular approach to be taken. Concurrency is often a thorny issue and this may be why many standard form construction contracts do not address concurrency and leave it to the general law. Parties are recommended to seek legal advice in drafting appropriate provisions to address this issue.
**Variation Procedure**

A greater degree of clarity has been added to the variation procedure set out in Sub-Clause 13.3 and the clause has been expanded considerably (it now runs to almost two pages). In addition to the Engineer being able to request a proposal prior to instructing a Variation, an instructed Variation must be by way of a Notice (with a capital ‘N’). This links to the new definition of ‘Notice’ which provides that the Notice must ‘describe itself’ as a notice and be issued in accordance with Sub-Clause 1.3 (Notices and other communications). Sub-Clause 1.3 includes various requirements for a valid Notice including a requirement to refer to the relevant Sub-Clause under which it is issued. The intention is, no doubt, to avoid uncertainty as to whether a particular communication is intended to be a Variation instruction.

**Application for Interim Payment**

Sub-Clause 14.3, which deals with applications for interim payments, has been tightened. The Contractor is now expected to submit its Statement to the Engineer in one paper original copy, one electronic copy and additional copies as set out in the Contract Data. Further, the list of items that the Statement is to cover has been extended to include amounts to be added for Provisional Sums, release of retention money and any amount to be deducted for utilities provided by the Employer for Contractor use.

**Performance Security Provisions**

Performance security provisions have been significantly enhanced by the later edition, and in particular if variations or adjustments result in an accumulative increase or decrease of the Contract Price of more than 20% of the Accepted Contract amount in the specific currency, then at the Employer’s request, the Contractor shall quickly increase the amount of Performance Security in that currency by a percentage equal to the increase. Similarly, in the event of a decrease, the Contractor may decrease the amount of Performance Security in line with the accumulative decrease, with this being done at the Employer’s request. Interestingly, the Employer pays for the increase but does not receive any saving if there is a decrease in the value of the Performance Security.

**Limitations of Liability**

Subtle amendments have been made restructure Sub-Clause 17.6 (Limitations of Liability) but the clause largely remains the same. Sub-Clause 17.6 has been split into two, the first part excluding indirect or consequential loss and loss of profit etc. and the second part limiting the Contractor’s total liability. Each part is subject to a list of ‘carve outs’ which are not excluded or limited.

This Sub-Clause in the pre-release version has been the subject of much debate because one of the ‘carve outs’ is a new indemnity from the Contractor in Sub-Clause 17.6 in relation to “any errors in the design of the works and other professional services which results in the works not being fit for purpose”. In other words, Contractors may be exposed to unlimited liability for fitness for purpose. It is not yet known whether this is an error in the pre-release version that may be picked up in
the final version issued for release. However, if it does make it through to the final version, Contractors should be aware of this exposure and the potential risk.

**Claims**

The Sub-Clause dealing with Employer Claims in the 1st edition has been deleted in its entirety, and instead of individual clause provisions for Employer claims (former Sub-Clause 2.5) and Contractor claims (former Sub-Clause 20.1), these have now been merged together within an enlarged Sub-Clause 20.1 and 20.2. The new claims provisions are now much more detailed, with the claims procedure in Sub-Clause 20.2 alone now running to almost three pages.

Under the ‘new’ pre-release Yellow Book, the Employer and Contractor are now both subject to the same time bars for making a claim, which can now be found in Sub-Clause 20.2. Whereas before it was only the Contractor who was subject to a 28 day period from the date it became aware of the event or should have become aware of the event to serve Notice, the Employer must now do the same.

As such, the time bar on notification is now reciprocal whereas, prior to this change, the Employer was not subject to a time bar and only needed to provide Notice as soon as reasonably practicable. This appears to address a criticism that the ‘old’ Sub-Clause 20.1 notice provisions were one-sided because there was a time bar attaching to Contractor’s claims but no equivalent time bar in relation to Employer’s claims against the Contractor.

Sub-Clause 20.2.2 sets out that the Engineer has a positive duty within 14 days of receipt of the notice of claim to give a preliminary response if he considers that the initial notice of claim is time barred.

There is also a requirement for a capital ‘N’ notice, again linked to the notice and communication provisions in Sub-Clause 1.3. The practical effect is that, to be valid, the Notice must describe itself as a notice and refer to the relevant clause, in addition to complying with the other notification provisions in Sub-Clause 1.3. This appears to be intended to add greater clarity and avoid Parties relying upon ‘informal’ notices, such as references in letters or minutes of meetings, to avoid the effect of the time bar provisions.

The time bars apply not only to claims notification but also to the particulars of the basis of the Claim in the ‘fully detailed claim’. This is no doubt intended to further the objective of ensuring that claims are resolved as early as possible. Some had suggested that the time bars in the ‘old’ FIDIC 1999 suite did not go far enough, because they only applied to notification and the Contractor could still subsequently roll forward the detailed claim into a ‘rolled-up’ claim to the end of the project. The new FIDIC contracts would seek to address this and lock the parties into an escalating procedure leading to agreement or determination or ultimately to arbitration.

In addition to the 28 day period to notify the Claim, the Employer is also under the same obligation as the Contractor to submit a ‘fully detailed claim’ comprising of a description of the event, particulars of claim and amount and contemporary records, within the prescribed period.
The Engineer is also required, as another positive obligation, to give a Notice to the effect that the claim has lapsed if the claiming Party fails to provide, within the prescribed period, particulars of the contractual or other basis of the Claim in a fully detailed claim. Accordingly, the time bar on the fully detailed claim only appears to apply if the fully detailed claim has either not been provided at all, or completely fails to set out its contractual or legal basis.

The prescribed period for serving a fully detailed claim is 42 days after the claiming party becomes aware, or ought to have become aware of the event or circumstance giving rise to the claim, or “such other period (if any) as may be proposed by the claiming party and agreed by the Engineer”. It appears that the Engineer may well be in the unenviable, and difficult position, of having to give notice that the Employer’s claim is time-barred, or decide whether to extend the period in circumstances where a claim would otherwise be time-barred.

The time bars and preliminary notice provisions are subject to a new Sub-Clause 20.3, “Waiver of Time-limits”. This builds on the approach in the Gold Book of giving the Dispute Adjudication Board (DAB) the right to override the time bar.

Sub-Clause 20.3 provides that the claiming party may apply to the DAB if the Engineer has issued a notice to the effect that the claim is time barred and the claiming party believes there are circumstances which justify the late submission of its preliminary or fully detailed claim. A failure to submit this to the DAB within 14 days of the Engineer’s notice deems the Engineer’s notice to be final and conclusive.

The DAB has power to override the time bars where, in all the circumstances, it is “fair and reasonable” to do so. Sub-Clause 20.3 provides a non-exhaustive list of such circumstances. These include the extent to which the other Party would be prejudiced by acceptance of the late submission and any evidence of the other Party’s prior knowledge of the Claim.

**Agreement or Determination**

Far greater detail has been inserted in relation to the role of the Engineer in arriving at determinations. The provisions for determination have been expanded from two paragraphs in the ‘old’ Yellow Book to over two pages.

In particular, the job and function of the Engineer has been more specifically described. Among other things, the Engineer has a greater role to play in helping the parties to reach agreement within specific time limits. For example, the Engineer has duty to consult with the Parties and facilitate time limits for achieving “agreement” (42 days). A failure to achieve agreement within this 42 day period gives the Engineer a second time limit (a further 42 days) to arrive at a fair determination. A failure by the Engineer to arrive at a determination within the timescales is deemed a rejection, and allows for the commencement of dispute resolution proceedings. Provision has also been made for the dissatisfaction of either party with the Engineer’s determination. A Notice of Dissatisfaction (NOD) can be made by the dissatisfied party to the other Party with a copy to the Engineer, provided it is done so within 28 days. A failure to comply with this time period means that the dispute is final and binding on the parties, unless revised by a DAB. A ‘fast track’ to obtaining a DAB decision is also provided for under this Sub-Clause.
The Engineer is required to act ‘neutrally between the Parties’ when carrying out his duties under the agreement or determination provisions. The word ‘neutral’ is not defined and may be a fruitful area of debate.

**Dispute Avoidance/Adjudication Board**

Sub-Clause 21 includes a requirement for a standing DAB (not ad hoc). The name of the DAB has been changed to “Dispute Avoidance/Adjudication Board”, perhaps to give greater emphasis to the DAB’s role in avoiding disputes, and the DAB has been integrated into the escalating claims resolution procedure. Under Sub-Clause 21.4.4 provides that if a party is dissatisfied with the DAB decision it must give a notice of dissatisfaction (NOD) within 28 days and must commence arbitration within a further 182 days. If neither party commences arbitration within that period the NOD “shall be deemed to have lapsed and no longer be valid”.

**Conclusion**

The updates to the FIDIC Yellow Book 1st Edition are substantial, reflecting the length of time and changes in the construction industry since 1999. It appears that many changes to the FIDIC Yellow Book build on the positive changes introduced in the Gold Book in 2008 as well as reflecting the success of the NEC3 Contract suite to date, which has focused heavily on project management.

Some of the most important changes appear to be practical, in particular the update to the claims provisions which will encourage faster dispute resolution. However, some areas of the “special pre-release version” of the Yellow Book are likely to generate debate and may be the focus of negotiation and amendment by contracting parties.

The increased prevalence of time bars, together with the greater complexity of the claims procedure and notification requirements and the greater integration of the DAB into the claims procedure, are likely to make the ‘new’ Yellow Book much more ‘resource hungry’ in terms of administration for all parties, and particularly the Engineer. They may also increase the number of claims as Parties notify and submit claims to avoid the time bars and refer disputes over time bars to the DAB. This will no doubt be an area of debate: some may see this as an unnecessary additional burden on the project and a distraction from the overriding objective of progressing the works, whereas others may see it is necessary to allow disputes to be resolved as and when they arise and avoid claims rolling up into more significant disputes.

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