

Q&A: The FIDIC rainbow suite

PAUL BATTRICK – DRIVER TRETT AND CO-AUTHOR OF THE FIDIC RAINBOW SUITE OF ARTICLES, RECENTLY ATTENDED THE FIDIC USERS' CONFERENCE IN LONDON. THE EVENT SAW THE FIRST PUBLIC VIEWING OF WHAT IS LIKELY TO BE THE NEW FIDIC YELLOW BOOK, TO BE ISSUED LATER IN 2017, ALONG WITH REVISED COPIES OF THE RED AND SILVER BOOKS. DRIVER TRETT DIGEST CAUGHT UP WITH HIM TO FIND OUT WHAT HE THOUGHT OF THE NEW EDITIONS.

This year's FIDIC Users' Conference in London was billed as being very special, why was that?

The first edition of the FIDIC Rainbow Suite of Contracts, notably the Red, Yellow and Silver Books, was issued in 1999. Whilst they are still a widely-used set of contracts, FIDIC decided (some years ago) that they needed a spring clean and set about re-drafting these three forms, with the Yellow Book being the first to be publicly viewed. This conference was where we could actually get hold of an authorised draft copy and listen to members of the drafting task force note their reasoning behind the revisions. Sight of the first draft of the Yellow Book has been mooted for some years now, and to finally see it was cause for some excitement.

Did the new version of the Yellow Book live up to expectations?

Let me just say that many senior practitioners from across the construction industry including lawyers, engineers, and consultants as well as employers have the view that, "if it ain't broke why fix it?".

So, what is FIDIC's reasoning in revising all of these forms?

There were many reasons given as to why the forms needed to be revised, they included:

- To enhance the project management tools and mechanisms.
- To reinforce the role of the engineer.
- To balance risk more fairly.



- To achieve clarity, transparency, and certainty.
 - To reflect current best international practice.
 - To address issues that have been raised since the previous contracts were brought into use.
- And, perhaps most significantly;
- To introduce the theme of dispute avoidance into the contract.

That is quite a list. Does this mean that the new Yellow Book looks significantly different?

Well it's still yellow, but there are some differences to how it looks when you flip through the pages. FIDIC noted that the word count is 50% higher and there are 108 pages as opposed to 63. It somehow looks more complex, and I note that there are now 90 defined terms whereas before there were 60. There is one additional clause, as clause 20 (claims, disputes and arbitration) has been split into two clauses; clause 20 is now employer's and contractor's claims and the new clause 21 is disputes and arbitration. If clarity was an objective, I am not so sure it will readily be achieved. For instance, the new sub clause 20.2, claims for payment and/or extension of time (EOT), stretches over some three pages, which suggests that it is not going to be so simple to administer. **With a 50% higher word count and so many more pages, I am sure that you could write a lengthy article noting and discussing all the changes made, perhaps that will come in the next Digest, but could you highlight just a few changes please?**

I will most definitely be writing that article soon, either for the Digest or perhaps on social media. In the meantime,

perhaps the most interesting changes are:

- The imposition of a time bar relative to the contractor submitting his particularised claim; this will send shudders through the bodies of all contractors but may bring some wry smiles to engineers and employers.
- Notwithstanding the above regarding the imposition of time bars by the engineer, under sub clause 20.3, can be referred to the dispute adjudication board (DAB).
- It is intended that the DAB will be a 'standing DAB' as with the current Red Book. In this respect, it is hoped that the DAB will take on a dispute avoidance role as advocated by organisations such as the Dispute Resolution Board Foundation (DRBF). Indeed, the DAB can invite the parties to make a referral if it becomes aware of an issue or disagreement.
- There is, like in other forms of contract, a distinct early warning procedure. This could have been considered to have been somewhat hidden in previous versions. This too is a feature of the dispute avoidance concept.
- There are increased programming obligations upon the contractor. This includes a positive obligation on the contractor to update the programme whenever it ceases to reflect actual progress. The programme is also to show all activities logically linked, showing earliest and latest start and finish dates, float, and the critical path.
- There is a reference to concurrency of delay, which is to be assessed in accordance with 'rules and procedures' stated in the 'particular conditions'. Perhaps there will be a desire for the parties to consider the revised Society of Construction Law (SCL) Protocol when it is issued?

- There is more reference to time limits and the consequences of failure to abide by them. One, that caused some consternation amongst the contracting fraternity related to engineer's determinations within a new sub clause 3.7. If the engineer fails to make a determination within the relevant time limit, the engineer shall be deemed to have given a determination rejecting the contractor's claim. The contractors consider that should be the other way around.
- Generally, the role of the engineer appears to have been reinforced with a greater amount of discretion on their part, with a greater number of clauses and uses phrases such as, "in a form acceptable to the Engineer". One example being the form of the contractor's statement or payment application.

The changes appear to require more contract administration, is that how you see it?

Most definitely. The contractor who fails to properly administer the new forms will definitely not be able to gain its entitlements without considerable difficulty, if at all. In fact, one delegate noted this and suggested that there should be an obligation within the contract for the contractor to provide the appropriate resources. This would attempt to ensure that all contractors were obliged to make adequate allowances within their tenders and no contractor would be disadvantaged by another under-pricing its obligations.

Finally, do you see the new Yellow Book as an improvement and that claims and disputes will be avoided, as FIDIC hope?

I will keep my powder dry on that one. However, in one of the sessions the delegates were asked for the views as to whether there will be more, less, or the same number of claims under the new Yellow Book. We had electronic voting so the answer was accurate, it was:

- Less claims 24%
- No change 26%
- More claims 50%

Only time will tell... ■