

Somewhere over the rainbow

PAUL BATTRICK – MANAGING DIRECTOR, DRIVER TRETT AND CO-AUTHOR OF THE FIDIC RAINBOW SUITE ARTICLES* ATTENDED THE FIDIC USERS CONFERENCE HELD IN LONDON DURING DECEMBER 2017. THE EVENT SAW THE RELEASE OF THE 2017 EDITIONS OF THE FIDIC RED, YELLOW, AND SILVER BOOKS. DRIVER TRETT DIGEST ASKED PAUL WHAT HE THOUGHT OF THE EVENT AND THE NEW FORMS, ESPECIALLY THE YELLOW BOOK.

This year's FIDIC Users Conference saw the release of the second edition of the Red, Yellow, and Silver Books - how did that affect the conference?

FIDIC had announced, some eight or nine years ago, that they were revising the Red, Yellow, and Silver Books. The 2016 London conference saw a pre-release second edition of the Yellow Book, so when it was finally confirmed that the second editions would actually be released this year, there was a last minute rush for seats; so much so that there were over 300 excited delegates in attendance instead of the usual 150 or so.

Why the excitement if the Yellow Book, albeit not in final form, was released 12 months before?

You may recall the interview I gave you twelve months ago, in issue 13, discussing the pre-release edition. The controversy and mixed feelings towards its content continued throughout 2017. Fortunately, the 'friendly reviewers' (those FIDIC rely upon to comment upon any draft) were successful in obtaining some significant revisions to make the final version more palatable to many more potential users within the contracting fraternity. Although, it has been said that FIDIC did not enter into enough dialogue with organisations that represent, for instance, engineering and mechanical contractors. I certainly look forward to seeing the commentaries on the new books drafted by the European International Contractors (EIC).



<https://www.driver-group.com/europe/knowledge/articles/>

Have FIDIC released a set of contracts that will be welcomed by all?

As I noted last year, there are many that took, and still take, the view, "if it ain't broke why fix it?". However, the construction industry moves on, there is the influence of case law to consider and the experiences of some eighteen years of contracting under the old Rainbow Suite to take into account.

In addition, FIDIC will have noted the growing popularity of the NEC forms in many jurisdictions. So, welcomed or not, FIDIC were probably correct in making revisions.

So, what did FIDIC try to achieve?

In their own words FIDIC sought:

1. Greater detail and clarity on the requirements for Notices and other

communications.

2. Provisions to address Employers' and Contractors' claims treated equally and separated from disputes.
3. Mechanisms for dispute avoidance.
4. Detailed provisions for quality management, and verification of Contractor's contractual compliance.

How have FIDIC achieved their goals?

In many ways the contracts are far, far more prescriptive than the previous versions. I always tell my clients that the 1999 edition of the FIDIC books are a good project management handbook, that will assist a contractor. First glance of the new versions could be considered a straight-jacket by comparison. For instance, there are many more Notices to be submitted, admittedly by all Parties, and more time bars or time limits to consider. If contracts

were put in a contractor's site office filing cabinets in the past, any contractor that continues in the same fashion in the future, when using the 2017 editions, will surely have a hard time. The well-known phrase, "fail to prepare, prepare to fail" will be trotted out ad nauseam.

Are the new contracts that different?

I haven't carried out a word count myself but a commentator has noted that the 1999 Yellow Book had some 30,400 words. The 2017 Yellow Book has over 50,000 words. The same commentator also noted that the new contracts weigh almost 1kg each.

That's a big increase in words. Are there many more clauses?

No, the 1999 edition had twenty clauses and the 2017 edition has twenty-

one. The change being that the old clause 20 - Claims, Disputes and Arbitration has been split into two clauses; clause 20 - Employer's and Contractor's Claims and clause 21 - Disputes and Arbitration. This being a result of FIDIC's desire to promote more dispute avoidance, by splitting the old clause it is hoped that a claim will not be so synonymous with a dispute. Going on from that, clause 21 introduces a dispute avoidance/adjudication board (DAAB) in all the forms. A standard DAAB, appointed at the outset of the contract, will seek to avoid issues becoming disputes by regular visits to the site and discussions with the parties, amongst others. The DAAB will facilitate the Parties in reaching their own decisions, rather than asking the Engineer to make a determination, the DAAB to make a decision or, if all else fails, an arbitral tribunal to make an award. For me this can be only a good thing, although I believe there should be some mechanism to ensure that all bidding contractors include the same amount for this process within their tenders.

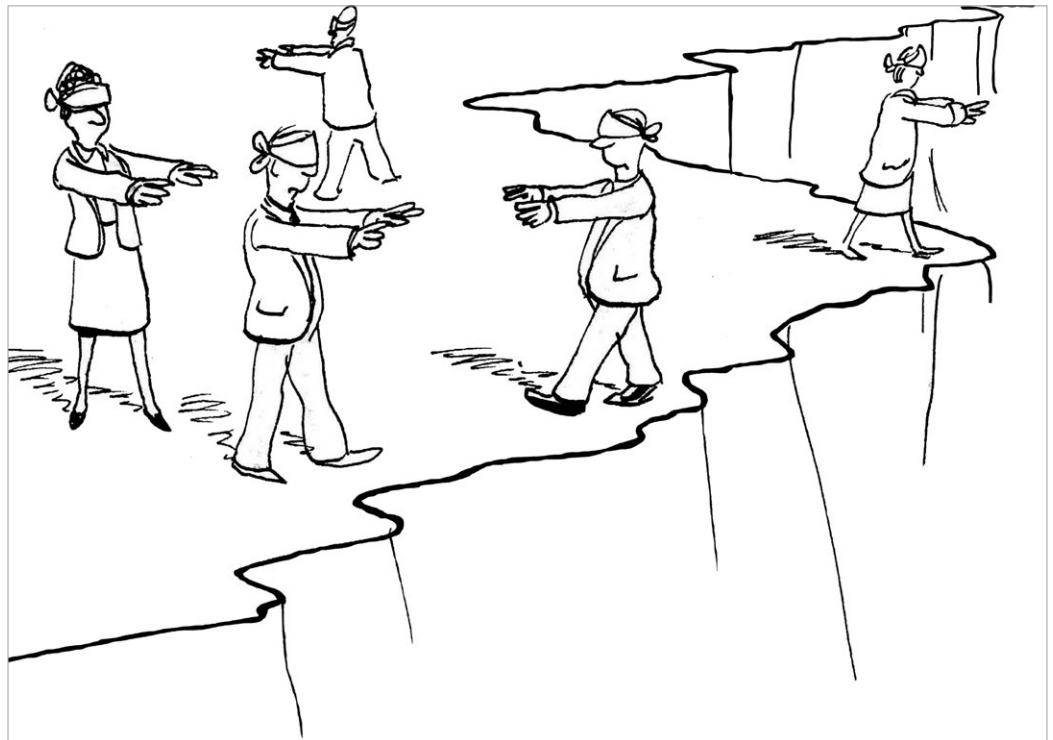
Clause 20 notes both Employer's and Contractor's Claims, what is that all about?

In the past, FIDIC were often criticised that contractors had to risk losing an entitlement to an extension of time (EOT), cost, or both by failing to provide a notice to the Engineer within the prescribed 28 days, whilst the Employer had no such precedent.

In the 2017 editions the same rules or precedents apply to both the Employer and the Contractor. These rules include the fatal 28-day notice, albeit it is not quite so fatal since there are levels of appeal which may be in recognition of the judgment in the OHL case¹.

Surely it is a good thing that the Employer and Contractor are treated the same?

Obviously yes, but in reality how many claims do Employers raise compared to Contractors? A very, very small number I would guess. So yes, it is a good thing, but numerous notices, time bars and time limits, and deeming provisions introduced throughout the rest of clause 20 will ensure that only contractors that are on



top of their game will succeed with their claims.

Are there any other new provisions that stand out for you?

Where do I start and where do I finish? There are so many. I quite like that amongst the definitions (90 in total compared to 68 in the Yellow Book) that Notice is defined. It should now be totally clear when a contractor is saying, "an event has taken place which is not in my risk area and I need more time or more money". It brings matters out into the open, such that they can be resolved quickly, and the project moves on.

Contractor's will no longer be able to seek to rely upon an ambiguous phrase buried within a monthly report, or minutes of meeting and claim, "there's my notice". Again contractors will have to be at the top of their game.

I believe that in general terms, as stated by FIDIC, it is a contract drafted by Engineers for Engineers. Contractors may need a small army of contract administrators to ensure that the contract provisions are fully understood and complied with. In doing so, I believe the Engineer will be even more aware of any frailties within the Contractor's organisation. Even more

so, the Contractor has to bare its soul via programme updates, monthly reports, and so on. On the other hand, why should the unprofessional Contractor succeed with ill-founded claims?

Do you have one final thought?

FIDIC has set out its objectives and has largely achieved those, although perhaps it could have achieved those objectives by using fewer words. Whilst clarity was an objective, when amended, as no doubt this edition will be, lengthy contracts become overly complicated and contradictory within their own terms. FIDIC have recognised that amendments beyond the clarifications noted within the guidance section will occur, and strongly recommend that all drafters of the Special Provisions, "take all due regard of the five FIDIC Golden Principles (see Box 1).

I have rarely seen a FIDIC contract that has not been amended by an Employer (and its Engineer) not to better its own position at the expense of the Contractor's. I wonder how many Employer's will abide by FIDIC's honourable recommendation?

BOX 1 - FIDIC GOLDEN PRINCIPLES

- GP1:** The duties, rights, obligations, roles and responsibilities of all the Contract Participants must be generally as implied in the General Conditions, and appropriate to the requirements of the project.
- GP2:** The Particular Conditions must be drafted clearly and unambiguously.
- GP3:** The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions.
- GP4:** All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration.
- GP5:** All formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.

¹Obrascon Huarte Lain SA vs Attorney General for Gibraltar [2015] EWCA Civ 712.