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Without Prejudice

At a recent conference held in London, attendees were provided with the proposed revisions to the FIDIC 1999 Yellow Book for Plant and Design.

The Yellow Book is the recommended "design and build document for projects where the employer wishes to protect its interests by appointing an engineer to supervise the overall construction of the works, notwithstanding that the overall responsibility for design lies with the contractor". In the ordinary course, the contractor designs and provides, according to the client's requirements, plant and/or other works which may include a combination of civil, mechanical, electrical and/or construction works.

The general conditions in the draft FIDIC 2017 Yellow Book increase from 63 pages to 108 pages. The fundamental amendments are:

- The role of the engineer (clause 3).
- Early warning (clause 8).
- Claims, time bars and disputes (clause 20).

The role of the engineer

In clause 3, the role of the engineer has changed in many respects. Not only does the engineer's assistant (which must be distinguished from the addition of the engineer's representative) need to be fluent in the ruling language, but also the engineer himself.

As observed, there is the addition that the engineer may appoint an engineer's representative and delegate to him the necessary duties, authority and attend to site when the engineer cannot. The wording suggests that the engineer's representative is on site for the entire duration of the project. However, what is unclear at this stage is whether the engineer's representative will have the authority to make

determinations. There is an assumption that the engineer's representative may make determinations; otherwise there would be no substantial differentiation between the engineer's assistant and the engineer's representative.

The engineer has the duty to encourage the parties to settle claims. In this process, he or she is said to be acting "neutrally" and not on behalf of the employer. According to the authors, the word "neutrally" in this context is not to be understood as meaning "impartial" or "independent". However, it has not been defined and will no doubt become the subject of many contract negotiations and discussions.

Early warnings

Similar to the NEC3 and the FIDIC gold book, the FIDIC Yellow Book has introduced a provision in clause 8 for early warnings.

The early warning is a mechanism whereby either party can notify the other of any foreseeable problem which could have an effect on the works, and ultimately the cost and delay of the works. The purpose of the early warning is not to decide who is responsible for the foreseeable problem, but rather to determine how the parties can work together to resolve the issue and avoid a claim or dispute arising. At this stage, it is unclear as to what process must be followed once an early warning notice has been issued.

Claims, disputes and arbitration

Clause 20 is now titled "Employer's and Contractor's Claims". Previous sub-clauses 2.5 and 20.1 have been merged.

Similar to the NEC3, the claims procedure set out in the revised Yellow Book is administrative intensive and is now one of the longest clauses in the contract, totalling approximately three pages.

Previously, an employer was only required to give notice and particulars of a claim to the contractor "as soon as practicable" once he became aware of an event or circumstance which gave rise to a claim. The revision aligns both the employer and the contractor to give notice of a claim within 28 days of becoming aware of the

event or when they ought to have become aware of the event. The change to these provisions is obvious, the current claims procedure appears to be one-sided and slightly prejudicial to the contractor.

Furthermore, the employer is now required to provide a detailed analysis of his claim, setting out the particulars of the claim, an explanation of the event and the quantum of the claim. The prescribed period of 42 days in which to submit a claim after the claiming party becomes aware or ought to have become aware of the event giving rise to the claim is the same for both the contractor and the employer.

The Dispute Adjudication Board has been amended to the "Dispute Adjudication/Avoidance Board". The revision to the Yellow Book welcomes the inclusion of an additional clause whereby the parties can jointly refer a matter to the DAB in writing, to provide assistance to discuss and attempt to resolve informally any issue or disagreement that has arisen between the parties during the contract. This provision will certainly assist in avoiding disputes reaching the formal adjudication stage.

The purpose behind the revision of the FIDIC 1999 Rainbow Suite, and specifically the Yellow Book, is to achieve greater reciprocity between the employer and contractor, to incorporate international best practice and to reflect the changes in the construction industry since 1999.

Employers must be aware of the administrative intensive requirements imposed on them as they will now be required to manage the project properly in order to ensure compliance with the stringent claims procedure. The role and authority of the engineer's representative currently remains unclear.

As investment and construction continues to develop rapidly in Africa, it appears that the revised Yellow Book will be in the "hot seat" and implemented shortly. FIDIC is used widely throughout Africa and Eastern Europe as it caters to a variety of legal systems. Once the final revision of the Yellow Book is published, contract negotiations and compliance with the revised provisions will undoubtedly become interesting.

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