The 12 Worst Things About FIDIC 2017 – A Christmas Special

Written by Victoria Tyson

The FIDIC 2017 forms first appeared at the December FIDIC Users' Conference four years ago. No one has suggested that the FIDIC 2017 forms of contract did not rectify some of the problems in the FIDIC 1999 forms, and in Edward Corbett's articles, *'Cherry Picking FIDIC 2017' and 'FIDIC 2017 – First Impressions of the 3-Kilo Suite'*, he considered some of these changes.

This new suite of contracts had, at best, a lukewarm reception when they were first reviewed, with some commentators complaining about the length of these new contracts and that the contracts had not taken account of criticisms that had been made by reviewers. This article looks at the twelve worst 'gifts' that FIDIC gave to us for Christmas 2017.

Number 12

The 2017 Red Book has 128 pages of conditions (up to the Guidance Section). Commentators have complained that it is too prescriptive and unsuitable for simpler projects of higher value. FIDIC are updating its Green Book, which borrowed ideas from the NEC forms of contract, and this will be issued on 8 December 2021. However, the new Green Book will only be suitable for projects up to US$10 million. It seems, therefore, that there is likely to be a colour missing in the new FIDIC rainbow.

Number 11

There are 90 definitions within the Definitions section of the FIDIC Yellow Book. One would have thought that everything that needed a definition would be defined therein, but the FIDIC drafters decided to add other definitions in the Contract – see Sub-Clause 5.2.1 where *'nominated Subcontractor'* is defined. Some definitions are unnecessary; for example, does 'FIDIC' need to be a defined term? The word 'year' is defined as 365 days, which of course takes no account of leap years and is only used in one other definition (see the Defects Notification Period).

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Number 10

The FIDIC drafters have changed the Notice to Correct procedure. Sub-Clause 15.1 now provides that it is the Contractor who is responsible for describing the measures it will take to remedy the failure and stating when it will commence such measures. This is likely to be a source of contention where the Contractor attempts to resolve problems using the cheapest option. Employers should also note that they cannot terminate the Contract for non-compliance with a Notice to Correct where this is not a "*material breach of the Contractor's obligations under the Contract.*"

Number 9

Sub-Clauses 20.1 and 20.2 contain both subjective and objective intentions. Sub-Clause 20.1(b) states that if the Contractor "*considers that the Contractor is entitled…*" a Claim may arise. This is a subjective test. However, Sub-Clause 20.2.1 states that if the Contractor does not give Notice describing the event

or circumstance giving rise to the loss "*as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of*" it, it loses its right to additional payment or an EOT. This contains both a subjective test and an objective test. What this appears to be saying is that the Contractor might be time barred from claiming an additional payment or EOT if it should have known of its right to claim, irrespective of the fact that it did not know it had a claim. FIDIC had an opportunity in the 2017 contracts to clarify precisely when a Notice of claim should be given. However, they chose not to take this opportunity and the ambiguity that existed in the 1999 suite of contracts, about when a claim starts to run, remains in the 2017 suite.

Number 8

There are now five distinct time bars in the 2017 Contract. In the FIDIC 1999 contracts there were two (one at Sub-Clause 20.1 and in relation to the Notice of Dissatisfaction). There is a general reluctance by adjudicators and arbitrators to strike out genuine claims just because a time bar has been missed, especially where the opposing party had caused the delay and was fully aware of its consequences. To add more time bars into the 2017 is an unnecessary and onerous step.

Number 7

FIDIC has introduced a claims procedure that has different routes depending on the type of claim it is. If you get this wrong you can waste time and, at worst, find that you are barred from going down the other route.

Number 6

One of the most common areas of dispute in construction contracts relates to whether a contractor is entitled to an extension of time. FIDIC decided to address the issue of concurrency in the final paragraph of Sub-Clause 8.5. The clause refers to the rules and procedures as stated in the Special Provisions (which fortunately is a defined term meaning Part B of the Particular Conditions). However, if it is not addressed in the Special Provisions then the EOT is awarded "*taking due regard to all relevant circumstances.*" This therefore leaves open the question of whether it is intended that the Contractor should be awarded time on a proportional basis or by applying the rules about EOTs under the governing law of the contract. The Notes to the Special Provisions seem to suggest the latter but the wording suggests some sort of proportional approach.

Number 5

'Exceptional Event' is defined without reference to the event being exceptional. An Exceptional Event must be beyond a party's control, which a party could not reasonably have provided against before entering into the contract, which such party could not reasonably have avoided, and is not substantially due to the other party. A road traffic accident on a road maintenance project, which was not due to the fault of the Contractor or Employer, could therefore fall within the definition. Clearly this was not intended.

Number 4

The Engineer can now issue an instruction requesting acceleration measures to reduce the scope of an EOT. While this sounds superficially attractive it could lead to significant problems if the Engineer attempts to specify how this is to be achieved.

Number 3

The Variation provisions of the Contract allow for a Contractor to object to a Variation if it is Unforeseeable, which is defined as not reasonably foreseeable by an experienced contractor at the Base Date. A cardinal change in the Works, i.e., a change which is so drastic that this requires the Contractor to carry out something materially different from what is in the Contract, would therefore be Unforeseeable. However, the Variation clause then permits the Engineer to confirm the Variation despite the Contractor's objection that it is Unforeseeable.

Number 2

The 2017 contracts contain a multitude of deeming provisions – there are nine deeming provisions in Clause 20 alone. There are situations where one set of deeming provisions apply to confirm another set of deeming provisions. There are also *'un-deeming'* provisions so that under Sub-Clause 20.2.2, a Notice of Claim will be deemed to be valid if the Engineer does not issue a Notice stating a claim is invalid. However, the other Party may disagree with this deeming provision and give its own Notice, whereupon the

Engineer must then determine the disagreement as to whether the deeming provision applies. Clause 1.3 has an interesting deeming provision in that an electronically transmitted Notice will be deemed to be received the day after transmission. Contractors should think twice about firing off a Notice by email on the last day of a time period.

Number 1

Sub-Clause 21.4.1 requires that Disputes be referred to the DAAB within 42 days of giving or receiving a Notice of Dissatisfaction under Sub-Clause 3.7.5. If the Dispute is not referred to the DAAB within 42 days, it shall be deemed to lapse and no longer be valid. Many lawyers will see this as an early Christmas present from FIDIC, however, for many Employers and Contractors this will be an extremely costly provision.

The raison d'etre, according to FIDIC, for the new suite of contracts was to increase clarity and provide greater certainty. One can make a case for arguing that these aims have been achieved, but, at what cost? This is a suite of contracts that appear to push the parties towards a DAAB at the earliest possible opportunity and then create a myriad of hurdles for the parties to jump through. It is fortunate therefore that FIDIC are training scores of new DAAB members. In this author's view the 2017 contracts, which were issued just before Christmas four years ago, are a bit of a turkey.

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