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Insights

FIDIC CONTRACTS – CONFERENCE, CARBON CLAUSES AND COLLABORATIVE CONTRACTING

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SUMMARY

In this Insight, first published in PLC, Natalie Wardle reflects on the FIDIC International Contract Users' Conference 2024 held in London in December and the new contracts and standard clauses that FIDIC is currently working on, including the carbon management guide and its collaborative contract.

This article contains links which are only accessible by PLC subscribers.

FIDIC's International Contract Users' Conference 2024, which took place in London in December, had a thoroughly forward-looking agenda, with AI, carbon clauses and collaborative contracting as key topics for discussion. Happily, this was the first conference in many years where it no longer felt relevant to even discuss the other C-word (Covid!).

Conversely, the Conference opened with a brief history of the Red Book. Far from just a history lesson, it served as a reminder of the evolution of the whole suite of FIDIC contracts from the Red Book's 1950 roots to the current editions and how they deal with today's global issues. A stated aim of the Conference was to:

"examine the growth and development of off-shore wind, solar and energy efficient projects and highlight how FIDIC contracts are shaping these sectors".

I couldn't help but notice that while FIDIC is undoubtedly the most commonly used (and adapted for use) standard form contract on such projects, much of the theme this year was dedicated to how different sectors are shaping FIDIC contracts, with some interesting new publications on the way.

For more information on FIDIC contracts generally, see *Practice note, FIDIC Forms of Contract*.

NET ZERO BECOMES THE CARBON MANAGEMENT GUIDE

FIDIC's task group dedicated to the publication of "net zero" clauses has changed its billing ("net zero" being too limiting for the ambition of the forthcoming Carbon Management Guide for FIDIC Contracts, which is to be as flexible as possible in the types of project for which it is used). The Guide will include, among other things, a Schedule of Carbon Emissions, new Contract Data, definitions necessary for a lifecycle approach and a stand-alone clause together with guidance on how to prepare the Particular Conditions to incorporate all of this into existing FIDIC contracts. The stated aim is the active and continuous management of the use and measurement of embedded carbon in the whole lifecycle of projects.

While the Guide is still in draft form, a taster of new definitions below sets the scene for how this is likely to work:

- An employer's procurement evaluation criteria must include the **Carbon Emissions Budget** prepared by tenderers.
- A **Carbon Balance Sheet** showing the positives and negatives of the project will be continuously managed with all stakeholders undertaking to improve the Carbon Balance Sheet throughout the project's lifecycle.
- Employers must establish a clear and unambiguous **Carbon Emissions Calculation Methodology** specific to each contract or project to ensure clarity of **what** is being measured and **how** it is being measured.
- The **Carbon Price** is the price per ton of CO_2 Equivalent that the employer provides and which equates to the employer's cost to remove any emissions.
- The **Carbon Price** will be used to calculate the **Carbon Emissions Damages and Incentives**(more on this slightly controversial topic below).

The Guide is clear that it is an employer's responsibility for removing the project's emissions and a core principle is that the employer must not transfer that obligation to others. While the task group recognise that this is a big shift in the current market approach, their view is that an employer has the most vested interest in the project and is therefore in the best position to promote measures to remove emissions rather than rely on off-setting. However, the lifecycle approach involves the whole supply chain and ensures that the contractor is invested and accountable for the promises made in tendering.

To that end, a contractor's performance will be measured against the Carbon Emissions Budget that it sets, with incentives and damages measured against that standard. Unsurprisingly there was some resistance from contractor groups at the conference on two levels. First, they consider that sustainability goals can be best achieved through collaboration between all stakeholders. Secondly, that, unlike performance or delay damages, there may be no tangible cost to the employer that needs to be compensated (if they are not forced to offset). However, without a clear carrot and stick it is hard to see how this carbon management lifecycle approach can be the catalyst for real change that it aspires to be, and I don't see how it could work effectively without contractual consequences. FIDIC say that the carbon management provisions will be balanced and fair and the damages cap, if applicable, will fall within the contractor's overall limit of liability. However, I know of several employers that would consider it more appropriate for such damages, as often with delay damages, to sit outside the overall cap, and be the subject of a separate cap.

One interesting aside, the DAAB (the Dispute Avoidance/Adjudication Board) will not play a part in the Carbon Emissions Budget given that it will involve third parties throughout the supply chain.

For more information generally about the use of climate change clauses in construction contracts, see *Practice note, Climate change clauses for construction contracts*.

PUBLIC PRIVATE PARTNERSHIP (PPP) 2.0 MODEL CONTRACT

Another forthcoming publication that is also considering side-stepping the role of the DAAB is the PPP 2.0 Model Contract principles, which is in the pipeline for next year, with the PPP 2.0 Model Contract itself to follow subsequently. FIDIC has previously indicated that this will include concession agreements and direct agreements not covered by the Silver Book.

Following a consultation process with more than 90 FIDIC members the relevance of the DAAB has been questioned for such contracts. A key benefit of a model PPP contract is to provide a trusted standard form for developing countries. It was acknowledged by the FIDIC PPP task group that the level of knowledge needed of a DAAB (in all areas of the PPP contract including revenue-related as well as performance) is different from that of a typical construction contract and it may be challenging to compose an adequately experienced DAAB for each project. A suggestion from the task group is that a new regulatory authority could perform this role. This is being explored.

DAAB IN PRACTICE

The DAAB is a core tenet of the 2017 second edition Red, Yellow and Silver Books. Whereas the 1999 first editions provided the option for an ad-hoc dispute board (constituted when required) (Yellow and Silver Books) or a standing dispute board (appointed at the outset for the duration of the project) (Red Book), under the 2017 forms a standing DAAB is intended to play a key part in managing the contract from the outset in all three contracts.

Statistics shared at the Conference (and I am sure experience among attendees) show that under the 1999 contracts the dispute adjudication board (DAB) (as it was) provisions are commonly deleted (contrary to FIDIC's Golden Principles). In contrast, while the data shows that parties do not delete the DAAB provisions with such alacrity under the 2017 editions (perhaps because they are embedded throughout the contracts), in practice, parties are only appointing the DAAB once a dispute arises (so in effect using an ad-hoc DAAB in place of a standing DAAB) and ignoring the dispute avoidance intentions of the 2017 editions.

A standing DAB/DAAB will inevitably cost more than an ad-hoc one. The results of a year-long research project carried out by Centre of Construction Law and Dispute Resolution at King's College, London (KCL) that considered six years of DAB practice was shared with Conference attendees. It highlighted that 86% of companies that decide not to have a DAB in the contract do so because of cost concerns and 43% due to the unfamiliarity of the functioning of a DAB. However, of 4016 DABs reported under the survey, 86% of users of a DAB find them either “extremely useful” or “very useful”.

To perhaps aid with the unfamiliarity aspect (if not the cost!) FIDIC has just released its Practice Note II on the Appointment of Dispute Boards. This is available to download for free on the FIDIC.org website.

For more information about FIDIC's practice note and the KCL surevy, see *Legal update, Dispute boards: FIDIC practice note and results of KCL 2024 international survey*.

COLLABORATION

Hopefully under the upcoming collaborative form of contract there will be no need to worry about disputes as the parties will get on marvellously from the get-go! Or rather there will be a collaborative management team empowered to resolve issues before they become disputes.

Last year we were told that FIDIC’s new collaborative contract will be based on the "snappy and flexible" Green Book, 2021 Edition. It will be a bi-lateral contract that aligns with other bi-lateral contracts throughout the supply chain; sub-contractors, engineers, designers and other advisers. Building blocks of co-operation if you will.

At this year's Conference more detail was provided about how the collaborative contract will work in practice, including the core principles underpinning it:

- There will be integrated management, by way of the **Collaborative Management Team** (CMT). The engineer will continue to play a key role, but the CMT will provide support and ensure early identification and resolution of issues and disputes.

- It will be relationship focussed with proactive and agile development. Parties will communicate and share information to facilitate a project wide understanding and management of issues and risks.

- There will be explicit objectives and interests, and transparency. Both parties are encouraged to acknowledge the other party's interests, be it a recognition that a contractor must make a profit, or that budget and/or time are paramount to the employer (or anything else). Transparency is key, especially on pricing.

- There should be whole life participation from the pre-construction phase (with early contractor involvement) to post-delivery if it is beneficial for the project. I'm not sure that everyone will agree with the suggestion raised at the Conference that the first stage should be on a reimbursable basis, and I don't think this is intended to be prescribed in the contract. We are told there will be flexibility with payment options (as there is under the Green Book).

- There will be collaborative tools and structures – proven mechanisms and reasonable outcomes. It is recognised that it is not just the process that must be reasonable but this must play out in all aspects of the contract such as BIM, early supply chain management, early warning mechanisms, joint risk management and dispute avoidance.

The collaborative contract is due for publication in 2025 so hopefully we will be able to get our hands on a copy by next year's conference.

For more information about collaborative contracting, see *Practice note, Partnering or alliancing on a construction or engineering project*.

OFF-SHORE WIND AND OTHER FUTURE RELEASES

FIDIC's off-shore wind contract remains in the pipeline (and definitely not in the wind). Last year I highlighted the specific reasons why this would be very welcome in this unique environment (see below). Since then, as part of the UK's Contract for Difference (CfD) Allocation Round 6, nine fixed-bottom projects and one floating wind farm project were awarded CfDs totalling 5.3GW (compared to zero the previous year). There is clearly a re-energising of the sector in the UK.

Unfortunately, with publication pushed back to post-2025 FIDIC's off-shore wind contract may not have a part to play in this year's CfDs, but the Yellow Book will undoubtedly feature in some form or another on a number of these projects.

For more information about the specific risks unique to an offshore-wind project, see *Article, Offshore wind projects: contracts, risks and looking forward*.

Other upcoming releases in 2025 (in addition to PPP 2.0 Model Contract principles, Carbon Management Guidance and the collaborative contract) include a test edition of the Bronze Book. Originally scheduled for 2020, it is an Operate-Design-Build-Operate contract (as the Gold Book) for brownfield sites including an upgrade for existing facilities and making allowances for existing plant that is unknown or un-surveyed. Finally, a sub-contract for use with the Silver Book 1999 (showing that FIDIC continues to recognise the enduring use of its first edition contracts).

Post 2025 there will be a guide to the 2017 suite of service agreements, together with "golden principles" for this suite; a form of JV agreement for contractors; sub-contracts for the 2017 Red, Yellow and Silver Books and 2021 Green Book, an EPCM contract, an updated FIDIC Procurement Guide and a handbook for practitioners.

CONCLUSION

There was so much content in this Conference I haven't got close to covering all of the topics that were discussed but I can't sign off without mentioning a very interesting debate on pay when paid and back to backing of claims under the FIDIC sub-contracts (I wonder if this will be removed in the 2017 sub-contract forms) and a fascinating discussion on AI in procurement and contracting (but as AI capability is doubling every six months I feel any commentary will be out of date by the time I publish this article!). Finally, a discussion about expedited arbitration and UNCITRAL's new Model Clause on Adjudication (released in November 2024) looking at enforcing decisions at an international level where there is no statutory framework supporting enforcement of adjudicators' decisions (as there is in the UK) and how this could potentially be incorporated into FIDIC contracts.

And lastly, I was delighted to be able to attend the FIDIC Contract Users' Conference Awards and collect the award for FIDIC Legal Firm of the Year on behalf of BCLP, in recognition of our global construction capabilities and use of FIDIC contracts.

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