



Lindy Patterson FIDIC will launch a second edition of its **Yellow Book** later this year. This longer contract looks to resolve some of the issues encountered by those using its predecessor

MORE WORDS, FEWER CLAIMS?

WHAT CHANGES WILL THE NEW YELLOW BOOK BRING? TWO OF THE BIG CHANGES INVOLVE NOTICES AND CLAIMS, AND WHAT IS CONTRACTUALLY REQUIRED IN PROGRAMMES

It is the season for new building and engineering contracts. FIDIC has produced the 2nd Edition of Conditions for Plant and Design Build (the Yellow Book) to be launched later this year with the Construction Contract (Red Book) and EPC/ Turnkey (Silver Book) to follow. Although widely viewed as being for international projects, FIDIC contracts, especially the Yellow and Silver Books, are increasingly used for UK energy work.

A pre-release version was made available to the FIDIC users' conference in December. Based on this, what changes will the new Yellow Book bring? Two of the big changes involve notices and claims, and what is contractually required by way of programme.

To be effective a notice will be required to state:

- **That it is a notice on the face of it** The aim is to avoid the time consuming arguments about whether a notice is truly a notice. The notice under the new form is defined as "a written communication identified as a Notice and issued in accordance with sub-clause 1.3".

- **The sub-clause under which it is made** So, a

contractor will have to identify the legal basis for a claim early. If not, it will be sensible for it to set out all possible sub-clauses that apply.

The time limit for issuing a notice of claim will remain 28 days from when the claiming party became aware or should have become aware of the event. The regime applies to contractor and employer claims. The engineer shall, within 14 days of receiving the notice of claim, advise if it is time barred. It is common for the engineer not to raise time bar issues until later, when it is the subject of a dispute. This sub-clause aims to avoid this. If the engineer fails to advise regarding time bar, the engineer must determine the claim. A fully detailed claim (which may be interim if the effect is ongoing) must be issued within a further 14 days, so 42 days from the event, or such longer period as is agreed. There are key parts of that detailed claim which must be issued within the 42 days or the engineer can give notice that the original notice of claim has lapsed.

The intention is to avoid late and stale claims. To give some relief, a clause is introduced called



"waiver of time limits". It provides that a failure to comply with a time limit can be referred to the dispute board appointed under the contract but, on a strict time limit of 14 days. This presumes a dispute board has been appointed - which is unlikely to happen in a 14 day window. In the UK, appointment of a dispute board is the provision that is often written out. Where that happens a substitute to provide for any relief may have to be put in its place.

In terms of programming, sub-clause 8.3 is the new programming clause. The existing sub-clause 8.3 had four essential requirements for a programme. The new proposed sub-clause has 11. As before, the contractor has an obligation to submit a revised programme which reflects actual progress whenever any existing programme is out of date.

The following will be new requirements for the original programme and any revised ones issued under this sub-clause:

- The first programme to be submitted is called

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an initial programme - within 28 days of notice to commence

- Programming software will be that specified in the employer's requirements or, if not, specified, software "acceptable to the Engineer"

- This programme will include: the logic links showing earliest and latest start and finish dates; critical path and float; sequence and timing of

remedial works for any revised programmes; holiday periods, including local holidays; and key delivery dates of plant and materials

- Every revised programme must also contain these essentials

- In the supporting report which accompanies a revised programme the contractor should include proposals to overcome the effects of any delays on the progress of the works and identify significant changes from previous programmes.

The engineer has 21 days to review the initial programme and 14 days to review any revision. If the engineer rejects a programme as not reflecting actual progress the contractor only has 14 days to come up with another.

The new edition tries to tackle how concurrent delays are dealt with, where one is contractor delay, by providing that whether there will be an entitlement to an extension of time in these situations shall be assessed "in accordance with the rules and procedures stated in the Particular Conditions".

It is common to see amendments to the standard form which seek to close down an entitlement to an extension of time in the event of a concurrent contractor culpable delay-not always successfully. This sub-clause is unlikely to change that.

It may be there will be some change to these conditions before publication, although word is that any major change is unlikely. So, programmers and engineers stand by; there will be lots to do, hopefully to good effect. And incidentally the new edition has 50% more words than the first.

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Rebecca Williams and David Wright JCT recently issued an updated version of its **Design and Build Contract**. Here is an overview of the most important changes to take note of before signing up

REFINEMENT, NOT REVOLUTION

The Joint Contracts Tribunal (JCT) published the 2016 edition of the Design and Build Contract (JCT DAB 2016) towards the end of last year. The JCT issued the previous iteration of the DAB in September 2011 and the new edition has been updated to take into account, among other things, the Construction (Design and Management) Regulations 2015 (CDM) and the Public Contracts Regulations 2015. The JCT DAB 2016 has also sought to simplify and clarify the payment regime that has been the source of much confusion and, as a consequence, caused disputes. This

article is intended to give an overview of the most important changes that parties will need to take note of before signing up to a project using the JCT DAB 2016.

If there is a discrepancy or divergence, not only within the contractor's proposals but also between the contractor's proposals and any other contractor's design documents, the contractor must now notify the employer. As discrepancies and divergences in project documentation can often be the subject of dispute between the parties, any change that allows for an increase in transparency as

to the potential for a divergence is to be welcomed. However, in keeping with the other changes introduced in the JCT DAB 2016, this is not a revolutionary change and simply makes express the general principle that each party is responsible for discrepancies and divergences in and in between the documents for which it is responsible.

The JCT DAB 2016 edition now makes the appointment of a full-time, and competent, site manager obligatory, whereas in previous editions this had to be expressly provided for in the contract particulars. It is the contractor's obligation

to appoint the site manager, but this appointment will still be subject to the approval of the employer.

Under the JCT DAB 2016, where a contractor notifies the employer that an instruction may infringe a patent right, the contractor is not required to comply until the employer has confirmed the instruction (clause 3.6.2). Further, the contract provides that if the employer has given an instruction orally, it may confirm this instruction in writing prior to or within seven days of the contractor's confirmation of that instruction. In these circumstances, the employer's written

notice takes effect from the date of that notice, which may be after the contractor's confirmation. The practical consequence of this change is that an oral instruction may in fact override the contractor's written confirmation if given within the specified period (clause 3.7.2).

Perhaps the most important changes to understand in the new form contract are those relating to payment provisions. The changes that have been introduced in the JCT DAB 2016 are intended to be in line with the government's Fair Payment Campaign, which is designed to improve payment practices in the construction industry. The key change is the imposition of interim valuation dates, which apply to subcontracts and also sub-subcontracts (clauses 4.72 and 4.73). The introduction of these dates will mean that, if unamended, the JCT DAB 2016 will

provide for payment to be made along the contractual chain within 30 days.

Another change that will have practical consequences is an amendment to the monthly payment cycle. Under the previous edition of the JCT DAB, the due dates applicable to payments after practical completion were on a two-month cycle. The JCT DAB 2016 provides that the payment cycle will revert to a monthly cycle up until the due date of final payment (clause 4.7.2).

A small change in the JCT DAB 2016 allows either party to terminate the contractor's employment, following a period of suspension, not only for loss or damage to the works but also for damage arising from any risk covered by the works insurance policy or an excepted risk (clause 8.11.1.3).

In line with the Public Contracts

THE JCT DAB 2016 SEEKS TO SIMPLIFY AND CLARIFY THE PAYMENT REGIME THAT HAS BEEN THE SOURCE OF MUCH CONFUSION

Regulations 2015, either party can terminate in a situation where the works have been suspended by the exercise of a statutory power by any local or public authority (clause 8.11.5). This will apply only in circumstances where this suspension has not been caused by the default of the contractor.

As with previous editions, there is no amendment to the JCT standard form that considers the common practice of requiring the contractor to assume single point responsibility for both the design and the construction of a development. In practice, the standard drafting has been amended to reflect the contractor's responsibility for the employer's requirements in return for the employer agreeing to novate appointments of designers across to the contractor.

It is clear that employers will continue to insist on this amendment to the standard form. However, it does bring into question how fit for purpose an unamended contract is if this amendment is so typically found in market practice.

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