

FIDIC 1999-Bad News or Good News for Qs?

Increasingly, Developers and Consultants in Dubai, have commenced using FIDIC 1999¹ as the Form of Contract for their current and forthcoming projects. For some time now FIDIC 1999 has been in use in Abu Dhabi for most of their projects. Therefore Quantity Surveyors in the UAE have no other option but to master the complex administration aspects under FIDIC 1999 as well, in addition to their current skills in administering contracts under FIDIC-4th Edition².

What should not be forgotten is that, whilst FIDIC-4th is a tested³ Standard Form of Contract which has withstood the test of time for over quarter a century, FIDIC 1999 is not so, and therefore the industry is unaware as to how the Courts and Arbitrators would decide on many unavoidable disputes that are likely to arise due to serious concerns that exist in this latest FIDIC Form.

Some terminology found in FIDIC-4th still exists in FIDIC 1999 but with different meanings/definitions and therefore the correct usage needs to be adopted in order to avoid contention. "Contract Price" for instance is not what it was under FIDIC-4th, if used with reference to a FIDIC 1999 contract !

Lack of separate provisions to value variations, and the combining of valuation of variations together with the valuation of the original scope of work have produced a very complex Sub-Clause 12.3, not easy to understand, and also lacking adequate provisions to value some aspects of original scope of work⁴ and varied work⁵. One unique feature in the previous FIDIC versions (when compared to JCT, ICE, NEC and other Forms of Contract), was Sub-Clause 52.3 which provided for restoring an under-recovery of a Contractor's overheads,

which also provided for correcting an over-recovery in favour of the Employer⁶. FIDIC has decided to do away with this provision in the new Form, but Sub-Clause 12.4 could still be construed as the mechanism to restore the Contractor's under-recovery, but the correction of any over-recovery is not available !

Opportunity for Contractors to claim varied rates/prices even in re-measurement type of contracts, if the BOQ quantities do not accurately represent the work shown in the Drawings and described by the Specification, would make it very onerous for QS Consultants to ensure the accuracy of quantities even in the Bills of Estimated Quantities prepared for re-measurement type of contracts. The new opportunity for Contractors to claim Extension of Time and associated cost reimbursements due to such quantity differences (without the instruction of a Variation) is another area of concerns.

Termination for Employer's convenience is a new Clause which did not exist in FIDIC-4th. Though drafted without provision for a Contractor to claim loss of profit, nevertheless a Contractor terminated pursuant to this Clause may succeed in receiving compensation in law, judging from cases decided by the highest court in the emirate, Dubai Court of Cassation.

Under FIDIC-4th it was not the contract that was terminated when a party is in breach, but the employment of the Contractor under the contract, and therefore there was no necessity to provide for the survival of important provisions. In the only two instances⁷ where the contract is terminated, FIDIC-4th expressly provided for the survival of Dispute Resolution by Arbitration, Entitlement to damages for antecedent breaches, and the Method

¹ Conditions of Contract for Construction for Building and Civil Engineering Works designed by the Employer – First Edition 1999, published by Federation Internationale des Ingenieurs-Conseils (FIDIC), Switzerland.

² Conditions of Contract for Works of Civil Engineering Construction – Fourth Edition 1987, published by FIDIC.

³ Though FIDIC-4th still has shortcomings (to the extent that the English literal meaning of a provision is exactly the opposite of what is intended !), authorities exist on how to interpret / construct them.

⁴ FIDIC 1999 does not have provisions to value an item of original scope of work which is missing from the BOQ, in a re-measurement type contract (unless there is a rate or price for a similar item existing elsewhere in the BOQ).

⁵ FIDIC 1999 does not have provision to compensate the Contractor (or the Employer) with a varied rate or price, when a variation affects cost of execution of an item of original scope of work (unless its quantity also changes by more than 10%, as a result of the Variation, whereas in FIDIC-4th this could be done under Sub-Clause 52.2.

⁶ Not the whole under-recovery or over-recovery but the net excess beyond 15% (or other percentage agreed by the parties in the contract).

⁷ Sub-Clause 65 – Special Risks (Force Majeure) and Sub-Clause 66 – Release from Performance (Frustration).

of Calculation of the payments following a termination. Under FIDIC 1999, it is the contract that is terminated in all instances, but the survival requirement of above important provisions is missing, and therefore (unless the law applicable to the contract provides otherwise), parties may end up in Courts to resolve their disputes, which is thoroughly undesirable, and also a court appointed expert may not want to adhere to the detailed method of calculation of payments provided in the contract (such as “any other cost or liability incurred by the Contractor in the expectation of completing the whole of the Works” etc.), as such provisions have not been made to survive the termination of the contract.

Lack of provision to extend time in “special circumstances” (which provision existed in FIDIC-4th), would offer opportunities to Contractors to plead for setting time at large, in order to escape from Liquidated Damages thus leaving the Employers to prove their losses in claiming damages.

Notices have been made condition precedent which would result in higher tender prices due to the tenderers either making allowances for this risk or including the cost of a claims team within the site overhead costs. Lack of a provision such as Sub-Clause 52.2(a) of FIDIC-4th to claim prolongation costs of a contractor when an instructed Variation delays the project completion, leaves the Contractors with the undesirable option of asserting that the Employer is in breach of contract (in order to claim such costs as damages for breach), every time a Variation is instructed !

Good news is that, the significantly increased cost management and contract administration activities required for FIDIC 1999 contracts (when compared to those under FIDIC-4th) would compel Contractors, Consultants and Developers to employ more Quantity Surveyors for each project without whose invaluable advice / services, the company interests cannot be adequately protected.

Whilst FIDIC-4th relied on the presence of an impartial Engineer to administrate the contract, the absence of the requirement of Engineer’s impartiality under FIDIC

1999 has made it necessary to refer any disputes to an independent Dispute Adjudication Board (and not to the Engineer as in FIDIC-4th), for resolution in the first instance, an area where Quantity Surveyors need to enhance their current skill sets⁸. This is also an area where Quantity Surveyors would have lucrative career opportunities. At present Developers / Consultants delete the Dispute Adjudication Board provisions in FIDIC 1999 contracts due to the acute shortage of Adjudicators in this part of the world. Quantity Surveyor, with his/her multi disciplinary education is an ideally placed candidate to undertake further studies and training in the field of dispute resolution to fill the thousands of Adjudicator positions that would be created when FIDIC 1999 inevitably becomes the norm in the near future for almost all projects in this part of the world, and the industry becomes fully aware about the benefits of resolving the disputes by referring to a Dispute Adjudication Board, which is less costly, quicker and would not break down business relationships, when compared to Litigation or Arbitration.

All the areas of concern in FIDIC 1999 cannot be highlighted in a short article of this nature. FIDIC-4th needed some four editions of improvements to reach its refined state. FIDIC 1999 is still in its 1st Edition and no doubt, FIDIC would address most of the above concerns in its subsequent Editions, but until then Quantity Surveyors have no other choice but to address them through Particular Conditions before the tenders are invited and also exercise care during the administration of the contract.



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¹ In the past, Lawyers were brought in to provide advice only when the parties entered into the final tier of Arbitration in the multi-tiered dispute resolution process of FIDIC-4th. Until then the Quantity Surveyor advised the company during the early tiers, especially in procuring the Engineer’s Decision pursuant to Clause 67. But under FIDIC 1999, referring the disputes to the Dispute Adjudication Board (“DAB”), arranging witness statements, preparing the witnesses, dealing with matters of evidence and arguments, participating in hearings and all other dealings with the DAB on jurisdictional, procedural and substantive issues, are now matters that the Quantity Surveyors would have to undertake (and provide the companies with correct advice), as lawyers are not engaged during this early tier. Companies which would offer their QSs with training opportunities in these areas would have the company interests protected.