Time's Up for FIDIC's Pink Book?

Written by Edward Corbett

Rumour reaches us that the Multilateral Development Banks behind the Pink Book, FIDIC's harmonised version of the 1999 Red Book, will discontinue the experiment. Should we be sorry to see the back of the Pink Book? We think not.

The idea would be to return to the Red Book with each MDB developing its own particular conditions.

The fragile consensus between the banks was already unravelling: the 2010 edition already had 6 bank-specific versions of clauses 15.6 to 16.2 on the subject of bribery and corruption.

The creations of committees are notoriously odd. The more independent and strong-willed the representatives of the committees, the odder will be the result. MDBs – and there were 9 of them involved in the first version in 2005 – can be notoriously stubborn. So it would be no surprise to learn that their amendments to the Red Book produced some oddities.

However, to be fair, the Pink Book also gave birth to some interesting ideas which FIDIC would do well to consider when drafting the 2nd editions of the Red, Yellow and Silver Books, a process now under way.

Below we consider a sample of both MDB oddities and also some it its good ideas.

Oddity #1: Contractor Control of the Commencement Date

The "stand-out" oddity relates to the Commencement Date. The amendments to clause 8.1 effectively put the Contractor in charge of when both work and the Time for Completion start. The Commencement Date can only be given when both parties have agreed that 4 precedent conditions have been fulfilled. Two of these are under the control of the Contractor, namely the signature of the Contract Agreement by the Contractor and the payment of the advance payment which depends on the provision by the Contractor of the advance payment guarantee.

The result is that if it benefits a Contractor to delay the start date – for example to give himself additional mobilisation time or in order to avoid a winter period – he can do so simply by delaying provision of the guarantee.

Better still for the unscrupulous, if the notice and instruction to commence are not provided within 180 days, the Contractor can terminate for *Employer default* and claim his lost profit on the job! This is apparently so even if the delay was due to the Contractor withholding his guarantee.

Of course, legal systems would resist this extraordinary result. Good faith doctrines would no doubt be mobilised in the civil law world to try to prevent a windfall result. Prevention principles might help out the Employer.

The question is: what were the draftsmen thinking when they added this to the MDB form? It was not in the original 2005 edition. And: who was lobbying the MDBs on behalf of contractors? They plainly did a very good job.

Good Idea #1: Define the Term "Profit"

The Pink Book defines as 5% the profit to which the Contractor is entitled as part of "Cost plus profit". This avoids the 10 instances of "reasonable profit" that appear in the Red Book with all the accompanying room for uncertainty and argument. (Should "reasonable profit" be based on any profit figures in the contract, or the Contractor's tender calculations, or current market profit levels or the Contractor's own average historical profitability or indeed the profitability of the particular project?)

There are 71 "reasonables" and "reasonablys" plus two "unreasonablys" still left to argue about but the MDBs have taken a step in the right direction.

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Oddity #2: The Contractor Chooses his Bonding Bank

The contractors' lobby appears to have succeeded regarding bonds and guarantees. Clauses 4.2 and 14.2 have been amended so that contractors can provide performance and advance payment guarantees from any "reputable bank or financial institution selected by the Contractor". The same applies to retention bonds which, by clause 14.9, the Contractor is entitled to substitute for a cash retention on taking-over.

As the MDBs know better than most, the value of bonds does not depend only on the repute of the bank but also on the attitude of the courts. Corbett & Co, for example, is yet to see a bond paid out in Italy. The courts appear to be very willing to intervene on behalf of a contractor to block payment. Other countries have the same problem - or safeguards - depending on your point of view.

The fact is that if the point of the bond is to provide security nearly equivalent to cash in hand, or at least security obtainable "on demand", then it matters where it comes from. Employers should be careful to ensure that the bond will be readily cashable. These amendments effectively prevent that. It is particularly odd that amendments made by funders for their client Employers should insist on bonds in lieu of cash retention; and then undermine the value of those bonds.

Good Idea #2: A Timescale for the Engineer's Determination

The obligation on the Engineer to make determinations promptly is specified in clause 3.5. He has 28 days. The consequence of not making a determination in relation to a claim within 42 days is spelt out in clause 20.1: the claim may be treated as rejected and the matter may be referred to the dispute board. This is a welcome clarification: it was generally understood that silence could be treated as a rejection; but there was much room for argument as to the required length of the silence and the effect of a late determination.

Oddity #3: Contractor Receives Profit if Project Cancelled

It is odd that the MDBs should volunteer that Employers who cancel the project and terminate for convenience under clause 15.5 should have to compensate contractors for their lost profit as if the termination were a default.

The 1999 editions - and, I would imagine, the 2nd editions will do the same - require Employers to refund to Contractors their costs and pay for their demobilisation but they do not award profit. It was accepted that Contractors signing FIDIC contracts took the risk that their clients might cancel the project for one reason or another. An omission is a cancellation of part only of the project: however, here the Pink Book does not award lost profit on the omitted work.

Clause 16.4 no longer refers expressly to loss of profit but there can be little doubt that a right to be paid "the amount of any loss or damage suffered by the Contractor as a result of this termination" would include profit.

Good Idea #3: Time Limit for Employer's Claims

The Red Book imposes tough time-limits and draconian sanctions on Contractor claims; but imposes neither on the claims of Employers. It seems right and a little more balanced to impose a time-limit on the Employer's notices of claim. Even though there is no express sanction attached to a failure to notify, the 28-day obligation reduces the contrast between the regimes applying to Contractors and Employers.

Conclusion

Whether the Pink Book continues to a new edition or not, it has certainly produced some good ideas as well as some curiosities. Harmony may be desirable in general but perhaps not when it comes to standard forms.

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