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FIDIC: GOING FOR GOLD – the FIDIC Gold Book and the race for first place in dispute resolution!

Introduction

The Gold Book - a quick Introduction!

This article is not about the number of gold medals Usain

Bolt displays in his medal cabinet since being regarded as the worlds fastest runner but rather a preview into the dispute resolution provisions of the FIDIC Gold book and how these provisions differ in comparison to the more commonly used Red, Yellow and Silver Books.

Most of those in the construction realm are *au fait* with the Red, Yellow and Silver Books which form part of the rainbow suite of the FIDIC forms of contract, however lesser used is the Conditions of Contract for Design Build and Operate Projects which was published by FIDIC in 2008 (the Gold Book). This form of contract creates the opportunity for a contractor to have two very distinct roles within an overarching contractual framework. This book is the baby sister of the 1999 FIDIC suite of Contracts and borne into fruition some nine years later it gave the FIDIC drafting team an opportunity for revision, and we would suggest, improvement to the 1999

The dispute resolution provisions of the FIDIC Gold book and how these provisions differ in comparison to the more commonly used Red, Yellow and Silver Books

forms. The Gold book is intended for use where the employer plans on employing a single contractor to design, build and subsequently operate a construction project for a considerable period of time (usually twenty years), where the contractor has no responsibility for the financing or ultimate financial success of the project and the project is a “greenfield” project.

The Gold book creates two periods within the overall contractual time frame. Firstly the design and build period, which runs up until issuance of the Commissioning Certificate by the Employer’s

Representative (at which stage all design and build obligations are fulfilled and all tests on completion have been passed) and signifies the commencement of the Operation Service Period. What this form of contract envisions is a scenario similar to where parties would use the FIDIC Yellow Book in conjunction with an Operation and Maintenance Agreement- in theory. However, in practice there are some differences between this Gold Book and its slightly older siblings, most specifically insofar as the resolution of disputes is concerned.

Time barring

Contractor’s claims being time barred is always a hot topic and any amendment to the general dispute resolution provisions is always of interest to all parties concerned. At first glance clause 20.1 of the Gold Book has had an overhaul and has been

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reformatted, what we now see are sub sections titled 20.1(a) Notices, 20.1(b) Contemporary Records, 20.1(c) Details and Particulars and 20.1(d) Employer's Representative's Response. And whilst the substances of these sub sections do flow from that found in the Red, Yellow and Silver Books, of interest is the change in clause 20.1 (a) Notices, which affects time barring.

Again, all those within the realm of construction are well versed and aware of the time bar hurdles. This is one of the instances in Clause 20 where the Gold Book differs. Bearing in mind that Sub-Clause 20.1(a) only applies to extensions of time and added costs under the design and build portion of the contract, the Sub-Clause allows representations to be made in respect of what otherwise would be time barred claims to the dispute adjudication board for consideration, and this is where the Gold Book may well cross the finish line in first place for Contractors. The Sub-Clause states that where the contractor fails to give notice of its claim within the usual period of 28 days (as seen in the other FIDIC forms) the contractor will not be entitled to an extension of time for the design and build or additional payment but goes further to state as follows: *“however, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers that, in all the circumstances, it is fair and reasonable that the late submission be accepted, the DAB shall have the authority to overrule the relevant 28-day limit, and, if it so decides, it shall advise the parties accordingly”*. If the DAB finds the late notification of the claim to be acceptable in the circumstances, the Contractor is entitled to proceed with its claim in accordance with the remainder of provisions of the Sub-Clause.

This is a dramatic change to the very strict provision of Sub-Clause 20.1 in the FIDIC Red, Yellow and Silver Books which provide that if the contractor fails to give notice of his claim within 28 days after the contractor became aware, or should have become aware of the event or circumstance, the contractor shall not be entitled to an extension of time nor any additional payment, this being an outright suspensive condition to submitting a claim, which suspensive condition is contractually incapable of waiver or relaxation.

The new approach of the Gold Book is then translated further into Sub- Clause 20.1(c) “Details and Particulars”, where the 42 day period within which to submit a detailed claim takes into consideration the ability of the DAB to accept a late notification of a claim by stating that *“within 42 days after the Contractor became aware (or should have become aware) of the event of circumstance giving rise to the claim, or within such other period as may be allowed by the DAB under paragraph (a) above, or proposed by the Contractor and approved by the Employer's Representative the Contractor shall send to the Employer's Representative a fully detailed claim”*.

What these amendments do is create an opportunity for the allowance of late notified or otherwise time barred claims where it is objectively reasonable to do so, perhaps to the dismay of the Employers out there. This change is however in line with the principles of natural justice (more specifically the principle of *audi alterem partem*) and those entrenched in our jurisprudence (as time bars are already narrowly interpreted by the South African Courts due to the limitations they place on a parties right to redress). Perhaps then the amendment to Sub-Clause 20.1 is a pace maker rather than a record breaker in the dispute resolution race.

Avoidance of Disputes

The concept of dispute avoidance is introduced as Sub- Clause 20.5, and no this does not replace the provisions of Sub-Clause 20.5 (Amicable Settlement) of the other contract forms, **it is in addition thereto**.

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This clause brings into the contract the concept of what can be compared to a recommendation handed down by a dispute review board (being a non-binding recommendation that may or may not be adopted by the parties).

Bearing in mind that the Gold Book envisions the DAB to be appointed for the duration of the Design and Build period, the allowance made by this provision creates a situation which is similar to what may well already take place under other contract forms where a standing DAB is appointed, namely where non-binding advice is sought from the DAB members during DAB site visits or discussions.

What the clause sets out is that if the parties so agree they may jointly submit a matter to the DAB in writing with a request to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the parties and goes further to state that such assistance may take place during any meetings, site visit or otherwise. The parties are not bound to act upon the advice of the DAB and the DAB is not bound in any future dispute process to any views formed during the informal process.

This clause follows the trend to avoid a dispute resolution process where possible and resolve disputes informally between the parties, again opting for fairness and sensibility over a straight win or lose.

Crossing the Finish Line

What we can see through the changes brought into the Gold Book by the FIDIC drafters is greater sense of fairness and equity and the adoption of a more collaborative approach to dispute resolution and the fostering of a win-win outcome. So, where practical to the specifics of the project at hand, our advice from a dispute resolution perspective would be to go for Gold!

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