In this issue we consider and analyse the responses we have received to our recent survey on the use of the FIDIC standard form of contract in the Middle East.

We proposed questions regarding the effectiveness of the FIDIC suite, whether or not it promotes proactive project management and asked respondents to propose the key areas which ought to be changed.

FIDIC in the Middle East – the views of the market

The FIDIC suite is the most common standard form suite of contracts used by the construction industry in the Middle East. FIDIC is in the process of redrafting and updating the suite, and a new suite is expected to be published either later this year or early in 2016. In our recent survey, we asked market participants about the use of FIDIC and its effectiveness, as well as how key aspects of the contract could be improved for use in the Middle East.

Our briefing last month, Moving with the times – Updating FIDIC and the move towards a project delivery focus, looked at the key areas for change in the FIDIC suite. The debate at the briefing and the responses to our survey demonstrate that a number of changes to the FIDIC form would be welcome in order for the contract to operate more effectively in the region.

Survey respondents and general observations

The majority of respondents to the survey were either consultants or contractors. A few respondents were employers or owners. There was a diverse range of projects being delivered by our respondents under the FIDIC suite, with the main sectors being property development, retail and hotel sectors. Almost all projects on which FIDIC contracts were used were civils oriented (50%) or a mixture of civils and process (47%).

Almost all respondents stated that in their experience, the FIDIC form is amended to some extent. Some respondents noted that these amendments tended to be project specific, although almost three quarters of market participants witnessed the FIDIC contract being ‘heavily’ (55%) or ‘very heavily’ (15%) amended.

This suggests that there has been a departure in this region from the use of the FIDIC suite as intended by FIDIC. FIDIC, and indeed most drafters of standard form contracts, presuppose the use of their contracts with minimal amendments. This represents part of the benefit of using a standard form suite, offering a balanced risk allocation and an administration process which becomes familiar and common to the market. It also allows the development of a ‘jurisprudence’ around the resolution of disputes under a standard form suite. The consequence of heavy amendment to the FIDIC suite is that contracts can differ significantly from project to project, depriving the market of some of this jurisprudential development.

How can proactive project management be achieved?

- Increased dialogue between the parties: 39%
- Early warning procedures: 33%
- Detailed/prescriptive programming requirements: 28%

Design responsibility

Our respondents stated that on most of their FIDIC projects, around 75%, there was an element of contractor design. Of these, 50% were primarily employer designed projects with some contractor design elements and 20% were full contractor design and build/turnkey. Only 20% of projects where FIDIC was used involved solely employer provided design.

The significant percentage of projects requiring contractor design is not problematic in itself, but may become problematic where the incorrect FIDIC form is utilised. The prevalence of the FIDIC ‘Red Book’ in the Middle East, often used when a Yellow Book or Silver Book would be more appropriate, can create difficulties for contractors in light of the imprecise nature of the risk allocation for design. The FIDIC Red Book is intended to be primarily used on ‘construct only’ projects, but also provides that the contractor shall ‘design (to the extent specified in the Contract)’. Over half of our survey respondents noted that this provision was problematic, and three quarters felt that the general concept and drafting around issues of ‘design’ in the Red Book could be improved.

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The references to ‘design’ in the Red Book create a number of significant potential problems for contractors. First, there is a risk of incremental scope creep whereby the contractor is instructed to perform variations with design requirements. Not only may this be outside the necessary expertise of the contractor but it may also create insurance difficulties (or costs) for a contractor in circumstances where it does not hold any existing professional indemnity insurance. Another potential problem for contractors is the risk of the employer seeking to allocate blame to the contractor in the event of a design failure, especially where the contractor may have worked up an existing design or completed shop drawings or installation design works. It is clear that the drafting around design in the Red Book could be improved.

The move towards a project delivery focus

FIDIC have indicated that forthcoming amendments to the suite are likely to include a more proactive approach to both project management and claims and dispute resolution. 90% of respondents agreed with this approach, with most considering that the FIDIC conditions could be improved by providing the opportunity for increased dialogue between the parties. Many respondents suggested that more proactive project management could be achieved by improving early warning procedures or through the use of detailed and more prescriptive programming requirements.

A project delivery focus in contracting is long overdue. A number of respondents noted that claims management should be much more prescriptive with options for delay costs and availability charges and that advisors to the public sector and government procurers should do more to shift thinking to collaborative delivery mechanisms.

90% of respondents agreed that the FIDIC suite would be more useful if it included a different range of potential pricing options.

Claims, variations and the role of the Engineer

There is scope for improvement with the claims procedure in the FIDIC contract, for both time and money. Most survey respondents considered that it could be improved simply by clarifying the procedure. There was a varied response on the issue of whether the 28 day time requirement for the initial notification of claims by the contractor under clause 20.1 of the Red Book is sufficient. Half of the respondents stated that it was appropriate and that no change to this is needed, however almost as many (40%) stated that the time limit is too short and more time is needed.

In terms of the time for the engineer to make a determination however, the majority of respondents (80%) agreed with the idea of a long stop date; a fixed time within which the engineer should make a decision. This is clearly a major issue for contractors, as the failure of the engineer to provide a timely response to claims and notifications renders it difficult for a contractor to manage their own programme and resources and to know the extent of their potential exposure to liquidated damages or costs of acceleration. Whether or not delayed responses to claims is strategic, it appears that the dialogue between parties and the efficiency of project delivery could be improved if engineers were required to provide determinations by a long stop date, with the contractual obligation resting on the employer to ensure compliance by the engineer with this requirement.

The issue on which the greatest majority of respondents considered there should be improvement was the variations regime under the Red Book. 90% of respondents considered that there should be greater clarity on what constitutes a variation in circumstances where no formal variation has been issued by the employer, but there has been a change in the scope of the works.

DABs and dispute resolution

Some respondents commented that an appropriate claims resolution ‘culture’ is necessary in order to make DABs or other forms of alternative dispute resolution effective, but that this is not prevalent in the Middle East. Others suggested that DABs should be adopted as the failure to promptly address disputes ties up valuable resources with a negative ‘knock-on’ effect elsewhere on the project, resulting in more disputes and an increasing inability to negotiate a resolution.

The reluctance of employers to utilise DABs was noted, with the FIDIC dispute resolution process typically amended to provide for negotiation followed by arbitration. Clearly the costs of maintaining a DAB is an impediment to their use, but we would suggest that they can provide efficiencies during the project and reduce the likelihood of complex and high cost arbitrations at the conclusion of projects. Accordingly, it may be that DABs represent a larger upfront or ongoing project cost, but can deliver costs savings by reducing the likelihood of complex and protracted arbitration at the end of a project.

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Going forward

What overall conclusions can we draw from market views? Clearly FIDIC has a comprehensive grip on the Middle East and is likely to remain the incumbent standard form of suite for some time to come. The market’s main focus appears to be on improving the project delivery aspects of FIDIC – clarifying and improving the design procedure for contractors, clarifying the variations regime so that it is more strictly adhered to, increasing the range of pricing options and generally improving the claims procedure for both time and money.

Many of these are issues which the FIDIC drafting committee is expected to address in the new edition of the suite. It will be interesting to see the changes that will be made and the extent to which new and proactive claims management procedures will be adopted on projects in the Middle East.

“Your main focus is on improving the project delivery aspects of FIDIC.”
Jed Savager, Senior Associate

“We consider that the FIDIC conditions could be improved by the opportunity for increased dialogue between the parties.”
William Marshall, Senior Associate

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