The new *White Book*: better

Fidic has just released the latest edition of the *White Book*, which is much used in the region. STUART JORDAN* discusses the criticisms of the existing version and the amendments to the new one.

WITHOUT too much fanfare, Fidic (Fédération Internationale Des Ingénieurs-Conseils – International Federation of Consulting Engineers) has just published a new edition of its main consultancy agreement. This is the "Client/Consultant Model Services Agreement", better known as the *White Book.*

The existing version – Fourth Edition 2006 – is heavily used in the Middle East (although usually with amendments), so this new publication will be read with interest, I hope.

The enduring popularity of the *White Book* can be explained by its connection to the other Fidic forms of contract – particularly the construction main contracts which have such a large market share in the Gulf region. By choosing all of the project contracts from one publishing body, such as Fidic, parties might be forgiven for assuming that they will achieve a seamless, coordinated risk profile in which all risks are picked up by one or other of the consultants and contractors. This was never the case, and most project developers (and their advisers) know to consider individually how to place each project risk.

I think that the industry has been hoping for an improved product in this new publication. Apart from the coordination issue, the *White Book* Fourth Edition has attracted a fair amount of criticism for its perceived disconnection from normal commercial market positions. Specifically, this includes a looseness and lack of coverage of key points, especially provisions which are traditionally required on externally-funded projects. Here are some of the issues which we would routinely want to address in the Fourth Edition conditions:

• The consultant's entitlement to more time and money due to any law change;
• Inability of the client to assign its full interest in the appointment;
• Lack of certainty in relation to additional information which the consultant may later require from the client;
• The qualification that the consultant, in relation to all obligations, shall be required only to exercise reasonable skill, care and diligence. This may be an appropriate standard for the carrying out of the services but it is obviously not acceptable in relation to obligations which need to be met without qualification, such as compliance with law and anti-corruption provisions;
• Also, the standard of skill, care and diligence is not specific to any particular consultant specialism, or size and type of project. This is the core provision in any appointment and it is not precise enough;
• Lack of client entitlement to instruct variations to the services and lack of means to value any variations where the parties fail to value them by agreement;

Jordan ... The new *White Book* has improvements.

• Undefined "*force majeure*" events and the consultant's entitlement to suspend services where it is "irresponsible" (but not impossible) to continue;
• Exclusion of all consultant liability outside of breach of the obligation to exercise reasonable skill, care and diligence;
• A "net contribution clause" limiting the consultant's liability where that liability (for any given loss or damage) is shared with third parties – for instance, contractors or other consultants; and
• An open-ended and one-way indemnity from the client to the consultant against all claims by third parties arising in connection with the appointment – which would cover every possible third-party liability and for all time!

So how much better is the Fifth Edition? Industry reaction has been generally positive, and I agree it is an improvement. Some of the main changes are:

• The required standard of skill and care refers to projects of similar size and scope – bringing this form into line with the normal position;
• The intellectual property licence is conditional on making payments due. This is not usually acceptable to clients as it creates an undue lever whenever there is a dispute about fees. Clients need to pay whatever is required but if there is uncertainty about that, this should not mean uncertainty about the ability to use the designs;
• There are provisions for valuation of variations although there still is not an unfettered right to instruct variations;
• There are mutual obligations to act in good faith. Since this is strongly implied in the Gulf in any event, parties might prefer not to add an express provision in case it creates uncertainty; and
• There is an exclusion of liability for loss of profits and revenue plus "consequential losses" such as loss of contract. These are precisely the most likely types of loss for a commercial client where a project is late completing or has design defects.

Overall, the new form is improved, partly due to being more detailed and so covering more ground. I was surprised, however, that the changes are mostly not in the direction of the more client-friendly market norms which we see in most bespoke appointments. Indeed, some of the changes are in the other direction.

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