ICCP

CONSTRUCTION CLINIC

Sub-Clause 3.5 (Determinations) of the 1999 FIDIC Red Book and 2017 FIDIC Red Book Updates

Presented by

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TODAY'S WEBINAR

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- FIDIC 2017 Updates
- FIDIC 2022 Reprint Updates

FIDIC 2017 Updates

- “Now Sub-Clause 3.7 (was 3.5)
- The Engineer shall act “neutrally” and “… shall not be deemed to act for the Employer”.
- Neutrally is not defined.
- Consultation (Sub-Clause 3.7.1): consult promptly jointly to endeavour to encourage Parties to agreement: and write it down and the Parties to sign within 42 days or proceed to make a determination.
- Make a fair determination taking account of all relevant circumstances within 42 days.
- If the Engineer does not issue a Notice of agreement or determination:
  - the claim is deemed rejected; or
  - the “matter” is deemed to be a Dispute and may be referred to the DAB (no NOD is required).”

- “Agreement and determination under Sub-Clause 3.7 also applies to:
  - measurement of the Works;
  - rates and prices;
  - Variations;
  - EOT and adjustments of the Contract price and Schedule of Payments;
  - Daywork;
  - amount to be paid for plant and materials off Site;
  - amounts not certified in an IPC; and
  - disagreement as to the cause of a defect.”

Fenwick Elliott

- **“Sub-Clause 3.7: T**he Engineer’s role in dealing with the Parties’ claims, and with other matters under the contract, is set out in greater detail using a step-by-step procedure with time limits, under what is now Sub-Clause 3.7 (Sub-Clause 3.5 under the 1999 FIDIC Contracts):
  - Consultation with the Parties to encourage them to reach agreement
  - Determination in the absence of agreement.
  - Effect of the agreement or determination.
  - Dissatisfaction with the determination.”

  Fenwick Elliott

“In order to promote what is expected of the Engineer under this Sub-Clause, namely that he/she deals with the Parties even-handedly in trying to broker an agreement between the Parties and, if there is no agreement in coming to a “fair determination” of the matter or claim, it is now expressly stated what was implied under the 1999 Red Book: the Engineer is required to “act neutrally between the Parties” and “not be deemed to act for the Employer”. To avoid the problems that many users have reported to FIDIC in recent years, it is now also expressly stated (under Sub-Clause 3.2) that there shall be no requirement for the Engineer to obtain the Employer’s consent before exercising his/her authority under Sub-Clause 3.7.”

Fenwick Elliott

FIDIC 2022 Reprint Updates

- “The 2022 Reprints have introduced a distinction between a ‘matter to be agreed and determined’ and a ‘Claim’. This has been done by excluding a ‘matter to be agreed or determined’ from the definition of a ‘Claim’ and instead listing specific sub-clauses that refer to a ‘matter to be agreed or determined’ at Sub-Clause 3.7(a) of the Red Book.

- With the introduction of a distinction between Claim and a ‘matter to be agreed or determined’, definition of Dispute now includes a claim with a capital C and ‘other matters to be agreed and determined’. The new definition now also requires a party to give a Notice of Dissatisfaction (NOD) with respect to an Engineer's determination for it to constitute a Dispute. So, unless an express exception applies an aggrieved party can no longer refer a Dispute directly to the DAAB without first issuing an NOD”.

- Clyde & Co.

QUESTIONS

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