

FIDIC Middle East Contract Users' Conference

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Introducing the New Yellow Sub-Contract

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Introduction

- In 1994, FIDIC published its first Subcontract, the FIDIC Conditions of Subcontract for Works of Civil Engineering Construction and was intended to be used with the Fourth Edition of the Red Book, published first in 1987 and then updated in 1992.
- When the Red Book was replaced in 1999, a need was created for a matching Subcontract. This did not materialise until 2011.





Introduction

- In 2011, the Subcontract that had been used in conjunction with the 1999 Red Book mirrored the number of Clauses in the Main Contract, with 20 Clauses and included:
 - FIDIC Conditions of Subcontract for Construction – Clauses 1 to 20;
 - 35 pages of Guidance Notes/Alternative Clauses;





Introduction

- **Six Flow Charts:**
 - **Typical sequence of Principal Events during Subcontract for Constructions;**
 - **Typical sequence of Subcontract Payment Events envisaged in Clause 14; &**
 - **Typical sequence of Subcontract Dispute Events envisaged in Clause 20.**



Introduction

- **Seven Annexes:**

- Annex A: Particulars of the Main Contract;
- Annex B: Scope of Subcontract Works and Schedule of Subcontract Documents;
- Annex C: Incentive(s) for Early Completion, Taking-Over by the Contractor, and Subcontract Bill of Quantities (***not in the YB***) and/or schedule of prices (if any);





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Introduction

- Annex D: Equipment, Temporary Works, Facilities, and Free-Issue Materials to be Provided by the Contractor;
- Annex E: Insurances;
- Annex F: Subcontract Programme; &
- Annex G: Other Items.
- Four sample Forms.





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Principles behind the Subcontract

1. Back to back;
2. The Subcontractor is intended to take on board the duties and obligations of the Contractor under the Main Contract;
3. Dispute Resolution provisions may be linked with the Main Contract in matters concerning both the Contractor and the Subcontractor;
4. Pay-when-Paid





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The principle of “pay when paid”, and not “pay if paid”

- A pay-if-paid clause makes payment by an Employer “E” to a Main Contractor “MC”, a condition precedent so MC’s obligation to pay a Subcontractor “SC” is contingent on MC being paid by the E, i.e., MC would not have a contractual obligation to pay its SC.
- A pay-when-paid clause: MC has no obligation to pay until he receives payment, but MC is obliged to pay in the end by a certain date, see Sub-C 14.8.





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The principle of “pay when paid”, and not “pay if paid”

- Accordingly, even in the event of an E's non-payment, a MC would still have an obligation to pay its SC after a reasonable time.
- Pay-if-paid provisions are not favoured by the courts in various jurisdictions and rule such clauses as unenforceable, because potentially substantial credit risks could be unintentionally shifted to an unwary SC.





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The Yellow Book Subcontract of 2019

- 8 years after the publication of the Red Book Subcontract, the Yellow Book Subcontract was produced. (This was due to the fact that the 2017 Major Forms of Contract were being drafted.)
- The YBSC is based on the RBSC, but there were necessary changes to reflect the differences between the Yellow and Red Books.





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The Yellow Book Subcontract of 2019

- These differences are:
 - Clause 5 was changed from “**Assignment of the Subcontract and Subcontracting**” to “**Subcontract Design**”;
 - Clause 11 remained as “**Defects Liability**”, but some of the content is different; and
 - Clause 12 of RB dealt with “**Measurement and Evaluation**”, whilst in the YB, it dealt with “**Subcontract Tests after Completion**”.





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The Yellow Book Subcontract of 2019

- Otherwise, the structure of the YBSC is the same as the RBSC.
- The title is, of course, different: ***Conditions of Subcontract for Plant and Design Build.***
- Other differences include some minor changes in Clause 20, ***Notices, Subcontractor's Claims and Disputes,*** and Clause 14, ***Subcontract Price and Payment.***





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The Yellow Book Subcontract of 2019

- There have also been changes and additions made, starting with Clause 1 “***Definitions and Interpretation***” and continuing with the additional provisions that have been added to Sub-Clauses 3.5, 4.1, 4.2, 7.6, 8.3, 8.4, 9.1, 10.1, 10.2, 11.1, 13.1, 13.2, 14.1, 14.3, 14.4, 14.7, 14.8, 17.1, 17.2, 17.3 and 19.1.





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Issues to watch for in the Yellow Book Subcontract of 2019

- Some of the issues that one should look out for in the YBSC are:
 - SC 2.2 deals with the compliance of the Subcontract with the Main Contract and makes the Subcontractor implicitly responsible for the Contractor's duties under the Main Contract, unless these obligations are specifically excluded. There are 11 such obligations.





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Issues to watch for in the Yellow Book Subcontract of 2019

- SC 4.1 defines the Subcontractor's design obligations such that the Works shall be fit for purpose when finished, as defined in the Subcontract Requirements.
- SC 8.3 requires the Subcontractor to submit a detailed programme to the Contractor within 21 days of receipt of the Contractor's Letter of Acceptance or the Contractor's programme submitted under the Main Contract, whichever date is later. This programme shall become the initial Subcontract Programme in accordance with Annex F, Part A.





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Issues to watch for in the Yellow Book Subcontract of 2019

Annex F shall apply to the programming of the Subcontract Works and the Subcontract Programme shall be defined therein.

If progress is too slow to complete the Subcontract Works within the Subcontract Time for Completion or progress has fallen behind the Subcontract Programme, then the Contractor may issue an Instruction requiring the Subcontractor to submit an updated programme, describing the methods that it





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Issues to watch for in the Yellow Book Subcontract of 2019

proposes to implement in order to expedite the progress and complete the Works within the Subcontract Time for Completion. The Subcontractor shall be responsible for covering the cost of any increase in working hours and/or in the numbers of Personnel. If the Contractor incurs any additional cost as a result of the revised methods, it shall be entitled to deduct this cost from the Subcontract Price.





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Issues to watch for in the Yellow Book Subcontract of 2019

The Contractor shall be entitled to rely on the Subcontract Programme while co-ordinating the Main Works and shall give the Subcontractor all reasonable co-operation and assistance in order that he may progress the Subcontract Works as required by the Programme.

Annex F contains the guidelines for preparing the Initial Subcontract Programme and those for updating that Programme. These include details required to be





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Issues to watch for in the Yellow Book Subcontract of 2019

established beyond what is required under the Main Contract, including 17 items that need to be incorporated, including the critical path(s) and sufficient details of the Subcontractor's resource requirements, i.e. manpower, work rates, plant, equipment and materials, etc. for each work activity. The programme should be flexible and allow for interfacing of the Subcontractor's activities with the Contractor and any other contractors on site.





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Issues to watch for in the Yellow Book Subcontract of 2019

- SC 14.6(b) and 14.7(b) provide for pay-when-paid, which entail that payment against the Subcontractor's monthly interim payment applications will be conditional upon the Contractor receiving payment under the Main Contract. For jurisdictions where pay-when-paid provisions are unenforceable, alternative wording can be used in the Particular Conditions.



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- SC 18.2 deals with the insurances to be issued by the Subcontractor in the names of the employer, the contractor and the Subcontractor, as stated in Annex E. Annex E is divided into 3 sections: the insurances to be effected by the Subcontractor; those to be effected by the Contractor under the Main Contract that relate to the Subcontract; and those to be effected by the Employer under the Main Contract that relate to the Subcontract.





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SC 18.2 further states that the Subcontractor shall be entitled to recover from the Contractor any amounts recoverable by the Subcontractor should the Employer fail to effect and keep in force his insurances, which the Contractor can then recover from the Employer. If the loss is significant, then this may cause the Contractor problems, so it is important that the Contractor ensures the Employer effects the insurances he is responsible for.





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Issues to watch for in the Yellow Book Subcontract of 2019

- Clause 20 provides that the YBSC requires the appointment of a DAB. As stated in the Guidance Notes for the preparation of the Particular Conditions, this Clause allows for the resolution of Subcontract disputes by a DAB, followed by arbitration if any party is dissatisfied with the DAB's decision. This Clause also provides for circumstances where the Contractor being of the opinion that a Subcontract dispute involves issues that are the subject under the Main Contract





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Issues to watch for in the Yellow Book Subcontract of 2019

either party's entitlement to refer the dispute to the Subcontract DAB is deferred for 140 days or any period agreed. This suspension gives the Contractor time to pursue the resolution of his dispute under the Main Contract and to attempt settlement of the Subcontractor dispute before the resolution procedure under the Subcontract is initiated.



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It takes account of 28 days for the Main Contract DAB to be appointed, 84 days for their decision and 28 days for the serving of a notice of dissatisfaction, totalling 140 days. Unless this Clause 20 is amended by the Particular Conditions to expressly provide for the such, the Subcontractor is not bound by any decision of the Main Contract DAB and/or any award(s) issued under the Main Contract.





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SC 20.1 requires the Subcontractor to provide notice and keep records as is done by the Contractor under the Main Contract.

SC 20.2 deals with the Subcontractor's claims and requires the Contractor to consult with the Subcontractor to attempt to reach agreement. If this fails, SC 20.2 provides the deadlines within which the Main Contractor makes a decision, with reasons, re each of the Subcontractor's claims,





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notifies it to the Subcontractor and makes payment, if any, and grants an extension to the Subcontract Time for Completion.

SC 20.3 deals with the Subcontractor's failure to comply with SCs 20.1 and 20.2, whilst SC 20.4 deals with disputes under the Subcontract, where either party may give notice of the dispute to the other party.



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SC 20.5 deals with the appointment of the Subcontract DAB and SC 20.6 provides for the procedure relating to obtaining the DAB's decision.

SC 20.7 deals with Arbitration.

The provisions of Clause 20 are complex, as they deal with a number of possibilities and alternatives, including whether or not the Subcontractor's claims are related to the Main Contract, whether they are to





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be dealt with by the Main Contractor or submitted to the Subcontract DAB or submitted to the Main Contract DAB. Understanding the procedure to be followed in dealing with these claims and any disputes that may arise as a result is helped by the last five Flow Charts provided at the beginning of the Conditions.



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Thank you for listening.

