

FIDIC Conditions 2017 - a step forward, or a heavier workload?

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The revised FIDIC suite 2017

- Naming and layout of forms largely unchanged
- Risk allocation similar – minor adjustments
- Main change: more detailed project management processes introduced, leading to increased length:
 - 44 additional pages in the printed version (106 instead of 62) in Red Book
 - 50% more words
 - 21 instead of 20 clauses
- New time limits, notification obligations, "deeming" provisions, administrative requirements, enhanced role of Engineer

Main areas of change

- Time for performance
- Payment
- Variations
- Defects
- Limitation of Liability (LOL)
- Termination
- Claims and Disputes (Bernd Ehle)
- Miscellaneous

Time for performance - Programme (1)

- More detailed requirements as to what the programme must include - 11 matters to cover, as against 3 before, including:
 - Commencement Date and Time(s) for Completion
 - Date(s) for right of access/possession of Site
 - Order of the performance of the Works
 - Review periods
 - Sequence and timing of tests/inspections
 - Sequence and timing of remedial work
 - All activities, with logic links, 'float' and 'critical path(s)' to be shown
 - Delivery dates of Plant and Materials
 - Supporting report explaining the above, and how delays will be tackled

Time for performance - Programme (2)

- If no Notice of Engineer to the contrary within such time, the submitted programme becomes the Programme, and is binding (??)

Time for performance – EOT - Concurrent Delay

- New provision on concurrent delay:
 - *"If a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Special Provisions (if not stated, as appropriate taking due regard of all relevant circumstances)" (Cl. 8.5)*

[Concurrent delay frequently argued over in a common law context; seems to be less contentious in civil law]

Payment

- 11 pages of procedure instead of 6.5 pages
- Closer regulation of the Interim Payment process:
 - Monthly applications for payment (14.3)
 - Interim Payment Certificate must be issued each month (unless minimum amount not reached)
 - No amount in the application may be withheld unless
 - any work or materials not in accordance with Contract (cost may be withheld)
 - Any 'significant error' in Contractor's application or supporting documents (14.6.2)
- Contractor's Final Statement is conclusive as to Contractor's outstanding claims; Final Payment Certificate is binding unless objection within 56 days

Variations

- Wider rights of Contractor to object to a Variation (13.1):
 - the varied work was 'Unforeseeable' having regard to the scope and nature of the Works described in the Specification/Employer's Requirements (i.e. not reasonably foreseeable by an experienced contractor at the Base Date – 28 days before latest date for submission of the Tender)
 - the varied work 'may' adversely affect the Contractor's obligation to complete the Works so that they shall be fit for the purpose(s) for which they are intended [Yellow and Silver Books only]
- Omission of work from the Contractor's scope so that it can be given to another contractor is now a possibility, provided the parties agree
 - in such cases, Contractor is entitled to the profit he loses as a result of the scope removal (13.3.1)
- Where Employer requests a Variation proposal, but it does not proceed, Contractor now entitled to the cost of producing the proposal (13.3.2)

Defects - "Fitness for Purpose" indemnity (1)

- 1999 Yellow Book already contained a Fitness For Purpose obligation (4.1).
- 2016 draft proposed a Fitness For Purpose indemnity (17.4) and initially it was to be carved-out of Contractor's exclusion of consequential loss etc. AND Contractor's liability cap (17.6).
- 2017 Yellow Book makes the Fitness For Purpose indemnity subject to the exclusion of consequential loss and the liability cap (1.15) following pressure from contractor groups, including OCAJI.
- "The purpose" can be stated in Employer's Requirements (4.1); if no purpose is stated, then it is the "ordinary purpose(s)" for which the Works/Section/Part is used.

Defects - "Fitness for Purpose" indemnity (2)

- However, some concerns about the indemnity remain. For example:
 - It seems to continue in effect after the end of the Defects Notification Period.
 - Limitation period for bringing indemnity claims: time starts to run from when the indemnified loss has been established (in contrast to a claim for breach of contract, when it starts to run at the time of the breach).
 - Availability of Professional Indemnity insurance covering fitness for purpose? (now expressly required under 19.2.3(b))
 - Possibility of monetary claim by Employer under the indemnity, without the Contractor having the opportunity to remedy the issue under the "defects" procedure in 7.5/11.1?

Defects – end of liability period for Plant?

- FIDIC 1999 forms do not clearly state that the Contractor has no liability to remedy defects arising after the end of the Defects Notification Period, so it will continue for the statutory limitation period.
- FIDIC 2017 forms have a new limitation in point of time for liability for Plant:
 - No liability where defects/damage "occurs" more than two years after end of Defects Notification Period for the Plant (11.10 – also in Silver)
 - But – meaning of "occurs"?
- The additional two years still too long for many Plant suppliers?

Defects – other comments

- Sub-clause 11.3 states that no Defects Notification Period may be extended for more than 2 years (same concept as 1999 version).
- Does this also cover the so-called "re-warranty" period for a part that has been repaired/replaced during the Defects Notification Period?

Limitation of liability – carve out for "gross negligence" (1)

- 1999 Yellow Book had carve-outs for "fraud, deliberate default or reckless misconduct" (17.6).
- Where the governing law of the contract is a civil law system, there would be an implied carve-out for gross negligence (e.g. Germany, France, Egypt, UAE etc.). It is not possible to limit gross negligence liability under those laws.
- In common law settings, Owners/Sponsors often push for gross negligence to be carved-out from Contractor's LOL and exclusions of consequential loss.
- Now FIDIC seems to be reflecting market practice by adding "gross negligence" as a carve-out in 1.15.

Limitation of liability – carve out for "gross negligence" (2)

- Definition of gross negligence in English Law?
 - Not clear in the past but becoming clearer as gross negligence is increasingly used in commercial contract wording.
 - Example: "Gross negligence is ... something more fundamental than failure to exercise proper skill and/or care constituting negligence... gross negligence seems to me ... not only conduct undertaken with actual appreciation of the risks involved, but also **serious disregard of or indifference to an 'obvious' risk.**" Red Sea Tankers v Papachristidis [1997] 2 Lloyd's Rep 547
 - But some uncertainty remains: see the old cases, where "gross negligence" was held to be "negligence with the addition of a vituperative epithet"

Limitation of liability - other comments (1)

- Limitation of Liability (LOL) has moved from 17.6 to 1.15 (1.14 in Silver) – greater prominence, but substance unchanged
- Considering the new carve-out of "gross negligence" has weakened Contractor's liability cap in 1.15, contractors may be pleased that FIDIC has not gone even further e.g. by carving-out "amounts recovered under insurance".
- Note that some Contractor indemnities are outside the LOL (eg. death/injury in 17.3, Intellectual Property in 17.4) but other indemnities are inside the LOL (eg. compliance with laws in 1.13(a), interference with public/roads in 4.14, import handling in 4.16, failure to maintain insurance 19.1).

Limitation of liability - other comments (2)

- FIDIC could have added some more carve-outs from the Clause 1.15 exclusion of consequential loss e.g. breach of confidentiality in 1.12, Employer indemnity obligations for wrongful bond call (4.2.2) and Employer indemnity for nominated subcontractor to which Contractor objected (4.5.1).
- Contractors may want to make the LOL wording clearer (e.g. expressly referring to "whether in tort ... etc) and list additional types of excluded loss to avoid doubt.

Termination

- Termination by Employer/suspension by Contractor (Cl.15.2.1/Cl. 16.1):
 - New pre-condition for exercise of Employer's right to terminate in case of Contractor's failure to comply with:
 - Notice to Correct;
 - agreement or determination under Cl. 3.7; or
 - decision of DAABand for exercise of Contractor's right to suspend work
 - In both cases the failure of the other Party must amount to a "material breach" of the Contract: otherwise termination/suspension cannot proceed.
- On a termination for convenience by Employer, Employer is now required to pay any loss of profit and other loss suffered by Contractor

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