



Mr
William Howard
Member of the Executive Committee
International Federation of
Consulting Engineers (FIDIC)
World Trade Center II - Geneva Airport
CH-1215 Geneva 15
SWITZERLAND

Berlin, Paris, Seoul, Tokyo, 25 January 2017

Special pre-release version of the FIDIC Yellow Book 2nd edition

Dear Mr. Howard,

We would like to bring the following important subject matter to your distinguished attention: CICA is the global construction industry umbrella representing a global turnover of US\$ 7 trillion and employing around 120 million employees on a global scale. EIC, ICAK and OCAJI are international contractors' associations whose member companies generate more than 60% of the annual international contracting value (according to ENR's ranking of the Top 250 International Contractors).

Our associations appreciate that, for many decades, the FIDIC standard forms of contract provided a sound basis for tendering and a sensible starting point for negotiations between employers and contractors. This was due to the fact that the FIDIC forms, notwithstanding certain criticisms, comprised the fundamental prerequisites for any standardised contract form: a fair and equitable risk-sharing between the employer and the contractor and clause wording leaving room for negotiations. This was partly due to the fact that the FIDIC "Red Book" First Edition in 1957 was jointly prepared by FIDIC and the European construction federation and that the Second and Third Editions of the FIDIC "Red Book" in 1969 and 1977 were approved and ratified by the regional federations of North America, Latin America, Europe and the Asia-Pacific region.

As of 1987, however, FIDIC took sole responsibility for the publication of most of its standard contract forms. With the notable exception of the FIDIC "Blue Book" for Dredging and Reclamation Work, FIDIC no longer endeavours obtaining contractors' consent prior to publication, but contractors' associations are merely invited to provide comments during the preparation of the FIDIC documents. It appears to be more than a coincidence, the risk profile of the two traditional FIDIC standard forms, the "Red and Yellow Books", has gradually changed to the detriment of contractors, e.g. by introducing an onerous fitness-for-purpose obligation and a time bar provision relating to contractor's claims.

In 1999, FIDIC decided – despite the objection of the international contractors' community – to publish a third major standard form of contract in which FIDIC intentionally departed from its traditional risk-sharing philosophy and placed the design and execution risk almost entirely on contractors. At the time, EIC warned FIDIC that clients world-wide, sometimes ill-advised, might not be willing to appreciate FIDIC's guidance to confine the use of the "Silver Book" to EPC type of projects. Since then international contractors in all parts of the world have observed and have severely suffered from a disturbing trend of indiscriminately "dumping" risk on contractors by referring to provisions borrowed from the FIDIC "Silver Book". We assume that such trend, which is neither in the interest of a project nor the parties involved, has not gone unnoticed by FIDIC.

The undersigned associations had hoped that FIDIC would seize the opportunity of the upcoming new 2017 edition of the FIDIC major contracts suite to restore the professional balance between the conflicting interests of those who commission projects, those who provide consulting services and those who at many different levels implement them, at least in the “Red & Yellow Books”. Bearing in mind that international contractors are most affected by the new edition, we had also trusted that FIDIC would seek the opportunity and allow for an in-depth discussion between (at least some of) the undersigned associations on some critical issues. We are saddened that various requests and proposals were declined by the FIDIC drafting team!

Based on the wording of the special pre-release version of the FIDIC “Yellow Book” 2nd edition, we would like to inform you as the responsible Member in FIDIC’s Executive Committee, that, after thorough and careful consideration, we have jointly come to opinion that FIDIC once again aggravates the Contractor’s position with respect to the proposed risk allocation and contract administration and, unfortunately, does not live up to the task of reflecting a good industry standard. Our concern cumulates in the following two main observations:

1. Increased risk for contractors

- a. The revised Clause 17 specifically lists the Employer’s Risks in Sub-Clause 17.1 whereas “*all the risks other than those listed under Sub-Clause 17.1*” shall be Contractor’s Risks according to Sub-Clause 17.2, thereby shifting to contractors all unidentified and residual risks. We doubt that the existence of an Employer’s commercial risk under Sub-Clause 17.1 lit. a) should depend on the question whether “*insurance is not generally or commercially available*”. The question of insurability should be separated from and should not affect the general risk allocation.
- b. The current draft obliges in Sub-Clause 17.7 the Contractor to “*...indemnify and hold harmless the Employer against all errors in the Contractor’s design of the Works and other professional services which result in the Works not being fit for the purpose(s) intended in accordance with Sub-Clause 4.1 [Contractor’s General Obligations] or result in any loss and/or damage for the Employer (including legal fees and expenses)*”. We consider this to be a wide-ranging remedy which would entitle the Employer to recover all its losses however unexpected or unforeseen they might be and irrespective as to whether or not the Employer has contributed by its own failings to the loss arising from an error in the Contractor’s design. The liability is unlimited as Sub-Clause 17.6 expressly excludes its limitations from applying to a claim under the indemnity in Sub-Clause 17.7. Therefore, the Contractor’s liability is unrestricted both as to the amount or the type of loss that may be claimed because neither the limitation on liability in Clause 17.6, nor the exclusion of liability for any indirect or consequential loss apply to the indemnity.
- c. In this context, the reference to fitness for purpose is confusing. It is probable that the Employer will assert that if any aspect of the Works is not fit for its intended purpose, whether or not that purpose was actually communicated to the Contractor, the Employer will be entitled to claim under the indemnity. We regret that FIDIC never replied to the qualification of the fitness for purpose obligation in Sub-Clause 4.1 proposed by EIC, i.e. “*To the extent that the Contract does not specify the Works, the Works... shall be, upon Take-Over, fit for the purpose(s) for which they are intended as defined and described in the Employer’s Requirements*”. We note that the “Blue Book” has incorporated such qualification and wonder why the “Yellow Book” hasn’t!

If the current wording is allowed to stand, it will impose a major additional risk upon international contractors and, in the case of major infrastructure works or plants, the losses that may be recovered could easily run into billions of euro and lead to insolvency, as claims under the indemnity will be uninsurable.

2. Increased bureaucracy in contract administration

- a. Contractors have to comply with a new time bar provision in Sub-Clause 20.2.4. In addition to the already existing time bar of 28 days related to the Notice of Claim in Sub-Clause 20.2.1, the submission of the “*particulars of the contractual and/or other basis of the Claim*” is now subject to a 42-days limit. Failing to submit the particulars within this time frame will eliminate the Contractor’s entitlement for an extension of time and/or additional payment. Such an additional time bar provision will only lead to an earlier involvement of claim consultants and lawyers.
- b. The obligation to submit a Notice of Dissatisfaction (“NOD”) within 28 days to express dissatisfaction with an Engineer’s Determinations (Sub-Clause 3.7.5) and the duty to commence a proceeding of the Dispute Avoidance/Adjudication Board (DAB) within another 28 days from the “NOD” (see Sub-Clause 21.4.1 lit. a) will dispose the parties of any opportunity to settle a dispute amicably.
- c. Further, Sub-Clause 21.4.4 provides that a party giving a “NOD” with the DAB’s decision must commence arbitration within 182 days failing which the Notice of Dissatisfaction “*shall be deemed to have lapsed and no longer be valid*”. This may lead to a series of practical problems and to an increase in the number of disputes referred to arbitration.
- d. Finally, we are concerned that the current problems with enforcement of DAB decisions remain. We would respectfully ask FIDIC to consider amending Sub-Clause 21.4.4 to make it a condition precedent for arbitration to issue of a “NOD” that the dissatisfied party has complied in all respects with the terms of the DAB decision.

If the current wording is allowed to stand, it will lead to an overly bureaucratic contract administration which will force the parties into time-consuming, costly and labour-intensive dispute resolution and arbitration alongside the ongoing project.

During the FIDIC International Users’ Conference 2016 in London, FIDIC representatives argued various times that some of the modifications mentioned above are already incorporated in the FIDIC “Gold Book”. The undersigned associations do not consider this to be a valid argument bearing in mind that the practical use of the FIDIC “Gold Book” in comparison with the “Red, Yellow and Silver Books” is rather limited. Furthermore, EIC has expressly objected to these amendments in its EIC Contractor’s Guide on the FIDIC “Gold Book” published in May 2009.

Recognising that clients and their legal advisers hardly ever use a “pure” FIDIC standard form of contract but will always try to twist the risk allocation at the expense of international contractors, the undersigned associations urgently call upon FIDIC to maintain an equitable FIDIC standard and to enter into a more elaborate dialogue with the international contractors’ community *before* FIDIC proceeds with the publication of the “Yellow Book” update. We would assume that the above-mentioned issues shall also arise with the updates of the FIDIC “Red & Silver Books”!

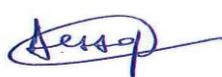
Yours sincerely,

CICA



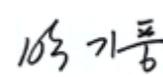
President

EIC



President

ICAK



President

OCAJI



President