International Federation of Consulting Engineers
The Global Voice of Consulting Engineers

Geneva, 19th April 2017

To the Presidents of CICA, EIC, ICAK and OCAJI

CICA – Confederation of International Contractors Associations
3, rue de Berri, 75008 Paris, France

EIC – European International Contractors
Kurfürstenstraße 129 D-10785 Berlin

ICAK – International Contractors Association of Korea
Sejong University Daegu 9 Road 42 (Seoso-mun-dong, Byeong building 13th floor)

OCAJI – Overseas Construction Association of Japan
7th Fl., Hatchobori Dai-ichi Seimei Bldg., 24-2,
Hatchobori 2-chome, Chuo-ku, Tokyo 104-0032, Japan

Re January 25, 2017 Letter Entitled Special Pre-release Version of the FIDIC Yellow Book 2nd Edition (Yellow Book Update)

Thank you again for your 25 January 2017 letter entitled Special pre-release version of the FIDIC Yellow Book 2nd edition (Yellow Book update). As you know, on 9 February, 2017, I sent Mr. Frank Kehlenbach an email responding to some of the items in your letter. This letter is a supplement to the February 9th email and contains more detailed information resulting from the ongoing process of recording and considering friendly review feedback (including that received from Mr. Kehlenbach on behalf of EIC) on drafts of the Yellow, Red and Silver Book updates. While a number of changes to the documents have been made since December, 2016 and some additional changes are anticipated, the process is far enough along that a further response to your letter is appropriate.

Once again, we at FIDIC wish to note that we very much value the relationship we have with CICA, EIC, ICIK, OCAJI and other professional organizations representing the construction industry. We especially value the annual meetings we have with some of these groups and, of course, we appreciate the time taken by so many people to review and comment on the FIDIC suite of contracts. All comments and suggestions we receive are carefully considered as we attempt to produce documents which reflect the climate we all practice in and which are reasonably fair to all parties. In this connection, we have received hundreds of comments from a diverse group of friendly reviewers and other interested parties. While our Task Groups, Contracts Committee (CC), the CC's Risk and Insurance Expert and CC's Legal Advisor have not agreed with all comments and suggestions, we have agreed with many of them and, as noted above, are making changes to the special pre-release version of the FIDIC Yellow Book (and corresponding changes to the Red Book and Silver Book updates) accordingly.

I should also note that many of the comments received have been positive (ie "good idea, this is an improvement" etc.). Indeed, we have found that a number of EIC's comments on the Red Book and Silver Book updates (in the friendly review feedback received from Mr. Kehlenbach on behalf of EIC) have been positive. For example, under Clause 3:

- sub-clause 3.6: "Although more restrictive, EIC considers these changes to be a step forward"
- sub-clause 3.7.1: "Sub-Clause 3.7.1 expands the meaning of 'consultation' and 'agreement' as those words appear in the 1999 edition Sub-Clause 3.5. EIC has reacted favorably to this addition …"
- sub-clause 3.7.4: "… EIC is inclined to view this Sub-Clause positively".

While I am personally not familiar with all the detail on how FIDIC produced contracts in the past, I surmise that the process was simpler and the number of authors, reviewers and other stakeholders fewer. Also, while we establish and strive to follow the CC's document drafting and review procedures, we do need to make adjustments on occasion, due to changes in the availability of volunteers, schedule difficulties and other reasons. In the end, we are thankful that so many qualified volunteers contribute to the writing and review of the documents.

In the third and fourth paragraphs of your letter you appear to imply that because FIDIC decided to change the processes we use to produce standard contracts and to "merely invite" contractor comments on the contracts we produce and because there has been misuse of clauses in the Silver Book, there has been significant transfer of risk to construction contractors. While the risk profile as well as onerous contracts terms and conditions has indeed made engineering and construction practice more challenging, the disturbing trends of increased risk, risk transfer and onerous contract terms have been going on for some time, and every entity involved in construction and engineering has contributed to the problem in a variety of ways. I also note that this disturbing trend is global, and is appearing to an equal extent in countries where the use of FIDIC contracts is rare or nonexistent. That said, we believe that FIDIC contracts continue to be fair to all parties. Without them, there is a high probability that the risk profiles to which engineers and construction contractors are exposed would be more severe than they currently are.

Regarding the specific points in your letter about increased risk to contractors, we have asked the CC's Expert on Risk and Insurance, Dr. Nael Bunni to carefully consider your concerns. His response (with a few edits from me) follows:

In paragraph 1a you state that, according to Sub-Clause 17.2 "***all the risks other than those listed under Sub-Clause 17.1***" shows a worsened risk apportionment for the contractor. This is incorrect. This situation has existed all along in the previous editions of the FIDIC Red Book. In the first three editions, the term "***Excepted Risks***" (Sub-Clause 20.2) was used. This was changed in the fourth edition (Sub-Clause 20.4) and subsequent documents to "***Employer's Risks***", but in each case all the risks belonged to the contractor except those allocated to the Employer. However, the term "***Employer's Risks***" did not include all the risks that belonged to the employer, since that term did not include the financial risks that were set out in other parts of the contract. Hence, it was necessary to come up with a clear distinction between the Employer's Risks and the Contractor's Risks as delineated now in Sub-Clauses 17.1 to 17.5. These were first corrected in the 2008 Gold Book. In fact, the risk apportionment in the Second Edition of the Yellow Book has shifted in favor of the contractor by the inclusion of the second paragraph of Sub-Clause 17.4 which deals with the situation where the risk can be traced to both the employer and the contractor, in which case the contractor becomes entitled, subject to Sub-Clause 20.2 to proportionate time and money. An example would be a risk emanating from a combination of defective Employer's Requirements and defective workmanship.

In paragraph 1(b), which is concerned with indemnities, your letter states: "***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.***" This is incorrect because of Sub-Clause 17.9 which states "***The Contractor's liability to indemnify the Employer, under Sub-Clause 17.7 [indemnities by Contractor], shall be reduced proportionately to the extent that the Employer's Risks may have contributed to the said damage, loss or injury.***" Furthermore, the new edition of the Yellow Book has added Sub-Clauses 17.7 to 17.9 (taken from the Gold Book) which, in our view, further balances indemnities between the employer and the contractor. It is notable that, at the FIDIC December 2016 Users Conference, we heard commentary from both employers and contractors about their respective liabilities being spelt out rather than left unexplained.

The insurance of the risk of fitness for purpose issue referred to in paragraph 1(c) has been reconsidered and the insurance requirement will be removed from the Yellow Book update and dealt with in the contract data. The employer can decide on whether or not to include insurance for fitness for purpose based on whether that insurance is available and whether or not the employer wishes to pay for it, as he has to in connection with all insurances specified under the contract. Also, the suggested wording in your letter regarding fitness for purpose is, with the exception of "***To the extent that the contract does not specify the works, the works….***" included in the beginning of clause 4.

The first boxed warning in your letter states that "***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.***" We at FIDIC do not understand the basis of this assertion of un-insurability, since third party liability insurance is required under the Contract (see Sub-Clause 19.2(d)) and is available. It should cover "***damage to or loss of any property, real or personal (other than the Works), to the extent that such damage or loss: arises out of or in the course of or by reason of the Contractor's execution of the Works; and is attributable to any negligence, wilful act or breach of the Contract by the Contractor, the Contractor's Personnel, their respective agents, or anyone directly or indirectly employed by any of them."***

I should also note that, in addition to the above response, as a result of your input and other comments raised at and following the FIDIC December 2016 Users Conference, Dr Bunni has taken the time to do another review of clauses 17, 18 and 19 in the special pre-release version of the Yellow Book and we intend to follow his recommendations to modify the text.

Regarding the specific comments in your letter concerning increased bureaucracy in contract administration we offer the following response:

Regarding 2a in your letter, we disagree that the time periods mentioned will result in earlier involvement of claims consultants and lawyers, unless the contractor chooses to retain these services to help with claim preparation. In cases where more time is needed to prepare a claim, an extension can be granted – although sub-clause 20.2.4(i) states a period of 42 days, sub-clause 20.2.4(ii) states: "*such other period (if any) as may be proposed by the claiming Party and agreed by the Engineer*". This, when read together with sub-clause 1.3 "*All Notices and other communications* [which include agreements, please see the first paragraph of 1.3] *shall not be unreasonably withheld or delay*ed", allows for appropriate modifications to time period requirements. It is in everyone's interest to extend a time period if there is good reason to do so. You will find other similar provisions in the document (including sub-clauses 1.6, 3.7.3 and 8.1) allowing for time extensions. Furthermore, we have added sub-clause 20.3 to the FIDIC contract updates which allows the DAB to waive the time-limits under both sub-clauses 20.2.1 and 20.2.4 where it is fair and reasonable to do so. Finally, the guidance notes to be published with each of the FIDIC contract updates will include guidelines advising contract users that the stated time periods are those that FIDIC believes are reasonable but that these should be evaluated and, if necessary, amended for a specific project.

In addition, as a general statement regarding specified time periods, we note that they apply to all parties including engineers and employers. Also, reasonable people should be expected to agree to time period extension requests if made in good faith for good reason. Indeed, as noted above, sub-clause 1.3 of the FIDIC contracts obliges the parties and the engineer to do so. In this connection, I am sure you would agree that, in the end, the success of a project often depends on the clarity and certainty of the contract documents and, of course, the people involved. If the people are properly qualified and act reasonably, the likelihood of success increases perhaps to a greater degree than the actual language in the contract.

Regarding 2b in your letter, we disagree that the referenced clauses will reduce the opportunities for the parties to settle a dispute amicably, because the stated time periods can and should be extended if constructive dialogue is occurring in an effort to reach an amicable settlement.

Regarding 2c in your letter, as a result of friendly review feedback, including EIC's, we have now removed the time bar for arbitration from sub-clause 21.4.4 in the special pre-release version of the Yellow Book. With this change, the concern about having disputes occurring simultaneously with project execution is mitigated.

Regarding item 2d, we agree with the principal that, before arbitration to resolve a NOD, the dissatisfied party should be required to have complied with the terms of the DAB decision (21.1.4). We believe this requirement is already substantially covered in 21.7. There is, however, some concern about the requirement being unenforceable in some jurisdictions. Nevertheless, we will consult our legal advisor about adding the requested statement in.

The second boxed warning in your letter states that ***"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***". The latter issue has been mitigated (see 2c above). Regarding the overly bureaucratic contract administration, we at FIDIC believe that the prescriptive nature of the updated Yellow Book offers more advantages than disadvantages as all parties will know in advance what is expected of them and when.

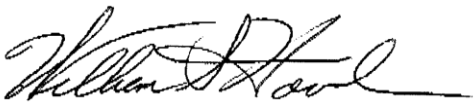
While not mentioned in your letter, we note that contractors have submitted numerous thoughtful positive and negative comments during friendly review of the Yellow, Red and Silver Books. These are very much appreciated. Let me reassure you that members of the FIDIC Contracts Committee and other volunteer drafters have carefully considered all comments received and, as noted above, a number of changes are being made to the documents. However, there remain some areas where we disagree. We disagree with other stakeholders as well. Having said that, we believe that the documents are reasonable for employers, contractors and engineers to use in negotiating contracts for specific projects. In the end, as you point out, FIDIC contracts are typically amended for individual projects. In addition, as we all know, construction contractors and engineers have the opportunity to factor in risk when pricing projects they are interested in pursuing. They also, of course, have the opportunity to decide not to pursue projects which they consider are too risky and/or projects with onerous contract terms and conditions. In the long run, if enough firms took this approach, perhaps the challenging atmosphere we all operate in would improve. We would also urge all contractor representatives to encourage all their firms to read and understand the contracts they are presented with in bid documents. In addition, they should consider carefully any amendments made unilaterally to FIDIC contracts.

While not a subject of your 25 January letter, I want to take this opportunity to remind you that FIDIC has developed a proposed "best value" system for procurement of construction services. We believe that, if more employers/owners used approaches similar to that outlined in the FIDIC guideline document describing this system, the climate we operate in would be improved. We believe it is compatible with the CICA-led WPP initiative. Thus, we ask for your help in advising clients to use best value approaches for procuring construction services. We also, of course, welcome your comments or any suggestions you may have with regard to these documents. A copy is attached for your information.

Thank you again for your 25 January 2017 letter. Hopefully, I have responded to your inquiries. I note that you have published your letter on the EIC website: http://www.eic-federation.eu/news/joint-federation-letter-fidic/. In order to be of benefit to your membership and all other interested parties, I ask that you also publish a copy of this response letter on your website so that the substance of our detailed response to each of the concerns you have raised is also available for public viewing.

Thank you again and please let me know if you have any questions.

Very truly yours,



William S Howard, PE, BCEE, FASCE

FIDIC Executive Committee

Contracts Committee Advisor