

New FIDIC White Book: The Key Changes

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The 5th Edition contains some important changes being made from the current 4th Edition of the White Book, which was released in 2006.

Form of Agreement

The 4th Edition Form of Agreement sets out the documents that should be deemed to form and be construed as part of the Agreement. However, it failed to state a specific order of precedence. In particular, while it stated the 'this Client/Consultant Model Services Agreement' was to form part of the Agreement, it failed to specify whether the general or particular conditions should take precedence.

The 5th Edition rectifies this problem with an order of precedence both under the Form of Agreement and within Clause 1.15 of the General Conditions.

Services

Services under the 4th Edition were divided into Normal, Additional and Exceptional Services. Normal and Additional Services were expressed in Appendix 1 of the Particular Conditions, while Exceptional Services were defined in Sub-Clause 3.2.2 as:

'those which are not Normal or Additional Services but which are necessarily performed by the Consultant in accordance with Clause 4.8'

This is a confused approach which does not conform to normal industry use of how the scope of services is described. There is also inconsistent use of 'varied Services' and 'Additional Services'. Further, there was no mention in the Agreement of how or when the client would be informed of the impact or costs of any Exceptional Service.

The 5th edition has adopted a more usual industry position in that the Scope of Services shall be defined and any changes will be variations under the new clause 5.

Exceptional Events

The 4th Edition managed force majeure – or the similar the concept of changed circumstances – under clause 4.2. The 5th Edition uses a more familiar approach under Sub-Clause 4.6 [Exceptional Event] which shares the risk of such an event between the client and consultant.

An exceptional event arises under Sub-Clause 4.6 of the 5th Edition where:

- the consultant is prevented from performing any of its obligations under the Agreement; or
- an unavoidable change occurs to the Scope of Services; or
- a delay occurs to the completion of the Services.

Variations

The 5th Edition deals with variation in a significantly more comprehensive manner.

The 4th Edition simply provides that the agreement may be varied on application by either party. If the client requests a variation, the consultant is to submit its proposal for the client's approval, and the proposal will be considered an additional service. The consultant is not required to commence the varied services until such time as the client has given written approval of the fees associated with the varied

Services.

There are no clear time-limits set out in the variation procedure for the submission of variation requests, nor is there a clearly set out methodology of substantiation or valuation. The clause may arguably also limit the client's right to omit part of the services. The need to negotiate an agreement of the fees for variations may delay a project if the consultant is not required to commence the varied service until an agreement is reached.

Clause 5 of the 5th Edition follows the traditional variation clauses seen in construction contracts. It provides that variations must be relevant to the services without substantially changing the extent or nature of the services. The client has the right to:

- amend the Scope of Services
- omit services (though only if no longer required by the client)
- change the sequence or timing of the services
- change the method of implementation.

The 5th Edition also contains a provision dealing with an instruction which the consultant believes is a variation, but is not described as a variation. In such cases, the consultant must give notice to the client as soon as reasonably practicable which must contain details of the estimated impact upon the programme and costs. The value of any variation is to be determined in accordance with the Remuneration and Payment provisions found within the Particular Conditions.

Programming

The 4th Edition includes provision for a Time Schedule for Service in Appendix 4. There is no detail for what is to be contained in the schedule, nor any obligation that the consultant submit or even comply with a programme.

While the 4th Edition states that that the services shall proceed in accordance with the Time Schedule in Appendix 4, there is no clear obligation or liability on the consultant to proceed expeditiously with or guarantee the completion of the Services.

Sub-Clause 4.3 of the 5th Edition obligates the consultant to provide a programme within 14 days of the commencement date. It also specifies that the programmes shall include the order and timing of services, key dates for performance or delivery of parts of the services, as well as key dates for decisions, approvals or information from the client to the consultant.

Sub-Clause 4.5 of the 5th Edition provides that the consultant shall revise the programme if the client does not reasonably believe the project will be completed on time. However the 5th Edition still does not contain a clear obligation to proceed expeditiously with the services. It also does not impose liability to pay compensation in the form of delay damages if the services are not completed within the Time for Completion.

Standard of Care

A major criticism of the 4th Edition is its treatment of the consultant's standard of care under the agreement.

Sub-Clause 3.3.1 states that:

'the Consultant shall have no other responsibility than to exercise reasonable skill, care and diligence in the performance of his obligations under the Agreement' (own emphasis added).

This widely drafted provision affords a loop-hole to consultants, as it applies not only to the standard of reasonable skill and care in the services performed, but to all obligations within the agreement, including

commencement, the completion dates, the procurement and maintenance of insurance and any reporting.

This issue was reinforced by Sub-Clause 6.1.1 of the 4th Edition which states:

The Consultant shall only be liable to pay compensation to the Client arising out of or in connection with the Agreement if a breach of Clause 3.3.1 is established against him.

As a result, establishing a consultant's liability is more difficult than where only a breach of contract has to be proven.

The 5th Edition provides that the standard of reasonable skill, care and diligence only applies to the performance of the Services. All other obligations are treated as absolute obligations. It also raises the standard of care to the standard to be expected from a consultant experienced in the provision of services for projects of a similar size, nature and complexity.

However, FIDIC have refrained from introducing a 'fit for purpose' clause. In some GCC countries the lack of such an obligation will not circumvent the consultant's decennial liability for the partial or total collapse of a building (for example, under Article 880 of the UAE Civil Code).

Termination

A termination clause is a crucial part of any consultancy agreement, and usually contains important protections for both clients and consultants.

Although it is an industry standard for clients to want the right to terminate consultancy agreements, the 4th Edition does contain a termination for convenience clause but does not differentiate the effect of it from other forms of termination. It also failed to give clear rights for immediate suspension in that the clause did not distinguish between the notice to suspend and notice to terminate for convenience.

Furthermore, the 4th Edition, also does not allow the immediate termination for specific cases of the consultant's default – for example for bankruptcy and corruption.

The 5th Edition's differentiates the effects of termination for convenience from termination for the consultant's default.

If the Agreement is terminated for the consultant's default then the client is entitled to any documents or deliverables pertaining to the services necessary to enable the client to complete the services, as well as any reasonable costs directly incurred as a result of the termination. The client may withhold any payment due to the consultant until such time that all costs, documents and deliverables have been received from the consultant.

If the Agreement is terminated for convenience and the consultant incurs additional costs, the client shall pay the consultant for the extra time spent by the consultant's personnel in the performance of the services, at the rates stated in the Appendix 3 [*Remuneration and Payment*]. The client shall also cover the cost of all other expenses reasonably incurred by the consultant, and the consultant is entitled to be paid the loss of profit that would otherwise have been earned on the services not performed due to the termination.

The 5th Edition now allows for immediate termination where there is insolvency or corruption. It also contains a clear power for the client to suspend the services for convenience, upon giving 28 days notice.

In relation to termination for convenience the 5th Edition allows for a shorter time-frame on the consultant's right to terminate following the client's suspension for convenience. It provides that when the services have been suspended for more than 168 days, the consultant may terminate, after giving 14 days notice. This is compared to the 4th Edition, where the consultant may terminate upon giving 56 days notice to the client, where services have been suspended for more than 182 days.

The consultant's right to suspend has also been enhanced to allow the consultant to suspend services after 7 days notice has been given since the date of non-payment, whereas the 4th Edition only permitted suspension following 28 days of non payment. After the services have been suspended for 42 days, the consultant may terminate the agreement, after giving a further 14 days notice.

Sub-Clause 6.3 of the 5th Edition also has more specific detail on how a resumption following suspension is to be managed and as well as each party's entitlements.

Additional clauses will still need to be added to deal with making termination valid in Middle Eastern countries (such as the UAE) without a court order.

Dispute Mechanism

The 5th Edition also makes changes to the dispute resolution procedure. Having previously adopted mediation as part of a multi-tiered dispute resolution process, the 5th Edition now includes adjudication.

It is likely that this provision will be amended by particular conditions in the GCC to refer any dispute straight to arbitration.

Summary

The pre-released 5th Edition White Book seems to have addressed many of the previous problem areas identified in the 4th Edition.

As a result of the changes the parties will be in a better position to understand and manage their risk allocation.

Al Tamimi & Company's Construction & Infrastructure team regularly advises on contract drafting and the use of the FIDIC suite of contracts. For further information please contact Scott Lambert (S.Lambert@tamimi.com).