

Variation Provisions in the FIDIC Yellow Book 2017

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Introduction

Much has already been written concerning the new FIDIC forms of contract published in December 2017. They are approximately 50 % longer and sought to set out the various procedure in much greater detail with the object of both encouraging good practice and reducing the scope for disputes. Numerous minor amendments have also been made.

The purpose of this article is to look in more detail at the provisions dealing with Variations, these being amongst the most frequently scrutinised in practice.

Definition of 'Variation'

In the previous 1999 Yellow Book, a 'Variation' is defined as any change in the Works or in the Employer's Requirements which is instructed or approved on behalf of the Employer pursuant to other provisions in the Conditions². Accordingly, if the Employer were to wish to change, for example, the performance criteria for the Works, he could do so by means of an appropriate change in the Employer's Requirements.

The position under the 2017 Yellow Book is less straightforward. The definition of "Variation" simply refers to changes in "the Works", the reference to the Employer's Requirements being omitted³. "The Works" are defined as the Permanent Works and the Temporary Works or either of them.⁴ The Permanent Works are in turn defined as being those of a permanent nature which are to be executed by the Contractor⁵, the

Temporary Works being those which are required on the site for the execution of the Works⁶. Both of these definitions therefore appear to restrict "the Works" to activities which take place on the site. A definition of 'Variation' solely by reference to changes in "the Works" has the potential to pose difficulties in the case of a design and build contract such as the Yellow Book since the precise nature of much of the Works will, subject to the Employer's Requirements and approval by the Engineer, be at the discretion of the Contractor. Such a definition enables the Engineer on behalf of the Employer to instruct changes to "the Works" to the extent that these are specified in the Contract, probably in the Employer's Requirements.

What the Engineer may wish to do in such circumstances is to change the performance criteria with which the completed works must comply or the basis on which that performance is measured. There is now, however, scope for doubt as to whether under the 2017 form the right of the Employer to vary includes making these kind of changes as opposed simply to ordering changes to the Works themselves.

The Right to Object to a Variation

The 2017 Yellow Book provides for the Engineer to initiate a Variation at any time before the Issue of a Taking-Over Certificate.⁷ This may be done by means of an instruction pursuant to Sub-Clause 13.3.1 or a request to the Contractor for a proposal in each case issued by the Engineer.⁸

In most cases, a Variation will be regarded by the Contractor as a welcome development. There may be cases, however, in which the Contractor may

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² Sub-Clause 1.1.1.5

³ Sub-Clause 1.1.88

⁴ Sub-Clause 1.1.89

⁵ Sub-Clause 1.1.65

⁶ Sub-Clause 1.1.82

⁷ Sub- Clause 13.1

⁸ Sub-Clause 13.3

wish to oppose the Variation because, for example, it might be difficult to implement or might have a detrimental effect on the performance of his other obligations under the Contract.

In the case of a Variation by means of an instruction, the Contractor is bound by the Variation instructed unless the Contractor promptly gives a notice contesting the Variation with detailed particulars on certain specific grounds. These differ from those found in the 1999 Yellow Book and are also more extensive.⁹

The grounds for objection in the 2017 Yellow Book are as follows:

- (a) that the varied work was Unforeseeable having regard to the nature and scope of the work described in the Employer's Requirements. "Unforeseeable" is defined as being unforeseeable by an experienced contractor as at the Base Date which, in turn, is defined as being a date 28 days before the latest date for the submission of the tender.¹⁰ This has no equivalent in the Yellow Book 1999. If the proposed Variation is of a kind which could not have been foreseen as a realistic possibility at the Base Date, the objection will have been made out;
- (b) that the Contractor cannot readily obtain the Goods required for the purpose. There is a similar provision in the 1999 Yellow Book.¹¹ "Goods" are widely defined.¹²

The effect of this wide definition is in broad terms that, if the Contractor cannot readily obtain any item required to execute the proposed Variation, this ground of objection will have been made out. The question of whether the Contractor cannot readily obtain the item in question may depend on the amount of time required to obtain the item, the amount of time normally required,

the efforts which the Contractor will need to make to secure the item and the likely effect of these factors on the overall progress of the execution of the Variation and the Works;

- (c) that the proposed Variation will adversely affect the Contractor's ability to comply with its health and safety obligations¹³ under the Contract and those relating to the protection of the environment¹⁴. There is a corresponding provision in the 1999 Yellow Book¹⁵ but the new provision is in considerably wider terms. This ground of objection is largely self – explanatory. It should be noted is the Contractor would need to demonstrate that compliance with these obligations has become significantly more difficult or risky but not that such compliance would become impossible;
- (d) that the proposed Variation will have an adverse impact on the achievement of the Schedule of Performance Guarantees. There is an almost identical provision in the 1999 Yellow Book.¹⁶ Again, this ground envisages that the achievement of the Performance Guarantees would be rendered more difficult by the proposed Variation rather than completely impossible.
- (e) that the proposed Variation may adversely affect the Contractor's obligation contained in Sub-Clause 4.1 to complete the Works so that they will be fit for the purpose(s) for which they are intended as defined in the Employer's Requirements.¹⁷

It should be noted that, in contrast to the grounds in sub-paragraphs (c) and (d) above, the Contractor does not need to demonstrate that the proposed Variation will render the performance of the Contractor's obligation under Sub-Clause

⁹ See Sub-Clause 13.1, Sub-paragraphs (a) – (e)

¹⁰ Sub-Clause 1.1.87

¹¹ Sub-Clause 13.1 Second Paragraph Sub -paragraph (i)

¹² Sub-Clause 1.1.44

¹³ Sub-Clause 4.8

¹⁴ Sub-Clause 4.18

¹⁵ Sub-Clause 13.1 Second Paragraph Sub-Paragraph (ii).

¹⁶ Sub-Clause 13.1 Second Paragraph Sub-Paragraph (iii).

¹⁷ Sub-Clause Sub-Clause 4.1(first paragraph)

4.1 more difficult but merely that it may do so. This difference is presumably because the Contractor's obligation as to fitness for purpose is of such fundamental importance that even the risk of increased difficulty is sufficient to justify an objection.

The Engineer's Response

The fourth paragraph of Sub-Clause 13.1 of the 2017 Yellow Book requires the Engineer, promptly after receipt of the Contractor's Notice and supporting particulars, to respond by cancelling, confirming or amending the Variation instruction. If the Engineer considers the Contractor's objection to be factually incorrect, he will confirm the instruction. If, on the other hand, he regards the objection as justified in whole or in part, he will either cancel the instruction or, if possible, vary it so as to accommodate the grounds of the objection.

In some cases at least, the Contractor will wish to challenge the decision of the Engineer either to confirm a Variation instruction or to modify it in ways which the Contractor regards as unsatisfactory. At that point, consideration will need to be given to the provisions of the Yellow Book 2017 dealing with the resolution of disputes.

Variation or Not?

There may be instances in which the Contractor considers that what purports to be simply an instruction issued by the Engineer is in fact a Variation. In these circumstances, the 2017 Yellow Book introduces a new procedure for resolving this kind of dispute¹⁸. The Contractor must immediately and before commencing work on the instruction give a notice to the Engineer of his position with reasons. The Engineer must respond within seven days of the notice confirming, varying or reversing the instruction. If he fails to do so, the Engineer will be deemed to have revoked the instruction. Otherwise, the Contractor is bound by the Engineer's response and must comply with the instruction.

¹⁸ Sub-Clause 3.5

¹⁹ Sub-Clause 13.3.1

Nothing is stated expressly in Sub-Clause 3.5 as to the basis on which the Engineer is to make his decision but the intention plainly is that, if the Engineer is satisfied that the Contractor's challenge to the instruction is well founded in fact, he is to either to reverse or vary the instruction.

Variation Procedure

The procedure immediately following the issue of a Variation instruction in the 2017 Yellow Book¹⁹ does not differ markedly from that in the 1999 Yellow Book. In each case, the Contractor must supply a description of the varied work including (in the case of the 2017 Yellow Book) details of the resources and methods to be adopted, a programme for the execution of the Variation and the Contractor's proposals for the modification of the overall project programme and the completion date for the project. The last of these may well, of course, involve a claim for an extension of time. Most importantly, the Contractor must also produce a proposal for the adjustment of the Contract Price with supporting particulars.

The 1999 Yellow Book requires all of this information to be produced as soon as practicable. The 2017 Yellow Book is more specific by stipulating a period of 28 days of the instruction or such other period as may be proposed by the Contractor and agreed by the Engineer.

Valuation of Variations

The 1999 Yellow Book contained little guidance on the valuation of Variations and numerous arguments and disputes arose. This deficiency is made good in the 2017 Yellow Book²⁰ which provides for alternative bases of valuation depending on whether or not a Schedule of Rates and Prices ('Schedule') forms part of the contract.

If a Schedule is included, the rate or price for an item in the Schedule, will be that for the same item forming all or part of the Variation. If there is no rate or price for an item in the Schedule, the rate or

²⁰ Sub-Clause 13.3.1

price for similar work will apply. This is however subject to the qualification that a new rate or price may be applied if no rate or price for an item is specified in the Schedule and no rate or price is appropriate because the work in question is not of a similar character or is not executed under similar conditions as any item in the Contract.

If a new rate or price is required, then this is derived from any relevant item in the Schedule with reasonable adjustments taking into account “*all relevant circumstances*”. If there is no relevant rate or price, then these are derived from the Cost Plus Profit of executing the Work. ‘Cost’ is defined as all costs reasonably incurred in undertaking the work whether on or off site together with overheads, taxes and similar charges.²¹ ‘Profit’ is defined as the percentage stated in the Contract Data or five per cent in default.²²

A further welcome new provision is to be found in the final paragraph of Sub-Clause 13.3.1 of the 2017 Yellow Book. This requires the Engineer to assess a provisional price or rate for the varied work for the purpose of including a sum on account of the value of the Variation in interim payments pending final resolution of that value by agreement or determination.

Finally, it should be borne in mind that, under the 2017 Yellow Book, the Engineer no longer acts on behalf of the Employer (as under the 1999 Yellow Book) but instead adopts a neutral position between the parties.²³ As a result, it is now open to the Employer to challenge the Engineer’s valuation of a Variation, if so minded.

Notices

The Yellow Book 2017 makes it clear that the Contractor is entitled to an extension of time and an adjustment to the Contract Price for a Variation without giving formal notice of his claim to the Engineer pursuant to Sub-Clause 20.2. It should be noted, however, that certain other claims under Clause 13 do require a formal notice. Thus payment

of the Contractor’s cost of preparing a proposal for a Variation at the request of the Engineer which has been subsequently rejected by the Engineer requires a formal notice under Sub-Clause 20.2.²⁴ The same is true of claims by the Contractor for additional time and money as a result of changes in Laws.²⁵

Omissions

The Yellow Book 1999 made it clear that the Employer was not allowed to omit work so that it could be undertaken by others. The 2017 Yellow Book contains a provision in similar terms but expressly provides for an agreement between the Employer and the Contractor to the contrary. In the event of a contrary agreement, there is an express provision for the Contractor to include a claim for loss of profit and/or damages suffered or to be suffered as a result of the omission. This would be part of the details particulars of the Variation required by Sub-Clause 13.3.1. The particulars including this information are considered by the Engineer and the issue resolved either by agreement or the Engineer’s determination.

Variation by Request for Proposal

The 1999 Yellow Book gave the Engineer the option of seeking a proposal from the Contractor before instructing a Variation. The 2017 Yellow Book contains a similar process but with more detailed provisions.

The Contractor is not entitled to a separate payment for the cost of the preparation of the proposal except in circumstances in which the proposal is not accepted. As mentioned, a formal notice of claim under Sub-Clause 20.2 is required as a precondition to entitlement.

Value Engineering

The 1999 Yellow Book provides for the Contractor to prepare (at his own expense) a proposal for a variation which would accelerate Completion,

²¹ Sub-Clause 1.1.19

²² Sub-Clause 1.1.20 – Definition of ‘Cost Plus Profit’

²³ Sub-Clause 3.7 – first paragraph.

²⁴ Sub-Clause 13.3.2 (last paragraph).

²⁵ Sub-Clause 13.6

reduce the cost of executing the Works or operating and maintaining the completed plant, improve the efficiency or value of the Works or otherwise benefit the Employer.²⁶

There is however no provision for any sharing of the benefit of such proposal between the Employer and the Contractor so that the incentive for the Contractor to take the initiative in preparing the proposal was limited.

The equivalent provisions in the 2017 Yellow Book²⁷ are very much more elaborate and expressly provide that the Engineer, when proceeding under Sub-Clause 3.7 to value the Variation, must give consideration to any provision for the sharing of the benefit of the Variation between the Employer and the Contractor contained in the Particular Conditions.²⁸

Adjustments for Changes in Laws

Both editions contain a right for the Contractor to be compensated for additional cost or time resulting from changes in Laws. However, the scope of such changes has been widened in the 2017 edition to include within 'Laws' permits, permissions and licences obtained by either the Employer or the Contractor. These are not restricted to those permissions etc. required under the law of the jurisdiction in which the project is situated.²⁹ Although in many cases the cost of these licences etc. is payable by the Contractor,³⁰ the Contractor will need to remain alert to the possibility that the cost of any change to the licence etc., as a result of a change in Laws, will be recoverable from the Employer. In contrast to the position concerning Variations generally, the Contractor is required to give notice of any claim under Sub-Clause 20.2. It should also be noted that the Employer in the 2017 edition is entitled to recover any benefit which the Contractor may have received as a result of changes in Laws.

There is a separate provision dealing with adjustments to the execution of the Works as a

result of any changes in Laws. If this occurs, either the Contractor or the Employer must give notice to the other as soon as practicable. Thereafter, the Engineer must commence the Variation procedure either by means of an instruction or a request to the Contractor for a proposal.

Adjustments for changes in cost

The 1999 Yellow Book included a complex formula for the calculation of any such changes.³¹ This provision has been removed from the 2017 edition but the parties have the option of including Schedules of cost indexation in the Contract setting out their own choice of formula. This change may reflect the fact that these provisions are not common in current economic conditions.

Conclusion

The Variation provisions in the 2017 Yellow Book are considerably lengthier and more prescriptive than those in the 1999 Yellow Book. That approach has much to be commended in that it provides considerably greater certainty in an area in which dispute and disagreement are common.

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²⁶ Sub-Clause 13.2

²⁷ Sub-Clause 13.2

²⁸ Sub-Clause 13.2 (ii)

²⁹ Sub-Clause 13.6

³⁰ Sub-Clause 1.13(b)

³¹ Sub-Clause 13.8.