



To read all other articles from this issue of *International Quarterly* and all previous issues [click here](#).

Commentary:

International contractual issues around the globe

Issue 05, 2013

Amending Clause 13.1 of FIDIC – protracted negotiations

By Jatinder Garcha
Associate, Fenwick Elliott

Having negotiated contracts on a number of internationally financed projects over the past year, the reluctance of employers (or more likely of their lenders) to progress projects on the standard FIDIC conditions of contract is clear to see. There are a number of provisions that will inevitably always be subject to protracted negotiations, for example the Clause 17.6 limitation on liability cap and, almost more importantly, which liabilities fall outside of the overall cap, and also the removal of the conditionality wording in Clause 4.2 and substitution with wording making it clear that the bonds are purely “on-demand”. Developments in respect of on-demand bonds are discussed separately in this edition.

However, there are other provisions that appear to be reasonable and uncontroversial but again are sought to be amended, which can lead to lengthy negotiations as a result of contractors attempting to “stay in line” with the standard FIDIC provisions. One such provision is Clause 13.1 which relates to the variation procedure set out in the FIDIC Yellow Book. There are three issues in Clause 13.1 that cause particular discussion. First, the employer will attempt to delete the last sentence of the first paragraph which states that “A Variation shall not comprise the omission of any work which is to be carried out by others.”

This provision is aimed at ensuring that the employer cannot remove works from the contractor’s scope and have them carried out by a third party at perhaps a lower price. The contractor will have priced the contract works on the basis of a complete EPC wrap and therefore it is unfair to compare its prices for individual elements of the works



with those of other contractors who do not have to price the full EPC risk. The obvious concern for the contractor is that removal of any scope of its works will result in a reduction in its contract price and therefore its profit. Contractors acknowledge that, if for commercial viability reasons the project works have to be scaled back, then the works under their contract can accordingly be reduced without any penalty. It is not acceptable, however, for works to be omitted just so that they can be carried out by another contractor. The employer will argue that for reasons of flexibility it needs an unrestricted right to be able to change the project works and how they are undertaken. Employers will vigorously argue that they require this flexibility

and that the contract provisions need amendment in order to be acceptable to lenders.

If the deletion is insisted upon, contractors should consider putting a proposal to the employer that the contractor be entitled to payment of its loss of profit in respect of the element of works omitted where the omitted works are to be undertaken by a third party. Any such provision would need to be specifically carved out of the exclusion for loss of profit under Clause 17.6.

The second issue that arises relates to the ability of the contractor to object to a variation proposed or initiated by the employer. The FIDIC contract allows for an objection in three limited circumstances only, but even that is considered far too wide by employers who require an unrestricted ability to instruct variations of any kind. Employers will look to delete the standard FIDIC rights of objection, arguing that they have to ensure that any modification in the project to reflect commercial changes can be forced upon the contractor, and that the project is not held to ransom by the contractor. One of the three rights of objection under the FIDIC contract is if the variation “will have an adverse impact on the achievement of the Schedule of Guarantees”. The rationale for this provision, which is occasionally amended to refer to failure to pass completion tests, is well understood. Employers, on the other hand, will argue that just because there is



To read all other articles from this issue of *International Quarterly* and all previous issues [click here](#).

Commentary:

International contractual issues around the globe

Issue 05, 2013



an impact this should not necessarily result in an automatic right to object. Employers consider that the contractor should assess the consequences of the variation and if necessary propose changes, redesigns, or other modifications that will result in the Schedule of Guarantees being achieved. As far as employers are concerned, it is for the contractor to come up with the necessary solutions as part of its proposal in response to the employer's request. For the employer it is just a matter of cost and time to the contractor.

Logic dictates that contractors are more than willing to accept variation orders (as variations increase the contract price and, accordingly, profit); however, there will inevitably be occasions when for good reasons a contractor may be unable to execute a variation. Being unable to execute a variation has to be distinguished

from a variation which is merely more difficult to execute. Added difficulty can be addressed through the compensation procedure, but impossibility can not. Such factors should be taken into account when discussing what events should entitle the contractor to object.

After lengthy discussions over the variation objection events, the final issue to be discussed is the wording of the last sentence of Clause 13.1. This states that upon receiving from the contractor an objection notice to a proposed variation the engineer "shall cancel, confirm or vary the instruction". It is the express right to "confirm" the instruction that causes contractors some concern. If a contractor has objected to a variation that will cause it to be in breach of laws or a consent, or will lead to the contractor's failure to achieve the Schedule of Guarantees, then how is it

appropriate that such a variation proposal can be confirmed? What is the effect of such confirmation on the contractor's obligations under the contract (especially where the contractor knows that being forced to comply with the variation will put it in breach of another express provision of the contract)?

The FIDIC contract does not specifically address this issue. One would expect that such confirmation would absolve the contractor from any responsibility or liability to the employer for the consequences of the contractor's failure to perform an express obligation under the contract which results by virtue of compliance with such variation. Whilst it is likely that this assumption would be implied into the contract under English law, it is prudent to incorporate wording to this effect, especially if the contract is to be governed by the laws of a jurisdiction other than England.

**Jatinder Garcha, Associate
Fenwick Elliott**
+44(0)207 421 1986
jgarcha@fenwickelliott.com

