

THE CONTRACTOR'S VIEW ON THE MDB HARMONISED VERSION OF THE NEW RED BOOK

RICHARD APPUHN

Salini Costruttori SpA

AND

ERIC EGGINK

*NABU*¹

Since the publication of the New Red, Yellow and Silver Books in 1999, EIC has published three *EIC Contractor's Guides* to this new FIDIC suite of standard contract forms. All of them have been reproduced in this *Review*.² In the case of the FIDIC 1999 New Red Book, Conditions of Contract for Construction, our in-depth study of the update and discussions with FIDIC led us to the conclusion that, whilst it does not present the same high degree of risk as the new EPC Turnkey Contract form (the Silver Book), it was more onerous than its precursor, the Fourth Edition of the old Red Book (1987), to the extent that the publication of a guide was justified.

As was the case with the Fourth Edition of the old Red Book, FIDIC's New Red Book has now been incorporated by the World Bank as the General Conditions of Contract in its Standard Bidding Documents for Works, however, in a modified version in order to suit their special requirements. In the light of the ongoing process of drafting Master Procurement Documents to be used to issue harmonised procurement documents for construction projects for which the Multilateral Development Banks (MDBs) are providing finance, it is expected that the other MDBs will soon follow the World Bank incorporating the so-called MDB Harmonised Edition of the FIDIC Conditions of Contract for Construction.³

EIC has been invited by FIDIC as a so-called "friendly reviewer" to review the MDB Harmonised Version of the New Red Book that was, at the outset, to become the Second Edition. EIC was initially surprised about the early update of the 1999 Edition, as the Fourth Edition of the old Red Book (1987) is still very much in use in Asia, Africa and Latin America. Of course, we had hoped to find at least some of the concerns which had been voiced in our *EIC Contractor's Guide to the FIDIC Conditions of Contract for Construction*

¹ Richard Appuhn and Eric Eggink are Members of the Working Group "Contract Conditions" of European International Contractors (EIC). Other members of the group, who have reviewed the text, are Michel Démarre (Colas), Chairman; Håkan Broman (NCC International); Francine Gural (Sade); Ulrich Jünemann (HOCHTIEF); and Chris Parker (Taylor Woodrow).

² These articles appeared at [2000] ICLR 504; [2003] ICLR 53; [2003] ICLR 332.

³ <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Works-5-05-ev1.pdf>

to be addressed by FIDIC and the MDBs in the harmonised draft version. But quite the reverse: upon scrutinising the “amended” version in detail, EIC realised that the modifications, on balance, swung to the other extreme and increased the risk to contractors even further than the 1999 First Edition of the New Red Book. From an international contractor's perspective, the harmonised updated clauses dealing with the definition of “unforeseeable”, the “Engineer's Duties and Authorities” as well as with his replacement, Performance Security and Evaluation all represented a move in the wrong direction. Moreover, EIC is concerned about the increased usage of subjective terms that in practice will lead to friction between the parties and thus eventually to more disputes.

As pointed out in the recently published *EIC Blue Book on Sustainable Procurement*⁴ we must recall that the MDBs should only use standard construction contracts with a balanced allocation of risk. Therefore, we query the need for deviating from a universal standard such as the 1999 FIDIC New Red Book and for adding employer-friendly amendments to the General Conditions. Considering the application of the Particular Conditions, it is the EIC position that they should be employed only to regulate project- and the country-specific items and that they should not be used to reallocate the risks, which is sometimes the case. Hence, EIC asks the MDBs to develop eventually and agree on standard country-specific Particular Conditions in order to avoid open-ended possibilities for deviation from the General Conditions. MDBs should, therefore, not approve bidding documents that contain such deviations and, as a consequence, contracting authorities may not disqualify a tenderer who has based a given qualification on a deviation from the standard conditions by the contracting authority.

The text of the MDB Harmonised Version has led us to highlight the following issues.

Sub-clause 1.1.6.8: the definition of “unforeseeable”

In the 1999 version of the FIDIC New Red Book the definition of unforeseeable was:

“ ‘Unforeseeable’ means not reasonably foreseeable by an experienced contractor by the date of submission of the Tender.”

In the MDB version of the New Red Book, FIDIC have added a twist of Catch-22 proportions. The definition of unforeseeable now reads:

“ ‘Unforeseeable’ means not reasonably foreseeable *and against which adequate preventive precautions could not reasonably be taken* by an experienced contractor by the date for submission of the Tender.”

⁴ Available from: European International Contractors, Kurfürstenstrasse 129, D-10785 Berlin, Germany. Tel: +49 30 212 86244; Fax: +49 30 212 86285.

Both FIDIC and the Multilateral Development Banks leave it completely unclear what events or circumstances they had in mind when they formulated this extended definition. The extended definition of “unforeseeable” begs several questions.

- Is it the intention of FIDIC and the MDBs that contractors should make allowances for precautionary steps for unforeseeable events and circumstances?
- Is it the intention of the MDBs simply to shift the balance of risk under the contract for unforeseeable conditions and events to the contractor?
- What events (or circumstances) can be considered as “not reasonably foreseeable”, and yet against which “adequate preventive precautions can reasonably be taken”?

If the answer to the first question is “yes” then surely the contractor must be entitled to be paid for taking such steps.

If the answer to the second question is “yes”, then henceforth all MDB projects are likely to be priced as if every disaster will in fact happen, which will have a very significant impact on the cost of MDB projects.

To answer the third question we need to explore the origin of the wording of the addition, and it seems to have been borrowed from the text of sub-clause 17.3 [Employer’s Risks], subparagraph (h):

“Any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.”

Noteworthy is that sub-clause 17.3(h) uses the words: “. . . Unforeseeable, *or* against which . . .” as opposed to the definition of “unforeseeable” in sub-clause 1.1.6.8. where the word “or” has been replaced by the word: “and”.

Sub-clauses 4.10 [Site Data] (second paragraph) and 4.11 [Sufficiency of the Accepted Contract Amount] (second paragraph) already require the contractor to investigate and assume risks and take up contingencies with regard to circumstances stemming from site data “which may affect the Tender or Works” and with regard to the sufficiency of the Accepted Contract Amount. So the extension to the definition must mean something in addition, but as it is, it is totally unclear what that is, even more so if one considers that it is virtually inexplicable how something that is unforeseeable can be something against which adequate preventative measures could reasonably be taken by an experienced contractor.

In sub-clause 17.3(h) the operation of the forces of nature are to be *either* unforeseeable *or* something “against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions”. So, if we apply the definition as given in sub-clause 1.1.6.8 to sub-clause 17.3(h) this sub-clause now reads:

“Any operation of the forces of nature which is Unforeseeable [= not reasonably foreseeable and against which adequate preventive precautions could not reasonably be taken by an experienced contractor by the date for submission of the Tender] or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.”

Now, that does simply not make sense, but even if we ignore the fact that this is sloppy drafting, the operation of the definition of “unforeseeable” is puzzling. Let us explore what that entails in practice:

Imagine a hurricane that takes a completely deviant path to all other hurricanes in the past 100 years, and passes over a site where a 1.5 km jetty is being constructed. No employer would accept that a contractor move its heavy equipment from the site to a safe place at the first mention of the hurricane and its expected trajectory, but when it ultimately deviates from its projected course (and thus becomes “unforeseeable”, as the course is literally contrary to those taken by any of the numerous hurricanes in the past 100 years) and hits the site and the contractor’s heavy equipment ends up being blown over and causing severe damage to the works and months of delay to the works, most (if not all) employers would take the position that the contractor should have secured his equipment from the wrath of the hurricane as there was sufficient time between the time that the hurricane was first mentioned (and thus became foreseeable) and the time that it hit the site. Was the trajectory of the storm unforeseeable or could an experienced contractor have been expected to take adequate preventative precautions?

If the contractor moves his equipment at the first mention of the hurricane he will encounter the argument that that is not what an experienced contractor would do, if he has insufficient time to move his heavy equipment from the jetty upon the deviation of any of the courses of hurricanes in that particular area of the world over the last 100 years, the argument will be that he could have taken adequate precautions by moving his equipment earlier. A typical 20/20 hindsight reasoning which, however, will be employed when the damage comprises a sizeable amount of money and lost time.

The point here is that it is sometimes difficult enough for a contractor to defend himself against a relatively clear-cut provision such as sub-clause 17.3(h) and that it will be impossible to defend himself against the dichotomy of something being unforeseeable yet against which he should have taken adequate precautions. Therefore the definition as per sub-clause 1.1.6.8 [Unforeseeable] as it is, will undoubtedly cause many unnecessary disputes because it is inherently unclear and intrinsically contradictory and thus everything a definition should *not* be.

Somewhat of an improvement might be to define it as:

“ ‘Unforeseeable’ means not reasonably foreseeable by an experienced contractor *by the date for submission of the Tender (or preferably the Base Date), or against which an experienced*

contractor could not reasonably have been expected to have taken adequate preventative precautions.”

In other words: the second alternative should not—time-wise—be linked to the time frame for submission of tenders, as it is not under sub-clause 17.3(h). This would clarify the situation that the contractor would not be entitled to compensation because the event had been foreseeable at tender stage yet against which no experienced contractor could reasonably have been expected to have taken adequate preventative precautions as such precautions would have been unjustifiably costly. The greatest improvement, however, would be to leave the definition as it was in the 1999 version of the New Red Book.

In a general sense: standard contract conditions are supposed to provide both the employer and the contractor with unambiguous wording that provides certainty to contractors with regard to the contractual provisions under which they are to work should they be awarded the contract. The pay-off for the employer is that it receives bids that are comparable because all bidders will have had a comparable understanding of the risk allocation under the contract conditions. There will be no differences in offered price because of different interpretations for risk allocation under the contract conditions. Uncertainty causes contractors to include contingencies in their bids in order to allow for such added risk, which then leads to a higher price offered, which can hardly be viewed as being in the interest of the employer. In addition to that, the employer faces the risk that he will have to award the contract to either a contractor that is either completely ignorant or utterly desperate for work, or a combination of the two, such as a contractor who would not take up a contingency, resulting in his bid being the lowest. It is seriously doubtful that this would be, at any time, in the interest of the employer, as in the end this contractor will receive insufficient funds to cover his costs and disputes will arise without a doubt.

The risk allocation for unforeseeable events under all of the versions of the FIDIC from the First Edition 1999 is rational. (In the Red Book that is, not in the Silver Book as we have stated before, where FIDIC have departed from the concept of balanced risk allocation, while the recently published ICC Turnkey Contract proves that even in a turnkey, lump-sum contract a much more balanced risk allocation is possible.) In the Red Book type of risk allocation, if the risk materialises during construction, the employer bears the cost. If the risk does not materialise during construction, the employer then enjoys the benefit of the lower cost for his project. Moreover, if the risk of unforeseeable events should materialise, then the employer and the contractor would be able to value the cost of that risk on the basis of real and objective considerations.

Therefore, under the MDB Harmonised Version scenario the employer cannot use the lowest bid as the award criterion. He must instead select the experienced contractor's bid on the basis of quality. Disputes are engrained

in the process because of the wording of this definition. The employer and his engineer will stand much to gain from maintaining the position that, even though a detrimental event that has occurred was indeed unforeseeable, the contractor could still have taken reasonable (general) preventative measures which at least would have mitigated the damage suffered as a result of the said event, and that therefore the contractor is not entitled to compensation, or only partly entitled to compensation, for damages.

Sub-clause 1.13 [Compliance with Laws]

This sub-clause requires the contractor to comply with all applicable laws. However, the responsibility for obtaining permits, licences or approvals is not entirely clear when sub-clauses 1.13(a) and (b) are compared:

Sub-clause 1.13(a) provides that:

“the Employer shall have obtained (or shall obtain) the planning, zoning or similar permission for the Permanent Works.”

Sub-clause 1.13(b) states that:

“the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by the Laws in relation to the execution and completion of the Works and the remedying of any defects.”

Responsibility for obtaining permissions is ambiguous and should be clarified. For instance, what is “similar permission” for which the employer is responsible pursuant to sub-clause 1.13(a) and how does it fit with the contractor’s obligations under sub-clause 1.13(b)? Ideally, the contract should include a detailed schedule of the permits required and should identify the party responsible for obtaining the same. A good way of making such division is by allocating the obligation to obtain permits, licences and approvals for the permanent works (or, what is to be built) to the employer and to allocate the obligation to obtain permits etc. for the temporary works (or, how it is to be built) to the contractor. Where the contractor is responsible then, under sub-clause 2.2.b(i) [Permits, Licences and Approvals] “the Employer shall (where he is in a position to do so) provide reasonable assistance to the Contractor”. Consequently, any delays caused by the employer’s failure entitle the contractor to an extension of time in accordance with sub-clauses 8.4(e) [Extension of Time for Completion]. Any delays caused by authorities entitle the contractor to an extension of time under sub-clause 8.5 [Delays Caused by Authorities]: sub-clause 8.4(b). In particular, all permits that are required to allow the project to be developed at the site of the works should be specifically identified in the contract as being the responsibility of the employer.

In the event that the contractor undertakes the design of any part of the works, he must clarify who is to be responsible for the provision of permits, licences or approvals for that part of the works.

As an example: the contractor is required to design the slope protection works for a quay wall to be built in the open sea and is to use measures that are proven by experience. The contractor selects and the employer approves a pre-cast element that is protected by an international patent. It would seem logical that the employer and the owner of the works should obtain and bear the cost of any patent right?

Mutuality of treatment

It is generally clear, and even more so where a project is financed through an MDB lender, that both an employer and a financier will need a very timely warning about cost-overruns, so that measures can be initiated to save money elsewhere on the project and the budget can be preserved. So the need to put a time constraint on the contractor putting in a claim for extra money and/or extra time can be seen as reasonable, particularly where projects are financed by, e.g., MDBs. Though generally overdraft facilities will exist, it does make sense to oblige contractors to notify employers with diligence about cost-overruns. Complexity of projects does, however, not allow confining such diligence to a 28-day notification period or a 42-day period for substantiation, all under penalty of forfeiture of the claim.

Contractors also have a vested interest in the obligation of employers to warn contractors of employer's claims, particularly contractors working on lump-sum contracts and those with significant design elements in their scope of works. They too need to be made aware timeously of the employer's potential claims and yet the contractor is limited in time from the moment he became (or should have become) aware of an event that will cause a cost overrun, both for notification of the event and the full submission of the substantiation of his claim, while the penalty for failure to meet these time limits is forfeiture of any extra money and/or time. The employer does not have these constraints, not in time, nor in effect, but it generally is not the case that the employer does not have competent representatives who could as easily answer to such an obligation as a contractor may.

This discrepancy in obligations of the contractor compared to those of the employer was there in the 1999 version of the New Red Book and this unfortunately has not been repaired in the MDB version of the New Red Book, whilst the contracts under the MDB version will significantly be under lump-sum pricing and may have significant design elements to be carried out by the contractor.

Sub-clause 2.4 [Employer's Financial Arrangements]

Contractors generally applaud FIDIC for recognising the need for the contractor to be satisfied that the employer has the necessary financial

strength to undertake his obligations under the contract, particularly so in a contract partially or fully financed by, or through, the MDBs. Sub-clause 2.4 requires that:

“the Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price.”

This is a crucial obligation on the employer, particularly where funding is being provided, in whole or in part, by third parties. The contractor must have the right to refuse to undertake any significant variation if no clear evidence is provided that the available funding is sufficient to cover the cost of the varied works. A further improvement would be that the MDBs would make it their policy to maintain all or part of the funds in an escrow account at the bank itself, upon which account the contractor can draw in the event of non-payment by the employer.

The contractor should also have a right to be made aware of any terms, conditions or step-in rights that exist in any agreement between the employer and his lenders. If such an agreement is to be put in place between lenders and contractor then the terms and conditions should be made available prior to signature of the contract.

A powerful sanction is available to the contractor should the employer fail to furnish “reasonable evidence”. The contractor is entitled to suspend the work or terminate the contract under sub-clauses 16.1 [Contractor's Entitlement to Suspend Work] and 16.2 [Termination by Contractor]. However, what constitutes reasonable evidence is undefined and the contractor is left to try to establish this prior to submitting a tender. His failure to do so could prejudice any attempt to obtain more detailed information during the currency of the contract, if for example a major variation is instructed.

Notwithstanding, contractors should consider the risk associated with continuing to work during the 28-day period available to the employer to provide the required evidence and the further extended notice periods required to comply with the suspension and termination provisions.

The MDB Harmonised Version adds the requirement that the employer shall submit evidence that financial arrangements have been made that will enable him to pay for the works before the commencement date. This action does not depend upon the contractor having made a request for him to do so.

Sub-clause 3.1 [Engineer's Duties and Authority]

The engineer's duties and authority

The MDB Harmonised Version will be used mainly for infrastructure work in developing countries where employers must be held to avail themselves of the services of an independent engineer. That engineer must be vested

with an authority to act on behalf of the employer as envisaged by the 1999 edition of FIDIC. Where the engineer takes action under that form of contract he must do so fairly. The contractor understands which actions under the contract require the engineer to seek specific authority and also understands that the employer cannot frustrate the contract by withholding such authority.

The MDB Harmonised Version makes unacceptable changes to the FIDIC terms in respect of the engineer's authority.

Sub-clause 3.1 is changed in the Bank Harmonized Version. The duties and authority of the engineer or of the employer's representative are of paramount importance to the contractor under any form of contract whether it is that of a construction contract or a design-build agreement. Under the FIDIC 1—1999 Editions, the employer is required to obtain the contractor's consent before changing the authority attributed to the engineer. The last sentence of the third paragraph of this sub-clause reads:

“The Employer undertakes not to impose further constraints on the Engineer's authority, except as agreed with the Contractor.”

This sentence is changed in the MDB Harmonised Version to read:

“The Employer shall promptly inform the Contractor of any change to the authority attributed to the Engineer.”

This change is generally unacceptable for contractors, as it seems to mean that the employer can alter the engineer's authority under the contract unilaterally, thus changing the balance of risk therein after the contract price has been agreed. As an example, should the “change to the authority attributed to the Engineer” be such to either restrict or remove such authority, that change would be likely to affect the rate of progress of the work.

Should the MDBs want to give such unilateral entitlements to the employer, then there ought to be a requirement that the employer provide the contractor with copies of the original document confirming the engineer's authority under sub-clause 3.1 as well as the document that alters such authority. Furthermore, there should be provisions in this sub-clause giving entitlement to the contractor to any additional time or costs that may flow from the change to the engineer's authority.

Specific approval for the engineer to take action

The sub-clause in the FIDIC 1—1999 version requires that the authority attributed to the engineer shall be stated in the Particular Conditions. This version contains guidance for the preparation of the Particular Conditions of Contract in respect of the sub-clauses for which there is a requirement that the engineer shall seek the approval of the employer before taking action under the contract.

As in earlier versions of the Standard Bidding Document of the World Bank, FIDIC 1—1999 includes an “optional” recommendation for the Particular Conditions. Previously, employers generally followed the Bank’s “optional” recommendation and required such specific approval to be obtained before the engineer takes action to:

- (a) consent to the subletting of any part of the works;
- (b) certify additional cost determined under the unforeseeable conditions provision of the contract;
- (c) determine an extension of time;
- (d) issue a variation, except:
 - (i) in an emergency situation, as reasonably determined by the engineer; or
 - (ii) if such variation would increase the contract price by less than the amount stated in the bid data; or
- (e) fix rates or prices.

The Bank Harmonised Version modifies the list of actions for which specific approval is required, and the text of the sub-clause now reads:

- “(a) Sub-Clause 4.12: agreeing or determining an extension of time and/or additional cost.
- (b) Sub-Clause 13.1: Instructing a Variation, except
 - (i) in an emergency situation, as determined by the Engineer; or
 - (ii) if such a Variation would increase the Accepted Contract Amount by less than the amount stated in the Contract Data.
- (c) Sub-Clause 13.3: Approving a proposal for Variation submitted by the Contractor in accordance with Sub-Clause 13.1 or 13.2.
- (d) Sub-Clause 13.4: Specifying the amount payable in each of the applicable currencies.
- (e) Notwithstanding the obligation, as set out above, to obtain approval, if, in the opinion of the Engineer, an emergency occurs affecting the safety of life or of the Works or of adjoining property, he may, without relieving the Contractor of any of his duties and responsibility under the Contract, instruct the Contractor to execute all such work or to do all such things as may, in the opinion of the Engineer, be necessary to abate or reduce the risk. The Contractor shall forthwith comply, despite the absence of the approval of the Employer, with any such instruction of the Engineer. The Engineer shall determine an addition to the Contract Price, in respect of such instruction, in accordance with Clause 13 and shall notify the Contractor accordingly, with a copy to the Employer.”

The Bank Harmonised Version generally follows the previous “optional” recommendations. The action of the engineer to determine additional cost is no longer tied only to the unforeseeable conditions terms of the contract but is now general. The engineer must now seek approval in order to take action to determine the amounts payable in applicable currencies. It further adds the power of the engineer to order and pay for additional work that is instructed as a result of an emergency that threatens life, the works or adjoining property.

A misunderstanding that commonly arises under the FIDIC contract forms as a result of this recommended wording relates to the meaning of and the employer's obligation in respect of, "the specific approval of the Employer".

It is an interpretation of some that under this provision the employer has the authority under the contract either to delay or even deny an entitlement to the contractor for: additional cost under sub-clause 4.12; or additional time under sub-clause 8.4; or a variation to the contract under clause 13 by simply withholding "the specific approval" for the engineer to take such action.

The contractor commonly believes that any authority for the engineer to act or make a determination under the contract is deemed to be given by the employer and that the engineer must act or determine fairly and in a timely manner. The employer would be in breach of his duties under the contract either to delay giving or deny any authority to the engineer to carry out his duties under the contract. Whilst the employer should have the right to deny authority to the engineer to vary the contract, it cannot deny such authority if the variation under clause 13, for example, is made necessary by events arising out of encountering unforeseeable conditions under sub-clause 4.12.

Furthermore, under a Design-Build or an EPC-Turnkey Contract, the employer would not be entitled to withhold any authority to the engineer or to the employer's representative to issue a variation under clause 13 for changes to the contractor's design that arise out of a revision to the employer's requirements.

The fourth paragraph of sub-clause 3.1 both in the FIDIC First Edition 1999 and in the Bank Harmonised Version states:

"However, whenever the Engineer exercises a specified authority for which the Employer's approval is required, then (for the purposes of the Contract) the Employer shall be deemed to have given approval."

When the Conditions provide that the engineer shall proceed in accordance with sub-clause 3.5 to agree or determine, the employer may not withhold or deny the engineer the specific authority to, "consent, certify, determine, issue or fix". Sub-clause 3.5 states:

"If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances."

The engineer should not be required to obtain, nor should the employer give, any "specific approval" for the engineer to "consent, certify, determine, issue or fix" when he is required to take such actions under the contract. If the employer disagrees with any action taken by the engineer then he is entitled to object under the provisions of sub-clause 2.5 [Employer's Claims] and Clause 20 [Claims, Disputes and Arbitration].

Sub-clause 4.2 [Performance Security]*The right to call*

The terms set out by the FIDIC Edition 1—1999 that govern the circumstances under which a performance security may be called represented a significant step forward in respect of earlier FIDIC editions. The wording of sub-clause 4.2 [Performance Security] sets out the four circumstances or events for which the Employer may make a call under the performance security:

- “(a) failure by the Contractor to extend the validity of the Performance Security as described in the preceding paragraph, in which event the Employer may claim the full amount of the Performance Security,
- (b) failure by the Contractor to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [Employer's Claims] or Clause 20 [Claims, Disputes and Arbitration], within 42 days after this agreement or determination,
- (c) failure by the Contractor to remedy a default within 42 days after receiving the Employer's notice requiring the default to be remedied, or
- (d) circumstances which entitle the Employer to termination under Sub-Clause 15.2 [Termination by Employer], irrespective of whether notice of termination has been given.”

Furthermore the recommended text for the performance guarantee stipulates that the ICC Uniform Rules for Demand Guarantees, Rule 458, shall govern the guarantee. The listing of the circumstances or events giving rise to a call provides the reasons for such call as required by ICC Rule 458.

The four sub-paragraphs have been removed in the Bank Harmonised Version.

The standard Red Book terms together with the reference to the ICC Uniform Rules provide sufficient guarantee for the employer as well as for the financing institutions and the contractor. Contractors are of the view that the Bank Harmonised Version should adopt the FIDIC 1—1999 language

The engineer's authority to vary the amount of the security

The Bank Harmonised Version adds a provision at the end of sub-clause 4.2 [Performance Security] that gives the engineer the faculty to request that the contractor vary the amount of the performance security in the event that there is a, “change in cost and/or legislation or as a result of a Variation amounting to more than 25% of the portion of the Contract Price”. Apart from the fact that it is an authority that the engineer may use with discretion (he may request an increase but not a decrease), it is not clear from the wording whether the circumstances giving rise to the 25% threshold amount would flow from a single event or variation or the accumulation of a series of events.

This addition should be corrected; both to remove discretionary authority of the engineer to request increases or decreases in the value of the performance security and to ensure that any change in the contract price determined by the engineer would arise from an accumulation of events.

What is the engineer to do under this sub-clause if a variation increases the scope of works which would warrant an increase of the performance security and he is aware that a subsequent decrease in quantities or non-use of a provisional sum will bring back the total cost to the original level?

Sub-clause 4.12 [Unforeseeable Physical Conditions]

The Bank Harmonised Version adopts the terms of FIDIC 1—1999 for dealing with unforeseeable conditions without change. The EIC is of the view that the provisions of sub-clause 4.12 as they would apply under the MDB Harmonised Version deserve further comment.

The definition of “unforeseeable” is now extended by the Bank Harmonised Version term (see the discussion under sub-clause 1.1.6.8, above) to include events “against which adequate preventative precautions could not reasonably be taken” in addition to events “not reasonably foreseeable by an experienced contractor by the date of submission of the Tender”. Sub-clause 4.10 [Site Data] deems the contractor to have obtained all necessary information (based on practicality of time and cost) as to risks and contingencies and to have satisfied himself before submitting his tender as to the nature of the site, including subsurface conditions, all of which permits the engineer to argue that the contractor should not only have foreseen such physical conditions but have made allowances in his tender for preventative precautions.

The contractor is entitled to relief for cost and time due to unforeseeable “natural physical conditions and man-made and other physical obstructions or pollutants” and “including subsurface and hydrological conditions”. The contractor may no longer rely on this sub-clause for relief due to unforeseeable obstructions encountered off the site. Like the Fourth Edition, the Harmonised Bank Version excludes climatic events from the definition of physical conditions that may give rise to entitlement to time extension and cost.

Before finally determining any entitlement to additional cost, the engineer may take into account whether “other Physical Conditions in similar parts of the Works (if any) were more favourable than could reasonably have been foreseen when the Contractor submitted its Tender”. If, in the engineer’s opinion such favourable conditions were encountered the engineer may take them into account when determining any entitlement to additional cost (although not with regard to additional time); however he may not reduce the contract price. This provision could be extremely prejudicial to the contractor because the expressions “similar parts of the Works” and “more favourable” are open to subjective interpretation.

The closing paragraph of this sub-clause in the Harmonised Version preserves the novel concept that permits the contractor to provide evidence of the allowances made for physical conditions and preventative precautions in his tender calculation. The contractor should be aware that if he provides the engineer with such “base line” evidence, the engineer may take account of it, but is not bound by any such evidence in making a determination pursuant to sub-clause 3.5 [Determinations].

An alternative and perhaps a more rational approach would be that, if the contractor elects to provide evidence of his allowance, then the parties would then be held to agree the foreseeable conditions before the contract is entered into. Where this practice has been adopted, experience shows that this approach reduces the number of disputes arising out the unforeseeable physical conditions and simplifies the resolution of such disputes should the parties not be able to agree.

An example of “base line” evidence is taken from a recently negotiated contract wherein, amongst other things, the presence of water in a tunnel excavation was not an unforeseeable physical condition but only to the extent that it may be encountered. The contractor made an assessment for the quantity of water that could reasonably be foreseen and a corresponding precautionary allowance for handling that amount of water. He provided the evidence of those assessments to the employer with his bid. The employer was then able to consider the costs of the contractor's allowances. This “base line” allowance for water was agreed between the employer and the contractor and the contractor's tender was adjusted accordingly. In this way, both the contractor and the employer were in a position to determine the share of risk of encountering foreseeable and unforeseeable quantities of water in the excavation. The height of the unforeseeable bar was set.

Sub-clause 12.3 [Evaluation]

The Harmonised Version varies the wording of this sub-clause and, in particular, changes the thresholds for the variations in quantities and values of single items of the bill of quantities in order to determine whether or not it would be appropriate to vary a billed rate:

- (1) The threshold amount for a change in quantity for a single bill item in sub-paragraph 12.3(a) (i) has been increased from 10% to 25%; a 2.5 times increase in the threshold.
- (2) The threshold amount for a change in value for a single bill item in sub-paragraph 12.3(a) (ii) has been increased from 0.01% to 0.25%; a 25 times increase in the threshold.

There is nothing to warrant the increase in the threshold amount for the quantity of a single billed item from 10 to 25%. Notwithstanding this,

consideration should be given to extending the application of changes in quantities and values from single bid items either to classes of work (i.e. concrete or earthworks) or sections of the bill (i.e. foundation treatment or equipment installations).

Sub-clause 15.6 [Corrupt or Fraudulent Practices]

The Bank Harmonised Version add this sub-clause which extends the definition of corrupt or fraudulent practice beyond that of commonly applied conditions of particular applications which included the offering of bribes or gifts or otherwise influencing the action of a public official. The definition is extended to include subparagraph (b) of this sub-clause which states:

“ ‘fraudulent practice’ means a misrepresentation of facts in order to influence a procurement process or the execution of the Contract to the detriment of the borrower, and includes collusive practice among Bidders (prior to and after the bid submission) designed to establish bid prices at artificial or non-competitive levels and to deprive the Borrower of the benefits of free and open competition.”

If the Employer determines that the contractor has engaged in a fraudulent act under this definition he may terminate the contract and expel the contractor from the site by giving 14 days’ notice.

At first glance it would appear that “fraudulent practice” under this definition is limited to the procurement process such as to deprive the borrower of the benefits of free and open competition. However, the definition contains the words, “the execution of the Contract” as distinct from the “procurement process”.

This may have far-reaching and problematic implications in the administration of a contract. As an example, if the employer “determines” that the contractor has inflated a claim for additional costs or for an extension of time for completion that would affect the financial arrangements for the contract (the “procurement process”), he may terminate the contract and expel the contractor from the site. The remedies available to the contractor in such an instance are not defined.

Furthermore, the language of the sub-clause is worded such that the conduct of fraudulent practice would apply only to one of the parties to the contract, the contractor. This begs the question as to whether a wilful breach of the contract by the employer or by the engineer by not taking required action during “the execution of the Contract” that would affect the contractor’s financing of the works would fall under the definition of fraudulent practice and that would entitle the contractor either to suspend work under sub-clause 16.1 or to terminate the contract under sub-clause 16.2.

Clause 20 [Disputes]*Sub-clause 20.2 [Appointment of the Dispute Board]*

The MDB Harmonised Version leaves sub-clause 20.2 intact with the exception of deviating from the well-known reference to a Dispute Adjudication Board (DAB). The Harmonised Version refers to a Dispute Board (DB).

The MDB Harmonised Version does not deviate from the concept that the DB is to be a standing body that is constituted at the start of the contract and which makes regular visits to the site and must remain available to the parties upon request to intervene in order to resolve disputes. The DB is to be composed of either one or three members as may be agreed by the parties. The MDB Harmonised Version makes the appointment of a DB compulsory regardless of the value of the works.

The DB member must be a professional, expert in the work of the contract and fluent in the language of the contract. The MDB Harmonised Version places onerous financial obligations on a DB member who fails to comply with any of his obligations under the Board Members agreement. He shall not be entitled to any fees or expenses and may be held to reimburse any fees and expenses received by the member and the other members for proceedings or decisions that are voided as a result of a failure to comply.

It is of paramount importance that the MDBs subscribe to the World Bank policy on procurement⁵ that the Dispute Board should issue a "decision" that is binding on the parties in the interim. However, if either party is dissatisfied with the DB's decision it may give notice of such dissatisfaction to the other party within 28 days. The decision remains binding on the parties unless and until such decision is modified or overturned by amicable settlement or by arbitral award.

⁵ Standard Bidding Documents, *Procurement of Works and Users Guide*, 2000.