

THE SILVER BOOK - A WOLF IN SHEEP'S CLOTHING?

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Published in the Row and Mawe "Construction and Engineering International Bulletin", October 2001, Issue 3

In 1999, FIDIC published a new contract, the Conditions of Contract for EPC Turnkey Projects, more commonly known as "The Silver Book".

The introductory note to The Silver Book sets out the circumstances in which FIDIC say the contract should be used and the philosophy behind the balancing of risk. In short, FIDIC say that the contract should be used where projects are financed by private funds, where the lender requires greater certainty about a project's costs and time for completion. The form is intended to be suitable not only for EPC Contracts where private finance is being provided, but also for process plant projects being carried out around the world by all types of employers, and where government departments or private developers wish to implement projects on a fixed price turnkey basis.

There is no doubt that such a form of contract was required, since, in its absence, employers would (often) rely on bespoke forms of contract with an unfair balance of risk in their favour, or would present amended forms of FIDIC Contracts, such as the Red and Orange Books, effectively removing FIDIC's traditional principles of balanced risk sharing.

However, there has been no contract issued in recent years, certainly in an international context, which has attracted more widespread publicity. Many articles have been written and published on The Silver Book. Initially, most of the articles were written from a contractor's perspective and were critical of the way risk had been allocated between the contractor and the employer. In particular, many saw The Silver Book as a departure from FIDIC's traditional role of balanced risk sharing.

It is not the purpose of this article to consider in any detail the criticism, much of which is justified. In summary, criticism was directed at clauses which made the contractor responsible for, amongst other things, the occurrence of poor or unexpected ground conditions, errors in the employer's requirements and the accuracy of site data provided by the employer. Further, the contract provides that the design is fit for its purpose; an onerous obligation (often not covered by insurers). On top of issues such as these, criticism was directed at the level of interference the employer could exercise despite the fact that the introductory note to The Silver Book states that the employer should only exercise limited control over the contractor's work. There are myriad clauses in The Silver Book which allow the employer to exercise a degree of control over the contractor, including the giving of any instructions, the nomination of subcontractors, the right to reject work, and the ability to instruct the contractor to accelerate, even where it is not in critical delay.

More recently, in response to the weight of criticism aimed at The Silver Book, FIDIC have hit back. A recent article by Christopher Wade (Chairman of FIDIC's Contracts Committee and Leader of the Task Group who prepared the FIDIC 1999 Conditions of Contract) stated that much of the criticism of FIDIC's Silver Book was "biased and generally unfounded". Mr Wade argued that the criticism made of The Silver Book often considered problems in using The Silver Book on projects for which FIDIC had indicated it was not suitable, and for uses which FIDIC had not recommended. Mr Wade was of the view that because contractors were active and well organised, and lawyers vociferous on their behalf, they had somehow all orchestrated a campaign against The Silver Book. Mr Wade and, more

recently, other commentators have gone on to point out the ways in which The Silver Book is actually favourable towards the contractor. Some of the points are well made, but in truth, there is little in The Silver Book that lends itself to the contractor. For example, much has been made of The Silver Book's provisions regarding employer's financial arrangements. These give the contractor the right to reasonable evidence of the employer's ability to pay. This right is supported by the right to terminate in the event the employer does not satisfy the contractor. However, in practice the provision is virtually worthless. On a project of any size, a contractor will go to great lengths to take security from the employer with regard to payment, such as a parent company guarantee or a letter of credit. It is unlikely that, once a contract has been signed, a contractor will make use of these provisions.

In truth, the problem with The Silver Book is not that it contains provisions which place more risk than is usual on a contractor. At the end of the day, it is up to contractors to familiarise themselves with the provisions of any contract which they are about to enter into, to take a view as to whether the risks are acceptable, and, if they are not, as to whether or not a price can be contained in the tender to cater for them. Indeed, Mr Wade is right to point out there are many forms of contract regularly used on international projects which are far more onerous than FIDIC's Silver Book and which place far more risk on the contractor. Despite the criticisms made, The Silver Book does (actually) represent (at least when compared to bespoke forms proffered by employers on major international projects) a relatively fair allocation of risk.

The real danger of The Silver Book lies in the fact that it is a FIDIC publication. Too many contractors, on projects worth millions of pounds, still enter into contracts without consulting lawyers or those experienced in contract negotiations. There is little doubt that, on projects where the employer puts forward FIDIC's Silver Book as the contractual terms, contractors will be mightily relieved they are not going to negotiate a bespoke form of contract which they have not hitherto seen. The fact that the contract is a FIDIC form means that they may be lulled into a false sense of security. It is still not uncommon for contracts on major projects to be agreed by contractors without any detailed analysis of the terms. Therein lies the danger of The Silver Book. How many contractors will read the introductory note to see whether The Silver Book is being used in the situations in which FIDIC indicated that it should? Indeed, how many contractors will read through all of the pages of The Silver Book analysing where the risk lies? It has to be the duty of contractors' organisations such as the European International Contractors and lawyers with a client base made up of international contractors to educate their clients and to alert their clients to the potential pitfalls contained within any given type of contract. The Silver Book is no different. In fact, the reason why it has prompted so much publicity is doubtless because it is a FIDIC publication. Contractors should not thereby assume that there is a fair allocation of risk therein.

It would be unfair to say that The Silver Book is a "wolf in sheep's clothing" but it is not far off. Contractors should consider it carefully and seek specialist advice (if they do not have the expertise in-house) before signing up.