MOVING FORWARD WITH FIDIC SUITE OF CONTRACTS
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1999 AND ONWARDS

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ABSTRACT

With this article, first a brief look is taken to two essential amendments introduced with the 2017 Revision of FIDIC Suite of Contracts. One of them relates to the Contractor's liability under Silver Book in the event the Employer begins to make use of parts of the Permanent Works prior to Taking Over, which is rectified with the exception included in the wording of Sub-Clause 10.2 [*Taking Over of Parts of the Works*] in 2017 Revision. The other change concerns Clause 17 [*Risk and Responsibility*] under 1999 Revision, renamed as [*Care of the Works and Indemnities*] with 2017 Revision and again relates to issues of liability, where the Employer performs a part of the design or has it performed via a third party in a project subject to Silver Book. In that vein, how the liability born by the Contractor under 1999 Revision is carved out with 2017 Revision is reviewed in relation with the items under the Employer's risk area. The emphasis in scrutinization of both changes is on the convenience brought by 2017 Revision.

In the sequel, two issues are pointed out, which remain unremedied in the 2017 Revision but still needs to be revisited, accompanied with certain suggestions for amelioration, with a vision to inspire future revisions of FIDIC. One point focuses on the Contractor's risk of facing delay when submitting proposals to the Employer under Sub-Clause 13.2 [*Value Engineering*] due to absence of any specification preventing silence of the Engineer or Employer to compel the Contractor to wait for an indefinite period of time in a manner to hamper the continuance of the Works, and cause damages. Second discussed issue is the problem of forcing the Contractor to leave the Site upon termination in case of the Contractor's objection regardless how unreasonable it is. Certain ideas are discussed to assist smooth realization of Site vacation upon any kind of termination as a solution to the Employer's risk of facing delay and damages in case the Contractor rejects to do so, since the Contractor cannot be physically forced to leave the Site.

Keywords: FIDIC Suite of Contracts, Silver Book, Yellow Book, Construction, Employer, Contractor, 2017 Revision, 1999 Revision

1. INTRODUCTION

Having first been issued in 1957, FIDIC suit of contracts are among the most commonly used standard contract templates in the construction sector. Throughout the years, the construction sector went through technological evolutions and also was affected by the global economic dynamics. Accordingly, FIDIC suit of contracts has addressed the emerging need for practical and legal changes via new revisions. The necessity for certain adjustments or clarification of matters that were noticed through the feedback received from the sector relying on the collective experience accumulated in time with many project implementations were also obviated within the scope of these modifications.

In that vein, the first edition of FIDIC 2017 Revision was issued in December 2017 and the second edition was reprinted in 2022 with amendments. It is pleasing to see that most of the previous missing stipulations are now included in the 2017 Revision such as; returning of the performance bond to the Contractor not only upon completion of the project but also upon termination of the Contract by the Contractor due to Employer's default; payment of loss of profit to the Contractor upon Contract being terminated by the Employer for convenience or termination of the Contract by the Contractor due to Employer's default; deeming provisions; the claim procedure being regulated in detail.

It would not be wrong to say that all these changes together with many other provisions introduced to enable the Parties to exercise their reciprocal rights, where applicable, currently reveal a more balanced and fair contract. However, I have always believed that not the state of perfection itself but the idea of it gives the motivation for attaining such a state. Hence, I suppose it would not be unfair -on the contrary, actually serve to the benefit of the suit of contracts- to point out certain aspects of the current version, which might be further developed.

In this article, initially, the two changes brought with 2017 Revision and possible risks under 1999 Revision containing the previous wording will be scrutinized, then two other Sub-Clauses of 1999 Revision, which remain unchanged, but in fact need to be re-visited, will be discussed. All references made in this article to 2017 Revision are the references to 2022 reprint.

2. USAGE OF PARTS OF THE WORKS BY THE EMPLOYER PRIOR TO TAKING OVER

A. FIDIC 1999 Revision and Former Problems in Silver Book

One of the important changes in 2017 Revision relates to Sub-Clause 10.2 [*Taking Over of Parts the Works*] under Silver Book 1999 Revision concerning taking over of parts of the Works, setting forth that "*Parts of the Works (other than Sections) shall not be taken over or used by the Employer, except as may be stated in the Employer's Requirements or as may be agreed by both Parties*". Previously, certain questions arose out of this provision remained unanswered. For example, it needs to be clarified what will happen if parts of the Works are used by the Employer, without any contractual ground or a mutual agreement. What if the Employer used these parts for months without the Contractor having any control? Would the Contractor continue to be liable for care of Works under Sub-Clause 17.2 [*Contractors Care of the Works*] due to Taking-Over Certificate not yet being issued? Would that be permissible under law or fair?

To address the above questions, it is necessary to first review relevant parts of Clause 17 [*Risk and Responsibility*] of Silver Book under 1999 Revision. First paragraph of Sub-Clause 17.2 [*Contractors Care of the Works*] sets forth that:

> "*The Contractor shall take full responsibility for the care of the Works and Goods from the Commencement Date until the Taking Over Certificate is issued (or is deemed to be issued under Sub-Clause 10.1 [Taking Over of the Works and Sections] for the Works, when responsibility for the care of the Works shall pass to the Employer […]*".

Third paragraph of Sub-Clause 17.2 [*Contractors Care of the Works*] refers to Sub-Clause 17.3 [*Employer's Risks*] as an exception to Contractor's such liability and sets forth that the Contractor shall be liable to rectify any loss or damage caused by reasons which are not listed in Sub-Clause 17.3 [*Employer's Risks*]. However, this Sub-Clause does not bear any mention of any part of the Works used by the Employer, except as may be specified in the Employer's Requirements or as may be agreed by the Parties.

If literal interpretation is adopted to read the above referred provisions, it can be argued that the Contractor will continue to be liable for the care of the Works, even if any part of the Works is occupied and/or used by the Employer without any contractual entitlement, since the Employer's

such usage is not covered under Sub-Clauses 17.2 [*Contractors Care of the Works*] and 17.3 [*Employer's Risks*], mentioning the exceptions for such liability.

Nonetheless, it would not be fair or even legally possible to claim that the Contractor would continue to be liable for parts of the Works, which are already in the possession and usage of the Employer, based on the sole reason that the Taking Over Certificate is not issued given the absence of an acceptance method for parts of the Works under Silver Book.

The phrasing of Sub-Clause 10.2 [*Taking Over of Parts of the Works*] of Silver Book under 1999 Revision, leaves space for different interpretations under different legal systems. As such, under Turkish law, it would not be possible to rely on Sub-Clause 10.2 [*Taking Over of Parts of the Works*] to defend that there is no deemed acceptance while the Employer is using certain parts of the Works, since the control of risk directly passes to the Employer upon use or occupation of the relevant parts. I had always found this stipulation risky, as I have witnessed multiple times that the personnel performing under Silver Book believes this provision applies notwithstanding any provisions or principles of the governing law from the perspective of a literal interpretation. Accordingly, this provision was in need of revision to avoid any unfair application.

B. FIDIC 2017 Revision and Current Situation

2017 Revision introduced the change in that regard by adding the wording "*use or occupation by the Employer of any part of the Permanent Works, except as may be specified in the Contract*" among the exceptions to the Contractor's liability for care of the Works under Sub-Clause 17.2 [*Liability for Care of the Works*] of Silver Book. Indication of "Permanent Works" rather than "Works" is deemed adequate, as the problems occurred relevant to this Sub-Clause in practice specifically concerned the Employer's use of parts of Permanent Works with no contractual ground.

Through the Golden Principle 3 ("**GP3**"), FIDIC emphasizes the importance of setting a fair and balanced risk & reward allocation between the Parties, and in line with this principle the liability for care of Works upon use or occupation of any part of the Permanent Works with no contractual base is currently imposed on the Employer, since due to possession of such part of Permanent Works, only the Employer may foresee, control and avoid any risk; and bear any consequences. It is good to see incorporation of this much needed change, which will prevent

occurrence of various deemed acceptance arguments throughout the projects awarded under Silver Book 2017 Revision. This amendment may also be reflected to contracts awarded under FIDIC Silver Book 1999 Revision via mutual consent of the Parties. Further, it can be argued that this change introduced to 2017 Revision will serve as an interpretative guide to adjudicators and arbitrators in resolution of disputes arising out of contracts awarded under Silver Book 1999 Revision bearing the original wording under Sub-Clause 10.2 [*Taking Over of Parts of the Works*].

3. DESIGN BY THE EMPLOYER

A. FIDIC 1999 Revision and Former Problems in Silver Book

The second matter that will be discussed relates to an already-mentioned clause – Clause 17 [*Risk and Responsibility*] that is dealing with the risk and liability areas of the Parties. Yet, the discussion herein will be more colourful, as the wordings of two different suites – Yellow and Silver – will be touched upon. Paragraph (g) of Sub-Clause 17.3 [*Employer's Risks*] of FIDIC Yellow Book 1999 Revision refers *"design of any part of the Works by the Employer's Personnel or by others for whom the Employer is responsible, if any"* as one of the Employer's risks, while Silver Book 1999 Revision does not mention such incident as a risk item under the Employer's liability area.

Presumably, reasoning for Silver Book's silence on this incidence is based on the EPC contract logic for which it was designed; and it was previously envisaged that the Employer would not interfere with design issues. In fact, this is sensible and if the Employer wishes to do so, it is more convenient for the Employer to adopt Yellow Book. However, there is again the question of what would happen if the Employer adopted Silver Book and yet dealt with design issues by preparing a part of the design.

As explained above, Sub-Clause 17.2 [*Contractor's Care of Works*] of Silver Book 1999 Revision refers to Sub-Clause 17.3 [*Employer's Risks*] as an exception to Contractor's liability with the Contractor being liable for any loss or damage caused by reasons other than the ones listed under Sub-Clause 17.3 [*Employer's Risks*]. Since, such a circumstance is not mentioned under Sub-Clause 17.3 [*Employer's Risks*], the question whether the Contractor will be liable for the design prepared by the Employer needs to be addressed. If the above referred provisions are

interpreted literally, the answer is yes, but this is neither sensible nor fair. It seems this is why this provision is also amended with the 2017 Revision in a manner to conclude that if the Employer has prepared a part of the design, then the Employer should bear the liability, in line with the GP3 referred above.

B. FIDIC 2017 Revision and Current Situation

2017 Revision introduced the change in regard to the Silver Book's silence on the scenario where the Employer has prepared a part of the design by including the "*fault, error, defect or omission in any element of design of the Works by the Employer, other than design carried out by the Contractor in accordance with the Contractors' obligations under the Contract*" among the exceptions under Sub-Clause 17.2 [*Liability for Care of the Works*]. Being very well balanced and adequate, this amendment concludes on design liability fairly. It is deemed necessary to note that if the Parties are working with the Silver Book 1999 Revision, this amendment is worth to be reflected into their Contract.

The above-mentioned changes presented with 2017 Revision with regard to Sub-Clause 10.2 [*Taking Over of Parts of the Works*], Sub-Clause 17.2 [*Contractor's Care of the Works*] and Sub-Clause 17.3 [*Employer's Risks*] under 1999 Revision, apart from being in line with GP3, comply with the common principles of law that no one can benefit from its own default; and also, no one can abuse its contractual rights. Yet, as previously mentioned, there still are some issues requiring to be re-visited. Hence, it is also useful to dwell into the points, which can make use of further clarification despite the detailed and extended provisions of 2017 Revision.

4. PROPOSALS FOR VALUE ENGINEERING

A. FIDIC Provisions

Under both 1999 and 2017 Revisions, Sub-Clause 13.2 [*Value Engineering*] providing for provisions concerning value engineering states that the Contractor may, at any time, submit a written proposal to the Engineer (in Red Book and Yellow Book) or to the Employer (in Silver Book) for the benefit of the project and the Employer. For the purposes of this article, the term "Engineer" will be used to refer to the authority to whom value engineering proposals will be submitted, in a manner to scope Red Book, Yellow Book and Silver Book.

In case submission of a value engineering proposal, the Engineer is required to respond to the Contractor "*as soon as practicable*"; however, it is also indicated that the Contractor shall not delay works while awaiting a response. At this point, a question arises, what happens if the Contractor submits a proposal to the Engineer under Sub-Clause 13.2 [*Value Engineering*] and the Engineer does not respond at all? This leads to an inference that when submitting a value engineering proposal, the Contractor needs protection from losses and damages, which may be caused by waiting or not for the Engineer's response and are not attributable to itself.

In many circumstances involving the Engineer's silence, deeming provisions, which are introduced with 2017 Revision to protect the Contractor from waiting for an indefinite period of time are of much help. In line with the concept of deeming provisions, the definition of "Review Period", and the concept of "No-objection" are now included in the 2017 Revision via Sub-Clause 5.2.2 [*Review by Engineer*] under Yellow Book & Silver Book. Accordingly, in the event the Engineer does not provide any comment or response within the Review Period as defined under Sub-Clause 5.2.2 [*Review by Engineer*], it is deemed that the Contractor's Documents, which is defined in Sub-Clause 1.1 [*Definitions*] with reference to relevant sub-clauses under the General Conditions, are approved. In Red Book, although there is no Review Period definition, in parallel to the logic set out under Yellow Book & Silver Book, via Sub-Clause 4.4 [*Contractor's Documents*] it is set forth that the Engineer would Review the Contractor's Documents within 21 days; and the concept of No-objection also reflected thereunder.

In FIDIC, "Contractor's Documents" are generally described as As Built Records and O&M Manuals and the documents specified in the Employer's Requirements or the Specification, or the ones required for permits, licenses and similar approvals.

Paragraph (c) of Sub-Clause 5.2.3 [*Construction*] Yellow Book & Silver Book and paragraph (d) of Sub-Clause 4.1 of Red Book [Construction] under 2017 Revision sets forth that "*the Contractor may modify any design or Contractor's Documents which have previously been submitted for Review, by giving a Notice to the Engineer with reasons*", while the Contractor's Documents referred above does not include any reference to Sub-Clause 13.2 [*Value Engineering*] or mention any value engineering proposals to be submitted by the Contractor. Moreover, as noted above, Sub-Clause 13.2 [*Value Engineering*] sets forth that the Engineer shall respond as soon as practicable but does not make a reference to the Review Period. So, the

question is that whether any proposal submitted by the Contractor shall be evaluated among the Contractor's Documents subject to Review Period and No-objection concept, or otherwise. If, it is accepted that the Contractor's value engineering proposal is not subject to these Sub-Clauses, then no automatic deemed acceptance of Contractor's proposal will be applicable in case of the Engineer's silence or delay in responding.

B. Problem

In such case, after submitting a proposal under Sub-Clause 13.2 [*Value Engineering*], whether the Contractor will be obliged to wait for some time and if so, for how long need to be answered. What if the Contractor can prove that it was impossible to proceed with the Works without first receiving the decision on its proposal? Will the Contractor be liable for any delay caused due to delay in receiving a response to its proposal?

In another scenario, the Contractor may deem its proposal rejected for not receiving any response, say within 30 days, and proceed with the Works without any design changes, but the Engineer may later approve the proposal. In such case, without a doubt, costs will incur, and an extension of time will be required, and it is essential to determine, which Party will be liable for all these. These questions may be varied, yet what remains common is the Contractor's risk of facing delay when submitting a proposal under Sub-Clause 13.2 [*Value Engineering*], which would actually hamper the aim of the provision to encourage the Contractor considering the Employer's benefit in evolving the design.

C. Ideas for Solution

I. Deemed Approval

To minimise the Contractor's risk of facing delay due to waiting for the Engineer's Review, mentioning the proposals under Sub-Clause 13.2 [*Value Engineering*] among Contractor's Documents may be considered as a solution, so that such proposals would be treated as Contractor's Documents providing a link to deemed approval.

On the other hand, from the perspective of an alternative interpretation, if the wording of relevant sub-clauses such as paragraph (c) of Sub-Clause 5.2.3 [*Construction*] of Yellow Book & Silver Book and Sub-Clause 4.4 [*Contractor's Documents*] of Red Book actually aimed to

provide this link, then a clarification via a reference to Sub-Clause 13.2 [*Value Engineering*] clearly stating that the Engineer shall respond within the Review Period (rather than "*as soon as practicable*") pursuant to relevant sub-clauses mentioned herein is necessary to prevent any interpretation to the contrary.

II. Deemed Rejection

It should also be scrutinized whether subjecting the Contractor's such proposal to deemed approval mechanism would be the best solution. As an alternative solution, inclusion of a "deemed rejection" concept may be considered to avoid possible problems, which may occur in the absence of a response from the Engineer within the Review Period. Accordingly, the Contractor could be allowed to deem its proposal rejected after expiry of the Review Period and be entitled to continue with the original design as previosuly agreed by the Parties under the relevant Contract without being having to wait for an indefinite term to proceed.

This view is shared as a discussion point to stimulate creation of any other solutions to adjust the Contractor's liability for delay while waiting for the Engineer's reply to the Contractor's proposal served under Sub-Clause 13.2 [*Value Engineering*], in a more balanced and fair manner to prevent occurrence of any possible disputes in that regard.

5. EXPELLING THE CONTRACTOR FROM SITE

A. FIDIC Provisions

Sub-Clause 15.2 [*Termination by Employer*] under 1999 Revision setting forth consequences of termination of Contract for Contractor's default is another provision which in fact needed some further adjustments, but Sub-Clause 15.2 [*Termination for Contractor's Default*] under 2017 Revision does not provide any amendment on the issue which will be scrutinised herein. The mentioned sub-clause under 1999 Revision, after listing the events entitling the Employer to terminate the Contract for the Contractor's default, states that in case of any of these events or circumstances "*[…] the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site"*.

Under 2017 Revision, Sub-Clause 15.2 [*Termination for Contractor's Default*] provides for the consequences of such termination through Sub-Clause 15.2.3 [*After termination*] by regulating

that "*the Contractor shall leave the Site and, if the Contractor does not do so, the Employer shall have the right to expel the Contractor from the Site*". Therefore, no change was made in that respect. Nonetheless, from a legal standpoint, it is not clear how the Employer shall exercise its right to expel the Contractor from Site if the Contractor refrains from leaving.

B. Turkish Law Perspective

From Turkish law perspective, pursuant to Law on Prevention of Violation of Immovable Property Possession numbered 3091, the legal possessor of a land may require prevention of trespass by applying to district governorate and inquiring taking of necessary administrative actions to expel such person from the site. In such case, the governorate carries out an investigation, hears any witnesses and decides on the matter. In the event the governorate decides that there is an illegal occupation of the land, then the trespass could be overcome by the enforcement officers, without losing severe time with a lengthy court proceeding or an endless negotiation process with the Contractor.

Although this structure may seem as a convenient resolution for the dispute, if such person is existent at the site based on a contractual relationship, such as a lease contract or a construction contract, it is not possible to have the site vacated via a decision from the governorate and with the executive force of the enforcement officers. This is because, administrative bodies do not have the authority to decide on legal disputes between contracting parties and legal issues are left to the sole discretion of judicial authorities.

In that vein, in case a FIDIC contract is governed by Turkish law whereby the Contract is terminated by Employer and the Contractor refuses to leave the Site, the Employer would not have any chance other than filing a lawsuit against the Contractor by claiming prevention of trespass and vacation of the Site due to termination of the Contract, and only the court may decide on the matter. Briefly, the Employer does not possess the right to expel the Contractor from Site without having a court decision, which may take years to be ruled. Therefore, at least from a Turkish law perspective, it is legally not possible for the Employer to force the Contractor to leave the Site without having a court decision in favour of the Employer, which may only be enforced through enforcement offices if the Contractor objects to abide by such court decision. Presumably, the same applies in many legal systems, as the Contractor is commissioned on Site

by relying on a contractual relationship and its leave in case of a conflict would depend on evaluation of such relationship by the authorised jurisdiction.

C. Problem

With that perspective, it is worth to evaluate what solutions can be worked out to protect the Employer from suffering delay in having the project completed by another contractor after termination of the Contract due to Contractor's default. Although it is very unusual for a Contractor to insist on remaining at the Site upon termination of the Contract and the Employer's instruction to leave the Site; this suggestion comes from an experience. Not always, but sometimes the Parties may not take the right and the best commercial decisions in their favour, and rarely the only aim may become harming the counterparty. My experience was the outcome of such a decision of a Contractor aiming to prevent the Employer's new contractor from accessing the Site by not vacating it. According to the Contractor, the new contractor, who is awarded by the Employer to complete the remaining works, would, without a doubt, reject to access the Site under such conditions -which expectation indeed proved to be accurate. In consequence, the Employer suffered serious delay in completion of the project as it could not make use of its contractual right to have the Site vacated given the resistance on the side of the Contractor.

The adverse effects of such a scenario may even extend to any settlement negotiations with an irreconcilable Contractor may lead the Employer to mostly focus to the perspective to have the Site vacated, and such focus may cause the Employer to become more fragile in possible settlement negotiations. Hence, regardless of the odds of facing a hardship in persuading the Contractor at default to leave the Site upon termination looks negligibly low, this circumstance worths to be considered in terms of preventive actions and/or remedial measures since the consequences of occurrence of such a scenario may have immense impacts over the project.

D. Ideas for Solution

In light of the above, it is deemed that this provision needs to be re-visited in the next revision with a view to ensure the Contractor leaves the Site upon termination, since the Contractor cannot be physically forced to leave the Site, regardless the Contract setting forth so.

It may be argued that if the Contractor is imposed with the liability for liquidated damages for each day that it refrains from leaving the Site, the Contractor could be more motivated to leave the Site right upon termination and seek any right via the lawful manner by way of filing a lawsuit for unjust termination. With FIDIC addressing this possibility in future revisions, country-specific solutions may also be built upon the amended structure in this regard through Particular Conditions. For instance, for legal frameworks under the Continental Law system, penalty provisions, as they are permitted thereunder, may serve better to ensure such motivation.

6. CONCLUSION

With this article, first a brief look is taken to two essential amendments introduced with the 2017 Revision in harmony with the GP3. One of them relates to the Contractor's liability under Silver Book in the event the Employer begins to make use of parts of the Permanent Works prior to Taking Over, which is now rectified with the exception included in the wording of Sub-Clause 10.2 [*Taking Over of Parts of the Works*] of Silver Book. The other change concerns Clause 17 [*Risk and Responsibility*] under 1999 Revision Silver Book, renamed as [*Care of the Works and Indemnities*] with 2017 Revision and again relates to issues of liability, where the Employer performs a part of the design or has it performed via a third party in a project subject to Silver Book. With 2017 Revision, the liability born by the Contractor under 1999 Revision is carved out with the inclusion of such a circumstance under Sub-Clause 17.2 [*Liability for Care of the Works*] among the items under the Employer's risk area. The emphasis in scrutinization of both changes is on the convenience brought by the 2017 Revision.

In the same vein, then two issues are pointed out accompanied with certain suggestions for amelioration, with the vision to inspire future revisions of FIDIC. One point is concluded with the idea of proposals to be submitted by the Contractor under Sub-Clause 13.2 [*Value Engineering*] being subjected to the Review Period and incorporation of a deeming provision whereby the Contactor would be entitled to deem its proposal rejected upon expiration of the Review Period with the silence of the Engineer, to prevent the Contractor from waiting for an indefinite period of time in a manner to hamper the continuance of the Works and cause damages. Second discussed issue is the problem of forcing the Contractor to leave the Site upon termination in case of the Contractor's objection regardless how unreasonable it is. It is argued if

the leave of the Contractor from the Site is subjected to liquidated damages, this would assist smooth realization of Site vacation upon any kind of termination.

To sum up, rather than being a criticism of 2017 Revision, which is a 60 years' product and a hard work clarifying many previous ambiguities, discussing all these risks as well as the already-incorporated and still-required changes are necessary to reach a clear understanding and making of further amendments in the future for smoother operation of projects. There are countless FIDIC users all around the world and the users owe FIDIC giving feedback and sharing their experiences and the problems suffered, to have all issues clarified, to the extent possible, in the next revisions.

REFERENCES

- International Federation of Consulting Engineers. (2017). *Conditions of Contract for Plant & Design Build (Second Edition, Reprinted 2022 with Amendments)*. FIDIC: Geneva
- International Federation of Consulting Engineers. (2017). *Conditions of Contract for Construction (Second Edition, Reprinted 2022 with Amendments)*. FIDIC: Geneva
- International Federation of Consulting Engineers. (2017). *Conditions of Contract for EPC /Turnkey Projects (Second Edition, Reprinted 2022 with Amendments)*. FIDIC: Geneva