

**FIDIC CONDITIONS OF CONTRACT FOR
EPC TURNKEY PROJECTS
(SILVER BOOK)**

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Introduction

- **FIDIC – the International Federation of Consulting Engineers**
- **Founded in 1913**
- **To promote the professional interests of its members**
- **More than 60 participating countries**
- **Members obliged to maintain high ethical and professional standards**
- **FIDIC publications include the so-called “Rainbow Suite”**

Rainbow Suite

- FIDIC publications include the so-called “Rainbow Suite”
 - ◆ New Red Book
 - ◆ New Yellow Book
 - ◆ Silver Book
 - ◆ Green Book
 - ◆ Turquoise Book/Dredgers Contract

New Red Book

- **Conditions of Contract for Construction 1999** (the “New Red Book”)
 - ◆ Updated version of “Old Red Book”
 - ◆ Recommended by FIDIC for building and engineering works designed by the Employer or the Engineer
 - ◆ Works may include Contractor designed elements

New Red Book

- **Conditions of Contract for Construction 1999 (the “New Red Book”)**
 - ◆ **Balanced risk** apportionment
 - ◆ Engineer deemed to **act for the Employer**, except when required to make a fair determination

New Red Book

- **Conditions of Contract for Construction 1999 (the “New Red Book”)**
 - ◆ Payment based upon **re-measured quantities**
 - ◆ Disputes resolved by:
 - DAB (“Dispute Adjudication Board”)
 - Amicable settlement
 - Arbitration

New Yellow Book

- **Conditions of Contract For Plant and Design-Build 1999**
 - ◆ Replaces the Old Yellow Book and the Orange Book
 - ◆ Recommended by FIDIC for:
 - Electrical and/or mechanical plant
 - Design and execution of building or engineering works
 - Any combination of civil, mechanical electrical and/or construction works

New Yellow Book

- **Conditions of Contract For Plant and Design-Build 1999**
 - ◆ **Balanced risk** apportionment
 - ◆ Contractor's design required to satisfy Employer's Requirements

New Yellow Book

- **Conditions of Contract For Plant and Design-Build 1999**
 - ◆ Payment based upon **lump sums**, with payment schedule
 - ◆ Disputes resolved by:
 - DAB(“Dispute Adjudication Board”)
 - Amicable settlement
 - Arbitration

Green Book

- **Short Form of Contract 1999**
 - ◆ Recommended by FIDIC for:
 - building or engineering works designed by or on behalf of the Employer
 - relatively **small capital value** i.e. less than US\$500,000
 - simple repetitive works
 - works of relatively short duration

Green Book

- **Short Form of Contract 1999**

- ◆ “Authorised Person” - Clause 3.1

- an individual nominated by the Employer
 - authorised to act generally on behalf of the Employer

Green Book

- **Short Form of Contract 1999**

- ◆ “Employer’s Representative” - Clause 3.2

- Firm or individual nominated by the Employer
- Discharges delegated duties – akin to Engineer’s Representative under Old Red Book

Green Book

- **Short Form of Contract 1999**
 - ◆ Precedence of documents – Clause 1.3

Green Book

- **Short Form of Contract 1999**
 - ◆ Employer's liabilities - Clause 6.1
 - ◆ Variations and claims - Clause 10:
 - Lump sum price agreed
 - Appropriate rates from the Contract
 - Analogous rates based upon Contract rates
 - New rates as may be agreed
 - Daywork

Green Book

- **Short Form of Contract 1999**
 - ◆ Contract Price - Clause 11:
 - Lump sum Price
 - Lump sum with:
 - ◆ schedules of rates
 - ◆ bill of quantities
 - Re-measurement with tender bill of quantities
 - Cost reimbursable

Dredgers Contract/Turquoise Book

- **Form of Contract for Dredging and Reclamation Works 2006, first edition**
 - ◆ Recommended by FIDIC for all types of dredging and reclamation work:
 - designed by or on behalf of the **Employer**
 - designed in whole or in part by the Contractor

Dredgers Contract/Turquoise Book

- **Form of Contract for Dredging and Reclamation Works 2006, first edition**
 - ◆ Contractor takes **full responsibility** for the care of the works – any loss and damage prior to the issue of the Taking-Over Certificate shall be rectified by the Contractor unless it results from a Defined Risk
 - ◆ **Defined Risks** include climatic conditions more adverse than those specified in the Appendix

Dredgers Contract/Turquoise Book

- **Form of Contract for Dredging and Reclamation Works 2006, first edition**
 - ◆ Contract Price – Clause 11
 - ◆ Lump Sum
 - ◆ Lump Sum with
 - schedules of rates
 - bill of quantities
 - ◆ Re-measurement with bill of quantities
 - ◆ Cost plus

Dredgers Contract/Turquoise Book

- **Form of Contract for Dredging and Reclamation Works 2006, first edition**
 - ◆ Disputes resolved by:
 - Amicable settlement
 - DAB(“Dispute Adjudication Board”)
 - Arbitration

Silver Book-Overview

- **Conditions of Contract for EPC/ Turnkey Projects 1999**
 - ◆ “EPC” = Engineering, Procurement and Construction
 - ◆ **Client market** demands fixed, lump-sum contract price
 - ◆ Prerequisites to obtaining private finance:
 - Project **independently viable** in financial terms
 - **Assured return** on finance provided
 - Risks of cost and time overruns are **limited**

Silver Book-Overview

- Wording and format similar to Red and Yellow Books
 - ◆ Such similarities are **superficial and deceptive**
 - ◆ Silver Book is **fundamentally different** in concept and allocation of risks

Silver Book-Overview

- The more significant differences include:
 - ◆ The independent Engineer is replaced by **Employer's Representative** (the “ER”) – Clause 3.1
 - ER acts on behalf of the Employer and **looks after the Employer's** interests

Silver Book-Overview

- The more significant differences include:
 - ◆ In the event of dispute, the Employer is required to make a “fair determination”- Clause 3.5
 - Unusual that one party should have power to **determine rights of both parties**
 - Employer’s determination **open to review** by DAB

Silver Book-Overview

- The more significant differences include:
 - ◆ Risk of **errors in setting out** information specified in the Contract rests with Contractor – Clause 4.7
 - ◆ **“Unforeseeable Difficulties”** significant shift of risk to the Contractor - Clause 4.12
 - Risk does not necessarily rest with the party best equipped to manage it

Silver Book-Overview

- The more significant differences include:
 - ◆ With limited exceptions, **Contractor is responsible** for the accuracy, sufficiency and completeness of data provided by the Employer – Clause 5.1
 - ◆ **Contractor is responsible** for errors or inaccuracies in or omissions from the original ER's – Clause 5.1

Silver Book-Overview

- The more significant differences include:
 - ◆ **Contractor responsible** for all design errors – Clause 5.8
 - ◆ By comparison with Red and Yellow Books, the Contractor's entitlement to extensions to the Time for Completion is **limited** – Clause 8.4

Silver Book-Overview

- The more significant differences include:
 - ◆ Risks which under Red and Yellow Books would rest with the Employer, under Silver Book are **borne by the Contractor** – Clause 17.3
 - ◆ Absent an Engineer, it falls to the Employer to receive the Contractor's claims and, in the first instance at least, to approve or disapprove – Clause 20.1

Silver Book-Overview

- **Movement away** from fair and balanced allocation of risk will come at a premium – which could be substantial!
- Tendering contractors should focus upon **risk apportionment**

Silver Book-Overview

- FIDIC's Introductory Note sets out the **fundamental principles** underpinning Silver Book:
 - ◆ **Certainty** of final price
 - ◆ **Fixed** price turnkey
 - ◆ **Certainty** of completion date

Silver Book-Overview

- FIDIC's Introductory Note sets out the fundamental principles underpinning Silver Book:
 - ◆ Contractor responsible for **wider** and **far more extensive** range of risks (*cf.* Red and Yellow books)
 - ◆ **Increased tendered prices** to cover additional risks

Silver Book-Overview

- FIDIC's Introductory Note sets out the fundamental principles underpinning Silver Book:
 - ◆ Employer's Requirements ("ERs") described in principle and by reference to:
 - **purpose and scope** of the Works
 - **functionality** and/or
 - **performance** criteria
 - ◆ Contractor's design required to satisfy ERs

Silver Book-Overview

- FIDIC's Introductory Note sets out the fundamental principles underpinning Silver Book:
 - ◆ Tendering Contractors:
 - Verify information and data
 - Make necessary investigations
 - Carry out design and detailing
 - ◆ Contractor free to carry out the Works in accordance with his proposals, **provided they satisfy the ER's**

Silver Book-Overview

- FIDIC's Introductory Note sets out the fundamental principles underpinning Silver Book:
 - ◆ Employer should exercise **limited control** and should not interfere with the Contractor's work
 - ◆ Contractor to prove reliability and performance by means of **Tests on Completion**

Silver Book-Overview

- Silver Book **unsuitable** if:
 - ◆ **Insufficient time or information** for tenderers to:
 - scrutinise and check ERs
 - carry out design and risk assessment studies
 - prepare considered tenders

Silver Book-Overview

- Silver Book **unsuitable** if:
 - ◆ **Substantial underground** work
 - ◆ Works required in **areas not accessible** to tenderers

Silver Book-Overview

- Silver Book **unsuitable** if:
 - ◆ Employer wishes to **exercise close control** and supervision over the Works
 - ◆ the amount of interim payments is to be determined by an official or other **intermediary**

Silver Book - Structure

- **Arrangement of sections**
 - ◆ **General Conditions**
 - Clauses 1 to 20
 - ◆ **Appendix**
 - General Conditions of Dispute Adjudication Agreement
 - ◆ Annex Procedural Rules for DAB
 - ◆ **Guidance for Preparation of Particular Conditions**

Silver Book - Structure

- **Arrangement of sections**
 - ◆ Annexes – Example Forms of Securities:
 - Parent Company Guarantee
 - Tender Security
 - Performance Security – Demand Guarantee

Silver Book - Structure

- **Arrangement of sections**
 - ◆ Annexes – Example Forms of Securities:
 - Performance Security – Surety Bond
 - Advance Payment Guarantee
 - Retention Money Guarantee
 - Payment Guarantee by Employer

Silver Book - Structure

- **Arrangement of sections**
 - ◆ Letter of Tender
 - ◆ Contract Agreement
 - ◆ Dispute Adjudication Agreements:
 - one-person DAB
 - three-person DAB

Clause 1: General Provisions

- **Definitions - Clause 1.1**
 - ◆ Clause 1.1.1 – The Contract
 - ◆ Clause 1.1.2 – Parties and Persons

Clause 1: General Provisions

- **Definitions - Clause 1.1**

- ◆ Clause 1.1.3 – Dates, Tests, Periods and Completion
- ◆ Clause 1.1.4 – Money and Payments
- ◆ Clause 1.1.5 – Works and Goods
- ◆ Clause 1.1.6 – Other Definitions

Clause 1: General Provisions

- **“Contract”** means the Contract Agreement, these Conditions, the Employer’s Requirements, the Tender, and the further documents (if any) which are listed in the Contract Agreement” – Clause 1.1.1.1
 - ◆ The “Conditions” are:
 - The **General Conditions** Clauses 1 to 20
 - The **Particular Conditions**

Clause 1: General Provisions

- **“Employer’s Requirements”** means the document entitled employer’s requirements, as included in the Contract, and any additions and modifications to such documents in accordance with the Contract. **Such document specifies the purpose, scope, and/or design and/or other technical criteria for the Works.”** – Clause 1.1.1.3
 - ◆ **Performance** or **prescriptive** specification
 - ◆ Employer is responsible for the correctness of the **definition of the intended purposes** of the Works – Clause 5.1 (b)
 - ◆ Contractor should insist upon Employer providing that definition

Clause 1: General Provisions

- **“Tender”** means the Contractor’s signed offer for the Works and all other documents which the Contractor submitted therewith..... as included in the Contract.” – Clause 1.1.1.4

Clause 1: General Provisions

- Clause 1.5 provides the **following order of priority** amongst the Contract documents:

The Contract Agreement

The Particular Conditions

The General Conditions

The Employer's Requirements

The Tender and **any other contract documents**

Clause 1: General Provisions

- The Tender and any other contract documents
 - ◆ **Lowest** in the order of priority
 - ◆ May include **pre-contract correspondence** – often ambiguous and contradictory
 - ◆ Ill considered last-minute exchanges of correspondence could give rise to difficulties, particularly if intended to amend documents higher in the order of priority

Clause 1: General Provisions

- Unlike Red and Yellow Books, Silver Book does not include any mechanism for the resolution of “... any ambiguity or discrepancy found in the documents...”
 - ◆ Consistent with **additional risk** upon the Contractor

Clause 1: General Provisions

- “Employer’s Representative” means the person named by the Employer in the Contract or appointed from time to time by the Employer under Sub-clause 3.1....., who acts on behalf of the Employer.”
 - ◆ The ER takes the place of the “Engineer” under the Red and Yellow Books
 - ◆ The ER could be either an employee of the Employer or an independent professional consultant – either way, **he is the Employer’s man**

Clause 1: General Provisions

- **“Defects Notification Period”** is defined in clause 1.1.3.7
 - ◆ The DNP will be as stated in the Particular Conditions or, if no period is stated, 12 months
 - ◆ DNP starts to run upon certified Taking-Over of the Works or a Section
 - ◆ DNP can be **extended by up to 2 years** – Clause 11.3

Clause 1: General Provisions

- **“Contract Price”** means they agreed amount stated in the Contract Agreement for the design, execution and completion of the Works and remedying of any defects, and includes adjustments (if any) in accordance with the Contract.” – Clause 1.1.4.1
 - ◆ **Lump-sum contract**, adjustable for Variations and other matters
 - ◆ **No mechanism for re-measurement**

Clause 1: General Provisions

- The Contract Price may include Provisional Sums (as defined in Clause 1.1.4.6)
 - ◆ Provisional Sums expended in accordance with Employer's instructions – Clause 13.5:
 - Work to be executed by the Contractor
 - Plant, Materials or services to be purchased by the Contractor

Clause 1: General Provisions

- “**Cost**” means all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but **does not include profit.**” – Clause 1.1.4.2
 - ◆ **Expense**, but not loss and damage
 - *cf* Employer’s indemnity under Clause 4.2
 - ◆ Cost must have been **reasonably** incurred – duty to mitigate
 - ◆ Includes overhead and **similar** charges (*cf* “other charges” in Red Book 4th edition)
 - ◆ Profit is **excluded**

Clause 1: General Provisions

- **“Variation”** means any change to the Employer’s Requirements or the Works, which is instructed or approved as a variation under Clause 13...” – Clause 1.1.6.8
 - ◆ **Restrictive definition**, the change must be instructed or approved under Clause 13
 - Failure to instruct or approve could lead to claims for damages for breach of contract

Clause 1: General Provisions

- **“Variation”** means any change to the Employer’s Requirements or the Works, which is instructed or approved as a variation under Clause 13...” – Clause 1.1.6.8
 - ◆ Whether or not any particular matter gives rise to a Variation will primarily turn upon a **proper interpretation of the Contract**
 - ◆ The definition of Works includes both Permanent Works and Temporary Works – Clause 1.1.5.8

Clause 1: General Provisions

- **“Variation”** means any change to the Employer’s Requirements or the Works, which is instructed or approved as a variation under Clause 13...” – Clause 1.1.6.8
 - ◆ **Additional work** carried out which falls outside the contractual definition of variation, could qualify for compensation under English law principles of:
 - restitution or
 - damages for breach of contract

Clause 1: General Provisions

- Unlike Red Book (clause 1.1.6.8) Silver Book includes no definition of “Unforeseeable”
 - ◆ Consistent with **additional risk** upon Contractor

Clause 1: General Provisions

- In the Contract, except where the context requires otherwise:

(c) provisions including the word “agree”, “agreed” or “agreement” require agreement to be recorded in writing - Clause 1.2

- ◆ Under English law at least, those words would almost certainly be **interpreted literally**

Clause 1: General Provisions

- Approvals, certificates, consents, determinations, notices and requests must be in writing – Clause 1.3

- Communications **must be delivered**:
 - ◆ by hand with receipt acknowledged;

 - ◆ by mail or courier

 - ◆ by electronic transmission, **but only as stated in the Particular Conditions**

Clause 1: General Provisions

- “... Approvals, certificates, consents and determinations shall not be unreasonably withheld or delayed
 - ◆ Whether or not there has been unreasonable withholding or delay will be a matter of fact in each case
 - Could give rise to a **breach of contract** on the part of the Employer

Clause 1: General Provisions

- “If a Party becomes aware of an error or defect of a technical nature in a document which was prepared for use in executing the Works, the Party shall promptly give notice to the other Party of such error or defect.”
 - ◆ **Omissions** from documents not covered
 - ◆ What constitutes “technical nature”
 - ◆ Applies only to documents to be used in executing the Works
 - ◆ **Failure to notify** constitutes a breach of contract

Clause 2: The Employer

- “The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (all times) stated in the Particular Conditions...” – Clause 2.1
 - ◆ Access and possession **may not be exclusive** – see Clause 4.6:
 - Contractor required to co-operate with others executing work on or near the Site

Clause 2: The Employer

- “The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (all times) stated in the Particular Conditions...” – Clause 2.1
 - ◆ If no time stated in the Particular Conditions, **access and possession** must be given on the Commencement Date

Clause 2: The Employer

- “The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (all times) stated in the Particular Conditions...” – Clause 2.1
 - ◆ Similar provisions apply in relation to possession of foundations, structures, plant or means of access
 - Absent express undertaking by Employer to provide a physical access route, **that obligation rests with Contractor** – Clauses 4.13 and 4.15

Clause 2: The Employer

- “The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (all times) stated in the Particular Conditions...” – Clause 2.1
 - ◆ Employer’s obligation is conditional upon Contractor **providing Performance Security** (Clause 4.2)

Clause 2: The Employer

- “The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (all times) stated in the Particular Conditions...” – Clause 2.1
 - ◆ Failure on the part of the Employer, could give rise to Contractor’s entitlement to:
 - Reimbursement of consequential **Cost plus reasonable profit**
 - An **extension of time** for completion – Clause 8.4
 - Subject to:
 - ◆ Notice of claim
 - ◆ Error or delay on part of Contractor

Clause 2: The Employer

- Clause 2.2 - At the request of the Contractor the Employer is obliged to provide reasonable assistance in:
 - ◆ Obtaining copies of the Laws of the Country
 - ◆ Obtaining permits, licences or approvals
 - ◆ What constitutes reasonable assistance will be a matter of fact in each case
 - ◆ Particularly helpful if the Employer is a government
 - ◆ Failure constitutes a **breach of contract** by the Employer

Clause 2: The Employer

- Clause 2.3 – Employer to ensure **co-operation** of:
 - ◆ Employer's Personnel
 - ◆ Employer's other contractors employed on the Site
 - Obligation on Employer far less onerous than that imposed upon Contractor under Clause 4.6

Clause 2: The Employer

- Clause 2.3 – Employer to ensure **co-operation** of:
 - ◆ Employer's other contractors employed on the Site
 - Obligation on Employer far less onerous than that imposed upon Contractor under Clause 4.6 to:

“... The Contractor shall be responsible for his construction activities on the Site, and shall **co-ordinate's own activities with those of other contractors...**”

Employer should be invited to take upon reciprocal obligations

Clause 2: The Employer

- Clause 2.4 – upon request and **within 28 days**, Employer to provide:

“...reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price...”

Useful **early warning**, but does not give rise to an independent legal right to sue for the Contract Price

Clause 2: The Employer

- Clause 2.4 – upon request and **within 28 days**, Employer to provide:

“...reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price...”

Failure on the part of the Employer to comply, entitles contractor to **suspend work on 21 days notice** – Clause 16.1

extension of time

reimbursement of **Cost plus reasonable profit**

Clause 2: The Employer

- **Clause 2.5 – Employer's Claims:**
 - ◆ **Payment:**
 - under any clause of the Conditions
 - in connection with the Contract
 - ◆ **Extension of Defects Notification Period**

Clause 2: The Employer

- Clause 2.5 – Employer’s Claims:
 - ◆ Notice to be given **as soon as practicable** after Employer becomes aware of event or circumstances
 - as soon as practicable – flexible
 - **no time bar**
 - ◆ Must provide particulars of claim including basis and substantiation

Clause 2: The Employer

- **Clause 2.5 – Employer’s Claims:**
 - ◆ Seek to agree, in default of agreement, **Employer can himself determine** amount or length of extension
 - ◆ **Can deduct** from monies due or falling due to Contractor
 - ◆ **Stark contrast** between these provisions and Clause 20.1
 - 28 days time bar applies to exclude Contractor’s claims

Clause 3: The Employer's Administration

■ Clause 3.1 – Employer's Representative:

◆ Appointment of ER:

- Employer **must give notice** to Contractor, stating ER's duties and authority
- Subject to any express restrictions ER has full authority to act for Employer, **except** in relation to termination of Contractor's employment (Clause 15)

Clause 3: The Employer's Administration

- **Clause 3.2 – Other Employer's Personnel:**
 - ◆ Employer/ER may assign duties and delegate authority to others
 - ◆ Such assignment and delegation takes effect only upon Contractor receiving copy of notice
 - ◆ Same position applies in relation to revocation of assignment or delegation

Clause 3: The Employer's Administration

- **Clause 3.3 – Delegated Persons:**

- ◆ Authorised to issue instructions to the extent defined by delegation
- ◆ Authorised to check, certify, consent, examine, inspect, instruct, notify, propose, request, test to the extent defined by delegation
- ◆ Instructions etc within scope of delegation, have same effect as if issued or carried out by Employer

Clause 3: The Employer's Administration

■ Clause 3.3 – Delegated Persons:

- ◆ Cannot relieve Contractor from responsibility under the Contract, **unless** stated in delegated person's communication
- ◆ Failure to disapprove does **not constitute approval**
- ◆ Contractor can refer to Employer any questions arising out of exercise of delegated powers
 - “... Employer... shall **promptly** confirm, reverse or vary the determination or instruction.”

Clause 3: The Employer's Administration

- “The Employer may issue to the Contractor instructions which may be necessary for the Contractor to perform his obligations under the Contract. Each instruction should be given in writing and shall state the obligations to which it relates and the Sub-clause (or other term of the Contract) in which the obligations are specified.....” – Clause 3.4
- ◆ Consistent with Contractor's greater design responsibility under Silver Book

Clause 3: The Employer's Administration

- If any such instruction constitutes a **Variation**, Clause 13 shall apply.....” – Clause 3.4
 - ◆ Contemplates the **possibility** that an instruction could give rise to a Variation to the ERs or the Works

Clause 3: The Employer's Administration

- **Clause 3.5 – Determinations:**

“... the Employer shall consult with the Contractor in an endeavour to reach agreement. If agreement is not achieved, **the Employer shall make a fair determination** in accordance with the Contract, taking due regard of all relevant circumstances...”

Employer given **unilateral right** to make determinations on a wide range of matters

Clause 3: The Employer's Administration

- **Clause 3.5 – Determinations:**

“...The Employer shall give notice to the Contractor of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination, unless the Contractor gives notice, to the Employer, of his dissatisfaction with a determination **within 14 days of receiving it**. Either Party may then refer the dispute to the DAB in accordance with Sub-clause 20.4.....”

Contractor under no obligation to give effect to the determination provided he gives notice of dissatisfaction within **14 days**

Clause 3: The Employer's Administration

- **Clause 3.5 – Determinations:**

“...The Employer shall give notice to the Contractor of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination, unless the Contractor gives notice, to the Employer, of his dissatisfaction with a determination **within 14 days of receiving it**. Either Party may then refer the dispute to the DAB in accordance with Sub-clause 20.4.....”

Failure to give notice **within 14 days** will have the effect of denying any opportunity for further redress against the Employer's determination

Clause 4: The Contractor

- **Clause 4.1 – Contractor’s General Obligations:**
 - ◆ Design, execute and complete the Works in accordance with the Contract
 - ◆ Remedy any defects in the Works
 - ◆ Complete the Works such that they are **fit for the purposes for which they are intended as defined in the Contract**
 - Fitness for purpose obligation could give rise to **difficulties in obtaining PII**

Clause 4: The Contractor

- **Clause 4.1 – Contractor’s General Obligations:**

“... The Works shall include [1] any work which is necessary to satisfy the Employer’s Requirements, or [2] is implied by the Contract, and [3] all works which (although not mentioned in the Contract) are necessary for stability or for the completion, or safe and proper operation, of the Works...”

Clause 4: The Contractor

- **Clause 4.2 – Performance Security:**
 - ◆ Terms of Performance Security required to be given **should be set out in the Contract**
 - ◆ Pro forma included within the annexes

Clause 4: The Contractor

- Employer's entitlement to claim against Performance Security **is limited to the amounts to which he is entitled under the Contract** and only in respect of the 4 grounds set out under sub-paragraphs (a), (b), (c) and (d)

Clause 4: The Contractor

- Clause 4.2 (d) permits the Employer to claim against the Performance Security in “circumstances which entitled the employer to termination under some-clause 15.2....., **irrespective of whether notice of termination has been given...**”
 - ◆ **Favourable** to the Employer
 - ◆ Could be **powerful weapon** in final account negotiations – i.e. threat to call in the Performance Security
 - ◆ Position **could be redressed** by modifying Performance Security such that notice of termination is a pre-condition

Clause 4: The Contractor

- **Clause 4.2 – Performance Security:**

- ◆ Penultimate paragraph affords **a degree of protection** against an improper call on the Performance Security:

“The Employer shall indemnify and hold the Contractor harmless against and from all damages, losses and expenses..... to the extent to which the Employer was not entitled to make the claim...”

Clause 4: The Contractor

- **Clause 4.5 – Nominated Sub-Contractors:**

- ◆ A sub-contractor whom the Employer instructs the Contractor to employ
- ◆ Contractor can “...raise reasonable objection... with supporting particulars...”
- ◆ Objection could raise difficulties in circumstances where a **special relationship** exists between Employer (and his advisers) and the Nominated Sub-Contractor

Clause 4: The Contractor

- **Clause 4.5 – Nominated Sub-Contractors:**
 - ◆ **Best course of action** would be to seek to negotiate an amendment to clause 4.5
 - ◆ Any Nominated Sub-Contract **should be back-to-back** with Main Contract, such that Nominated Sub-Contractor carries same obligations as Contractor

Clause 4: The Contractor

- **Clause 4.5 – Nominated Sub-Contractors:**
 - ◆ If the Employer were to instruct the Contractor to enter into a Sub-Contract with a particular Nominated Sub-Contractor **in the face of a reasonable** objection, in the event of default by the Nominated Sub-Contractor, the Contractor would have reasonable grounds for recovering damages from the Employer

Clause 4: The Contractor

- **Clause 4.7 – Setting Out:**

- ◆ “The Contractor shall set out the Works and shall be responsible for the correct positioning of all parts of the Works, and shall rectify any error...”

- ◆ **Clause 5.1 – General Design Obligations:**

- “... The Contractor shall be responsible for the design of the Works and for the accuracy of [the] Employer’s Requirements (including design criteria and calculations), **except as stated below.....**”
- The exceptions **do not** specifically identify setting out data provided by the Employer

Clause 4: The Contractor

- **Clause 4.7 – Setting Out:**
 - ◆ If the Employer's Requirements include setting out data, then **it would be prudent** either:
 - before submitting the tender verify the accuracy of the setting out data, or
 - **fix the Employer** with unqualified responsibility for the accuracy of the setting out data – see final paragraph of Clause 5.1

Clause 4: The Contractor

- **Clause 4.7 – Site Data:**

- ◆ “... The **Contractor shall be responsible** for verifying and interpreting all [data made available by the Employer to the Contractor]...”
- ◆ “...The **Employer shall have no responsibility** for the accuracy, sufficiency or completeness of such data, except as stated in Sub-Clause 5.1...”

Clause 4: The Contractor

- **Clause 4.7 – Site Data:**
 - ◆ **Onerous obligations** upon the Contractor, in particular responsibility for:
 - Verifying and interpreting all data on sub-surface and hydrological conditions, including environmental aspects
 - ◆ **Scope of the exceptions** under Clause 5.1 is unclear
 - Suggested that the application of the exceptions to the Site Data provided be addressed on individual projects **before entering into contract**

Clause 4: The Contractor

- **Clause 4.7 – Site Data:**

- ◆ “... the Employer shall similarly make available to the Contractor all such data which come into the Employer’s possession after the Base Date...”
 - That applies to information provided by the Employer during the course of the Works
 - **Contractor must always verify** the reliability of information coming from the Employer

Clause 4: The Contractor

- **Clause 4.12 – Unforeseeable Difficulties:**

- ♦ “**Except as otherwise stated** in the Contract:

- (a) the Contractor shall be deemed to have obtained **all necessary information as to risks, contingencies and other circumstances** which may influence or affect the Works;

- (b) by signing the contract, the Contractor **accepts total responsibility for having foreseen all difficulties and costs** of successfully completing the Works;

- (c) the Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs.”

Clause 4: The Contractor

- **Clause 4.12 – Unforeseeable Difficulties:**
 - ◆ Misleading side note, since all possible contingencies **deemed to be foreseen** and priced, however inconceivable they may have appeared when tendering
 - ◆ Uncompromising language
 - ◆ Likely to attract **heavy premium additions** to the tender in terms of time and money

Clause 4: The Contractor

- **Clause 4.12 – Unforeseeable Difficulties:**
 - ◆ Includes events completely **outside the control** of the Contractor
 - ◆ The only **concessions** are those stated in the Contract:
 - Employers Risks - Clause 17.3
 - Force majeure – Clause 19

Clause 4: The Contractor

■ Progress Reports – Clause 4.21:

- ◆ Requirements are detailed and prescriptive
- ◆ Will be **time-consuming and expensive** to produce
- ◆ Engenders required mindset as to
 - Budgetary control
 - Programme management
- ◆ Clause 4.21 – “Unless otherwise stated in the Particular Conditions.....”

Clause 5: Design

- **General Design Obligations – Clause 5.1**
 - ◆ One of the **most important provisions** in Silver Book
 - ◆ Establishes the general rule that Contractor has wide-ranging **responsibility for the correctness of the Employer's Requirements**
 - ◆ Silver Book includes four imprecise and potentially **ambiguous exceptions** to the general rule

Clause 5: Design

- **General Design Obligations – Clause 5.1**
- “... The Contractor shall be responsible for [1] the design of the Works and for [2] the accuracy of such Employer’s Requirements, except as stated below...Any data or information received by the Contractor, from the Employer or otherwise, shall not relieve the Contractor from his responsibility for the design and execution of the Works”

Clause 5: Design

- **General Design Obligations – Clause 5.1**

- ◆ “... The Employer shall not be responsible for any [1] error, [2] inaccuracy or [3] omission of any kind in the Employer’s Requirements as originally included in the Contract...”
 - No express limit to the Contractor’s responsibility for omissions, however, would fall to be determined by reference to the purpose and scope of the Works
 - Contractor’s proposals should be qualified

Clause 5: Design

- **General Design Obligations – Clause 5.1**
 - ◆ “...The Employer shall not be deemed to have given any representation of accuracy or completeness of any data or information, **except** as stated below ...”

Clause 5: Design

- **General Design Obligations – The Exceptions - Clause 5.1(a)**
- “... portions, data and information which are **stated in the Contract** as being **immutable...**”
 - ◆ Mandatory requirements, e.g.
 - “... the Contractor shall...”
 - ◆ **Check and confirm** which of the Employer’s Requirements immutable

Clause 5: Design

- **General Design Obligations – The Exceptions - Clause 5.1(b)**
 - ◆ “... definitions of **intended purposes** of the Works or any part thereof...”
 - Contractors should **insist upon a comprehensive definition**
 - Definition sets the parameters for the Works
 - Sets the overall standard for Contractor’s design obligations

Clause 5: Design

- **General Design Obligations – The Exceptions - Clause 5.1(c)**
 - ◆ “... criteria for the testing and performance of the completed Works...”
 - **Contractors should ensure** that the state criteria are appropriate to the proposed design

Clause 5: Design

- **General Design Obligations – The Exceptions - Clause 5.1(d)**
 - ◆ “... portions, data and information which **cannot be verified** by the Contractor, except as otherwise stated in the Contract...”
 - Highly subjective
 - Probably means **impossible or impractical to verify**

Clause 5: Design

- **General Design Obligations – The Exceptions - Clause 5.1(d)**
 - ◆ “... portions, data and information which **cannot be verified** by the Contractor, except as otherwise stated in the Contract...”
 - Available time or commercial practicality could be a determining factor
 - Prudent to state in Contract **which parts of the Employer’s Requirements could not be verified**

Clause 5: Design

- **Contractor's Documents – Clause 5.2**
 - ◆ Potential opportunity for **Employer to disrupt/delay design and construction** by condemning and repeatedly reviewing
 - ◆ Given Contractor's wide-ranging responsibility, he should be at liberty to proceed at his own risk without Employer interference
 - ◆ Documents should be issued for information only

Clause 5: Design

- **Contractor's Undertaking – Clause 5.3**

- ◆ “... The Contractor undertakes that the completed Works will be in accordance with:
(b) the documents forming the Contract...”

Documents forming the Contract include the Employer's Requirements

- ◆ Potentially ambiguous when read together with Clause 5.1
 - By Clause 5.3 the Contractor undertakes to complete the Works in accordance with the Employer's Requirements **even if they are in some way defective**

Clause 5: Design

- **Technical Standards and Regulations – Clause 5.4**
 - ◆ The completed Works must comply with the Laws of the Country “... prevailing **when the Works or Section are taken over** by the Employer...”
 - Changes in legislation after the Base Date qualify as grounds for adjusting the Contract Price and an extension of Time for Completion – Clause 13.7

Clause 5: Design

- **Technical Standards and Regulations – Clause 5.4**
 - ◆ “... published standards should be understood to be references to the edition **applicable on the Base Date**, unless stated otherwise...”
 - Changed or new applicable standards after Base Date could give rise to a Variation provided Employer requires compliance with the changed/new standards

Clause 7: Plant, Materials and Workmanship

- Remedial Works – Clause 7.6
 - ◆ Employer entitled to order removal, replacement or re-execution of non-compliant work
 - ◆ No express provision for **repairing** non-compliant work
 - Implied obligation on **Employer to mitigate**
 - ◆ if repair is feasible alternative, Employer should adopt least cost option

Clause 7: Plant, Materials and Workmanship

- **Ownership of Plant and Materials – Clause 7.7**

- ◆ Property transfers to the Employer on **whichever is the earlier** of:

- Delivery to Site

- When the Contractor is entitled to payment

- ◆ Entitlement and receipt of payment frequently do not coincide

Clause 8: Commencement, Delays and Suspension

■ Programme – Clause 8.3

◆ Programmes to be submitted to the Employer:

- Within **28 days** after the Commencement Date
- Whenever the **previous programme is inconsistent** with actual progress or Contractor's obligations

Clause 8: Commencement, Delays and Suspension

■ Programme – Clause 8.3

- ◆ “... the Contractor shall **promptly give notice** of specific probable future events or circumstances which may adversely affect or delay the execution of the Works...”
- ◆ Clause 20.1: “... notice [of claim] shall be given **as soon as practicable**, and **not later than 28 days** after the Contractor became aware, or should become aware, of the event or circumstance...”

Clause 8: Commencement, Delays and Suspension

■ Programme – Clause 8.3

- ◆ Notice under clause 8.3 could have bearing upon the date upon which the 28 days under 20.1 started to run
 - Failure to give timely notice under Clause 20.1, **will disqualify the Contractor's claims for time and/or money**

Clause 8: Commencement, Delays and Suspension

■ Extension of Time for Completion – Clause 8.4

◆ **Three** broad grounds:

- Variations
- Delays, impediments or prevention caused or attributable to
 - ◆ Employer
 - ◆ Employer's Personnel
 - ◆ Employer's other contractors
- A cause of delay under the Conditions

Clause 8: Commencement, Delays and Suspension

- **Causes of delay referred to under the Conditions:**
 - ◆ Failure by the Employer to give access to and possession of the Site – Clause 2.1
 - EOT, Cost plus reasonable profit
 - ◆ Discovery of fossils etc – Clause 4.24
 - EOT and Cost
 - ◆ Delayed testing caused by Employer – Clause 7.4
 - EOT, Cost plus reasonable profit

Clause 8: Commencement, Delays and Suspension

- **Causes of delay referred to under the Conditions:**
 - ◆ Delays caused by Authorities – Clause 8.5
 - EOT
 - ◆ Suspension initiated by the Employer – Clause 8.9
 - EOT and Cost
 - ◆ Interference with testing by Employer – Clause 10.3
 - EOT, Cost plus reasonable profit
 - ◆ Changes in Legislation – Clause 13.7
 - EOT and Cost

Clause 8: Commencement, Delays and Suspension

- **Causes of delay referred to under the Conditions:**
 - ◆ Suspension initiated by the Contractor – Clause 16.1
 - EOT, Cost plus reasonable profit
 - ◆ Employer's Risks – Clause 17.4
 - EOT and Cost
 - ◆ Force majeure – Clause 19.4
 - EOT and Cost

Clause 8: Commencement, Delays and Suspension

- Unlike Red and Yellow Books, Silver Book **does not entitle** the Contractor to extensions of time for:
 - ◆ Exceptionally adverse climatic conditions
 - ◆ Unforeseeable shortages of personnel or goods
 - ◆ Adverse physical conditions

Clause 8: Commencement, Delays and Suspension

- Conceivably any one of those three circumstances could fall within the exceptional events or circumstances qualifying as force majeure – Clause 19.1

Clause 8: Commencement, Delays and Suspension

- For force majeure, the Contractor must demonstrate the exceptional event or circumstance:
 - ◆ Was beyond a Party's control
 - ◆ Could not reasonably have been provided against before entering the Contract
 - ◆ Could not reasonably have been avoided or overcome
 - ◆ Is not substantially attributable to the other Party

Clause 8: Commencement, Delays and Suspension

- **Rate of Progress – Clause 8.6**
- The **Employer can instruct acceleration** when:
 - ◆ “... actual progress is too slow to complete within the Time for Completion, and/or
 - ◆ “...progress has fallen (or will fall) behind the current programme...”

Clause 8: Commencement, Delays and Suspension

■ Rate of Progress – Clause 8.6

- ◆ **Potentially highly controversial**, since the Employer's right to order acceleration :
 - presumes that any extensions of time have first been fully and properly determined
 - could be based upon a forecast that progress will at some time in the future fall behind programme

Clause 8: Commencement, Delays and Suspension

- **Rate of Progress – Clause 8.6**
 - ◆ **What should the Contractor do** when confronted with an instruction to accelerate and he is not in culpable delay and progress has not fallen and is unlikely to fall behind programme?
 - Should he give effect to the instruction without objection?
 - Should he refuse to give effect to the instruction?
 - Should he refer the matter to the DAB?

Clause 8: Commencement, Delays and Suspension

■ Delay Damages – Clause 8.7

- ◆ Liquidated damages required to be a **genuine pre-estimate** of actual cost of the damage
- ◆ Wherever possible contractors should endeavour to **stipulate a maximum amount** of delay damages in the Particular Conditions

Clause 8: Commencement, Delays and Suspension

- **Delay Damages – Clause 8.7**

- ◆ The delay damages “... shall be the only damages due from the Contractor **for such default, other than in the event of termination.....** prior to completion of the Works...”

Clause 9: Tests on Completion

■ Contractor's Obligations - Clause 9.1

◆ Sequence of events:

- Contractor provides to Employer **as-built documents and O&M manuals**
- Contractor gives Employer not less than **21 days** notice of testing
- Tests carried out within **14 days** thereafter as instructed by Employer

Clause 9: Tests on Completion

- **Contractor's Obligations - Clause 9.1**
 - ◆ Sequence of events:
 - **Pre-commissioning tests** – inspections and functional tests – verify safe operation
 - **Commissioning tests** – specified operational tests – verify safe operation
 - **Trial operation** – performance reliability – does not constitute taking over by Employer

Clause 9: Tests on Completion

- **Contractor's Obligations - Clause 9.1**
 - ◆ Sequence of events:
 - (during trial operation) **Contractor gives notice** that works ready for Tests on Completion, including performance tests

Clause 9: Tests on Completion

■ Delayed Tests - Clause 9.2

- ◆ Delays to Tests on Completion for which the Employer is responsible – contractor entitled to release by way of **extension of time** and **Cost plus reasonable profit** under:

- Clause 7.4

- Clause 10.3 – prevention for more than **14 days**

Clause 9: Tests on Completion

- **Failure to Pass Tests On Completion - Clause 9.4(b)**
 - ◆ “...if the failure deprives the employer of **substantially the whole benefit** of the Works or Section, [the Employer shall be entitled to] **reject** the Works or Section...”

Clause 9: Tests on Completion

- **Failure to Pass Tests On Completion - Clause 9.4(b)**
 - ◆ In that event, Clause 11.4 (c) could come into effect:
 - “... the Employer shall then be entitled to recover **all sums paid for the Works** or for such part....., plus **financing charges** and the **cost** of dismantling the same, clearing the Site and returning Plant and Materials to the Contractor...”

Clause 9: Tests on Completion

- **Failure to Pass Tests On Completion - Clause 9.4(b)**
 - ◆ Clause 17.6 - Subject to certain exclusions, **Contractor's total liability** shall not exceed:
 - Amount stated in Particular Conditions, or
 - (if no amount stated) the Contract Price stated in Contract Agreement

Clause 9: Tests on Completion

- **Failure to Pass Tests On Completion - Clause 9.4(c)**
 - ◆ “... the Contract Price shall be reduced by such amount as shall be appropriate to cover the reduced value to the Employer..... **Unless the relevant reduction for this failure is stated** (or its method of calculation is defined) in the Contract, the Employer may...”
 - Liquidated damages for under-performance should be include within Particular Conditions – otherwise, damages ‘at large’

Clause 10: Employer's Taking Over

- **Requirements** to be fulfilled:
 - ◆ Works completed in accordance with the Contract including:
 - All work stated in the Contract as required for the purposes of taking- over has been completed
 - Tests on Completion passed
 - Taking Over Certificate issued, or deemed issued

Clause 10: Employer's Taking Over

- **Procedure:**

- ◆ Contractor applies for Taking Over Certificate no more than **14 days** before the date upon which in his opinion the Works will be ready to be taken over
- ◆ Contractor can apply for Taking Over Certificate for the **whole** of the Works or for a **Section**

Clause 10: Employer's Taking Over

- **Procedure:**

- ◆ Within **28 days** of receiving Contractor's application, Employer **shall**:
 - Issue Taking Over Certificate
 - Reject the application, giving reasons and specifying work required
- ◆ If the **Employer fails** to issue Certificate or reject, taking over certificate **deemed** to have been issued on the 28th day

Clause 10: Employer's Taking Over

- **Taking Over of Parts of the Works – Clause 10.2**
 - ◆ “Parts of the Works (other than Sections) **shall not be taken over or used** by the Employer, except as may be stated in the Contract or as may be agreed by both Parties.”

Clause 10: Employer's Taking Over

- **Taking Over of Parts of the Works – Clause 10.2**
 - ◆ What is the position if the Employer takes over without the Contractor's agreement?
 - **Risk of damage** – possibly not covered by insurance
 - Silver Book **does not include the Yellow Book equivalent** of clause 10.2 whereby Employer's use gives rise to deemed taking over

Clause 11: Defects Liability

- **Cost of Remedying Defects – Clause 11.2**
 - ◆ Contractor responsible for remedying damage due to design of the works, **irrespective of whether or not that design was part of the Employer's Requirements**
 - ◆ That situation fails to reflect the fact that responsibility for certain parts of the design could rest with the Employer – Clause 5.1
 - ◆ A similar ambiguity exists under Clause 17.3 (Employer's Risks) – which does not include the Clause 5.1 exceptions

Clause 11: Defects Liability

- **Cost of Remedying Defects – Clause 11.2**
 - ◆ Yellow Book Clause 11.2 (a) is more evenly balanced:
 - “... the design of the Works, **other than a part of the design for which the Employer is responsible** (if any).”

Clause 11: Defects Liability

- **Performance Certificate – Clause 11.9**
 - ◆ “... Only the Performance Certificate shall be deemed to constitute acceptance of the Works.”
 - ◆ To be issued by the Employer not later than **28 days** after whichever is later:
 - Expiry of the latest Defects Notification Period, or
 - Contractor supplying all Contractor’s Documents and completed and tested the Works

Clause 11: Defects Liability

- **Performance Certificate – Clause 11.9**
 - ◆ If the Employer fails to issue, Performance Certificate deemed to have been issued on the date **28 days** after the date on which it should have been issued

Clause 13: Variations and Adjustments

- **Right to Vary - Clause 13.1**

- ◆ The right exists up to the point at which the Taking Over Certificate for the Works is issued
 - Any additional or varied works required after would have to be the subject of a **separate agreement** between the Parties

Clause 13: Variations and Adjustments

- **Right to Vary - Clause 13.1**

- ◆ The Employer **is not permitted** to instruct a variation omitting work in order that the omitted work can be carried out by others
 - If the Employer sought to do that, Contractor entitled to the overheads and profit that would have been earned on the omitted work

Clause 13: Variations and Adjustments

- **Right to Vary - Clause 13.1**

- ◆ **Limited grounds for Contractor objecting to a Variation instruction:**

- Contractor can not readily obtain the Goods required
- Variation would reduce safety or suitability of the Works
- Variation would adversely impact upon achievements of Performance Guarantees

Clause 13: Variations and Adjustments

- **Right to Vary - Clause 13.1**

- ◆ Even in the face of Contractor's objections, Employer may **confirm** his instruction to vary
 - In that situation, **risk for the variation should transfer to the Employer**, although the Silver Book includes no express wording to that effect
 - Employer's power to **unilaterally order** Variations does not sit easily with EPC turn key philosophy
 - Contractor remedy is to refer matter to DAB

Clause 13: Variations and Adjustments

- Value Engineering – Clause 13.2
 - ◆ Proposals to be made **at Contractor's cost**
 - ◆ **No provision for Contractor to share** in benefits of value engineering

Clause 13: Variations and Adjustments

- **Variation Procedure – Clause 13.3**
 - ◆ **Employer requests** Variation
 - ◆ **Contractor makes proposals** including:
 - Proposed design/description of work
 - Modifications to programme
 - Adjustments to Contract Price
 - ◆ Should comprise direct cost together with time related costs

Clause 13: Variations and Adjustments

- Variation Procedure – Clause 13.3
 - ◆ Employer response to proposals, approving, disapproving or commenting
 - ◆ Contractor **continues with work** while awaiting response
 - Silver Book does not address the question of **abortive costs** in the event of the Variation being abandoned - that omission should be addressed

Clause 13: Variations and Adjustments

▪ Variation Procedure – Clause 13.3

- ◆ Silver Book includes **no statement as to rules of valuation**
- ◆ Employer makes a Determination – Clause 3.5
- ◆ **Advisable to include** in Particular Conditions rules for valuation, including:
 - Schedule of rates
 - Adjustment for overheads and profit

Clause 13: Variations and Adjustments

- **Provisional Sums – Clause 13.5**
 - ◆ No specific statement as to where design liability rests on the expenditure of Provisional Sums
 - Probably with Contractor – additional risk

Clause 13: Variations and Adjustments

- **Daywork – Clause 13.6**

- ◆ “For work of a **minor or incidental** nature...”
- ◆ Before ordering Goods required for the daywork, Contractor required to submit quotations
- ◆ Statement of daywork resources to be submitted the day following that in which the work was carried out

Clause 13: Variations and Adjustments

- **Adjustments for Changes in Legislation – Clause 13.7**

- ◆ **Contract Price adjusted** to take into account increases or decreases in Cost resulting from changes in Laws of the Country
 - **Applicable only** in the Country (as defined) in which the Site (or the majority of it) is located

Clause 13: Variations and Adjustments

- **Adjustments for Changes in Costs – Clause 13.8**
 - ◆ Price fluctuations in relation to the cost of labour, Goods and other inputs
 - Requires **specific provisions** to be included in Particular Conditions, otherwise of no effect

Clause 14: Contract Price and Payment

- **Clause 14.1**

- ◆ Unless otherwise stated payment for the Works is on the basis of the **lump sum Contract Price subject to adjustments** in accordance with the Contract

Clause 14: Contract Price and Payment

■ Clause 14.2

- ◆ The Employer is required to make an **advance payment** for mobilization and design **provided** that:
 - the amount of the advance payment is stated in the Particular Conditions, and
 - the Contractor has submitted a guarantee

Clause 14: Contract Price and Payment

▪ Clause 14.3

- ◆ The Contractor submits a Statement in **6 copies** to the Employer after the end of the period of payment stated in the Contract
- ◆ If no period is stated, the Statement is submitted at the **end of the month**
- ◆ The Statement shows the amounts to which the Contractor considers himself entitled **together with supporting documents** including the relevant progress report (Clause 4.21)

Clause 14: Contract Price and Payment

- **Clause 14.3**

- ◆ The Statement shall include the following, which shall be expressed in the various currencies in which the Contract Price is payable:
 - the estimated contract value of the Works including design (including Variations)
 - the amounts to be added or deducted for Changes in Legislation and Changes in Cost
 - the amount of Retention
 - repayment of the advance payment
 - Any other adjustments under Clause 20 [Claims, Disputes and Arbitration]
 - Previous payments

Clause 14: Contract Price and Payment

- **Clause 14.4**

- ◆ The Contract may provide for payment based upon a **Schedule of Payments** and, if so, the amount of the estimated contract value of the Works (Clause 14.4(a)) will be the amount of the instalment quoted in the Schedule of Payments
- ◆ The **Employer is entitled to adjust** the amount of the instalments in the Schedule of Payments if they are not defined by reference to actual progress – any such adjustment would be under Clause 3.5 [Determinations]

Clause 14: Contract Price and Payment

▪ Clause 14.5

- ◆ The Contract may provide for payment for Plant and Materials which are not yet on the Site
- ◆ The **conditions precedent** to payment are:
 - the Plant and Materials are in the Country and have been marked as the Employer's property
 - the Contractor has provided evidence of insurance and a bank guarantee

Clause 14: Contract Price and Payment

▪ Clause 14.6

- ◆ Within **28 days** after receiving a Statement the Employer shall give notice of any items within the Statement with which he disagrees together with supporting particulars

- ◆ The Employer may **withhold payment** if:
 - any thing done or work supplied is not in accordance with the Contract and/or

 - the Contractor is failing to perform any work or obligation in accordance with the Contract and has been so notified by the Employer

Clause 14: Contract Price and Payment

■ Clause 14.10

- ◆ The Contractor is required to submit a **Statement at Completion** with supporting documents **within 84 days** following receipt of the Taking-Over Certificate
- ◆ **All of the Contractor's claims** must be submitted otherwise they will be barred under Clause 14.14(b)

Clause 14: Contract Price and Payment

- **Clause 14.12**

- ◆ The Contractor must submit a written discharge with his Final Statement confirming that the total of the Final Statement **represents full and final settlement of all monies due** under or in connection with the Contract.

Clause 14: Contract Price and Payment

■ Clause 14.14

- ◆ **The Employer shall not be liable** for any matter or thing under or in connection with the Contract or the execution of the Works, except to the extent that the Contractor has included an amount for it in the Statement at Completion and/or the Final Statement.
- ◆ Matters arising before the issue of the Taking-Over Certificate **must be included** in the Statement at Completion and in the Final Statement
- ◆ Matters arising after the issue of the Taking-Over Certificate **must be included** in the Final Statement

Clause 15: Termination by Employer

■ Clause 15.1

- ◆ The Employer has an **unlimited right** to give instructions under Clause 3.4 [Instructions] to require the Contractor to make good any alleged failure to carry out **any obligation** under the Contract
- ◆ If the Contractor fails to comply, the Employer may **terminate** the Contract under Clause 15.2

Clause 15: Termination by Employer

- **Clause 15.2**

- ◆ The Employer has the **right to terminate** the Contract for a number of reasons including breach by and insolvency of the Contractor and for corruption
- ◆ Clause 15.2(a), in particular, gives the right to terminate for **any failure** to carry out **any obligation** (however trivial)

Clause 15: Termination by Employer

- **Clause 15.5**

- ◆ New provision granting the Employer the right to terminate “for convenience” **provided that termination is not** for the purpose of the carrying out of the Works by the Employer himself or by others

Clause 16: Suspension and Termination by Contractor

■ Clause 16.1

- ◆ The Contractor may suspend if the Employer fails to comply with Clause 2.4 [Employer's Financial Arrangements] and/or Clause 14.7 [Timing of Payments]
- ◆ Notice of not less than **21 days** must be given to the Employer
- ◆ Any claim for delay and/or Cost **must be notified** pursuant to Clause 20.1

Clause 16: Suspension and Termination by Contractor

- **Clause 16.2**

- ◆ The Contractor's right to terminate by reason of the Employers failure to comply with Clause 2.4 [Employer's Financial Arrangements] and/or Clause 14.7 [Timing of Payments] is subject to extended notice periods i.e. **42 days** must elapse before a **14 day** notice can be issued

Clause 17: Risk and Responsibility

■ Clause 17.1

- ◆ The Contractor is required to indemnify the Employer **irrespective of whether the Contractor is liable** for any negligence, wilful act or breach of the Contract (provided that the Employer is not so liable)
- ◆ The Employer's indemnity obligation arises **only if the Employer is liable** for any negligence, wilful act or breach of the Contract

Clause 17: Risk and Responsibility

■ Clause 17.3

- ◆ The Employer risks do not include loss or damage **due to occupation** of the Works, or any Section thereof, by the Employer because Clause 10.2 [Taking Over Parts of the Works] does not allow the use of parts of the Works unless:
 - it is stated in the Contract; or
 - it is agreed between the parties

Clause 17: Risk and Responsibility

- **Clause 17.3**

- ◆ The Contractor should ensure that a Taking-Over Certificate is obtained in respect of any parts or Sections taken over and occupied by the Employer

Clause 17: Risk and Responsibility

■ Clause 17.6

- ◆ The Contractor is **not entitled to claim profit except** in relation to claims under Clauses:
 - 2.1 [Right of Access to Site]
 - 7.4 [Testing]
 - 10.3 [Interference with Test on Completion]
 - 16.1 [Contractor's Entitlement to Suspend Work]

Clause 19: Force Majeure

- **Clause 19.6**
- In the event of termination due to Force Majeure, the Contractor is entitled to be paid for:
 - ◆ the Works executed
 - ◆ the Cost of Plant and Materials ordered
 - ◆ any other Costs incurred in expectation of completing the Works

Clause 19: Force Majeure

- **Clause 19.6**

- In the event of termination due to Force Majeure, the Contractor is entitled to be paid for:
 - ◆ the Cost of removal of Temporary Works and Contractor's Equipment

 - ◆ the Cost of repatriation of staff and labour

 - ◆ **Cost does not include profit**

Clause 20: Claims, Disputes and Arbitration

▪ Clause 20.1

- ◆ Sets down a procedure that **must** be followed
- ◆ Contractor **must** give notice of his claim as soon as practicable and **not later than 28 days** after becoming aware, or when he should have become aware, of the event or circumstance giving rise to the claim
- ◆ Failure to comply means that the **Contractor forfeits** his claim to extension of time and additional payment

Clause 20: Claims, Disputes and Arbitration

▪ Clause 20.1

- ◆ Never before has a FIDIC contract **removed the fundamental right of the Contractor to make a claim**
- ◆ *c.f.* other contracts that **merely prejudice the Contractor's entitlement** to the extent that the Employer / Engineer has been disadvantaged by the delay to notify

Clause 20: Claims, Disputes and Arbitration

▪ Clause 20.1

- ◆ Notice requirements for Contractor are **more onerous** than for the Employer
 - *c.f.* Clause 2.5 [Employer's Claims] and 20.1 – Employer is required to give notice **as soon as practicable** after becoming aware of the event or circumstance

Clause 20: Claims, Disputes and Arbitration

▪ Clause 20.1

- ◆ Contractor must send **fully detailed particulars** of the claim to the Employer within **42 days** after becoming aware, or when he should have become aware, of the event or circumstance giving rise to the claim
- ◆ Contractor must maintain **contemporaneous** records
- ◆ Failure to provide a fully particularised claim does not itself bar the claim.

Clause 20: Claims, Disputes and Arbitration

▪ Clause 20.1

- ◆ Within **42 days** after receiving the claim the Employer:
 - **shall respond** with approval, or with disapproval and detailed comments; and
 - **may request** further particulars
 - but **must give** his response on the principles of the claim

Clause 20: Claims, Disputes and Arbitration

- **Clause 20.1**

- ◆ The Employer shall proceed in accordance with Clause 3.5 [Determinations] to agree or determine:
 - the extension (if any) to the Time for Completion in accordance with Clause 8.4; and/or
 - the additional payment (if any) to which the Contractor is entitled under the contract

Clause 20: Claims, Disputes and Arbitration

■ Clause 20.2

- ◆ Provides for the establishment of the **Dispute Adjudication Board** (“DAB”) comprising either 1 or 3 members appointed by the parties
- ◆ The DAB is to be appointed within **28 days** after a Party has given notice of its intention to refer a dispute to the DAB
- ◆ The DAB expires after it has given its decision on the dispute provided no other disputes have been referred in the meantime

Clause 20: Claims, Disputes and Arbitration

■ Clause 20.2

- ◆ *c.f.* Red Book where the DAB is **appointed at the start** of the Contract and remains in existence for the duration of the Contract unless agreed otherwise by the Parties
- ◆ The “Red Book” approach **may be preferable** for large, complex projects where familiarity with the Contract would be advantageous

Clause 20: Claims, Disputes and Arbitration

■ Clause 20.2

- ◆ If the DAB comprises 3 members **each Party nominates 1 member** for approval by the other Party
 - Clause 20.3 does not provide default in the event of absence of approval
- ◆ The Parties shall consult with these members and appoint a **third member** who will be appointed to act as chairman
- ◆ If the DAB comprises 1 member the Parties are to agree his/her identity

Clause 20: Claims, Disputes and Arbitration

■ Clause 20.4

- ◆ The DAB's decision will become final and binding unless a **notice of dissatisfaction** is given within **28 days** following receipt
- ◆ Even if a notice of dissatisfaction is given it would appear that the **decision is binding unless revised** by amicable settlement or an arbitral award

Clause 20: Claims, Disputes and Arbitration

- **Clause 20.5**

- ◆ Amicable Settlement

- **only available** if a notice of dissatisfaction has been given following a DAB decision
 - intended to be attempted before the matter is referred to arbitration
 - **can be dispensed with** provided that **56 days** has expired since the date on which the notice of dissatisfaction was given

Clause 20: Claims, Disputes and Arbitration

■ Clause 20.6

- ◆ **Unless settled amicably**, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration

- ◆ Unless agreed otherwise:
 - ICC Rules apply

 - the dispute shall be settled by 3 Arbitrators

 - the arbitration shall be conducted in the language for communications defined in Clause 1.4 [Law and Language]