New FIDIC Agreements for Consultants

FIDIC have published a new suite of Consultant agreements including the 5th edition (2017) of the Clients/Consultants Model Services Agreement (the “White Book”), the second edition (2017) of the Sub-Consultancy Agreement and a new Joint Venture Agreement. In this briefing note, we focus on the new White Book and the Sub-Consultancy Agreement. The Joint Venture Agreement will be the subject of a separate briefing note.

5th edition of the White Book

The general arrangement and layout of the 5th edition follows that of the 4th edition, including the division between the Particular Conditions and Appendices (which need to be populated and agreed by the parties) and the General Conditions. A significant amount of work will be required to populate the Particular Conditions, including any additional or amended conditions which are agreed (for example to reflect the legal requirements in the jurisdiction where the Project is being carried out), and the Appendices. The latter need to set out the agreed Services (Appendix 1); the personnel, equipment and services of others to be provided by the Client (Appendix 2); the Consultant’s remuneration (Appendix 3); and the Programme (Appendix 4). All this information must be drafted and agreed by the parties in some detail.

Consultants will need to take particular note of the following key changes to the General Conditions.

Standard of Care (Clause 3.3)

The standard of care in clause 3.3.1 has been brought into line with widely accepted “elevated” drafting typical of Client bespoke appointments (and now incidentally the ACE Professional Services Agreement 2017). Clause 3.3.1 now requires the Consultant to exercise the "reasonable skill, care and
diligence to be expected from a Consultant experienced in the provision of such services for projects of similar size, nature and complexity”.

In a further nod towards the drafting which is typical of Client bespoke appointments in a number of jurisdictions where “fitness for purpose” obligations are often required, clause 3.3.2 requires the Consultant to “perform the Services with a view to satisfying any function and purpose that may be described in Appendix 1 (Scope of Services)”. While this should focus the parties’ minds on agreeing a description of the project objectives, consultants will want to know if this introduces a “fitness for purpose” obligation which may not covered by their PI insurance. Clause 3.3 states that the Consultant’s obligation under this clause only applies to the extent achievable using the standard of care in Sub-Clause 3.3.1, without extending the Consultant’s obligation beyond that required under that sub-clause. It is clear from this that the “reasonable skill and care” obligation trumps “fitness for purpose”, in the “hierarchy of obligations” referred to in English cases such as MW High Tech Projects UK Ltd v Haase Environmental Consulting GmbH (2015). The Consultant’s liability should therefore be covered by its PI insurance. However, it would be prudent for consultants to obtain confirmation of this from their insurers before entering into an appointment based on the new White Book.

Intellectual Property Rights (clause 1.7)

There is now a distinction between the treatment of Background Intellectual Property (i.e. intellectual property owned by either party prior to the commencement of the Services) and Foreground Intellectual Property (i.e. intellectual property created by the Consultant during the performance of the Services). This distinction is normally drawn where the Client requires Foreground Intellectual Property to be vested in it (as is often required by Clients in some overseas jurisdictions). However, this is not the effect of the clause 1.7. This provides that Foreground Intellectual Property remains vested in the Consultant, and that the Client will have a licence to use and copy it for any purpose in connection with the Project. This is more typical of Consultant’s appointments in the UK, although the licence given by clause 1.7 is very wide and would, for example, entitle the Client to use the Consultant’s designs in a future extension of the Project. Under other standard forms of appointment, such use would be subject to payment of an additional licence fee so Consultants should make due allowance for this in their fees, or make provision for additional fees in these circumstances by way of an appropriate Particular Condition.

Clause 1.7.5 provides that if the Client fails to pay any amount due, the Consultant may revoke the licence on giving the Client 7 days’ notice. This is
potentially powerful weapon which could be used by the Consultant as leverage to obtain payment. However, in many cases there will be a serious risk that the Consultant would be found to be in repudiatory breach of the Agreement if purports to exercise its rights under this clause, but it is held by an Adjudicator or Arbitrator that the amount claimed by the Consultant is not in fact due. Accordingly, it is likely to be extremely rare for a Consultant to seek to exercise its rights under this clause.

Good Faith (Clause 1.16.1)

Clause 1.16.1 states “In all dealings under the Agreement the Client and Consultant shall act in good faith and in a spirit of mutual trust”. In an interesting departure from the usual formulation (for example in the NEC3 PSC), there is no express duty in addition “to cooperate”. In most jurisdictions, there is likely to be an implied duty to cooperate, although the extent of that duty will differ from contract to contract depending on the circumstances of each contract in question.

The good faith obligation in the White Book is very wide in its application (to “all dealings”) and is likely to be in issue in almost any dispute. For example if one of the parties terminates, the other party may contend that it has not acted in “good faith”.

The meaning and scope of this “good faith” obligation will differ according to the governing law and jurisdiction concerned. It has recently been considered by the English courts in a number of recent cases, for example Portsmouth City Council v Ensign Highways Ltd [2015]. No general rule as to the meaning of “good faith” can be deduced from these cases, since much depends on the exact drafting and how it should be interpreted in the context of the contract as a whole. However it is clear that the English courts are reluctant to infer from a good faith obligation a positive requirement for a party to act against its own commercial interests. Given the absence of an express duty to cooperate, clause 1.16.1 may not entail much more than an obligation not to mislead the other party.

Liabilities (Clause 8)

Clause 8.3 provides for the respective parties’ liabilities to be limited by an overall cap. As in the 4th edition, the level of the cap needs to be agreed by the parties and inserted in the Particular Conditions. This could be by reference to a multiple of the Consultant’s projected fees, or alternatively could be the amount of PI insurance which is required. Most Clients would expect the latter, assuming this results in a higher cap.

For further information please contact:

Tom Pemberton
Partner
T: +44 (0) 20 7469 0416
E: t.pemberton@beale-law.com
Pursuant to clause 8.4.1, the cap does not apply to deliberate manifest and reckless default, fraud, fraudulent misrepresentation or reckless misconduct by the defaulting party. These are similar to the carve-outs from the cap in the 4th edition.

As in the 4th edition, there is an abbreviated version of a net contribution clause (at clause 8.1.3). In addition, clause 8.3.3 of the 5th edition now sets out a mutual exclusion of liability for loss of revenue, profit, production, contracts, use, business, business opportunity and third party punitive damages, as well as indirect, special or consequential loss or damage. This is useful additional protection for the Consultant (which was not explicitly set out in the 4th edition to the same extent), since in many jurisdictions (including England and Wales) in the absence of express wording excluding liability for loss of profit etc, the Consultant would be liable for such losses to the extent that these constitute “direct losses”.

When agreeing limitations and exclusions of liability, Consultants will need to be mindful of any rules relating to the enforceability of limitation and exclusion of liability under the governing law concerned, for example the Unfair Contract Terms Act (1977) in the UK. The fact that the liability cap and exclusions in the White Book are mutual should help to rebut any contention that they are unreasonable and therefore unenforceable.

Disputes and arbitration (clause 10.1)

As in the 4th edition, the 5th edition provides for a tiered approach to resolving any dispute, commencing with the requirement for the parties to meet (if so requested by either party) in an attempt to resolve the dispute amicably. An important change is that in the 5th edition the mediation stage (where the parties are unable to reach an amicable settlement) as been replaced by an adjudication procedure which is set out in detail in Appendix 5. This is conceptually similar to statutory adjudication in the UK under the Construction Act, but has some important differences. For example, the Adjudicator under the White Book procedure has 56 days from reference of the dispute to him to give his decision, rather than the 28 days which would apply under the Construction Act (subject to extension in specified circumstances). As in respect of a Construction Act adjudication, the Adjudicator’s decision is binding.

Consultants should note that if they are dissatisfied with a decision given by the Adjudicator, they must give Notice of Dissatisfaction (in accordance with clause 10.2.3) within 28 days of receipt of the decision, since if neither party does so within that period, the decision becomes “final and binding” on both parties.
does so within that period, the decision becomes “final and binding” on both parties.

Given that the White Book adjudication procedure was not drafted to comply with Section 108 of the Construction Act, the parties should, where the Appointment relates to a project in the UK, agree a Particular Condition which incorporates a Construction Act compliant adjudication procedure. Otherwise the procedure in the statutory Scheme for Construction Contracts would apply. This is widely regarded as an acceptable “default” procedure and is identified in many UK standard forms of contract as the procedure to be adopted, with an important proviso that a mutually acceptable adjudicator and/or adjudicator nominating body (ANB) is named in order to avoid the statutory default position of the ANB being selected by the referring party in the event of a dispute.

Where one of the parties has given Notice of Dissatisfaction before the deadline noted above, there is provision for the dispute to be finally determined under the Rules of Arbitration of the International Chamber of Commerce. This is similar to the “default” arbitration option under the 4th edition, but parties will need to take note of the much more detailed drafting of the arbitration provisions in clause 10.4 of the 5th edition.

Other changes

Consultants will need to take note of their detailed obligations in relation to a range of matters including the following:

* Submission and review/updating of a Programme (clause 4.3): among other things, there are now more prescriptive requirements as to what the Programme is to include. There are also more detailed provisions governing commencement and completion of the Services and extension of time;

* Variations to Services (clause 5.1): there is more detail on the events and circumstances which could constitute a Variation together with the procedure for initiating Variations and agreeing their impact on the Programme and the Consultant’s remuneration (the basis of which should be set out in Appendix 3). Consultants should consider the list of circumstances which could give rise to a Variation in clause 5.1.2. If appropriate, they should request the addition of a Particular Condition extending this list to include other events or circumstances. These could, for example include a change in, or delay to, the Project itself (which is not listed in clause
5.1.2), in order to be sure of an entitlement to additional fees in these circumstances.

- **Anti-Corruption** (clause 1.10): The core obligation to comply with anti-corruption legislation now applies to the Client as well as to the Consultant. In addition, the Consultant is now required to adhere to a documented code of conduct relating to the prevention of corruption and bribery. At a minimum the Consultant must comply with the FIDIC Code of Ethics and the FIDIC Integrity Management System, so Consultants should familiarise themselves with these requirements.

- **Suspension of Services and Termination of Agreement** (clause 6): There are more extensive rights of suspension including an express right for the Consultant to suspend if the Client fails to demonstrate that it has made satisfactory financial arrangements which will enable it to meet its payment obligations.

**The FIDIC Sub-Consultancy Agreement (second edition, 2017)**

The publication of the second edition of the Sub-Consultancy Agreement will be welcomed by Consultants since the first edition (published in 1992) does not reflect the drafting of successive editions of the White Book which have been published since then.

Generally, the new edition of the Sub-Consultancy Agreement has been drafted as a “step down” of the latest White Book and includes provisions which flow down most of the terms of the latter. In addition, there is a general “step down” provision at clause 3.2, among other things obliging the Sub-Consultant to perform all the main Consultant’s obligations under the main White Book appointment insofar as they relate to the Sub-Consultancy Services.

Consultants should, however, note the differences of detail between the White Book and the Sub-Consultancy Agreement. For example, the Consultant is not under an obligation to provide evidence that it has made satisfactory financial arrangements. It will no doubt rely on payments received from the Client to meet its own payment obligations to the Sub-Consultant. However, it should be noted that there is no “pay when paid” clause (which of course would be unenforceable in relation to projects in the UK and also now in Ireland) so the Consultant would remain liable to pay the Sub Consultant all amounts due in respect of its fees even if there is no prospect of recovering these amounts from the Client because, for example, the Client has become insolvent.
Conclusion

The new editions of the White Book and the Sub-Consultancy Agreement should be welcomed by Consultants since they have been brought up to date with current “best practice” drafting in relation to such matters as good faith and limitation of liability. As with all forms of contract, it is important that Consultants familiarise themselves with the detail, and take appropriate insurance and legal advice if in any doubt as to the extent of their rights, obligations and liabilities, and the extent to which the latter are covered by their insurance.

March 2017

For further information please contact:

Tom Pemberton
Partner
T: +44 (0) 20 7469 0416
E: t.pemberton@beale-law.com