

The new FIDIC White Book for Consultancy Services

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Authors: Julian Bailey, Michael Turrini, Luke Robottom, Chris Duncan

FIDIC has recently published the 5th Edition of its Client/Consultant Model Services Agreement (the **White Book**). The White Book is an important part of the FIDIC suite and is one of the most widely used forms of professional services contract internationally. FIDIC has also published the second edition of the Sub-Consultancy Agreement to go with the new White Book.

In its new edition of the White Book, FIDIC has made significant revisions compared with the previous edition. We consider below some of the key changes introduced by the new White Book.

Standard of Skill and Care

The new White Book claims in its Foreword that it has “enhanced” the duty of care obligation on the Consultant by providing a higher project-specific standard of “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”. This develops upon the previous general obligation on the Consultant to use “reasonable skill and care”, and may be of particular relevance where the Consultant does not possess the necessary expertise or has taken on something it is not fully equipped to handle. However, in most cases it will not significantly add to the obligation on the Consultant compared with that contained in the previous version of the White Book.

Interestingly, the relevant provision also appears to contain a fitness for purpose obligation as it requires the Consultant to perform the Services with a view to satisfying any function or purpose that may be described in the Scope of Services. However, this obligation is expressed only to apply to the extent achievable without extending the obligation of the Consultant to use reasonable skill and care. Therefore it would not appear to impose any greater standard on the Consultant.

While there may be good reasons for not including a “fitness for purpose” obligation, including that it may be uninsurable in many common law countries, it appears that the changes that have been made are, from a Client’s point of view, a case of form over substance.

Good Faith

A new obligation on the parties to act in good faith and in the spirit of mutual trust has been included. Its meaning and effect will differ from jurisdiction to jurisdiction, but the current English law position is that its interpretation will depend on its context and certainty of drafting. Based on recent case law it is unlikely to be interpreted to infer a positive requirement for a party to act against its own interests or to trump an absolute contractual right.

Revocation of License for Non-payment

The Consultant has been given the right to revoke any intellectual property license granted in case of any default in payment of any amounts due under the Agreement. This is a fairly strong incentive to ensure that the Client does not unjustly withhold payment, and some Clients may consider it to be an excessive remedy for failure to make timely payment. The Consultant may, however, be wary of exercising such a right as in many cases there might be a genuine dispute as to whether or not an amount is due.

Rely Upon Information

A specific obligation has been included making the Client responsible for the accuracy, sufficiency and consistency of all information provided by the Client or by others on behalf of the Client. There is, however, an obligation on the Consultant to exercise the standard of skill and care with a view to ensuring that there is no manifest error, omission or ambiguity in such information and to promptly give notice to the Client of any adverse findings.

Construction Administration

The new White Book includes provisions which are designed to apply where the Consultant is providing construction administration services in relation to physical works to be carried out under a Works Contract.

Under these provisions, the Client provides a relatively wide indemnity to the Consultant in relation to any and all claims made by a Works Contractor arising out of or connected with the Works Contract. Potentially, the Consultant would be indemnified even where the relevant claim may be its own fault.

In addition, the Consultant is not responsible for the sequencing of any aspects of the Works Contract. This will need to be considered in light of the scope of the Consultant's services as there is a possibility that where there are multiple Works Contractors and potential interfaces, the Consultant may have an input in the sequencing of Works Contracts.

Termination

The new edition of the White Book provides that the Client is not entitled to terminate for convenience in order to carry out the services itself or through a third party. In the previous edition of the White Book, this was not expressly stated.

Dispute Resolution

The dispute resolution provisions have been amended to include a detailed adjudication procedure set out in an appendix of the new White Book. Under these revised provisions, any disputes not resolved amicably will first need to be referred to adjudication, prior to any referral to arbitration.

Variation

A more detailed variation provision has been included, which provides the procedure to be followed for initiating Variations and for calculating their impact on the Programme and the Consultant's remuneration. The Client's right to issue Variations is limited to those matters which do not substantially change the extent or nature of the Services. As it is unclear as to what would amount to "substantial" in the context of the Services, this could be problematic for the Client when instructing Variations and potentially lead to disputes.

Liability

The exclusions to the liability cap have been tweaked so that a "deliberate default" also needs to be "manifest and reckless" in order for the exclusion from the liability cap to apply.

A mutual carve-out of liability for any loss of revenue, loss of profit, loss of production, loss of contracts, loss of use, loss of business, third party punitive damages or loss of business opportunity as well as any indirect, special or consequential loss or damage has been included. This is favourable to the Consultant as it expressly excludes certain types of losses, such as loss of business or profits, even though they may be a "direct loss" in the context of the contract.

Exceptional Event

A detailed Exceptional Event regime dealing with force majeure events has been included in the new White Book, which is similar to force majeure regimes in the FIDIC construction contracts.

Conclusion

The overall allocation of risk between the parties under the new White Book would appear to be similar to the previous 4th edition, however the provisions of the contract have been developed and strengthened compared with the previous edition of the White Book.

White & Case LLP

16th Floor, Al Sila Tower,
Abu Dhabi Global Market Square
PO Box # 128616, Abu Dhabi
United Arab Emirates

T +971 2 611 3400

White & Case LLP

Alfardan Office Tower, 7th Floor,
P.O. Box 22027
West Bay, Doha
Qatar

T +974 440 643000

White & Case LLP

Level 6, Burj Daman, Happiness Street,
Dubai International Financial Centre
PO Box 9705, Dubai
United Arab Emirates

T +971 4 381 6200

White & Case LLP

5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000

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