

## Clause 13: Variations and Adjustments

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### The Power to Vary and its Limitations

While the process of ordering a variation has not changed dramatically, the 2017 edition substantially clarifies the limits on (some may say “*additionally limits*”) the Engineer’s power to vary.

Under the 1999 and all earlier editions, the power to vary was expressed in open-ended terms and it was left to the underlying law to say whether or not this power was limited. Most legal systems do recognise that variations cannot depart significantly from the original scope of the contract. Under English Law there is probably an implied term, based on the concept of business efficacy, that instructions should be reasonable and not stray ‘outside the Contract’. However, this was not spelled out and always left room for argument.

In a change which will be welcome to Contractors they are now given an express right to object when the varied work was “*Unforeseeable having regard to the scope and nature of the Works described in the Employer’s Requirements.*” This is a provision that is capable of dramatically changing the concept of what may be the subject of a Variation under the contract. “*Unforeseeable*” is defined in Sub-Clause 1.1.87 as “*not reasonably foreseeable by an experienced contractor by the Base Date*”. “*Base Date*” is the date 28 days before submission of tender. Sub-Clause 13.1. (a) adds the additional gloss that regard must be had to the scope and nature of the Works as described in the Employer’s Requirements.

While an experienced contractor will assume that there will be some variations during the course of the Works, he would have to be possessed of quite extraordinary foresight to know what each one of these would be. By definition a variation is likely to be something which the Employer, advised (hopefully) by an experienced engineer also did not

foresee. It is thus difficult to see how any variation at all could fail to be caught by this test.

Two significant limitations now expressed for the first time allow the Contractor to object where the variation may adversely affect its ability to meet health and safety and environmental protection obligations.

The final provision may also have unexpected consequences. This is set out in Sub-paragraph 13.1(e) which allows the Contractor to object where the variation “*may adversely affect the Contractor’s obligation to complete the Works so that they shall be fit for the purpose(s) for which they are intended in accordance with Sub-Clause 4.1 [Contractor’s General Obligations].*”

Sub-Clause 4.1 imposes on the Contractor the obligations:

- To execute the Works in accordance with the Contract. This would normally require obedience to VO’s, but Sub-Paragraph 13.1(e) creates an exception.
- To ensure that “*when completed the Works shall be fit for the purposes for which they are intended as defined and described in the Employer’s Requirements*”.

The language here is different from that used in the 1999 Edition and, in the context of Variations, this causes important consequences. The 1999 Edition required the Works, when completed to be fit for the purposes “*as defined in the Contract*”. As a Variation changed the effect of the Contract, the fitness for purpose obligation adjusted accordingly. It can be seen that, under the 2017 edition a Variation, would have to specifically amend the Employer’s Requirements if it were intended to impact the purpose for which the Works are

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intended. In the absence of a change to the Employer's Requirements, a change which affects the ability of the Contractor to achieve the purpose intended as defined in the Employer's Requirements is a ground to refuse to comply with the Variation instruction.

Thus, where the Engineer is faced with an objection under ground (e), one way of dealing with it would be to vary the Employers' Requirements so that the Contractor, while carrying out the Variation, can still comply with them.

Sub-Clause 1.1.33 [*Employer's Requirements*] defines the term and includes the document included in the Contract and *"any additions and modifications to such documents in accordance with the Contract."*

However Sub-Clause 3.2 prevents the Engineer from amending the Contract or *"to relieve either Party of any duty, obligation or responsibility under or in connection with the Contract."*

There is thus a question as to whether a Variation can override Sub-Clause 3.2 by empowering the Engineer to vary the Employer's Requirements (which in this case would have the effect of relieving the Contractor of one of its obligations under the Contract.)

There is nothing in Sub-Clause 13 which says this and it therefore has to be assumed that the Engineer cannot amend the Employer's Requirements.

In order to overcome this difficulty, the Employer will need to attempt to reach agreement with the Contractor and enter a supplemental agreement. This puts great bargaining power into the Contractor's hands and may mean in practice that a variation which may require a change to the Employer's Requirements is not possible.

## Objections by the Contractor

There is also a new and clarified procedure for objection by the Contractor. Unusually for the 2017 edition there are no clear time limits for this process. The Contractor must give notice *"promptly"* and the Engineer must also respond *"promptly"*.

Some of the value for the Contractor is taken out of the provision as the Engineer is given the option to cancel, confirm or vary the instruction which will then be treated as a Variation, even if it in fact continues to exceed the Engineer's powers.

If the Engineer chooses to cancel, there is clearly no problem. If he chooses to vary and the Contractor still finds there is an objection, there seems to be no reason why the Contractor cannot again give notice. However, if the Engineer chooses to confirm the instruction, this effectively means that it is rejecting the Contractor's assertions. There will thus be a dispute between the parties as to whether or not the Contractor's complaint is valid.

As the right to refuse is an absolute one, a brave Contractor might continue to refuse to perform the Variation. The safer course will be to continue and carry out the Variation instruction. In those circumstances the Contractor will certainly have put the Engineer on notice that the Variation is likely to be costly and/or cause significant delay or that the adequacy of the final product will be adversely affected unless the Contractor makes other changes in order to achieve safety, its guarantees or fitness for purpose obligations, for the Cost of which it intends to claim.

The additional cost may arguably be included as part of the valuation of the Variation (see below) or may only be claimable on the basis of an allegation that the Engineer has exceeded his authority. It is particularly important for the Contractor to take care in these circumstances. As will be seen below, the valuation of a Variation takes place without the need for the Contractor to give a notice under Clause 20.2. However, a claim for breach of

contract does require a Clause 20.2 Notice. Thus, if a Contractor has given notice and the Engineer has confirmed the instruction, the Contractor should immediately give notice under Clause 20.2 (repeating what it has said in its notice under the present Sub-Clause and adding any additional relevant information) so as to set the basis for a claim for additional payment and an extension of time if the Engineer later declines or fails to include the additional costs in its valuation of the VO.

### Variation as an Instruction

There is a linkage with Sub-Clause 3.5 [*Engineer's Instructions*]. This is because a Variation is one form of instruction. 3.5 now contains a welcome clarification (in this case probably more welcome to the Employer than to the Contractor) of what the Contractor may do if he considers an instruction which the Engineer does not call a Variation in fact amounts to a variation. In that case he must, immediately and before commencing work, give notice to the Engineer and the Engineer has 7 days to confirm, reverse or vary the instruction.

The requirement of “*before commencing work*” may be hard to comply with in practice, particularly in the common situation where a co-operative Contractor begins work on an urgent Variation on the basis of a promise by the Engineer that a formal VO will follow. As with Cause 13.1, it is not clear what is to happen if the Engineer confirms an instruction as not being a Variation when it should have been a Variation.

Where an instruction is not stated to be a Variation, Clause 3.5 also adds additional rights to objection to those in Clause 13.1 – the Contractor can object on the basis that the instruction does not comply with applicable Laws or is technically impossible. Quite why these grounds of objection are not applied to Variations also is unclear. There will be some interesting arguments to come on the consequence of this omission from the limits on the power to vary.

### The Process of Variation

The 1999 edition provided that VO's could be commenced by either a direct instruction or by a request for proposal followed by instruction. The 2017 edition follows the same model.

### Valuation of Variations

Following an instruction to vary, the Contractor is required to provide details of his planned resources and methods, an execution programme and any need to time extension and its proposal for adjustment to the Contract Price.

### Price Proposal – to be Taken into Account?

The obligation to submit a price proposal is set out in Sub-Clause 13.3.1(c). This Sub-Clause is one of the few in the contract which is said by Sub-Clause 1.15(b) to leave open liability on the part of the Employer for loss of profit, loss of any contract or any indirect or consequential loss or damage. It would seem therefore that the Contractor is entitled to include such losses and damages in its proposal.

This is therefore one way in which a Contractor can seek compensation for a loss caused to it by an Unforeseeable variation or by other abuse by the Engineer of its power to vary. However, the right goes further than that. As will be seen below the valuation methods open to the Engineer are very restrictive and do not, in some instances, allow it to take into account price increases which may have occurred since the Tender. Even a legitimate VO may be costly to the Contractor in ways beyond the direct cost of the work itself – for example if it means that it has to use resources which it would otherwise have been able to deploy more profitably elsewhere.

If the Engineer is required to take the proposal into account in making its valuation, this opens the door to some very substantial claims from contractors. However, the remainder of Sub-Clause 13.3.1 does not explicitly answer the question as to whether the



Engineer is required to take account of costs, etc. included in the proposal in its eventual evaluation. The answer as to whether or not the Engineer has this obligation is perhaps found again in Sub-Clause 1.15(b). If a proposal does not create a liability, why would there be a need to exclude it from the general prohibition on imposing liability for loss of profit, etc.? It appears that the assumption is that the Employer will be required to take the proposal into account.

Further support for this position comes from the fact that Sub-Clause 13.3.1(c) is the only place where the Contractor's right to compensation in the case of an agreed omission is to be found and, if it were not to be taken into account in the valuation it would be meaningless.

### Method of Valuation

The 1999 edition was notably vague about how the Engineer was to go about valuing the variation and this often led to argument. One approach under the 1999 (and earlier editions) would have been to assess the value using the tender as a comparator. Alternatively, the new work could have been valued on the basis of Cost plus profit. The new edition sets out two methodologies. One applies where there is no schedule of rates and prices (not unusual in a D&B contract) and one where there is. In the former case valuation is on a Cost plus basis. In the latter the rates are to be used unless there is no relevant item, in which Cost plus again applies.

The new valuation methodology where there are no rates and prices comes as a surprise as it ties the Engineer's hands to a method which may substantially favour one party or the other when tendered prices would previously have been used as the basis.

The valuation of the variation is (as before) fixed by an Engineer's Determination. This may have what is probably an unintended consequence when Cost plus has to be applied. Under the new time limits set out in Sub-clause 3.7 [*Engineer's Determinations*] the Engineer has a maximum 84

days to give his determination. However, these 84 days may have expired before the Cost plus information necessary to make the determination is available.

The Engineer may be faced with the impossible dilemma of whether to issue a determination without the necessary information or to fail to make a determination at all. In either case the issue may then become a dispute to be referred to the DAAB. It is not clear whether the DAAB has the power to take into account the Cost information which may have finally become available before it, in turn, is obliged to reach a decision. Indeed, in the case of a major Variation it is quite possible that the DAAB itself will not have enough information even assuming it can take into account the information which has become available in the meantime. The same problem continues into the arbitration process.

These problems can be resolved by the Engineer by demands for further information before a decision is given or by agreement of the parties to extend the time limits for determination. Time only starts to run once all requested information has been received from the Contractor (a real incentive for the Contractor to respond promptly). However, Engineers will need to be very alert to the need to demand full particulars of actual costs so as to avoid time starting to run for their determinations.

The Engineer is obliged to assess a provisional rate for interim payments pending agreement or determination. This is a new provision which is welcome and at least ensures that the Contractor will receive some of his entitlement.

In this situation, there is one specifically relevant consequence of the new-found "*neutrality*" of the Engineer in reaching determinations. Unlike the situation under the 1999 and previous editions, the valuation is no longer made by the Engineer acting as agent of the Employer. Thus, for the first time, the Employer has equivalent rights to the Contractor to challenge a valuation of a variation made by the Engineer.

There is a provision of Clause 14 which might have been better placed in Clause 13 and of which Engineers need to be aware. Clause 14.15(b) provides that where a variation is valued the amount to be paid in different currencies must be specified and this must be done by reference to the expected currency proportions of the Cost of the varied work. This is a sensible provision in principle but assumes that valuation can be done before the actual work has been carried out and that all Variations are valued on Cost (which, as noted above, they are not).

### Notices

There is now no requirement for the Contractor to give notice under Clause 20.2 if it wishes to seek an extension of time consequent on a Variation. This has always been the case for valuations but is now expressly stated for time as well. It should be noted, however, that this exemption from the requirement to give notice does not apply to the other provisions of Clause 13 (Provisional Sums, Daywork, Adjustments for Changes in Laws).

Under these latter provisions it may be arguable that the Contractor is obliged to give notice, even in order to get its entitlement for cost adjustments. It is certainly required for applications for extensions of time. A trap for the unwary Contractor who may be lulled into a false sense of security by the lack of a need for such notice for Variations proper.

### Prolongation and Disruption arising from Variations

As with the 1999 edition there is no provision for compensation for prolongation or disruption costs arising from variations. It remains the case therefore that it is very arguable that in the absence of specific provision, these costs will not be compensable. Indeed, if there was any room for argument under the earlier edition, this is now removed by the prescriptive provisions about the way in which variations are to be valued.

### Omissions

As with the 1999 edition the Engineer is not permitted to use a Variation Order to omit work which is to be carried out by others. The new edition clarifies this by making it impermissible for work to be omitted where the intention is for the Employer himself to carry out the same work.

There is now express provision for the parties to agree on the omission of work. In these circumstances the Contractor is entitled to propose an amount of compensation for loss of profit or other compensation for the omission. There is some doubt as to what will happen if the Contractor fails to include such a proposal. Indeed, there is no direction to the Engineer to consider this element of the proposal. Rather unfortunately, where there is no agreement on the omission there is no express right to propose such an amount. However, an omission in order to carry out the works by someone else would be a deliberate breach of contract and under Sub-Clause 1.15 is excluded from the general prohibition on claims for loss of profit and indirect or consequential loss.

### Variation by Request for Proposal

The 1999 edition gives the Engineer the option to ask for a proposal prior to instructing a variation. The new procedure is spelt out more clearly but does not change the process significantly. As before there is no general provision for compensation for the Contractor to be compensated for the (possibly considerable) cost of preparing a proposal.

However, there is now an exception to this in the situation where the Engineer does not give consent to a proposal. Contractors should note that, unlike the right to evaluation of payment, this right is not exempt from the requirement for a Sub-Clause 20.2 Notice.

### Value Engineering

Value engineering under the Yellow and Silver Books was thankless under the 1999 forms. Under the Red Book, the Contractor could earn 50% of the net benefit. Here all the forms leave it to

the Special Provisions to set out any sharing of “*the benefit, costs and/or delay*”. However even where these are set out the Engineer is not obliged to take them into account, only to “*include consideration*” of them when he issues a Variation. This is very vague language. If the Engineer’s “*consideration*” leads it not to include any sharing in its ultimate valuation there seems to be no basis for a change either through the Sub-Clause 3.7 procedure or through a DAAB.

### Provisional Sums

There is new provision allowing the Engineer to require the Contractor to produce quotations from suppliers.

### Daywork

The process for dealing with quotations is usefully spelled out in more detail.

Daywork is described in the sub clause as a Variation and the cost consequences (though not time) in cases of disagreement are, for the first time, to be determined under Clause 3.7.

Whereas the Contractor is entitled to have the value and time consequences of other variations determined under Clause 3.7 without the requirement for a notice under Clause 20.2, there is no such exception in the case of Dayworks. Contractors are going to have to be very careful to ensure that they adapt to the new procedure by giving Clause 20.2 notices whenever they need to have dayworks valued and/or require an extension of time.

Sensibly (and in contrast to the procedure for other Variations), time for the Clause 3.7 determination starts to run from when any disputed dayworks are completed and their value can easily be determined. However, there is no special provision dealing with the start of the 28-day period for giving Notice under Clause 20.2. The effect appears to be that the Engineer’s time for considering any disputed valuations will be

truncated by the time the Contractor takes to issue his Clause 20.2 Notice. In the case of applications for extensions of time, time may start at a different point, so the Engineer’s time limits may expire on different days.

### Adjustments for Changes in Law

- As under the 1999 edition, the Contractor may be entitled to compensation in money or time for the consequences of changes in law.
- The scope of what may be considered Changes in Law is expanded beyond what was included in the 1999 Edition and now includes:
  - The Laws of the Country
  - Not only judicial or government interpretation of such Laws but also their implementation.
  - Permits, permissions, licenses or approval obtained by the Employer or the Contractor. These are not limited to those of the Country.
- The last of these may be the most significant as it will extend to planning and environmental requirements and may potentially apply to matters arising outside the Country. In addition, in an international project, the Contractor is as likely to be affected in another country as in the country where the Works are actually being performed – much of the manufacture may be taking place off-shore and materials and labour may well be being procured elsewhere and may be affected by regulatory requirements off-shore. The application of this provision to such permits licenses or approvals thus represents a potentially significant change to the balance of risk.
- It should be noted that permits obtained by the Employer are at the expense of the Contractor (Clause 1.13(b)). Thus the Contractor will need to be vigilant to check whether a permit may be the result of a change of law and the cost thus reimbursable.

- In contrast to the 1999 edition, the Employer is now given the right (subject to a Clause 20.2 Notice) to recover any benefit which the Contractor may have received as a result of any changes in Laws.
- Unlike in the case of Variations, there is no waiver of the requirement to give Notice under Clause 20.2 when seeking time or money compensation.
- Finally, there is a new provision which enables either the Contractor or the Engineer to trigger a Variation where a change in Laws requires an adjustment to the execution of the Works. There is no fixed time limit for giving such notice. The term used is “*promptly*”, but the starting point for such “*prompt*” notice may be subject to some controversy. Nothing is said about what happens if a party fails to trigger such a Variation and it may well be that the general right for the Contractor to be compensated in Cost and time for such changes will mean that (subject to timely notices) the Contractor will be entitled to compensation even if it does not trigger a Variation.



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### **Adjustment for Changes in Cost**

The 1999 edition included detailed methodology for the calculation of such changes. This is now omitted, and the parties are expected to include their methodology in a schedule to the Contract (without which the right to adjustment will not apply).

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