You’re Creeping Me Out – Design Creep under the FIDIC Silver Book

Kluwer Construction Blog
December 23, 2009

Sarah Thomas (Pinsent Masons)

Please refer to this post as: Sarah Thomas, ‘You’re Creeping Me Out – Design Creep under the FIDIC Silver Book’, Kluwer Construction Blog, December 23 2009, http://kluwerconstructionblog.com/2009/12/23/youre-creeping-me-out-design-creep-under-the-fidic-silver-book/

In the wake of the current downturn, employers will increasingly look for greater budget certainty under EPC or Turnkey contracts. This is where the contractor undertakes all tasks – design, construction, management etc – so that, upon completion, the employer merely needs to ‘turn the key’ and operation of the plant or building can begin immediately. The whole point is that the contractor assumes price risk in return for relative autonomy over how he delivers the project – provided of course he meets the employer’s output requirements. But often employers want not just price certainty but also to retain control over design approval and how the project is actually delivered. This can lead to claims of ‘design creep’ by the contractor when he perceives that the employer is trying to introduce design improvements under the guise of reviewing the contractor’s documents.
But what is ‘design creep’? Why are contractors upset at its use and are their concerns justified?

I will be concentrating on the provisions of the FIDIC Silver Book, although design creep is not something particular to the Silver Book, or indeed any construction standard form.

Sub-clause 5.2 of the Silver Book allows the Employer to review the Contractor’s Documents. Nothing controversial about that. But what happens if the Employer undertakes a design review and makes ‘comments’ on those documents? Will those comments amount to a “Variation” (entitling the Contractor to time and money)? Or will they be taken as something less than a Variation, so that any additional work will have to be absorbed into the Contractor’s schedule and budget? This is the classic example of “design creep”.

What can the Contractor do when he considers that a comment constitutes a variation?

The first question to ask is: Does the “comment” amount to a “variation” under the terms of the contract? A Variation is defined in the Silver Book as “any change to the Employer’s Requirements or the Works which is instructed or approved as a variation under Clause 13”. Clause 13 [Variations] may be initiated at any time, “either by an instruction or by a request for the Contractor to submit a proposal”. The Contractor is often put in a difficult position because he must execute each variation unless he promptly gives notice that he cannot implement it (because of lack of goods, increased risk to safety or suitability of the Works or to his ability to meet Performance Guarantees). Obviously the broader the Employer’s Requirements and the Works are described in the contract, the less likely it is that the comment will be seen as a change to the Employer’s Requirements or to the Works.

However, if the comment does require a clear change, the Contractor’s first step should be to write to the Employer asking him to confirm whether the comment amounts to an instruction to change the Works under clause 13.1.

The second step is to follow the requirements of sub-clause 20.1 [Contractor’s Claims] and request the Employer to agree or determine adjustments to the Contract Price and the Schedule of Payments, proceeding in accordance with sub-clause 3.5 [Determinations].

But what if the comment does not amount to a ‘change’ as such. Is the Contractor still bound to follow it? This is the more difficult area. The Contractor could argue that the provision of comments that do not specify “non conformity with the Contract” is not a proper use of the review procedure under sub-clause 5.2. That clause only allows the Employer to give notice to the Contractor if a Contractor’s Document fails to comply with the Contract. There is a difference here between the FIDIC Silver and Yellow Books. The key difference is that the documents are submitted “for review and/or for approval” (if so specified) under Yellow but under Silver, they are submitted for review only. Thus under Silver, the argument can be made far more strongly that the Employer can only issue a notice if the documents don’t comply with the Contract. Under Yellow on the other hand, where a document is specified “for approval”, the Engineer can give notice of approval with or without comments. This is an important difference and is the reason why “design creep” may well be a bigger problem under the Yellow Book than under Silver. But under both contracts, it is important to remember that the Employer’s scope to review the Contractor’s documents is confined to issuing a notice that the document does not comply with the Contract. A Contractor would also be well advised to check the formalities for issuing instructions and variations under his contract – to see whether he does in fact have to implement the change. For example under the FIDIC contracts, an instruction must (1) be given in writing and (2) state the obligations to which it relates as well as the sub-clause in which the obligations are specified [Sub-clause 3.4].

No matter what approach the Contractor adopts, to the extent that the Contractor is making a claim under a FIDIC contract, he will have to comply with the provisions of sub-clause 20.1.

So, what has been your experience of design creep? Is it occurring more or less often? What do you see as the threshold that needs to be reached in order for a comment to turn into a Variation? I would be interested to hear your war stories.