

Variations under the FIDIC Yellow Book:

Lessons from *Uniform Building Contractors Ltd v. The Water and Sewerage Authority of Trinidad and Tobago*

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A recurring tension under lump-sum EPC and design-build contracts is the distinction between a genuine “variation” and work that simply falls within the contractor’s original contractual obligations. Indeed, according to the Eighth Annual HKA Crux Insight Report, from a pool of 2,204 engineering and construction projects in 114 countries, 34.7% of all claims or disputes arose because of “changes in scope”.

The recent Privy Council decision in *Uniform Building Contractors Ltd v. The Water and Sewerage Authority of Trinidad and Tobago* provides helpful guidance on how courts and tribunals may approach that question. While the case concerned the 1999 FIDIC Yellow Book, the underlying risk allocation and contractual structure are substantially similar to the 2017 edition.

The contractual test for a variation

Under the 1999 Yellow Book, a “variation” is defined in Subclause 1.1 as any change to the employer’s requirements, or the works instructed or approved under Clause 13.

To claim for varied works, a contractor will ordinarily need to demonstrate:

1. **A valid instruction** – The engineer must issue an instruction (or approve a proposal) in accordance with Clause 13. Engineers commonly issue directions through correspondence, meeting minutes, drawings, sketches or site communications. As Subclause 3.3 contemplates that instructions will be issued in writing, contractors would be well advised to create proper records and confirm any oral instructions in writing – especially if a “no oral variation” clause exists. An engineer’s or employer’s failure to object to the contractor’s design or execution of the works does not amount to an instruction.
2. **A genuine change in scope** – Establishing a variation requires a clear and reasoned articulation grounded in a proper interpretation of the contract, identification of the original contractual scope, a comparison with the relevant instruction or change, and a coherent explanation of how and why that instruction departs from the agreed scope.

3. **Procedural compliance** – The contractor must provide timely notice under Clause 20.1 and follow all mandatory valuation mechanisms. The Privy Council reaffirmed that Clause 20.1 of the 1999 FIDIC Yellow Book, as written, operates as a condition precedent under English law. The Privy Council did not address the procedures for submitting a detailed claim. However, under the 1999 FIDIC Yellow Book, noncompliance with those procedures may adversely affect its assessment – including the potential reduction or rejection of elements of the claim to the extent that such noncompliance has prejudiced the engineer’s or employer’s ability to evaluate it properly.

4. **Substantiation** – The claimed costs must be properly valued and substantiated in accordance with the contractual valuation mechanism.

Case study: The asphalt verge dispute

One of the central issues in *Uniform* centred on installing sewer infrastructure.

5. **Tender documents** – Although the evidence on the record was limited, there was some indication that the drawings contemplated the sewer being located within a strip of grass, gravel or lightly surfaced land immediately adjacent to an asphalt road (commonly referred to as a verge).
6. **Preliminary design** – The contractor’s preliminary design showed that the sewer would run through the verge.
7. **Requirement for site investigations** – The contract placed responsibility on the contractor to investigate the site, including borehole data and hydrological conditions. The employer’s requirements further made clear that only limited ground investigation had been undertaken and that the contractor was deemed to have satisfied itself that it had sufficient information regarding the ground conditions.
8. **Final design/execution** – Ultimately, the sewer was installed directly beneath the asphalt roadway rather than the verge, thereby requiring extensive cutting, excavation and reinstatement that the contractor claimed was unanticipated.
9. **Claim** – The contractor claimed this was a variation. Crucially, the engineer supported this view, acknowledging portions of the work as variations and approving payment recommendations.

The lower courts initially agreed. The Privy Council, however, took a stricter contractual approach, dismissing the contractor's claims based on the following:

- **The contractual definition of a variation** – The council stressed that an engineer's characterisation of work as a "variation" is not determinative. While evidentially relevant, an engineer's views do not override the proper interpretation of the contract. This aspect of the judgment is particularly significant for Yellow Book projects, where parties sometimes rely heavily upon informal site instructions, provisional agreements, or contemporaneous understandings reached during project delivery.
- **The need for qualifying instructions** – The fact that the engineer discussed the issue, approved payment recommendations or considered aspects of the works to be additional did not itself constitute a contractual variation instruction.
- **Design and execution risk under a design-build contract** – Absent a contractual notice or formal variation instruction, the employer was not required to object to construction methodologies adopted by the contractor. In the council's view, under a design-build contract, the contractor itself retained primary responsibility for design and execution.
- **No change to employer's requirements** – The invitation to tender expressly stated that pipe routes provided to tenderers were "indicative only" and required the contractor to confirm the "final routes" "with site investigation and field surveys". Furthermore, contractual specifications included provisions addressing asphalt cutting and roadway reinstatement, and the bill of quantities included separate line items for both verge and roadway excavation. Taken together, the council concluded that the contract expressly contemplated under-road excavation as part of the original obligations.

Practical implications

The decision highlights several practical lessons for both employers and contractors:

1. **Distinguish scope changes from execution effort** – Parties should carefully distinguish between (a) a genuine change to the employer's requirements and (b) increased effort required to achieve the original contractual requirements. Only the former is likely to constitute a compensable variation.
2. **Review risk allocation for design development** – EPC and design-build contracts frequently contain provisions expressly shifting responsibility for site investigation, design development and verification of preliminary engineering information onto the contractor. Accordingly, even where tender drawings appear to contemplate a particular construction methodology or alignment, the employer's requirements may nevertheless allocate the ultimate risk of design development and constructability to the contractor. Where possible, contractors should undertake the necessary investigations before accepting those risks, incorporate appropriate contingencies within their lump-sum pricing, or negotiate limitations during the contract negotiation phase.
3. **Retain records to evidence the "why"** – The contractor weakened its case by failing to evidence why the pipe alignment moved from the verge to the road. Had contemporaneous records proven the shift was caused by the employer (e.g. failure to secure access rights, revised performance requirements or unforeseen utility conflicts), the outcome might have been different.
4. **Governing law matters** – The Privy Council interpreted the contract objectively – the standard approach under English and many common law systems. By contrast, some US jurisdictions and civil law systems seek to identify the parties' mutual intention and shared commercial understanding. The council's reasoning may apply differently depending on the contract's governing law. It is therefore advisable to review the impact of whatever governing law may be proposed at the outset.
5. **Arguments relying on implication are difficult** – Contractors sometimes advance claims on the basis that an instruction was implied by necessity, conduct or surrounding circumstances, or "constructively" issued, or that the employer is estopped from denying an instruction despite the lack of a formal variation. Such arguments are difficult to win under a heavily risk-allocated lump-sum design-build contract. This is particularly true if records are incomplete, the contract includes a no oral variation clause, and there is an express stipulation that the engineer is not entitled to amend the terms of the contract, as exists in the FIDIC Yellow Book.
6. **Procedural compliance is essential** – Employers are likely to rely on the engineer's technical expertise to ensure variations are not issued unnecessarily. In turn, engineers are likely to take a cautious approach before issuing variations. Where no variation is issued or proposal approved, entitlement under the FIDIC Yellow Book will almost certainly depend upon strict compliance with the notice and claims provisions contained in Clause 20.

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