IChemE publishes new Silver Book professional services contract to complete its set of standard forms

The Institution of Chemical Engineers (IChemE) has recently published a new form of Professional Services Contract (the “Silver Book”). This completes its set of standard contract forms, which previously did not include a form dedicated to professional services.

With the recent publication in addition of the ACE Professional Services Agreement (“ACE PSA”) and the FIDIC White Book 5th Edition, there is now therefore a range of up-to-date standard forms to choose between for the appointment of Consultants. This is shortly to be increased further with the forthcoming publication of the new NEC4 PSC (as part of the NEC4 suite of forms).

The Silver Book contains both a Long Form Contract and a Short Form Contract. The Short Form Contract is a much shorter and simpler version of the Long Form Contract. It is intended for use in relation to limited commissions, such as the provision of services in relation to the preparation of a business case for a project before it attracts funding, at which point it would be appropriate for the parties to enter into a Long Form Contract.

Although the Silver Book is primarily intended for use by the process engineering industry, the IChemE has stated that it can be used in relation to projects in other sectors.

The Long Form Contract and the Short Form Contract have been drafted to conform with the style and to some extent the content of the other IChemE EPC contract standard forms, and are structured as follows:

- Agreement
- General Conditions of Contract
The Silver Book has been drafted for use both in the UK and internationally. The necessary flexibility to allow “jurisdiction specific” drafting is provided by the Special Conditions, which are split into two parts, as follows:

- Part A should be used where the commission relates to projects in the UK, since it includes an adjudication procedure which complies with Section 108 of the Construction Act.
- Part B provides model “non-jurisdiction specific” provisions, including alternative drafting for intellectual property rights and liquidated damages for delay, on which we comment below.

We focus below on a number of key issues arising out of the drafting of the Silver Book.

### Standard of Care

The Consultant is required to exercise “the reasonable skill and care to be expected from a qualified and competent consultant experienced in the provision of services of similar scope, size and complexity to the Services”. This is widely accepted as being “market standard” wording which is covered by a typical professional indemnity insurance policy, and similar elevated standard of care wording is found in the ACE PSA and the 5th Edition of the FIDIC White Book.

### Programme obligations

The Silver Book includes detailed obligations on the Consultant to prepare a programme and to revise it to conform with progress where so required, together with an obligation to “complete the Services [and] issue … all Deliverables … on or before any date … stated in Schedule 7”, subject to the right to an extension of time for delays caused by specified events including Force Majeure, i.e. any event or circumstances beyond the reasonable control of the parties. The Special Conditions include suggested drafting where the Purchaser requires the right to levy liquidated damages for delay. It is essential to note that to the extent liquidated damages exceed the Purchaser’s actual losses, they would not be covered by a typical professional indemnity insurance policy. Consultants should seek comments from their insurers or brokers as to any insurance implications accordingly before entering into a Silver Book appointment, particularly where the Special Condition providing for liquidated damages applies.
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**Limitation of liability**

Importantly, both the Short Form Contract and the Long Form Contract appointments contain overall aggregate limits on the Consultant’s liability. Under the Short Form Contract, the Consultant’s liability is limited to the Contract Price (which is likely to be low given the limited scope of the commissions for which the Short Form Contract is intended). Under the Long Form Contract, the Consultant’s liability is limited to a sum to be agreed by the parties and specified in the Agreement. It should be noted that the following liabilities are explicitly carved out of the liability cap in the Long Form Contract:

- liquidated damages for delay, where these apply. These are only capped if specified in the Agreement;
- liability under the indemnity granted to the Purchaser in relation to breach of third party intellectual property rights;
- breach of the Consultant’s confidentiality obligations; and
- the Consultant’s liability under the indemnity granted to the Purchaser in relation to loss or damage to the Purchaser’s (and its affiliates’) property. This is potentially a very significant risk if, for example, negligent design by the Consultant could result in a fire which destroys the Project.

In addition to the overall cap on liability, both the Long Form Contract and the Short Form Contract exclude liability for loss of profit, revenue, production etc and any indirect and consequential losses. This, together with a net contribution clause (in the Long Form Contract only) will be welcomed by Consultants.

**Collaboration and good faith**

The Silver Book includes a requirement for the parties to “co-operate with each other … with the aim of satisfactorily completing the Services in accordance with the Contract”. The obligation to cooperate is typical of the most recent standard Consultant forms, including NEC3 PSC, and ACE PSA 2017, but the Silver Book goes further by including an explicit obligation for the parties to “deal fairly, openly and in good faith with each other”. The English courts have held that the scope of a duty of good faith does not normally go much further than an obligation not to mislead the other party.
However, Consultants working on overseas projects should be aware that in certain jurisdictions (for example the UAE) a duty of “good faith” may be imposed by law and has far more wide-ranging ramifications.

**Intellectual property rights**

The Silver Book sets out a more Purchaser-friendly intellectual property regime than the other standard forms of professional services contract. A distinction is drawn between the parties’ pre-existing background intellectual property and that which is developed by the Consultant in the course of providing the Services.

Pre-existing intellectual property vests in the party that had developed it (as is to be expected). However, any intellectual property which is developed by the Consultant in the course of the Services (“New Intellectual Property”) vests in the Purchaser. While this is not unusual in the context of the process industry, it should be borne in mind by Consultants when developing a proposal for a Silver Book appointment that the consequence of this is that any design, patent or other intellectual property which it develops in the course of the Services may be used by the Purchaser for any purposes, including in relation to future projects. This is a potentially extremely valuable right for the Purchaser if, for example, the Consultant develops a new process solution that can be applied for future projects. Under the default provision referred to above, the Consultant would have no entitlement to charge a licence fee for the future application of that solution in other projects. Furthermore, it would not be entitled to “sell” that solution to other purchasers for use on their projects without a licence from the original Purchaser.

The Special Conditions include suggested alternative drafting pursuant to which the Consultant retains ownership of New Intellectual Property, with the Purchaser to have a licence to use it only for the purposes of the Project. This is more typical of drafting practice in the UK and should be selected by an appropriate entry in to the Agreement where so agreed by the Purchaser.

**Conclusion**

The Silver Book fills a gap in the IChemE’s standard suite of documents targeted specifically at the process industry, but also provides a further standard professional services contract which is suitable for use in relation to a wide range of projects. It is anticipated that it will primarily be used where one of the other IChemE forms is chosen as the basis of the EPC contract.
As with the NEC3 PSC, which has increased its market share in recent years, the particular attraction of the Silver Book for the Purchaser will be that it should allow a degree of consistency in the way the design process and construction activities respectively in relation to a project are managed, for example in relation to the programme obligations as referred to above.

As always when considering an appointment based on a new form, Consultants would be well advised to seek confirmation from their insurers that their liability under the Silver Book is covered, and should consider obtaining advice from their lawyers on the implications of unfamiliar obligations and processes.

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