



## Clause 13: Variations and Adjustments

Written by George Rosenberg<sup>1</sup>

### 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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