(1) FIDIC Risk Allocation: A pragmatic comparison across Red, Yellow, and Silver Books 1999

Pragmatic Project Consilium

Risk allocation is the soul of any construction contract, and the FIDIC suite of contracts (Red Book, Yellow Book, and Silver Book) provides a clear framework for how risks should be distributed between the Employer and the Contractor.

1. Compliance with Laws (Clause 1.13)

- **Red Book**: Contractor (C)
- **Yellow Book**: Contractor (C)
- **Silver Book**: Contractor (C)

Under all three FIDIC Books, the responsibility for complying with applicable laws lies with the Contractor. This is a common allocation across many contracts, ensuring that the Contractor, who is often better placed to manage local legal requirements, takes on this obligation.

2. Delayed Drawings or Instructions (Clause 1.9)

- **Red Book**: Employer (E)
- **Yellow Book**: Employer (E)
- **Silver Book**: Not Applicable (N/A)

In both the Red and Yellow Books, the risk of delayed drawings or instructions falls on the Employer. However, this risk is not applicable under the Silver Book, where the Contractor is usually responsible for both design and construction, thus controlling the timing of the drawings and instructions.

3. Errors in the Employer’s Requirements (Clause 1.9)

- **Red Book**: Not Applicable (N/A)
- **Yellow Book**: Employer (E)
- **Silver Book**: Not Applicable (N/A)

In the Yellow Book, where the Employer provides specific requirements, the risk of errors in these requirements is borne by the Employer. However, this is not applicable in the Red and Silver Books, where either there are no such detailed requirements or the Contractor takes responsibility for the design.

4. Right of Access to the Site (Clause 2.1)

- **Red Book**: Employer (E)
- **Yellow Book**: Employer (E)
- **Silver Book**: Employer (E)

The responsibility for providing access to the site remains with the Employer in all three FIDIC Books. This ensures that the Contractor can commence work as scheduled without delays caused by site access issues.

5. Setting Out (Clause 4.7)

- **Red Book**: Contractor (C)
- **Yellow Book**: Contractor (C)
- **Silver Book**: Contractor (C)

In all three contracts, the Contractor is responsible for setting out the works. This includes ensuring that the works are positioned correctly according to the contract requirements.

6. Quality Assurance (Clause 4.9)

- **Red Book**: Contractor (C)
- **Yellow Book**: Contractor (C)
- **Silver Book**: Contractor (C)

Quality assurance is consistently the Contractor’s responsibility across all three books. The Contractor must implement and maintain a quality assurance system to meet the contract’s standards.

7. Site Data (Clause 4.10)

- **Red Book**: Contractor (C)
- **Yellow Book**: Contractor (C)
- **Silver Book**: Contractor (C)

The Contractor is responsible for interpreting and using the site data in all three contracts. This places the burden on the Contractor to account for the conditions of the site as provided in the data.

8. Unforeseeable Physical Conditions (Clause 4.12)

- **Red Book**: Employer (E)
- **Yellow Book**: Employer (E)

- **Silver Book**: Contractor (C)

Unforeseeable physical conditions are a shared risk in the Red and Yellow Books, with the Employer bearing the responsibility. However, in the Silver Book, this risk is transferred to the Contractor, reflecting the Silver Book's intent to place more risks on the Contractor.

9. Protection of the Environment (Clause 4.18)

- **Red Book**: Contractor (C)
- **Yellow Book**: Contractor (C)
- **Silver Book**: Contractor (C)

Environmental protection is uniformly the Contractor's responsibility across all three FIDIC Books. The Contractor must ensure that the works comply with environmental laws and regulations.

10. Fossils (Clause 4.24)

- **Red Book**: Employer (E)
- **Yellow Book**: Employer (E)
- **Silver Book**: Employer (E)

The discovery of fossils is treated as an Employer's risk under all three contracts, meaning that any delays or extra costs due to fossil findings are the Employer's responsibility.

11. General Design Obligations (Clause 5.1)

- **Red Book**: Not Applicable (N/A)
- **Yellow Book**: Contractor (C)
- **Silver Book**: Contractor (C)

In the Yellow and Silver Books, the Contractor is responsible for the design. However, in the Red Book, where the Employer provides the design, this clause does not apply.

12. Design Error (Clause 5.8)

- **Red Book**: Not Applicable (N/A)
- **Yellow Book**: Contractor (C)
- **Silver Book**: Contractor (C)

The responsibility for design errors lies with the Contractor in both the Yellow and Silver Books. This reflects the Contractor's role in the design process under these contracts.

13. Testing Delays by Employer (Clause 7.4)

- **Red Book**: Employer (E)
- **Yellow Book**: Employer (E)
- **Silver Book**: Employer (E)

The Employer is responsible for any delays in testing under all three books, as it is generally the Employer's obligation to arrange for testing.

14. Rejection of Materials (Clause 7.5)

- **Red Book**: Contractor (C)
- **Yellow Book**: Contractor (C)
- **Silver Book**: Contractor (C)

If materials are rejected, the Contractor bears the responsibility, which is consistent across all three FIDIC Books. The Contractor must ensure that materials meet the specified requirements.

15. Remedial Work (Clause 7.6)

- **Red Book**: Contractor (C)
- **Yellow Book**: Contractor (C)
- **Silver Book**: Contractor (C)

Remedial work is the Contractor's responsibility in all three contracts. This includes correcting any defects or deficiencies in the work.

16. Extension of Time for Completion – Variation (Clause 8.4(a))

- **Red Book**: Employer (E)
- **Yellow Book**: Employer (E)
- **Silver Book**: Employer (E)

Variations that lead to a delay in completion entitle the Contractor to an extension of time, with the responsibility falling on the Employer in all three books.

17. Extension of Time for Completion – Delay (Clause 8.4(b))

- **Red Book**: Employer (E)
- **Yellow Book**: Employer (E)
- **Silver Book**: Employer (E)

If the Employer causes a delay, the Contractor is entitled to an extension of time. This is consistent across all three FIDIC contracts.

18. Extension of Time for Completion – Exceptionally Adverse Climatic Conditions (Clause 8.4(c))

- **Red Book**: Employer (E)
- **Yellow Book**: Employer (E)
- **Silver Book**: Contractor (C)

Exceptionally adverse climatic conditions are an Employer's risk in the Red and Yellow Books, but in the Silver Book, this risk is transferred to the Contractor. This is in line with the overall risk allocation approach of the Silver Book, where the Contractor assumes more risk.