

The Employer's Agent

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The Engineer is deemed to act for the Employer and is essentially the Employer's agent under the FIDIC Red Book 1999. He is not a wholly impartial intermediary, unless such a role is specified in the Particular Conditions, and there is no general obligation under the FIDIC Red Book 1999 for the Engineer to act independently or impartially. However, when he is required to make a determination under Sub-Clause 3.5, he is obliged to make it a fair determination and when he is obliged to issue an Interim Payment Certificate under Sub-Clause 14.6, or a Final Payment Certificate under Sub-Clause 14.13, he must fairly determine the amount due¹.

But, what does "fair" and "fairly" mean and does it compromise the Engineer's role as Employer's agent?

The key things to note about the Engineer

- The Engineer is appointed by the Employer.
- The Engineer is paid for by the Employer.
- The Engineer is deemed to act for the Employer.
- The Engineer may be one of the Employer's salaried employees.
- The Employer may replace the Engineer (without giving reasons)².
- The Engineer must carry out the duties assigned to him in the Contract.
- If the Engineer fails to perform his duties, this may be a breach of the Employer's obligation under the Contract to have appointed an appropriate person.
- The Employer may impose a requirement that the Engineer obtains specific approval before exercising a particular power.
- Whenever the Engineer exercises a particular power for which the Employer's approval is required, then the Employer shall be deemed to have given approval.

The Engineer is the Employer's Agent

Agency occurs where a party is authorised to act as the representative of another. An agent may be appointed either expressly or impliedly by consent. Under Sub-Clause 3.1 of the 1999 FIDIC forms of contract, the Engineer is deemed to act for the Employer and thus authorised to act as the Employer's representative, i.e. he is the Employer's agent.

Therefore, (unless there is a Particular Condition to the contrary), when an Engineer makes a "fair determination" under Sub-Clause 3.5 or "fairly determines" the amount due in an Interim Payment Certificate under Sub-Clause 14.6, or Final Payment Certificate under Sub-Clause 14.13, he remains the Employer's agent.

This is supported in the FIDIC's Contract Guide (1st edition, 2000) which states (with emphasis added): "*Under [the FIDIC Red Book 1999] or [the FIDIC Yellow Book 1999], the Employer is required to appoint the "Engineer", who is to be named in the Appendix to Tender. The Engineer does not represent the Employer for all purposes. The Engineer is not authorised to amend the Contract, but he is deemed to act for the Employer as stated in subparagraph (a). The role of the Engineer is thus not stated to be that of a wholly impartial intermediary, unless such a role is specified in the Particular Conditions. If [the FIDIC Red/Yellow Book 1999's] Engineer is an independent consulting engineer who is to act impartially, the following may be included in the Particular Conditions: At the end of the first paragraph of Sub-Clause 3.5, insert: "The Engineer shall act impartially when making these determinations."*"

In the FIDIC Red Book 1999, FIDIC removed the express requirement for the Engineer to act impartially found in the previous form, and made a conscious and deliberate attempt to distance itself from the Anglo-Saxon concept that the Engineer's duty to be impartial should be implied to reflect the fair and unbiased role of the Engineer as explained

in the English House of Lords decision of *Sutcliffe v Thackrah*³ (considering the R.I.B.A. standard form of contract). This concept has been followed in subsequent English decisions such as those of Mr Justice Jackson in *Costain v Bechtel*⁴ (considering the N.E.C.2 form of contract) and *Scheldebouw v St. James Homes (Grosvenor Dock) Ltd*⁵.

However, it is a concept that is not thought to be well understood or accepted internationally. In civil jurisdictions it is often asked how someone paid by one party (and therefore not independent) can act impartially as between Employer and Contractor.

Determinations

So, under the FIDIC Red Book 1999, must the Engineer maintain his role as the Employer's agent when making a "fair determination" under Sub-Clause 3.5 or when he "fairly determines" the amount due in an Interim Payment Certificate under Sub-Clause 14.6 or Final Payment Certificate under Sub-Clause 14.13 and, if so, how? What do the words "fair" and "fairly" mean and do they compromise the Engineer's role as Employer's agent?

"Fair" is defined widely in the Oxford English Dictionary and includes (with emphasis added) at number 14(a): "Of conduct, actions, methods, arguments, etc.: free from bias, fraud, or injustice; equitable; legitimate, valid, sound."

"Fairly" is also widely defined and includes (with emphasis added): "1. In a fair manner, so as to be fair....4. (a) By proper or legal means; legitimately; in accordance with rules or laws... (b) In accordance with what is right or just; equitably; without bias, impartially. Also: with good reason, rightfully....5. In a proper or suitable manner; appropriately, fittingly; (also) proportionately...6. Clearly, distinctly, plainly; frankly, openly...."

Reference is made to the Oxford English Dictionary as it is a well-regarded and accepted authority on the English language, which is the official language of the FIDIC forms of contract. Obviously, not everyone will accept this source. However, from these definitions, it is logical to conclude that the Engineer is obliged to act without bias and

impartially when making determinations under Sub-Clauses 3.5, 14.6 and 14.13, notwithstanding his role as Employer's agent.

This conclusion is supported in other parts of the FIDIC Red Book 1999 General Conditions of Contract. If it were not the case:

- Why would the Engineer (as Employer's agent) need to consult with both parties before reaching a determination?
- Why would the Employer be entitled to dispute the Engineer's determination and refer it to the Dispute Board under Sub-Clause 20.4 (particularly if the Employer's specific approval has been sought prior to issuing the determination)?
- How could the determination be disputed under the FIDIC form if the Contractor and the Engineer (as Employer's agent) agreed? Ordinarily, if a principal does not like something his agent has done which was properly within the agent's authority, the principal would take it up with the agent under the agency agreement.

The conclusion is also supported in the FIDIC Code of Ethics which states: "*The consulting engineer shall: - Be impartial in the provision of professional advice, judgement or decision...*"

The wording of the FIDIC Contracts Guide might be interpreted to compliment such a view. On one reading, the phrase "*The role of the Engineer is thus not stated to be that of a wholly impartial intermediary...*" could allow room for the Engineer to act as an impartial intermediary in limited situations, such as when making fair determinations under Sub-Clauses 3.5, 14.6 and 14.13.

An Engineer's professional codes of conduct could also be relevant in establishing the way in which he is expected to behave. For example, the Guidance Notes on the Interpretation and Application of the Rules of Professional Conduct of the Institution of Civil Engineers state (with emphasis added): "**Rule 1: All members shall discharge their professional duties with integrity and shall behave with integrity in relation to all conduct bearing upon the standing,**

reputation and dignity of the Institution and of the profession of civil engineering.

The manner in which members can fulfil this Rule includes, but is not limited to, the following: - Carry out their professional duties with complete objectivity and impartiality.

The FIDIC White Book 2006 goes further and refers to independence, although the obligation is not mandatory. Sub-Clause 3.3.2 states: “Where the Services include the exercise of powers or performance of duties authorised or required by the terms of a contract between the Client and any third party, the Consultant may: ... (b) if authorised to certify, determine or exercise discretion to do so fairly between the Client and third party not as an arbitrator but as an independent professional exercising his judgement with reasonable skill, care and diligence;...”

The problem has been recognised in the pre-release version of the FIDIC Yellow Book 2017. In Sub-Clause 3.2 of the FIDIC Yellow Book 2017 (as in Sub-Clause 3.1 of the FIDIC Yellow Book 1999), the Engineer is still deemed to act for the Employer, i.e. he remains the Employer’s agent, except as otherwise stated in the Conditions. However, to remove any ambiguity as to how the Engineer should act when brokering agreements or making determinations, Sub-Clause 3.7 states, “The Engineer shall act neutrally between the Parties when carrying out duties under this Sub-Clause”. Siobhan Fahey of the FIDIC Contract Committee acknowledges that the words “fair” and “fairly” are causing problems around the world and she hopes that the new obligation on the Engineer to act “neutrally”, when making a fair determination under Sub-Clause 3.7, will resolve this issue. However, there is a risk that neutrally may be seen as a synonym for impartially used in previous editions which could see the opening up of old arguments⁶.

Note also that in the pre-release version of the FIDIC Yellow Book 2017, Sub-Clause 14.6.1 obliges the Engineer to issue an Interim Payment Certificate (“IPC”) stating the amount which he “fairly considers to be due” to the Contractor (and not the amount which he “fairly determines to be due” as in the FIDIC Red Book 1999). A similar

change has been made in Sub-Clause 14.13 in respect of the Final Payment Certificate (“FPC”). This takes the issue of IPCs and FPCs outside the scope of Sub-Clause 3.7 and the Engineer’s obligation to act neutrally in the first instance. However, if the Contractor is not satisfied with an IPC, he may refer it to the Engineer for a determination. There seems to be no corresponding provision in respect of FPCs.

Unfortunately, the pre-release version of the FIDIC White Book 2017 is difficult to reconcile with the pre-release version of the FIDIC Yellow Book 2017 as it obliges the Engineer to act independently. Mandatory language is now used. Sub-Clause 3.9.3 states, “...If the Consultant is authorised under the Works Contract to certify, determine or exercise discretion in the discharge of its duties then the Consultant shall act fairly as go between [sic] the Client and the [C]ontractor, exercising independent professional judgement and using reasonable skill, care and diligence”.

Employer’s approval

The position is further complicated where the Engineer is obliged to obtain the Employer’s approval before, for example, agreeing or determining an extension of time and/or additional costs, or issuing Variations (under the FIDIC Red Book 1999 Particular Conditions or as set out in Sub-Clause 3.1 of the FIDIC Pink Book 2010). Under Sub-Clause 3.5 the Engineer is obliged to make a fair determination, but if the Employer does not approve that fair determination, the Engineer cannot make it. This leaves the Engineer in a very difficult position. He should not make a determination he thinks unfair but as the Employer’s agent he ought to do as he is told by his principal.

In practice, what appears to happen is that the Engineer does nothing and the matter is referred to the Dispute Board to resolve where a Dispute Board is provided for. Sub-Clause 20.1 of the FIDIC Pink Book 2010 states that “If the Engineer does not respond within the timeframe defined in this Clause⁷, either Party may consider that the claim is rejected by the Engineer and any of the Parties

may refer to the Dispute Board in accordance with Sub-Clause 20.4”.

However, it is arguable that, by failing to approve the fair determination, the Employer has interfered with, or prevented, the Engineer from carrying out the duties assigned to him in the Contract⁸. If done unreasonably, this may be considered a breach of contract by the Employer. Further, if the contract machinery for extending time for Employer risk and shared risk events is rendered inoperable by such an act of prevention, time may be set at large, entitling the Contractor to a reasonable time within which to complete the Works and defeat any claim for liquidated damages. This may happen if, for example, there is no recourse to a Dispute Board because one has not been appointed by the date stated in the Appendix to Tender (under the FIDIC Red Book 1999) or Contract Data (under the FIDIC Pink Book 2010).

Conclusion

The lack of clarity concerning the Engineer’s role in the FIDIC form has been criticised since 1999, and it is obvious to see why. Employers generally wish to have full control over their agents, whilst Contractors are concerned that the Engineer’s determinations will naturally favour the Employer. As currently drafted, this can cause problems for all concerned. Whilst the problems have been recognised in the pre-release version of the FIDIC Yellow Book 2017, the requirement upon the Engineer to act “neutrally” when making a determination is likely to raise many more questions. Further, an increase in payment disputes is to be predicted where the Engineer is obliged to issue Interim Payment Certificates and Final Payment Certificate fairly but not neutrally.

¹ There is no express obligation of fairness in any other contractual provision including, for example, Taking-Over under Sub-Clause 10.1.

² Although the Employer may not replace the Engineer with a person against whom the Contractor raises reasonable objection.

³ [1974], AC 727. Lord Reid at page 737: “*The building owner and the contractor make their contract on the understanding that in all such matters the [Engineer] will act in a fair and unbiased manner and it must therefore be implicit in the owner’s contract with the [Engineer] that he shall not only exercise due care and skill but also reach such decisions fairly, holding balance between his client and the contractor*”. Lord Morris at pages 740-741: “*Being employed and paid by the owner [the Engineer] unquestionably has in diverse ways to look after the interests of the owner. In doing so he must be fair and he must be honest. He is not employed by the owner to be unfair to the contractor*”.

⁴ [2005] EWHC 1018 (TCC).

⁵ [2006] EWHC 89 (TCC).

⁶ “*Neutral*” is defined in the Oxford English Dictionary as “*Not belonging to, associated with, or favouring any party or side*”. “*Impartial*” is defined similarly in the Oxford English Dictionary as “*Not partial; not favouring one party or side more than another; unprejudiced, unbiased, fair, just, equitable. (Of persons, their conduct, etc.)*”.

⁷ 42 days.

⁸ *Roberts v Bury Improvement Commissioners* [1870] L.R. 5 C.P. 310 – Blackburn J. “*...it is a principle very well established at common law, that no person can take advantage of non-fulfilment of a condition the performance of which has been hindered by himself ...; and also that he cannot sue for a breach of contract occasioned by his own breach of contract...*”.



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