

Workshop on Obligations of the Contract Parties

Justice Academy

Author-presenter: Tahseen Saleh

1



International Federation of Consulting Engineers

Tahseen Saleh

Outline

1. Introduction
2. Structure of FIDIC Forms of Conditions of Contracts (1999 suite of Contracts)
3. General Provisions – Definitions
4. Parties to the Contracts and their Obligations
 1. The Employer
 2. The Engineer
 3. The Contractor

1. Introduction

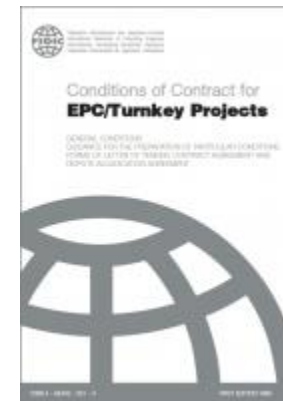
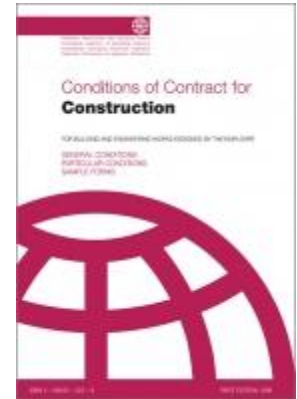


- FIDIC is the abbreviation of the “**F**édération **I**nternationale **D**es **I**ngénieurs-**C**onseils ‘FIDIC’”, which stands for : (The International Federation of Consulting Engineers)
- The FIDIC was established in 1913
- Promotes and implements the consulting engineering industry’s strategic goals
- Members endorse FIDIC’s statutes and policy statements and comply with FIDIC’s Code of Ethics.
- Develops and promotes business practice: Business Integrity management; Project Sustainability management; Quality management; Risk Management

4

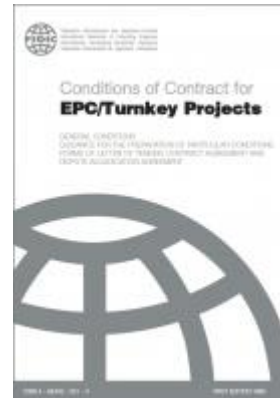


- Standard Contracts and Agreements:
 - Construction (Red)
 - Plant and Design – Build (Yellow)
 - EPC / turnkey Projects (Silver)
 - Short Form of Contract (Green)
 - Design, Build and Operate Projects (Gold)



FIDIC Releases 2017

- New FIDIC Releases
- Compared with 1999 releases



FIDIC Releases 2017



7



International Federation of Consulting Engineers

Tahseen Saleh

FIDIC Releases 2017



8



International Federation of Consulting Engineers

Tahseen Saleh

2. Structure of FIDIC Forms of Conditions of Contracts (1999 suite of Contracts)

- Categories of the Clauses in the 1999 suite General Conditions
 - ▶ a) Clause 1
 - General Provisions
 - ▶ b) Clauses 2 to 4
 - Rights, duties and obligations of the Employer, **Engineer** and Contractor.
 - ▶ c) Clauses 5 to 7
 - Resources (**Nominated subcontractors**, staff and labor, Plant, material and workmanship)
 - ▶ d) Clauses 8 to 10
 - Time aspects (Commencement, delays and suspension; Tests on completion and Employer's taking over)
 - ▶ e) Clause 11
 - Defects Liability

- Categories of the Clauses in the 1999 suite General Conditions (Cont'd)
 - f) Clauses 12 to 14
 - Monetary terms (**measurement and evaluation**, variations and adjustments, contract price and payments)
 - g) Clauses 15 to 16
 - Terminations (By the Employer and by the Contractor)
 - h) Clauses 17 to 19
 - Risks, responsibilities, insurances and force majeure
 - i) Clauses 20 (& 21 in the 2017 ed.)
 - Claims, disputes and their settlement

- **FIDIC Forms of Conditions of Contracts**
- The General Conditions:
- The FIDIC 1999 Red Book Clauses
- Clause 1 General provisions
- Clause 2 The Employer
- Clause 3 The Engineer
- Clause 4 The Contractor
- Clause 5 Nominated Subcontractors
- Clause 6 Staff and Labor
- Clause 7 Plant, Material and Workmanship
- Clause 8 Commencement, Delays and Suspension
- Clause 9 Tests on Completion
- Clause 10 Employer's taking Over

12



- **FIDIC Forms of Conditions of Contracts**
- The General Conditions:
- The FIDIC 1999 Red Book Clauses (Cont'd)
- Clause 11 Defects liability
- Clause 12 Measurement and Evaluation
- Clause 13 Variations and Adjustments
- Clause 14 Contract price and Payment
- Clause 15 Termination by Employer
- Clause 16 Suspension and termination by Contractor
- Clause 17 Risk and Responsibility
- Clause 18 Insurance
- Clause 19 Force Majeure
- Clause 20 Claims, Disputes and Arbitration

13



- Differences between the Red, yellow and Silver Books in the 1999 suite General Conditions

- | | | |
|---|--|--|
| <ul style="list-style-type: none"> <u>Red Book 1999 1st Edition Clause:</u> | <ul style="list-style-type: none"> <u>Yellow Book 1999 1st Edition Clause:</u> | <ul style="list-style-type: none"> <u>Silver Book 1999 1st Edition Clause:</u> |
| <ul style="list-style-type: none"> Clause 3: The Engineer | <ul style="list-style-type: none"> Clause 3: The Engineer | <ul style="list-style-type: none"> Clause 3: The Employer's Administration |
| <ul style="list-style-type: none"> Clause 5: Nominated Subcontractors | <ul style="list-style-type: none"> Clause 5: Design | <ul style="list-style-type: none"> Clause 5: Design |
| <ul style="list-style-type: none"> Clause 12: Measurement and Evaluation | <ul style="list-style-type: none"> Clause 12: Tests after Completion | <ul style="list-style-type: none"> Clause 12: Tests after Completion |

3. General Provisions – Definitions

3.1 Clause 1 – General provisions

Definitions for the (capitalised) defined terms in the **1999** Editions of the FIDIC contracts are extensive.

Definitions are identical across all the FIDIC forms of contract, **are grouped not alphabetically** but in six different categories:

- Parties to the Contract
- dates, Tests
- periods and completion
- money and payments
- Works and Goods
- other definitions.

Changes to Clause #1

• Clause 1 General Provisions

Main Changes in 2017 edition

- This Clause is composed of:
- Red Book became **16 S/C** instead of 14 S/C;
- Yellow Book became **16 S/C** instead of 14 S/C;
- Silver Book became **15 S/C** instead of 14 S/C;

- The Definitions Sub-Clause (1.1) in the three books became arranged in **alphabetical order** instead of the subdivision in six sub-categories

Clause 1

1.1.2: Parties to the Contract

Parties can be firms, corporations, individuals or other legal entities.

1.1.2.{1, 1, 1}: “Party” means the Employer or the Contractor, as the context requires.

Definition of “Party” only includes the Employer and the Contractor, not the Engineer, who is by implication, not a party to the Contract. The definition has little impact on the fact that the Engineer is the agent of the Employer with the legal implications of this.

19



Clause 1

1.1.2.{2, 2}: “Employer” means the person named as employer in the Appendix to Tender (Contract Agreement) and the legal successors in title to this person.

1.1.2.{3, 3}: “Contractor” means the person(s) named as contractor in the Letter of Tender Accepted by the Employer and the legal successors in title to this person(s).

1.1.2.{3}: “Contractor” means the person(s) named as contractor in the Contract Agreement and the legal successors in title to this person(s).

20



Clause 1

1.1.2.{4, 4}: “Engineer” means the person appointed by the Employer to act as the Engineer for the purposes of the Contract and named in the Appendix to Tender, or other person appointed from time to time by the Employer and notified to the Contractor under Sub-Clause 3.4 [*Replacement of the Engineer*].

1.1.2.{4}: “Employer’s Representative” means the person appointed by the Employer in the Contract or appointed from time to time by the Employer under Sub-Clause 3.1 [The Employer’s Representative], who acts on behalf of the Employer.

Clause 1

1.1.2.6: Employer's Personnel

Definition is wide-ranging and includes not just, as one would expect, those who work for the Employer but also the Engineer and his staff.

.

Clause 1

1.1.2.7: Contractor's Personnel

Definition of “Contractor's Personnel” is also very wide, as it includes any other personnel assisting the Contractor in the execution of the Works.

Definition may generate disputes as to what level of implication is necessary to constitute “assisting the Contractor in the execution of the Works”.

Definition casts the net of liability unreasonably wide. Common Law would not extend the Contractor's liability to include any person who assists the Contractor no matter how informally or minutely in the execution of the Works.

Clause 1

1.1.2.8: Subcontractor

By Sub-Clause 4.5, any person nominated by the Employer as a ‘nominated subcontractor’ is considered as a Subcontractor, and the Contractor is responsible for such persons.

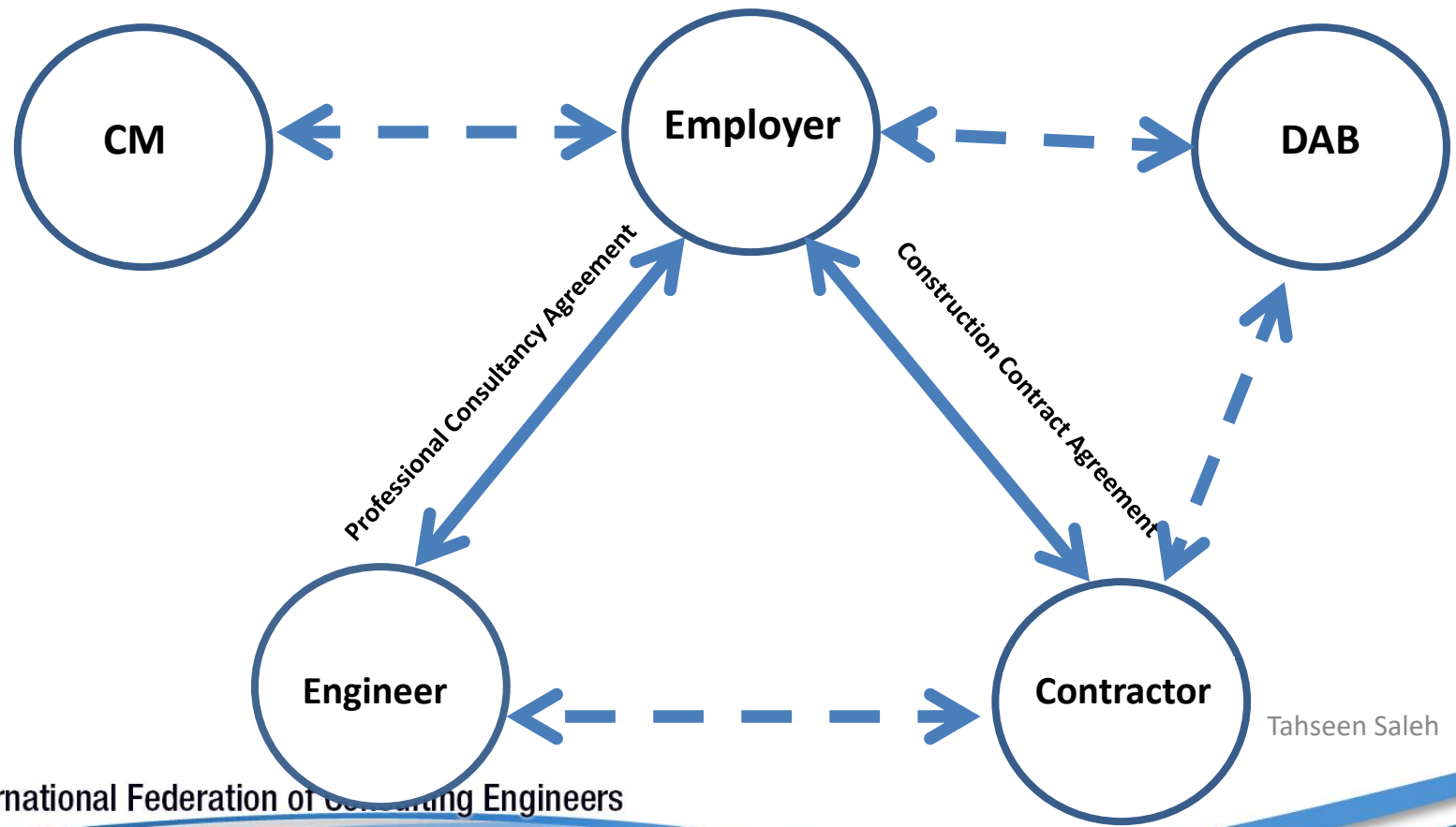
1.1.2.9: DAB or DAAB

In terms of the dispute resolution procedures, the most important change is the advent of Dispute Resolution Boards whose temporarily binding decisions have effect and replace the traditional Engineer’s Decision.

4. Parties to the Contracts and their Obligations

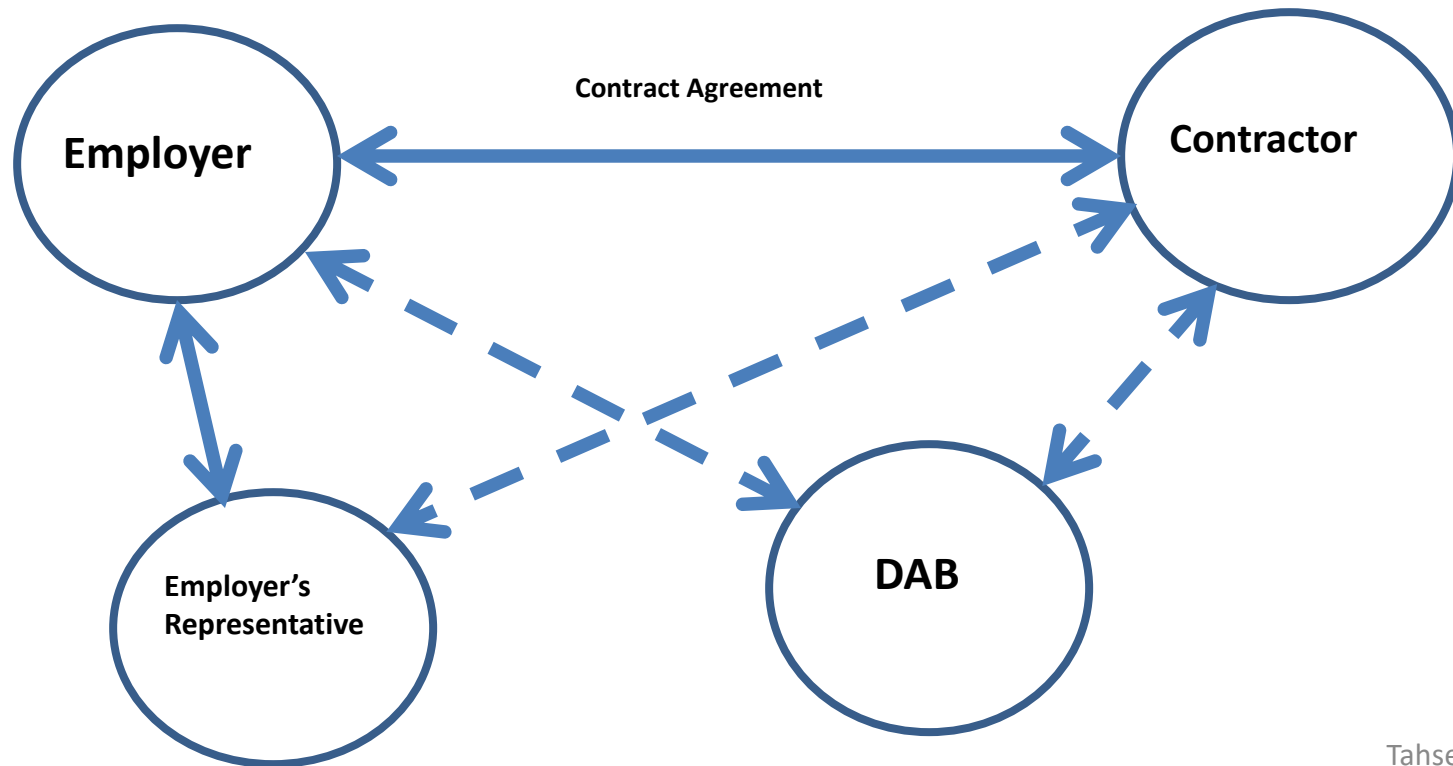
Parties to the Contract

Red and yellow Books



Parties to the Contract

Silver and Gold Books



Clause 2 – The Employer

Role of the Employer is dealt with in Clause 2 of the 1999 editions:

2.1 Right to Access to the Site;

2.2 Permits, Licenses or Approvals;

2.3 Employer's Personnel;

2.4 Employer's Financial Arrangements; and

2.5 Employer's Claims.

Employer's role and obligations can be summarised in the order in which they appear in the General Conditions:

Clause 2 – The Employer

- This Clause covers the role of the Employer during the overall project duration.
- The Employer is required to submit within 28 days of receiving the Contractor's request, reasonable evidence that financial arrangements have been made and are being maintained.
- In case of Employer's Claims, the Employer is required to give notice and particulars to the Contractor if the Employer considers himself entitled for payment.
 - What is the time bar for the Employer to give his notice?
 - Is the entitlement for payment the only thing the Employer can claim for?

The Employer (Cont'd)

1. Definitions

Particular Conditions require data to be entered for the Employer.

2. Appointment of the Engineer

Engineer's roles are:

- continuing design
- administrative role as the Employer's agent
- supervisory
- certifying
- adjudicating.

The Employer (Cont'd)

3. Possession of Site

4. Access to Site

Employer responsible for providing access to the Site in the time stated in Appendix to Tender.

If no time stated, access must be provided in a such manner to not delay the Contractor and his programme of Works.

Site Access can be withdrawn if the Contractor fails to provide a Performance Security.

5. Permits and Approvals

Assist the Contractor for permits: Employer shall reasonably assist the Contractor in obtaining permits, licenses and approvals.

31



The Employer (Cont'd)

6. Ensure the co-operation of his (the Employer's) personnel

Sub-Clauses where the Employer and his personnel are required to act in a proper manner to fulfil the various provisions of the Contract (e.g., safety and environmental matters; maintaining the integrity of the insurance provisions).

Employer shall be responsible for the good co-operation of his personnel with the Contractor.

Employer will take on similar safety measures and environment protection as required for the Contractor.

7. Employer's instructions

8. Supply of materials and carrying out works

The Employer (Cont'd)

9. Nominate specialist subcontractors

10. Payments

11. Appointing a DAB

12. Submitting his financial arrangements when required

Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained enabling the Employer to pay the Contract Price.

13. Employer's Claims If the Employer considers himself to be entitled to any payment under any clause of the Contract, the Employer or the Engineer shall give notice and particulars to the Contractor.

33



The Employer (Cont'd)

Clause 2 Sub-Clauses

2.1: Right of Access to the Site - Key issues

Employer to give Contractor right of access to and possession of all parts of the Site as stated in the Contract.

Right to access to and possession of the Site not exclusive.

If Contractor suffers delay or incurs costs due to (a) the failure by the Employer to give access, (b) if no time is specified, within such time as may be required to enable the Contractor to proceed in accordance with his programme, provided he gives notice he may be entitled to an extension of time and payment of any costs (plus reasonable profit

The Employer (Cont'd)

Clause 2 Sub-Clauses (Continued)

No extension of time granted if Employer's failure to give possession or access caused by Contractor's error or delay.

•

35



The Employer (Cont'd)

Clause 2 Sub-Clauses (Continued)

2.2: Permits, Licenses and Approvals - Key issues

To the extent that the Employer can, the Employer shall assist the Contractor:

- to obtain copies of the relevant laws which are not readily available; and
- in the making of any applications for permits, licenses and approvals which the Contractor will need to make in accordance with those laws.

Employer only required to provide this assistance if so requested by the Contractor.

The Employer (Cont'd)

Clause 2 Sub-Clauses (Continued)

2.3. Employer's Personnel - Key issues

Employer shall be responsible for ensuring that the Employer's Personnel and his other contractors:

- co-operate with the Contractor to the limited extent provided for in Sub-Clause 4.6; (comply with the health & safety requirements set out in Sub-Clause 4.8);
- take all reasonable steps to protect the environment both on and off the Site as required by Sub-Clause 4.18.

The Employer (Cont'd)

Clause 2 Sub-Clauses (Continued)

2.4: Employers Financial Arrangements - Key issues

If the Contractor so requests, the Employer shall provide within 28 days reasonable evidence that financial arrangements are in place to pay the Contract Price in accordance with Clause 14.

Employer must give notice to the Contractor if he intends to make any material change to his financial arrangements.

If that evidence is not provided, Contractor may, subject to the provision of the necessary notices, suspend work or even terminate the Contract.

The Employer (Cont'd)

Clause 2 Sub-Clauses (Continued)

2.5: Employer's Claims - Key issues

If Employer considers himself entitled to either any payment or an extension of the Defects Notification, the Employer or Engineer shall give notice and particulars to the Contractor.

Notice relating to payment should be given as soon as practicable after the Employer has become aware of the event or circumstance which gives rise to the claim.

Any notice relating to the extension of the Defects Notification Period should be given before the expiry of that period.

The Employer (Cont'd)

Clause 2 Sub-Clauses (Continued)

2.5: Employer's Claims Key issues (continued)

Employer must also provide substantiation including the basis of the claim and details of the relief sought.

Once notice has been given, the Engineer shall make a determination in accordance with Sub-Clause 3.5.

Any amount payable under Sub-Clause 2.5 may be included as a deduction in the Contract Price and Payment Certificates.

Employer cannot make any deduction as a set-off or any other claim unless it is in accordance with the Engineer's determination.

Notice not required for payments due to the Employer for services under Sub-Clause 4.19 or equipment under Sub-Clause 4.20.

Clause 2 – The Employer

The changes made to the Role of the Employer in the 2017 editions are summarized as follows:

- This Clause became 6 Sub-Clauses instead of 5:
- Sub-Clause 2.2 [*Assistance*] instead of Permits, Licenses or Approvals
- Sub-Clause 2.3 [*Employer's Personnel and Other Contractor's*] instead of Employer's Personnel ;

Clause 2 – The Employer

The changes made to the Role of the Employer in the 2017 editions are summarized as follows:

- More Elaboration on Sub-Clause 2.4 [*Employer's Financial Arrangements*], the Contractor may request for evidence and the Employer shall provide within 28 days if:
 - the Contractor receives a variation of more than 10% or the accumulated total variations exceed 30%, or
 - the Contractor does not receive payments in accordance with S/C 14.7, or
 - Becomes aware of material change in the Employer's financial arrangement

Clause 2 – The Employer

The changes made to the Role of the Employer in the 2017 editions are summarized as follows:

- Moving Sub-Clause 2.5 [*Employer's Claims*] in the 1999 edition to Clause 20 [*Employer's and Contractor's Claims*]
- Sub-Clauses 2.5 [*Site Data and Items of Reference*] & Sub-Clause 2.6 [*Employer's Supplied Materials and Employer's Equipment*] were brought from Clause 4: The Contractor

3.3 Clause 3 – The Engineer

Clause 3 summary

Once a contract is placed with a Contractor, the promoter or developer of a project is called an Employer, and the consulting engineer is referred to as the Engineer for (c) and (d) below, where the consultant acts as Supervisor and Employer's Agent and as the Administrator and Certifier.

Two contracts are traditionally formed:

- between the consulting engineer and the Employer: the Contractor is not a party.
- between the Employer and the Contractor: the Engineer is not a party.

The Engineer (Cont'd)

Clause 3 summary (Continued)

Concept of engaging a consulting engineer stems from the idea that when a promoter initiates a construction project he is faced with many considerations with which he is not an expert.

In civil engineering construction, in order to transform the promoter's ideas into reality, the method adopted by FIDIC is to engage a consulting engineer to carry out various duties classified by:

- contract phase
- project phase.

The Engineer (Cont'd)

Classification by contract phase

Checklists are available of what should be done by the Engineer at the pre-contract and the post-contract stages. For example:

Pre-contract

Ensure the Employer is aware that he carries the financial risk for unforeseen events and of the financial managerial and advisory resources required for the Contract.

Warn the Employer of the decision and actions required of him giving programme dates of finalisation of designs, provision of access, construction and taking over the works.

The Engineer (Cont'd)

Classification by contract phase (Continued)

Before construction

a) Designer, Advisor and Consultant: complete a skillful design of the project sought by the promoter, including:

- Prepare drawings giving details of every aspect of the Project.
- Draft a specification of the materials to be used and of the standard of the workmanship to be achieved.
- Prepare the Bill of Quantities.

b) Employer's Agent (before construction):

- Prepare tender and contract.
- Advise the promoter on tenders received and on selection of the Contractor.

The Engineer (Cont'd)

Classification by contract phase (Continued)

During construction

- c) Supervisor and Employer's Agent: supervise or inspect the work carried out by the Contractor to ensure quality and conformity with the design requirements.
- d) Administrator and Certifier: administer the Contract
 - evaluate and certify work carried out deal with situations as they arise
- e) **Adjudicator: act as an adjudicator of disputes.**

The Engineer (Cont'd)

Misunderstandings

While the duties set out in (a), (b) and (c) above are known worldwide, it is misunderstanding of the role of the Engineer under (d) which is controversial. Concerns are:

- Engineer, while not a Party to the Contract between the Employer and the Contractor, is empowered under a FIDIC contract to give instructions, etc., which are binding on the Parties unless and until they are rescinded or varied by an arbitrator.
- But the Engineer's actions or inaction do not expose him to any liability under the Contract between the Employer and the Contractor.

The Engineer (Cont'd)

a) Engineer as a Designer, Advisor and Consultant

When the design has been completed the following aspects of the Project would normally have been determined:

- Shape, form and dimensions.
- Function and level and quality of performance.
- Selection of materials and workmanship
- Production of documents to communicate the design.
- Method of construction
- Projected cost of the Project on completion, based on an accurate Bill of Quantities.
- Timing or sequence of construction of any part of the Works.

The Engineer (Cont'd)

b) Engineer as the Employer's Agent

When the Employer appoints a contractor to construct the Project, certain duties must be performed by the Employer, or on his behalf, in order to ensure that the Project is completed on time, within the budget and with qualities as designed and specified.

Whoever performs these duties is called the Employer's agent.

Construction Contract Sub-Clause 3.1 provides that the "Engineer shall carry out the duties assigned to him in the Contract". Engineer is given certain authority either specified in, or implied from, the Contract.

The Engineer (Cont'd)

Typical duties of the Engineer

- Design: implementing and augmenting the design.
- Quality control: quality must be monitored by someone familiar with the original concepts and parameters of the design.
- Cost accountancy and certification: the Contract is based on interim payments made mostly on a monthly basis by the Employer to the Contractor.
- Administration and management: Progress on-site depends on the availability of information required by the Contractor.

The Engineer (Cont'd)

Classification of duties of the Engineer

Clauses 1 and 2 are the principal clauses setting out the duties of the Engineer as the Employer's agent and his authority. These duties are:

- Pro-active - any duty performed or action taken where the initiative lies with the Engineer: see WORK EXERCISE.
- Re-active - any duty performed or action taken in response to a request by the Contractor or the Employer.
- Passive - include rules and regulations which must be observed.

The Engineer (Cont'd)

c) Engineer as a Supervisor

Achieving the quality specified is the responsibility of the Contractor.

Under Sub-Clause 3.1, normal actions of the Engineer listed below does not relieve the Contractor from his responsibilities under the Contract, including responsibility for errors, omissions, discrepancies and non-compliance:

Approval, Check, Certify, Consent, Examine, Inspect, Instruct, Notice, Proposal Request, Test Or similar act, including absence of disapproval

The Engineer (Cont'd)

c) Engineer as a Supervisor (Continued)

These actions reflect the Engineer's role as a supervisor to monitor, through inspection and testing, the work being carried out. The main aspects to be monitored by the Engineer are:

- Compliance with the specified quality.
- Progress in accordance with the planned programme.
- Budget control in accordance with the cost plan.
- Compliance with other matters specified, such as safety, environmental controls, etc.

The Engineer (Cont'd)

d) Engineer as Certifier

Engineer's role as a certifier includes:

- Monthly payments to the Contractor.
- Issuing a taking-over certificate.
- Issuing an Interim Payment Certificate.
- Certifying the date of completion of the Works.
- Certifying payments to nominated Sub-contractors.
- Issuing a Final Payment Certificate.
- Signing and delivering a Defects Liability Certificate
- Valuation of work done, materials supplied and other equipment on site in case of termination.

The Engineer (Cont'd)

e) Engineer as Adjudicator

In the 1999 & 2017 editions the Engineer role as an adjudicator has been handed over to the Dispute Adjudication Board, whose duties and procedures are dealt with separately.

The Engineer (Cont'd)

Clause 3 Sub-Clauses

Once a contract is placed with the Contractor, the consulting engineer is referred to as the Engineer where he acts under the Contract as the Supervisor and Employer's Agent and as the Administrator and Certifier.

.

The Engineer (Cont'd)

Clause 3 Sub-Clauses (Continued)

3.1: Engineer's Duty and Authority - Key issues

Engineer is appointed by the Employer.

Engineer is obliged to carry out the functions described in the Contract but he has no power to amend the Contract.

Engineer's authority to act derives from the Contract documents, whether by express words and by virtue of powers necessarily implied from the express words.

For certain further acts, specified authority is required, and the permission required by the Engineer from the Employer must be in the Particular Conditions.

The Engineer (Cont'd)

Clause 3 Sub-Clauses (Continued)

3.1: Engineer's Duty and Authority - Key issues

Engineer shall be deemed to act on behalf of the Employer.

Neither any act nor omission by the Engineer shall relieve either the Employer or Contractor of any obligation or responsibility under the Contract.

.

The Engineer (Cont'd)

Clause 3 Sub-Clauses (Continued)

3.2: Delegation by the Engineer - Key issues

Engineer can delegate functions to assistants or to a Resident Engineer.

These delegations must be in writing and must define the extent of the so delegated.

Unless agreed by both the Employer and Contractor, the Engineer may not delegate his Determination function under Sub-Clause 3.5.

The Engineer (Cont'd)

Clause 3 Sub-Clauses (Continued)

3.3: Instructions of the Engineer- Key issues

Contractor must comply with instructions given by the Engineer (or his assistants to whom proper authority under Sub-Clause 3.2 has been delegated).

Where possible, these instructions should be in writing.

If the instructions are oral, if they are confirmed in writing by the Contractor within 2 days, they shall be deemed written unless the Engineer responds to the contrary within 2 days.

If Contractor considers that the instruction constitutes a variation then he should respond in accordance with Sub-Clause 13.3.

The Engineer (Cont'd)

Clause 3 Sub-Clauses (Continued)

3.4: Replacement of the Engineer - Key issues

Employer must give 42 days' notice of any intention to replace the Engineer.

If the Contractor raises a reasonable objection against the proposed replacement, then the Employer must find someone else.

.

The Engineer (Cont'd)

Clause 3 Sub-Clauses (Continued)

3.5: Determinations - Key issues

Where the Engineer is required by the Contractor to reach a determination, the Engineer is bound to consult with both Parties in order to reach agreement.

If no agreement is reached, the Engineer's duty is to provide a fair determination in accordance with the Contract and having regard to all the circumstances.

Engineer must provide a reasoned notice of his determination.

Determination(s) is binding unless revised in accordance with Clause 20.

The Engineer (Cont'd)

The changes made to the Role of the Engineer in the 2017 editions are summarized as follows:

- This Clause became 8 Sub-Clauses instead of 5:
- Three Sub-Clauses 3.1 [*The Engineer*], 3.3 [*The Engineer's Representative*] and 3.8 [*Meetings*] were newly added
- The other Sub-Clauses were renumbered accordingly
- Sub-Clause 3.5 [*Engineer's Instructions*] instead of 3.3 Instructions of the Engineer:

The Engineer (Cont'd)

- The Contractor shall only take instructions from the Engineer, or from the Engineer's Representative (if appointed) or an assistant ...
- If the Instruction is not stating that it constitutes a Variation and the Contractor considers that it is a Variation or it does not comply with the applicable laws, then:
 - The Contractor shall immediately give a Notice to the Engineer with reasons before commencing any work related to the instruction,
 - The Engineer shall within 7 days after the instruction respond by giving a Notice confirming, reversing, or varying the instruction.
 - If the Engineer does not respond, then he shall be deemed to have revoked the instruction,
 - Otherwise, the Contractor shall comply with and be bound by the terms of the Engineer's response.

The Engineer (Cont'd)

The changes made to the Role of the Engineer in the 2017 editions are summarized as follows:

- More Elaboration on Sub-Clause 3.6 [*Replacement of the Engineer*];
- Sub-Clause 3.7 [*Agreement or Determination*] instead of 3.5 Determination in the 1999 edition;
- More elaboration and details on Sub-Clause 3.7
- S/C 3.7 starts with: “When carrying out his/her duties under this Sub-Clause, the Engineer shall act **neutrally** between the Parties and shall **not be deemed to act for the Employer.**”

The Engineer (Cont'd)

- Only two paragraphs were in the 1999 edition. In 2017 edition, it is further detailed into 5 sub-sub clauses detailing the procedure to be followed:
 - 3.7.1 Consultation to reach agreement,
 - 3.7.2 Engineer's Determination
 - 3.7.3 Time limits, Engineer to make a fair determination,
 - 3.7.4 Effect of the agreement or determination, and
 - 3.7.5 Dissatisfaction with the Engineer's determination.
 - NOD to be given within 28 days after receiving the Engineer's Notice of Determination. If no NOD is given the determination of the Engineer shall be deemed to have been accepted and shall be final and binding.
 - Partial NOD

Clause 4 – The Contractor

Clause 4 summary

Contractor's obligations in two main categories

- Obligations which are construed from the agreement between the Parties as prescribed in the conditions of contract.
- Obligations which apply under the applicable law of the Contract, and which extend in legal terms beyond his obligations under the Contract with the Employer and in time beyond the completion of the Contract.

The Contractor (Cont'd)

Clause 4 summary (Continued)

Contractor's obligations in five main areas

- Construction and completion of the Works with due diligence and within the time for completion.
- Use of Materials, Plant and Workmanship as described in the Contract and in accordance with the Engineer's instructions.
- Provision of securities, indemnities and insurances in respect of such work.
- Supply of information and notices required for the execution of the Works and for alerting the Employer when an event occurs which may increase the cost or the completion time.
- Performance of administrative and other functions (including, if explicitly required, the design of certain elements).

The Contractor (Cont'd)

The changes made to the Role of the Engineer in the 2017 editions are summarized as follows:

- This Clause became 23 Sub-Clauses instead of 24:
- Elaboration and detailing of most of the Sub-Clauses;
- Sub-Clauses 4.19 [Electricity, Water & Gas] & 4.20 [Employer's Equipment and Free Issue Material in the 1999 edition were moved to Clause 2; Sub-Clause 2.6 [*Employer's Supplied Materials and Employer's Equipment*];
- Sub-Clause 19 [*Temporary Utilities*] was introduced instead of the above two Sub-Clauses;
- Sub-Clause 4.23 became [*Archaeological and Geological Findings*] instead of 4.24 Fossils in the 1999 edition..

The Contractor (Cont'd)

Clause 4 Sub-Clauses

Although the Contractor's obligations can be summarised as above, they are in fact spread throughout the whole FIDIC contract.

Seldom do the provisions of a complete clause impose no obligations on the Contractor.

The Contract clauses regulate in detail the procedure for many of the complex situations associated with civil engineering construction.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.1: Contractor's General Obligations - Key issues

Contractor's primary obligation is to “execute and complete the Works” and “remedy any defects” in accordance with the Contract and the Engineer's instructions.

Contractor is responsible for ensuring, in accordance with the requirements of the Contract:

- supply of the necessary Plant, Personnel, and Goods and services necessary to complete the Works in good time.
- all Site operations and construction methods. This includes all design of Plant and Materials to the extent required by the Contract.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.1: Contractor's General Obligations - Key issues (Cont'd)

Contractor must submit whenever required by the Engineer details of the methods which he intends to adopt. Contractor must notify the Engineer of any alterations to the method statement.

Contractor only has design responsibility to the extent specified in the Contract. If the Contractor undertakes any element of design, his design must be fit for the purpose.

Four paragraphs provide guidelines for the Contractor to follow where he is required to undertake design.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.2: Performance Security - Key issues

Contractor must provide a Performance Security (PS) if the amount of the security required is in the Appendix to Tender.

If PS is required, then the Contractor must, at his own cost, provide the PS to the Employer no later than 28 days after receiving the Letter of Acceptance.

Copy sent to Engineer at the same time.

PS must be:

- in the form annexed to the Particular Conditions. If it is not, it must be in a form agreed by the Employer.
- issued by an entity and jurisdiction approved by Employer.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.2: Performance Security - Key issues (Cont'd)

- remain valid until the Contractor has completed the Works and remedied any defects

If the PS has not been accepted by the Employer, the Engineer will not issue an Interim Payment Certificate.

Employer can call on the PS if: (a) failure by Contractor to extend the PS beyond the expiry date, if the Works are not complete at that date; (b) failure by Contractor to pay an amount to Employer under Sub-Clause 2.5 or Clause 20; (c) failure by the Contractor to remedy a default in 42 days of being notified of defect; (d) when Employer can terminate Contract.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.3: Contractor's Representative - Key issues

Contractor must appoint a Representative named in the Contract or approved by Engineer prior to the commencement.

If Contractor wishes to replace the Contractor's Representative, Engineer's prior consent must be obtained.

Contractor's Representative:

- must devote the whole of his time on Site to directing the performance of the Contractor.
- receives instructions issued by the Engineer;
- must be fluent in language stated in the Appendix to Tender to be the language the Parties should communicate in;
- may delegate his powers if the Engineer receives notice.

77



The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.4: Subcontractors - Key issues

Unless otherwise agreed, the Contractor shall not subcontract the whole of the Works.

If the Contractor is permitted to subcontract an element of the works, then the Contractor remains wholly responsible to the Employer for the acts of that Sub-contractor.

Engineer's prior consent required for all Subcontractors apart from suppliers and Subcontractors named in the Contract. Contractor must give the Engineer 28 days notice of both the intended and actual commencement date of any Subcontractor's work.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.5: Assignment of Benefit of Subcontract - Key issues

Where a Subcontractor's obligations last beyond the Defects Notification period, the Employer (through the Engineer) can choose to instruct the Contractor to assign to him the benefits of those obligations. Employer, and not the Contractor, will be responsible for work carried out after any such assignment.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.6: Co-operation - Key issues

Contractor shall co-operate with the Employer's Personnel, other contractors and personnel from public authorities to enable them to carry out their work on or near to the Site.

If the Contractor is instructed by the Engineer to co-operate in such a way, this shall constitute a Variation.

If the Contractor requires possession of any means of access, structure or foundation, or Plant, this must be set out in the Contractor's Documents.

Contractor's Documents be submitted in accordance with the specification.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.7: Setting Out - Key issues

Employer's responsibility to set out the original points, lines and levels of reference specified in the Contract.

Contractor shall set out his works from this data. Contractor has an obligation to check or use reasonable efforts to verify the accuracy of the Employer's setting out.

If any error in the setting out causes delay or costs, then the Contractor should give notice to the Engineer within Clause 20 time limits (may be entitled to time and cost plus profit).

Engineer to determine whether the error could have been found by "an experienced Contractor" using reasonable efforts to verify the data.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.8: Safety Procedures - Key issues

Contractor must:

- comply with the applicable safety regulations and take care for the safety of everyone entitled to be on the Site;
- keep the site clear of unnecessary rubbish;
- provide site security until the issue of the Taking Over Certificate;
- provide any Temporary Works which may be necessary as a consequence of the impact of the Works on the areas surrounding the Site.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.9: Quality Assurance - Key issues

If required by the Contract, the Contractor shall institute a quality assurance system.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.10: Site Data - Key issues

Employer must make available, prior to the Base Date (i.e., 28 days prior to the latest date for submission of the Tender), all relevant data in his possession on sub-surface and hydrological conditions at the Site.

This is an ongoing obligation.

It is the responsibility of the Contractor to interpret the data.

Assumed that the Contractor has examined and inspected the Site and all the available information provided to the Employer about the Site and taken that information into account in compiling and submitting his tender.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.11: Sufficiency of Accepted Contract Amount - Key issues

Contractor deemed to have based his tender sum on:

- information provided by the Employer; and
 - Contractor's own checks of that information.
- Contractor to ensure that his tender sum covers everything needed to carry out the Works.

- .

85



The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.12: Unforeseeable Physical Conditions - Key issues

Contractor to give notice to the Engineer if he encounters adverse physical conditions which he considers unforeseeable. “Physical conditions” means both natural phenomena and manmade obstructions.

Unforeseeable is defined as being “not reasonably foreseeable by an experienced Contractor by the date of submission of the Tender”.

Notice must describe the problem and demonstrate why it was unforeseeable.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.12: Unforeseeable Physical Conditions (Cont'd) - Key issues

Upon receipt of such a Notice, the Engineer shall proceed to make a determination in accordance with Sub-Clause 3.5.

If the Engineer so determines, the Contractor may be entitled to an extension of time under Sub-Clause 8.4 and to Payment of Cost.

Before the Engineer or Employer's Representative finally agrees any cost that may be due, the Engineer must take account of whether any physical conditions were more favorable to the Contractor than had been anticipated.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.13: Rights of Way and Facilities - Key issues

Contractor is responsible for:

- site access;
- special and/or temporary rights of way. This includes those routes outside the Site but which are necessary for Access to the Site;
- obtaining any facilities outside of the Site which he needs to execute his Works at his own cost and risk.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.14: Avoidance of Interference - Key issues

Contractor:

- shall not “unnecessarily or improperly” interfere with the convenience of the public or access of all roads and footpaths.
- shall indemnify the Employer against any claims resulting from any such unnecessary or improper interference.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.15: Access Route - Key issues

Contractor:

- to satisfy himself as to the suitability and availability of access to the Site;
- is responsible for obtaining permissions to use the access route and all necessary signage;
- bears all the costs and risks associated with access. Sub-clause expressly provides that the Employer does not guarantee the suitability or availability of particular access routes.

•

90



The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.16: Transport of Goods - Key issues

Contractor:

- must give the Engineer not less than 21 days notice of delivery of Plant or major items of other Goods;
- is responsible for the transportation, storage and protection of all Goods necessary to carry out the Works;
- is responsible for all costs arising out of the transport of goods;
- shall indemnify the Employer against any claims arising from the transport of goods.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.17: Contractor's Equipment - Key issues

Contractor is responsible for his own equipment.

All the Contractor's Equipment on the Site is for the exclusive use of the Works on the Site.

Major items of Contractor's Equipment may only be moved off the Site with the consent of the Engineer.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.18: Protection of the Environment - Key issues

Contractor shall take all reasonable steps to protect the environment.

This obligation includes the environment both on and off the Site.

Emissions, surface discharges and effluent caused by the Contractor's activities must not exceed the greater of the values set out in the Specification or that allowed for by the applicable laws.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.19: Electricity, Water and Gas - Key issues

Contractor:

- is responsible for the provision of all services needed to carry out the Works.
- is entitled, at his own cost, to use such supplies as are available on site.

Cost of these services shall be agreed or determined by the Engineer.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.20: Employer's Equipment and Free-Issue Materials - Key issues

Employer :

- shall provide, and the Contractor may use, the Employer's Equipment to the extent set out in the specification.
- is responsible for the Employer's Equipment except whilst the Contractor is using or controlling it.
- shall provide and the Contractor may use Free-Issue Materials, to the extent set out in the Specification.

Contractor responsible for cost of using such equipment at rates agreed or if not agreed, determined by the Engineer. Free-Issue Materials shall be provided free of charge Contractor becomes responsible for Free-Issue Materials.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.21: Progress Reports- Key issues

Contractor shall provide regular progress reports, if required by the Contract.

Format of the Progress Reports agreed with the Engineer or Employer's Representative, or detailed in Specifications.

Provision of the progress reports is a condition of payment.

Reports shall be in the detail outlined in this sub-clause.

Six copies of the reports to be provided to the Engineer.

First report at the end of the calendar month following the Commencement Date.

Then reports provided monthly until the Contractor has completed all the work listed as outstanding.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.23: Contractor's Operations on Site - Key issues

Contractor's:

- operatives are confined to the Site and any additional areas agreed by the Engineer.

- Equipment and Personnel should keep to these areas.

Contractor:

- is responsible for keeping the Site tidy and otherwise free from obstruction.

- should remove his equipment off the Site on issue of the Taking-Over Certificate.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.23: Contractor's Operations on Site (cont'd) - Key issues

Contractor:

- should leave the Site in a clean and safe condition, when he removes his equipment.
- permitted to retain on the Site such Goods and Equipment as are required to enable him to fulfil his obligations under the Defects Notification Period.

The Contractor (Cont'd)

Clause 4 Sub-Clauses (Continued)

4.24: Fossils - Key issues

All fossils and other antiquities are to be placed under the control of the Employer.

Contractor shall promptly give notice to the Engineer of the discovery of any such antiquity.

If the discovery of any such antiquity leads to delay or additional cost, upon the determination of the Engineer, the Contractor may be entitled to an extension of time or payment of any cost, but no profit.

- **THANK YOU**

- Tahseen Saleh