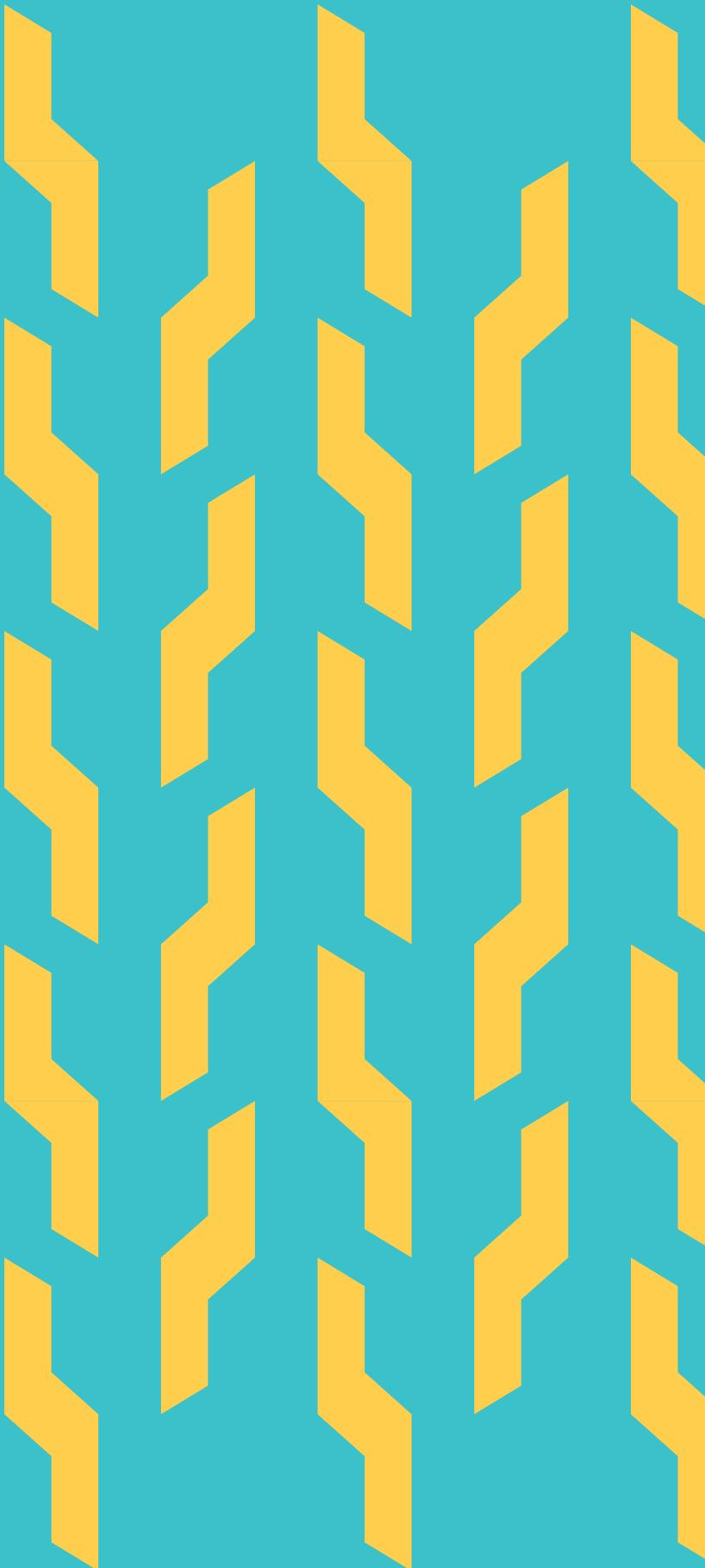


Insight

Insight provides practical information on topical issues affecting the building, engineering and energy sectors.

Inside this issue

The Role of the Engineer in the FIDIC 2017 Editions



The Role of the Engineer in the FIDIC 2017 Editions¹

In this *Insight*, we analyse the role of the Engineer in the FIDIC 2017 editions and, specifically, the Yellow and Red Books. The Engineer's role in these 2017 editions is significantly enhanced, reflecting an increased emphasis on pro-active project management with the aim of avoiding disputes.

However, in order to ensure that the Engineer's role is as envisaged, it is essential that not only are the Engineer's powers and obligations known (and understood) by all involved, but that the Engineer has the right qualifications and resources to make appropriate use of them. Deeming provisions and time bars are in place to ensure that delays in carrying out certain requirements and/or failures to review documents (such as programmes) in time have real consequences. The Engineer's role is, therefore, a sophisticated one and anyone taking that role on needs to spend time studying their responsibilities in advance.

Who is the Engineer?

The Engineer fulfils the project manager or contract administration role in the FIDIC Yellow² and Red³ Books.⁴ Under Clause 3.1, the Engineer can be a person or "a legal entity" (i.e. a company, partnership, etc). If they are a legal entity, then a natural person must be appointed to act on its behalf, and notice must be given to the Parties as to who that person is. Whoever is appointed must be a professional engineer⁵ having suitable qualifications, experience and competence to act, and must be fluent in the ruling language⁶.

Unless the terms of Clause 3.1 are amended, these requirements can cause difficulties for employers who would normally appoint project managers who are not necessarily engineers (perhaps, because they are cheaper), since a failure to comply with them would be a breach of contract.

The duties and authority of the Engineer are set out in Clause 3.2 and provide that the Engineer must act as a "skilled professional". They will also be deemed to act for the Employer unless stated otherwise (for example, in Clause 3.7, in the context of an Engineer's Determination). However, the Engineer does not have unfettered powers. For example, they have no authority to amend the contract and cannot relieve anyone of any duty, obligation or responsibility under the contract.

Further, the Particular Conditions should state where the Employer's consent is required in order for the

Engineer to exercise a power. That said, the Employer's consent is deemed to have been given when the Engineer does exercise that power. In any event, the Employer's consent is not required for the Engineer to reach a determination and any amendments to this effect would, in our view, have a major impact on the functionality of the contract provisions, arguably breaching FIDIC's golden principles in the process.⁷

The Engineer's Representative

The Engineer's Representative was a new concept introduced by the 2017 editions. It provides for a natural person to be based at the site the whole time that the works are being executed. The Engineer's Representative is not to be confused with the natural person authorised to act as the Engineer (where a legal entity appointed as the Engineer). The option of having someone based on site reflects the increased focus and project management in the 2017 editions. However, it obviously comes with a cost attached to it.

Finally, it is important to realise that the Engineer's powers can be delegated to the Engineer's Representative save for in relation to two crucial respects. These are: (a) Determinations;⁸ and (b) Notices to Correct⁹.

So, can the Engineer be an employee of the Employer?

Nothing within the FIDIC form expressly prevents this. However, the

appointment requirements and the provisions on the replacement of the Engineer in clause 3.6, which provide that the Contractor has a right to raise reasonable objections if someone unsuitable is nominated, sits rather oddly with the concept of the Engineer being part of the Employer. It is also difficult to envisage how an employee of the Employer could act "neutrally" when making a determination (as to which see further below).

The governing law of the contract may also impact on the answer to this question. For example, English case law suggests that the Employer cannot assume the role of construction manager and decision maker unless there is an express contractual provision permitting them to do so.¹⁰ More generally, under English law, contract administrators must act in a fair and unbiased manner¹¹ and it would be very hard for Employer's employees to achieve that, in reality.

What role does the Engineer play?

As already noted, the Engineer has a very significant project management role under the 2017 forms. Examples of the Engineer's role (and tools for project management) include:¹²

1. Notifying the Contractor of the Commencement Date not less than 14 days before that date;¹³
2. Reviewing programmes;¹⁴
3. Measuring the Works;¹⁵
4. Issuing payment certificates;¹⁶
5. Issuing instructions (including for variations);¹⁷
6. Ensuring that the personnel of the

- contractor act professionally and safely and removing them the site if they do not;¹⁸
7. Inspection and testing of the works;¹⁹
 8. Issuing notices to correct failures;²⁰
 9. Issuing Taking-Over Certificate(s);²¹
 10. Issuing the Performance Certificate;²²
 11. Assessing and making a neutral determination.²³

We take a look at some of these tools in more detail below.

Issuing Instructions

Under Clause 3.5, the Engineer can issue instructions necessary for the execution of the works. The Contractor must then comply with them unless: (a) the instruction is actually a Variation but doesn't say that; (b) or it is not compliant with the applicable Laws, is unsafe or technically impossible.

If the contractor believes that the instruction is a Variation, then they must issue a notice to the Engineer immediately and (crucially) before commencing the works. The Engineer then has 7 days to respond to that Notice or the instruction is deemed to be revoked. This is helpful because it is an opportunity for the Contractor to challenge a Variation by the back door followed by a refusal to pay later on. Theoretically, this provision (if acted on) should enable the parties to avoid typical "it's a variation, oh no it isn't" arguments developing. It also allows the Employer to cancel a Variation in advance if unanticipated consequences in terms of time and expense flow from something initially thought to be straightforward.

The Programme

Clause 8.3 requires the Engineer to "Review" the initial as-planned programme as well as subsequent iterations.²⁴ They must do this against a detailed list of requirements, with emphasis put on early detail to allow a

highly effective project and risk management tool to be created.²⁵

The Engineer must provide notice of any comments on programmes submitted by the Contractor within 21 days after receiving the initial programme, or 14 days after receiving a revised programme. If he does not do so, he is deemed to have given a Notice of No-Objection to the programme in question. Again, the Engineer has to be organised and ensure that he responds in the correct time periods or an important opportunity to put the project on the right footing from the beginning will be lost.

Advanced Warning

Clause 8.4 also allows the Engineer (as well as the Parties) to issue an advanced warning of circumstances which: (a) adversely affect the work of the Contractor's Personnel; (b) adversely affect the performance of the Works to be completed; (c) may increase the Contract Price; or (d) may delay the Works. The Engineer can also request proposals to avoid or minimise the effect of issues under Clause 13.3.2 [Variation by Request for Proposal] in order to avoid or mitigate the effects of such events.

This is potentially a powerful risk management tool, especially if used in conjunction with risk management meetings and, if appropriate, a recovery programme.

Risk Management Meetings

Under Clause 3.8, the Engineer can also require attendance at meetings with the Contractor's representatives and other contractors, Sub-Contractors and Suppliers. The Engineer can keep records and supply them to others in attendance. Actions can be noted but must be in accordance with the Contract.

Recovery Programme

Clause 8.7 also allows the Engineer to instruct a recovery programme if the

programme is delayed and (rather crucially) no extension of time is due (i.e. the delay is the Contractor's fault). The revised programme can instruct revised methods for expediting the programme and completing on time. Costs for implementing the revised programme are at the contractor's risk, the contractor must adopt it unless the engineer notifies otherwise, and the employer can notify a claim for costs if they incur expense as a result of it.

However, this power comes with a health warning. If the delays are due to matters entitling the Contractor to an extension of time, the Contractor will be entitled to their costs and the revised methods will, in fact, be acceleration.²⁶ This is, therefore, a potential recipe for disputes if not used properly and, in particular, if there is a dispute brewing as to extension of time entitlement when it is used.

Records, records and records

Under Clause 20.2.3, the Engineer may also monitor the Contractor's contemporaneous records after events giving rise to a Claim, instruct the contractor to keep additional records, inspect those records (during normal working hours or as agreed) and ask for copies of them. No implied acceptance of them is deemed to be given as a result of inspecting the records.

This is, undoubtedly, a useful tool allowing the Engineer (and the Parties generally) to keep track of the quantum or length of delays associated with any Claims after they have been notified. From the Employer's perspective, this power should, if used properly, reduce the likelihood of exaggerated claims at the end of a project. For the Contractor, it is helpful to try and agree the format of records and get the Employer to buy into any records as it will make it harder for them to reject the records as inadequate later on.

Payment

Finally, the Engineer is much more involved in payment provisions than in previous editions of FIDIC. Applications for payment (the Statement) shall "be in a form acceptable to the Engineer" and the Engineer can agree and determine revised instalments if: (i) instalments are not defined by reference to the actual progress of the execution of the Works; or (ii) actual progress differs from that on which the schedule of payments is based.

The Engineer must also give reasons and details of its calculations if it withholds any payment from the Contractor from its Interim Payment Certificates ("IPC").²⁷ There are also provisions allowing the Contractor to challenge withholdings under Clause 14.6.3. If an IPC is challenged again, then the Engineer should correct or modify any errors in the next IPC. If that is not done, the matter can then be referred to a Determination (in respect of which the Engineer has a duty to act neutrally).

The Engineer's Determination

So, that overview of the Engineer's project management tools leads us to their most significant tool – making a determination under Clause 3.7.

In making a determination, the Engineer must act "neutrally". This word was chosen specifically to avoid issues with words such as impartially and independently experienced in Civil Law jurisdictions historically. This neutrality obligation doesn't apply elsewhere, for example, when issuing payment certificates. However, given a dispute on a payment certificate may end up in a determination, an Engineer should always have the obligation to act neutrally in mind.

Significant amendments were made to the procedure for an Engineer's Determination in Clause 3.7, and the whole process is more complex than in previous editions. Clause 3.5 (determinations) in the FIDIC 1999 Red Book simply stated as follows:

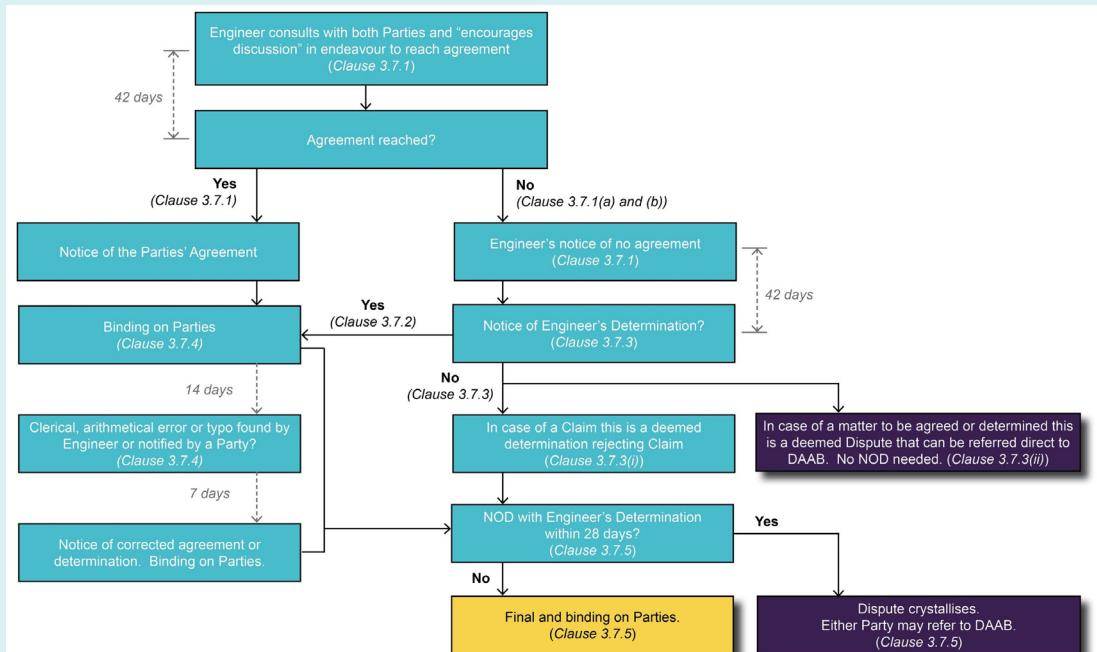
"Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances. The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration]".

In contrast, Clause 3.7 of the 2017 editions is nearly three pages of text. It details the procedure the Engineer must follow in agreeing or determining: (i) time and/or money claims under clause 20.1 (a) and (b); (ii) claims for another entitlement or relief (not time or money) under clause 20.1 (c)²⁸; and (iii) any matter that the contract expressly provides is to be referred to the Engineer.

The procedure, as a whole, is much more detailed and it contains additional time limits on the Engineer when agreeing or (if agreement is not possible) determining any matter or Claim. The aim is to resolve disputes between parties at an earlier stage so as to avoid the need for a DAAB decision and/or any arbitral award. Obviously, for Claims for money or time, Parties must be vigilant of the time bar for notification (and procedures for providing the necessary particulars) in Clause 20.2.1.

The process is set out below:

Image credit: Original source prior to redesign: Thomson Reuters.



Crucially, the determination will be binding on the Parties unless a Notice of Dissatisfaction ("NOD") is given within 28 days after receiving the Notice of Determination. This should never be left until the last minute not least because Clause 1.3 provides that electronically transmitted Notices are deemed received the day AFTER transmission and that's if there is no non-delivery notification received back!

Finally, recourse to the DAAB is much more tightly controlled under the 2017 suite. A dispute does not arise under the Contract unless and until the Clause 3.7 process for agreeing and determining Claims has been completed, and then only if a NOD is given within the requisite time period. However, equally, if the Engineer misses the date for the Determination of a Claim, it is deemed to be a rejection of that Claim allowing the Parties to proceed to the next steps (the DAAB) with certainty.

Overview

The Engineer's role in the FIDIC Yellow and Red Books 2017 Editions is far more wide ranging and sophisticated than previously. For domestic readers, it is closer to the role of the Project Manager in NEC contracts than the Architect's role in the JCT standard building contract. That is theoretically good for project and risk management. However, as seen all too frequently in NEC disputes, it is crucial that the Engineer's role is undertaken properly, thoroughly and with the necessary resources in place if the goal of enhanced project and risk management (and reduced disputes) is to be achieved.

Footnotes

1. By Claire King with thanks to Beth McManus for her input on the Engineer's Determination process. See also Claire and Beth's webinar on this topic at [The Role of the Engineer in FIDIC Contracts | Fenwick Elliott](#).
2. Conditions of Contract for Plant & Design Build.
3. Conditions of Contract for Construction.
4. For the avoidance of doubt, reference to the Yellow and Red Book in this article means to the 2017 editions unless stated otherwise.
5. No reference is made as to what engineering qualification is appropriate as noted in "FIDIC Red Book: A Commentary" by Ben Beaumont, 1st Editions, 2019. This is perhaps something for the Parties to consider especially for more specialised projects although the requirement for Project Management skills may limit any choice in practise.
6. See Clause 1.4 but this should ideally be stated in the Contract Data.
7. FIDIC's Golden Principles are as follows: "GP1: The duties, rights, obligations, roles and responsibilities of all the Contract Participants must be generally as implied in the General Conditions, and appropriate to the requirements of the project. GP2: The Particular Conditions must be drafted clearly and unambiguously. GP3: The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions. GP4: All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration. GP5: Unless there is a conflict with the governing law of the Contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration." (See FIDIC Golden Principles, First Edition 2019).
8. See Clause 3.7.
9. See Clause 15.1 which can be a first step determination for default.
10. Sheldebouw BV v St James Homes (Grosvenor Dock) Ltd 2006 BLR 113 TCC; and Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2017] EWHC 1763 (TCC).
11. See Sutcliffe v Thackrah [1974] AC 727. See also Section 24-025 of Keating on Construction Contracts, 11th Edition, Section 4 - The Engineer.
12. With thanks to LexisNexis' helpful checklist in "FIDIC Contracts 201 - the role of the Engineer".
13. See Clause 8.1.
14. See Clause 8.3.
15. See Clause 12 in the Red Book 2017 Edition.
16. See Clause 14.6 for the issue of Interim Payment Certificates and Clause 14.3 in relation to the Final Payment Certificate.
17. See Clause 3.5.
18. See Clause 6.9.
19. See Clause 7.3.
20. See Clause 7.5 [Defect and Rejection] and Clause 7.6 [Remedial Work]. See also Clause 4.9.1 [Quality Management] pursuant to which the Engineer should review the QM System.
21. See Clause 10.1.
22. See Clause 11.9.
23. See Clause 3.7.
24. Review means the Engineer has to consider to what extent it complies with the Contract.
25. See "New FIDIC Yellow Book (2017): A case of when more (words) mean less (clarity)?" by Frederic Gillion and Michael Cottrell. As published in the International Construction Law Review, 2017, page 349 et seq.
26. See Clause 13.3.1.
27. See Clause 14.6.2.
28. This is a new provision in the 2017 suite. The parties can no longer refer this time or claim directly to the DAAB/DAB for a decision as under the 1999 suite.