

“Engineer” in FIDIC Red Book(s)

Abstract

The primary aim of this Article is to discuss the changes to the role of the Engineer that has been introduced in the FIDIC “Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer”; First Edition 1999 (Red-Book99) in comparison with FIDIC “Conditions of Contract for Works of Civil Engineering Construction”; Fourth Edition 1987 (Red-Book87).

Red-Book99 in a dramatic change has expressly identified the Engineer as a member of Employer’s (team of) Personnel and further Red-Book99 expressly provides that under the given circumstances the Engineer shall be deemed to act for the Employer. However, under Red-Book99 the Engineer is expected to exercise his authority, under the given circumstances, in a fair manner to Employer and Contractor. These express provisions in respect of Engineer’s dual role prima facie provide a significant change to the traditional role of the Engineer provided in Red-Book87.

The Engineer in Red-Book87 has been identified as an impartial (under the given circumstances) entity and has not been expressly identified as an entity to carry out duties for the Employer. However, it is not difficult to find implied provisions within Red-Book87, which identify such dual role of Engineer. However, as compared to Red-Book87, in Red-Book99 the Engineer’s services (under a service agreement with Employer) have become more challenging whilst Engineer’s exclusive role towards the Employer has been expressly identified.

Introduction

Red-Book99 has made certain specific changes with respect to the appointment, replacement and duties of the Engineer. These specific changes of the Engineer’s role are reflected in some specific clauses of Red-Book99. It may be noted that the Sub-Clause(s) referred to in various heading throughout this Article are such specific Sub-Clause(s) selected from Red-Book99.

The defined terms such as Employer, Contractor, Engineer, Work of FIDIC Red-Book(s) have been used throughout this Article and denote the same defined meanings.

Sub-Clause 1.1.2.6 [Employer’s Personnel] Sub-Clause 1.1.2.7 [Contractor’s Personnel]
Sub-Clause 3.1 [Engineer’s Duties and Authority]

Red-Book99 has a unique feature of expressly dividing the contract implementing team into two different classes, as it describes “Employer’s Personnel” (Sub-Clause 1.1.2.6) and “Contractor’s Personnel” (Sub-Clause 1.1.2.7). There is no such express division that can be found in Red-Book87. As per Sub-Clause 1.1.2.6 of Red-Book99, the Engineer and his staff have been identified as a part of the “Employer’s Personnel”. The “Contractor’s

Personnel” include the Contractor’s Representative and his staff and Subcontractors. In a move to identify the Engineer’s dual role, ie, the exclusive role towards the Employer and the role which affects the rights and obligations of the Employer and the Contractor, Red-Book99 under its Sub-Clause 3.1 (a) stipulate that,

“Except as otherwise stated in these Conditions:

(a) whenever carrying out duties of exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer;”

The above scenario might raise a question in one’s mind as to if the Engineer under Red-Book99 is partial to the Employer. This is due to the fact that Red-Book87 under Sub-Clause 2.6 [Engineer to act impartially] identifies the Engineer to be “impartial” in exercising his discretion whereas Red-Book99 does not expressly identify the Engineer to be “impartial”.

The clarification to such a question would be the exception given for Sub-Clause 3.1 (a) (ie “Except as otherwise stated in these Conditions :”). This exception apparently provides the Engineer’s role which affects the rights and obligations of the Employer and the Contractor where the Engineer is not expected to act for the Employer. This clearly illustrates in Sub-Clause 3.5 [Determinations] of Red-Book99, which identifies the Engineer’s such role towards the Employer and the Contractor where the Engineer after consulting each party and as the last resort shall make a fair determination of a matter in question between the Employer and the Contractor.

According to Sub-Clause 2.6 [Engineer to Act Impartially] of Red-Book87 the Engineer is required to be impartial under the Contract only whenever he exercises his discretion in giving his decision, opinion or consent, expressing his satisfaction of approval, determining value or otherwise taking action which may affect the rights and obligations of Parties. Does this mean the Engineer has an implied exclusive role towards the Employer to provide services on Employer’s behalf such as for preparation of claims on behalf of the Employer? If that is the case, both the Red-Books recognize the dual role of the Engineer, Red-Book87 impliedly and Red-Book99 expressly. This matter is further subject to discussion under Sub-Clause 2.5 [Employer’s Claims] below.

Sub - Clause 3.4 [Replacement of the Engineer]

Red-Book99 has defined the “Engineer” differently from Red-Book87, the major difference being Red Book99 gives the Employer an express right to replace the Engineer under Sub-Clause 3.4 [Replacement of the Engineer]. However, the Employer cannot replace the Engineer with a person against whom the Contractor raises reasonable objection. Red-Book87 in its provisions is silent as to the replacement of the Engineer; hence, one may contend that the Employer is bound under the Contract to employ the initially named Engineer until end of the Contract. This position of Red-Book87 may be seen as a harsh and rigid provision in the event of an inability of the Employer to employ the Engineer throughout or in an inability of the Engineer himself to continue due to reasonable grounds and due to circumstances beyond the control of the Employer and/or the Engineer. It is imperative therefore to have flexibility to any party to a contract to change any of his administrative or supporting personnel to that contract without affecting the rights of the other party. The Engineer is usually employed by the Employer

under a service agreement where usually a termination clause exists. Under such termination clause any party will have the right to terminate the services of the other under given circumstances. In view of that it would be therefore rational from the Employer's point of view to maintain a provision in his contract with the Contractor to terminate the Engineer's service if the Employer to reasonably exercise his right of termination under the agreement with the Engineer. The Contractor's rights in this respect shall be safeguarded with his right to raise reasonable objection to the proposed new Engineer.

Since Sub-Clause 3.4 of Red-Book99 thereby removes any guarantee on the Engineer's employment for the full contract period, the Engineer in exercising his duty under the Contract tend to be more cautious not to involve himself in any ultra-vires (beyond power) situations. Sub-Clause 3.4 of Red-Book99 therefore to a great extent avoids detrimental affects towards the rights of the Employer and/or the Contractor as a result of any such ultra-vires situations by the Engineer. Further, in an event of the Engineer acting detrimental to the rights of the Parties, the Contractor citing such justifiable circumstances may opt to demand or request the Employer to exercise his rights under this Sub-Clause to replace the Engineer. In such situations therefore the Engineer's employment would be more challenging under Red-Book99 than before.

Sub-Clause 18.4 [Insurance for Contractor's Personnel]

Red-Book99 under Sub-Clause 18.4 [Insurance for Contractor's Personnel] makes the Contractor obligatory in providing insurance for Employer and Employer's Personnel. However, there exists no such express provision in Red-Book87 as to the insurance of the Engineer and the Employer and their personnel. This new provision confirms the position of the Engineer as a part of the Employer's Personnel team and also makes it clear the position of insurance of the Employer and the Engineer whereas Red-Book87 in this respect is silent.

Sub-Clause 2.5 [Employer's Claims]

A provision that was not included in Red-Book87 has been introduced in Red-book99 which is Sub-Clause 2.5 [Employer's Claims]. Under this provision the Employer or the Engineer shall give notice and particulars (these shall include basis and substantiation of claim) of Employer's Claims to the Contractor.

Through this Sub-Clause the Employer has been given the opportunity to utilize the Engineer's knowledge in the Work in making claims against the Contractor. There was no such express provision in Red-Book87 for the Employer to utilize the Engineer's available such knowledge and the Employer instead would have to obtain services from a different party, who most probably would be an outsider without any knowledge of the Work. The Clause further requires the Engineer to proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine on the claim.

It is evident from this Sub-Clause that the Engineer as given in Sub-Clause 3.1 9 (a) may act for the Employer in the preparation and substantiation of Employer's claims and on the other hand the Engineer is required to exercise his authority in agreeing and determining the claim pursuant to Sub-Clause 3.5. A question arises as to if this situation leads to a conflict as the Engineer is required under the Contract to make a fair determination of a claim he may have involved in putting up.

However, it is noteworthy that according to the last Paragraph of this Sub-Clause, any deduction to the Contract Price as a result of the Engineer's agreement or determination of any such claim may be made by the Employer only and not by the Engineer.

Sub-Clause 3.5 [Determinations]

Pursuant to this Sub-Clause the Engineer has the duty to make a fair determination of circumstances whenever the Conditions of Contract so demands. The Sub-Clause further provides that each party shall give effect to such determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration]. Red-Book99 has no express provision for Engineer's Decision whereas Red-Book87 so does under Sub-Clause 67.1 [Engineer's Decision].

However under Engineer's Decision a dispute of any kind whatsoever can be referred for Engineer's Decision whereas the Engineer's Determination under Sub-Clause 3.5 of Red-Book99 can be obtained for a given set of circumstances only. Any other dispute (and disputes arising out of any Party's disagreement to Engineer's Determinations) under Red-Book99 shall be referred to the Dispute Adjudication Board (DAB) pursuant to Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. However under Red-Book99, all major circumstances such as variations, claims, payment certificates, extensions of time shall in an event of dispute be referred to Engineer's Determination which can be regarded as if referred for Engineer's Decision as given in Sub-Clause 67.1 of Red-Book87. A concern arises as to the fairness to the Contractor when all such major disputes are first being referred to the Engineer who acts for the Employer. Does this mean whilst the Engineer's position has been more inclined towards the Employer, he (Engineer) has been retained with most of authority in making decisions between two parties? This Sub-Clause further justifies the characteristic of Engineer's Decision under Red-Book87 due to the fact that the Engineer shall not pursuant to Sub-Clause 3.2 [Delegation by the Engineer] delegate the authority to determine any matter.

Sub-Clause 14.7 [Payment]

According to Paragraph (b) of this Sub-Clause the Employer is obliged to pay interim payments to the Contractor within 56 days after the Engineer receives the Statement. This guarantees the Contractor's payment period within which he would receive payment where as Red-Book87 is not specific about the delay in issuing the payment certificate by the Engineer. This also confirms the move of Red-Book99 that the Engineer is expected in certain events to work for the Employer.

Conclusion

Engineer's impartiality stipulated in Red-Book(s) and its practicality has always been subject to various contentions. Red-Book99 has completely removed the word "impartial" from its texts and instead the Engineer is expected to carry out a "fair determination" of matters in dispute. Whatever the terminology used to describe the impartiality and/or the fairness of the Engineer, it is important to investigate what is the real material change that has taken place to the Engineer's role within the express and implied meanings of the Red-Book(s) bearing in mind that the Engineer's impartiality has always been highly contentious.

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