

FIDIC - New 1999 Edition of the Red Book

Impartiality of the Engineer

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1. Background

The Fourth Edition of the FIDIC Conditions of Contract for Works of Civil Engineering Construction, known as the "Red Book", has been updated and replaced with a new standard form.

The title of the new 1999 First Edition construction book - which is red in colour - is "Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer" ("New Red Book").

2. Issue

In this paper, I consider whether the impartiality of the Engineer has been enhanced or diminished in the New Red Book as compared to the Red Book.

3. Summary of Findings

An overall review of the New Red Book indicates that the contractual impartiality of the Engineer has been diminished compared to the position in the Red Book.

Examples of specific provisions which support this view are set out below:

(a) The New Red Book introduces an express statement regarding the relationship between the Employer and the Engineer. Sub-Clause 3.1 of the New Red Book provides:

"Except as otherwise stated in these Conditions:

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

(b) The express duty of the Engineer to exercise his discretion impartially has been completely removed in the New Red Book. It has been replaced by an express duty to make a fair determination. However, the contractual duty to make a fair determination only applies where the Engineer is required to follow the procedure set out in Sub-Clause 3.5.

(c) Under the New Red Book, the Employer may replace the Engineer - this right does not exist under the Red Book.

(d) Under the New Red Book, the general indemnity given by the Contractor is extended to cover the "Employer's Personnel". The definition of Employer's Personnel includes the Engineer and his assistants.

(e) Under the New Red Book, the Contractor may terminate the Contract if the Engineer fails to issue the relevant Payment Certificate within the required time. The rationale for this inclusion may be based on the statement in paragraph (a) above, that is, that the Engineer is deemed to act for the Employer.

However, there are instances in the New Red Book where the impartiality of the Engineer has been enhanced.

For example, under the Red Book all disputes between the Employer and the Contractor, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer are referred to the Engineer. Note, however, in response to the mounting criticism of the role of the Engineer as an adjudicator or quasi-arbitrator, the November 1996 Supplement to the Fourth Edition of the Red Book

provided alternative wording to the disputes clause. The alternative wording provides for disputes to be resolved by an adjudication board.

The New Red Book supports the alternative position and provides that all such disputes are to be referred to a Dispute Adjudication Board and not the Engineer.

4. Detailed analysis

This section considers the role of the Engineer under the main provisions of the Red Book and the New Red Book.

A detailed analysis (see [attachment](#)) of the above examples and other provisions regarding the role of the Engineer is set out below.

Provision's detailing the appointment and authority of the Engineer

Clause 2 of the Red Book and Clause 3 of the New Red Book detail the general provisions regarding the appointment and authority of the Engineer.

For ease of reference, the Attachment to this memo sets out the provisions in a table format to highlight the differences between the Red Book and the New Red Book.

The main differences between these provisions are highlighted below:

(a) Appointment of Engineer

(i) Under the Red Book, "Engineer" means the person appointed by the Employer to act as Engineer for the purposes of the Contract and named as such in Part II of these Conditions.

(ii) The definition in the New Red Book goes further because it states "*or other person appointed, from time to time by the Employer and notified to the Contractor under Sub-Clause 3.4.*"

(iii) Sub-Clause 3.4 of the New Red Book provides a mechanism for the Employer to replace the Engineer. There is no such mechanism in the Red Book.

(iv) Replacement of the Engineer requires notice of the intention to replace to be given by the Employer to the Contractor. However, the Employer shall not replace the Engineer with a person against whom the Contractor raises objection by notice to the Employer, with supporting reasons.

(b) Engineer's Representative

(i) Under the Red Book, "Engineer's Representative" means a person appointed from time to time by the Engineer under Sub-Clause 2.2

(ii) Sub-Clause 2.2 provides that the Engineer's Representative shall be appointed by and be responsible to the Engineer and shall carry out such duties and exercise such authority as may be delegated to him by the Engineer under Sub-Clause 2.3.

(iii) Under the New Red Book, an Engineer's Representative is not appointed and the term is not used.

(c) Delegation

(i) Under Sub-Clause 2.3 of the Red Book, the Engineer may delegate to the Engineer's Representative any of the duties and authorities vested in the Engineer and he may at any time revoke such delegation. Any communication given by the Engineer's Representative to the Contractor in accordance with such delegation shall have the same effect as though it had been given by the Engineer.

(ii) Under Sub-Clause 3.2 of the New Red Book, the Engineer may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation. However, unlike the Red Book there is a restriction that, unless otherwise agreed by both parties, the Engineer shall not delegate the authority to determine matters in accordance with Sub-Clause 3.5 (Determinations). Any approval, consent, instruction, notice etc, in accordance with the delegation, shall have the same effect as though it had been an act of the Engineer.

(d) Appointment of assistants

(i) Under Sub-Clause 2.4 of the Red Book, the Engineer or the Engineer's Representative may appoint any number of persons to assist the Engineer's Representative in the carrying out of his duties. However, such assistants shall have no authority to issue any instructions to the Contractor save in so far as such instruction may be necessary to enable them to carry out their duties and to secure their acceptance of materials.

(ii) There is no corresponding clause in the New Red Book. The term assistants has a different meaning in the New Red Book - it relates to where the Engineer delegates authority.

(e) Instructions

(i) The provisions dealing with the giving of written and oral instructions are similar in both the Red Book and the New Red Book. However, the New Red Book expressly provides that the Contractor shall only take instructions from the Engineer or from an assistant to whom the appropriate authority has been delegated.

(f) Engineer to Act Impartially/Determinations

(i) This is an area where there is a significant difference between the position adopted in the New Red Book compared to the Red Book.

(ii) Sub-Clause 2.6 of the Red Book provides:

"Wherever, under the Contract, the Engineer is required to exercise his discretion by:

(a) giving his decision, opinion or consent,

(b) expressing his satisfaction or approval,

(c) determining value, or

(d) otherwise taking action which may affect the rights and obligations of the Employer or Contractor, he shall exercise such discretion impartially within the terms of the Contract and having regard to all the circumstances."

(iii) Sub-Clause 2.6 is important because it provides a general overriding contractual duty for the Engineer to act impartially. However, this express requirement has been entirely omitted in the New Red Book.

(iv) Rather, Sub-Clause 3.5 of the New Red Book provides:

"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."

(v) The effect of the above clause, is that the Engineer is only under a contractual duty to act fairly in circumstances where he is required by a particular clause to comply with Sub-Clause 3.5 (unless otherwise specified).

(vi) For example, the granting of an extension of time requires the Engineer to follow the process set out

in Sub-Clause 3.5, However, upon termination of the contract by reason of Force Majeure, the Engineer is not expressly required to comply with Sub-Clause 3.5 when determining the value of work done.

Other main provisions detailing the role of the Engineer

This section provides an overview of the expanded or reduced role of the Engineer and his relationship with the Employer and the Contractor.

(a) Extensions of Time

(i) Under the Red Book, the Contractor is entitled to an extension of time for "any delay, impediment or prevention by the Employer" (Sub-Clause 44.1). The implication is that there is no express reference to a right to claim for an extension of time where the Engineer either delays or prevents the Contractor.

(ii) Under Sub-Clause 8.4(e) of the New Red Book, the Contractor is entitled to an extension of time for *"any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel or the Employer's other contractors on Site. "*

(iii) Clause 8.4(e) refers to "Employer's Personnel". This term is defined as follows:

"Employer's Personnel means the Engineer, the assistants referred to in Sub-Clause 3.2 [Delegation by the Engineer] and all other staff, labour and other employees of the Engineer and of the Employer: and any other personnel notified to the Contractor, by the Employer or the Engineer, as Employer's Personnel."

(iv) On this basis, the New Red Book expressly entitles the Contractor to claim for an extension of time for any delay or prevention by the Engineer or his assistants.

(v) An extension of time claim under the Red Book is determined by the Engineer after due consultation with the Employer and the Contractor.

(vi) An extension of time claim under the New Red Book is determined in accordance with Sub-Clause 3.5 - that is, the Engineer shall consult with each Party in an endeavor to reach agreement but if agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

(b) Suspension

(i) Under Sub-Clause 16.1 of the New Red Book, the Contractor may, by notice in writing to the Employer, suspend work if the Engineer fails to certify in accordance with Sub-Clause 14.6 (Issue of Interim Payment Certificates).

(ii) There is no equivalent right of suspension in the Red Book.

(iii) Under the Red Book, in the event of suspension by the Contractor, the Engineer determines the cost and time implications after due consultation with the Contractor and the Employer.

(iv) Under the New Red Book, the Engineer is required to follow the procedure in set out in Sub-Clause 3.5.

(c) Default by Employer

(i) Under the Sub-Clause 16.2(b) of the New Red Book, the Contractor has a right to terminate if the Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant

Payment Certificate. This is a useful provision for contractors.

(ii) There is no equivalent right of termination in the Red Book.

(d) Default by Contractor

(i) Sub-Clause 63.1 of the Red Book provides that the Employer can only terminate, in certain circumstances, where the Engineer has certified that, in his opinion, the Contractor has failed to do something eg failed to commence work.

(ii) This requirement has been deleted in the New Red Book, which is to the advantage of contractors.

(e) Indemnity provided by Contractor

(i) Under Sub-Clause 22.1 of the Red Book, the Contractor provides a general indemnity to the Employer for the death of or injury to any person and for the loss of or damage to any property arising out of the execution of the Works. This indemnity does not extend to the Engineer.

(ii) However, under the New Red Book the general indemnity is extended to include "Employer's Personnel" and the definition of Employer's Personnel includes the Engineer and his assistants.

(f) Indemnity provided by the Employer

(i) Under Sub-Clause 22.3 of the Red Book, the Employer gives a general indemnity to the Contractor in respect of certain events including circumstances where there is *"death of or injury to persons or loss of or damage to property, resulting from any act or neglect of the Employer, his agents or servants or other contractors..."*

(ii) Note, there is no express reference to any acts or neglect of the Engineer.

(iii) However, Sub-Clause 1.1 of the New Red Book removes any doubt that the indemnity is intended to extend to cover acts or neglect of the Engineer by indemnifying the Contractor for loss of or damage *"which is attributable to any negligence, willful act or breach of the Contract-act by the Employer, Employer's Personnel, or any of their respective agents."*

(iv) As noted above, Employer's Personnel includes the Engineer.

(g) Assignment of benefit

(i) Under Sub-Clause 4.5 of the New Red Book, if a subcontractor's obligations extend beyond the expiry of the relevant Defects Nomination Period and the Engineer, prior to this date, instructs the Contractor to assign the benefit of such obligations to the Employer, then the Contractor shall do so.

(ii) Under the Red Book, the Contractor must assign such obligations in those circumstances at the request of the Employer and not the Engineer.

5. Conclusion

The above analysis highlights some significant changes in the New Red Book compared to the Red Book regarding the role of the Engineer and his relationship with the Contractor and Employer.

Overall, these changes have reduced the contractual impartiality of the Engineer. However, obviously the parties may through the use of Particular Conditions amend the General Conditions.