Supervising the engineer under a FIDIC contract

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Summary

Beware of clauses which seek to limit the engineer’s authority as they may be more trouble than they’re worth. Under most of the FIDIC forms, and a number of other construction and engineering contracts, many of the key obligations fall on someone who is not a party to the contract. In the case of FIDIC, this person is the engineer. In other contracts, this person is commonly a project manager, development manager or construction manager.

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Enshrined in most legal systems is the principle that contracting parties cannot impose obligations on a non-party. However construction contracts do, and have done for generations. Construction law provides a framework for this by using various concepts such as agency and duties and standards of conduct which are imposed by the law of tort in England and Wales. In Gulf legal systems such as the UAE, rules concerning “wrongful acts” and also concepts of third party supervision recognised in the Civil Codes achieve the same aim. Of course, the engineer’s obligations most naturally derive from the terms of the contract between the employer and engineer.
Limiting the engineer’s authority

The agency aspect of the engineer’s role, together with the associated concept of authority, can sometimes cause difficulties. This is particularly the case where the employer (or those to whom it is beholden, such as funders) want to place limits on the engineer’s authority. The 1987 FIDIC Red Book gives the engineer broad authority in relation to the construction contract, but states that if the engineer’s appointment requires the employer’s approval for anything specific, then this must be set out as particular conditions. The 1999 FIDIC Red Book says much the same, but omits the reference to the engineer’s appointment, so in theory limits on the engineer’s authority can be found elsewhere. It also envisages that changes to the engineer’s authority can be made from time to time with the contractor’s agreement.

The Multilateral Development Bank Harmonised Edition of the FIDIC Red Book (the “MDB Form”) was published to reflect the practices that those institutions adopted when tailoring FIDIC contracts. Clause 3.1 of the general conditions states that the engineer must obtain specific authority from the employer before:

- Determining extra time or cost.
- Instructing a variation (or approving a variation proposal).
- Determining the allocation of payment currencies.

If these limits are subsequently changed, the employer must notify the contractor but does not need to obtain its consent. This is the default position, absent amendment.

It’s an ostensibly attractive provision from an employer’s perspective, and one which many employers (especially in the UAE) have replicated in their bespoke forms of contract. Unfortunately it can cause difficulties in practice.

Practical difficulties

It is difficult to see how this interfaces with the way in which the engineer is supposed to determine contractor claims. Gone are the days when the employer-appointed (and paid) engineer was expected to act impartially. However, there is still the notion (enshrined in clause 3.5 of all the FIDIC forms, including
the MDB Form, and even the Silver Book where the employer undertakes that role itself) that
determinations must be made fairly if the outcome cannot be agreed.

The requirement for the employer to approve determinations of time and money under the MDB Form
gives it two bites of the cherry. It can block agreement in the first place and then, if it doesn't like the
engineer’s determination, it can withhold approval. Clause 1.3 states that approval cannot be
unreasonably withheld or delayed, but fairness is a subjective concept (which is why, you might say, it is
best left to someone else to decide without having to get the approval of one of the affected parties).
Moreover, a contractor may struggle to come to terms with yet another hurdle, in an already crowded
field, to having its entitlements determined during the project.

The second difficulty, which arises surprisingly often, is the status of the (ultra vires) instruction or
determination if the engineer fails to obtain the employer’s approval when it should have done.

The FIDIC forms provide:

“whenever the Engineer exercises a specific authority for which the Employer’s approval is required,
then (for the purposes of the Contract) the Employer shall be deemed to have given approval”.

This is tantamount to saying that, yes, the engineer has to obtain the employer’s approval for certain
things but if it fails to do so then that does not matter. The determination will stand. This undermines the
point of limiting the engineer’s authority in the first place. From the employer’s perspective this type of
“deeming” provision would work more logically in reverse. In other words, any exercise of the engineer’s
authority would be deemed not approved; the onus would be on the engineer to show the contractor that
the necessary approvals had been obtained.

I think most people would accept that giving the employer the right to veto the prompt determination of a
claim does not work in practice. At best it stores up disputes to the end of the project; at worst it leads to
administrative paralysis during the project as trust and relationships start breaking down.

On the other hand, providing that the employer must approve all variations over a financial threshold can
help to prevent the design team (through the engineer) “going rogue” and not properly considering the
employer’s budget.
Whatever suits the parties and the project in each specific case is usually the correct approach, rather than imposing hard and fast rules in the abstract. Perhaps the approach of the 1987 FIDIC Red Book, which referred specifically to the terms of the engineer’s appointment and required the parties to give some thought to making the particular conditions consistent with it, wasn’t so bad after all. The only downside is that the engineer is often appointed well before the contractor and the prevailing consensus on the engineer’s role and authority may well have moved on by the time the contractor is appointed.

Rules of thumb

In all cases, there are some straightforward rules of thumb to keep in mind:

- The engineer’s appointment must reflect its obligations and the limits on its authority under the construction contract (and vice versa). If the engineer strays beyond these limits, then the employer may suffer loss which should be recoverable from the engineer. If the engineer’s appointment has already been finalised, ideally it will provide for the limits on the engineer’s authority to be changed to reflect the outcome of negotiations with the contractor. This is a reasonable position and is in everyone’s interests.

- The employer must be realistic. Having delegated responsibility to the engineer for administering the contract, does it really want to intervene in every decision? Does it have the resources to do so without delaying progress of the project? If employer approval is a funder requirement, then what assurance does the employer have that the funder will be sufficiently involved in the project to provide timely and helpful input?

- If the MDB Form’s “deemed approval” clause is included, then the particular conditions (and the engineer’s appointment) should provide that the engineer must positively request approval from the employer within an appropriate period, giving the employer sufficient time to consider and issue its approval. Only if it fails to do so or acts unreasonably should the employer’s approval be deemed to have been given. This protects the employer from having to pay for the failure of others to follow the correct procedure.

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