

## FIDIC 2017: Clause 3 - The Engineer

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### The main changes: Employer's consent and neutrality

The main changes in Clause 3 are the express provisions in Sub-Clause 3.2 [*Engineer's Duties and Authority*] that the Engineer is not required to obtain the Employer's consent before the Engineer exercises its authority under Sub-Clause 3.7 [*Agreement or Determination*], and that the Engineer must act "*neutrally*" when exercising its duties under Sub-Clause 3.7 [*Agreement or Determination*]. Dictionary definitions suggest that "*neutrally*" is similar in meaning to the words "*independently*" or "*impartially*" found in the FIDIC Red Book 4th Edition and the FIDIC Yellow Book 3rd Edition. However, the drafting committee believe that by using a different word, it will avoid the difficulties raised in the interpretation of independently or impartially in the earlier editions. This remains to be seen. The intention is that:

'the Engineer treats both Parties even-handedly, in a fair minded and unbiased manner'.<sup>1</sup>

### Instructions and Variations

Another significant change is the Contractor's right under Sub-Clause 3.5 [*Engineer's Instructions*] to "*immediately*" and "*before commencing any work related to the instruction*" give Notice to the Engineer that an Engineer's instruction, which is "*necessary for the execution of the Works*" but is not expressly stated to be a Variation, constitutes:

- a Variation, or
- involves work that is already part of an existing Variation, or
- does not comply with applicable Laws, or
- will reduce safety of the Works, or
- is technically impossible.

<sup>1</sup> Guidance for the Preparation of Particular Conditions, page 21, Sub-Clause 3.7.



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The purpose of this drafting is to accelerate the resolution of Variation challenges and give the Employer more budget certainty and control.

If the Contractor fails to give such Notice "*immediately*" and "*before commencing any work related to the instruction*" it will be in breach of the Contract entitling the Employer to damages if he has suffered a loss. There is a lack of express wording to indicate that it would also amount to a time-bar.

The Engineer must respond to the Contractor's Notice within 7 days of receiving it, by giving a Notice confirming, reversing, or varying the instruction. The Engineer's response does not need to address the Variation question, it just needs to confirm, reverse, or vary the instruction. The Contractor is expressly "*bound by the terms of the Engineer's response*".

If the Engineer does not respond within the prescribed time, the instruction is deemed to be revoked.

At the FIDIC Users' Conference London in December 2017, Michael Sergeant identified the risk of an impasse where the Contractor thinks the work is a Variation and will not carry it out unless the Engineer issues a formal Variation Instruction, but the Employer/Engineer thinks the work is not a Variation and will not issue a Variation Instruction because the



Employer will have to pay. It seems that the intention of the drafting committee is for the Parties to proceed with the work and leave the argument as to whether or not the instruction constituted a Variation to be resolved under the claims procedure. Therefore, if the Engineer confirms the instruction but the Contractor remains of the opinion that it constitutes a Variation the Contractor would need to proceed with the work (so as not to be in breach of contract) and pursue a claim under Sub-Clause 20.1. However, this is not expressly stated in Clause 3 (there is no reference to Clause 20), will cause delay and may be an unsatisfactory process particularly for the Contractor who will have more negotiating power at the start of a project when the Employer is keen to proceed with the Works.

## Time Limits

A further important change concerns the time an Engineer has to make a fair determination under Sub-Clause 3.7.3 [*Time Limits*]. There are now two separate 42-day periods in this clause:

- (i) 42 days for the Engineer to give Notice of the Parties Agreement if agreement is achieved; and
- (ii) if no agreement is reached, a further 42 days for the Engineer to give Notice of the Engineer's Determination.

Consequently, the time in which the Engineer must make a determination is now 84 days. This is generally considered to be an improvement to the open ended FIDIC 1999 editions, where the Engineer was obliged to:

- (i) respond to a claim or any further particulars supporting a previous claim with approval, or with disapproval and detailed comments under Sub-Clause 20.1 within a single 42-day period; and
- (ii) make a fair determination under Sub-Clause 3.5 for which there was no time-limit.

These FIDIC 2017 time limits may be amended if proposed by the Engineer and accepted by the Parties. If the Engineer does not give the Notice either (i) where there is a Claim, that Claim is rejected, i.e. it is resolved against the claiming Party, or (ii) where there is a matter to be agreed or determined, that matter is deemed to be a Dispute which may be referred by either Party to the DAAB for its decision under Sub-Clause 21.4 [*Obtaining DAAB's Decision*] without the need for Notice of Dissatisfaction (NOD).

Under Sub-Clause 3.7.5 [*Dissatisfaction with the Engineer's Determination*] the Engineer's determination becomes final and binding unless a dissatisfied Party gives a NOD to the other Party (with the Engineer in c.c.) within 28 days after receiving the Engineer's determination under Sub-Clause 3.7.2 [*Engineer's Determination*] (or corrected version thereof) stating that it is a "*Notice of Dissatisfaction with the Engineer's Determination*" and setting out the reasons for the dissatisfaction. The 28-day time bar is not waivable under Sub-Clause 20.2.5 [*Agreement or Determination of the Claim*]. Under Sub-Clause 21.4.1 [*Reference of a Dispute to the DAB*] the dispute must then be referred to the DAAB within 42 days of a NOD, failing which the NOD lapses and the determination becomes final and binding. Again, there is no waiver.

## Other changes to note include:

- The Engineer must now be a "*professional engineer*" with suitable qualifications, experience and competence. He/she must also be fluent in the ruling language: Sub-Clause 3.1 [*The Engineer*]. It has been suggested that the new provisions may pose difficulties for those Employers who like to appoint project managers (who are generally less expensive than professional engineers) into the role. Further, it is important to note that professional engineers who are members of recognised institutions will be bound by certain codes of conduct. There is no express requirement for the Engineer to be based at Site for the whole time the Works are being executed (but if appointed an Employer's Representative must be).
- In the FIDIC 4th Edition, there was provision for an Engineer's Representative. The Engineer's Representative was removed from the FIDIC 1999 but has been reintroduced into the FIDIC 2017: Sub-Clause 3.3 [*The Engineer's Representative*]. The Engineer may appoint a project manager into this role. The Engineer's Representative must be based at the Site for the whole time during which the Works are being executed, and therefore a prudent Engineer might appoint a deputy Engineer's Representative to minimise the impact of any unforeseen absences. The Engineer's Representative must comply with sub-paragraphs (a) and (b) of Sub-Clause 3.1 [*The Engineer*], i.e. "*be a professional engineer having suitable qualifications, experience and competent to act as the Engineer under the Contract*", and "*be fluent in the ruling language defined in Sub-Clause 1.4*".



- The Engineer may delegate duties and authority to act to assistants (such as design engineers, other construction professionals, technicians, inspectors and/or specialist independent engineers and/or inspectors appointed to monitor and review the execution of the Works). It is likely that such assistants will have a major role in the achievement of a successful project and be given whatever formal title is considered by the Engineer to be appropriate. However, the express wording in Sub-Clause 3.4 provides that the Engineer may not delegate authority to act under Sub-Clause 3.7 [*Agreement or Determinations*] and/or issue a Notice to Correct under Sub-Clause 15.1 [*Notice to Correct*]: Sub-Clause 3.4 [*Delegation by the Engineer*].
- The Employer may now immediately replace the Engineer on a temporary basis if the Engineer is unable to act as a result of death, illness, disability, or resignation: Sub-Clause 3.6 [*Replacement of the Engineer*].
- If an error of a typographical, clerical, or arithmetical nature is found in the determination or, remarkably, a signed agreement between the Parties, the Engineer may correct it: Sub-Clause 3.7.4 [*Effect of the Agreement or Determination*].
- The new wording at Sub-Clause 3.8 [*Meetings*] is a development of the optional clause found in the FIDIC 1999 editions, now covering both future work and/or other matters in connection with the Works. The Engineer is obliged to take a record of the meeting but there is no requirement that the Contractor or other attendees agree this record. Therefore, the Contractor or other attendees should point out any differences in the record from their understanding of the meeting promptly and in writing.

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