

THE ROLE OF THE ENGINEER IN THE FIDIC CONDITIONS OF CONTRACTS

Abstract

The engineer has significant role in the process of construction contract administration. In general he can act as agent of the employer. But his role is not restricted to agency relationships. At the same time he is acting as independent arbitrator in the relations between the employer and the contractor. The position of the engineer is defined by the mandatory rules of the public law (for example in Macedonia that is Law on Construction). If we extract the mandatory rules of public law, the next most important document which is defining the role of engineer is the contract itself. The international practice, first of all FIDIC, is playing crucial role in setting of the rules determining the engineer's role. A lot of his obligations towards the employer are arising from the contract.

Key words: Engineer, Contractor, Employer

1. Position of the Engineer according to the FIDIC Conditions of Contract

The engineer has specific role into the process of execution of construction contracts. He has large spectrum of responsibilities which are determining his crucial role in the administration of construction contracts. Contract administration involves making decisions and timely flow of information and decisions to enable completion of the project as required by the contract

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documents including review and observation of the construction project.² This is important to the Employer and the Contractor because this is determining that the work is proceeding in conformity with the agreement, and it allows a possibility to inspect if there are inaccuracies, ambiguities or inconsistencies in the design.³ As it can be seen, there are few terms describing the engineer, which including *architect* and *consultant*. The term used in this text, i.e. *engineer, architect and consultant* are considered as a synonyms.

Contract administration handles daily contractual issues in a contract execution and copes with them in accordance with the progress of the whole project. Contractual issue may be related to time, cost, quality and other obligations set out in the contract.⁴

The basic structure of the engineers role in to the administration of construction contracts is set by the the FIDIC Conditions of Contracts. FIDIC is founded in 1913, and is charged with promoting and implementing the consulting engineering industry's strategic goals on behalf of its Member Associations and to disseminate information and resources of interest to its members.⁵ Today, FIDIC membership covers 97 countries of the world. FIDIC, in the furtherance of its goals, publishes international standard forms of contracts for works and for clients, consultants, sub-consultants, joint ventures and representatives, together with related materials such as standard pre-qualification forms.⁶ FIDIC also publishes business practice documents such as policy statements, position papers, guidelines, training manuals and training resource kits in the areas of management systems (quality management, risk management, business integrity management, environment management, sustainability) and business processes (consultant selection, quality based selection, tendering, procurement, insurance, liability, technology transfer, capacity building).⁷

In this part of the text, next FIDIC documents worth to be mentioned: 1) Conditions of Contract for Construction, 1999; 2) Conditions of Contract for Plant and Design-Built, 1999; 3) Conditions of Contract for EPC/Turnkey Projects, 1999; 4) The Short Form of

² <http://csc-dcc.ca/Education/Construction+Contract+Administration/>

³ Ibid.

⁴ Niralula Rajenda, Kusajagani Sjujni, „Contract administration for a construction project under FIDIC Red Book contract in Asian developing countries”, available at http://management.kochi-tech.ac.jp/ssms_papers/sms11-8874_26c77ee7398a284f7160e5ef1a6f075e.pdf, accessed on 10.10.2014.

⁵ <http://fidic.org/about-fidic>, accessed on 1.10.2014.

⁶ Ibid.

⁷ Ibid.

Contract, 1999; 5) Multilateral Development Banks (MDB) Harmonised Conditions of Contract for Construction, 2005 and 6) Conditions of Contract for Design, Build and Operate Projects, 2007.

The Red Book of 1999 is containign norms which are representing equal balanced risk allocation between the Contractor and Employer, especially in the parts concernign drawings and designs.

The Yellow Book (Conditions of Contract for Plant and Design-Built) also is based on balanced risk allocation clauses, where the risk for the drawings is on the side of the Contractor.

In the Conditions of Contract for EPC/Turnkey Projects or the Silver Book, the large amount of the contractual risk is shift to the Contractor. This is acceptable if we take in to consideration of the nature of turnkey concept of construction project. Here the role of contract administration is completly different from the Red Book and the Yellob Book because almost whole amount of the risk is in the hands of the Contractor.

According to FIDIC Red and Yellow Book from 1999, clause 3.1., the employer shall appoint the engineer who shall carry out the duties assigned to him in the contract. The Engineer according to this FIDIC clause shall have no authority to amend the contract. But, the engineer may exercise the authority attributable to the engineer as specified in or necessarily to be implied from the contract. If the Engineer is required to obtain the approval of the employer before exercising a specified authority, the requirements shall be as stated in the particular conditions. The employer undertakes not to impose further constraints on the engineer's authority, except as agreed with the contractor. However, whenever the engineer exercises a specified authority for which the employer's approval is required, then (for the purposes of the contract) according to FIDIC RED and Yelooow Book, the employer shall be deemed to have given approval. Except as otherwise stated in clause 3.1. of FIDIC Red and Yellow Book: 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 engineer has no authority to relieve either party of any duties, obligations or responsibilities under the contract; and (c) any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the engineer (including absence of disapproval) shall not relieve the contractor from any responsibility he has under the contract, including responsibility for errors, omissions, discrepancies and non-compliances.

According to clause 3.2 of the FIDIC Red and Yellow Book, the engineer may from time to time assign duties and delegate authority to assistants, and may also revoke such

assignment or delegation. These assistants may include a resident engineer, and/or independent inspectors appointed to inspect and/or test items of plant and/or materials. The assignment, delegation or revocation shall be in writing and shall not take effect until copies have been received by both parties. However, unless otherwise agreed by both parties, the engineer shall not delegate the authority to determine any matter in accordance with Sub-Clause 3.5 of the FIDIC Red and Yellow Book.

Assistants shall be suitably qualified persons, who are competent to carry out these duties and exercise this authority, and who are fluent in the language for communications defined in the contract.

Each assistant, to whom duties have been assigned or authority has been delegated, shall only be authorised to issue instructions to the contractor to the extent defined by the delegation. Any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by an assistant, in accordance with the delegation, shall have the same effect as though the act had been an act of the Engineer. However according to clause 3.2 of FIDIC Red and Yellow Book: (a) any failure to disapprove any work, plant or materials shall not constitute approval, and shall therefore not prejudice the right of the engineer to reject the work, plant or materials; (b) if the contractor questions any determination or instruction of an assistant, the contractor may refer the matter to the Engineer, who shall promptly confirm, reverse or vary the determination or instruction.

The Engineer according to clause 3.3 of FIDIC Red and Yellow Book may issue to the contractor (at any time) instructions which may be necessary for the execution of the works and the remedying of any defects, all in accordance with the contract. The contractor shall only take instructions from the engineer, or from an assistant to whom the appropriate authority has been delegated under this Clause. The contractor shall comply with the instructions given by the engineer or delegated assistant, on any matter related to the contract. These instructions shall be given in writing.

According to clause 3.4 of the FIDIC Red and Yellow Book, if the Employer intends to replace the engineer, the employer shall, not less than 42 days before the intended date of replacement, give notice to the contractor of the name, address and relevant experience of the intended replacement engineer. The employer shall not replace the engineer with a person against whom the contractor raises reasonable objection by notice to the employer, with supporting particulars.

2. Structuring the position of the Engineer between the Contractor and the Employer

Usually will be expected that the mutual trust position will allow any party to notifies to other of any events which may be reasons for delay in the execution of the contract and will result with extra cost. However, a contract requires the Contractor to notify the Owner/Employer/Project Manager of the event or circumstances which needs additional time and cost.⁸ The architect serving as a construction administrator observes construction for conformity to construction drawings and specifications.⁹ These documents are part of the legal contract between the owner and general contractor.¹⁰ When interpreting these legal documents, the architect's role shifts. The architect serves not as the owner's direct agent but in a quasi-judicial capacity, showing partiality to neither owner nor contractor.¹¹ At other times during the construction phase the architect acts as the owner's representative and agent.¹²

The law presumes that the architect is aware of the whole of the terms of the building contract under which he or she is acting. That is fundamental to the architect 's responsibilities.¹³ Unfortunately too many architects have very limited knowledge of the contracts which they purport to administer.¹⁴ The architect has no intrinsic powers by virtue of being the architect under a particular contract, still less by virtue of simply being an architect.¹⁵

The continuing involvement of the architect during the construction phase helps assure the client that the completed building will reflect the design intent, and further ensures the quality of materials and workmanship.¹⁶ When the architect is retained by the owner to administer the

⁸ Niralula Rajenda, Kusajagani Sjujni, „Contract administration for a construction project under FIDIC Red Book contract in Asian developing countries”, available at http://management.kochi-tech.ac.jp/ssms_papers/sms11-8874_26c77ee7398a284f7160e5ef1a6f075e.pdf, accessed on 10.10.2014

⁹ Mays Patrick, „Contract Administration”, available at <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab089226.pdf>, accessed on 10.8.2014.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Chappell David, „Building Contract Claims” Fifth Edition, Wiley-Blackwell, 2011

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Mays Patrick, „Contract Administration”, available at <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab089226.pdf>, accessed on 10.8.2014.

construction contract, the architect is the owner's representative in dealing with the contractor.¹⁷

A construction administrator needs substantial design and construction experience, a thorough understanding of construction techniques and methods, and the ability to interpret the intent of construction documents.¹⁸ The construction administrator also needs a thorough understanding of building codes, standards, and regulations as well as the ability to communicate, negotiate, and resolve disputes with trade personnel.

So far as claims are concerned, the architect may only act in the way set out in the contract. If there is a pre - condition which must be satisfied before the architect can act, such as the giving of notice by the contractor, an architect who acts without that pre - condition is acting without authority and may become liable to the employer. The exercise of that discretion is so circumscribed by the terms of that provision of the contract as to emasculate the element of discretion virtually to the point of extinction.¹⁹

Architect and the quantity surveyor, if so instructed, have an implied duty to carry out the ascertainment of direct loss and/or expense within a reasonable time from the time that reasonably sufficient information is received from the contractor.²⁰

¹⁷ The architect will be available for advice and consultation with the owner. In monitoring the construction, the architect will be alert to whether the contractor has carried out the design intent and the contract requirements relating to quality of workmanship and materials. The architect will endeavor to guard the owner against defects and deficiencies in the work. A general rule of thumb is that about 25 percent of the architect's total compensation for services accounts for construction administration. This fee percentage is generally sufficient to compensate the architect for the following services during construction: 1) Spending one day per week on site, attending a meeting and observing the progress of construction, 2) Responding to questions from the contractors and material suppliers, 3) Reviewing shop drawings and submittals, 4) Reviewing and certifying monthly applications for payment, 5) Authoring clarifications and minor changes to the documents, 6) Assisting consultants with construction administration duties, 7) Record keeping and 8) Project closeout responsibilities. Ibid.

¹⁸ Ibid.

¹⁹ However, more recently, it has been said: in the administration of a complex contract, however, it is not uncommon to find that the procedural requirements of the contract are not followed to the letter. This is hardly surprising; if matters seem straightforward or if the practical result that is desired is clear, the niceties of procedure may not seem important, and there is an obvious temptation to ignore them. In a construction contract most of the procedural requirements will be matters with which the architect is directly involved on the employer's behalf. Consequently the decision to dispense with procedural requirements is likely to be that of the architect. *Partington & Son (Builders) Ltd v Tameside Metropolitan Borough Council* (1985) 5 Con LR 99 at 108. Chappell David, op.cit. pp.143.

²⁰ A 'reasonable time' is a notoriously variable concept and the precise period will depend on the relevant circumstances. However, it seems that an architect or quantity surveyor who unreasonably delayed in the ascertainment of loss and/or expense might be liable personally to either the employer or even to the contractor. This proposition has received judicial support from an *obiter* observation: ' [If] the period was unreasonable the chain of causation would be completely broken. This might give rise to a claim against the architect . It is tentatively believed that this is a correct statement of the law and it appears to be supported by a clutch of other cases. In *Michael Salliss & Co Ltd v ECA Calil* , 25 the contractor sued Mr and Mrs Calil and the architects, W F

Very interesting for analysing is the case of *Pacific Associates v Baxter*. Halcrow International Partnership were the engineers for work in Dubai for which Pacific Associates were in substance the contractors under a FIDIC contract. During the course of the work, the contractors claimed that they had encountered unexpectedly hard materials and that they were entitled to extra payment of some £ 31 million. Halcrow refused to certify the amount and in due course, Pacific Associates sued them for the £ 31 million plus interest and another item. It was claimed that Halcrow acted negligently in breach of their duty to act fairly and impartially in administering the contract. At first instance, the court struck out the claim, holding that Pacific Associates had no cause of action. The court noted that: there was provision for arbitration between employer and contractor; and there was a special exclusion of liability clause in the contract (clause 86) to which, of course, the engineers were not a party, whereby the employers were not to hold the engineers personally liable for acts or obligations under the contract, or answerable for any default or omission on the part of the employer. The question of whether a duty of care exists does not depend on the existence or absence of an exclusion of liability clause although it may be one factor to be considered.

Legally, the architect occupies three different positions as the professional service phases progress from inception of design to completion of construction contract administration. The three separate and distinct roles recognized in law are: 1) as an independent contractor, 2) as an agent of the owner and 3) as a quasi-judicial officer.²¹

An independent contractor is one who contracts to do something for another according to its own means and methods and not under control of the employer except as to the end result.²²

Newman & Associates. It was claimed that the architects owed a duty of care to the contractor. The claim fell into two principal categories: 1) failure to provide the contractors with accurate and workable drawings and 2) failure to grant an adequate extension of time and under - certification of work done. The court held that the architect had no duty of care to the contractors in respect of surveys, specifications or ordering of variations, but that he did owe a duty of care in certification. It was held to be self - evident that the architect owed a duty to the contractor not to negligently under - certify: ‘ If the architect unfairly promotes the building employer ’ s interest by low certification or merely fails properly to exercise reasonable care and skill in his certification it is reasonable that the contractor should not only have the right as against the owner to have the certificate revised in arbitration but also should have the right to recover damages against the unfair architect. Ibid.

²¹ Mays Patrick, „Contract Administration”, available at <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab089226.pdf>, accessed on 10.8.2014.

²² During the time the architect is conferring with the owner, designing the project, preparing the contract documents, and administering the contract, the architect’s relationship to the owner is as an independent contractor. The architect contracts with the owner to furnish architectural services for which the owner agrees to pay a fee. The architect’s and owner’s duties are spelled out in the owner-architect agreement. Mays Patrick, „Contract Administration”, available at <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab089226.pdf>, accessed on 10.8.2014.

An agent is one who has the authority to act for another, called the principal. After a contract has been entered into between the owner and the contractor, the architect's position changes.²³

Some architects are inclined to shield the owner from some of the unpleasant technical details that plague the construction process.²⁴ This could very well be a mistake, as some owners or their legal counsel might interpret this to be a violation of the architect's duty, as an agent, to disclose. Concealment of relevant information from the owner could be construed as fraud when there is a duty to disclose. Silence is often interpreted as concealment.²⁵

The architect's third position is one of judge of the performance of the owner and the contractor under terms of the contract. Some have termed this position of the architect as being a "friend of the contract."²⁶

Arbitration tribunals and courts are inclined to look with suspicion on contracts where final decisions on the performance of the parties are made by a person under the control of one of the parties.²⁷ Thus an architect's decision that is not fair, and is not seen to be fair, will be easily overturned by arbitrators and judges on appeal.

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²³ During the construction period, when the architect deals with the contractor and others in behalf of the owner, the architect is serving as the owner's agent. However, the architect's powers to obligate the owner are restricted to the extent provided in the owner-architect agreement. When dealing with the contractor, the architect acts in a fiduciary capacity for the owner and in this position of trust must represent the owner's best interests. As a fiduciary, the architect has the duty to disclose to the owner all information that is material to the owner's interests. See: Mays Patrick, „Contract Administration”, op.cit.

²⁴ Ibid.

²⁵ Ibid.

²⁶ All claims by the owner or contractor against each other should be referred to the architect for initial decision as a condition precedent to more formal procedures such as mediation and arbitration. Some claims will be those alleging errors or omissions in the architect's own actions or work product. The architect must make even-handed, fair decisions strictly in accordance with the contract, not siding with either party. The architect also must be a fair interpreter of the documents. This can be difficult when the documents are imperfect and the architect's fair ruling will expose the documents to be at fault. When decisions on the "intent of the documents" are made, they must be based on some tangible evidence within the documents as to what is reasonably inferable and not merely on what is in the architect's mind. The architect's decisions must be formulated pursuant to procedural due process. This means that the architect must give reasonable notice to each party to allow its position to be made known before the architect makes a final decision. Arbitration tribunals and courts are inclined to look with suspicion on contracts where final decisions on the performance of the parties are made by a person under the control of one of the parties. Thus an architect's decision that is not fair, and is not seen to be fair, will be easily overturned by arbitrators and judges on appeal. Ibid.

²⁷ Ibid.

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