

DIFFERENCE BETWEEN ROLES OF THE ENGINEER AS PER FIDIC CONDITIONS OF CONTRACTS AND ENGINEERING SUPERVISION IN ACCORDANCE WITH LAW ON SPATIAL PLANNING AND CONSTRUCTION OF MONTENEGRO

Abstract

For more than 20 years, FIDIC Conditions of Contract have been used by many of donor or credit international financial institutions. Whether it was Conditions of Contract for Construction, for Building and Engineering Works designed by the Employer, First Edition 1999 or Second Edition 2017, there are still many misunderstandings and misinterpretations regarding utilization of FIDIC. FIDIC own attempts to clarify some aspects of the obligation of the Engineer are also creating potential issues and disputes. First dilemma that will be addressed is related to application of FIDIC in Montenegrin legislation system. Secondly, role of the Engineer shall be addressed and in particular difference between Engineer as per FIDIC CoC and Engineering supervision in accordance with Law on Spatial Planning and Construction. It is beyond doubt that roles are overlapping and in certain areas appears to be completely the same. However, major difference is related to role which is by default of the private nature considering that it is determined by contractual relationship. Role of the Engineer as per FIDIC will remain entirely of the private legal nature while role of the Engineering Supervision will in accordance with the Law be of the public legal nature. Engineering Supervisor always had a role to secure implementation of the Law by securing that any facility shall be built in accordance with approved design and Law. As from 2017, this role has been expanded in the way that Engineering Supervisor was given some of the public authorities which were exclusively retained by the Government. Moreover, Engineering Supervisor is now even entitled to issue orders to his own Employer. Therefore, it is important is that Employers are aware of this different roles, different legal and/or stakeholder's requirements and to take all of the circumstances into consideration when preparing Terms of Reference for selection of consulting engineers and/or Engineering supervision services.

Keywords

Engineer, Engineering Supervision, FIDIC, Law on Spatial Planning and Construction, Law on Contracts and Tort, Public and Private Role

¹ Dipl CE, Acc Spec. EnvE, Freelance consultant, ITCE doo, Beograd, s.topalovic@gmail.com

² Attorney at Law, Managing Partner of Vukmirovic Misic law firm- JPM Partner, ana@lvmlawfirm.com

1. INTRODUCTION

First edition of FIDIC Red Book was published 65 years ago. Being professional association of the consulting engineers, FIDIC, in his publications of construction contracts models, promoted role of the contract's "third" party, FIDIC Engineer. Now, more than 20 years elapsed from the first edition of "new" FIDIC Red Book titled „Conditions of Contract for Construction, for Building and Engineering Works designed by the Employer, First Edition 1999" (hereinafter called "FIDIC 1999") [1]. History of Red Book started with first edition in 1957 and got dramatic twist with 1999 edition. Unlike in previous cases, when conditions of contract were only improved in line with acquired experiences, FIDIC made decision not only to improve but to make significant changes on the basic principles of the model contracts. Together with existing division based on the subject of the procurement (civil works, plant and installation of electro-mechanical equipment, etc.), FIDIC adopted new concept of risk management where most important risk of responsibility for design was identified. Additionally, FIDIC also made significant changes to the role of the Engineer. Therefore, main goal of this paper is to give explanation of the evolution of the role of the FIDIC Engineer and clarify the difference between roles of the Engineer and Engineering Supervision in accordance with Law on Spatial Planning and Construction of Montenegro[2]. We also hereby provide with details of stipulations of the FIDIC Red Book Second Edition titled "Conditions of Contract for Construction, for Building and Engineering Works designed by the Employer, Second Edition 2017" (hereinafter "FIDIC 2017") [3].

2. RELATIONSHIPS BETWEEN FIDIC CONDITIONS OF CONTRACT AND LEGISLATION OF MONTENEGRO

Stipulations of Sub-Clause 1.13 „*Compliance with Laws*“ FIDIC 1999 states following:

"The Contractor shall, in performing the Contract, comply with applicable Laws."

Stipulations of Sub-Clause 1.13 „*Compliance with Laws*“ of FIDIC 2017 [2] are expanded with balanced obligation which is now explicitly imposing obligation both on the Contractor and Employer to comply with valid laws:

"The Contractor and the Employer shall, in performing the Contract, comply with all applicable Laws."

Definition of „Law“ under FIDIC 1999 is provided in the Sub-Clause 1.4 „*Law and Language*“:

"The Contract shall be governed by the law of the country or other jurisdiction stated in the Appendix to Tender."

Similarly, „Law“ is defined in the FIDIC 2017:

"The Contract shall be governed by the law of the country (or other jurisdiction) stated in the Contract Data (if not stated, the law of the Country), excluding any conflict of law rules."

The Contractor and the Engineer are obliged to comply with the laws defined in the Contract Data (Appendix to Tender in FIDIC 1999). Alternatively, if the law is not specified the law of the Country where the project is located should apply (according to the definition of the "Country" both in FIDIC 1999 and FIDIC 2017, the "Country means the country in which the Site (or most of it is located), where the Permanent Works are to be executed").

For the above reasons, we emphasize the following: the FIDIC terms of the contract have been prepared in such a way that full implementation is possible only with the defined governing laws, and in this case, the laws of Montenegro.

Therefore, there is no dilemma whether to apply FIDIC 1999 / FIDIC 2017 Conditions of Contract or laws of Montenegro, and especially not, whether the provisions of substantive law, i.e. the Law on Spatial Planning and Construction remain in force. What needs to be done is to adjust the General Conditions and Conditions to the legislation of Montenegro through the Particular Conditions of the Contract.

Finally, regardless of the laws defined in the Contract Data (Appendix to Tender in FIDIC 1999), the mandatory laws should apply. The Montenegrin Law on International Private Law sets that the mandatory norms of the Montenegrin law whose application is considered particularly important for the protection of the public interest, such as the political, social, or economic system of the state, apply to all cases to which these norms apply, regardless of the applicable law [7] as it is the case with the Law on Spatial Planning and Construction.

3. THE ENGINEER

The Sub-Clause 1.1 FIDIC 1999 provides the following definition which we consider to be of particular importance:

“1.1 Definitions

In the Conditions of Contract (“these Conditions”), which include Particular Conditions, and these General Conditions, the following words and expressions shall have the meanings stated. Words indicating persons or parties include corporations and other legal entities, except where the context requires otherwise.

...

1.1.2 Parties and Persons

1.1.2.4 “Engineer” means the person appointed by the Employer to act as the Engineer for the purposes of the Contract and named in the Appendix to Tender, or other person appointed from time to time by the Employer and notified to the Contractor under Sub-Clause 3.4 [Replacement of the Engineer].

1.1.2.6 “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.”

Likewise, but with an additional explanation, FIDIC 2017 defines the term "Engineer" by introducing the term "Engineer Representative":

“1.1.35 “Engineer” means the person named in the Contract Data appointed by the Employer to act as the Engineer for the purposes of the Contract, or any replacement appointed under Sub-Clause 3.6 [Replacement of the Engineer].

1.1.36 “Engineer’s Representative” means the natural person who may be appointed by the Engineer under Sub-Clause 3.3 [Engineer’s Representative].”

Before proceeding further, we would like to emphasize two very important facts. An Engineer can be a natural person, but such project setup is possible only on very simple projects where the requirement of technical expertise of the Engineer is limited. In most cases, the Engineer must be a legal entity that will ensure that all engineering disciplines are adequately "covered", i.e. that experts in structural engineering, surveying, mechanical, electrical, etc. are provided.

The second important fact refers to the provision of Sub-Clause 1.1.2.6 by which the Employer’s Personnel includes all persons acting in the role of Engineers. In all previous editions of the FIDIC Red Book (1957, 1963, 1977 and 1987), the Engineer was a (quasi) independent participant in the project.

Formally the Engineer is appointed by the Employer, however according to the provisions of the Sub-Clause 2.6 of the „Conditions of Contract for Works of Civil Engineering Construction [6], FIDIC 1987:

“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 the Contractor*

he shall exercise such discretion impartially within the terms of the Contract and having regard to all the circumstances. Any such decision, opinion, consent, expression of satisfaction, or approval, determination of value or action may be opened up, reviewed or revised as provided in Clause 67.”

In our opinion, this position of the Engineer (to be simultaneously engaged by the Employer but to act in an independent manner) was unsustainable and influenced the Engineer to be perceived not only by the Contractor as biased towards the Employer but also the opposite by the Engineer to be perceived as biased towards the Contractor and contrary to the interests of the Employer as the party that appointed him. Consequently, in the FIDIC 1999 edition all possible doubts have been clarified in the above-mentioned manner by which the Engineer is defined as part of the Employer’s Personnel.

However, FIDIC has made one compromise when it comes to the performance of duties by Engineers. Although in all situations the Engineer is considered to be part of the Employer’s Personnel and to act in accordance with his interests, when making Decisions in accordance with Sub-Clause 3.5, the following is stated:

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.

Also, it is important to note the following: the exception to the acting in the interest of the Employer given in FIDIC 1999 in Sub-Clause 3.5 is significantly strengthened primarily by the new definition given in Sub-Clause 3.7 of the FIDIC 2017:

“When carrying out his/her duties under this Sub-Clause, the Engineer shall act neutrally between the Parties and shall not be deemed to act for the Employer.

...

The Engineer shall make a fair determination of the matter or Claim, in accordance with the Contract, taking due regard of all relevant circumstances.”

Due to all doubts about how to ensure that this provision is actually applied in practice, the new obligations of the Employer are added in Sub-Clause 3.2:

“...If the Engineer is required to obtain the consent of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. There shall be no requirement for the Engineer to obtain the Employer’s consent before the Engineer exercises his/her authority under Sub-Clause 3.7 [Agreement or Determination]. The Employer shall not impose further constraints on the Engineer’s authority.”

The importance of these provisions was further emphasized by FIDIC with the issuance of FIDIC Golden Principles 2019 [5], i.e. the rules that must be followed in order for a contract to be called a FIDIC contract. Namely, the golden rule number 1 (GP1) states the following:

“The duties, rights, obligations, roles and responsibilities of all the Contract Participants must be generally as implied in the General Conditions, and appropriate to the requirements of the project.”

This is further given as an example of changes that is not in accordance with the golden rule number 1:

“Under a Red Book, or Yellow Book contract, the Engineer is required to obtain the Employer’s approval before making any determination of a Contractor’s claim or granting any extension of time pursuant to Sub-Clause 3.7 (or Sub-Clause 3.5 in the 1999 Editions). The Engineer’s role as defined in a FIDIC Contract is to fairly determine the Contractor’s entitlements in accordance with the Contract conditions, and this should not be subject to influence or control by the Employer.”

The genesis of (quasi) independence of Engineers is interesting. FIDIC 1987 defines the obligation to be "impartial". In FIDIC 1999, this obligation (only when making decisions) becomes "fair" which in FIDIC 2017 evolves into "neutral". Unfortunately, in none of the editions, there was a precise definition of these terms, which were certainly, one of the causes of disputes. Although the

intention of the FIDIC 2017 was to clarify that the Engineer shall act “*neutrally*” i.e. shall not take sides and “*shall not be deemed to act for the Employer*” the new formulation does not provide the desired clarity and we deemed that the lack of definition shall continue to be a cause of disputes.

As far as the Golden Rules are concerned, it remains to be seen in practice whether it is possible and in what way to respect the stated golden rule. We are afraid that the possible situations related to, especially, public sector projects that are the subject of certain allocations (budget, credit, etc.) are not properly perceived, but also the basic limitation of the Engineer's role of not having the right to make changes to the contract.

In accordance with all the above, the Engineer is a person (legal or natural) who derives his rights and obligations from the FIDIC construction contract, but also from his consulting (service contract) with the Employer. Such a role determined by the contract is completely in accordance with the provisions of the Law on Contracts and Torts [4]. First, through the general provisions that refer to the service contract (Article 672), and then through the provisions of the construction contract (Article 701).

Article 672

The client has the right to supervise the performance of work and give instructions when it suits the nature of the work, and the employee is obliged to enable him to do so.

Article 701

The contractor is obliged to enable the client to constantly supervise the works and control the quantity and quality of the used material.

The role of the Engineer defined in this way, as can be seen from the above provisions, **is of a private legal nature**, i.e., the Employer has the right to constantly monitor and supervise by himself, or by authorizing another person, whether the service will be sufficient in terms of quantity and quality and in all respects according to the provisions of the contract.

4. ENGINEERING SUPERVISION

Engineering supervision, on the other hand, is not only a question of the contractual relationship between the Employer and the Contractor, but also envisages the fulfilment of obligations set by the Article 100 of the Law on Spatial Planning and Construction. [2]

Therefore, the supervision derives its rights and obligations from the provisions of the Law on Spatial Planning and Construction and its bylaws.

Article 100 of the Law on Spatial Planning and Construction envisages:

“During the structure building, the employer shall provide for the performance of engineering supervision.

...

The supervision set out in para.1 of this Article shall include, in particular: control of execution of works as per the reviewed final design, the present Law and separate regulations...”

Further, the obligations of the Engineering Supervisor are set in the Article 95 of the Law on Spatial Planning and Construction:

“During the execution of works, engineering supervisor shall make sure that the contractor:

1) is executing works in accordance with the reviewed final design;

2) is marking boundary and building lines, elevation points of the structure and terrain alignment, in compliance with the reviewed final design;

...

4) is organising the building site in a manner which ensures access to the location, unimpeded traffic and protection of the environment during construction;

5) is protecting trees, hedges and other plants, which must be preserved and protected during construction work pursuant to separate regulations;

6) is ensuring the safety of the structure, health and safety at work of employed persons and protection of the environment (adjacent structures and infrastructure);

...

9) is ensuring measurements and geodetic monitoring of soil and structure behaviour during the building ...”

When determining the role of the Engineer Supervision the provision of the Article 97 of the Law on Spatial Planning and Construction is also significant:

“... ”

If the Engineering Supervisor finds that the Contractor’s remarks set out in para.1 of this Article are justified, he shall order the Employer to change the final design and to review it without further delay, and shall notify the competent inspection authority thereof.

...

If the Employer or Design Engineer who has developed the final design fails to act pursuant to para.3 of this Article, the Engineering Supervisor shall notify the competent inspection authority thereof within seven days of the receipt of the warning.

...

In the event set out in para. 6 of this Article, Engineering Supervisor shall inform the Employer and the competent inspection authority and issue an order to the Contractor to execute works in accordance with Article 111 of the law.”

As determined in the provisions above, regardless of the contractual relationship between the Employer and the Engineering Supervision, the Engineering Supervision role has **a public legal nature**, i.e. it ensures that the works are performed in accordance with the construction permit and the Law on Spatial Planning and Construction.

Moreover, the provisions of the Law on Spatial Planning and Construction introduced a new set up whereby the obligations of the commission for technical acceptance (which was previously performed by the public authorities) and engineering supervisions were combined, therefore increasing the role of the Engineering Supervisor by transferring the public authorities. The Final Report issued by Engineering Supervision has replaced the report of the commission for technical acceptance of the construction which was envisaged in previous regulations, i.e. it enables registration of the construction in the Land Registry and use of the construction.

Article 103

The Engineering Supervisor shall make accurate statements on the works executed on the construction of the structure in the final engineering supervision report and make a written statement that the structure was built in accordance with the reviewed final design, i.e., constructed in accordance with the reviewed as-built design, law and other regulations or a statement that the structure is fit for occupancy and that it can be used in the designated manner.

Article 104

Use of the structure shall not be allowed prior to registering the structure into the Land Registry.

The Employer shall file an application for registration into the Land Registry within 15 days of the receipt of the final engineering supervision report.

Enclosed to the application set out in para. 2 of this Article, along with the evidence laid down by the law governing the registration of rights to real estate, the employer shall submit the final engineering supervision report.

The transferring of the previous obligations of the public authorities to the Engineering Supervisor is further supported in the Article 125

“A reviewer may be a natural person who is performing the tasks of engineering documents or engineering supervision of construction, who is a Montenegrin national with at least four years of work experience on the development of engineering documents and/or the building of structures in the capacity of a chartered engineer.”

The intention of the legislator to entrust part of the activities of the public authorities to the Engineering Supervisor is explicitly given in the Report on Public Debate on the Draft Law on Spatial Planning and Construction, prepared by the Ministry of Sustainable Development and Tourism, dated July 2017.

MUNICIPALITY OF BUDVA (on proposal of Article 116 Reviewer)

it is omitted that the review must be a member of the Chamber of Engineers of Montenegro, but it is prescribed that the natural person must be a Montenegrin citizen. We believe that the reviewer may be a person with permanent residence in Montenegro, who is a member of the Chamber of Engineers and has valid licenses for the preparation of technical documentation and execution of works.

Here we noticed the following contradiction: the insurance policy is an obligation for the designer who does not have to be a Montenegrin citizen, and the reviewer does not have to have a liability insurance policy, but must be a citizen of Montenegro.

Answer: it is prescribed that the licensee must be a member of the Chamber. On the other hand, reviews and experts of engineer supervision will take over a part of the tasks that were in the competence of the body, so it is necessary for them to be Montenegrin citizens.

MONTENEGRIN ELECTRICITY TRANSMISSION SYSTEM (on proposal of Article 116 Reviewer)

The review (meaning the review of the technical documentation) is a person who is a Montenegrin citizen.

Proposal: delete this part in terms of citizenship because it limits the possibility of selecting the review of technical documentation for some more complex infrastructure projects.

Answer: reviewer take over some of the tasks that were in the competence of the state body, so it is necessary for them to be Montenegrin citizens.

MUNICIPALITY OF PLJEVLJA (on proposal of Article 123 Prohibition of conflict of interest)

General discrimination against employees in the state administration was committed. Why can't an investor supervise if he has qualified engineers?

Answer: The investor cannot perform supervision because for review and engineering supervision, specialized companies will be formed to which the tasks that are now in the competence of state or local authorities are transferred by this law.

5. CONCLUSION

A detailed comparison of the obligations of the Engineering Supervisor and the Engineer, shows that a significant number of obligations of the Engineering Supervisor and the Engineer overlap, such as: obligations to control the quality of work performed, control the work programme or verification of work performed by the Contractor for payment, since such obligations are envisaged both by the Law on Spatial Planning and Construction and the FIDIC Contract.

The role of the Engineer under the FIDIC Contract is clearly a much wider (in particular in the FIDIC 2017 edition) than the role of the Engineering Supervisor set under the Law on Spatial Planning and Construction. Also, contrary to the position of the Engineer under FIDIC the Engineering Supervisor is not acting as the Employer's agent, (Employer's Personnel) neither his authority derives from the works contract.

In fact, the main difference of the roles of Engineer and Engineering Supervisor is primarily set by their legal nature. While the role of the Engineer and its relationship with the Employer under the FIDIC Contract is purely of a private nature, governed by the service contract among the private

parties, the role of the Engineering Supervisor in addition to the contractual i.e., private nature also has a public role which derives of defending the public interest based on authorizations of the Engineering Supervisor set by the Law on Spatial Planning and Construction.

It was not intention of the authors to show that these different roles are representing in any way irreconcilable differences. Also, due to the limited form of this paper the authors focused only on the main differences in the roles of the Engineer under FIDIC and Engineer Supervision under the Law on Spatial Planning and Construction. What is important is that Employers are aware of the different roles, different legal and/or stakeholder's requirements and to take all of the circumstances into consideration when preparing Terms of Reference for selection of consulting engineers and/or Engineering supervision services.

LITERATURE (STYLE LITTITLE: 11PT, BOLD, ALL CAPS, BEFORE 24PT, AFTER 12PT)

- [1] Conditions of Contract for Construction, for Building and Engineering Works designed by the Employer, First Edition 1999, FIDIC, 1999, ISBN: 2-88432-022-9.
- [2] Law on Spatial Planning and Construction (Official Gazette of Montenegro Nos. 64/17, 44/18,63/18, 11/19 and 82/20)
- [3] Conditions of Contract for Construction, for Building and Engineering Works designed by the Employer, Second Edition 2017, FIDIC, 2017, ISBN: 978-2-88432-084-9
- [4] Law on Contracts and Torts (Official Gazette of Montenegro Nos. 47/08, 04/11 and 22/17)
- [5] The FIDIC Golden Principles, First Edition 2019, <https://fidic.org/books/fidic-golden-principles-2019>
- [6] *Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987, Reprinted 1988 with editorial amendments, Reprinted 1992 with further amendments, FIDIC, 1992, ISBN: 2-88432-001-6*
- [7] Law on International Private Law (Official Gazette of Montenegro Nos. 01/14, 06/14, 11/14, 14/14 and 47/15)

Note: This paper is accepted for publishing on the 8th International Conference "Civil Engineering-Science and Practice", GNP 2022- Kolasin, Montenegro, 8-12 March 2022