



ADB

FIDIC Contract Management Workshops

Engineer's Role & DBs

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3. The FIDIC “Pink Book” Model - General

- Pink Book = Conditions of Contract for Construction, FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER. (MDB HARMONISED EDITION [2010])
 - Intended to be a remeasurement contract.
 - The Engineer may or may not be the designer.
 - The Engineer is allocated a powerful role as first line dispute resolver.
 - A standing Dispute Board is foreseen to foster dispute avoidance and serve as second line dispute resolver.

The FIDIC “Pink Book” Model – The Engineer

- The Engineer’s role is partly defined under Clause 3 – but in reality almost every clause of the Contract mentions the Engineer.
- His role is a mixture of Employer’s agent – checking quality, chasing progress, processing payments and generally ensuring compliance with the Contract, on behalf of the Employer.
- **But it also involves him acting as a semi-independent professional, making determinations (decisions) which are fair and in accordance with the Contract.**

The Engineer

The Engineer's authority generally **PB /2017 RB**

- The Engineer has no authority to amend the Contract (**PB SC3.1 3.1/ SC 3.2**), but after approval by the Employer, he/she can issue Variations (SC 13.1). What does this mean?
- Whenever exercising specified or implied authority, the Engineer is deemed to act for the Employer.
- No authority to relieve either Party of duties or obligations.
- If the Employer's approval is required for a specified authority, it must be stated in the **Particular Conditions/ Special Provisions**.
- The Employer's approval is deemed granted any time the Engineer exercises a specified authority for which approval is required.

The Engineer

The Engineer's authority generally

- Under the Pink Book only, the Employer can unilaterally impose further constraints on the Engineer's authority.
- Under the **Gold Book** and the **2017 RB (SC 3.2)**, the Employer cannot unilaterally impose further constraints on the Engineer's authority.

The Engineer

The Engineer's authority in matters of payment certification **PB**
/2017 RB

- The Engineer is the sole decider of the amount to be paid to the Contractor in Interim Payment Certificates (Sub-Clause 14.6).
- Corrections or modifications can only be made in future Payment Certificates.

The Engineer

The Engineer's authority in matters of payment certification PB

- The Employer's rights to contest must pass through the Employer's claims procedure of Sub-Clause 2.5 and then through Sub-Clause 20.4 (DB).
- The Contractor's rights to contest must pass through the Contractor's claims procedure of Sub-Clauses 20.1/3.5 and then through Sub-Clause 20.4 (DB).

The Engineer's authority in matters of payment certification 2017 RB

- A new Contractor's claims procedure has been included in Sub-Clause 14.6.3. The Contractor is to include amounts identified as not certified in its next Statement. If the Contractor is not satisfied with the next IPC, the Contractor sends a Notice for a Sub-Clause 3.7 determination.
- The Employer's rights to contest must pass through the Employer's claims procedure of Sub-Clause 20.1(c) and then through Sub-Clause 21.4 (DAAB).

The Engineer

The Engineer's authority in matters of Variation valuations

- The Engineer issues Variations (SC 13.1)
- Under the **PB** the Engineer is to obtain the Employer's specific approval before issuing a Variation instruction or approving a proposal for a Variation from the Contractor. There is an exception for emergencies and Variations less than the stated percentage.
- As a practical matter under the **2017 RB** GCs, Variations should be reviewed with the Employer prior to issue, but there is no express requirement to do so. ADB's Special Provisions reinstate the old PB rule.
- Variations can be issued "unilaterally" – meaning prior to or without any agreement on price or time impact.

The Engineer

The Engineer's authority in matters of Variation valuations

- The Engineer values the Variation and any time impact, if claimed by the Contractor.
- **PB:** Contestation of the Engineer's valuation could be resubmitted to the Engineer for a formal determination under Sub-Clause 3.5 by the Contractor or Employer or more often submitted directly to the DB under Sub-Clause 20.4.
- **PB:** The procedure in the PB was not defined and not time constrained. As will be seen in the next slide, the 2017 RB calls for a prescriptive procedure.

The Engineer

The Engineer's authority in matters of Variation valuations (2017 RB)

- The Engineer instructs a Variation by giving a Notice including the required change plus the requirements for recording Costs (SCs 13.3.1 and 3.5).
- It is now clear that the Engineer issues a fair determination through a [“Notice of the Engineer's Determination”](#), in accordance with the Contract having due regard for all circumstances, with its valuation of the Variation under SC 3.7.
- The time frame is 42 days from receipt of the Contractor's submission or receipt of requested further particulars.
- The Engineer shall include reasons and detailed supporting documents.
- Recall that the time bar provisions of SC 20.2 are expressly excluded for Variations.

The Engineer

The Engineer's authority in matters of Variation valuations (2017 RB)

- If the Contractor contests it must issue a "Notice of Dissatisfaction" (NOD) within 28 days of a rejection or there is a "deemed rejection".

CONTRACTORS BEWARE:

- If no NOD is issued, the Engineer's determination becomes final and binding. There is no recourse to the DAAB or arbitration.

The Engineer

The Engineer's authority in matters of disputes PB

- If an agreement cannot be reached in respect of a Contractor's claim (SC 20.1) or Employer's claim (SC 2.5), the Engineer issues a "determination" (SC 3.5).
- The Engineer is required to make "a fair determination in accordance with the Contract".
- As a first step, the Engineer is required to consult with the Parties in an endeavour to reach an agreement. Is this mediation?
- The determination is binding on the Parties unless and until revised by the DB, or arbitral tribunal, via Clause 20 procedures.

The Engineer's authority in matters of disputes **PB**

Engineer must then issue a "determination" under Sub-Clause 3.5.

Procedures for the determination of the Contractor's or Employer's claims are identical:

- Engineer **to consult with the Employer and the Contractor** in an endeavour to reach agreement for resolution of the claim;
- If agreement is not achieved, the Engineer shall make a **fair determination in accordance with the Contract** taking account of **relevant circumstances**;
- Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars.

The Engineer's authority in matters of disputes **PB**

- Engineer's determination of a claim will be based on the particulars submitted, but not necessarily confined thereto.
- Since the Engineer is required to pay due regard to all relevant circumstances, he should take into consideration events or circumstances of which he is aware.
- Each IPC shall include amounts for any claim as have been reasonably substantiated.
- Unless and until the particulars supplied are sufficient to substantiate the whole of a claim, the Contractor shall be entitled to payment for such part of the claim as he has been able to substantiate.
- Each Party shall give effect to each agreement or determination unless and until it is revised in the process of Dispute Resolution.

Engineer's authority in matters of disputes - **New Features 2017 RB**

- Contractor's and Employer's claims are now both covered in Clause 20.
- Recall two claims procedures:
 - 20.1(a) and (b) for Contractor's claims for additional payment and EOT and Employer's claims for additional payment and extension of the DNP.
 - 20.1(c), expedited procedure for non monetary claims.
- The new notice provisions have been covered in a previous session.
- Recall that an Engineer's determination can become final and binding due to a failure to issue a timely Notice of Dissatisfaction. An Engineer's determination could never become final and binding under the PB.

Engineer's authority in matters of disputes - **New Features 2017 RB**

WARNING ABOUT SUB-CLAUSE 21.4.1(a):

- If a Party has issued a Notice of Dissatisfaction (NOD) after and Engineer's determination, there is now a time limit of 42 days to submit disputes to the DAAB.
- If the dispute is not submitted to the DAAB in 42 days, the NOD is deemed to have lapsed and the NOD become invalid.
- Because the NOD has become invalid, the Engineer's determination becomes final and binding.
- The impact of these changes is that the Engineer's authority has been substantially strengthened in the 2017 RB compared to the PB.
- **The impact of Sub-Clause 20.4.1(a) may also be to force more referrals to the DAAB.**

The Engineer

The Engineer's authority in matters of defective works PB /2017 RB

- Whether during construction (Clause 7), at taking over (Clause 9) or during the Defects Notification Period (Clause 11), the Engineer determines if the Works are defective.
- Standard recourse procedure if a Party disagrees with the Engineer.

The Engineer

The Engineer's authority in matters of Subcontractor selection (SC 4.4 and 4.5) **PB**

- The Contractor may not subcontract the whole of the Works.
- The Contractor is required to obtain the Engineer's prior "consent" before subcontracting.
- Assignment provisions are to be included in the Subcontract, notably in case of Contractor bankruptcy.
- The intent is not to control the subcontracting process.

The Engineer

The Engineer's authority in matters of Subcontractor selection (SC 5.1) 2017 RB

- The Contractor is required to obtain the Engineer's prior "consent" before subcontracting.
- Percentage cap to be stated in Contract Data. If nothing stated: limit is the whole of the Works.
- Contract Data can specify any part of the Works for which subcontracting is not permitted.
- The provision on assignment has been deleted from the GCs. The Guidance Notes provides suggested language for a Special Provision if this feature is desired.
- The intent in the 2017 RB is still not to overly control the subcontracting process.

The Engineer

The Engineer's authority in matters of termination PB /2017 RB

- Only the Employer can decide to terminate the Contract and decide whether to call the Performance Security.
- The Engineer however determines the value due to the Contactor at termination for Works executed (SC 15.3) and determines the Employer's claims (SC 15.4 and PB SC 2.5/ 2017 RB SC 20.1(a)).

The Engineer

Other PB limitations on the Engineer's authority

- Sub-Clause 4.12: agreeing or determining an extension of the time and/or additional cost,
- Sub-Clause 13.1: instructing a Variation, except;
 - (i) in an emergency situation as determined by the Engineer, or
 - (ii) if such a Variation would increase the accepted Contract Amount by less than the percentage specified in the Contract Data.
- Sub-Clause 13.3: approving a proposal for Variation submitted by the Contractor in accordance with Sub-Clause 13.1 or 13.2.

The Engineer

Limitations on the Engineer's authority under the 2017 RB

- None of the limitations described in the previous slide are included in the 2017 RB.
- However in the draft ADB COPAs there are similar requirements for the Engineer to obtain the Employer's consent for Variation instructions under Sub-Clause 13.1 and 13.2.
- Note that the draft ADB COPAs also includes the following Special Provision applicable to Sub-Clause 13.1: *"The Engineer shall be a third party capable of acting neutrally between the Parties."*

The Engineer

Removing an Engineer PB /2017 RB

- Will depend on your professional services agreement with the Engineer.
- However, under the FIDIC Works contracts (SC 3.4):
 - Must give 21 days (42 days **Gold Book**) notice to the Contractor, indicating the name and experience of the intended replacement.
 - If the Contractor considers the replacement to be unsuitable he may raise objection with full and supporting particulars.
 - The Employer shall give full and fair consideration to the objection.
 - Incompetence may be a breach under SC 3.1, but very difficult for the Contractor to take any substantive actions if the Employer retains a replacement.

Dispute Boards

- The provisions for DB should include:
 - the number of persons that the DB will comprise;
 - possibly a list of persons from whom members of the DB shall be selected;
 - procedures for appointment of members of the DB;
 - procedures for replacement of DB members;
 - General Conditions of the Dispute Board Agreement between the Parties and each member of the DB;
 - procedures for referral of disputes to the DB and for obtaining the DB's Decision.

Dispute Boards PB / Dispute Avoidance/Adjudication Boards 2017 RB

- Site visits and dispute avoidance:
 - Site visits should take place every 70-140 days. The purpose is to provide a forum for the Parties to discuss project issues in a neutral environment.
 - It gives the opportunity for the Parties to see how outside experts may view the project.
 - Visits also allow the DB/DAAB to stay abreast of issues in real time. This saves time if a dispute occurs because the DB/DAAB already if familiar with the project.
 - With the joint approval of the Parties, the DB/DAAB may give non-binding opinions.
 - Opinions can be issued quickly and help the Parties move through issues more quickly.

- Typically a 3-member DB/DAAB; although, for small contracts, a single Adjudicator is often specified.
- The DB/DAAB is to be appointed 28 days after Commencement in the **PB** and 28 days after the Letter of Acceptance in the **2017 RB**. Both are standing type DBs,
- **PB**: For appointment of a 3-person DB/DAAB the Employer and Contractor each nominate, for the other's approval, one member, and then the Parties and the two members agree upon the third member who shall be appointed to act as chairman.
- **2017 RB**: Similar procedure for appointment but the members are to be selected from a list in the Contract Data.

- **PB:** For a single Adjudicator, the person should be appointed by mutual agreement of the Parties.
- **2017 RB:** Similar procedure for appointment but the member is to be selected from a list in the Contract Data.
- In the event of a failure to agree, there is an appointing entity to be listed in the Contract Data. This is usually the FIDIC President or the ICC in Paris.
- Employer and Contractor are equally responsible for paying one-half of the fees and expenses of the DB/DAAB members. Therefore the terms of remuneration of the DB/DAAB members must be mutually agreed by the Parties when agreeing the appointments.

- The adjudication process begins with referral of the dispute to the DB/DAAB for a decision to be made, pursuant to Sub-Clause 20.4 PB/ 21.4 **2017 RB**
- For a three-person DB/DAAB, the notice of referral is deemed effective when received by the Chairman.
- **2017 RB**: Note the provision in Sub-Clause 1.3 which states that electronically transmitted communications are deemed to have been received on the day after transmission.
- DB/DAAB is required to render its reasoned decision to the Contractor and the Employer **within 84 days** after receipt of the notice of referral.
- DB/DAAB's decision is contractually binding and must be implemented by the Parties.
- If, **within 28 days** after receipt of the decision, neither Party serves written notice of dissatisfaction with the DB/DAAB's decision, the decision becomes final and binding.

- If the DB/DAAB fails to render a decision within 84 days, then either Party may within 28 days after the date by which the decision should have been received give notice to the other of dissatisfaction.
- Once a Notice of Dissatisfaction has been served, either because a Party is dissatisfied with the DB/DAAB Decision or no Decision was given within 84 days of the referral, either Party may then, subject to attempting amicable settlement, commence arbitration.

- Where a notice of dissatisfaction with the DB/DAAB's decision has been given, both Parties are required to attempt to settle the dispute amicably before referring the matter to arbitration.
- However, unless the Parties agree otherwise, arbitration may be commenced on or after the 56th day (**28 days 2017 RB**) after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement was made.
- Requirements for attempted amicable settlement do not apply prior to commencing arbitration for failure by either Party to comply with a DB/DAAB decision. In this event, the complying Party may, without notice to the non-complying Party, refer the failure to arbitration.

Are DBs Effective?

Statistical Findings : Dispute Escalation in more Detail

DB Effectiveness

	Standing Boards								Ad-Hoc Boards				
	Tot Projects	Dispute Avoidance Yes				Dispute Avoidance No				Nr. Boards	Opinions	Decisions	-> Arbitration
		Nr. Boards	Opinions	Decisions	-> Arbitration	Nr. Boards	Opinions	Decisions	-> Arbitration				
MDB	107	59	95	184	3	26	8	75	3	22	5	66	16
Bilateral Loan	37	17	76	48	0	3	0	1	0	17	0	20	7
Government	47	30	81	22	0	9	0	7	0	8	5	19	0
Private	11	5	15	15	0	0	0	0	0	6	16	30	1
Other	29	16	13	14	0	6	7	3	0	7	16	8	2
		Issues	280	283		Issues	15	86		Issues	42	143	
		∑ Issues	563		3	∑ Issues	101		3	∑ Issues	185		26
					0,53 %				2,97 %				14,05 %

Thank You!