



ADB

Role of the Employer and the Contractor

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1. The Employer

The role of the Employer is covered to a large extent by five sub-clauses of Clause 2:

- 2.1 Right of Access to the Site;
- 2.2 Permits, Licences or Approvals; **2.2 Assistance**
- 2.3 Employer's Personnel;
- 2.4 Employer's Financial Arrangements; and
- 2.5 Employer's Claims. **20.1 Claims**
- 2.5 Site Data and Items of Reference**

1. The Employer

However, the Employer's role and obligations are also mentioned elsewhere in the Contract and can be summarised in the order in which they appear in the General Conditions.

- Obtain building permit, etc.:

The Employer must obtain planning, zoning, building permits or similar permission for Permanent Works and any other permits described in the Specifications/Employer's Requirements as to be obtained by the Employer. (Clause 1.13)

1. The Employer

- Give right of access to and possession of the Site:
 - The Employer is required under Clause 2.1 to give the Contractor the “right of access to” and “possession of” the Site.
 - He may withhold doing so until the Performance Security has been received.
 - The right of access and possession must be given within the times stated in the Contract documents. If no times are stated, they must be given so as to allow the Contractor to proceed without disruption.
 - If the Contractor suffers delay and/or incurs Costs as a result of late possession, he is entitled to an extension of time and/or payment of the Cost plus reasonable profit.

1. The Employer

- Assist the Contractor for permits:

The Employer shall provide reasonable assistance to the Contractor to obtain any permits, approvals etc. the Contractor needs for the Works, for the delivery of Goods including customs clearance and for the export of his equipment. (Sub-Clause 2.2)

- Ensure the co-operation of his Personnel:

The Employer must ensure that his Personnel and his other contractors cooperate with the Contractor and take actions similar to those required of the Contractor with respect to safety and protection of the environment. (Sub-Clause 2.3)

1. The Employer

- Provide evidence of financial arrangements:
 - The Employer must provide **reasonable** evidence that financial arrangements have been made and are being maintained to enable him to pay the Contractor punctually.
 - He must do so within 28 days after receiving any request from the Contractor.
 - The information must relate to the Contract Price as estimated at that time.
 - Before making any material change to his arrangements, he must notify the Contractor and give detailed particulars. (Clause 2.4)

1. The Employer

- Employer's Claims

- The Employer (or the Engineer) must give **notice** and **particulars** to the Contractor of any claim by the Employer against the Contractor.
- The notice must be given **as soon as practicable** after the Employer became aware of the event or circumstances.
- The particulars must specify the basis for the claim and substantiate the amount and/or extension claimed.
- 2017 RB procedures already discussed

1. The Employer

- Appoint the “Engineer”/“Employer’s Representative”:
 - The Employer is required to appoint the “Engineer” and name him in the Contract Data.
 - He must promptly inform the Contractor of any change to the authority of the Engineer.
 - He must give notice to the Contractor of the duties and authorities of the Employer’s Representative.

1. The Employer

- If he intends to appoint a replacement, he must give notice to the Contractor at least 21 days beforehand (Yellow) / **42 days (2017 RB)** and he must not appoint a replacement against whom the Contractor raises reasonable objection. (Sub-Clause 3.4/ **3.6 2017 RB**)

1. The Employer

- Inform the Contractor of any restrictions on the Engineer's authority
 - Sub-Clause 3.1 states that whenever the Engineer exercises any authority for which he is supposed to obtain prior approval from the Employer, he is deemed to have obtained that approval before exercising the authority.
 - This means that:
 - The Employer is bound by the actions of the Engineer;
 - The Contractor does not have to worry about whether or not the Engineer exceeded his authority;
 - The Engineer may find himself sued by the Employer for the additional expense.

1. The Employer

- Changes in the restrictions on the Engineer's authority
 - In the Pink Book, the Employer may add or change the restrictions on the Employer's authority during the execution of the Contract.
 - This is not so in all the other forms of FIDIC Contracts.
 - The ADB COPA's have not integrated the PB Conditions and they follow the FIDIC policy of no changes to the Engineer's authority after contract signature.

1. The Employer

- Appoint a Dispute Board:
 - The Employer shall participate in the appointment of a Dispute Adjudication Board (DAB)
 - He may include in the tender documents a list of potential DAB members to be included in the Contract, if agreed by the successful tenderer. **List to be included in the 2017 RB**
 - Regardless of whether or not a list has been included in the Contract, he must appoint a member of the DAB within the time fixed in the Contract (3 member DAB) or if the Contract states that the DAB shall have one member, he must attempt to agree with the Contractor on the appointment within the time fixed in the Contract.

2. The Contractor

- Some of the Contractor's main obligations are summarized in Clause 4 but many are in fact spread throughout the whole document. Some of the more evident obligations include:
 - The Contractor is to design, execute and complete the Works and remedy any defects such that when completed, the Works shall be **fit for the purposes intended as defined in the Contract**.
 - The Contractor must provide and do everything that is necessary to satisfy the Employer's Requirements or implied by the Contract.

2. The Contractor

- He is responsible for the adequacy and safety of all operations.
- Whenever required by the Employer he must submit details of the arrangements and methods he intends to use.
- These will not be significantly modified without informing the Employer beforehand.

2. The Contractor

- Complies with applicable Laws:
 - The Contractor shall, in performing the Contract comply with applicable Laws.
 - He shall give all notices, pay all taxes, duties and fees and obtain all permits, approvals, etc required by the Laws in relation to the execution and completion of the Works and the remedying of defects.
 - He must indemnify the Employer against the consequences of any failure to do so. (SubClause 1.13)

2. The Contractor

- Provides the Performance Security:
 - The Contractor shall provide a Performance Security in the required form and in the amount and currencies stated in the Appendix to Tender, **within 28 days after receiving the Letter of Acceptance** (with a copy to the Engineer)
 - He must ensure that the Performance Security remains valid and enforceable until he has executed and completed the Works **and remedied any defects**. (Clause 4.2)

2. The Contractor

- Employer must return the Performance Security to Contractor **within 21 days** after receiving a copy of the **Performance Certificate**.
- He must not make any claim under the Performance Security **except for amounts to which he is entitled under the Contract** in the event of (Pink Book/ **2017 RB**):
 - failure to extend the validity (full amount claimable);
 - failure to pay an Employer's claim as determined under Sub-Clause 2.5. within 42 days of determination;
 - failure to remedy a default within 42 days of Employer's notice requiring remedying;
 - circumstances which entitle Employer to terminate under Sub-Clause 15.2.

2. The Contractor

- Appoints his Representative:
 - The Contractor must appoint the Contractor's Representative and give him all the necessary authority to act on his behalf.
 - Unless the person is named in the Contract (unusual) the Contractor must submit his name and details prior to the Commencement Date.
 - The Contractor must not revoke the appointment of the Contractor's Representative or appoint a replacement without the prior consent of the Engineer.
 - The Representative must be fluent in the language of the Contract. (Sub-Clause 4.3)

2. The Contractor

- Obtains the Engineer's consent to a subcontractor
 - The Contractor must obtain the Engineer's consent before appointing a Subcontractor, unless the Subcontractor is to supply materials only or is named in the Contract
 - He must give the Engineer at least 28 days notice of the intended date of the commencement of subcontractor's work.
 - Each subcontract shall permit the assignment of the benefit to the Employer under given circumstances. **Not in the 2017 RB**
 - The Contractor shall not subcontract the whole of the Works.
 - He remains liable for the acts and defaults of subcontractors.
 - **2017 RB: In the Contract Data can add a percentage cap on subcontracting and bar subcontracting of certain work,**

2. The Contractor

- Cooperates with others:
 - The Contractor must allow appropriate opportunities for work by others on or near the Site, **as specified in the Contract or as instructed by the Engineer.**
 - Any such instruction will be a Variation if and to the extent that it causes the Contractor to incur Unforeseeable Cost. (Sub-Clause 4.6)

2. The Contractor

- Satisfies himself regarding access routes to the Site:
 - The Contractor is deemed to have satisfied himself as to the suitability and availability of access routes to the Site.
 - The **PB** states however that the Employer is to provide effective access to the Site including special and temporary rights of way. Whereas the **2017 RB** states that this is the Contractor's cost.
 - He cannot claim for costs due to non-availability or non-suitability of the access routes. (Sub-Clause 4.15)
 - **2017 RB – adds however that the Contractor may claim if non-availability or non-suitability of the access route is due to a change to the access route by the Employer or third party.**
 - He must obtain at his own risk and cost any additional facilities outside the Site, which the Employer is not obliged to provide. (Sub-Clause 4.13)

2. The Contractor

- Protects the Environment:
 - The Contractor must take all reasonable steps to protect the environment (both on and off Site) and to limit damage and nuisance to people and property from pollution, noise, etc.
 - He must ensure that emissions, discharges and effluent stay within limits fixed in the Specification or by applicable Laws.
- Obtains power, water & other services for construction activities & tests:
 - Contractor is responsible for providing power, water, etc. for his construction activities.

2. The Contractor

- Maintains the Site in an orderly manner
 - The Contractor must confine his activities to the Site and any additional areas agreed by the Engineer as working areas.
 - He must take all necessary precautions to stay off adjacent land.
 - He must keep the site free of unnecessary obstructions and properly store or dispose of his Equipment or surplus materials.
 - He shall clear away any rubbish, Temporary Works, etc. and shall leave the Site in a clean and safe condition.



Thank You!