

# FIDIC Middle East Contract Users' Conference

Dubai,  
24-27 February 2020

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International Federation of Consulting Engineers  
The Global Voice of Consulting Engineers





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## How the 2017 Edition Addressed Contractors and Employers Concerns about the Role/Authority of the Engineer?

### Content

- Contractors Concerns about the Engineer's Role/Authority under the 1999 Ed.
- How the 2017 Edition Addressed Contractors Concerns?
- Employers Concerns about the Engineer's Role/Authority under the 1999 Ed.
- How the 2017 Edition Addressed Employers Concerns?
- Conclusion.



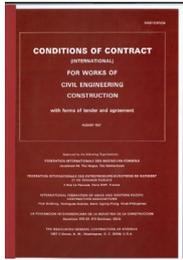


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## Evolution of the Role/Authority of the Engineer – Overview

Engineer's Authority



1957-1969



1977



1987



1999



2005-2010



2017

Independent  
Unquestionable significant authority  
No text on Impartiality (presumed)

'Impartial'  
Pre-Arbitral 'Decisions'

Acts for the Employer, BUT  
Makes fair determinations  
DAB

Acts for the Employer, BUT  
'Neutral'  
Dispute avoidance role

Limits on the  
Engineer's authority

Eng. Authority



Employer's Involvement/Control

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## Contractors Concerns about the Engineer's Role/Authority under the 1999 Ed.

- Despite the 1999 Ed. improvements ([SC 3.1](#), [SC 3.5](#) and [the DAB](#)), Contractors were skeptical about the Engineer's ability to make 'a fair determination' while acting for the Employer.
- Contractors saw the Engineer:
  - Likely to be biased as it is appointed and paid by the Employer.
  - Unlikely to determine in a way that reveals its own mistakes or adversely affects the Employer.
  - Keen to increase its chances of future appointments.
- Amendments restricting the Engineer's role/authority increased Contractors complaints.





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## Question (1)

**Do you agree with the mentioned Contractors concerns about the Engineer's role/conduct?**

- 1) Agree
- 2) Not sure
- 3) Disagree





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## How the 2017 Edition (R&Y Books) addressed Contractors Concerns?

The 2017 Ed. comprised (new/amended) improved express provisions, notably:



➤ **SC 3.2** [*Engineer's Duties and Authority*]:

- “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.”

➤ **SC 3.7** [*Agreement or Determination*]:

- “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.”

➤ SC 3.1, SC 3.4 and SC 3.6 included other improvements.





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## How the 2017 Edition (R&Y Books) addressed Contractors Concerns? (Cont'd)

- The scope of the Engineer's role and authority under SC 3.7 expanded with emphasis on Dispute avoidance, including:
  - Detailed, reinforced obligations to forge agreements.
  - A new role to handle Claims for other entitlements (SC 20.1 (c)).
  - A new authority to extend the Notice of Claim (SC 20.2.5).
  
- The **2017 Guidance Notes** reinforced the updated express provisions by:
  - Explaining acting “**neutrally**” as: “... *under this Sub-Clause the Engineer treats both Parties even-handedly, in a fair-minded and unbiased manner.*”
  - **Repeatedly stressing NOT** to restrict the new role/authority under SC 3.7.
  - **Strongly recommending** taking due regard of FIDIC Golden Principles!

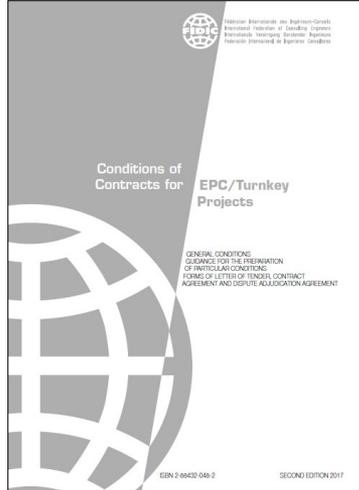




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## How the 2017 Edition addressed Contractors Concerns? (Cont'd)



The **2017 SB**, **an Engineer-free Form**, included another notable change:

The Employer **shall** appoint an Employer's Representative (**SC 3.1**) who **shall not be deemed to act for the Employer** when making a **fair determination** of the **matter** or **Claim** under SC 3.5 [*Agreement or Determination*].



- All the above demonstrates the extent to which the 2017 Edition went in furthering the spirit of neutrality and addressing Contractors concerns.





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## Employers Concerns about the Engineer's Role/Authority under the 1999 Ed.

### Common Concerns

#### ➤ By Public Employers:



#### ➤ By Financiers (e.g. MDBs):



Therefore, amendments were often made in the PCs; or, the GCs were modified (the Pink Book).





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## Employers Concerns about the Engineer's Role/Authority under the 1999 Ed. (Cont'd)

Discreet concerns



➤ **By Private Employers:**

**disturbing fears of potential malpractice by the Engineer, including:**

- Collusion with the Contractor/Suppliers during pre/post-contract stages.
- At best, leniency with Contractor's claims to increase the Engineer's Fees.



Surprisingly, Contractors and (some) Employers did not seem to have adequate faith in the Engineer's conduct **despite the GCs provisions!**





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## Question (2)

**Do you agree (are you familiar) with the mentioned Employers discreet concerns about the Engineer's role/conduct?**

- 1) Agree
- 2) Not sure
- 3) Disagree





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## How the 2017 Edition (R&Y Books) addressed Employers Concerns?

The answer is mainly in the Guidance Notes, **not in express provisions in the GCs.**

➤ See the GNs **recommendations** on:

**SC 3.1** [*The Engineer*]: using the 2017 5<sup>th</sup> Ed. of the White Book to appoint the Engineer.

**SC 3.2** [*Engineer's Duties and Authority*]: the Engineer should take due regard of:

- a) FIDIC Code of Ethics (FCoE); and
- b) FIDIC Guidelines for Integrity Management System (FIMS).





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## How the 2017 Edition (R&Y Books) addressed Employers Concerns? (Cont'd)

- The 5<sup>th</sup> Ed. of the White Book is aligned with the 2017 Ed. of the RYS Books and comprises improvements incl. the Engineer's compliance with FCoE and exercising **independent professional judgement**.
- FCoE is a comprehensive code of professional conduct covering, inter alia, **professional status, independence** and **competence** (copy attached).
- Compliance with FCoE and FIMS provides reassurance to Employers and Contractors alike!
- The 2017 Guidance Notes refer to several other FIDIC publications e.g. FIDIC Golden Principles and **FIDIC Procurement Guide** (addressing, inter alia, **FIDIC QBS of Consulting Services**).
- These publications help provide guidance for a complete procurement process.





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## How the 2017 Edition (R&Y Books) addressed Employers Concerns? (Cont'd)

### Question (3)

**SC 3.1:** The Engineer shall be a professional engineer having suitable qualifications..  
**Could this be considered an implied provision addressing Employers concerns?**



- 1) Yes
- 2) Not Sure
- 3) No





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## Question (4)

**How many times did you read FIDIC Code of Ethics during the last 5 years?**

- 1) Never
- 2) Once
- 3) > 5 times





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## Conclusion and Recommendations

- The 2017 Ed. addressed Contractors and Employers concerns BUT differently (not even-handedly!).
- The Guidance Notes for FIDIC Forms of Contract are a MUST-READ.
- The 2017 Edition could provide an integrated solution covering the (QBS) appointment of the Engineer or the Employer's Representative under a FIDIC Model Agreement that is extensively improved and aligned with the updated works Contracts. **This is a commendable improvement!**
- Employers are recommended to adopt **FIDIC Procurement Guide** and FIDIC Golden Principles.
- Engineers actions are vital in confirming (restoring?) confidence in the Engineer's role/conduct.
- **As the global voice of consulting engineers**, FIDIC can further the use of **and compliance with** FIDIC Code of Ethics as part of its continuing efforts on training and capacity building.





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## How the 2017 Edition Addressed Contractors and Employers Concerns about the Role/Authority of the Engineer?

**Thank You!**

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