The role of the Employer in accordance with FIDIC

The Employer

• The FIDIC standard form for the Contract Agreement includes the statement that the Employer covenants to pay the Contractor the Contract Price in consideration of the execution of the Works and the remedying of defects therein.

• However, this does not mean that the Employer is only required to appoint an Engineer to administer the project and then sign the payment cheques.

The Employer

• Even though the Engineer is classed as ‘Employer’s Personnel’ there are some tasks which are allocated to the Employer.

• The Employer could delegate the paperwork to the Engineer, but the actual tasks require the Employer to be involved.

• It is important that the Employer designates a staff member, separate from the Engineer to represent him whenever the Contract requires notice to, or action by the Employer.

Right of Access to the Site

• The Employer shall give the Contractor right of access to, and possession of all parts of the Site within the time stated in the Appendix to Tender.

• However, the Employer may withhold such right of possession until the Performance Security has been received.

Right of Access to the Site

• If no such time is stated in the Appendix to Tender, the Employer shall give the Contractor right of access to, and possession of, the Site within such times as may be required to enable the Contractor to proceed in accordance with the programme submitted.
### Right of Access to the Site

- If the Contractor suffers any delay as a result of a failure by the Employer to give any such right or possession within such time, the Contractor shall give notice to the Engineer and shall be entitled to:
  - Extension of time for any delay if completion is or will be delayed and
  - Payment of any such Cost plus reasonable profit which shall be included in the Contract Price.

### Right of Access to the Site

- After receiving this notice the Engineer shall proceed in accordance with the clause on ‘determinations’ to determine these matters.

- However, if the Employer’s failure was caused by an error or delay by the Contractor including an error in, or delay in the submission of any of the Contractor's Documents, the Contractor shall not be entitled of time, Cost or profit.

### Right of Access to the Site

- The possession does not necessarily mean exclusive possession, but shared possession needs clarification in the Particular Conditions.

- When the Contractor takes possession of the Site, he is responsible for safety, security and insurance. If the Contractor does not have full control of the Site and the activities on the Site, or the site will be shared, then the extent of the Contractor’s responsibilities must be clearly stated.

### Right of Access to the Site

- If the Employer fails to give right of access to and possession of the Site within the stated period then the Contractor will be entitled to an extension of time plus his costs and a reasonable profit.

### Permits, Licenses or Approvals

- The Employer shall provide reasonable assistance to the Contractor at the request of the Contractor:
  - By obtaining copies of the Laws of the Country which are relevant to the Contract
  - For the Contractor's applications for any permits, licenses or approvals required by the Laws of the Country

### Employer's personnel

- The Employer shall be responsible for ensuring that the employer’s Personnel and the Employer’s other Contractors on the Site:
  - Cooperate with the Contractor’s efforts and
  - Take actions similar to those which the Contractor is required to take in relation to the clauses relevant for ‘Safety Procedures’ and ‘Protection of the Environment’.
Employer’s personnel

• Employer’s Personnel includes:
  – The Engineer and his assistants
  – All staff, labour and employees of the Employer and the Engineer
  – Any other person who the Employer or the Engineer has decided to designate as Employer’s Personnel.

Employer’s personnel

• When two or more Contractors are working on the same Site the possibilities of delays and costs from failures of cooperation can lead to serious problems.
  
• The FIDIC Clauses may be adequate when one Contractor is carrying out a high percentage of the total work on the Site.
  
• If the work is more evenly divided between two or more Contractors, the provision of the Contract need to be reviewed.

Employer’s Claims

• If the Employer considers himself entitled to any payment the Employer or the Engineer shall give notice and particulars to the Contractor.
  
• The notice shall be given as soon as practicable after the employer became aware of the event or circumstances giving rise to the claim.

Employer’s Claims

• The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled for the claim.

Employer’s Claims

• The Engineer shall then proceed in accordance with the ‘Determination’ clause to agree or determine:
  – The amount that the employer shall be paid by the Contractor
  
• This amount can be deducted from the Contract Price and Payment Certificates.

Employer’s Claims

• If the Employer deducts money from the Contractor which he (the Employer) is not entitled to do, will enable the Contractor to claim ‘all consequences of the deductions’.
  
• This could involve a substantial claim by the Contractor. In such case, the Employer would be advised to reserve his rights but not to deduct any money until the final resolution of this matter.
The role of the Contractor in accordance with FIDIC

• In accordance with the FIDIC form, the Contractor will ‘execute and complete the Works and remedy any defects therein, in conformity with the provisions of the Contract’.

• In order to achieve this, the Contractor accepts a large number of secondary obligations.

The Contractor’s General Obligations

• The Contractor shall design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract and with the Engineer’s instructions and shall remedy any defects in the Works.

• The Contractor shall provide the Plant and Contractor’s Documents specified in the Contract, and all Contractor’s personnel, Goods, consumables and other things and services required to carry out the Works.

• The Contractor shall whenever required by the Engineer, submit details of the arrangements and methods which the Contractor proposes to use.

• No significant alteration to these arrangements and methods shall be made without this having been notified to the Engineer.

The Contractor’s General Obligations

• The Contractor shall be responsible for the:
  – Adequacy
  – Stability
  – Safety
  of all site operations and methods of construction.
The Contractor’s General Obligations

• The FIDIC Conditions of Contract for Construction are intended to be used for projects with the design provided by the Employer.

• The phrase ‘execute and complete’ is important in the Contract. The requirement to execute and complete can also give an obligation to complete any item of work which is necessary for total completion of the Works, but may not have been shown in detail on the Drawings.

• This is an obligation to carry out and complete the Works and the question of whether payment is included in the Accepted Amount is a separate issue.

Performance Security

• The Contractor shall obtain a Performance Security for proper performance, in the amount and currency stated in the Appendix to Tender.

• The Contractor shall deliver the Performance Security to the Employer within 28 days after receiving the letter of Acceptance, and shall send a copy to the Engineer.

• The Contractor shall ensure that the Performance Security is valid and enforceable until the Contractor has executed and completed the Works and remedied any defects.

• If the Performance Security has an expiry date and the Contractor has not become entitled to receive the Performance Certificate by the date 28 days prior the expiry date, the Contractor shall extend the validity of the Performance Security until the completion of the Works and any defects have been remedied.

• The Employer may make a claim under the Performance Security if:
  – The Contractor does not extend the validity of the Performance Security
  – The Contractor does not pay the Employer an amount either agreed or determined as discussed previously (determinations under Engineer’s role)
  – The Contractor does not remedy a default within 42 days after receiving the Employer’s notice requiring the default to be remedied

• The Employer shall return the Performance Security to the Contractor within 28 days after receiving a copy of the Performance Certificate.
Contractor’s Representative

• The Contractor’s Representative is the Contractor’s equivalent to the Engineer.

• Some Tender Documents specify:
  – the required qualifications
  – the required experience and
  – that the Contractor’s Representative must be named in the tender.

Contractor’s Representative

• The Contractor’s Representative must:
  – Have received the consent (approval) of the Engineer
  – Not be removed or replaced without the prior consent of the Engineer
  – Have the authority to act on the Contractor’s behalf under the Contract
  – Be on site whenever work is in progress
  – Be fluent in the language for communication stated in the Contract.

Subcontractors

• The Contractor shall be responsible for the acts or defaults of any Subcontractor and his employees.

Cooperation

• The Contractor shall allow the following to carry out work on or near the site:
  – The Employer’s Personnel
  – Any other contractors employed by the Employer
  – The personnel of any legally constituted public authorities (government bodies) that carry out work not included in the Contract

Cooperation

• However, the Contractor may make a claim for Unforeseeable Cost and get paid as a Variation.

• Any delays would qualify for an extension of time.

Setting out

• The Contractor shall be responsible for the correct positioning of all parts of the Works, and shall rectify (correct) any error in the positions, levels, dimensions or alignment of the Works.