

THE POWER OF THE ENGINEER IN ENGINEERING CONTRACTS

Some comments

by

C. Rasiah

Many Engineers in Sri Lanka use the FIDIC International Conditions of Contract for major projects, sometimes with minor modifications. Under these conditions, the Engineer is an all-powerful figure, but his relationship to client and contractor is sometimes confusing.

The contractor is to complete the works to the Engineer's satisfaction, "and shall comply with and adhere strictly to the Engineer's instructions and directions on any matter touching or concerning the works" Clause 13. This sweeping provision could scarcely be more widely drawn, but is it that important in practice or, is it reasonable!

The legal effect of the requirement that the works are to Engineer's satisfaction is limited. Although his decision is binding until the work is completed, Arbitration is available to the contractor. The Arbitrator has controversial power to "open up, review and revise any decision or opinion of the Engineer" Clause 67 which means that Engineer's opinion has only temporary finality.

In many contracts we find the words "As directed by the Engineer" and the phrases "to the Engineer's Satisfaction" "As approved by the Engineer". These phrases are intended to be more or less synonymous and mean that where the Contract documents are not sufficiently precise or, are ambiguous or, where site or other conditions are such that the existing specifications etc., cannot properly be met by the Contractor, then the relevant work or, works shall be executed by the Contractor

in such a way that the works executed comply with the requirements, specifications etc., established by the Engineer and so that the finished work complies with the true intent of the Contract and is acceptable to the Engineer.

Of more significance and concern to the contractors is the Engineer's power to issue instructions and directions "on any matter whether mentioned in the contract or not".

Some Engineers make use of these words and even dictate the contractor's methods of working without giving rise to a variation order and thus prevent the contractor from claiming extra payment. This is unfair by the contractor. However, it has been held against him in the English High Courts on the ground that the methods of working are not stated in the Contract and therefore Engineer has the power to decide on the contractor's methods of working on the basis of Clauses 13 & 46 read conjointly.

Mr. C. Rasiah graduated from Cambridge University in May 1983.

He then worked in the U.K. with Howard Humphreys and Sons Consulting Engineers until end of 1937.

He worked as District Engineer, Superintending Engineer, Assistant Director and Deputy Director in the then Public Works Department for 1938-1960 and served as a Director Department of Water Supply and Drainage from 1961-1969.

He joined Samuel Sons & Company as Director in 1969 and now is a Consultant there.

This ruling will prevail in countries including Sri Lanka which have adopted the English Law but in other countries it is still a controversial subject.

Another interesting point is about the Engineer's powers and his role as Agent of the Employer. The important question always is in what capacity does the Engineer act? Does he do so in his capacity as an Agent for the Employer? If so, the Employer will be liable in damages if the Engineer acts wrongfully or, not at all. But if he is acting in the exercise of his independent professional role, he alone should be liable and not the Employer.

Where the contract imposes a duty on the Engineer indicated by the word "shall" - failure by the Engineer to act will amount to a breach of Contract for which the Employer may be liable in damage. In a recent English case (Groudace Ltd Vs London Borough of Lambeth (1986) 6 Con L R) it was held that an Architect's failure to deal with a Contractor's claims under a standard building contract gave the contractor a right to damages equivalent to the amount of his claim and the Employer's conduct debarred it of a right to Arbitration. This ruling applies equally well to the Engineer under FIDIC conditions of contract in countries like Sri Lanka which have adopted the English Law.

There are many acts which are outside the Engineer's authority as Agent of the Employer eg: He has no authority to vary the contract entered into between the parties unless of course he is specifically authorised to do so. Even if he is authorised as per contract conditions, it is not proper for the Engineer to make variations to the contract which will involve the Employer in additional financial commitments or, a longer period for completion of the work.

Many of the Contract clauses require the Engineer to exercise his discretion on matters which may affect the Contractor's interest. Cl. 52 (Variations & Claims) Cl. 40 (suspension) Cl. 44 (Extension of time) are prime examples. In exercising his discretion, the Engineer must act in a manner which is fair to both parties, taking into equal account the interests of both client and contractor. The FIDIC conditions were prepared on the basis that the Consulting Engineer and the Engineer will be independent Professional people. In Sri Lanka most of the Departments and Boards have their own Designers and the Engineer appointed to administer the contract is also an employee. Can independent judgement and action be expected in such cases! The answer in my view is "NO" as the Engineer depends on the Department or, Board for his living and betterment of his prospects.

Once the Engineer issues the maintenance certificate under Clause 62 it is certain that his powers are exhausted. He no longer has power to correct or modify previous certificates. But there are opposing views of the combined effect of clauses 61 and 62, some people arguing that the maintenance certificate is made binding and conclusive on the Employer and stop him questioning whether the contract has been duly performed.

The principle enshrined in clause 61 - namely that no certificate other than the maintenance certificate shall be deemed to constitute approval of the works - is contrary to all legal systems not based on the common law in any case. Either the taking over of the works or, the issue of the completion certificate amounts to approval of the work.

The Employer certainly bears a large and heavy responsibility for the Engineer's rights. Those rights are enforceable, and the Engineer's decisions may be challenged before the Arbitral tribunal. This is

the safeguard for contractors who discretionary powers conferred on the
are concerned about the vast dis- Engineer under FIDIC.