

1 **Owners' Obligations Under FIDIC Construction**
2 **Contracts**

3
4 Omar Alhyari
5 British University in Dubai, 345015 Dubai, UAE
6 Omar.alhyari@buid.ac.ae

7 **Abstract.** Proper delivery of construction projects entails collaboration between
8 contracting parties and strict performance of contracting obligations. Each
9 contracting party has rights that need to be fulfilled by the counterparty and
10 responsibilities that need to be performed and respected. This paper presents an
11 analysis of the obligations of the Owner according to FIDIC construction
12 contracts. Research on FIDIC contracts has faocused on the responsibilities of
13 either the Engineer or the Contractor with little or no attention to the obligations
14 of the Owner. The analysis revealed a number of obligations that include, but not
15 limited to, the following groups: 1) pre-construction obligations; 2) obligations
16 associated with contract documents; 3) obligations associated with the Engineer
17 and Owner's personnel; 4) holding risks of events caused by external factors
18 (third party actions); 5) obligations related to risks assumed by the Owner; and
19 6) Owner's obligations related to notification responsibilities. Proper
20 understanding of the obligations of the Owner can contribute to minimizing
21 disputes and claims, and as such minimizing the considerable costs associated
22 with the resolution and settlement of these disputes and claims.

23 **Keywords:** Employer, Owner, FIDIC, Obligations, Risk Allocation.

24 **1 Introduction**

25 Traditionally, the three major parties in a construction contract are: the owner (referred
26 to as employer), the contractor, and the engineer. Contracts are drafted to assign rights
27 and responsibilities to the contracting parties. Standard conditions of contract form a
28 principal document in most contracts due to their balanced assignment of risk between
29 parties as well as wide coverage of issues that might be encountered during
30 construction. Moreover, the standard nature of these conditions of contract and their
31 wide usage enable the contracting parties to be familiar with their provisions and their
32 established interpretations. Due to the above listed reasons, standard forms have
33 significantly contributed to the reduction of construction disputes and the ease of
34 settlement of disputes encountered.

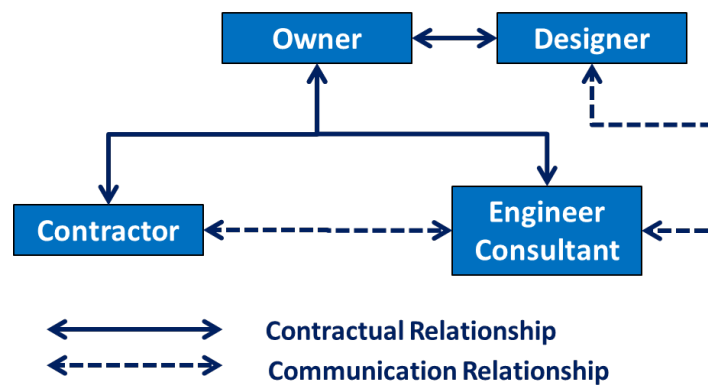
35 Many countries have adopted international conditions of contract in their
36 agreements which also helps owners and contractors in finding common grounds for
37 the contract especially with the globalization and wide movement of contracting
38 companies to build projects internationally. FIDIC standard conditions are widely used
39 worldwide [1-2].

40 While many publications studied the role of engineer in these contracts [3-7], and
 41 the responsibilities of the contractor [8-9], few or no scholars investigated the
 42 responsibilities of the owner.

43 The owner is a major contracting party (first party) and has responsibilities that go
 44 beyond appointing the engineer and paying the contractor. The owner plays a central
 45 role in the delivery of a construction project and he is the only party who has contractual
 46 relationship with both the contractor and the engineering consultant as illustrated in
 47 Figure 1. On the other hand, the contractor and the engineering consultant do not have
 48 a contractual relationship with each other. They are supposed to communicate and
 49 collaborate although their contractual relationship is with the owner.

50 As such, this paper is intended to analyze the owner's responsibilities as stipulated
 51 in FIDIC construction contracts.

52 The understanding of the rights and responsibilities of each party can contribute to
 53 reducing conflicts that entail considerable resources for their settlements and can
 54 contribute to the speedy delivery of construction projects. The following section
 55 presents the obligations of the owner that are stated in FIDIC contracts for construction,
 56 or can be drawn from the provisions of FIDIC contracts.



57
 58

Figure 1. Traditional Delivery Approach for Construction Projects

59 **2 Owner's Obligations**

60 **2.1 Pre-Construction Obligations**

61 Owner's obligations start early in the procurement stage before selecting the contractor,
 62 and continue throughout the procurement phase before the actual start up of the
 63 construction phase. These obligations include drafting clear contract, readiness of the
 64 site for construction without obstructions, financial arrangements for paying the
 65 contractor..etc.

66 **2.1.1 Drafting Clear and Correct Contract**

67 The owner is responsible for drafting contract documents that convey clear
68 requirements. The established legal principle "ambiguous terms are interpreted against
69 the party who drafted the contract" is intended to support this responsibility. Drafting
70 contract documents that deliver the same message to all bidders is a prerequisite for
71 healthy competitive bidding and reduces misunderstanding of contract requirements
72 which leads to construction disputes. The owner is responsible for setting appropriate
73 value for liquidated damages. An excessive value may be challenged at courts as a
74 penalty and may not be enforceable. Excessive values may deter good contractors from
75 bidding on a project due to risks involved in excessive damages. The owner must
76 respect the law of the country and, therefore, should ensure that its drafted contract does
77 not contradict mandatory provisions of the applicable law.

78 **2.1.2 Site Access**

79 The owner is responsible for giving the contractor access to the site at the time stated
80 in the contract or in the approved schedule of work. The owner will be required to
81 compensate the contractor for damages associated with delay in providing access.
82 Compensation includes extension of time for completion and/or cost plus reasonable
83 profit.

84 **2.1.3 Supporting Contractor's Application for Permits, Licences or Approvals**

85 The owner is required to provide reasonable assistance to the contractor in obtaining a
86 copy of the relevant country's legislation, and in obtaining permits, licences or
87 approvals required for the works. These obligations are stated in Sub-Clause 2.2
88 (Assistance).

89 **2.1.4 Disclosing Financial Arrangements**

90 FIDIC contracts require the contractor to perform the work according to specifications
91 and other contract documents, and at the same time require the owner to provide details
92 in the contract documents regarding the financial arrangements made to pay the
93 contractor during the construction phase of the project. This requirement is introduced
94 in the new FIDIC contracts [10] as a modification to the requirement stipulated in the
95 previous edition [11] which requires the owner to provide the contractor upon his
96 request with reasonable evidence about the financial arrangements taken in order to
97 allow the owner to pay the contractor. This request can be made anytime during
98 construction. The new edition requires disclosing financial arrangements in the bidding
99 documents. The Owner is also required to inform the contractor of any significant
100 changes to financial arrangements during construction. Failing to do so entitles the
101 contractor to suspend the work and seek compensation for damages incurred. This
102 requirement intends to reduce contractor's risk. The contractor in any contract is under
103 the risk of performing work, incurring costs and not getting paid by owners.
104 Construction contracts and the prevailing profit rates in the construction industry are
105 based on the timely payment of contractors during construction. The contractor is not

106 supposed to provide financing to the project beyond the limited amounts agreed upon
107 at the time of the contracting.

108 **2.2 Obligations Associated with Contract Documents**

109 The owner is responsible for providing the contractor with the contract documents and
110 as such will be responsible for errors or omissions in these documents. The contractor
111 has the right to study these documents and submit his bid on the premise that any error
112 in the documents submitted by the owner will be compensated by the owner.

113 **2.2.1 Compensating the Contractor for Errors in Setting Out Points of** 114 **Reference**

115 The owner is responsible for errors in points of reference (location and/or levels) given
116 to the contractor, and therefore is responsible for compensating the contractor for the
117 consequences of finding an error in these points of reference. Compensation includes
118 extension of time for incurred delay, and/or costs plus profit for incurred costs. FIDIC
119 protects the owner by requiring the contractor to verify the accuracy of these points of
120 reference, and stipulating that the contractor's entitlement for compensation will take
121 place only if an experienced contractor could not reasonably discover these errors and
122 avoid their consequences (i.e. time and cost consequences).

123 **2.2.2 Responsibility for Adjusting Unit Prices for Quantity Variation**

124 The contractor prepares his bidding offer based on the quantities provided by the owner
125 in the bidding documents (bill of quantities). The owner will be required to make
126 equitable adjustment to contract unit rates to compensate the contractor for variations
127 in quantities of work from estimated quantities in the bill of quantities. This obligation
128 is stated in Sub-Clause 12.3 (Evaluation).

129 **2.2.3 Responsibility for Compensating the Contractor for Omissions**

130 The bidding price for individual work item includes the direct cost of the item in
131 addition to a fair allocation of indirect costs and overhead. The owner will be
132 responsible for compensating the contractor for unrecovered costs due to omitting items
133 of work by a variation order. Compensation here includes only unrecovered costs (no
134 profit or time). This obligation is stated in Sub-Clause 12.4 (Omissions).

135 **2.3 Obligations Associated with the Engineer and Owner's Personnel**

136 The Engineer plays a major role in FIDIC contracts, and is generally deemed to act for
137 the owner. The following paragraphs include owner's obligations associated with the
138 Engineer, and other owner's personnel.

139 **2.3.1 Appointing the Engineer**

140 Appointing the Engineer is the owner's responsibility. The owner must appoint an
141 Engineer and grant him the authority necessary to perform the role and duties assigned
142 to the Engineer under the FIDIC contracts. The appointed Engineer should be
143 competent to perform such role and duties.

144 **2.3.2 Putting into Effect all "Determinations" of the Engineer**

145 Although the FIDIC conditions state clearly that "the Engineer...shall be deemed to act
146 for the Employer", they also provide that as to "determinations", the Engineer shall be
147 neutral between the parties, and shall not be considered as acting for the Employer. The
148 owner is required to put into effect all determinations issued by the Engineer. The
149 enforceability of determinations applies to both the owner and the contractor, and is
150 intended to avoid interruptions to the works in the project which can lead to more
151 damages to both parties. This balanced perspective takes into account that
152 determinations are temporary decisions that will be enforceable until revised through
153 dispute resolution mechanisms. This obligation is stated in Sub-Clause 3.7
154 (Determinations).

155 **2.3.3 Holding Responsibility Regarding Performance of the Engineer**

156 Examples of such performance include: delayed drawings or instructions and
157 suspension of works. According to Sub-Clause 1.9 (Delayed Drawings or Instructions),
158 the Owner will be responsible for compensating the Contractor for delays or disruptions
159 caused by the Engineer's delay in issuing necessary drawings or instructions. Drawings
160 or instructions should be issued within a reasonable time. The compensation includes
161 extension of time and/or cost plus reasonable profit. Also, by virtue of Sub-Clause 8.9,
162 the Engineer can instruct the Contractor to suspend part or all of the work in the project.
163 However, if the cause of suspension is not the Contractor's responsibility (e.g. faulty
164 workmanship or materials, or failure to protect work), the owner will be responsible for
165 compensating the Contractor for the consequences of the suspension (extension of time
166 and/or costs incurred plus profit).

167 **2.3.4 Responsibility for Owner's Personnel's Cooperation and Compliance**

168 The owner is responsible for ensuring the cooperation of his personnel with the
169 contractor's efforts and their compliance with safety procedures and environmental
170 protection practices. The responsibility of the owner includes also other contractors
171 working with the owner in the project. This obligation is stated in Sub-Clause 2.3
172 (Employer's Personnel and Other Contractors).

173 **2.3.5 Responsibility for Compensating the Contractor for Damages Caused by**
174 **Delayed Tests**

175 According to Sub-Clause 7.4 (Testing), the owner will be responsible for compensating
176 the contractor if tests are delayed by the owner or on his behalf (owner's personnel).
177 The compensation includes extension of time and/or cost plus reasonable profit. This
178 requirement applies to all specified tests throughout the project. The owner carries
179 similar responsibility for delayed tests on completion subject to Sub-Clause 10.3
180 (Interference with Tests on Completion). Compensation in this case also includes
181 extension of time and/or cost plus reasonable profit.

182 **2.4 Holding Risks of Events Caused by External Factors (Third Party** 183 **Actions)**

184 In an attempt to protect the contractor, the owner is required to compensate the
185 contractor for unforeseeable actions taken by third parties that affect the performance
186 of the construction project.

187 **2.4.1 Changes in Legislation**

188 The owner will be responsible for compensating the contractor for any increase in cost
189 or delay caused by changes in the laws of the country or in the official or judicial
190 interpretation of these laws. The changes include introducing new laws or modifying
191 or repealing any of the existing ones. Such changes need to occur after the base date
192 (Sub-Clause 13.6 Adjustments for Changes in Laws). It should be noted that Sub-
193 Clause 13.6 also protects the owners since they will be compensated for changes that
194 lead to reduction in construction cost. Compensation may include cost and/or time but
195 with no profit.

196 **2.4.2 Delays Caused by Public Authorities or Private Utility Entities**

197 Subject to Sub-Clause 20.2, and provided that the contractor has carefully followed the
198 proceedings of the concerned public authorities or private utility entities in the country
199 of the project, the owner should extend the duration of work to account for
200 unforeseeable delays or disruptions caused by such authorities or entities. The owner's
201 obligation is limited to extension of time without financial compensation.

202 **2.5 Obligations Related to Risks Assumed by the Owner**

203 FIDIC contracts are intended to provide a fair share of risks between the contracting
204 parties. As such, the owner is obligated to compensate the contractor for risk events
205 that may emerge if such risks are allocated to the owner in the contract.

206 **2.5.1 Holding Risks of Unforeseeable Physical Conditions**

207 Construction projects are subject to physical conditions that affect performance of
208 work. FIDIC contracts assign such risks to the owner as long as such conditions are

209 unforeseeable (Sub-Clause 4.12 Unforeseeable Physical Conditions). The criterion for
210 determining whether such conditions are unforeseeable or conditions that should be
211 accounted for by the contractor is stated in Sub-Clause 1.1.85 that defines unforeseeable
212 as “not reasonably foreseeable by an experienced contractor by the Base Date”. The
213 contractor is under duty to investigate the site and learn about any condition that might
214 affect the performance of work, and subsequently the cost. However, if the contractor
215 was required to hold the risk of unforeseeable physical conditions, this could lead to
216 incorporating high contingencies in the bid price and increasing significantly the
217 inherited uncertainty in estimating construction costs. The owner's obligation in the
218 case of unforeseen physical conditions includes granting additional time and/or
219 compensating the contractor for additional costs with no profit.

220 **2.5.2 Compensating the Contractor for Archaeological Finding**

221 Sub-Clause 4.23 includes provisions that the owner will bear the consequences of
222 finding archaeological finding in the construction site. Often times, such findings lead
223 to a delay in performance and as such, the contractor can claim for damages incurred.
224 Contractor's compensation in this case includes costs and/or time, but with no profit.

225 **2.5.3 Compensating the Contractor for Specified Owner's Risks**

226 According to Sub-Clause 17.4 (Consequences of Employer's Risks), the owner will be
227 responsible for compensating the contractor for damages that relate to any of the
228 employer's risks specified in Sub-Clause 17.3 (Employer's Risks). The compensation is
229 extension of time plus incurred costs, and in some cases adding reasonable profit to the
230 costs (only when the cause of damage is attributable directly to the owner such as
231 utilizing permanent works or design carried by the owner or his personnel).

232 **2.6 Owner's Obligations Related to Notification Responsibilities**

233 FIDIC contracts include requirements on the contractor to notify the engineer in some
234 occasions. Such a notification is considered in some cases a condition precedent where
235 failing to notify within the stipulated period will deprive the contractor of his
236 compensation entitlement. The owner is also required to provide notifications to the
237 engineer or the contractor in some occasions. It is noteworthy that the owner's duty to
238 notify is less restricted relative to the contractor's notification duty. This difference can
239 be attributed to the fact that the contractor's knowledge and involvement in the work is
240 more than the owner, and therefore the contractor is in a better position to know about
241 any matter that requires notification. The owner's involvement is less and therefore
242 notification periods are less restrictive. Examples of the owner's notification
243 responsibilities include: (1) The owner is required to notify the contractor of his
244 intention to replace the engineer at least six weeks before the intended date of
245 replacement, and (2) The owner is required to notify the engineer of his intention to
246 claim as soon as practicable after becoming aware of the matter giving rise to his claim.

247 **2.7 Other Owner's Obligations**

248 **2.7.1 Compensating the Contractor for Delayed Payments**

249 The owner is required to make payments to the contractor in a timely manner. For
250 delayed payments, the owner is required to compensate the contractor by paying
251 financing charges compounded monthly on the due amount (Sub-Clause 14.8).

252 **2.7.2 Compensating the Contractor for Utilizing Parts of the Works During**
253 **Construction**

254 According to Sub-Clause 10.2 (Taking Over Parts of the Works), the Engineer may
255 issue a taking over certificate for parts of the permanent works during the construction
256 period. The owner may be required to compensate the contractor for any additional
257 costs incurred by the latter due to the owner's utilization of works during the execution
258 of the construction project. This is in addition to a reasonable profit.

259 **2.7.3 Compensating the Contractor for Searching for Causes of Defects**

260 If the contractor is instructed to search for the causes of defects which are not his
261 responsibility, the owner will be required to compensate the contractor for extra costs
262 incurred plus reasonable profit (compensation may also include time extension). The
263 entitlement for compensation occurs when the cost of remedying the defect shall not be
264 paid by the contractor according to Sub-Clause 11.8 (Contractor to Search).

265 **2.7.4 Insurance**

266 If the owner is listed in the contract as the party who should effect and maintain any
267 insurance, the owner should do so and will be responsible for compensating the
268 contractor for consequences of failing to insure.

269 **3 Conclusions**

270 FIDIC construction contracts are widely used all over the world for reasons that include,
271 *inter alia*, their fair allocation of risks between the contracting parties. Each contracting
272 party has rights and obligations. This paper presented an analysis of the Owner's
273 obligations under FIDIC construction contracts.

274 The paper showed that the Owner has obligations that go beyond appointing the
275 Engineer and paying the Contractor. The Owner as well as the Engineer and the
276 Contractor should be aware of these obligations and how they should be performed.
277 The Owner's failure to perform one or more of his obligations may lead to costly claims
278 and disputes that require substantial resources to be resolved, and may erode the much
279 needed trust and collaboration between the contracting parties.

280 The analysis revealed a number of risks allocated to the Owner as examples of the
 281 fair allocation of risks between the contracting parties under the FIDIC contracts. This
 282 includes unforeseeable physical conditions; responsibility regarding the proper
 283 performance of the Engineer (proper inspection and testing; site instructions;
 284 approvals...etc.); collaboration of the Owner's personnel; errors in points of reference;
 285 errors in design and omissions in contract documents; delays and disruptions caused by
 286 third party; risks associated with changes in legislation and archaeological findings.

287 The Owner's proper performance of his contractual obligations helps in reducing
 288 disputes and contributes to the proper delivery of the construction project.

289 4 References

- 290 1. Ruxandra, Gherghina: The Role of Standardized FIDIC Contracts in the Process
 291 of Construction Market Globalization. In: Proceedings of the International
 292 Conference Education and Creativity for a Knowledge-Based Society – LAW,
 293 Vienna, Universitatea Titu Maiorescu (2017).
- 294 2. Battrick, P.: The Spread of FIDIC Contracts throughout the World, an Insight to
 295 their Usage. In: Proceedings of the Annual NORDIC FIDIC Conference,
 296 Copenhagen (18th–19th June 2008).
- 297 3. Zoppis, E.: The Role of the Engineer: a Contractor's Viewpoint. In: Proceedings
 298 of the FIDIC-ACEG European Regional Infrastructure Conference, Tbilisi,
 299 Georgia (1st -6th March 2018),
 300 [https://static1.squarespace.com/static/599c50c86a49639d4d722872/t/5ab8a92770](https://static1.squarespace.com/static/599c50c86a49639d4d722872/t/5ab8a92770a6ad55c6768ad7/1522051370848/1.10.Eugenio+Zoppis_the+Role+of+the+Engineer_ARTICLE.pdf)
 301 [a6ad55c6768ad7/1522051370848/1.10.Eugenio+Zoppis_the+Role+of+the+Engi](https://static1.squarespace.com/static/599c50c86a49639d4d722872/t/5ab8a92770a6ad55c6768ad7/1522051370848/1.10.Eugenio+Zoppis_the+Role+of+the+Engineer_ARTICLE.pdf)
 302 [neer_ARTICLE.pdf](https://static1.squarespace.com/static/599c50c86a49639d4d722872/t/5ab8a92770a6ad55c6768ad7/1522051370848/1.10.Eugenio+Zoppis_the+Role+of+the+Engineer_ARTICLE.pdf), last accessed 13/5/2019.
- 303 4. Saket, M.: The Role of the Engineer in FIDIC 99 Red Book - Could it be
 304 Performed by A Supervision Consultant & A Construction Manager?
 305 http://fidic.org/sites/default/files/saket_role_engineer_cairo_jan10.pdf, last
 306 accessed 13/5/2019.
- 307 5. Bunni, N.: The FIDIC Forms of Contract, Chapter 10 Role of the Engineer. 3rd
 308 edn. John Wiley & Sons, (2008), <https://doi.org/10.1002/9780470759417.ch10>,
 309 last accessed 13/5/2019.
- 310 6. Ndekugri, I., Smith, N., and Hughes, W.: The Engineer under FIDIC's Conditions
 311 of Contract for Construction. *Construction Management and Economics* 25(7),
 312 791-799 (2007), <https://doi.org/10.1080/01446190701411216>, last accessed
 313 13/5/2019.
- 314 7. Lina, C.: Role of Engineer under FIDIC Form Contract. *Journal of Professional*
 315 *Issues in Engineering Education and Practice* 123(2), 48 – 50 (1997),
 316 [https://doi.org/10.1061/\(ASCE\)1052-3928\(1997\)123:2\(48\)](https://doi.org/10.1061/(ASCE)1052-3928(1997)123:2(48)), last accessed
 317 13/5/2019.
- 318 8. Robinson, M.: A contractor's guide to the FIDIC conditions of contract. 1st edn.
 319 John Wiley & Sons, (2011).
- 320 9. Seppälä, C.: Contractor's Claims under the FIDIC Contracts for Major Works. In:
 321 *Proceedings of the International Construction Contracts and Dispute Resolution*,

- 322 Co-Hosted by ICC and FIDIC in partnership with The Cairo Regional Centre for
323 International Commercial Arbitration, (9th – 10th April 2005),
324 http://fidic.org/sites/default/files/13%20seppala_cont_claims_2005.pdf, last
325 accessed 13/5/2019.
- 326 10. International Federation of Consulting Engineers: FIDIC Conditions of Contract
327 for Construction for Building and Engineering Works Designed by the Employer.
328 2nd edn, Geneva, Switzerland (2017).
- 329 11. International Federation of Consulting Engineers: FIDIC Conditions of Contract
330 for Construction for Building and Engineering Works Designed by the Employer.
331 1st edn. Geneva, Switzerland (1999).