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Title: FIDIC Sub-Clause 3.5 (Determinations) Explained

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Introduction

FIDIC forms of contract, which had gone through several evolutions since they first appeared in 1957, were to change radically towards the end of the 20th Century. By this time there were several different forms of contract which had all developed independently of one another and which had become very weighty and cumbersome, e.g., the 1987 Red Book[1] had up to 72 Clauses, which did not necessarily coincide with the numerous clauses in the other forms.

In order to address this problem FIDIC experimented with a radically new form in 1995 entitled the Design – Build and Turnkey Contract[2] which contained only 20 clauses, but which still retained some of the features of older editions. The 1995 form was fairly well received and effectively formed the template for the majority of FIDIC's new suite of contracts issued in 1999 (the 1999 FIDIC Suite). Despite FIDIC's opposition to the unofficial naming of the various forms by the colour of their covers, this practice has continued and three of the new forms, i.e., the Construction Contract (known as the Red Book)[3], the Plant and Design/Build Contract (known as the Yellow Book)[4] and the EPC/Turnkey Contract (known as the Silver Book)[5] each contained 20 clauses. Where possible these clauses were identical across all three forms meaning that knowledge of the contents of one form was to some extent transferrable across all three forms. Upon the issue of the 1999 FIDIC Suite the 1995 Design – Build and Turnkey

[1] FIDIC Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987, Reprinted 1992 with amendments
[2] FIDIC Conditions of Contract for Design – Build and Turnkey, First Edition 1995
[3] FIDIC Conditions of Contract for Construction for Building Works Designed by the Employer, First Edition 1999
[4] FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor, First Edition 1999
[5] FIDIC Conditions of Contract for EPC/Turnkey Projects, First Edition 1999

Contract was effectively replaced by the new Plant and Design/Build Contract (Yellow Book) and the EPC/Turnkey Contract (Silver Book).

The fourth form in the 1999 FIDIC Suite was the Short Form (known as the Green Book)[6] the like of which had never been previously produced by FIDIC. It had very simplified conditions as befits a form of contract which, in their own words, FIDIC created for *"fairly simple or repetitive work or work of short duration without the need for specialist sub-contracts"*.

As you would expect from a radical new suite of contract forms, there were new previously unseen clauses and sub-clauses too. One of these was Sub-Clause 3.5 [*Determinations*]. Although the Engineer had been required to carry out consultations with both Parties and determinations under various clauses of the 1987 Red Book, there was previously no specific clause describing the method to be adopted by the Engineer in such circumstances.

However, despite the passing of more than seventeen years since the 1999 FIDIC Suite was originally issued, there appears to remain to this day a great deal of confusion as to when and how Sub-Clause 3.5 [*Determinations*] should be used. Much of this confusion is caused by its title and the wording of associated sub-clauses, not to mention a seeming duplication of effort between the procedure for dealing with claims under Sub-Clause 20.1 [*Contractor's Claims*], i.e., approval or disapproval under the sixth paragraph, and the requirement to proceed in accordance with Sub-Clause 3.5 [*Determinations*] to *"agree or determine"* matters under the eighth paragraph. This article attempts to clear up that confusion.

Sub-Clause 3.5 [*Determinations*] – FIDIC Red, Yellow and Silver Books

The wording of Sub-Clause 3.5 [*Determinations*] under the first three forms of the 1999 FIDIC Suite, i.e., the Construction Contract, the Plant and Design/Build Contract and the EPC/Turnkey Contract is virtually identical, except that the EPC/Turnkey Contract (Silver Book) has no Engineer and it is either the Employer or the Employer's Representative (if he has such delegated power) who is required to proceed in accordance with Sub-Clause 3.5 [*Determinations*] and there are also some other slight administrative differences.

This article considers the position under the Construction Contract (Red Book) in which Sub-Clause 3.5 [*Determinations*] reads as follows:

> *"Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.*
>
> *The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration]."*

Why Sub-Clause 3.5 [*Determinations*]?

In order to understand why the introduction of Sub-Clause 3.5 [*Determinations*] was found necessary it is essential to understand the significance of some of the duties and obligations of the Engineer under earlier FIDIC editions (and other forms of contract too) in the years prior to

[6] FIDIC Short Form of Contract, First Edition 1999

the issue of the 1999 FIDIC Suite. Traditionally, the Engineer (or the Architect under other contract forms) was expected to act impartially on any matter between the Parties even though he was employed by only one Party. When reviewing the FIDIC 4th Edition in his book entitled "*FIDIC 4th – A Practical Guide"* first published in 1991, Edward Corbett wrote that the FIDIC Fourth Edition was *"..very much in the traditional English mode with Bills of Quantities and a named Engineer whose functions include making certification and other determinations independently of the Employer and indeed impartially as between the Parties"*.[7]

The 1987 Red Book, actually stated as much. For example, Sub-Clause 2.6 was entitled "*Engineer to Act Impartially*" and the said sub-clause stated *"Whenever … the Engineer is required to exercise his discretion by: (a) giving his decision, opinion or consent, (b) expressing his satisfaction or approval, (c) determining value, or (d) otherwise taking action which may affect the rights and obligations of the Employer or the Contractor he shall exercise such discretion impartially within the terms of the Contract…".*

One such decision on which millions of dollars could hang was the *"Engineer's Decision"* under Sub-Clause 67.1 of the 1987 Red Book which was required to be rendered impartially by the Engineer within 84 days of *"a dispute of any kind whatsoever between the Employer and the Contractor"* being referred to him by either Party. Failure to obtain this decision from the Engineer before taking any action to commence arbitration had lead, on numerous occasions, to arbitration proceedings collapsing when the arbitrator's jurisdiction was questioned and he found that no "*Engineer's Decision"* had been applied for or rendered under Sub-Clause 67.1 [*Engineer's Decision*] leading to the conclusion that there was no dispute to be resolved.

Over the years many contractors became sceptical as to whether or not the Engineer was capable of acting completely impartially when he was employed and paid by only one of the Parties, especially if his decision under Sub-Clause 67.1 [*Engineer's Decision*] could highlight his own shortcomings and cost his client millions of dollars if he found in favour of the Contractor. The contractors argued that decisions in their favour were few and far between and that this illustrated a bias on the part of the Engineer towards the Employer despite his obligation to act impartially.

A survey commissioned jointly by European International Contractors (EIC) and FIDIC stated: *"There was also a wide range of views about impartiality of Engineers. Generally, consultants and clients feel that Engineers are impartial whereas contractors feel that they are not. Most people feel that Engineers typically favour the Employer in administering contracts"*.[8] Eventually FIDIC bowed to pressure to rectify this situation by introducing another tier of dispute resolution between the Engineer's now *"fair"* determination and either Party's reference to arbitration, i.e., a decision rendered by a Dispute Adjudication Board (DAB) employed and paid for by both Parties under the Contract.

Hence, the Engineer's duties under Sub-Clause 67.1 [*Engineer's Decision*] of the 1987 Red Book were taken over by the DAB and Sub-Clause 3.5 [*Determinations*] was introduced to enable the Engineer to make a *"fair"* determination[9] if agreement on the matter could not be reached between the Parties. Otherwise, the Engineer was expressly recognised as acting for the Employer.[10]

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[7] Published by Sweet and Maxwell, London, 1991

[8] EIC/FIDIC Questionnaire Survey: The use of the FIDIC Red Book, 5 June 1996, Will Hughes, Department of Construction Management & Engineering, University of Reading, UK

[9] 4th line of Sub-Clause 3.5 [*Determinations*]

[10] Sub-Clause 3.1 [*Engineer's Duties and Authority*], fifth paragraph, sub-paragraph (a)

Each Party was then required to give effect to each determination unless and until the determination was revised by a DAB and only then could either Party give notice of arbitration, which process would be preceded (as always) by a period of amicable settlement.

Conditions Which Trigger Engineer's Action under Sub-Clause 3.5 [*Determinations*]?

Sub-Clause 3.5 [*Determinations*] states: *"Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement".* So, which Conditions of the Contract trigger the Engineer's action under Sub-Clause 3.5 [*Determinations*]? The following twenty-five sub-clauses contain the trigger paragraph, e.g., *"…the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine…"* the matter:

- 1.9 [*Delayed Drawings or Instructions*]
- 2.1 [*Right of Access to the Site*]
- 2.5 [*Employer's Claims*]
- 4.7 [*Setting Out*]
- 4.12 [*Unforeseeable Physical Conditions*]
- 4.19 [*Electricity, Water and Gas*]
- 4.20 [*Employer's Equipment and Free-Issue Material*]
- 4.24 [*Fossils*]
- 7.4 [*Testing*]
- 8.9 [*Consequences of Suspension*]
- 9.4 [*Failure to Pass Tests on Completion*]
- 10.2 [*Taking Over of Parts of the Works*]
- 10.3 [*Interference with Tests on Completion*]
- 11.4 [*Failure to Remedy Defects*]
- 11.8 [*Contractor to Search*]
- 12.3 [*Evaluation*]
- 12.4 [*Omissions*]
- 13.2 [*Value Engineering*]
- 13.7 [*Adjustments for Changes in Legislation*]
- 14.4 [*Schedule of Payments*]
- 15.3 [*Valuation at Date of Termination*]
- 16.1 [*Contractor's Entitlement to Suspend Work*]
- 17.4 [*Consequences of Employer's Risks*]
- 19.4 [*Consequences of Force Majeure*]
- 20.1 [*Contractor's Claims*]

Thirteen of the above instances are linked to the submission of claims by the Contractor under Sub-Clause 20.1 [*Contractor's Claims*] in that the Sub-Clause 3.5 [*Determinations*] trigger paragraph appears in conjunction with paragraphs that give the Contractor entitlement to an extension of time and/or additional payment subject to Sub-Clause 20.1 [*Contractor's Claims*]. For example, Sub-Clause 2.1 [*Right of Access to Site*] requires the Employer to give the Contractor right of access to, and possession of, all parts of the Site within the time (or times) stated in the Appendix to Tender.

The third and fourth paragraphs of Sub-Clause 2.1 [*Right of Access to Site*] state:

"If the Contractor suffers delay and/or incurs Cost 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 subject to Sub-Clause 20.1 [Contractor's Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and
(b) payment of any such Cost plus reasonable profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters". (Emphasis added)

The sub-clauses which contain the trigger paragraph, but are not linked to the submission of claims by the Contractor under Sub-Clause 20.1 [*Contractor's Claims*], are:

- Sub-Clause 2.5 [*Employer's Claims*] although the Engineer has to perform the same tasks as for a Contractor claim under Sub-Clause 20.1 [*Contractor's Claims*];
- Sub-Clause 4.19 [*Electricity, Water and Gas*] where the Engineer has to agree or determine the quantities consumed and the amounts due when the Contractor uses electricity and/or water and/or gas provided by the Employer;
- Sub-Clause 4.20 [*Employer's Equipment and Free-Issue Material*] where the Engineer has to agree or determine any claim the Employer may make under Sub-Clause 2.5 [*Employer's Claims*] for the appropriate quantities and amounts due for the use of Employer's Equipment;
- Sub-Clause 9.4 [*Failure to Pass Tests on Completion*] where the Engineer has to agree or determine any claim the Employer may submit under Sub-Clause 2.5 [*Employer's Claims*] for the reduction in Contract Price where Works that have repeatedly failed to pass the tests on completion are taken over by the Employer and where no value or method of calculation is stated in the Contract;
- Sub-Clause 10.2 [*Taking Over of Parts of the Works*] where the Engineer must agree or determine the reduction in delay damages for the remaining Works;
- Sub-Clause 11.4 [*Failure to Remedy Defects*] where the Engineer must agree or determine any costs reasonably incurred by the Employer under Sub-Clause 11.2 [*Cost of Remedying Defects*] and claimed under Sub-Clause 2.5 [*Employer's Claims*] for when the Contractor fails to remedy defects and the Employer exercises the option to carry out the work himself or have it done by others at the Contractor's cost;
- Sub-Clause 11.8 [*Contractor to Search*] where the Engineer must agree or determine the cost (plus reasonable profit) of a search for the cause of any defect directed by the Engineer, unless the defect is to be remedied at the cost of the Contractor;
- Sub-Clause 12.3 [*Evaluation*] where the Engineer must agree or determine the Contract Price where the Works are to be measured and valued for payment under Sub-Clauses 12.1 [*Works to be Measured*] and 12.2 [*Method of Measurement*];
- Sub-Clause 12.4 [*Omissions*] where the Engineer shall agree or determine costs associated with a Variation pursuant to the final paragraph of Sub-Clause 13.3 [*Variation Procedure*]

where the Contractor incurs costs when work is omitted, but which may not be covered by the Variation or elsewhere in the Contract;

- Sub-Clause 13.2 [*Value Engineering*] where the Engineer shall agree or determine the reduction in the Contract Price, stemming from a Value Engineering proposal from the Contractor, which is adopted by the Employer and the division of any benefit to the Employer as between the Employer and the Contractor;
- Sub-Clause 14.4 [*Schedule of Payments*] where the Engineer may be required to agree or determine revised payment instalments if actual progress is found to be falling behind where stage payments are being used; and finally
- Sub-Clause 15.3 [*Valuation at Date of Termination*] where the Engineer is required to agree or determine the value, of the Works, Goods, etc., due to the Contractor after the issuance of a termination notice.

There are also some other sub-clauses which do not contain the trigger paragraph, but where the Engineer has an implied obligation to proceed in accordance with Sub-Clause 3.5 [*Determinations*], e.g., Sub-Clause 14.8 [*Delayed Payment*] where the Contractor is entitled to receive financing charges, if he does not receive payment in accordance with Sub-Clause 14.7 [*Payment*], compounded monthly on the amount unpaid during the period of delay. In practice, such a task may be performed by a Quantity Surveyor, but for the purposes of the Contract this is an Engineer obligation.

Engineer Implementation of Sub-Clause 3.5 [*Determinations*]

When called upon to implement the provisions of Sub-Clause 3.5 [*Determinations*] there are a few matters of which the Engineer should be cognisant before proceeding any further, as follows:

1) Whether the Engineer is a juridical person or an individual he is prohibited under Sub-Clause 3.2 [*Delegation by the Engineer*] from delegating the authority to determine any matter in accordance with Sub-Clause 3.5 [*Determinations*] to any assistant unless otherwise agreed by the Parties. A determination could, presumably, be drafted by a member of his staff, but he would have to sign it and take full responsibility for it.

2) Does the Engineer have the authority under the Contract to issue a determination pursuant to Sub-Clause 3.5 [*Determinations*] without the prior agreement of the Employer? The third paragraph of Sub-Clause 3.1 [*Engineer's Duties and Authority*] states *"If the Engineer is required to obtain the approval of the Employer before exercising a special authority, the requirements shall be as stated in the Particular Conditions".* Sample wording would be as follows:

> *"The Engineer shall obtain the specific approval of the Employer before taking action under the following Sub-Clauses of these Conditions:*
>
> (a) *Sub-Clause 3.5 [Determinations] – issuing a determination where the Contract requires the Engineer to proceed in accordance with this Sub-Clause"*

3) If he was to issue a determination without first obtaining the prior specific approval of the Employer, if such was a requirement in the Particular Conditions as stated above, the

Employer would pursuant to Sub-Clause 3.1 [*Engineer's Duties and Authority*] be deemed to have given approval as the Contractor has an implied right to expect that the Engineer has authority to issue any instruction or determination under the Contract once he has signed it and delivered it to the Contractor. In such circumstances the Engineer would possibly find himself in breach of his Contract with the Employer, i.e., his *"Client"* under the FIDIC White Book [11] as the same stipulation would very likely be incorporated in his consultancy agreement.

4) Where Sub-Clause 3.5 [*Determinations*] requires him to *"agree or determine any matter"*, the agreement he is to endeavour to achieve is one between the Parties, not just the Engineer's agreement with one of the Parties, a common misconception. It is quite common for the Engineer (or his staff) to skip the *"agreement"* phase of Sub-Clause 3.5 [*Determinations*] because he may have already disapproved a claim pursuant to Sub-Clause 20.1 [*Contractor's Claims*] or already believe that his opinions and those of the Contractor are entrenched and cannot change. As can be seen from the above, this is an erroneous assumption and often the opportunity that the first phase of Sub-Clause 3.5 [*Determinations*] offers is therefore lost before it is even exercised. Failure to proceed properly in accordance with Sub-Clause 3.5 [*Determinations*] could also lay the Engineer open for accusations of negligence.

5) Finally, whereas the fifth paragraph of Sub-Clause 3.1 [*Engineer's Duties and Authority*] states that the Engineer acts for the Employer, the Engineer should bear in mind his obligation under Sub-Clause 3.5 [*Determinations*] to make "fair" determinations which therefore implies they must be rendered in a professional manner taking regard of all the circumstances.

The opening sentence of Sub-Clause 3.5 [*Determinations*] states: *"Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement."* This is the first stage of the Engineer's tasks under Sub-Clause 3.5 [*Determinations*], i.e., he has to meet with both Parties either together or separately to discuss the matter that the trigger paragraph in one of the above listed Sub-Clauses requires him to explore when one of the situations arise, for example:

- under Sub-Clause 9.4 [*Failure to Pass Tests on Completion*] where the Employer has submitted a claim under Sub-Clause 2.5 [*Employer's* Claims] for a reduction in Contract Price where Works, that have repeatedly failed to pass the tests on completion, are taken over by the Employer and where no value or method of calculation is stated in the Contract; or

- under Sub-Clauses 2.1 [*Right of Access to the Site*] and Sub-Clause 20.1 [*Contractor's Claims*] where the Contractor may have suffered delay and/or incurred Cost as a result of a failure by the Employer to give access to the Site within the time stated in the Appendix to Tender and the Contractor has submitted a claim for an extension of time and/or additional payment.

[11] FIDIC Client/Consultant Model Services Agreement, Fourth Edition 2006

In my view the Engineer's implied duty in this first stage of the implementation of Sub-Clause 3.5 [*Determinations*] is to act in a quasi-mediator role since it is unlikely on the very large projects, on which the forms of contract of the 1999 FIDIC Suite are used, that the Engineer will be able to organise several meetings at which both the Employer's and the Contractor's decision makers may be present. This is particularly so on government projects where the Employer may be a state government represented by a committee or a government minister, for example.

Consequently, the likely scenario is that the Engineer will meet with the Contractor several times on one particular aspect of a claim and discuss details with the Contractor until the Engineer has either received or seen all the required contemporary records he deems necessary and has satisfied himself that the Contractor has properly substantiated that aspect of his claim or is unable to produce further substantiation. Only then will the Engineer consult with the Employer in an effort to obtain his agreement of that aspect. Indeed, as stated in the FIDIC Guide[12], "*The Engineer does not proceed in accordance with Sub-Clause 3.5 only once in respect of each claim. He does so in stages, as further particulars are submitted under Sub-Clause 20.1…".*

Thereafter the Engineer may have further meetings with the Contractor and may continue to shuttle backwards and forwards between the Contractor and the Employer until they have agreed a matter or the Engineer has come to the conclusion that no agreement is possible. This process must be concluded in a reasonable time, not prolonged unnecessarily and upon such agreement the Engineer must set down what has been agreed in writing and give notice to both Parties of the agreement.

If agreement cannot be reached the Engineer can proceed with the second stage of the provisions of Sub-Clause 3.5 [*Determinations*], i.e., "*If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances".*

It is expected that "*each agreement or determination"* prepared by the Engineer would be set down in writing in a professional manner and perhaps utilising the expertise of the Engineer's *"suitably qualified engineers and other professionals"*[13] in accordance with the provisions of Sub-Clause 1.3 [*Communications*] and each document should make it clear either what has been agreed by the Parties or how and why the Engineer has reached the conclusions in his "*fair determination"*.

The final sentence of Sub-Clause 3.5 [*Determinations*], i.e., "*Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration]*" clearly implies that the "*supporting particulars"* should be comprehensive so that every aspect of "*each agreement or determination"* is itemised and accompanied by the necessary evidence, as these will be binding on each Party until revised under the dispute resolution procedures in Clause 20 [*Claims, Disputes and Arbitration*]. Consequently "*each agreement or determination"* should also state that it is issued pursuant to Sub-Clause 3.5 [*Determinations*] so that both Parties are aware that the final paragraph applies.

Although, the clear implication is that no further correspondence on the subject should be entered into between the Contractor and the Employer and/or the Engineer, the FIDIC Guide nevertheless states: *"In practice, the Engineer may first make an interim determination* [or

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[12] The FIDIC Contracts Guide, First Edition 2000, Geneva, Switzerland
[13] First paragraph of Sub-Clause 3.1 [*Engineer's Duties and Authority*]

determinations], *indicating his intention to review it when further particulars are presented to him, and meanwhile including the appropriate adjustment in Interim Payment Certificates. Although an interim determination may nevertheless be referable to the DAB directly without further delay, it is usually preferable, if further particulars become available, for the Engineer to review his previous determination"*. In my view this is one area of potential confusion and the thought of the Engineer opening up a determination, reviewing it and perhaps amending it, seems to me to undermine the Sub-Clause 3.5 [*Determinations*] process which would appear to be an opportunity to draw a line under a matter which was previously in dispute and incapable of being resolved without intervention.

Conclusion

As mentioned in the Introduction to this article, there appears to remain a great deal of confusion as to when and how Sub-Clause 3.5 [*Determinations*] should be used. The areas of confusion are summarised as follows:

- The title of Sub-Clause 3.5 is *"Determinations"* – Although the Contract expressly states in Sub-Clause 1.2 [*Interpretation*] that the headings and marginal notes shall not be taken into account in the interpretation of the Conditions, it is common for users of the 1999 FIDIC Suite to consider that Sub-Clause 3.5 [*Determinations*] is about determinations only;

- Once the Engineer has either approved or disapproved a claim under the sixth paragraph of Sub-Clause 20.1 [*Contractor's Claims*] there is confusion as to why the Engineer should then need to proceed to *"agree or determine"* the matter in accordance with the eighth paragraph as this seems to duplicate effort unnecessarily;

- The content of the trigger paragraph, taking the version stated in Sub-Clause 20.1 [*Contractor's Claims*] as our example, is confusing. It states: *"The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract";*

- The implication of the above wording is that the Engineer (or perhaps his staff who may not be particularly contract savvy) must look at the Contractor's claims and either agree them or make a determination. Having already (possibly) disapproved a claim such staff may enter into discussions with the Contractor and invariably, in my experience, their opinions become more entrenched than ever and the language and content of correspondence deteriorates accordingly. Against this background the Engineer can see no way of reaching agreement between himself and the Contractor and he therefore proceeds (erroneously as it turns out) directly to a determination, thus putting himself in danger of allegations of negligence and the Employer in breach of a provision of the Contract.

- Although, the final sentence of Sub-Clause 3.5 [*Determinations*] states that "*Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration]"* which implies that no further correspondence on the subject should be entered into between the Contractor and the Employer and/or the

Engineer until one or the other issues a dispute notice pursuant to Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*], the FIDIC Guide nevertheless suggests that the Engineer may open up a determination, review it and perhaps amend it. This seems to undermine the finality, subject to the issuance of a dispute notice, of the Sub-Clause 3.5 [*Determinations*] process.

The reason for the introduction of Sub-Clause 3.5 [*Determinations*] into the 1999 FIDIC Suite was, in conjunction with the introduction of other new sub-clauses such as the DAB provisions, to address the apparent unfairness of the Engineer's role to act impartially as between the Parties when making decisions that could either illustrate his own shortcomings or adversely affect the position of his Employer, the person that employed him and paid his fees. To some extent Sub-Clause 3.5 [*Determinations*] replicated provisions already found in pre-1999 editions of the FIDIC contracts, but it set out the procedure in a more ordered way and arguably introduced another layer of dispute resolution possibilities by giving the Engineer the power to broker an agreement between the Parties before moving to the determination stage if no agreement could be reached.

That the first stage of the Sub-Clause 3.5 [*Determinations*] process, i.e., *"agreement"*, may not have been fully utilised as intended by FIDIC may be the reason that future editions of the FIDIC contracts are apparently going to have a revamped version of Sub-Clause 3.5 [*Determinations*] where the Engineer will be required to act *"neutrally"*. Only time will tell whether this will lead to a better understanding amongst the users of FIDIC Contracts of the provisions of Sub-Clause 3.5 [*Determinations*] and its implementation.

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