



## **Role of the Engineer Under FIDIC Red Books and its Influence on the Legal Nature of Consultant Services Agreement**

**JPM**

**PARTNERS**

## **Role of the Engineer Under FIDIC Red Books and its Influence on the Legal Nature of Consultant Services Agreement**

Publisher: JPM | Partners

Delta House, 8a Vladimira Popovića street

[www.jpm.law](http://www.jpm.law)

Authors: Mina Čogurić, Associate, Lana Vukmirović Mišić, Senior Partner,  
Srđan Topalović, Dipl Ing. CE, Acc Spec. EnvE, FIDIC Accredited Trainer

Design and prepress: JPM | Partners

Copyright: © JPM | Partners 2026 All rights reserved.

### **Disclaimer:**

The sole purpose of this publication is to provide information about specific topics.

It makes no claims to completeness and does not constitute legal advice.

The information it contains is no substitute for specific legal advice.

If you have any queries regarding the issues raised or other legal topics, please get in touch with your usual contact at JPM & Partners.

# 1. Introduction

The purpose of Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition, 1987<sup>1</sup> (hereinafter: “FIDIC 1987”), also known as “the Red Book”, was to serve as a contract template in cases when the tenderers for conducting the construction works are invited on an international basis. In 1999, Fédération Internationale des Ingénieurs-Conseils (hereinafter: „FIDIC“) published a completely new edition, which was originally envisaged as an updated version of FIDIC 1987. The Conditions of Contract for Construction (First Ed. 1999) for Building and Engineering Works designed by the Employer (hereinafter: “FIDIC 1999”)<sup>2</sup> excluded the wording “civil engineering” from its title, which together with newly adopted principle of responsibility for the design process, led to the interpretation that FIDIC 1999 was applicable, not only to civil engineering projects, but rather to any construction works in cases when the Employer carries out the design.

The latest version of the Red Book – Conditions of Contract for Construction 2nd Ed, 2017 Red Book, Reprinted 2022 with amendments (hereinafter: „FIDIC 2017“)<sup>3</sup> represents a standard form contract which builds on the FIDIC’s fundamental principles of balanced risk sharing between the Employer and the Contractor, while seeking to build on the substantial experience gained during the years of drafting different versions of the Red Books.

According to the Merriam-Webster dictionary<sup>4</sup>, the term impartial describes the act of not being partial or biased, that is, treating or affecting all equally. If a person is impartial, it means that they are not biased or prejudiced, and it presumes that they are able to see the whole picture. Furthermore, the term fair when used as an adverb describes that something is conducted in a manner that is honest or impartial or that conforms to the rules. When used as an adjective, the term fair represents someone or something that is marked by impartiality and honesty, that is free from self-interest, prejudice, or favoritism. Finally, the term neutral is related to someone who is not engaged on either side, which is in essence, very similar to the term impartial. It can be argued that the reason for using a different term was to additionally emphasize the different role of the Engineer in FIDIC 1987 and FIDIC 2017. Further, the term “fair” remained in use in FIDIC 2017, where the drafters used similar wording in Sub-Clause 3.7.2, as in FIDIC 1999.

Although the change in terms may influence the role of the Engineer as a whole ( and vice versa – the role of the Engineer was influenced by changes in terminology), as it will be further explained in this paper, the terminological distinction alone cannot be decisive in determining the Engineer’s actual role. In practice, the legal significance of these terms depends on the functional role that the Engineer has within the contractual relationship and on the manner in which his or her powers are exercised, rather than exclusively on the terminology used.

The changes of the role of the Engineer in the Red Books also influence the interpretation of the legal nature of the Consultant Services Agreement concluded between the Engineer and the Employer, which will be further elaborated in relation to the Client/Consultant Model Services Agreement, Fifth Ed. 2017 (hereinafter: „FIDIC White Book“) <sup>5</sup>.

FIDIC standard forms of contract represent a transnational contractual regime that cannot always be fully subsumed under the institutes of national contract law. This is particularly evident in the case of the Engineer’s role, whose function is shaped both by the contractual text and by the practice of its implementation.

## 2.The Role of the Engineer Pursuant to FIDIC Red Books

### 2.1. FIDIC 1987

The definition of the Engineer as per FIDIC 1987 refers to a person appointed by the Employer to act as the Engineer for the purposes of the Contract and named as such in Part II of the GCC. Furthermore, Sub-Clause 2.6 of FIDIC 1987 prescribes the following:

*“Wherever, under the Contract, 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 and having regard to all the circumstances. Any such decision, opinion, consent, expression of satisfaction, or approval, determination of value, or action may be opened up, reviewed, or revised as provided in Clause 67.”*

The cited provision is drafted broadly to determine the Engineer’s obligation to act impartially whenever taking actions that may affect the rights and obligations of the contracting parties. However, according to FIDIC 1987, the contracting parties may amend the GCC and provide that the Engineer shall obtain specific approval from the Employer before carrying out duties in accordance with specific sub-clauses of the contract, as per the agreement of the contracting parties. This possibility of conditioning the Engineer’s actions with the Employer’s approval is conflicting with the Engineer’s express impartiality as prescribed by Sub-clause 2.6 of FIDIC 1987.

## 2.2. FIDIC 1999

Compared to FIDIC 1987, FIDIC 1999 defines the term Engineer as the person appointed by the Employer to act as the Engineer for the purposes of the Contract and named in the Appendix to Tender, or other person appointed from time to time by the Employer and notified to the Contractor under Sub-Clause 3.4 [Replacement of the Engineer]. It is evident that one of the newly introduced changes relates to the possibility of replacing the Engineer as per the GCC of FIDIC 1999.

Sub-clause 3.1, paragraph 5 (a) of FIDIC 1999 introduces the explicit statement that the Engineer acts on behalf of the Employer:

*„Except as otherwise stated in these Conditions: (a) whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer“*

Additionally, Sub-clause 3.5, paragraph 1 of FIDIC 1999 specifies the following:

*„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 endeavor 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.“*

Moreover, the express impartiality of the Engineer is excluded, which is further confirmed by prescribing that the Engineer acts in accordance with the interests of the Employer. However, the Engineer is obliged to make a fair determination when deciding on the claims raised by the Contractor and Employer. Considering that the terms impartial and fair overlap to a certain extent, it was necessary to explain the intention behind the changes introduced with FIDIC 1999. Therefore, the FIDIC Contracts Guide, First edition, 2000<sup>6</sup> lays out the interpretation of the wording “fair determination in accordance with the Contract”. The cited provisions state that the Engineer must carry out his duty in a professional manner and is not required to act impartially, unless such requirement is agreed between the contracting parties in the Particular Conditions of Contract (hereinafter: „PCC“).

The actual degree of the Engineer’s independence in these situations does not depend solely on the contractual provisions, but also on the manner in which the Employer exercises its powers in practice. The intensity of instructions and the pressure exerted on the Engineer may significantly influence whether a “fair determination” is carried out as an independent professional assessment or merely as a formal confirmation of the Employer’s interests.

### 2.3. FIDIC 2017

The definition of the Engineer is not much amended by FIDIC 2017, and it is the same in substance as the definition of the Engineer provided in FIDIC 1999. Accordingly, the Engineer means the person named in the Contract Data appointed by the Employer to act as the Engineer for the purposes of the Contract, or any replacement appointed under Sub-Clause 3.6 (Replacement of the Engineer).

Additionally, the Sub-clause 3.2. Paragraph 1 of FIDIC 2017 prescribes the following:

*„Except as otherwise stated in these Conditions, whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall act as a skilled professional and shall be deemed to act for the Employer. (...) There shall be no requirement for the Engineer to obtain the Employer’s consent before the Engineer exercises his/her authority under the Sub-clause 3.7.“*

Bearing in mind the cited provision, it is concluded that, as a rule, the Engineer shall act for the Employer. The only exemption exists in a situation when the Engineer acts under the Sub-clause 3.7. [Agreement or Determination] of FIDIC 2017, which expressly states that the Engineer shall not be required to seek the Employer’s consent in such cases.

Furthermore, Sub-Clause 3.7 of the FIDIC 2017 provides that:

*“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.“*

The use of the term neutral is in accordance with the provision that determines that the Engineer shall not act for the Employer when it comes to exercising his authority under Sub-clause 3.7 of FIDIC 2017.

The Golden Principles<sup>7</sup> issued by FIDIC in 2019 provide the following:

*„Thus, for the Red, Pink and Yellow Books, this requires that an Engineer be appointed with appropriate authority, competence and resources to carry out his/her role, and that she/he fulfils their duties and obligations as defined in the Contract. Further, the Engineer must exercise their contractual authority and make fair determinations in accordance with the Contract, taking due regard of all relevant circumstances. This means that s/he must not make determinations that only suit the Employer’s interests, without having due regard to the Contractor’s rights and entitlements under the Contract.“*

Therefore, it is not allowed for the contracting parties to amend the GCC in a way that would require the Engineer to obtain the Employer’s approval for any determination of a Contractor’s claim or granting any extension of time pursuant to Sub-Clause 3.7 of FIDIC 2017. The role of the Engineer is to fairly determine the Contractor’s entitlements in accordance with the Contract conditions, which should not be subject to influence or control by the Employer.

The neutrality prescribed under Sub-Clause 3.7 constitutes a normative requirement, but it does not guarantee the Engineer’s factual independence. Even under this regime, the Employer’s conduct in the day-to-day application of the contract may have a decisive influence on the actual scope of the Engineer’s autonomy.

### 3. Legal Nature of the Consultant Services Agreement

FIDIC White Book represents a standard form agreement, whose purpose is to provide for the minimum requirements of the Consultant Services Agreement concluded between the Engineer and the Employer. The FIDIC White Book represents a tool that serves for general use in pre-investment and feasibility studies, detailed design and administration of construction and project management, both for Employer-led design teams and Contractor-led design teams on design and build commissions.

When determining the legal nature of contracts concluded based on the FIDIC White Book 2017, the authors argue that the answer to the question of which legal characteristics of the Consultant Services Agreement will prevail in each case depends on the will of the contracting parties and the amendments made by PCC. The role of the Engineer in the contract between the Contractor and the Employer does not automatically determine the legal nature of the Consultant Services Agreement. However, the manner in which that role is exercised in practice may indirectly shape the content of the Engineer's obligations and the degree of autonomy vis-à-vis the Employer. Whether the Consultant Services Agreement will be determined as the contract for mandate or the contract for services depends on the scope of the Engineer's autonomy in providing the services and project management. Even though the role of the Engineer is primarily determined in the Consultant Services Agreement itself, the Engineer also has a role in administering the contract concluded between the Contractor and the Employer. Therefore, the manner in which the Engineer's role is defined in the contracts concluded between the Contractor and the Employer influences the legal characteristics of the Consultant Services Agreement.

The FIDIC model of the Engineer's role often does not fully correspond to any classical institute of contract law. Depending on the phase of the project and the type of authority involved, the same contractual relationship may simultaneously contain elements of a contract for services and a contract for mandate.

It is worthy to note that in cases when the scope of the Engineer's services is related to design, preparation of feasibility studies, etc., it can be concluded that the Consultant Services Agreement prevails with the legal characteristics of the contract for services. However, when the Engineer is engaged to take the role of FIDIC Engineer under FIDIC Red, Yellow, and related construction contracts, the situation becomes more complex.

According to the Law on Contracts and Torts of Montenegro<sup>8</sup> (hereinafter: „the Law“), the contract for mandate represents a contract by which the agent undertakes and is authorized to perform certain tasks on behalf and for the account of the principal (Article 842, paragraph 1 of the Law). Furthermore, the Law provides the following:

*Article 844, paragraph 1 of the Law*

*The agent is obliged to perform the mandate in accordance with the received instructions, with the care of a prudent businessman or a diligent head of household, remaining within their limits and in all respects safeguarding the interests of the principal and being guided by them.*

*Article 845 of the Law*

*The agent may depart from the mandate and the given instructions only with the consent of the principal; however, where due to lack of time or for any other reason it is not possible to seek the principal's consent, the agent may depart from the mandate and instructions only if, after assessing all circumstances, he could reasonably consider that such departure was required in the interests of the principal.*

If the agent exceeds the limits of the mandate or departs from the given instructions outside the cases provided for in paragraph 1 of this Article, he shall not be regarded as an agent, but as a manager without mandate (negotiorum gestor), unless the principal subsequently approves what he has done.

Besides determining the Consultant Services Agreement as the contract for the mandate, it is also possible to determine it as the contract for services, which is less strict when it comes to the obligation of the provider of services to follow the direct instructions of the client and to safeguard the interests of the client at all times.

The contract for services represents an agreement by which the provider of services undertakes to perform a certain task (such as the manufacture or repair of an item, or the performance of physical or intellectual work, etc.), and the client undertakes to pay remuneration for it (Article 669 of the Law). Moreover, the client has the right to supervise the performance of the work and to give instructions whenever this is appropriate to the nature of the work, and the provider of services is obliged to enable him to do so (Article 672 of the Law).

Taking into consideration the cited provisions of the Law, the authors emphasize the following sub-clauses of the GCC provided in the FIDIC White Book:

*Sub-clause 2.2.*

*On all matters properly referred to the Client in writing by the Consultant, the Client shall give its decision, approval, consent, instruction, or Variation, as the case may be, in writing within a reasonable time and with regard to the Programme so as not to delay the Services.*

*Sub-clause 3.1.1. and 3.1.2.*

*The Consultant shall perform the Services as stated in Appendix 1 (Scope of Services)*

*The Consultant shall perform the Services in accordance with the Programme as may be amended from time to time in accordance with the Agreement.*

*Sub-clause 4.3.1. and 4.3.2.*

*Within fourteen (14) days of the Commencement Date, the Consultant shall submit its Programme, which shall include as a minimum:*

- a) the order and timing in which the Consultant intends to carry out the Services in order to complete the Services within the Time for Completion;*
- b) any key dates stipulated in Appendix 4 (Programme) or elsewhere in the Agreement for the delivery of any part of the Services to the Client;*
- c) the key dates when decisions, consents, approvals or information from the Client or third parties is required to be given to the Consultant;*
- d) any other requirements stated in Appendix 4 (Programme).*

*The Consultant shall keep the Programme under review and shall amend the same as and when necessary to comply with the Agreement.*

*Unless the Client, within fourteen (14) days of receiving the Programme, gives Notice to the Consultant stating the extent to which it does not comply with the Agreement, the Consultant shall proceed in accordance with the Programme, subject to its other obligations under the Agreement.*

Based on the wording of the GCC of FIDIC White Book, the Consultant Services Agreement could be characterized as a contract for services rather than a contract of mandate. This is primarily due to the degree of professional autonomy granted to the Engineer in determining the manner and method of performing the contracted services. The obligation to prepare and manage the Programme, to determine the order and timing of the Services, and to proceed in accordance with the Programme unless the Employer raises objections, demonstrates that the Engineer is not merely executing the Employer's instructions but is independently organizing and carrying out the agreed scope of work. Although the Employer retains the right to approve, consent to, or instruct certain matters, these powers do not amount to continuous control over the manner of performance. Instead, they reflect a framework of coordination rather than subordination. Such an arrangement corresponds to the essential elements of a contract for services, where the focus lies on the achievement of a defined result or the performance of a particular service, while the provider of services retains independence in the organization and execution of the work.

One of the provisions that could indicate that even the GCC includes some provisions which favor the Employer is the Sub-clause 5.1.1 of the FIDIC White Book, which provides that:

A Variation to the Services may be initiated by the Client by issue of a Variation Notice at any time prior to completion of the Services. The Client may request the Consultant to submit a proposal in respect of a proposed Variation. If the proposal is accepted by the Client, then the Variation shall be confirmed by the Client by issue of a Variation Notice. Any such Variation shall not substantially change the extent or nature of the Services.

Taking into account the cited provision, together with the true intention of the contracting parties and the possibility of modifying the GCC through the PCC, it becomes evident that, in practice, the Consultant Services Agreement may also acquire the legal features of a contract of mandate. It is not uncommon for the contracting parties to stipulate that the Engineer shall act in accordance with the instructions of the Employer and fully in the Employer's interests. In such cases, the Engineer's autonomy is significantly reduced, and the contractual relationship is shaped by elements of subordination and fiduciary duty, which are characteristic of a contract of mandate. Consequently, the legal nature of the Consultant Services Agreement cannot be assessed in abstract terms only, but must be determined in each individual case on the basis of the specific contractual provisions and the actual intention of the contracting parties.

## 4. Conclusion

The evolution of the Engineer's role in FIDIC contracts – from being explicitly defined as independent in FIDIC 1987, to acting on behalf of the Employer in FIDIC 1999 and FIDIC 2017 – raises important questions regarding the legal nature of the Consultant Services Agreement concluded between the Engineer and the Employer. Expressing impartiality of the Engineer, as stated in FIDIC 1987, aligns with a more independent role of the Engineer, which is in accordance with determining the Consultant Services Agreement as the contract for services. In contrast, the FIDIC 1999 and FIDIC 2017 editions position the Engineer as acting largely on behalf of the Employer, except in specific cases such as prescribed in sub-clause 3.7 (that is, sub-clause 3.5 in FIDIC 1999), which reflects elements reminiscent of a contract of mandate, where the Engineer's discretion is limited to safeguarding the interests of the principal. The tension between the Engineer's obligation to act for the Employer and the requirement to make fair or neutral determinations is not a flaw of the FIDIC framework, but an inherent characteristic of its contractual architecture.

While the FIDIC White Book generally reflects a contract for services, the degree of guidance or instruction from the Employer, as well as any specific clauses mirroring subordination or fiduciary duty, could potentially tilt the legal nature closer to that of a contract of mandate. Ultimately, the determination of prevailing legal characteristics of the Consultant Services Agreement requires a case-by-case assessment. For that purpose, it is necessary to take into account the contractual terms, the intended degree of autonomy, and the practical implementation of the Engineer's role within the project framework.

At first glance, the role of the Engineer in the latest edition of FIDIC 2017 aligns with the legal nature of the contract for mandate, given that, under FIDIC 2017, the Engineer is to act on behalf of the Employer, as a rule. Therefore, if the Engineer's role within the Consultant Services Agreement is determined accordingly, it may be concluded that the agreement has prevailing elements of the contract for mandate. However, if the Engineer's role in the contract concluded between the Contractor and the Employer remains impartial as provided in FIDIC 1987, the Consultant Services Agreement may be characterized as a contract for services or at least have some impact, especially related to the liability of the Engineer. Additionally, the Engineer's role is determined by the will of the contracting parties, who may influence it by amending the GCC through the PCC. This also means that the Contractor and the Employer may agree to include impartiality clauses in contracts, even when using FIDIC 1999 and FIDIC 2017. Although if the Contractor and the Employer were to determine the Engineer as impartial, regardless of whether the Engineer's impartiality relates to the contract as a whole or solely certain aspects, this would raise other controversial issues. For example, if the Engineer is determined as impartial in the contract concluded between the Contractor and the Employer, this raises a question of who is responsible if the Engineer acts contrary to the contract.

The issue of the Engineer's liability further underscores the complexity of its legal qualification, as different classifications of the contract entail different liability regimes vis-à-vis the Employer and third parties.

It remains to be further analyzed whether the provisions of the FIDIC Red Books may influence the legal nature of contracts concluded under the FIDIC White Book. In particular, it is important to examine how the definition and role of the Engineer in the Red Books could affect the rights, obligations, and degree of autonomy of the Engineer in practice. A related question is whether such contracts exhibit a dual legal nature, combining characteristics of both a contract for services and a contract of mandate, or whether these two legal forms are mutually exclusive. Addressing this issue requires careful consideration of both the contractual text and the practical implementation of the Engineer's role in the project management.

# Authors



Mina Čogurić

Associate

E: [mina.coguric@jpm.law](mailto:mina.coguric@jpm.law)



Srđan Topalović

Dipl Ing. CE

E: [s.topalovic@gmail.com](mailto:s.topalovic@gmail.com)



Lana Vukmirović Mišić

Senior Partner

E: [lane.vukmirovic@jpm.law](mailto:lane.vukmirovic@jpm.law)

## Endnotes:

- 1 Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987, Reprinted 1988 with editorial amendments, Reprinted 1992 with further amendments, Reprinted 2011, FIDIC, 2011, ISBN: 2-88432-001-6.
- 2 Conditions of Contract for Construction (First Ed. 1999). For Building and Engineering Works designed by the Employer, FIDIC, 1999, ISBN: 2-88432-022-9.
- 3 Conditions of Contract for Construction 2nd Ed (2017 Red Book, Reprinted 2022 with amendments), FIDIC, 2022, ISBN: 978-2-88432-084-9.
- 4 Merriam-Webster, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/>
- 5 Client/Consultant Model Services Agreement (Fifth Ed. 2017), FIDIC, 2017, ISBN: 978-2-88432-078-8.
- 6 The FIDIC Contracts Guide (First Ed. 2000), FIDIC, 2000, ISBN: 2-88432-022-9
- 7 The FIDIC Golden Principles, First Edition 2019, <https://fidic.org/books/fidic-golden-principles-2019>
- 8 Law on Contracts and Torts (Official Gazette of Montenegro Nos. 47/08, 04/11 and 22/17).

JPM | PARTNERS

2 Šeika Zaida Street

81000 Podgorica

Montenegro

email: T:+382 20 672534

E: [office.mne@jpm.law](mailto:office.mne@jpm.law)

[www.jpm.law](http://www.jpm.law)