

ARE WE IMPLEMENTING THE CONSTRUCTION LAW IN PAKISTAN IN LETTER AND SPIRIT?

By

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“I WILL STRAIN MY POTENTIAL TILL IT CRIES FOR MERCY” . . . OG MANDINO

1. INTRODUCTION

With more than 40 years of experience in the Civil Engineering profession in Senior Executive positions with International and leading national Construction firms, Consulting firms, the Donor agencies (The United States Agency for International Development and the World Bank) in 5 developing countries : (Pakistan, UAE, Sudan, South Africa and Nigeria), I have come to a sad and painful conclusion that we are not implementing the construction law in Pakistan in letter and spirit. We all are now experiencing its destructive effects on our economy.

The inspiration for writing this paper, despite my hectic schedule working in Islamabad as an Individual Consultant, is a hope to wake up our construction contractors from a deep slumber to know their contractual rights provided by FIDIC ; and also a wake-up call to Professional Engineers acting as “Engineer” with Clients/Employer to work conscientiously to fulfill their roles as “Engineer” as required by FIDIC General Conditions of Contract clause 2.4 : “ Engineer to act impartially” as quoted below:

“Whenever 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,
- d. Otherwise taking action which may affect the rights and obligations of Employer or Contractor.

He shall exercise such discretion impartially within the terms of the contract and having the regard to all the circumstances.”

My perception of the above quoted clause is that FIDIC bestows a position of judge to the Engineer between the Employer and the contractor for the judicious execution of the contract throughout the contract duration. The Engineer has to act judiciously executing the contract in accordance with the FIDIC rules and regulations as spelled out by FIDIC and made part of the bidding documents issued to the bidder during the bidding stage.

I would like to question all Engineers assigned the role of “Engineer” of the contract whether they are fulfilling this vital Professional and Contractual obligation ; and are they aware what are the national detrimental consequences of its non-compliance .The author also dares to enquire from the construction contractors why they feel timid in asserting their contractual rights as bestowed by FIDIC. Perhaps our contractors have forgotten the several years struggle of the international community of their predecessor contractors against the tyranny of their Employers which resulted in the birth of FIDIC. I would like to see that contractors should not compromise with their rights at any cost. In my opinion the “cost” which they are paying for making profits in an unethical way are far less than the profit they can earn by asserting their rights as per FIDIC rules. Yes I assure you. The taste of the pudding is in the eating!

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Or is it the bid of the Engineer and the contractor to make their Employers happy for their future business promotion? But they should ask themselves at what cost is this attitude to their business and the community they are supposed to serve.

2. IS THE “ENGINEER” EXERCISING HIS DISCRETION IMPARTIALLY WITHIN TERMS OF THE CONTRACT AND HAVING REGARD TO ALL CIRCUMSTANCES?

In, most of the countries where I have worked (Pakistan, UAE, Sudan, Nigeria and South Africa) my experience is that most of the time, the Engineer is not exercising his discretion impartially generally in most of the circumstances, and particularly while giving his decisions regarding time extension in accordance with the General conditions of contract (GCC) 26.1 and other decisions related to his duties under GCC clause 2.

In addition, most of the time the Engineer becomes a party to his employer for all aspects of contracts administration throughout the contract period. For example, in justifying delays in site possession, delay in approval of materials and shop drawings, delay in progress payments and all other daily contractual aspects. Most of the contractors remain silent spectators most of the time generally in the countries I have worked and in particular Pakistan, even the leading consulting companies at times indulge in this unethical and unprofessional collusion and unholy alliance with the Client / Employer.

One may ask why the Engineer acts in this unprofessional behavior.

Some of the reasons which arise in my mind are enumerated below:

I) SOME OF THE “ENGINEERS” (WHICH MAY BE A TINY MINORITY) CONSIDER THEMSELVES AS A CAPTIVE OF THE SYSTEM.

I was working as an “Engineer” representing one of the leading consulting firms in Pakistan and the contractor was a west European firm on a multi-million rupees construction contract; Employer, a well known Government Authority of Pakistan.

The Contractor submitted his time extension claim to the Engineer in accordance with the contract, very well documented, meeting all the contractual requirements of the contract. I professionally reviewed this claim and could not find any reason to reject it. Before I could take the “Engineer’s Decision” regarding this claim, a high ranking official of the Government authority “summoned” me to his office. I could clearly see him as “Power drunk” when I visited his office. He dictated to me very rudely to reject the contractor’s claim, as the Government may have to pay a huge sum of money if the Engineer decides to accept his claim. I told him politely that we cannot act like this as it is an international contract and the contractor could complicate the government in international arbitration. However, I suggested inviting the contractor for an amicable settlement in accordance with the provisions of the contract. The “Employer” declined to listen to my suggestion; and I did not accept his dictation. Consequently, I was removed from the position of “Engineer” by my employer, although my employer was gracious enough not to terminate my services.

Later an interesting professional event happened enhancing my professional acumen, while working with one of the leading local consultants in Dubai during the years 2004 to 2011 on a multi-million AED high rise towers construction, monitored by a European project management firm, the contractor was one of the leading local contractors. The Employer was one of the leading real estate developers of Dubai.

The contractor was lagging far behind his submitted program as per GCC clause 12.1. As the completion date for one of the towers was approaching near and he was liable for liquidated damages under contract, he submitted his claim for time extension in an effort to preempt payment of liquidated damages.

To explain it further for the better understanding of my readers, the contractor had submitted his time extension claim for a particular activity, which according to him was delayed due to employer's delay in the issuing of the building permit for concreting of roof slab.

While the delay in the issuing of the building permit for this activity was a reality, the contractor was solely claiming delay in the planned program of this activity due to impact of building permit delay on his planned completion date. He was not taking into account the cumulative delay before the occurrence of this delay event and the responsibility analyses of this delay. I, as senior contracts administrator working with the consultants, assisting the engineer on contractual matters, instructed the contractor to determine and analyze delay and the responsibility of this delay right from the start of the project upto the starting time of the claimed delayed activity. The contractor was not willing to analyze the delay and the responsibility. He remained adamant that his delay claim was justified keeping in view the impact of delay of the non-issuing of the building permit, on his planned program.

To me the contractor's argument was not in accordance with the conditions of his contract. Surprisingly the whole project management team, supposed to protect the Employer's rights, was supporting the contractors view point for "obvious reasons." The liquidated damages per day were AED 100000. The readers can easily understand the invisible deal.

As I was not a team leader in the Engineers team, I discussed the matter with my team leader, making my best efforts to convince him that Contractor time extension claim does not meet the contractual requirements. With my hectic efforts and contractual arguments I did manage to convince our team leader, but he hushed me by saying that it is "politics", which you will not understand as your experience in Dubai is limited. I did understand it very well the "politics" but I chose to play the role of a fool. I had no other viable option.

With this Engineers decision the contractor was exempted from payment of liquidated damages for all the towers under the contract as it became precedent for time extension. All future time extensions were granted to be without delay and responsibility analysis. The contractor gained millions of AED through the un-holy alliance between the Engineer / Project Management team / contractor.

Later in the late 2007, I took up the position of Engineer with my firm on the same project. I explained the contractual view points of the delay claims to our Director. As our Director had a sound contractual background, he was wonder struck what the previous Engineer had been doing. Later with the permission of my Director I met with the Employer and explained to him the contractual view point regarding the previous delay claims. Although we had to eat a humble pie by explaining our involvement in this un-holy alliance. The Contractor was then instructed to submit his delay and responsibility analyses with the final bill.

The Contractor employed American Claims Consultant (AMC) to prepare the delay and responsibility analyses to defend his claims with the Engineer. I gave AMC ample time to defend his claims. But he could not defend the contractual snags pointed out by me in contractor's claims. Based on my findings and contractual conditions I took the Engineers Decision. The Employer was thus saved from a bogus AED 300 million claim. To acknowledge and reward my professional accomplishment I was promised a bonus from my Director which I never received due to deteriorating economic conditions of UAE. However, I was satisfied from my contributory professional work and elated feelings of an enhanced image of Pakistani professional, although my doors for future employment with the above mentioned American Claims Consultant were shut.

I could quote many similar examples from my professional experience for the benefit and enlightenment of my readers but I am constrained by my time and space.

II) THE ENGINEER GETS POWER DRUNK WITH THE POWERS GIVEN TO THE ENGINEER BY FIDIC, GCC CLAUSE 2.1

In my opinion most of the Engineers, at least I can say for the countries I have worked, get

Power Drunk with the powers given to the Engineer under the above mentioned clause.

As I see it, the powers given to the Engineer are to be exercised in the best interest of the project in order to complete the works in accordance with the specifications within the constraints of time and cost.

Unfortunately, these powers “massages the ego” of the Engineer, and he misuses it to meet his own ends detrimental to the project interests; at times against the employer and contractor’s interest. Astonishingly at times, some of the employers become party to the misuse of Engineer’s powers against their own interest. I now leave it upto the imagination of my readers to understand this strange behavior of the employer.

Moreover although the Engineer’s Decision contrary to FIDIC conditions of contract could be redressed through arbitration, most of the contractors are not willing to risk their relationship with the Employer.

III) ENGINEER’S COLLUSION AND UNHOLY ALLIANCE WITH THE CLIENT / EMPLOYER FOR FUTURE BUSINESS DEVELOPMENT.

Unfortunately most of the Employers / Clients in government, as well as private sectors, prefer “stooges” and “compliant consulting firms” who will only protect their interest over looking contractor’s rights given by FIDIC. So, keeping in view the limited available business opportunities, most of the consulting firms, consciously or unconsciously, become “stooges” and “compliant consulting firms” disregarding the FIDIC rules and regulations in administering the contract in particular the contractor’s rights to claim.

I would like to quote a particular condition of contract inserted by a leading Pakistani consulting firm on a multimillion Pak rupees project funded by international donor (FIDIC Based). Incidentally I was providing contracts advisory services to the contractor of this contract:

Clause 26.1.1. Financial compensation against extension of time :

“Contractor shall not be entitled for any financial compensation consequent upon the Extension of Time (EOT) for the completion granted to him under the provision of the sub-clause of the general conditions of contract and he shall not have any further re-course against the employer, nor shall have any right of action against the employer for loss or damage suggested by reasons of delay on which basis EOT is granted to him”.

In my opinion this is a shameful example of addition of an arbitrary clause by the engineer violating the rights of the contractor to make claim as guaranteed by FIDIC for the failure of the employer to fulfill any of his obligations under the contract.

IV) ENGINEER AND EMPLOYER PERCEIVES CONTRACTOR AS A CROOK MAKING ALL EFFORTS TO EARN MONEY BY HOOK OR CROOK.

In my opinion this perception of the Engineer / Employer is not absolutely correct. The contractor provides services in accordance with the contract, and is paid accordingly. It is the contractor’s right to make profit by working in accordance with the conditions of contract. The contractor cannot become a crook without the connivance of the Engineer / Employer in manipulation of the conditions of contract.

This perception needs to be corrected by the Engineer / Employer to be fair with the contractor.

3. WHY THE CONTRACTOR REMAINS A SILENT SPECTATOR TO THE ENGINEER’S VIOLATION OF THE CONDITIONS OF CONTRACT?

I) the contractor may be ignorant to his rights provided to him under FIDIC, a contract which he has signed. At the time of bidding the contractor is more eager to win the contract than to know the conditions of the contract.

II) the program furnished by the contractor is normally not realistic. It is not based upon the available resources, practical production rates and the contractual constraints. Most of the time

the program is a bar chart and not based on a critical path method (CPM).

With an unrealistic program provided to the Engineer committing as a contractual obligation, the contractor is on a weak wicket and vulnerable to the Engineer as he cannot keep up with his committed program and could be liable for liquidated damages.

The Engineer, presumably to be more knowledgeable of the conditions of the contract, blackmails the contractor's incompetence and lack of project management skills.

III) As most of the employers are not knowledgeable about the conditions of contract, the "Engineer" virtually becomes the "Employer". The Engineer harasses the contractor and plays with his weaknesses. The Engineer is now in collusion with the contractor. The contractor remains silent and "pays" the engineer to bail him out for his non-compliance with the contract to preempt the invoking of liquidated damages clause by the Engineer.

4. IS THERE A WAY OUT TO PUT AN END TO THIS VICIOUS UNHOLY ALLIANCE BETWEEN THE ENGINEER / EMPLOYER / CONTACTOR RESULTING IN LOW QUALITY WORK AND ENDLESS PROJECT DELAYS CAUSING BILLION OF PAK RUPEES LOSS TO THIS POOR NATION?

Yes I believe there is a way out to put an end to the above stated unholy alliance. Below are my recommendations to this effect :

- a. Statutory requirement for hiring of Project Management Firms by Government Agencies Responsible for managing construction contracts above Pak. Rs. 300 million.

At present the Government agencies hire the services of consulting firms for the preparation of bidding documents, selection of contractors, and construction supervision. These consultants are directly managed by the Government agencies right from the preparation of bidding documents through contract finalization.

I recommend minimizing the project management role of the government agencies. Project Management is a specialized job for which the government agencies are not qualified and competent. The role of the government agencies should be restricted to monitor the project management firms to assure that the government rules and regulations are complied with and project targets are met within particular time and budgetary constraints. Project Management from (PMF} will be responsible to assure project completion within time and budgetary constraints. The consulting firms will also be appointed. The PMF will assist the Government in procurement of consultants. The consulting firms will report to the PMF only during the bidding stage and selection of construction contractors. They will prepare the bidding documents and assist the PMF in selection of contractor. The bidding documents and the bid evaluation report will be reviewed by PMF and approved by the government agencies.

During the construction supervision phase the supervising consulting firms will be reporting to National Construction Contracts Management Authority (NCMA), a new authority recommended to be established through a government regulation as explained below.

The induction of project management firms will relieve the unnecessary expenditures of maintaining permanent staff by the government even when there are no projects. The size of the National Highways Authority and WAPDA and other similar agencies involved with construction management will be significantly reduced and their professional skills will be enhanced through their interaction with PMF, resulting in completing projects of highest quality within the constraints of time and cost.

- b. Statutory requirement for creation of a National Construction Contracts Management Authority (NCMA) for managing all construction contracts above Pak. Rs. 300 million during the construction phase through project completion.

Just to refresh the memory of my readers my perception of the quoted clause in the beginning of my paper was that FIDIC bestows a position of a judge to the Engineer between the Employer and the contractor for the judicious execution of the contract throughout the contract

duration. The Engineer has to act judiciously executing the contract in accordance with the FIDIC rules and regulations as spelled out by FIDIC and made part of the bidding documents issued to the bidder during the bidding stage.

As the Engineer is considered to be a judge and is to act judiciously executing the contract and also to give decisions on disputes between the contractor and the employer, one wonders how the Engineer can act judiciously while working under the employer. This is the basic flaw of the system. In order to make the Engineer independent he has to work under an independent authority NCMA as stated above. For example there is a NHA road construction contract say above Pak. Rs. 300 million. It will become mandatory for NHA to appoint a PMF as required by the above mentioned statutory requirements. PMF will assist NHA in the procurement of the consultants, who will prepare the bidding documents, assist the PMF in the selection of the contractor. After the contractor is on board the consultant will report to NCMA. Thus the Engineer will be acting independently under NCMA and not to NHA. PMF will be coordinating with the Engineer on behalf of NHA through NCMA.

c. STATUTORY REQUIREMENT FOR REVIEW OF PAKISTAN ENGINEERING COUNCIL PARTICULAR CONDITIONS OF CONTRACT FOR PROJECTS ABOVE PAK RS. 300 MILLIONS.

For the memory of my readers I re-quote the shameful inclusion of a contract clause in the particular conditions of contract by one of the leading consulting firm of Pakistan:

Clause 26.1.1. Financial compensation against extension of time:

“Contractor shall not be entitled for any financial compensation consequent upon the Extension of Time (EOT) for the completion granted to him under the provision of the sub-clause of the general conditions of contract and he shall not have any further re-course against the employer, nor shall have any right of action against the employer for loss or damage suggested by reasons of delay on which basis EOT is granted to him”.

This is an example of addition of an arbitrary clause by the Engineer violating the rights of the contractor to make claim as guaranteed by FIDIC for the failure of the employer to fulfill any of his obligations under the contract. There are many such examples I can quote from my experience working in many countries, but limited by space and time I restrict to the above quoted clause. To protect the rights of the contractor I strongly recommend the PEC review of particular conditions of contract for all projects above Rs. 300 million to ensure that all particular conditions are based on the essence of FIDIC. I hope the above mechanism will ensure the judicious working of the Engineer and reduce the malpractices as mentioned earlier under the unholy alliance between the Employer / Engineer / Contractor.

The above three statutory requirements would hopefully quell the fears of the Engineer to work judiciously not worrying about his relationship with the Employer for future business development. The review by PEC of the Particular Conditions of Contract will also act as a check and balance to the Engineer's Powers.

Now I make the following recommendations to encourage the contractor to become constructively aggressive with the Engineer to claim his rights given by FIDIC under his contract.

1. The contractor has to relinquish the myth that claims are bestowed by the Engineer by pleasing the Engineer and the Employer throughout the contract period.

In order to get rid of the above mentioned myth he has to make himself well versed with FIDIC rules and regulations. Adding a competent contracting specialist in his team is essential for the survival and flourishing of his business. He and his contracting specialist must understand that the bid documents have to be read very carefully before bid submission, particularly the Particular conditions of contract. If he finds any particular condition changed or added to the GCC, which is not in accordance with the spirit of FIDIC, he must raise this issue in the pre bid conference. If Engineer/ Employer is adamant not to delete or change these conditions, the contractor should ensure his dissent to this condition to be included in the minutes of the pre bid meeting. This matter should also be reported in writing to Pakistan Engineering Council.

2. The contractor must remove this obsession from his mind that his goal is only to grab more and more business. He should focus and develop his skills in Project management to successfully execute and complete the Project.

This obsession I have noted in almost all the contractors in the countries I have worked. In my opinion managing projects should be the top priority of every contractor big or small.

The contractor must have a competent project management team which must include a Planning Manager and a Quality Control Manager. A computerized construction program must be prepared during the mobilization stage based on critical path method. The program must be pragmatic based on ground realities, keeping in view the budgeted cost, available equipment and realistic production rates. The program should be prepared imagining if you are at war and you have to conquer your enemy with your available equipment and time.

This program needs to be monitored for time and cost every day. In case there is any delay in the program the responsibility for delay must be found out. If the consultant is the reason for delay he has to be notified in writing.

3. The contractor must make all efforts to promote a professional image in the community.

My perception about a contractor is a person or a firm who is contracted to provide certain services. Before committing any contract he must understand his scope of work (SOW) and his quoted price should reflect the committed SOW. For a competitive price he can lower his overheads and profit margin. During execution of works he should make his best effort to control the quality of works even if he has to compromise his profit margin.

A contractor who completes his work of a best quality within cost and time will capture the market. This is only his insurance for his future business.

While concluding this paper the author hopes that this paper may become a food for thought for our Professional Engineers; the “Engineers” may start acting impartially in fulfilling their professional and contractual roles; and the construction contractors by willing to behave in a positive aggressive ways to their clients will loose nothing but their imaginary chains, resulting in a rewarding business in their best interest and the community they are serving.

In the end the author appeals to Pakistan Engineering Council and all consulting and contracting firms to deliberate implementing the suggested statutory changes by convincing our legislators to build a new and better Pakistan for our children.