



Re-invention of the Engineer to the Contract Role

By: Mike Hanson
Associate Director, RDT Pacific
Mike.Hanson@rdtpacific.co.nz

Background

The role of an Engineer to the Contract (EtC) in the NZS 3910 form of contract, involves managing the terms of a construction contract between the employer and building contractor. This role has two distinct functions i.e., an agency function and a decision making function. In a wide sense this role has been in existence on building projects for centuries, (this type of form of contract having originated in the United Kingdom) although the term EtC (or Contract Administrator in some forms of contract) was not formally introduced until recently.

It is the EtC's duty to administer the project in such a way that the correct contractual procedures and good administrative practices are followed and the life of the building contract through the process is accurately and completely recorded.

This was a role historically performed by the architect but is now being performed by other professionals such as project managers, quantity surveyors, engineers etc. It should be noted that the EtC is an individual and not a company.

NZS3910 defines the role of the EtC as follows (clause 6.2.1):

- ▶ To act as expert advisor to and representative of the Principal; to give directions to the Contractor on behalf of the Principal, and act as agent of the Principal in receiving payment claims and providing Payment Schedules on behalf of the Principal; and
- ▶ Independently of either contracting party, to fairly and impartially make decisions entrusted to him or her under the Contract, to value the work and to issue certificates.

The obvious contradiction to this “dual” role can give rise to difficult issues. In New Zealand, the Advisian report to Treasury in August 2019, highlighted the following problem areas:

- ▶ Use of client employees to fulfil the role of EtC.
- ▶ Conflict in relation to the dual role of acting as a representative of the client as well as acting impartially in relation to decisions under the contract.
- ▶ The altering of the role of the EtC through special conditions of contract to remove the duty of care of the Principal to ensure the EtC fulfils its role reasonably and in good faith.
- ▶ The inability of the contractor to comment on the named EtC or raise concerns as part of their tender.
- ▶ The lack of focus when appointing the EtC on the individual and their relevant specialist expertise.
- ▶ Concerns that the EtC or its organization is also acting as the client’s overall project managers, quantity surveyors or designers and the increased conflict of dual roles in this regard.

RDT Pacific Response

RDT Pacific was aware of the “dual role” issue well before the publication of the Advisian report. In response to this issue RDT Pacific has separated the two functions within the company on each project i.e., having separate people performing each of the two functions along with putting processes in place to ensure objectivity and impartiality in the EtC role is maintained and can be seen to be maintained.

In terms of this model, the EtC is fully aware of the capabilities of the person undertaking the project manager/Engineer’s Representative role and the project management systems in place and is on hand to provide essential pre-contract services such as input into special conditions of contract, procurement strategy, calculation of liquidated damages etc.

RDT have an internal EtC panel comprising suitably experienced personnel from whom Etc’s are nominated for a particular project. This panel meets regularly to share information on projects, arrange training modules for current and aspiring EtC’s, and ensure panel members are committed to continuing professional development including adherence to a code of ethics.

Treasury Response

The Advisian report in 2019, advised Treasury to consider establishing a country wide panel of individual independent experts who can be procured for the EtC role on public sector projects.

This advice was taken up by Treasury and via Engineering New Zealand a pilot panel comprising 40 members has recently been established. These members have been appointed for a three year term. At this early stage of the development of the EtC panel, biographies of each of the panel members have been published on various channels such as Engineering New Zealand's website etc.

Challenges

In the Engineering New Zealand model, a project manager or Engineer's Representative will undoubtedly come from another organisation to that of the EtC. A by-product of this model could be additional professional fees due to a duplication of some aspects of the EtC and Engineer's Representative roles.

The EtC is accountable to the Principal when carrying out the Principal's Agent function, so this model introduces a raft of challenges, particularly in terms of liability.

The EtC is ultimately critical to the smooth delivery of a project. In terms of clauses 1.6 and 6.2.4 any failure or inability on the part of the EtC to carry out their obligations will result in a variation to the contract. An experienced EtC will recognize the danger signals during the course of the contract and the part that can be played in achieving the completion of a project in a manner satisfactory to both parties. The proper and impartial administration of the building contract is one way in which this can be achieved by minimising disputes.

Splitting the EtC/Engineer's Representative function between two separate organisations challenges this ideal. The situation is sometimes further complicated by the Principal wanting to carry out the Engineers Representative function themselves.

With the Engineers Representative separately appointed by the Principal under these arrangements, adjustments to NZS 3910 will become necessary. NZS 3910 currently envisages the Engineer's Representative being appointed by the EtC and only from "time to time".

Before accepting any commissions on the above basis, RDT has developed a decision tree diagram that needs to be satisfied, a scope of services development tool and special conditions of contract to ensure the Principal is fully informed of the workings of the revised process and that the roles and responsibilities of the participants are clearly defined and set out in both consultant and construction contracts, to ensure there are no gaps in the various roles and responsibilities.

The great unknown. NZS 3910 is in the process of being revised which is currently targeted for completion in January 2024. There will be a new direction. A Chair update issued on the 1 August 2022 states:



The new direction redefines the ETC role to be split into two distinct roles:

- *the Contract Administrator (CA), who provides direction behalf of the Principal; and*
- *the ETC who providing determinations under the contract, acting fairly and impartially, with duties that cannot be delegated.*

It is anticipated that for large or complex contracts the roles may be performed by different individuals or a team, and for smaller contracts they may be all undertaken by an individual.

The Contract Administrator may appoint assistants who will support and assist the CA but are not authorised to direct the contractor. Assistants may include:

- *Architects, Engineers, and technical consultants in relation to design, surveillance, and quality assurance support*
- *Quantity Surveyor to prepare payment recommendations and variation valuations*
- *Specialists for targeted advice and support (e.g., programmers, with regards to delay analysis)*

In addition, P3910 will include a new role, being the Principal's Representative."

This update is intriguing. It appears the new EtC role may be for providing determinations only. The legal definition of determinations is "a decision of a court or administrative agency regarding an issue, case, or claim". In other words, a form of dispute resolution service only and not taking a hands on approach to the project and therefore with no responsibility for the smooth running of the project.

Conclusion

We believe it is essential that the "sweet spot" of the EtC's involvement in a project is identified to ensure the EtC is able to fulfill their age old responsibility of ensuring the smooth running of a contract without falling foul of the "dual" role issues identified in the Advisian report. RDT's decision tree diagram and services development tool is designed to achieve this.