The Role of the Supervisor under the ECC

One of the roles identified in the Engineering and Construction Contract (ECC) is that of the Supervisor, a job title that is not found in other major standard forms of contract used in the construction industry. A frequently asked question is what does this role actually entail and who is this person.

As with other roles in the ECC, although an individual should be named, it is the scope and requirements of the role that should be concentrated on.

The role of Supervisor is one of four primary roles required to be fulfilled by the ECC, the others being Employer, Project Manager and Contractor. The duties of the Supervisor are, in the main, set out in Core Clause 4 (Testing and Defects), and it is from this that the general nature of this role becomes apparent. The role of Supervisor is, primarily, akin to that of a resident engineer or architect in checking that the works are in accordance with the contract. Depending on the size and nature of the works it might be that a clerk of works or inspector or similar person could be appointed to this role.

As the title of Core Clause 4 suggests the role can be divided into testing on the one hand and defects management on the other hand. The testing part of the role includes inspections, both on and off site, and is covered by clauses 40 and 41. The tests and inspections to be carried out and who carries them out will be identified either in the Works Information or required by the law applicable to the contract. The Supervisor must therefore be sufficiently experienced to understand and identify all these requirements.

The carrying out of tests and inspections by either the Supervisor or Contractor should be notified to the other in reasonable time before the test or inspection starts. There is no requirement for the party carrying out a test or inspection to wait for the other to attend, providing sufficient notice has been given. The tester carries out the necessary actions at the prescribed time, records the results and gives a copy to the other. If all this is done in the spirit of mutual trust and co-operation required by clause 10.1 then that should be the end of the matter. One quirk of this procedure is that clause 40.3 says that the Supervisor may watch any test done by the Contractor (see final sentence of the clause). What I find strange is that this provision does not refer to inspections as well as tests and I can’t understand why the Contractor is not given an equal right to watch any test, and inspection for that matter, of the Supervisor. Surely the principle at clause 10.1 would suggest that both the Supervisor and the Contractor should be able to watch all tests and inspections done by each other or any outside agency if so specified by the Works Information.

There is a requirement for the Supervisor to do his tests and inspections without causing unnecessary delay to the works or a payment. One can see that there could be a difference of opinion over what is necessary delay and what is unnecessary delay. However use of the Accepted Programme, the proper giving of the notices required and the spirit of mutual trust and co-operation should go a long way to avoid such differences.

Where any test or inspection is required of Plant or Materials before the goods are brought to the Working Areas then the Supervisor has a vital role to play. Regardless of whether the Supervisor carries out the test or inspection himself or whether it is done by the Contractor or one of the Contractor’s suppliers or subcontractors, clause 41.1 is quite clear that such Plant or Materials cannot be brought to the Working Areas until the Supervisor has notified the Contractor that the test or inspection has been passed. So where the off site test or inspection has been passed should the Supervisor not issue the necessary notice to the Contractor the Plant or Materials cannot be delivered and a delay could result. The Supervisor must therefore be aware of
such requirements and make sure that he issues the required notices in a timely manner. It must be hoped that mutual trust and co-operation will mean that the Contractor reminds the Supervisor of this requirement before any delay was allowed to occur, but remember that the Contractor is not obliged to provide this reminder and cannot be held at fault if he doesn’t.

The second part of the Supervisor’s role under core clause 4 relates to Defects (as defined at clause 11.2(5)).

The only power that the Supervisor has to issue an instruction to the Contractor is the one set out at clause 42.1 which permits the Supervisor to instruct the Contractor to search for a Defect. The actions that the Supervisor can instruct the Contractor to undertake are set out in the clause. This type of provision is common in construction contracts and users should not find it difficult to follow. What is not set out in core clause 4 is the financial consequences of such an instruction. It is of course necessary for givers and receivers of such instructions to understand what the implications may be. What users would probably expect is what they will find, being that if no defect is found then, subject to an exception regarding timing, a compensation event (clause 60.1(10)) would arise. If a defect is found then of course the compensation event wouldn’t arise.

With regard to any Defects that the Supervisor finds then he is obliged to immediately notify the Contractor of that Defect. A quirk of the ECC that should be remembered here is that clause 13.7 requires every notification given under the contract to be given separately from other communications. Technically this can be interpreted such that every Defect found should have its own separate notification, i.e. one Defect per notice. In practical terms this would become very cumbersome. Common sense and to that extent include mutual trust and co-operation suggests that an appropriate way of notifying and recording Defects should be established for each project, including mechanisms that are administratively workable by those responsible. This is what the vast majority of users do in practice. In respect of notifying Defects the Supervisor should remember that the Contractor also has a responsibility to inspect for and notify Defects; it is a two-way exchange.

The Defects regime makes the Supervisor responsible for the issue of one of the most important certificates required by the ECC, i.e. the Defects Certificate. It is the Defects Certificate that brings most of the Contractor’s obligations under the ECC to an end. The contents of the Defects Certificate, in principle, are set out in the definition of the term at clause 11.2(6), with which the Supervisor should acquaint himself. The timing of the issue of this certificate is crucial and impacts on the timing of the last payment to the Contractor.

Outside of Core Clause 4 the Supervisor has a further duty at clause 71 to mark Equipment, Plant and Materials which are outside the Working Areas when specified circumstances arise. These circumstances arise when the contract has identified such items for payment before they are brought to the Working Areas. The process for marking should be set out in the Works Information. The reason for and effect of such marking is to transfer the title in such items to the Employer (see clause 70.1).

So in summary the Supervisor’s role is that of an inspector who tests and inspects the works for compliance with the contract, who manages the defects process and checks and marks materials off site so as to protect the Employer’s interests.

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