

CONSTRUCTION REVIEW SEMINAR

CONSTRUCTION CLAIMS AND DISPUTE RESOLUTION SEMINAR

**PAYMENTS TO CONTRACTORS IN BUILDING AND
CIVIL ENGINEERING CONTRACTS**

*Presented By
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1. INTRODUCTION

In Building and Civil Engineering contracts there are two parties to a contract generally known as the **Employer** on one side and the **Contractor** on the other side.

All other persons mentioned in the Standard forms are not party to the contract, they are agents of the contracting parties. Amongst these people are the Architect, the Quantity Surveyor, the Engineers, the Site Agent, Clerk of works, Engineer's representative and the like.

However, the employer, the contractor and the other persons are expected to work together for the mutually beneficial fulfillment of the contract. This notwithstanding, it is imperative to realize that although the intention of the parties is to have the contract completed successfully their interest will more often than not be very different depending on whether they are serving the Employer , on the contract.

In Building and Civil Engineering contracts, the contractor's cardinal obligation is to execute and complete the works in accordance with the drawings and specification to the reasonable satisfaction of the Architect or the Engineer.

On the other hand, the employer's cardinal obligation is to pay the contractor for the works which have been completed to the reasonable satisfaction of the supervising agents.

Once the two parties enter into a contract, their respective focus become parallel with the contractor hoping and working towards making as much money as possible from the contract and Employer hoping to get the most work for least payment possible. To a very large extent, payment becomes the central focus for both of them.

It is for this reason that understanding the subject of payments becomes crucial to the contractor and his team (generally referred to as the **contracting team**), the Employer (also known as the Client, **the building owner**, the developer etc) and the **Design team** comprising the Architect, Engineers, the Quantity Surveyor and other specialist consultants.

For the purpose of this presentation, I will confine myself to forms of payments made to the contractor once the contract with the Employer is in place. The payment would generally be in the form of

- (i) Advance payment which is also commonly referred to as mobilization payment.
- (ii) Interim payments which is made periodically commensurate with work done.
- (iii) Final payment made once the contractor has met all his contractual obligations.

I will discuss payments in the context of the three most commonly used Standard forms of contract in Kenya. These are as follows

- 1) **Agreement and Conditions of Contract for Building Works** published by JBC (hereinafter referred to as the **JBC form**).

This document is mainly used for building works in the private sector.

- 2) **Republic of Kenya Standard Tender Document for Procurement of Works** (Building and Associated Civil engineering works) (hereinafter referred to as the **PPOA form**)

The Standard form is used in the public sector by government ministries and parastatals.

- 3) **FIDIC Conditions of Contract for Works of Civil Engineering Construction** (hereinafter referred to as the **FIDIC form**)

This form is extensively used for major local and international civil engineering works.

2.0 RESPONSE TO SEMINAR QUESTIONS

2.1 What form should an Application for Payment take and what should it contain?

Payments to a contractor are made against a certificate for payment issued by the designated **certifier** usually the Architect or the Engineer depending on the Standard form of contract.

The manner in which a contractor should apply for a payment is prescribed in the respective Standard forms.

The JBC form clause 34.1 requires the contractor to submit the application to the quantity surveyor giving sufficient details for the work done and the materials on site and the amount which the contractor considers himself to be entitled to.

Upon receipt of this application, the quantity surveyor is required to verify the information and prepare a valuation which is given to the Architect who then prepares an interim payment certificate. This certificate is presented to the Employer by the contractor

Clause 23 of the PPOA form requires the contractor to submit the application to the Project Manager who can be the Architect, Quantity Surveyor or the Engineer as the case may be.

The FIDIC form clause 60.1 is quite elaborate on the form the application should take. The monthly application should be submitted in 6 copies signed by the contractor's representative approved by the Engineer. The engineer may from time to time prescribe the form of statement of submission of application which must show what the contractor consider himself to be entitled in respect to

(a) Value of permanent work done

- (b) Other items in bills of quantities including contractor's equipment, temporary works, day works e.t.c.
- (c) Materials on site
- (d) Adjustments made in respect to cost changes
- (e) Any other amounts the contractor considers himself entitled to under the contract or otherwise.

It is therefore important for the contractor to submit the application in the prescribed manner and with sufficient detail to make verification reasonably easy.

**2.2 How should materials stored on site and off site be evaluated for payment?
What conditions should be fulfilled before paying for materials off site?**

In addition to the value of work done, the three forms mentioned above allow payment to be made to the contractor for unfixed materials delivered to the site for incorporation in the works. Both the JBC and FIDIC forms have a provision for payment of **off site** materials. The PPOA form has no express clause for payment of materials stored off site.

Clause 34.10 and 34.11 of the JBC form provides that interim certificate shall include value of materials and goods required for use in the works which have either been delivered to or adjacent to the works or have been stored elsewhere in safe custody by the contractor or his agent.

The quantity surveyor needs to confirm that the materials are actually on site and ascertain approximately how much of such materials there is.

The contractor should prepare for verification a list of materials with their respective quantities immediately prior to the “valuation date” and provide supporting delivery notes and invoices available so that each of the material can be valued at invoice cost.

The quantity surveyor may reduce or exclude the value of

- (a) insufficiently protected materials or those which have deteriorated or been damaged
- (b) quantities which are clearly in excess of requirements and
- (c) any materials or goods which have been delivered prematurely

The value of such materials is subject to retention and once paid for, the unfixed materials contractually become the property of the employer and if they are on site, they are under the control of the clerk of works on his (employer’s) behalf

Payment of materials stored off site

Where the standard contract give the architect discretion to allow valuation and certification of materials stored off the site, the quantity surveyor must satisfy himself that the following conditions have been met before he accepts a claim included in the application.

- that they are intended for the works
- that they are in accordance with the contract and to the satisfaction of the architect
- that they are set apart at the place where they are being kept and are clearly and visibly marked to identify the person to whose order they are being held and that their destination is the works.
- that they are properly and adequately insured
- that where ordered from a supplier or subcontractor they expressly provide that

- the materials shall pass unconditionally to the contractor. The ownership should be established in a written contract or subcontract for their (materials) supply

Contractually, a quantity surveyor who receives an application for payment of site materials should ask for authority to value them from the architect, who, when satisfied as the conditions prescribe (if any to protect employers interest are met) would in all probability give authority .

The object of the above condition is to ensure that the employer can recover materials paid for and stored off site in the event of the contractor insolvency before such materials are incorporated into the works or are brought to site.

This being the case, it is my humble opinion that a contractor could be required to provide a bond equivalent to the value of material stored off site certified.

The bond would in effect bind the approved provider to pay the employer an amount equivalent to the off site materials certified if so required until such a time that the materials are delivered to site thereby discharging the obligation

2.2 What is the effect of a letter of intent? If the contractor commences design, orders materials and starts on site following the receipt of a letter of intent, is he entitled to be paid if the contract does not go ahead?

Before defining or even discussing the letter of intent, it is imperative to briefly examine how building contracts become legally binding.

An invitation to tender sent out to a tenderer is not an offer which can in any way directly result in a binding contract.

The tender submitted is however, an offer, the unqualified acceptance of which forms a binding contract.

A letter of intent usually, merely expresses an intention to enter into a contract in the future and creates no contractual liability

Example

“We are pleased to advise you that we intend to contract your company for supply and delivery of building stone”

However, in most cases, where work is done on the basis of a request made in the letter of intent, it will not matter at all whether a contract did or did not exist if the party who has acted on the request is simply claiming for the work done and not damages. This is referred to as a quantum meruit claim and provides remedy for a person who has carried out the works where no price is agreed or where the original contract has been replaced by a new one and payment is claimed for work done.

However, where the party is seeking to claim damages for breach of contract, the question of whether a legally binding contract was created by the letter of intent would be of crucial importance.

Good illustration

British Steel Corporation (BSC) V Cleveland Bridge & Engineering Co. Ltd (CBE) QBD 21/12/81

- *CBE was involved in construction works in Saudi Arabia and needed steel for which they negotiated with BSC*
- *On 21/2/79 CBE sent following letter of intent to BSC*
“We are please to advise you that it is our intention to enter into a subcontract with your company for the supply and delivery of steel We

request you to proceed immediately with the works pending the preparation and issuing of the official form of subcontract”

- *BSC acted on the letter and started work*
- *On 27/2/79 CBE sent telex to BSC listing sequence in which they required delivery*
- *CBE did not send any official form of subcontract did the parties agree on price or delivery dates*
- *Finally CBE refused to pay BSC for the delivered steel*
- *BSC sued for breach of contract and alternatively upon quantum meruit.*
- *CBE admitted goods were delivered and accepted liability in part subject to plea for a counterclaim on ground that BSC was in breach of contract for delivering the steel late and out of sequence*

Contentions

- **BSC** – *They were entitled to payment on quantum meruit basis, because if there was no binding contract between the parties, there was no legal basis of CBE,S counterclaim*
- **CBE** – *Agreement between the parties was comprised in letter of 21/2/79, the telex and BSC ,S conduct.*
- **Held:** *No binding contract between the parties and BSC were entitled to paid upon quantum meruit*

Judge Robert Geolf Argued:

“Being a subcontract which was in a state of negotiation, not least on issues of prices, delivery dates and terms It is difficult to see how BSC, by starting work bound themselves to any contractual performance..... It is impossible to say with any degree of certainty what the material contract of the term would be”

2.4 What is the status of quotations?

The quotation is a form of tender. Just like a tender, an invitation to quote does not in any way bind any of the parties.

The quotation submitted becomes an offer whose unqualified acceptance forms a binding contract.

2.5 Can a Contractor / Subcontractor legitimately walk off site if payment is not made when due?

The simple answer to this question is no. Most standard forms have a prescription of events that follow once an employer defaults a payment.

In the case of the JBC form the first remedy to the contractor for default of payment is entitlement to simple interest on the unpaid amounts for the period the money remains unpaid as stipulated in Clause 34.6

However a close look at clause 39.1.1 gives the contractor the option to terminate the contract for non-payment provided the prerequisite notice is given in accordance with clause 39.3

The case is similar in the FIDIC form wherein clause 60.10 stipulates that the Employer is to make payment within 28 days or otherwise pay interest at the rate agreed. Clause 69.1(a) goes further to say that the contractor may terminate the contract after giving notice as required

Similarly Clause 23.3 of the PPOA standard form provides simple interest for the contractor for any delayed payments.

Clause 33.1 (d) gives the contractor a right to terminate the contract for non payment which is considered a **fundamental breach** (breach of an essential or basic term of contract by one party entitling the other party to treat the contract as terminated) of the contract.

2.6 Are Standard Conditions of Subcontract adequately worded to protect Subcontractors from rogue Main contractors who settle claims which are either real or fabricated from sums due to the subcontractor?

The JBC, FIDIC and PPOA forms all recognize subcontractors.

The JBC form devotes clauses 31 and 32 to nominated subcontractors and suppliers

Definition of a Subcontractor

This term refers to a person or corporate body who enters into a contract with the Main Contractor to carry out part of the works in a contract.

At this juncture it is important to distinguish between nominated and domestic subcontractors or suppliers.

Nominated subcontractor refers to all specialists appointed by the Architect with the approval / consent of the Employer and the contractor who enter into a contract with the Main contractor.

Privity of contract

It cannot be overemphasized that no privity of contract between the Employer and the Subcontractor can arise out of a subcontract concluded between the main contractor and the subcontractor. A domestic subcontractor is a person employed directly by the contractor to carry out part of the works.

In many cases, subcontractors even after accepting an order from the Main Contractor sometimes mistakenly seek to infer privity of contract with the Employer particularly if the Main contractor becomes financially embarrassed in an effort to charge the Employer for their work.

However, despite the general rule of lack of privity, the employer and the subcontractor may establish a direct legal relationship in the following circumstances.

- 1) In case where work has to be put in place before the Main Contractor has been selected and no main Contractor ready and willing to enter into a Subcontract has been chosen.
- 2) If during the course of negotiations warranties are given or representations made by the subcontractor on the faith of which the Employer instructs the Main Contractor to place his order with the Subcontractor.

As a general rule the assumption is that an Employer wishing to have a building erected or works carried out, wishes and intends to contract with one contractor for the performance of the whole work and for this reason, a contractual relationship with a subcontractor will not be inferred by holding that the Main Contractor and the Architect, contracted with the Subcontractor as agent for the Employer.

This way, the Employer one price for the whole work, avoids a multiplicity of contracts and liabilities and the complicated problems of delay and interference which would certainly arise if the work were to be carried out by various contractors

Probably with this in mind, many subcontract documents are written to ensure that terms follow closely those of the Main Contractor or make provisions only to have effect between the Main Contractor and the Subcontractor and will be considered irrelevant in inferring privity of contract between employer and the subcontractor.

It would be important to note that even where the Employer is in direct contractual relationship with the subcontractor or supplier, it does not follow in every case that, **ipsosfacto** (by this very fact) the Employer will be liable to the Main Contractor for default by the Subcontractor. This will depend on the circumstance in which the contract was made, or upon the construction of the main contract which may contemplate such a direct relationship without imposing any liability on the Employer.

Incorporation of the Terms of Main Contract

If the subcontract gives rise to considerable difficulties since the incorporation is often loosely expressed in the most general words and without any precise or careful consideration of the consequences.

Each case must be separately considered to determine exactly to what extent the terms of the Main Contract are incorporated.

It follows from the absence of privity of contract between the Employer and the Subcontractor that without incorporation, the terms of the main contractor cannot bind the scope.

Direct Payment to Subcontractors

Architects often indicate in their certificates what proportion of sums certified is payable to a subcontractor.

This is done with a view of assisting the Subcontractor obtain payment from Main contractor to speed up the works. This practice occurs even when there is no power in the main contractor for direct payments.

Unless however, there is an express provision in the Main Contract for Employer to pay subcontractor directly and deduct the sum paid from monies due to the Main Contractor, an employer who does so puts himself in peril since he will remain liable to the Main Contractor for the same work.

Normally, if a contractor becomes insolvent, the Subcontractor cannot claim any lien or charge on money due to the Main contractor in respect of subcontractor work.

2.7 Where the Employer becomes insolvent, is a Main Contractor obliged to pay his Domestic and Nominated subcontractors in full?

Clause 31.5.7 of JBC standard form places an obligation on the main contractor to pay the subcontractor amounts certified as due to the subcontractor as indicated in clause 31.6 within 14 days **after receipt of such money from the Employer.**

Clause 31.7 further stipulates that the Architect may request reasonable proof from the main contractor that all amounts due to the subcontractor have been paid in full and if such proof is not forthcoming, the Architect can issue a certificate to such effect and thereafter the Employer may pay such amount directly and recover the same from the main contractor in subsequent payments

The FICDIC form clause 59.4 and 59.5 is more or less the same wording in the above reference JBC form clauses requires the main contractor to pass onto the subcontractor his dues failure to which the Employer will be advised to make such payment direct.

The implication of these clauses is such that the main contractor is required to **pay the subcontractor only the amount certified and actually received from the Employer.**

Consequently, it would be logical to argue that a main contractor would not be obliged to pay the subcontractor any amounts which had not been certified and paid before the Employer's bankruptcy.

2.8 Where a Contractor / Subcontractor include an unrealistic low rate in the Bills of Quantities, can he be held to the rate if the quantities substantially increase? Equally, can a Client / Employer decline to pay an exorbitant rate to variations?

To satisfactorily respond to these questions, one would have to examine the type of contract that has been signed.

Generally speaking, a low or exorbitant rate can and should be moderated before a contract is signed. Otherwise they become binding to both parties. A very low rate will work to the disadvantage of the contractor if works are increased and to the disadvantage of the employer if works are omitted.

An exorbitant rate will disadvantage the contractor if works decrease and work to the advantage if works increase.

Contract types

- (a) There are three main types of contract most commonly used for building works
 - i) **Lump sum** where specific sum of money is stated in the contract as the contract sum. It is also called the fixed (not firm) price contract because the price for a definite amount of work is fixed before hand.
 - ii) **Schedule of rates** where no prescribed total sum is given, but a schedule in unit rates is priced and given to be used as basis for calculating payment for work done. Sometimes called measurement contract.

- iii) **Prime cost** where the contractor is reimbursed the total cost incurred plus a fee for his services to cover overheads and profits. Also referred to as cost reimbursement or cost plus contract.

- (b) However, in practice, contracts often combine the characteristics or qualities of two or three of the above and hence the list given above is far from being exhaustive.

- (c) Lump sum contracts can be based on
 - a) Bill of quantities of firm quantities
 - b) Bills of quantities of approximate quantities
 - c) Specification and drawings

- (d) When bills of quantities of firm quantities are used, both the quantities and unit rates in bills of quantities form part of the contract.

- (e) With bills of quantities of approximate quantities, the unit rate forms part of the contract but not the quantities.

Tendering evaluation

- (f) Usually, tenderers submit their tenders on a form of tender.
 - i) The form of tender, is a pre printed letter addressed to the employer in which the tenderer fills in the blank spaces, their name and address, the sum of money for which they offer to do the works and the period they intend to take.

 - ii) Once, the forms of tender are opened , to identify the lowest tender, the other supporting tender documents, in this case the bills of

quantities require careful scrutiny to detect, errors of any kind, and any anomalies or peculiarities which might jeopardize the tender.

- iii) It should, at this point in time, be understood that in a lumpsum contract, the important and therefore, a detailed examination of the priced bills of quantities is crucial to detect any errors that may have occurred in the computation of the tender, or any anomalies that could cause problems at the post contract stage.
- iv) If this examination is not done problems will almost certainly occur during the course of the contract and in settlement of variations and final account
- v) It is possible that a tenderer can make an arithmetical error of such a magnitude that it would be extremely unfair to the employer or the contractor for that matter depending in whose favour the error is, such that it would make the contractor to withdraw a tender or the employer refuse to accept the offer. The component parts of a tender play a vital role in the management of the contract.

The rates and extra works

- (g) If the contractors unilateral errors or mistake in tender price, individual errors in pricing multiplication, or addition are not detected and corrected before acceptance, such errors will be binding on both parties.
- (h) However, the legal position of whether a bill of quantities rate applies to extra works is stated ***in the case of Dudley Corporation V Parson & Morrin Ltd (Court of appeal 8/4/59)*** in which the construction of the bill was crucial in determining whether or not the rate could be applied.

(i) **A contractor priced rock excavation @ £0.1 per c.yds i.e. £75 for 750 cyds. Under the RIBA 1939 form with quantities. This was a gross under estimate although it was not known whether rock would be met.**

- *In carrying out the work, the contractor excavated 2230cu.yds of rock*
- *The architect valued works at £0.1 a cube for 750c. yrd and the balance at £2 per cube (the market rate)*
- *The employer disputed the amount, the arbitrator ruled that the contractor was entitled to £0.1 per cube for all excavation*

(j) *The question before the court was whether on true construction of the bills of quantities, the 750 cu yd. refers and is applicable only to excavation of the basement or to all the items in respect of excavation*

Held: The contractor was entitled only to £0.1 per cube for all excavation in rock over the quantity provisionally allowed in the priced bills of quantities.

(k) *It is imperative to note that if an employer discovers an error in the contractors tender and the mistake is as to the terms of the offer itself and not merely as to or affects the underlying assumption on which the offer is based he cannot accept the mistaken tender*

2.9 Is a Quantity Surveyor / Engineer or Contract Administrator empowered to alter hours which he considers to be excessive on a signed daywork sheet? Are they also empowered to alter rates which are excessive or inappropriate? If not, how are they to be dealt with?

(i) In some cases yes. The quantity surveyor / engineer or contract administrator may alter hours on a daywork sheet, considering that the hours are the measurable quantity on a daywork sheet applied against the agreed unit rate and what is presented must be reasonable. However the alterations must be done with the

knowledge of the contractor or subcontractor and they should be handled reasonably and agreed upon. A good approach would be prior to the dayworks being authorized and executed an estimate of the dayworks should be prepared and alterations be made on the schedule on completion of the dayworks.

- (ii) Alterations of rates on the dayworks schedule if excessive or inappropriate can be done and agreed upon prior to entering into contract with the contractor or prior to execution of the works, but with full knowledge and agreement of the contractor. Works that are likely to generate disagreement should generally be handled under other arrangements and NOT dayworks. It's recommended prior to getting into agreement to execute a contract that all rates including day works rates are moderated. High rates may work against either party.

2.10 Where the Architect/Engineer or contract administrator issues numerous variations which do not necessarily affect the completion date of the works but involves extensive time being spent by the contractor's personnel is the contractor entitled to be paid extra for administration of the variations?

The most appropriate way to handle this is on a case by case basis. It is a very rare occurrence that practical cases of this may arise. Proposed approaches would be as follows

- a) Under the traditional procurement system no extra payments can be justifiable.
- b) Where contractors programme is altered to accelerate sections of work or phase of work within the overall contract period, an acceleration cost can be justified

2.11 If the work is omitted, can the Contractor / Subcontractor make a claim for loss of profit?

All the three standard forms have clauses that give the Architect or the engineer express authority to order variations.

However, of interest is the limit to which these variations can be ordered. Clause 30.3 of the JBC form stipulates that if net value of variations should equal 15% of the builders work, the Architect shall not order further variations for additional work without consent of the Employer and the contractors. Further clause 30.14 stops the Architect from issuing an instruction requiring a variation for additional works exceeding 0.01% of contract price without the prior approval of the Employer.

Clause 30.9 of the JBC form is explicit about the contractors entitlement to a claim for profits he would have made on any parts of the works omitted.

This specific clause raises a lot of questions. It presupposes that the contractor is bound to make a profit on the works.

We are aware of many instances when contractors have indeed made losses.

Therefore, I would argue that, in assessing such profit the quantity surveyor would have to satisfy himself as to the profit margin the contractor would make on the job. This is not easy especially when one considers the fact that it is very possible that a contractor can make a profit on some items in the contract and yet make losses on others.

Although the FIDIC and PPOA form do not expressly provide for a contractors to claim on account of omitted works; there is the implied right for the contractor to claim for additional payment pursuant to any clause of the forms or otherwise.

2.12 Where there is gross or persistent under certification, failure or refusal to certify, can a contractor claim damages from an Architect / Engineer or Contract Administrator?

Yes

2.13 Where an Architect / Engineer under certifies, is the Contractor / Subcontractor entitled to claim interest?

Clause 23.4 of the PPOA for states that the contractor shall be paid interest if an amount certified is increased

- a. The position of the architect or the engineers in law varies according to the function being performed.
- b. He may perform his duties as an agent of the employer, or as the independent contractor of the employer or an impartial certifier (or independent arbitrator)
- c. The law of tort may also lay a duty on the architect / engineer to other persons by imposing duty of care to persons likely to suffer injury or damages as a result of his negligence.
- d. A common feature in construction contracts is a provision for the architect / engineer to issue certificates. The role of the certifier is invariably to act impartially between the employer and the contractor which is distinct from his role as an employers agent, when he must act in the best interest of his principal e.g. supervision of the works.
- e. In the famous case of Sutcliffe V. Thackrach (1974), Lord Reid said**

“the building owner and the contractor make their contract on the understanding that in all such matters, the architect will act in a fair and unbiased manner and it must therefore be implicit in the owners contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor”

- f. **In another court case Michael Sallis & Co. Ltd vs Calil & Calil, and William Newman & Associates, the judge ruled as follows**

“It is self evident that a contractor who is party to a JCT contract looks to the architect to act fairly between him and the employer in matters such as certificates....., If the architect unfairly promotes the employers interest by low certification or merely fails to exercise reasonable care and skill in his certification it is reasonable that the contractor should not only have the right as against the employer to have the certificate reviewed in arbitration, but should also have the right to recover damages as against the unfair architect”

Payment without a certificate

- g. Not only can a contractor recover damages from a negligent architect / engineer, but he can also recover without certificate money properly owed under the contract by dispensing with the requirements of a certificate.
- h. First, fraud or collusion will disqualify the certifier and permit recovery of sums without a certificate. As a principle of civil law, it is generally true that a defendant can never rely upon his wrongful act.
- i. Secondly, a certificate may be dispensed with where the certifier has acted improperly in some other way without fraud e.g. failure to act independently and refusal to issue a certificate.
- j. In Hickman vs. Roberts (1913) where an architect agreed to the employer’s instruction not to issue further certificates, it was held that the contractor could recover the sum in question without certificates.
- k. It is also improper for the certifier to consider extraneous matters in making a decision e.g. where a certifier function is to certify that work was satisfactory, but he refused to issue his certificate until satisfied that the work had also been done economically.

- I. The certifier may be disqualified if there is interest or other factor, which may influence his mind and which is known to the contractor e.g. In Kemp vs Rose (1858) an architect, before signing of a contract, promised the employer that the cost would not exceed a certain figure and it was held that his decision was not binding.

2.14 Once the value of Contractor / Subcontractor's work has been certified and paid can it be devalued in a later certificate?

- a. Clause 34.23 of JBC form states that interim certificates are not conclusive evidence that any works, materials or goods to which they relate are in accordance with the contract.
- b. Clause 61 of FIDIC form provides that no certificate other than the maintenance certificate shall be deemed to constitute approval of the works. The maintenance certificate is given when works are completed and maintained to the satisfaction of the Engineers. It is the equivalent of the certificate of making good defects in building contract.
- c. Valuation for interim certificates should be done in such a manner that undervaluation or overvaluation which may have occurred in the previous valuation certificate are automatically corrected.
- d. The proper way to prepare an interim valuation, in my opinion, is to value on each occasion, the amount of work which has been done since the beginning of the contract and value materials on/off site on the "Valuation date". From the total value so arrived at, the total of previous payments, if any will be deducted leaving a balance due of payment. By following this procedure strictly, any overvaluation or undervaluation will be automatically adjusted.

- e. An interim certificate, properly given, creates a debt due to the contractor from the employer but this does not mean that it cannot be reviewed as above.
- f. In addition, where there has been delay or defective work, the employer may generally withhold the amount of his gross claim from certified sums due to the contractor, and the contractor may similarly withhold from a subcontractor.
- g. Further, the employer is entitled to challenge the certificate, for instance, if work has been overvalued.

2.15 Where the Final Account and Claim have been signed by a Contractor / Subcontractor and final settlement paid in full, but subsequently it is discovered that an entitlement has not been included in the signed agreement, can the matter be reopened?

- (a) A common feature in construction contracts is a provision that a final certificate or maintenance certificate is certification for approval of works and what is finally payable to the contractor unless it is erroneous by reason of
 - i) fraud, dishonesty or fraudulent concealment
 - ii) any effect (including omission) in work or which could not have been disclosed by a reasonable inspection at any reasonable time during the works or before the issue of the final certificate
 - iii) any accidental inclusion of any work, materials, goods or figure in any computation or any arithmetical error.

Definition of terms

- (b) The ICE conditions define the final certificate as merely a document of account and the maintenance certificate as the one signifying final completion of works.
- (c) It is important, at this point in time, to also distinguish between the final account and the final certificate in the context of the AAK contract. The final account is merely a document of accounts (as the final certificate under ICE conditions) whereas the Final certificate is the legal approval of the works as well as the final statement of amounts to be settled.
- (d) Usually, in building contracts, the responsibility of preparing a final account is with the quantity surveyor who is expected to obtain the contractors agreement.
 - (i) In preparing the final account or interim valuations for that matter, the quantity surveyor's primary concern is measurements and value of work done and not quality of work done. The responsibility for approval of works is with the architect who should at all reasonable times keep the quantity surveyor informed of defective work which is not to be valued.
 - (ii) When the final account has been agreed, a copy of the signed document should be sent to the architect and or the client for consideration and issue of final certificate.
 - (iii) ***In Hosier & Dickson V KAYE Ltd (1 W.L.R. 1611) Lord Denning said,***

"that an architect owes a duty of care to the employer to see that the works have been properly carried out and is liable accordingly if he is negligent. He cannot be allowed to cover up his own mistakes by giving a final certificate".

2.16 How should the Contractor /Subcontractor have his final account settled in a short period?

- a) The contractor and subcontractors should ensure that proper and accurate interim valuations are done from the onset of the project to completion. With this approach the interim valuations are prepared to progress towards the final account and the last interim valuations will be a replica of the penultimate final account or the actual final account. If this approach is taken any remeasurements and issues to be resolved will not wait for the final account but will be resolved early enough at valuation stages and most of the information relating to the project finances will be very clear to all parties involved in the final account.

- b) Proper programming of post construction activities and management of the same would greatly influence the period taken to settle final account. If all parties involved in preparation of the final account follow a proper structured programme all activities such as outstanding works or making good defects can be handled and managed within a very short period and the final accounts similarly settled in the shortest time possible.

- c) In the cause of the project the client and contractor should be well appraised on project finances so that at the final account stage no surprises will be presented to them. This will go to a large extent in reaching consensus on the final account and eliminate any possible disagreement.