

QUESTION #1

THE MOWUD AND FIDIC CONDITION OF CONTRACT FOR CONSTRUCTION

1. THE MOWUD AND FIDIC CONDITION OF CONTRACT FOR CONSTRUCTION WITH RESPECT TO LIQUIDATED DAMAGE

SIMILARITIES

- ◇ Both are try to state the reasonable conditions that leads for liquidated damages at: -

MoWUD on Clause 47

Sub Clause (1): Liquidated Damages for Delay

"If the Contractor shall fail to achieve completion of the Works within the time prescribed by Clause 43 (Time for Completion which subject to any requirement in the Contract as to completion of any section of the Works before completion of the whole, the whole of the Works shall be completed), then the Contractor shall pay to the Employer 1/1000 of the contract price per day as liquidated damages for such default and not as a penalty for every day or part of a day which shall elapse between the time prescribed by Clause 43 and the date of certified completion of the works.

Depending on the nature of the works, Liquidated damage higher than the minimum limit provided here in above may be fixed in the contract. The Employer may deduct the amount of such damages from any monies in his hands without prejudice to any other method of recovery due or which may become due to the Contractor. The payment or deduction of such damages shall not relieve the Contractor from any other of his obligations and liabilities under the Contract."

Sub Clause (2): Reduction of Liquidated Damages

"If, before the completion of the whole of the Works any part or section of the Works has been certified by the Engineer as completed, pursuant to Clause 48 hereof, and occupied or used by the Employer, the liquidated damages for delay shall, for any period of delay after such certificate and in the absence of alternative provisions in the Contract be reduced in the proportion which the value of the part or section so certified bears to the value of the whole of the Works."

Sub Clause (3): Bonus for Completion

"If it is desired to provide in the Contract for the payment of a bonus in relation

to completion of the Works or of any part or section thereof this shall be set out in the projects Particular Conditions of Contract.”

Sub Clause (4): Limits of Liquidated Damages

“The maximum limit of the liquidated damage shall be 20% of the Contract Price.”

FIDIC on Clause 8, Sub clause 8.7 states that

“If the contractor fails to comply with Sub Clause 8.2 [time for completion], the contractor shall subject to notice under Sub Clause 2.5 [employer’s claims] pay delay damages shall be the sum stated in the contract data, which shall be paid for every day which shall elapse between the relevant Time for Completion and date stated in the Taking-Over Certificate. However, the total amount due under this Sub Clause shall not exceed the maximum amount of delay damages (if any) stated in the contract data.”

“These delay damages shall be the only damages due from the contractor for such default, other than in the event of termination under Sub Clause 15.2 [Termination by Employer subjects the employer should be entitled to terminate the contract without reasonable excuse if the contractor fails to proceed with the works in delays] prior to completion of the works. These damages shall not relieve the contractor from his obligation to complete the works, or from any other duties, obligation or responsibilities which he may have under the contract.”

DIFFERENCIES

MoWUD	FIDIC
Claus 47 in MoWUD states about liquidated damages for delay. The situations which the contractor has to pay liquidated damage for delay are: - 1. if the contractor shall fail to achieve completion of the works within the time prescribed by clause 43 (which states that the whole of the works shall be completed ,in accordance with the provisions of certification of completion of works.) then the Contractor shall pay to the Employer 1/1000 of the contract price per day as liquidated damages for such default and not as a penalty for every day or part of a day which shall elapse between the time prescribed by Clause 43 which states that the	Sub- Clause 8.7 in FIDIC states about Delay Damages. If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall subject to notice under Sub-Clause 2.5 [Employer’s Claims] pay delay damages to the Employer for this default. These delay damages shall be the sum stated in the Contract Data, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate. However, the total amount due under this Sub-Clause shall not exceed the

whole of the works shall be completed in accordance with the provisions of clause 48 hereof and the date of certified completion of the works. Depending on the nature of the works, Liquidated damage higher than the minimum limit provided herein above may be fixed in the contract. The Employer may, without prejudice to any other method of recovery, deduct the amount of such damages from any monies in his hands, due or which may become due to the Contractor. The payment or deduction of such damages shall not relieve the Contractor from any other of his obligations and liabilities under the Contract. 2. States about the reduction of liquidated damages. This happens when the whole work is not completed, any part or section of the Works has been certified by the Engineer as completed, and occupied or used by the Employer, the liquidated damages for delay shall, for any period of delay after such certificate and in the absence of alternative provisions in the Contract be reduced in the proportion which the value of the part or section so certified bears to the value of the whole of the Works. 3. Bonus for completion: in this sub clause it is stated that if the employer is desired to provide in the Contract for the payment of a bonus in relation to completion of the Works or of any part or section thereof this shall be set out in the projects Particular Conditions of Contract. 4. Limits of liquidated damage: The maximum limit of the liquidated damage shall be 20% of the Contract Price.	maximum amount of delay damages (if any) stated in the Contract Data. These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2 [Termination by Employer] prior to completion of the Works. These damages shall not relieve the Contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract. ➤ Here in FIDIC the amount of the payment for delay damage is not particularly written like the MoWUD which is 1/1000 of the contract type. ➤ The maximum (limit) amount of delay damage to pay is not stated in the general conditions of contract of FIDIC. ➤ Reduction of delay damage payment if some section of the work is being completed and certified by employer, is not stated in the general conditions of the contract unless it is stated in the specific contract data.
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QUESTION #2

2. MOWUD AND FIDIC CONDITION OF CONTRACT FOR CONSTRUCTION WITH RESPECT TO LIQUIDATED DAMAGE

The possible difference and similarities between the MD B-FIDIC 2006 and the PPA (ICB) and the ministry of works and urban development (MoWUD) conditions of contract with respect to:-

- ◇ Dispute settlement mechanisms
- ◇ Variations and
- ◇ Quality regulations are discussed below in the table

Our method of discussion is first we pointed out the clauses of the issues and

then we presented our point of view on their similarity and difference in a table.

A. Dispute Settlement Mechanism

Condition s of contract	Similarities on The dispute settler
1, MoWUD	In the MOWUD conditions of contract if any dispute or difference of any kind what so ever shall arise between the parties (the employer and the contractor) a dispute is referred to the engineer.
2,PPA - ICB	The authority of deciding contractual matters between the two parties in the role of representing the employer is the engineer.
	In Both the MOWUD and PPA - IC The authority of deciding contractual matters between the two parties in the role of representing the employer is the engineer.
	Difference on The dispute settler
3 MDB FIDIC 2006	Dispute here is referred to a dispute board for decision. The parties (the employer and the contractor) are the ones that shall appoint the dispute board.
	Here the difference is between MDB FIDIC and the two(MOWUD & PPA ICB) In MOWUD and PPA- ICB the decision maker in disputes between the employer and the contractor is the engineer but in the MDB FIDIC 2006 the decision maker is the dispute board.
	The engineer shall give a written notice of his decision to the parties within a period of 90 days after being requested by either party.
1, MOWUD	The Engineer shall give notice of his decision.
2, PPA - ICB	Within 84 days after receiving reference, or within such other period as may be proposed by the DB and approved by both Parties, the DB shall give its decision, which shall be reasoned.
3, MDB FIDIC 2006	In All the three condition of contracts the engineer give a notice of decision.
	Difference Disagreement of both parties on the decision of the dispute settler
	If the engineer shall fail to give notice of his decision within 90 days after being requested, or if either parties are dissatisfied with any decision of the employer then the dispute will be referred to MOWUD or his authorized representative.
1, MOWUD	If the parties believes that the decision taken by engineer was either outside the authority given to the engineer by the contract or that the decision was wrongly taken then decision shall be referred to the adjudicator within 14 days of notification of engineer's decision.
2, PPA - ICB	If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration.

3, MDB FIDIC 2006	In All the condition of the contract the second dispute settler after the dissatisfaction caused by the engineer and the dispute board is different. For MOWUD it is MOWUD or his authorized representative, for PPA - ICB it is the adjudicator and for MDB FIDIC 2006 it is the arbitrator.
	Similarities
	❖ Obligation of the parties the employer, the contractor and the engineer.
	the obligation of the parties shall not be not altered while adjudication.
1, PPA - ICB	The obligations of the Parties, the Engineer and the DB shall not be altered by reason of any arbitration being conducted during the progress of the Works.
2, MDB FIDIC 2006	The obligation of the employer, engineer and contractor shall not be altered by reason to appeal being conducted during progress of the works.
3, MOWUD	In all the conditions of contract the obligation of the parties and the engineer is not altered b/c of the dispute settlement process.
	Difference
	Payment for the dispute settling parties
	Adjudicator is paid by hour at rate specified in the bid data sheet. The cost shall be divided equally by the employer and the contractor. Whatever, the decision is reached by the adjudicator.
1, MOWUD	The payment will be for the engineer.
2, PPA - ICB	Then the appointing entity or official named in the Contract Data shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.
MDB FIDIC 2006	Payment is done in all conditions of contract. But to whom it is nominate is different Under MOWUD it is for the adjudicator and the payment is divided equally for the parties. Under PPA - ICB the dispute settler is the engineer there for the payment is included in the engineers salary Under MDB FIDIC the payment is for the dispute board, but if the parties disagree in the appointment of a new DB when the old DB resigns or something like that then the appointing entity or official named in the Contract Data shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DB. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

2, VARIATIONS

	Difference Right to vary
1, MOWUD	In MOWUD engineer shall make any variation that he thinks is necessary or desirable work.
2, MDB FIDIC 2006	here variation are entitled by the engineer at any time before issuing the taking over certificate for the works
3, PPA- ICB	here all variations shall be included in the updated programs produced by the contractor.
	❖ Their difference here is that in MOWUD the engineer make any variation if necessary in MDB FIDIC the engineer also can make variation but only before the issuing of the taking over certificate of the works. In PPA - ICB their is a big difference with the two the variations are included in the updated program.
	Difference The variations payment
1, MOWUD	Here the extra or additional work done or the work omitted by order of the engineer shall be valued at the rates & price set out in the contract.
2, MDB FIDIC 2006	If the Contract provides for payment of the Contract Price in more than one currency, then whenever an adjustment is agreed, the amount payable in each of the applicable currencies shall be specified. For this purpose, reference shall be made to the actual or expected currency proportions of the Cost of the varied work, and to the proportions of various currencies specified for payment of the Contract Price.
3, PPA- ICB	Here for both Admeasurement and Lump Sum Contracts, the Contractor provide to Engineer with a quotation for carrying out the Variation when requested to do so by the Engineer. The Engineer shall assess the quotation, which shall be given within seven days of the request or within any longer period stated by the Engineer and before the Variation is ordered. For Admeasurement Contracts only, if the work in the Variation corresponds with an item description in the Bill of Quantities and if, in the opinion of the Engineer, the quantity of work or the timing of its execution do not cause the cost per unit of quantity to change, the rate in the Bill of Quantities shall be used to calculate the value of the Variation
	❖ The difference among the three is in MOWUD the rates and the values are set out in the contract. In MDB FIDIC the payment is also refereed in the contract but here if the Contract Price in more than one currency, the amount payable in each of the applicable currencies shall be specified there for reference is made to the actual or expected currency and to the proportion of various currencies specified for payment of the Contract Price.
	Similarities Payment request
1, MOWUD	Here the contractor furnishes engineer such receipts of other

	vouchers as may be necessary to prove the amounts paid
2, MDB FIDIC 2006	Here the Contractor shall submit invoices, vouchers and accounts or receipts for any Goods.
3, PPA- ICB	the quotation by the Contractor shall be in the form of new rates for the relevant items of work.
	❖ In All the three condition of contracts, the contractor submit invoice, voucher or quotation for the amounts paid.
	Difference
1, MOWUD	
2, MDB FIDIC 2006	
3, PPA- ICB	

3 Quality regulations

	Difference Who makes the test
1, MOWUD	Engineer shall, when he requires any part or parts of the Works to be measured, give notice to the Contractor's authorized agent or representative, who shall forthwith attend or send a qualified agent to assist the Engineer or the Engineer's Representative in making such measurement, and shall furnish all particulars required by either of them.
2, MDB FIDIC 2006	The Contractor shall carry out the Tests on Completion. The Contractor shall give to the Engineer not less than 21 days' notice of the date after which the Contractor will be ready to carry out each of the Tests on Completion
3, PPA- ICB	The Engineer shall check the Contractor's work and notify the Contractor of any Defects that are found. The Engineer may instruct the Contractor to search for a Defect and to uncover and test any work that the Engineer considers may have a Defect.
	❖ In MOWUD the engineer or Engineer's Representative and the contractor or contractors Representative will be in the measurement of the work, if the engineer believe that the work need to be measured. The engineer give notice for the contractor authorized agent or representative, who shall forthwith attend or send a qualified agent to assist. In MDB FIDIC the contractor is going to do the test but it gives not less than 21 days' notice of the date after which the Contractor will be ready

	to carry out each of the Tests on Completion. In PPA - ICB the engineer himself might check the work or may instruct the contractor to take a test on he/HER work.
	Difference
	The absence of the contractors agent on the test
1, MOWUD	Contractor not attend, or neglect or omit to send such agent, then the measurement made by the Engineer or approved by him shall be taken to be the correct measurement of the Work
2, MDB FIDIC 2006	In MDB FIDIC the contractor shall carry out the Tests on Completion within the period of 21days. If the Contractor fails to carry out the Tests on Completion within the period of 21days, the Employer's Personnel may proceed with the Tests at the risk and cost of the Contractor. The Tests on Completion shall then be deemed to have been carried out in the presence of the Contractor and the results of the Tests shall be accepted as accurate.
PPA - ICB	The test is done by the engineer or by the contractor by the instruction of the engineer.
	❖ For both MOWUD and MDB FIDIC if the contractor fail to attend or carry out the test with in the specified day, then the engineer will perform the test and the result will be taken as accurate, ut for PPA ICB either the engineer or the contractor will carry out the test on the engineers order.
	Similarities
	Payment for the failure (defects)
MOWUD	If in the test there is a failure the Contract Price shall be reduced by such amount as shall be appropriate to cover the reduced value to the Employer as a result of this failure.
MDB FIDIC 2006	If defects are found the Contract Price shall be reduced by such amount as shall be appropriate to cover the reduced value to the Employer as a result of this failure. Unless the relevant reduction for this failure is stated (or its method of calculation is defined) in the Contract, the Employer may require the reduction to be (i) agreed by both Parties (in full satisfaction of this failure only) and

	paid before this Taking-Over Certificate is issued.
PPA - ICB	The Engineer shall give notice to the Contractor of any Defects before the end of the Defects Liability Period, which begins at Completion, and is defined in the Special Conditions of Contract. The Defects Liability Period shall be extended for as long as Defects remain to be corrected. But If the Contractor has not corrected a Defect within the time specified in the Engineer's notice, the Engineer will assess the cost of having the Defect corrected, and the Contractor will pay this amount.
	❖ Although the method of the payment is different in all the three if there is a defect then the defect is not corrected with in the specified day then contract price will be deducted on the amount of the defect or the contractor is obliged to pay the amount for the defect

QUESTION #3

PREFERRED OR SELECTED SUB- CONTRACTOR Vs.

NOMINATED SUB CONTRACTOR

1) Introduction:

In any construction job, Contractors may not have all the required skills or resources necessary to complete the works described in a construction contract, and so sub-contractors are commonly appointed to undertake those aspects of the project. Typically, subcontractors are selected and appointed by the contractor themselves. These are referred to as 'domestic' subcontractors. there will inevitably be the use of Subcontractors. The Subcontractor is usually appointed by the Contractor to perform a part of the construction works. However, there are times where one finds that their agreement makes reference to a nominated Subcontractor and a Selected Subcontractor. It is important to understand the difference between the two as they may have implications for the Employer.

There are three types of subcontractors provided for in standard forms of contract for construction works, namely:

- ✓ **Domestic subcontractor:** subcontractor appointed by the main contractor at his discretion;
- ✓ **Nominated subcontractor:** a subcontractor nominated by the employer which the contractor is obliged to appoint as a subcontractor; and
- ✓ **Selected subcontractor:** a subcontractor selected by the contractor in consultation with the employer in terms of the requirements of the contract.

GENERAL

“NOMINATED SUBCONTRACTOR” Someone the Employer has told the contractor he must use. The client will have usually negotiated the terms and price and entered a PC sum into the tender Bill of Quantities, which you add attendances, profit etc... to, again usually in a separate Bill item. There are often certain obligations that the Employer remains responsible for such as programmer, but this entirely depends on what is written in the contract.

“SELECTED SUBCONTRACTOR” means a subcontractor executing work provided for in a selected subcontract amount included in the contract sum or, in respect of additional specialist work, a subcontractor appointed as a selected subcontractor in terms of a contract instruction

✚ *The difference between selected Sub-Contractor and nominated Sub-Contractor under FIDIC are presented as follows.*

1) SELECTED SUB-CONTRACTORS

Selected sub-contractor is the one that is employed at the discretion of the contractor. The Contractor shall not subcontract the whole of the Works. The Contractor shall be responsible for the acts or defaults of any Subcontractor, his agents or employees, as if they were the acts or defaults of the Contractor. Unless otherwise stated in the Particular Conditions: -

- i. The Contractor shall not be required to obtain consent to suppliers solely of Materials, or to a subcontract for which the Subcontractor is

- named in the Contract;
- ii. The prior consent of the Engineer shall be obtained to other proposed Subcontractors;
- iii. The Contractor shall give the Engineer not less than 28 days' notice of the intended date of the commencement of each Subcontractor's work, and of the commencement of such work on the Site; and
- iv. Each subcontract shall include provisions which would entitle the Employer to require the subcontract to be assigned to the Employer under Sub-Clause 4.5 [Assignment of Benefit of Subcontract] (if or when applicable) or in the event of termination under Sub-Clause 15.2 [Termination by Employer]. The Contractor shall ensure that the requirements imposed on the Contractor by Sub-Clause 1.12 [Confidential Details] apply equally to each Subcontractor. Where practicable, the Contractor shall give fair and reasonable opportunity for contractors from the Country to be appointed as Subcontractors.

2) NOMINATED SUB-CONTRACTORS

In the Contract, "nominated Subcontractor" means a Subcontractor that: -

Clause 5

Sub Clause 5.1 Definition of "nominated Subcontractor"

- (a) Who is stated in the Contract as being a nominated Subcontractor, or
- (b) Whom the Engineer, under Clause 13 [Variations and Adjustments], instructs the Contractor to employ as a Subcontractor subject to Sub-Clause 5.2 [Objection to Notification].

Sub Clause 5.2 Objection to Nomination:

The Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises reasonable objection by notice to the Engineer as soon as practicable, with supporting particulars. An objection shall be deemed reasonable if it arises from (among other things) any of the following matters, unless the Employer agrees in writing to indemnify the Contractor against and from the consequences of the matter:

- a) There are reasons to believe that the Subcontractor does not have sufficient competence, resources or financial strength;
- b) The nominated Subcontractor does not accept to indemnify the Contractor against and from any negligence or misuse of Goods by the nominated Subcontractor, his agents and employees; or
- c) The nominated Subcontractor does not accept to enter into a subcontract which specifies that, for the subcontracted work (including design, if any), the nominated Subcontractor shall:

✚ *The difference between selected subcontractor and*

nominated sub-contractor under MoWUD are presented as follows:

Clause 4 Sub-letting or sub-contracting.

The Contractor shall not sub-let the whole of the Works. Except where otherwise provided by the Contract, the Contractor shall not sub-let any part of the Works without the prior written consent of the Engineer, which shall not be unreasonably withheld, and such consent, if given, shall not relieve the Contractor from any liability or obligation under the Contract and he shall be responsible for the acts, defaults or neglects of any Sub-contractor, his agents, servants or workmen as fully as if they were the acts, defaults or neglects of the

- Here in MoWUD as we have seen in the above clause the subcontractor is the one that is employed by the contractor by the written consent of the engineer.
- The contractor is responsible for the subcontractor in any way.

Clause 59

(1) Definition of "Nominated Sub-contractor"

All specialist, merchants, tradesmen and others executing any work or supplying any goods, materials or services for which Provisional Sums are included in the Contract, who may have been or be nominated or selected or approved by the Employer or the Engineer, and all persons to whom by virtue of the provisions of the Contract the Contractor is required to sublet any work shall, in the execution of such work or the supply of such goods, materials or services, be deemed to be sub-contractors employed by the contractor and are referred to in this Contract as "Nominated Sub-contractors".

(2) Nominated Sub-contractors, Objections to Nomination

- a) The Contractor shall not be required by the Employer or the Engineer or be deemed to be under any obligation to employ any nominated Sub-contractor against whom the Contractor may raise reasonable objection, or who shall decline to enter into a Sub-contract with the Contractor containing the following Sub-contract provisions and such provisions shall become part of this Contract- That in respect of the work, goods, materials or services he subject of the Sub-contract, the nominated Sub-contractor will undertake towards the Employer by the terms of the Contract and will save harmless and indemnify the Contractor from and against the same and from all claims, proceedings, damages, costs, charges and expenses whatsoever arising out of or in connection therewith, or arising out of or in connection with any failure to perform such obligations or to fulfill

such liabilities, and Standard Conditions of Contract for Construction of Civil Work Projects

- b) That the nominated Sub-contractor will save harmless and indemnify the Contractor from and against any negligence by the nominated Sub-contractor, his agents, workmen and servants and from and against any misuse by him or them of any Constructional Plant or Temporary Works provided by the Contractor for the purposes of the Contract and from all claims as aforesaid.
 - c) That the Sub-contract Works shall be completed within the period or (where they are to be completed in sections) periods therein specified. The Contractor shall not without the written consent of the Engineer grant any extension of time for completion of the Sub-contract Works or any section thereof, and the Contractor shall inform the Engineer of any representations made by the Nominated Sub-contractor as to the cause of any delay in the progress or completion of the Sub-contract Works or any section thereof.
 - d) that if the Nominated Sub-contractor shall fail to complete the Sub-contract Works or (where the Sub-contract Works are to be completed in sections) any section thereof, within the period therein specified or within any extended period granted by the Contractor with the written consent of the Engineer, and provided that the Engineer, certifies in writing to the Contractor with a duplicate copy thereof to the Nominated Sub-contractor that the same ought reasonably to have been completed, the Nominated Sub-contractor or shall pay or allow to the Contractor a sum equal to any loss or damage suffered or incurred by the Contractor and caused by the failure of the Nominated Sub-contractor as aforesaid.
- (e) That payments in respect of any work, materials or goods comprised in the Sub-contract shall be made within seven days after the receipt by the Contractor of Payment under Clause 60 of the Main Conditions of Contract.
- (f) that the Contractor shall retain from sums directed by the Engineer to be paid to the Nominated Sub-contractor the same percentage (if any) as may be specified in the Main Contract and if and when any sums or any part thereof are released to the Nominated Sub-contractor they should be paid in full within seven days of their being paid to the Main Contractor.
- (g) that the Engineer and his Representative shall have a right of access to the places of the Nominated Sub-contractor in accordance with the requirements of Clause 37 of these Conditions.
- (h) that the employment of the Nominated Sub-contractor under the Sub-contract shall be determined immediately upon the determination (for any reason) of the Contractor's employment under this Contract unless at the time of such determination the Employer might require the Contractor to assign to him the benefit of the Sub-contract.

(i) That in the event of the last paragraph of sub-clause 59(5) of these Conditions being operated by the Engineer, the Sub-contractor shall indemnify the Contractor against any claim which the Employer might make in respect of latent defects in the Sub-contract Works.

Under PPA

The Contractor may subcontract with the approval of the Engineer, but may not assign the Contract without the approval of the Employer in writing. Subcontracting shall not alter the Contractor's obligations

The Employer may modify the Schedule of Other Contractors nominated subcontractors) and shall notify the Contractor of any such modification

CONCLUSION

A Selected Subcontractor is one that is employed at the discretion of the Contractor. A Nominated Subcontractor on the other hand is nominated by the Employer, usually to complete a specialized part of the works. There is no contract between the Employer and the Nominated Subcontractor. This distinction is important to determine who is responsible for any delays in the works and in determining where liability lies if things go wrong.

Introduction

The effective administration of the payment clause of a building contract is one of the most important tasks that the contract administrator and consultant quantity surveyor perform during the contract period. The importance of cash flow within the construction supply chain is key to the smooth running of a contract.

The Act's primary purpose is to ensure that contractors, and more particularly subcontractors, are paid promptly, and in full, for work that they have carried out. The Act requires construction contracts to provide an 'adequate mechanism' for calculating both the timing of payments, and the amounts to be paid. If such a mechanism is not included in the agreement; the procedures set out in the 'Schedule' to the Act are deemed to apply. The default arrangements in the Schedule require contractors to be paid within 30 calendar days of submitting a payment claim. The default provisions in the Schedule apply to all subcontract payment agreements, unless more favorable terms than those set out in the Schedule can be secured. The Act also outlaws previous widespread payment practices such as pay-when-paid conditions. The primary impact of the Act, therefore, may be viewed as enshrining interim payments as the standard means of paying for construction work in order to generate the vital cash flow required by the supply chain. The Act is not specific as to what constitutes an 'adequate mechanism' for payment but it is supposed that a number of common approaches would satisfy the Act's requirements such as:

- ⇒ regular predetermined set periodic payments;
- ⇒ milestone or stage payments, which are predetermined payments made following the completion of specific sections of the work;
- ⇒ detailed interim valuations of the construction work in progress.

WHAT IS PAYMENT IN THE CONSTRUCTION INDUSTRY?

Payment is a sum of money paid to someone in return for goods, work done or services rendered. In the construction industry, payment is the sum of money paid to contractors after their work for certain projects has been successfully completed. In a typical engineering and construction contract, it is apparent that the contractor has promised to carry out all the works under the contracts. On the other hand, the employer must keep his side of the promise by giving necessary consideration to payment when due which in most cases comes in monetary form.

Payment is considered as the life blood of the construction industry

because construction projects often involve very large capital outlay (Ameer-Ali, 2005). It is very obvious that a healthy and consistent disbursement of money is a critical point in determining contractor performance. In order to ensure the flow of the work activities under the contract and its eventual successful realisation, construction contracts have to be drafted. Most of these standard forms of contracts contain specially drafted clauses which govern all aspects of the subject of payment under the contract; these clauses have been reduced to the following principal categories:

Interim or progress payment

During contract periods, the most common method used is interim payments or the so-called progress payments. In Standard Forms, the interim or progress payments are effected by the issuance of 'interim certificates'. An interim certificate is actually the periodic certification for the payment due to contractor. The failure of the certifier to issue the relevant 'interim' certificates in line with the stipulation of the contract can expose his employer to a possible claim of breach of contract by the contractor (Singh, 2003). The frequency of periodic payment could be varied from a fortnight to a month. The actual duration is normally the period as agreed to in the contract conditions signed.

Stage payment

The term 'stage' payment is used when the payments are made at specific stages of work. This mode of payment is often used in small lump sum contract without quantities where a proportion of the total sum is agreed to be paid over in a number of stages. These proportions are fixed and do not depend upon any re-measurement of work. Nevertheless, the applications of this mode of payments are also applied in turnkey, design and build contracts as well as contracts involving repetitive works.

Advance payment

This is the sum of money paid to the contractor by the employer well before the work involved is executed. This practice is usually done in public works contracts. The main purpose of implementing this scheme is to assist the contractor to start up and finance the contract without having to resort to unnecessary and costly external borrowings.

Payment after completion

This is the method of payment to contractor triggered by the achievement of the contract milestone of practical or substantial completion and/or the so-called handing over of the works to the employer. Hence, unless such stage is reached and certified by the contract administrator, the contractor is not entitled to any payment

whatsoever. In using this method, the contractor is basically financing the works to a large degree, which costs would eventually build into the contract sum. The employer must also be prepared to shoulder this burden as well as be in a position to source and effect payment ultimately of a sizeable lump sum amount upon the taking over of the works.

CAUSES OF DELAYED PAYMENT

There are many factors that are said to be causing the delayed payment problems in construction industries (Nazir, 2006). There is a need therefore to identify the contributing factors which lead to a situation of delayed payments. Based on the literature review various factors have been identified as the potential causes of delayed payment. These include:

- ✓ Employer's poor financial management: It is anticipated that employers' poor financial management could cause them to have insufficient operating funds when they are obliged to pay the payees. Payment is considered as the life blood of the construction industry because construction projects often involve very large capital outlay.
- ✓ Employer's withholding payment: As provided in many standard forms of contract, the employer may withhold payment to the main contractor or subcontractor for a variety of reasons. Such reasons are major defective construction work, disputed work, failure to comply with any material provision of the contract, third party claims filed or reasonable evidence that a claim will be filed, and failure to make timely payments for project resources (Reeves, 2003). These reasons may cause the employer to refuse to make payments which will result in delayed payments.
- ✓ Conflict among parties involved: 'Payment, not unexpectedly, has always been the main subject of disputes' (Adballa and Hussein, 2002). It is anticipated that conflict if unsettled will escalate into disputes which can also cause delayed payment.
- ✓ The use of 'pay when paid' clause in sub-contracts: The 'pay when paid' clause in contracts could cause delayed payment issues especially to the subcontractors (AmeerAli, 2005).
- ✓ Local culture/attitude: Before the introduction of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) the construction industry in the UK was prone to a culture of late payment where a delay of 53 days in making payment after the receipt of invoice was not uncommon (Johnston, 1999).

Other causes of delayed payment identified by the researcher include:

- Delay in certification
- Disagreement on the valuation of work done

A few works published on this issue worldwide have stated that the delayed payment problems could be due to contractors, clients and sometimes the contractual matters in the contract provision used (Reeves, 2003; Adballa and Hussein, 2002; Artidi and Chotibongs, 2005).

CONCLUSIONS It was realised that client-related factors were the highest ranking group to contractors in the study. According to the contractors, the most frequent causes of delayed payment by clients are: 'Clients' poor financial management'; 'clients' poor financial sources/conditions'; and 'clients' failure to cultivate a good payment attitude among its employees by wrongfully withholding the payment'. On the other hand, the clients also related the most frequent causes of delayed payment by contractors as: 'Contractors' failure in submitting a new (corrected) claim'; 'contractors submit claims with mistakes'; and 'contractors' failure to understand the contract agreement'. It was also identified that delayed payment is sometimes caused by disagreement on the valuation of work done between client and contractor. Delayed payment most likely will cause undue cash-flow problems for the contractors and this would have a devastating knock-on effect down the contractual payment chain. Failure to receive payment in a timely manner could expose contractors to a greater risk of failing to complete construction projects on time. The survey results indicate that the most serious effects of delayed payment are: 'Delay in project's progress'; 'creates financial hardship for the company'; 'sub-contractors refuse to continue works on the project'; and 'creates negative relationship between clients and contractors'.

Most of the respondents (contractors and subcontractors) agreed that a mechanism for avoiding or reducing delayed payment needs to be taken in the form of contractual or statutory rights. According to the literature review, the 3 most preferable alternative remedies for securing payment debt from the employer are: 'Right to speedy dispute resolution mechanism, for example, adjudication'; 'a right to suspend work'; and 'a right to regular periodic payment'. However, according to the study results, the 3 remedial actions of delayed payment chosen by the main contractors are: 'Follow-up with clients by direct communication'; 'follow-up with clients using formal procedure'; and 'sending notice letter via company's lawyer'. Subcontractors, on the other hand, prefer to take the

following actions: 'Suspend the construction process until payment is received'; 'slow down the construction work at site until payment is received'; and 'follow up with clients using formal procedure'. It was found that the method of applying overdue (interest) charges was very rare in the construction industry. Arbitration or litigation was also least likely to be chosen because it usually takes a long time to resolve disputes using these methods.

The study concluded that professional bodies and government agencies should study and amend the existing standard forms of contract to provide protection and to promote well-balanced allocation of risk and a fair contract to all related parties. It should also be made mandatory for employers' financial capacity and credit rating to be made transparent to facilitate contractors in selecting employers who are credit-worthy and to improve the chances of the contractor being paid. Perhaps, an increased sense of professionalism in the construction industry could overcome some of the problems related to delayed payment.

RECOMMENDATIONS

To improve the situation regarding delayed payments in the construction industry, the findings of this research must be addressed by a joint effort of all participants in the construction industry. This calls for:

1. Enforcing clauses of delayed payment in contracts. Applying charges to overdue payments could be determined in the same way as late delivery charges have been applied.
2. Developing payment departments for every contractor to report any delayed payment problems. This department would be responsible for keeping records of every client with a history of delayed payments. These clients would be subject to penalties if they fail to pay on time as stipulated in the contract. This department should be mindful of the fact that

time is of the essence and should be in a position to settle any problems in this regard as soon as possible

