



MODULE 7

The Engineer's Response & Determinations

VIDEO 1

- **The Engineer's Response**
- **Certification and Payment**
- **Agreement or Determination**

The Engineer's Response (Silver Book – Employer, Gold Book – Employer's Representative)

- The various clauses providing entitlement to an extension of time and/or the payment of additional Cost contain the following obligations:
 - “After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 (*Determinations*) to agree or determine these matters.”
- It is unclear just how the Engineer is expected to proceed as directed at this point in time, without receiving the Contractor's claim

The Engineer's Response (Yellow Book – Employer, Gold Book – Employer's Representative)

- The Red, Yellow, Silver & Gold Books, Sub-Clause 20.1 (*Contractor's Claims*) however, provides further directions:

“Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.”

Summary

- The Engineer must respond to the Contractor within 42 days after receiving a claim or additional particulars
- The response could be approval
- The response could be disapproval but with detailed comments
- Presumably the response could be approval but with a reduced amount
- The response could contain a request for additional particulars but in such a case, the response should also comment on the principles of the claim
- The Gold book provides that if the Employer's Representative does not respond in accordance with the provision of this clause, either party may consider this to be a rejection and may refer the matter to the DAB

Certification and Payment

- The Red, Yellow, Silver & Gold Books Sub-Clause 20.1 (*Contractor's Claims*) continues:

“Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.”

Summary

- The Engineer shall certify amounts that he reasonably considers to be due after reviewing the claim
- This does not mean that payment may be withheld until the details are finalised

Agreement or Determination

- The Red, Yellow, Silver & Gold Books Sub-Clause 20.1 (*Contractor's Claims*) further directs the Engineer:

“The Engineer shall proceed in accordance with Sub-Clause 3.5 (*Determinations*) to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 (*Extension of Time for Completion*), and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.”

Agreement or Determination

- The Red, Yellow, Silver & Gold Books Sub-Clause 3.5 (*Determinations*) provides that:

“Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 (*Claims, Disputes and Arbitration*).”

Summary

- The Engineer is obliged to consult with both Parties to try to reach agreement
- In the case of no agreement being reached, the Engineer shall make a fair determination
- When either agreement is reached or a determination is made, the Engineer shall give notice to both Parties
- The Parties are required to comply with the determination unless it is revised under the dispute procedure