

ADMINISTRATION OF CONTRACTS

by Hemal A. Pieris

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The subject, "Administration of Contracts", relates to the most important phase of a Civil Engineering Project, particularly from the owner's point of view - because this is where most of his money will be spent or mispent on the project. When talking about Contract Administration it is first necessary to clearly understand what we mean by this term "Contract", the parties involved, and most important who will be responsible for administering the contract.

The Contract

The contract we are talking about is between the Employer or owner and the Contractor. There is not much doubt about this. The Administration of the contract is the function of "the Engineer". This too is generally understood. What is not clearly understood, is exactly what constitutes the Contract Document and the limits of the powers, responsibilities and duties of the Engineer, and the interplay of such duties and responsibilities with those of the others involved in the project, during the period of the contract.

Now the Engineer is someone employed by the owner to act on his behalf during the period of the contract to administer the contract. The Engineer is usually an independent Consultant commissioned by the owner for this purpose, or may in some instances, be an employee of the owner.

At one of the previous C.I.T.P. Seminars I read a paper on the subject, "Relationship between client Consultant and Contractor". That dealt with the entire assignment of the Consultant including the Planning, Design, Tender and Construction supervision phases, but today's talk only deals with the Construction Phase, which is the one relevant to Contract Administration.

The basis for the Administration of the contract by the Engineer is set out in a standard document called the General Conditions of Contract, which I am sure, you are familiar with. There are available in Sri Lanka,

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General Conditions of Contract documents produced by both the I.E.S.L. and the C.I.T.P. which are in turn, based largely on the F.I.D.I.C. document.

Definition

Now let us consider the definition of the term 'Contract' in the General Conditions of Contract. It is defined thus - 'Contract' means the 'Conditions of Contract', Specification, Drawings, priced Bill of Quantities, Schedule of Rates and Prices, if any, Tender, Memorandum of Understanding, Letter of Acceptance and the Contract Agreement, if completed.

This definition, I find is uniform in all three General Conditions of Contract documents referred to.

You will note from the definition that the 'Contract' seems to be operative at the time the various documents listed in the definition i.e. Drawings, Bill of Quantities, Specifications etc. have been completed, and a 'letter of acceptance' issued. However, the definition provides for the Agreement not being signed at this point. This is often so, in practice. It cannot be stressed too much that it is in the interest of the project that all the documentation listed are prepared and completed as far as possible before work commences, and also that the agreement is signed within a specified period of time. The important principle to be realised here is that what is important is not merely to commence work quickly, but to complete the project satisfactorily, within the prepared estimates and within a reasonable period of time. That is the real test of effective Contract Administration.

As you may know, even an exchange of letters forms a legal contract. In Sri Lanka there are many instances where site work on projects commences after preliminary estimates have been prepared and on what is known as a

'Letter of Intent' issued to the Contractor by the Owner. This is quite in order in some instances, where it is not possible to prepare all the other documentation in time and even F.I.D.I.C. allows for this, but what is wrong is that in Sri Lanka particularly on some public sector projects a 'Letter of Intent' is used not only to get work started, but sometimes on such projects the actual agreement is not signed well into the construction phase and sometimes even until after work is completed. This is highly irregular and inadvisable. Often the estimates are exceeded and no one is blamed for this -- as the documentation has not been finalised and fixing blame is not easy in such circumstances. This type of situation is best avoided.

Signing of the Agreement also signifies that all matters relating to the contract as far as can be foreseen, have been satisfactorily negotiated and concluded between the owner and contractor, under the guidance of the Engineer. It is important to note here that although the contract is between the owner and contractor all the documentation is in fact prepared and put together by the Engineer, (perhaps with some legal advice when necessary). If standard contract documents acceptable to all parties, such as those now being prepared by the C.I.T.P. which I understand have the approval of the Attorney General, and the Buildings Department and others such, are available, there should be no excuse for delays.

Consultant's duty

Sometimes the Consultant too can contribute towards delays in concluding the Contract Agreement by not finalising the necessary documentation required, which is his responsibility. For example on a straight-forward building project, I can see no valid reason for a Consultant to delay preparation of working drawings and detailed documen-

tation provided he has taken the trouble to ascertain from the client his precise requirements and advised him correctly on the need to finalise details early, and provided the client has been sensible and co-operative. If detailed construction documentation is well prepared this will benefit both client and contractor, in that variation orders during the course of the project will be minimised, and thereby cost fluctuation and delays too, minimised.

If work is to proceed smoothly during the period of the contract, it is also very important that not only the Engineer who administers the contract, but also the Contractor and even the owner are familiar with the clauses of the General Conditions of Contract documents, which as I said earlier forms the basis of Contract Administration. The Consultant or Engineer once appointed and named, acts on behalf of the owner and except in some instances such as where there will be a substantial variation in cost through the actions or orders of the Consultant, and where it is normal courtesy to obtain the prior approval of the owner, the Consultant has wide ranging powers to instruct and supervise the work of the Contractor, as will be seen, if one studies the General Conditions of Contract. It must clearly be understood, that no instructions to the Contractor should be given even by the owner, without it being channelled through the Consultant. On some projects where this fact is not understood, contract administration can become ineffective through contradictory orders being given to Contractors at site. This division of responsibility and delegation of authority, must be clearly understood by all parties involved.

Letter of Intent/Mobilisation Advance

Once Tenders have been evaluated and a selection of a Contractor has been made, sometimes it is felt, a formal "Letter of Acceptance", cannot be

issued straightaway and in order to save time "a Letter of Intent" is issued to enable the contractor to make a start. This then becomes the point at which Contract Administration commences. But as I said earlier a Letter of Intent is not an excuse for proceeding with the project upto completion. The F.I.D.I.C. document titled "Tendering Procedure", describes the limitations which apply to Letter of Intent - Let me quote - "Where it is not immediately possible to issue a formal Letter of Acceptance to the successful Tenderer, the Issue of a Letter of Intent to enter into a Contract may in some circumstances serve a useful purpose".

"A Letter of Intent issued as a prelude to entering a formal contract should contain:

A statement that it is intended to accept the Tender.

Instructions to proceed (or not to proceed) with certain work (eg. mobilisation, ordering of materials, letting of sub-contracts, etc.)

The basis of payment for work authorised and a limit to the financial liability which may be incurred before formal acceptance of the Tender.

A statement that if the Tender is subsequently not accepted, or the Letter of Intent withdrawn, the costs legitimately incurred by the Contractor will be paid by the Employer.

A statement that when the Tender is formally accepted by a Letter of Acceptance, the provisions of the Letter of Intent will become void.

A request to the Contractor to acknowledge receipt of the Letter of Intent and to confirm his acceptance of its conditions".

So you see the Letter of Intent is clearly a preliminary instruction to commence work within specified limiting factors.

At this point if a Mobilisation Advance has been agreed upon it may be paid

to the Contractor against a suitable Bank Guarantee.

In Sri Lanka it is not uncommon to pay upto 20% of the Project Estimate as a Mobilisation Advance which can amount to a tidy sum on a large project. It is sometimes helpful if the manner in which this advance is to be utilised by the contractor, can be discussed, and approved, to tie down the contractor. This is necessary, as if there is any delay in obtaining the "Performance Bond" and concluding the contract, the Contractor could default by using the money for other purposes not connected with the project. This has been known to happen.

Performance Bond

Once it has been decided to confirm acceptance of Tender, a Letter of Acceptance should be sent to the Contractor and a Performance Bond in the manner prescribed in the Tender documents should also be obtained from the successful Tenderer. The letter of acceptance should refer to all documents as described in the Tender and also to all matters agreed upon in correspondence, discussions etc., between the parties which can be included, in the form of a "Memorandum of understanding".

While the Bank Guarantee only safeguards the Mobilisation Advance given to the Contractor, the performance Bond will help Owners ensure proper performance by the contractor and to receive compensation upto the limit stated on the Performance Bond, if the Contractor defaults e.g. 10% of Project Estimate. All these are essential ingredients for effective contract administration, and as I stated earlier unless the client and contractor co-operate with the consultant in effecting these measures without delays at the commencement of work, there is very little a Consultant can do, to ensure performance by the Contractor later on.

F.I.D.I.C. too has put out documents

titled "Performance Bond" and "Surety Bond for Performance".

Commencement of Work

Before handing over the site to the selected Contractor to commence work, it is best if negotiations between the Contractor and the owner, or Consultant be concluded and agreement reached as far as possible, on all essential matters such as rates, programme and target date for completion, detailed project estimate and so on. For once the work commences and the owner is committed, it will be more difficult to negotiate with the Contractor and vice versa. Once the Consultant feels that agreement has been reached on essential factors and confirmed, he should instruct the contractor in writing to take over the site and to commence work. Thereafter, while the Contractor busies himself with preliminary work the Consultant should expedite putting together all the Contract Documentation, Drawings etc. and have them bound and ready for signing, by the agreed date.

Programming

An important aspect of the Contract Administration is supervision of work and monitoring of progress, once site work commences. It is normal for the Contractor to be requested to submit a detailed programme to be included in the Contract. This should be checked by Consultant and modified, if requested, by him. Once a detailed programme has been drawn up, it is most essential that progress is monitored against the actual programme. Far too many programmes are drawn up without adequate monitoring of time or expenses. Just as in the case of a budget where expenses need to be periodically monitored to ensure that the budgetted costs are not exceeded, it is equally important in the case of a programme of work, that progress is monitored carefully and corrective measures adopted if delays are observed or foreseen. Since assessments liquidated

damages is related to delays over date of completion, it is necessary to maintain a record of allowable or unforeseen delays for which the Contractor is not to be held responsible, e.g. non-availability of essential material, civil disturbances, exceptionally bad weather etc. This is another useful result that comes from monitoring progress carefully and checking on delays and fixing responsibility for such delays. This can help both the owner and also the contractor.

It is of paramount importance to realise that both the Contractor and Engineer are serving the client, who is the person who is paying out the money and to whom losses will result, if the project is not efficiently executed and managed. The owner in my opinion should be considered the most important of the parties involved. Very often the client is a State Organisation and the losses are a national loss. Therefore, it is most essential that both the Contractor and Engineer co-operate on the technical aspects of a project so as to ensure speed and quality of work, adherence to specifications, and so on. The responsibility of the owner will be limited to taking decisions when so requested by the Engineer and ensuring that payments are made on time, as becomes necessary.

He needs to have implicit faith in his Consultant's professional competence and integrity, once appointed.

Site Meetings

As part of Contract Administration and to ensure the smooth progress of work it is essential to hold regular site progress meetings, where the Contractor's Site Agent, the Resident Engineer and the Consultant (or his representative) are present. The Contractor's Site Manager is usually called the Resident Agent.

Regular progress meetings at site are very helpful to smoothen day to

day problems that occur in most construction sites usually between the Resident Engineer and the Contractor's staff. Such problems can relate to quality of work, failure to abide by specification laid down, interpretation of documentation, problems over taking of joint measurement disputes over quality of materials, variation orders and claims for variations etc. Preparation of good working drawings and contract documentation will minimise such misunderstandings and misinterpretation, and will enable the Contractor to get on with the job, without constant delays in having to get details clarified.

It is best if progress review meetings at site, end with all decisions taken and instructions given by the Engineer, clearly recorded in the site log book. A site log book is a very important document in the proper administration of a Project. I find it useful to have a duplicate or triplicate book for this purpose whereby the Consultant retains the original and can hand over a copy to the client if he wishes. The Bound copy remains at the site for the Contractor's and Resident Engineer's reference. All entries by the Consultant can be countersigned by the Resident Agent and Resident Engineer and others who are present at the site meeting. Whenever, on the spot instructions or variation orders are required to be given, these can be instructed on the log book, and confirmed later by letter if necessary. The entries in this Site Log Book can become a fundamental issue, if disputes arise, and therefore it should be carefully maintained from the very beginning.

Contract Administration Vs. Construction Management

Now "Contract Administration" must not be misunderstood for "Construction Management". While Contract Administration as I have explained earlier is the responsibility of the Engineer

or Consultant, Construction Management is the responsibility of the Contractor. Contract Administration, can never be effective, unless Construction Management is efficient. Therefore, it is important that at the outset the Contractor is advised to have at site responsible Engineers or Technical Officers, depending on the magnitude of the project, who are capable of managing the contract and carrying out the instructions of the Consultant. This is covered under the clause titled "Site Superintendence" in the C.I.T.P. General conditions of Contract document Clause 15, whereby the appointed Resident Agent must be "Acceptable" to the Consultant - Quote - "The Contractor shall give or provide all necessary superintendence during the execution of the Works and as long thereafter as the Engineer may consider necessary for the proper fulfilling of the Contractor's obligations under the Contract. The Contractor, or a competent and authorised agent or representative approved of in writing by the Engineer, which approval may at any time be withdrawn, is to be constantly on the Works and shall give his whole time to the superintendence of the same".

The Consultant will only be responsible for periodic site inspections and instructing the Resident Engineer to keep a day to day supervisory watch over the contractor's work. The actual quality of work is the ultimate responsibility of the contractor. This is clearly explained in the Article titled "For what we are responsible" (Ref. 'International Consulting Engineer' - 1981 No.2) Quote" It is most important to note that the engineer's duties in respect of inspection of the works do not include detailed day to day supervision; they are essentially limited to such selective sampling procedures as the engineer, in his sole discretion or by prior arrangement with the employer, considers necessary to enable him to ascertain whether the contractor is carrying out the

work in general "conformity with the design concept of the project".

"It must be clearly understood and appreciated by the employer that only work which has been seen during examination of representative samples by the engineer can be said to have been appraised, and comments upon the balance of the work are assumptions only, based on extrapolation by the engineer of such assessments as he has been able to make".

"The proper performance of the contract is not the engineer's responsibility nor that of his site representative, nor that of the site supervisory staff, and the engineer's contract administration and inspection services are not carried out for the contractor's benefit".

"The contractor alone is responsible for the proper construction of the project and for the accuracy and quality control of his work, in terms of the contract between himself and the employer".

There must be no mistake on this if disputes regarding the degree of responsibility for supervision is to be avoided, during the period of the contract, and the owner too must be made fully aware of this division of responsibility.

Bills

One of the most important functions of the Consultant as part of his duties in the Administration of Contract is the approval of interim bills of the Contractor. Many of the disputes and delays that occur during the period of a contract are owing to disagreements over payments to the Contractor. The basis for all payments to the contractor is the submission of periodic bills usually monthly, using the rates approved in the Bill of quantities. The C.I.T.P. document suggests that bills should be submitted on the 1st week of each

month. This may not be always possible, but it is best if regular monthly bills are submitted. Where progress is slow the contractor may delay submission of bills. This is most unsatisfactory, and must be avoided.

A bill normally is accompanied by other supporting documents including measurement sheets, materials schedules, claims for fluctuations etc. It is most important that the measurements have been "taken off" and recorded in a standard format acceptable to the Consultant. Cross references should be made to the drawings, etc. It is possible that the Contractor does not submit his measurements in a clear format. He must be instructed by the Consultant and his Quantity Surveyor Staff in what manner he should submit such measurements. If these instructions are not carried out the contractor has only himself to be blamed, for any delays in approval of payments by Consultant, who will not be able to read and check the measurements, adequately.

In the general Conditions of Contract document (CITP) clause (60.7) it is stated that the owner should pay the Contractor within 28 days of approval by the Engineer. Contractors have objected to this clause, pointing out that the time period should be related to the date of submission of bill and not the approval date. There are two sides to this. The Consultant cannot check a bill just because it is presented - unless all the information is presented in an acceptable, checkable form, as stated above.

The Consultant, however, has a clear responsibility by the Contractor to ensure that payments to the contractors are not delayed and he must do all in his power to ensure that bills submitted to him are checked carefully but quickly, and forwarded to the client with his official "payment certificate". He must engage the services of a competent and reliable

Quantity Surveyor for this purpose. Once the Consultant's Payment certificate has been issued the owner too has a duty to settle the sums approved early, as Contractors cannot work efficiently unless paid promptly.

In most contracts the Contractor is entitled to claim for fluctuation in prices for those materials whose basic prices have been included in a schedule at the commencement of the contract. It is important that the Contractor submits regular claims for fluctuations and supports such claims with the purchase receipts etc. The Consultant's staff will check these against the measurement of work done, and ensure, that the quantities are reasonable, before approving payment. Here again it is in the Contractor's interest, to submit all support documentation, to facilitate checking and approval.

Retention

On each bill due to contractor 10% of the value of work is normally deducted as retention. It is normal practice to refund half of this sum retained, at the completion of work and when certificate of practical completion has been issued, - thus reducing the sum retained to 5% of the contractor's total bill. This 5% is retained upto the completion of the "defect liability period"

Clause 48 of the General Condition of Contracts allows for issuing the Certificate of Completion in stages. The retention too may be refunded proportionately in stages, provided this has been clearly agreed to at the commencement. If during the maintenance period as referred to in clause 49 of the General Conditions of Contract, the Contractor fails to repair defects pointed out, the client is entitled to get the services of others to do this work and to deduct such monies from the retention.

The Period of "Administration of Contract" expires with the approval of the final payment to the Contractor which will include the release of the balance retention money, once the Contractor has remedied defects (if any), and met all liabilities in terms of his contract with the Employer, to the entire satisfaction of the Engineer.

CONCLUSION

As I have explained, the Administration of the Contract is the responsibility of the Engineer. However, the Engineer, is not a magician, and he can only perform his duty effectively if the client carries out his advice - (such as signing the contract agreement once prepared), and also if the contractor "performs" in terms of his contractual obligations. The Engineer although

he is employed by the owner has a clear duty to be fair by the Contractor as an unbiased professional, when interpreting the contract documentation. The Engineer also has a professional duty to maintain a high sense of integrity and not to have any business dealings with the Contractor during the period of the contract. Excessive cost escalation and long delays over the contract period, are usually indicative of poor Contract Administration. If the Engineer has performed his duties during the preliminary stages by preparing all the necessary detailed documentation, correctly, and having the agreement signed by the owner and contractor, he would have laid a good foundation for Administering the Contract later, as the contract document is indeed the very basis for efficient administration of any Contract.

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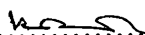
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