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**PAYMENT PROCEDURES UNDER THE RIAI FORM OF
CONTRACT AND THE PUBLIC WORKS CONTRACT WHERE
THE EMPLOYER PROVIDES THE DESIGN:
A COMPARATIVE STUDY**

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Introduction

Cashflow is very important to any construction business and its effective management is a key function of quantity surveyors, particularly those working in the contracting sector. This study explains the administrative procedures and components involved in compiling valuations for the various Architect's Certificates / Employer's Representatives certificates required under the RIAI (2002) Standard Form of Building Contract and the Public Works Contract for Building Works Designed by the Employer (2007) (GCCC Contract). The study discusses how the contractor may recover full reimbursement as allowed for under the two contracts, and describes the steps the consultants should take to ensure the client's position is safeguarded.

Background

Historically, most contractors did not have the facility to raise sufficient finance to complete entire construction projects. The Industry developed a practice of paying contractors regular interim payments to finance these works. Contractors now depend on cash flow to operate their business effectively. Late or inadequate certification can cause severe difficulties, particularly if this occurs on a number of projects. In extreme cases this may be a factor in company insolvency. Subcontractors, particularly domestic subcontractors, are particularly vulnerable as they typically operate on pay-when-paid or extended credit arrangements.

Building contracts have been developed to provide a means of paying contractors during the course of the works. These payments are made through the following certificates:

- Interim Certificates
- Partial Possession Certificates
- Practical Completion Certificate

□ Final Certificate

It is important to note that, apart from the Final Certificate, these certificates are not conclusive. This means that the valuations may be subsequently adjusted to take account of matters such as arithmetical errors, latent defects etc,

This paper examines the administrative procedures contained in the RIAI and GCCC forms of contract regarding these certificates.

Administrative Procedures

Interim Certificates

The RIAI Contract

Interim certificates are the main vehicle for providing cash-flow on building contracts. RIAI Clause 35(b) provides that contractors will be paid at the intervals set out in the Appendix. This period is four weeks unless otherwise stated.

The Contractor initiates the process by submitting a detailed progress statement to the Architect, valuing the work, including sub-contract work, completed to date. On most projects the task of checking the valuation will be carried out by the QS. This task must be attended to promptly, as the contract requires the Architect to issue a certificate within a defined timescale, usually five working days. The Certificate must identify payments for Nominated Sub-Contractors. It is common for the QS to disagree with the Contractor's valuation and adjust it, and in these instances, the QS or Architect must explain any differences between the application and the Certificate. The Employer must pay the Contractor the amount on the Certificate within seven working days of its presentation. The Contractor, in turn, must pay Nominated Sub-contractors within five days of being paid. If the Employer fails to honour a certificate then contractor is entitled to interest for outstanding period.

Ideally the entire process should be complete within seventeen working days and initiate the next payment application. The contract is silent on the payment of domestic subcontractors, who are typically engaged on the Main Contractor's own terms.

Clause 35 (c-d) sets out the contents of interim certificates; in brief this covers the value of the work 'duly' (properly) executed and the materials delivered since the previous valuation. Duly executed work includes elements such as preliminaries, provisional work, prime cost work, works covered by architects' instructions, labour and material

fluctuations, and loss and expense claims. These components are considered below. Materials on site must be properly protected and not prematurely delivered, and once certified, become the Employer's property. The Contractor, however, remains responsible for them. The Architect has discretion to include materials before they are delivered provided a number of safeguards are satisfied: i.e. they are as specified, ordered, identifiable, complete, protected, and the Employer's ownership of them is confirmed and safeguarded.

Clause 35 (e, f and g) deals with retention options and procedures. The basic provision permits the Employer to retain an agreed percentage to cover remedying defects. This percentage may be subject to a cap if this is stated in the Appendix. The retention amounts are held on trust for the contractor without the need to invest. Clause 35g, however provides an option for retention to be paid into a joint deposit account, with interest accruing to the contractor.

The GCCC Contract

Section 11 of the GCCC Contract is broadly similar in approach to interim payments as the RIAI form but includes a number of different payment particulars. These may be inserted in Schedule 1L of the Contract and are: the default period interim payment is monthly; a minimum value threshold for payments may be stipulated; the default valuation of unfixed materials is 90% of their contract value, and the default retention percentage is 10%. In addition the provisional work and prime cost work components are generally absent under this Form.

The GCCC form has introduced a number of sanctions which aim to eliminate the failure to provide collateral warranties, up-to-date programmes, and certificates of compliance with employment legislation requirements. These sanctions stipulate e.g a cut of 15% for failure to submit the programme.

The timetable for valuing the work is longer than the RIAI form allowing 10 days for certification following the Contractor's detailed breakdown application. The Employers Representative's opinion, no doubt informed by the QS, is the basis of the Certificate. The Contractor must then invoice the Employer who has 15 days to pay the Contractor.

A major difference between the two forms is the approach to unfixed materials. Under the GCCC payment for *all* unfixed work items, not just off site materials, is at the Employers Representative's discretion and may be subject to a valuation percentage ceiling. Comparable vesting, protection and delivery conditions to those in the RIAI also apply.

The retention provisions are similar to the usual arrangements in the RIAI Form, but there is no provision for a Joint Account. The Form also provides for a Retention Bond to release all retention money following Substantial Completion of the work.

Certificate of Partial Possession.

Certificates of Partial Possession are issued under Clause 32A under the RIAI Form where the Employer takes over part of the works before overall practical completion. The Possession Certificate describes the relevant Part and provides an estimate of the 'relevant percentage' of the overall contract value. The Possession Certificate is issued at least three days before handover to Employer. The Employer is required to insure the relevant part two days after the issue of the Possession Certificate and the Contractors All Risks liability is reduced pro-rata.

This estimate or valuation will usually be prepared by the QS and will include components such as variations claims and fluctuations if appropriate. The Practical Completion Certificate issued in relation to the relevant part will release half the retention for the relevant part.

A *Certificate of Substantial Completion of a Section of the Works*, is the equivalent Certificate issued under Section 9.7 of the GCCC Form. The Contractor must request this Certificate and the Employer's Representative has 20 days in which to issue it. This Certificate has a five day notice period to the Contractor. Section 11.1 requires an interim payment to be made in conjunction with this Certificate and the Contractor must identify all monies owed in respect of the relative section in his application for payment. Notwithstanding these differences, the same valuation principles and procedures as the RIAI Form are used.

Certificate of Practical Completion

The Certificate of Practical Completion is issued on the handover of the project to the Employer. An Interim Certificate is usually issued in conjunction with this Certificate. In terms of valuing the work, the procedure is similar to that outlined above for Interim Certificates. However there are a number of important differences. Valuations after Practical Completion will not contain any materials on or off-site as, at this stage, all materials will have been incorporated in the Works. In addition, half the Retention will be released (Clause 35 f (ii)). Alternatively, where the Contractor provides a Retention Bond the full retention will be released (Clause 35f (i)).

The Certificate of Substantial Completion issued under Section 9.6 of the GCCC form follows the procedures for sectional completion discussed in the previous section. Its provisions in effect mirror that contained in the RIAI Form.

Final Certificates

The Final Certificate documents that the contract has been performed to the satisfaction of the Architect. Under the RIAI Contract, the QS is required to produce a priced bill of variations, (Final Account) within the Period of Final Measurement, and to recommend payment of any outstanding balance – which usually is in favour of the Contractor.

The Architect should be in a position to notify the Contractor of issue the Final Certificate ten days after: outstanding works are complete, the defects liability period expires and the defects have been remedied or the Period of Final Measurement has expired, whichever is the latest. If The Architect fails to issue the Final Certificate within this timeframe the Contractor is entitled to charge interest for outstanding period.

The Final Certificate is conclusive that materials and workmanship is to the architect's approval and that the contract sum has been properly adjusted in accordance with the terms of the contract (except where fraud, dishonesty or fraudulent concealment is involved).

The GCCC operates a much tighter five month time frame to compile the Final Account. The Contractor must provide a full and Final Statement within two months of Substantial Completion. Within a further three months the Employer's Representative will issue a Penultimate Certificate. In practical terms this normally only leaves the final release of retention in the Final Certificate which is issued within three months after the Defects Certificate, unless there are: Compensation Events after Substantial Completion, amounts owed by the Contractor to the Employer or counter-charges under Section 11.4 (failing to provide collateral warranties, certificates etc.)

Procedures for Gaining Full Reimbursement

Interim Certificates

The Contractor's surveyor will seek to maximise the profit on the project. Optimising cash flow is a key objective in achieving this aim. The Contractor's surveyor must therefore take a pro-active approach to obtain full and prompt payment by taking the initiative and getting on with the PQS generally. The Contractor will therefore seek to maximise work-in-progress but should avoid stretching valuations which may result in a backlash from the PQS. Setting up valuation formats, co-ordinating dates and agreeing valuations with the PQS on site are worthwhile initiatives. The Contractor must also

organise effective *procedures and approaches in-house* – by chasing and keeping subcontractor accounts up to date and on time.

Prompt Application

Contractors aim to get money in as soon as possible in order to minimise project finance costs. They must, therefore, be well organised and submit valuations as they fall due. Once the initial payment date has been established it is straight-forward to schedule future dates and confirm these in writing. It is good practice to tie valuation dates in with site meetings. The contractor's quantity surveyor should then advise all subcontractors of the latest dates by which applications for payment should be made and also formally advise the contractor's costing department in order that cost information is provided on time to be included in the valuation. These dates should be strictly observed. It is important to remind subcontractors of the dates when their orders are placed later in the project. Late or incomplete applications may generate an easy going attitude which may be difficult to correct at a later stage. Late applications often lead to late payment.

It is also essential to ensure that all *notices and supporting documentation* required by the contract is provided along with the valuations. This is particularly important when dealing with the GCCC contract which contains terms allowing for sanctions, deductions and forfeiture of entitlements if the conditions are not strictly observed.

The contractor may also have adopted an early recovery pricing strategy in the BQ by loading money into early items such as mobilisation items in the preliminaries and excavation and substructures.

The Contractor must maximise the various components of the valuation. Before submitting the *application*, the contractor should visit the site and discuss progress with the site agent. The QS should note his comments, and particularly note any reasons for departure from estimated production standards. These may have been caused by architects instructions or employers or consultants actions and could form the basis of a claim. Meeting the client's QS on site presents an ideal opportunity to show him/her these works. In addition, agreeing and completing the valuation on site usually means that the valuation is processed quickly and fewer/no cuts are made to the figures.

Work in Progress

The contractor must ensure that all *completed work* is included in the valuation. Accurate measurement is a key task in establishing the quantum and detailed site measures are

preferable to percentage estimations, as these are more likely to be accepted without alteration by the client's QS. Nevertheless, as there is an interval between the submission and checking of valuations, the contractor will normally claim for an element of further work-in-progress but should avoid this becoming an obvious over-measurement.

Check sheets are frequently used with percentages being entered against subsections of work items. It may be in the contractor's interest to take the initiative in producing these check sheets to ensure minor items are included in the valuation. A favourable assessment of progress is often secured by using these check sheets.

The contractor should ensure *provisionally measured work* and expenditure of *provisional sums* is kept fully up-to-date. It is the clients QS's responsibility to ensure that provisional quantities are promptly remeasured. The contractor should, nevertheless, ensure that all site measurements are witnessed, confirmed and signed off with the PQS promptly.

Preliminaries costs are often paid for on a cost per week/month or a percentage of work carried out basis. These approaches may be unsatisfactory, particularly on contracts with substantial start-up costs. In these circumstances, the individual preliminaries should be identified and broken down into fixed and time related costs and agreed with the PQS. This approach will help to ensure that the contractor will be paid for, and in turn can pay for 'point' costs as they occur.

Nominated Sub-Contractors may need to be co-ordinated and progressed with consultants in the Design Team to ensure that these accounts are checked and approved in good time to allow the Architect to certify promptly. The contractor should prioritise these payments as failure to meet target dates may result in the withdrawal of the prompt payment discounts. The possible early handover of Nominated sub-contract work should also be sought to release retention being held on that section of the work.

Variations are a common area where cuts are made. Where possible the value of variations should be agreed in advance. This will ensure their full value in interim valuations. Contractors should ensure that all variations are supported by Architects Instructions and that verbal instructions are promptly confirmed. Variation accounts should be kept up to date and routinely signed off with the clients QS, particularly where dayworks are involved to minimise cuts being made. They should not be let drift.

Where the contract is let on a *price variation* clause, a comprehensive basic price list at the designated date must be agreed. Labour and material price rises should be immediately notified and supported with labour returns and invoices. Subcontractors should also be advised of these procedures.

Where contractors are *delayed or disrupted* by client actions, the contractor may claim for loss and expense. The contractor should promptly notify the architect of the cause of the delay/disruption and that it will cause loss which would not otherwise be recovered under the contract. The contractor should record and evaluate the effects of the delay and submit it in the next interim valuation. Early settlement of claims is likely to be more productive than putting it 'on the long finger'. Keeping accurate contemporaneous records and showing political acumen is important here.

Materials On or Off-Site

Material deliveries between the certificate recommendation should always be included in applications. Materials on site should be located in recognised storage areas and should be readily quantifiable and be supported by invoices if necessary. Over-ordering should be avoided at all costs. Payment for *materials off site* should be sought as a matter of routine and the conditions for payment strictly observed

Retention

The contractor should request that the option to hold retention in a joint account in which the contractor will be entitled to interest. The contractor should also ensure that quality standards are maintained to avoid the possibility of delaying the issue of completion certificates.

Partial Possession and Practical Completion

The contractor should attempt to ensure that practical completion is certified as quickly as possible. The first half of the retention is released on the issue of the certificate of practical completion. This is important as retention often represents a large proportion of the contractor's profit margin.

The contractor should attempt to finalise the account before practical completion if possible, as after practical completion payment can become sporadic. Outstanding amounts are in-fact a second form of retention. They may be used by the client's QS as a means to 'force the contractor to the table'. Subcontractor accounts and final accounts

should be submitted within the period of Final Measurement to ensure that the issue of the Final Certificate is not delayed.

Payment at Final Account

Final Accounts have been known to drag on for years. In isolation, a single late account with small outstanding amounts and half retention may not be serious, however where this is repeated over a large number of contracts the effect may be devastating. It is obviously in the contractor's interests to minimise these outstanding amounts and to push for the remaining half of the retention to be released as soon as possible.

Safeguarding the Employers Position

The QS is responsible for checking the contractor's application for payment and making a valuation recommendation for Architect's Certificates. Their primary objective is to avoid overpaying for the work, particularly in situations where the contractor appears to be facing financial difficulties or during Final Account negotiations. The QS must exercise due diligence in this regard and must ensure that an effective checking procedure to verify prime cost, provisional work, variations and the various claims discussed above. The QS would be liable in the event that they negligently under or over-certify amounts due to the Contractor.

Although the PQS is often seen as the Client's watchdog whose duty is to keep the Contractor honest, nevertheless he/she is duty bound to administer the contract fairly and to be unbiased in recommending valuations. This requires strong personal qualities including authority and integrity to carry out the task. The QS will be aware of the importance of cashflow to the contractor and should not be unduly obstructive or tardy in valuing the work. It is in the Employer's interest that issues are dealt with promptly and professionally to avoid the souring of relationships and potential surprises later in the contract. The need for effective management of the valuation process therefore is a vital task.

The QS must be aware of what is happening on site. He/she must adopt a pro-active cost management approach and work closely with both the design team and the Contractor's QS. Knowledge of potential changes in the design or construction operations allows the QS to evaluate the cost, quality and programme implications before their issue. Regular site visits and discussions with the Clerk of Works, and/or Resident Architect/Engineer are particularly important and allow valuable intelligence to be gathered. Site notes,

measurements, photos and contemporaneous records are crucial evidence in verifying as-built work and claims.

Of particular concern is the management of variations and claims. Developing good working relationship with the Contactor's surveyor supports the identification and agreement and signing of these aspects of the final account promptly. Variations may initially be based on approximate measurements and notional lump sums and it is important to update these estimates as more detailed measured and recorded information becomes available. Dayworks must be rigorously checked for validity. The QS should also review all correspondence and minutes to identify the potential cost implications. The QS should be aware of what is happening on site to identify undocumented or unconfirmed variations. The process of regular cost reporting provides the impetus and discipline necessary to keep accounts up to date and allows the client and design team to be advised on a regular basis of the anticipated final account. Costs must be managed rather than monitored.

Conclusion.

The operation of the payments clause of a building contract is probably the single most important task that a quantity surveyor performs during the contract period. The core contractual obligation of the Employer is to pay the Contractor, breach of which is considered so serious, that the Contractor can determine his own employment. The various Certificates are the vehicle by which vital cashflow is advanced to contractors for the smooth operation of their business. Payment is the most contentious issue in a building contract. Late payment, underpayment, or indeed non-payment seriously strains or ruins smooth working relationships on site. Quantity surveyors representing both the Employer and Contractor must therefore be mindful of the importance of this task and act professionally to properly administer this vital duty.

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