

## Clause 14: Contract Price and Payment

Written by George Rosenberg<sup>1</sup>

**This important clause sets out the method of payment, certificates and release from liability.**

The overall methodology has not changed but there are several procedural adjustments and some inconsequential tidying. Some of the procedural changes will be welcomed by Contractors but several will entail further delay in payment to the Contractor. There is a determined effort to ensure that all claims are dealt with during the contract period or very shortly thereafter.

### Advance Payment Guarantee (14.2)

There is a new sub-clause specifically dealing with advance payment guarantees. The most significant change (a very useful one for the Employer) is that where a guarantee has to be extended and the Contractor fails to do so, the Employer may call it in to the extent that any part of the advance payment has not been repaid.

The Advance Payment is to be made within 35 days of the Contractor's providing his application together with the Performance Guarantee and Advance Payment Guarantee. This contrasts with 42 days under the 1999 edition.

### Interim Payments (14.3)

The 1999 edition referred to applications for interim payment certificates. This terminology is now gone. Now there is a Statement which is then followed by the IPC. (the term "IPC" is used throughout).

The statement was formerly required in 6 paper copies. Only 1 hard "original" is now required, coupled with an electronic copy. There then follows a list of the items which have to be included in the Statement. These have been expanded to include Provisional Sums, any release

of Retention Money and the amount which the Employer is entitled to be paid for use of Temporary Utilities.

Presumably because Sub-Clause 21.4.3 requires that any money awarded by a DAAB shall be paid without the requirement for any certification or Notice, there is (in contrast to the 1999 Edition) no specific reference to such amounts in the list of items which are to be included in the Statement. Nonetheless, Contractors should include such amounts as this will bring into effect the right to interest under Sub-Clause 14.8, running from the date of the decision. There is no provision for payment of interest unless a DAAB award is included in this way.

A new requirement has been added to the detail that the Contractor is required to provide. This stated as "sufficient detail for the Engineer to investigate these amounts". While this is obviously a useful and sensible requirement it has significant implications.

For the first time an element of subjectivity is included in the requirements. It is quite possible that the Engineer and the Contractor will disagree about what is "sufficient" or what the Engineer needs to investigate any amounts claimed.

Should there be such a disagreement and the Engineer demands additional information, the time for payment under Sub-Clause 14.7 does not start to run until the relevant information has been received (there will, arguably, be a short-fall in the supporting documents). Not only may the Contractor be paid later than it would otherwise be entitled, but it will also be limited in any claim for financing charges under sub clause 14.8. Unfortunately, it is not uncommon for Engineers to be slow in issuing IPC's, especially when the Employer is having payment difficulties. The Contractor would be very unwise not to comply with any demands for additional information, even

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if it considers the demands unreasonable, but, even then, there may be a consequent delay in payment.

It will be difficult for the Contractor to do anything which will speed payment in these circumstances (a Notice under Sub-Clause 16.1 would be a drastic but possible remedy) but it will have the basis of a claim for Financing Charges. To gain these it will need to initiate a dispute under Sub-Clause 20.2 – a time-limited right so notice needs to be given within 28 days of the Engineer wrongly refusing to accept additional information as sufficient for it to investigate.

However, it should be noted that Sub-Clause 14.6.2 requires the Engineer to issue an IPC even in the absence of such information, but making a suitable deduction to reflect his concerns. (See also the discussion under 14.7)

#### Schedule of Payments (14.4)

Under the 1999 edition, the Engineer was entitled to revise a payment schedule only if progress was less than expected. Now he may amend it if it “differs”. This opens the way to bringing payments forward if the Contractor is making better than expected progress. Unfortunately, there is no provision for the Contractor to trigger this correction process. However, the trigger date for the purposes of the Engineer’s Sub-Clause 3.7 process is when the difference is first “found by the Engineer”. Presumably the Contractor can tell the Engineer and thus makes sure he/she “finds” it.

Under Sub-Clause 3.7, however, the time allowed to the Engineer to make its decision is 42 days and the decision only starts the payment process, so it may be up to 70 days before a change takes effect.

Where the Engineer decides to invoke the process (most likely when progress is slower than that on which it considers the Schedule of Payments was based) the Contractor at least has the advantage that it is entitled to be consulted and that the Engineer must act neutrally and fairly.

There will be a question of how the Engineer can determine that progress differs from that on which

the Schedule of Payments was based. If the Schedule simply provides for fixed payments on a monthly basis there will be the possibility of a dispute as to what progress was assumed in the Schedule of Payments. The Contractor’s principal obligation is to complete on time, not necessarily to conform to the programme and it is arguable that if it decides to change the way in which it will achieve timely completion this does not mean that the agreed schedule of payments is inappropriate.

Where there is a Schedule of Payments, payments for Plant and Materials intended for the Works (see next Sub-Clause 14.5) is disappplied. There is no equivalent provision in the 2017 Silver Book and it is difficult to see how Sub-Clause 14.5 can work in this situation.

#### Plant and Materials Intended for the Works (14.5)

Like the 1999 edition, the 2017 edition allows the parties to agree that Plant and Materials may be paid for when shipped or delivered. The Contractor simply provides the evidence in his application for payment and the amount should then eventually be included in the IPC. Under the 1999 edition the word “determination” was used without cross reference to the (then) Clause 3.5. Once that determination was made the amount could be included. Presumably in the interests of clarification the Clause now refers to Clause 3.7 Determination.

This has the consequence that the Engineer has up to 84 days to make a decision which previously would have been made immediately and it will no longer be possible to include the amount in the next IPC. Even then there will be another 56 days delay before payment. In addition, the amount to be included in the IPC is only 80% of the value of the

items.<sup>2</sup> It is thus probable that by the time the application is dealt with under Clause 3.7 the items will have been installed so this causes further cash-flow issues. The provision was intended to give the Contractor some early payment but as amended it achieves the opposite.

In a sensible and practical change, the requirement for a bank guarantee before the Engineer proceeds to determine a payment has been replaced with a promise of a guarantee, but with eventual payment being conditional on the guarantee being provided.

Note that (even if the parties have agreed to apply this provision) Sub-Clause 14.4 excludes its operation when payment is made against a Schedule of Payments rather than against measured interim payments.

#### **Issue of IPC (14.6)**

The Clause now provides, as a condition precedent, that the Contractor has appointed the Contractor's Representative.

#### **Content of IPC (14.6.1)**

The Contractor is now entitled to a copy of each IPC and it is specified that the Engineer must explain any differences between the amount applied for and the amount Certified. Contractors will be very pleased to have an entitlement to this information.

It is interesting to note that the requirement for the Engineer remains to issue the FPC for such amount as he "*fairly*" considers due, so that while Sub-Clause 3.7 has moved from "*fair*" to "*neutral*", the halfway house of fairness remains in place here. (Clause 14.13 includes the same requirement for issue of the FPC).

#### **Withholding (amounts in) an IPC**

<sup>2</sup> Note that under Sub-Clause 7.7 property in Materials and Plant does not pass until they are fully paid for, so this 80% provision means that the Contractor retains ownership far longer than one might expect.

A further welcome addition from the point of view of Contractors is that the Engineer is now obliged to explain why amounts are withheld.

Where Engineers find significant errors or discrepancies in the Statement they now have a right to adjust the amount certified to take account of the extent to which this has prejudiced or prevented a proper investigation. This does not amount to a licence simply not to include amounts in respect of items where there may have been such an error. All the Engineer is entitled to do is "*take account*" of the error. This must be something other than simply failing to consider material which contains errors. Presumably this is not intended to detract from the obligation to act fairly, but exactly what it will mean in practice remains to be seen.

The IPC also includes any amounts determined under Sub-Clause 3.7. Although there is no specific statement to this effect here, this provision in fact reflects another considerable improvement from the Contractor's point of view. Virtually all employer claims now pass through the Sub-Clause 3.7 procedure, so the situation which prevails under the 1999 edition where a deduction is sometimes made for an Employer claim before the Contractor has the opportunity to argue the point has now been remedied.

#### **Correction or modification of IPC (14.6.3)**

There is a welcome new provision setting out in detail what the Contractor is entitled to do if he does not agree with the IPC. Following the Contractor's submissions, the Engineer has an opportunity to include corrections in the IPC. If he does not do so, or the Contractor still remains unhappy, he is entitled to ask the Engineer to deal with the matter under Sub-Clause 3.7. There is no time-limit on the Contractor making this request.

Although the 3.7 process is lengthy in the context of payment, the clear right for a Contractor to pursue this procedure in the face of a difficult Engineer will be welcomed by Contractors.

#### **Payment (14.7)**

As before the Employer's time for payment runs from when the application is made by the Contractor. This is 56 days for all IPC's except the Final Payment Certificate. Confusingly the Sub-Clause includes two separate time limits for payment under IPC's – 56 days after Engineer receipt for normal ones and 28 days after Employer receipt where the IPC is issued as result of a Partially Agreed Final Statement under Clause 14.13. The FPC is payable 56 days after its receipt by the Employer.

#### **Delayed Payment (14.8)**

As before interest is due on late payment. The rate is calculated at 3% above variously defined base rates which have been re-defined. Formerly the base was the discount rate of the central bank of the country of currency of payment. It is now based on the rates charged to borrowers at the place for payment or, if there is no such rate, the rate in country of the currency of payment (there should be some interesting debates about what rate should be paid where the currency of payment is the Euro!).

Payment is now to be made without any requirement for a notice from the contractor of any sort. There is no time limit expressed and no provision for interest on late payment of such interest. Contractors who fear late payment of interest may be wise to included a claim in their next Statement for inclusion in an IPC.

#### **Release of Retention Money (14.9)**

This new provision marks a considerable negative change as far as Cotractors are concerned. Under the 1999 edition payment was certified by the Engineer outside the normal IPC process and should have been made immediately. It is now to

be included in a Statement for an IPC. This inevitably means at least a 56 day delay in refund.

#### **Statement at Completion (14.10)**

This has always been required to include any amounts the Contractor considers to be due. The particular categories are now spelled out in detail – including claims still being considered by the Engineer and the DAAB. These are only given as examples but the list contains considerable gaps – for example amounts where an NOD is likely to be issued and amounts which are about to be challenged in arbitration.

#### **Draft Final Statement, Agreed Final Statement and Partially Agreed Final Statement (14.11)**

There are now three sub-clauses covering what was previously in one sub-clause referring to the application for a Final Payment Certificate. As before the Sub-clause envisages a process under which the Engineer and the Contractor attempt to agree on the figures for the FPC.

The significant change is the introduction of the concept of a Partially Agreed Final Statement (PAFS). This is a Statement prepared by the Contractor identifying amounts which (after discussions with the Engineer) are agreed and those which are not agreed. This is a sensible additional provision to avoid the situation where there is disagreement over the content of the Final Statement and the Engineer is forced to make a decision as to what he includes in the FPC.

As with as Agreed Final Statement, the consequence of a PAFS is that the Engineer proceeds to issue an FPC (14.13). However, the payment consequences are different. In the case of an FPC, Clause 14.7 requires payment 56 days after receipt by the Employer. A PAFS does not lead to an FPC but to an IPC which is to be paid 28 days after receipt by the Employer.

### Discharge (14.12)

The 1999 edition provided for a full and final discharge by the Contractor which only took effect once all outstanding claims had been satisfied. This has now been limited in that the discharge covers all agreed amounts but can only exclude limited elements of the Contractor's claims.

The excluded items may only be items in respect of which a DAAB or arbitration is "*in progress*". Thus claims still being dealt with by the Engineer under Clause 3.7 cannot be excluded, nor can those which, while still live, have not yet been made the subject of a DAAB or arbitration (notice not yet given, proceedings not yet commenced etc). Contractors ought to be very reluctant to issue such a discharge, but it is a condition precedent to issue of the Final Payment Certificate. The discharge will be deemed to have been submitted and will be effective even if the Contractor fails to provide it so long as the amount certified in the Final Payment Certificate has been paid and the Performance Security returned. Given that the FPC cannot be issued until the discharge is provided this provision is unworkable.

### Issue of FPC (14.13)

The FPC is issued 28 days after the Final Statement or Partially Agreed Final Statement. This is as in the 1999 edition, but the content of the statement now includes credit for any amounts paid under the Performance Security and any balance due from the Employer.

The Sub-Clause now contains additional wording to deal with the situation where there is a Partially Agreed Final Statement (or the Engineer considers that the draft final Statement submitted is in fact a Partially Agreed Final Statement).

Unfortunately (perhaps due to a drafting error) there are two alternative approaches included with no indication as to which is to apply.

<sup>3</sup> Exclusions from Immunity: Gross Negligence and Wilful Misconduct, James Pickavance and James Bowling SCL October 2017

The opening words provide that following a Partially Agreed Final Statement a Final Payment Certificate is to be issued.

However, the final paragraph provides that in the same case no FPC is to be issued, but there is to be another IPC. As noted above if this approach is followed, this IPC (unlike other IPC's) is to be paid 28 days after receipt by the Employer rather than 56 days after its receipt by the Engineer.

### Cessation of Employer's Liability (14.14)

As in the 1999 edition, the Employer's liability is limited by reference to what is included in the Final Statement, unless something new arises after the work is completed.

The 2017 edition contains an additional exemption for the Employer. Unless reference has been made in the Final Statement or Partially Agreed Final Statement, the Employer is absolved from any amounts which the Contractor might wish to claim unless he makes a claim under 20.2 within 56 days of receiving the Final Payment Certificate. Under the 1999 edition no such cut-off was provided. Contractors will have to be sure to start all their claims immediately.

As with the 1999 edition the cessation of the Employer's liability does not apply in the case of his indemnification obligations or in case of fraud, deliberate default or reckless misconduct. To this list (and to the Contractor's possible advantage) "*gross negligence*" has now been added.

The addition of "*gross negligence*" may have substantially different results depending on which Law applies to the contract.

In a very interesting treatment of the subject recently presented to the Society for Construction law in London<sup>3</sup> the authors quoted a passage from

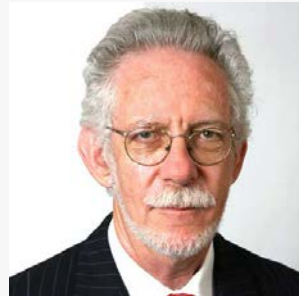
a Court of Appeal case *Armitage v Nurse*<sup>4</sup> as follows:

*“It would be very surprising if our law drew the line between liability for ordinary negligence and liability for gross negligence. In this respect English law differs from civil law systems, for it has always drawn a sharp distinction between negligence, however gross, on the one hand and fraud bad faith and wilful misconduct on the other ... we regard the difference between negligence and gross negligence as merely one of degree ... civil systems draw the line in a different place. The doctrine is culpa lata dolo aequiparatur [gross negligence is equal to fraud]; and although the maxim itself is not Roman the principle is classical. There is no room for the maxim in the common law.”*<sup>5</sup>

On this basis it seems that in common law jurisdictions all significant negligence prevents parties from escaping from liability and under civil systems only fraud will enable them to escape.

#### Currencies of Payment (14.15)

This adds two provisions to those in the 1999 edition. One provides for the way in which currencies are to be allocated in valuing variations (there is a comment on this in our treatment of Clause 13). The other deals with the currencies in which Performance Damages are to be paid.



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<sup>4</sup> [1997] EWCA Civ 1279, [1997] 2 All ER 705, [1997] 3 WLR 1046

<sup>5</sup> *Armitage v Nurse* Note 14 [1997] 3 WLR 1046 para [254]

<sup>6</sup> The contents of this article should not be treated as legal advice. Please contact the lawyers at Corbett & Co before acting on or relying upon anything stated in this article.]