

Programme Approvals

Adrian Dobbie Holman

Introduction

I am often faced with clients struggling to obtain approval of their programmes, and often see claims rejected due to them not being based on approved programmes.

But do programmes always need to be approved? Even if they do, what is the scope of the reviewer's discretion in approving? To what extent is the approval status of a programme fundamental to demonstrating EOT entitlement based on that programme?

I have considered these questions below, from an international and Malaysian perspective, by referring to two commonly used FIDIC and Malaysian forms of contract (PAM and PWD).

FIDIC Red Book First Edition 1999

Clause 8.3 [Programme] states that the Contractor shall submit a programme to the Engineer. It gives the Engineer the option to provide notice to the Contractor of *"the extent to which it does not comply with the Contract"*. The Contractor must submit a revised programme if the Engineer notifies it that a programme fails to comply with the Contract or is inconsistent with actual progress or the Contractor's stated intentions.

Although the clause does mention requirements of *"the Contract"* and the Contractor's *"other obligations"*, it does not require the programme to be approved, authorised or consented to by the Engineer.

Clause 20.1 [Contractor's Claims] covers claims for payment and EOT and requires contemporary records, a *"fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time..."*.

So, neither Clause 8.3 nor Clause 20.1 require a programme to be approved. However, a valid notice that a programme does not comply with the Contract to a certain extent can adversely affect the success of a claim to the extent that the non-compliance affects what is claimed.

FIDIC Yellow Book Second Edition 2017

Clause 8.3 [Programme] states that the Contractor shall submit an initial programme prepared using programming software stated in the Employer's Requirements or, if not stated, acceptable to the Employer. It also states that the Contractor shall submit revised programmes in certain circumstances.

The Engineer “shall” review and “may” give a Notice to the Contractor stating the extent to which the programme does not comply with the Contract, ceases to reflect actual progress or is inconsistent with the Contractor’s obligations. If the Engineer does not issue such a Notice within a certain time, it is deemed to have given a Notice of No-objection, and the initial or revised programme shall be the Programme.

Clause 20.2 [Claims for Payment and/or EOT] requires “contemporary records as may be necessary to substantiate the Claim” and a “fully detailed Claim”, which includes detailed supporting particulars.

So, similar to the Red Book, no programme approval is required, and the Engineer is limited to commenting on the factors mentioned above related to compliance, actual progress, and the Contractor’s obligations.

PAM 2018

Clause 3.5 [Works Programme] requires the Contractor to provide the Architect “for his information” with the Works Programme that complies with any requirements specified in the Contract Documents. No clause mentions that acceptance by the Architect is required, but Clause 3.7 [Architect’s acceptance of programme] states, “The acceptance by the Architect of the Works Programme shall not relieve the Contractor...”.

Clause 23.1 [Submission and notice and particulars for extension of time] requires an “initial estimate” of the EOT with “all particulars of the cause”, and then “all particulars to enable the Architect to assess”.

So, there seems to be a conflict between Clauses 3.5 and 3.7. Still, I would argue that Clause 3.5’s express statement that the provision of the Works Programme is “for his information” has more weight than Clause 3.7’s reference to an apparently undefined acceptance, i.e., “the acceptance”.

Furthermore, the EOT claim clauses do not expressly require an approved programme.

PWD Form 203 (Rev 1/2010)

Clause 12 [Programme of Work] states that the Contractor “shall submit to the S.O. for his approval - ... a work programme”. It does not state details of the basis of approval, but it does state that a rejection of the programme should be given with reasons and that further information can be requested to satisfy the S.O. as to its reasonableness.

Clause 43.1 requires “relevant information with supporting documents enabling the said office to form an opinion as to the caused and calculation of the length of delay”. It states that the S.O. may issue a Certificate of Delay and EOT as “soon as he is able to estimate the length of the delay”.

Scope of Approvers Discretion

Another question is – where approval or consent is expressly required, what precise characteristics of a programme does the reviewer reasonably have the freedom or ability to exercise discretion over? Consider that:

1. The **scope** of work will usually be defined to a certain extent by the contract documents;
2. Some **logic** links will be fixed by standard practice, practicality or common sense;

3. Completion **dates** will likely be defined by the contract documents;
4. Discretionary **sequencing and resourcing** might reasonably be at the contractor's discretion to a large extent, if not completely. After all, contractors are often employed because the project owner does not have the necessary skills, experience or resources to carry out the work itself;
5. Cost and resource **loading** might also reasonably be at the contractor's discretion to a certain extent, if not completely; and,
6. Submission approval or response **durations** might also be defined by the contract documents.

Conclusion

Given the above, it is clear that programmes do not always have to be approved, but they must comply with stated contract requirements. Therefore, it is important for all contractors to know what approval or consent is required, if any, and what specific contract requirements the programme must comply with.

In order to avoid or limit the potential for disputes to arise around the issue and acceptance of programmes, I would recommend that an accompanying narrative be provided with any programme issued that positively explains to the approver or recipient how the programme meets the specified requirements of the Contract and/or for acceptance.

If a dispute arises in relation to an approval, and approval is not granted, I recommend that contractors consider the above points in discussions with the reviewer and attempt to obtain approval amicably.

About the Author

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Adrian is a Regional Director based in CCI's Kuala Lumpur office. He is a quantum expert witness and construction claims and disputes advisor with 28 years of industry experience, including many years in contracting and project management, gained in the UK, SE Asia and the Middle East.

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