

## Determination By The Engineer Under The ICTAD/SBD/02 Form of Contract



D.G. Jayarathna NDT-Civil Eng., FIQS(SL), FRICS

### 1.0 Preamble

ICTAD/SBD/02 2nd Edition with the amendments dated 5th October 2009 is used as the Standard Form of Contract in Sri Lanka for works of over Rs. 100 Million and Works of lesser Value which are of complex nature. For the public sector contracts, use of this document is mandatory while in the private sector it is seldom used, Most of the clauses in the ICTAD form are similar and virtually identical to those in the FIDIC 1999 Form of Contract.

In the ICTAD/SBD/02 form there are many clauses under which the Parties (the Employer and the Contractor) are given the opportunity to seek redress for matters related to issues/problems arising from the execution of the Works and the Contractor asking for agreement or determination by the Engineer in accordance with Sub Clause 3.4 (Determination). Claims made by a Party arising out of any default by the other Party or Force Majeure are subject to Clause 2.4 (Employer's Claim) and Sub Clause 19.1 (Contractor's Claim).

Sub Clause 3.4 and Sub Clause 2.4 are mutually explanatory of one another and so are the Sub Clause 3.4 and Sub Clause 19.1

The purpose of this article is to discuss such clauses and their salient points in detail.

This is not easy task because of the wide range of activities involved under different circumstances.

Giving some words, sentences and paragraphs in Italics in this article is for the convenience of the reader, to help identify them with the relevant clauses and terms in the Conditions of Contract.

### 2.0 Sub Clause 3.4 - Determination

Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.4 to agree or determine any matter, the Engineer shall consult with each Party in an endeavor 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 19.0 (Claims, Disputes and Arbitration).

The Contract provides for the Engineer to proceed under the above Sub Clause with respect to matters which will give rise to the Parties making a claim on time, cost and any other matters which are subject to the Engineer's agreement or determination, as stipulated in different clauses in the Conditions of Contract.

According to this Sub Clause, the Engineer shall consult with each Party in an endeavor to reach an agreement whenever the conditions state that the Engineer should proceed in accordance with Sub Clause 3.4 (Determination) to agree or determine any matter.

Many of the clauses where the "Determination by the Engineer" is referred to include the phrase "After receiving this further notice the Engineer shall proceed with Sub Clause 3.4 (Determination) to agree or determine on these matters." This gives the Engineer two options for resolving the issue/problem. The first option would be to make an agreement with the Parties through negotiations and the second option would be to make a decision of his

own. In the best interest of the Contract, the Engineer can first try to make an agreement through negotiation rather than making a decision of his own.

However, in acting under this sub clause, it is more practical if the Engineer can do his evaluation of the claim independently taking due regard of all relevant circumstances that have provided the opportunity for the Party to make a claim and follow up with the consultation of the Parties separately. During the consultation if there is anything that the Engineer has not taken into consideration in his independent evaluation, necessary adjustments can be made to the determination, provided they are relevant and justified. Then, the Parties can be formally informed of the final determination. If no agreement could be reached on the adjusted determination, the Engineer can treat his final determination as the fair determination and inform the Parties to give effect to his determination or else the Party who is not agreeable to the Engineer's final determination can refer the matter for adjudication under clause 19.2

Sub Clause 3.5 (Engineer's Impartiality) has a bearing on the Engineer's determination under Sub Clause 3.4. The Impartiality of the Engineer in exercising his discretion has been emphasized in Sub Clause 3.5. The Engineer is empowered to use his discretion when:

- (a) giving his decision, opinion or consent
- (b) expressing his satisfaction or approval
- (c) determining value or
- (d) otherwise taking action which may affect the rights and obligations of the Employer.

Accordingly, the impartiality required by Sub Clause 3.5 must be met by the Engineer when he acts under Sub Clause 3.4.

However, whether or not the Engineer's determination on the value is impartial, according to Sub Clause 3.5, it may be opened up, reviewed or revised as provided in Clause 19.0 (Claims, Disputes and Arbitration)

Sub Clause 3.2 (Delegation by the Engineer) does not allow the Engineer to delegate to his assistants the authority to determine any matter related to Sub Clause 3.4 (Determination) unless otherwise agreed upon by both Parties. The writer is of the opinion that any matter, particularly one related to the cost and time, should be handled by the Engineer only as both cost and time

items are sensitive issues as far as the Employer and the Contractor are concerned even though the Engineer can reverse or vary the determination or instructions of his assistants under Sub Paragraph 2.(b) of Sub Clause 3.2.

### **3.0 Sub Clause 2.4 – Employer's Claim**

According to the 1st paragraph of Sub Clause 2.4 the Engineer can also make claims on behalf of the Employer.

It is a condition that the notice shall be given as soon as practicable after the Employer become aware of the event or circumstances giving rise to a claim. Accordingly, in the first instance, Employer should be aware of the event that has caused losses or damages to him. Then he should either make his claim or advise the Engineer to make a claim on his behalf in accordance with Sub Clause 2.4 (Employer's Claim) or advise the Engineer to make the claim.

If the Engineer has made a Claim on behalf of the Employer and sent it to the Contractor, he has to argue his own case with the Contractor when it comes to agreement or determination under Sub Clause 3.4. If the Contractor disagrees the Engineer will have to make a fair determination.

This is somewhat peculiar as the same Party that has made a claim against another party, is trying to make a decision on the same claim that he has prepared. Therefore the Contractor may sometimes take the position that the Engineer's role is not impartial, despite the Engineer's claims to be fair and reasonable.

### **4.0 Sub Clause 19.1– Contractor's Claim**

This Sub Clause allows the Contractor to make his claims if he considers that he is entitled to any Extension of Time and/or any additional payment under any clause in the Conditions of Contract or otherwise in connection with the Contract. There are specific clauses in the Conditions of Contract under which the Contractor can make claims for reasons specified in those clauses. Apart from this the Contractor is allowed to make his claims for reasons outside these clauses provided such reasons have connections with the Contract. Such connections must be bona-fide and able to be proved beyond doubt.

After the 1st Notice of Claim is given to the Engineer by the Contractor under this sub clause describing the event that gives rise to a claim, further notices together with supporting details and information will also have to be sent to the Engineer from time to time until such time as the Engineer is able to proceed in accordance with Sub Clause 3.4 (Determination) to agree or determine the Contractor's entitlement.

The Contractor should make reference to the sub clause or the connection to the sub clause or the connection to the Contract under which he intends to submit his claim in his 1st notice to the Engineer.

## 5.0 Clauses Under Which The Engineer is Empowered to Make His Determination

There are many clauses in the Conditions of Contract under which the Engineer has been given the authority to determine in accordance with Sub Clause 3.4 on the issues/claims raised by the Parties. These include the Clauses which are subject to Sub Clause 2.4 (Employer's Claim) and Sub Clause 19.1 (Contractor's Claim).

Most of the issues originate from failures on the part of a Party to comply with its individual obligation stipulated in the Contract. Sometimes, they originate from failure on the part of the Engineer. Force Majeure and other reasons beyond anyone's control will also give rise to problems and claims. In such instances the Party affected by such an issue or the Party that has to face the problem can seek redress under these clauses in the Conditions of Contract.

When the Engineer receives a claim from the Contractor asking for Extension of Time and or Cost, it is his responsibility to examine such a claim and give his determination. In the process of the Contractor's Claim, the Engineer should ensure that the time limits given in Sub Clause 19.1 (Contractor's Claim) are adhered to. It should be noted that there are no time limits stipulated in Sub Clause 2.4 (Employer's Claim).

The line of action of the Engineer and procedure to be followed in such determination may differ from case to case and clause to clause.

## 5.1 Claims Subject to Sub Clause 2.4 (Employer's Claim)

### 5.1.1 Sub Clause 4.11 – Unforeseeable Physical Conditions

The Engineer and the Contractor should note the meaning of "Physical Conditions" given in this Sub Clause.

If the Engineer finds the physical conditions of the Site more favorable than could reasonably have been foreseen at the time of tender, the Engineer shall proceed in accordance with Sub Clause 3.4 (Determination) to agree or determine the amount of reduction to be included in the Contract Price and payment certificate.

Mode of the Employer's entitlement under this clause is the **Reduction in the Contract Price**.

### 5.1.2. Sub Clause 7.4 – Rejection

Under this sub clause, the Employer is entitled to make claims when he incurs additional cost due to the Contractor's failure to conform to the specifications and standards specified in the Contract with respect to Plant, Materials and Workmanship to be incorporated into the Permanent Works. This can happen if the Employer is to spend his effort, money and resources on corrective action or rectification Works and the testing of such defective items. Sometimes, the Employer may require retesting done by an independent testing organization as he may not be satisfied with the work of the Contractor's testing organization.

The mode of the Employer's entitlement under this clause is **Cost**.

### 5.1.3. Sub Clause 7.5 – Remedial Work

In the event of the Contractor's failure to adhere to the Engineer's instruction issued with respect to items (a), (b) and (c) described in this sub clause, the Employer is required to appoint another party to carry out the remedial works and make payments directly.

It should be noted that the remedial works under this clause shall also include any urgent work which is necessary for the safety of the Works.

The Engineer has to agree or determine the cost of remedial works carried out by the third party in accordance with Sub Clause 3.4 (Determination) and make recommendations to the Employer to recover such payments from the Contractor.

The mode of the Employer's entitlement under this Clause is **Cost**.

#### *5.1.4. Sub Clause 8.6 – Rate of Progress*

When the rate of progress of the Works is behind the programme due to reasons other than those counted for Extension of Time under Sub Clause 8.4 (Extension of Time of Completion), the Engineer can instruct the Contractor to submit a revised programme in such manner that the Works could be completed within the originally agreed Time for Completion together with new methodology (to catch up the delay).

Unless the Engineer notifies otherwise, the Contractor shall proceed with the Works as per the revised programme and the new methodology. Sometimes there will be issues arising from the implementation of these new methods and as a result the Employer may incur additional cost. Eg: If the contract provides for water and power being supplied to the Contractor free of charge, the Employer will incur additional cost on the use/consumption of these facilities by the Contractor for the Works under the new methodology and this is a cost which the Employer has not originally envisaged. Therefore this additional cost will be agreed or determined by the Engineer in accordance with Sub Clause 3.4 (Determination).

The mode of the Employer's entitlement under this Clause is **Cost**.

#### *5.1.5. Sub Clause 8.7– Liquidated Damages*

If the Contractor fails to comply with Sub Clause 8.2 (Time for Completion), the Contractor shall subject to Sub Clause 2.4 (Employer's Claims) pay

liquidated damages to the Employer for his default.

The Liquidated damage is a predetermined sum included in the Contract, as a payment to be made to the Employer by the Contractor in the event of the latter's failure to complete the Works within the Time for Completion stipulated in the Contract.

Therefore a question of further determination by the Engineer on the same matter does not arise except in the case of the Engineer's determination under Sub Clause 8.4 (Extension of Time for Completion) and in the calculation of proportional amounts of Liquidated damages for the Works taken over in part or parts under Sub Clause 10.2 (Taking Over of Part of the Works)

The mode of the Employer's entitlement under this Clause is **Liquidated Damage**.

#### *5.1.6. Sub Clause 9.4 – Failure To Pass Tests on Completion*

Even if the testing required to be done under Sub Clause 9.3 (Retesting) is failed, at the request of the Employer, the Engineer can issue a Taking Over Certificate (sub paragraph (C) of this Sub Clause). As a result there will be reduced value to the Employer. Unless the amount of this reduction or its method of calculation is otherwise stated in the Contract the Employer needs both Parties to agree on this reduction and the amount is paid prior to issue of the Taking Over Certificate or determined and paid in accordance with Sub Clause 3.4 (Determination).

If the Parties are unable to agree on the reduction or its method of calculation, the Engineer has to get involved and make his determination under Sub Clause 3.4. (Determination)

The mode of the Employer's entitlement under this Clause is **Reduction in the Contract Price**.

#### *5.1.7. Sub Clause 11.3–Extension of Defects Notifications Period*

After the Taking Over, if the Works or a part of the Works cannot be used by the Employer for the intended purpose due to a defect or damage, the

Employer shall be entitled to an extension of the Defects Notification Period for the Works or that part of the Works.

If the Employer considers that he is entitled to an extension as a result of the above, he will give a notice to the Contractor with a copy to the Engineer. Then the Engineer will proceed in accordance with Sub Clause 3.4 (Determination) to agree or make his determination on the extension to be granted to the Employer by the Contractor.

The mode of the Employer's entitlement under this Clause is **Time**.

### *5.1.8. Sub Clause 11.4 – Failure to Remedy Defects*

Due to the Contractor's failure to rectify any defect or damage within a reasonable time, a date may be fixed by the Employer or the Engineer for the Contractor to finish the rectification works. If the Contractor fails to complete such rectification works even by this new date the Employer will have to select one of the options available to him under this Sub Clause as a remedy to the Contractor's default.

Under the 1st option [11.4(a)], the Employer has to carry out the rectification himself or employ a third party and get the rectification work done in which event the Employer will make a claim. Then the Engineer will proceed in accordance with Sub Clause 3.4 (Determination) to agree or determine the cost that would have been reasonably incurred by the Employer in getting the rectification work done by himself or a third party.

In the second option [11.4(b)], the Engineer is required to agree or determine a reasonable reduction from the Contract Price in accordance with Sub Clause 3.4. (Determination)

Under the 3rd Option [11.4(c)], the Employer can terminate the Contract if he is unable to have full use of the entire Works or a part of Works and the amount of money paid by the Employer to the Contractor for the works not used can be recovered in full including the financial cost, dismantling and clearing cost, subject to plant and materials removed from that part of the Works being returned

to the Contractor. There is no obligation on the part of the Engineer specified in this Clause for the determination of the amount of money to be recovered from the Contractor. However it is an implied obligation of the Engineer.

The mode of the Employer's entitlement under this Clause is **Cost or Reduction in the Contract Price**.

### *5.1.9. Sub Clause 15.4(a) – Payment after Termination*

If the Employer or the Engineer on his behalf considers the Employer to be entitled to any payment he may proceed under this Sub Clause. The Engineer shall then proceed to agree or determine the amount the Employer is entitled to be paid by the Contractor.

The mode of the Employer's entitlement under this Clause is **Cost**.

## **5.2 Claims Subject to Sub Clause 19.1 (Contractor's Claim)**

### **5.2.1 Sub Clause 1.9 (Delayed Drawings or Instructions)**

According to Sub Clause 1.8:

- Drawings are in the custody of the Employer.
- Drawings shall be supplied to the Contractor. The person who should issue the drawings to the Contractor has not been stated in this Sub Clause.

According to Sub Clause 1.9

- The Contractor should give notice to the Engineer whenever the Works are likely to be delayed if necessary drawings or instructions are not issued.
- Notice should include the details of drawings required and when they are to be issued and delay if any.
- The Contractor shall give further notice of his entitlement for Extension of Time, Cost and reasonable Profit if the Engineer has failed to supply the requested drawings in time.

Even though Sub- Clause 1.8 is not very clear about who should issue the drawings and when it should be done, Sub Clause 1.9 implies that the Engineer should issue the drawings within a reasonable time.

If the Contractor has made a request to the Engineer asking him to issue the drawings and if the Engineer has failed to do so, the Contractor has to give further notice of his claim for Extension of Time and cost for the determination by the Engineer in accordance with the Sub Clause 3.4.

The mode of the Contractor's entitlement under this Clause is **Time, Cost and Reasonable Profit**.

#### *5.2.2 Sub Clause 2.1 – Right of Access to the Site*

Under this Sub Clause the Employer is responsible for giving Right of Access and the Possession of the Site to the Contractor on the receipt of the Performance Security. Therefore the Engineer should ensure that the Performance Security is submitted to the Employer by the Contractor in correct order within the specified period in terms of Sub Clause 4.2 (Performance Security). The Engineer should also ensure the site being given to the Contractor for his exclusive use and if not, there should be an agreement and arrangement between the Parties as to when the remaining part of the Site is released for the Contractor's use and how the works will be executed in that part of the Site.

If the Contractor has suffered a delay in receiving these rights and has given the required notice and submitted his claim, the Engineer should proceed to agree or determine the delay and/or cost that should be allowed to the Contractor in accordance with Sub Clause 3.4 (Determination). Such determination is only possible if the Employer's failure to give the required rights to the Contractor is not due to a fault of the Contractor.

The modes of the Contractor's entitlement under this Clause are **Time, Cost and Reasonable Profit**.

#### *5.2.3 Sub Clause 4.7 – Setting Out*

Under this Sub Clause, the Contractor is required to set out the works in relation to original Points, Lines and Levels of reference specified in the Contract or notified by the Engineer. The Contractor shall be responsible for the correct positioning of all parts of the Works and shall rectify any errors.

The Employer shall be responsible for errors in the information and data given in the Contract or those notified by the Engineer. If the Contractor suffers delay and/or incurs cost due to these errors, he shall give notice to the Engineer and be entitled to extension of time and the payment of connected cost plus reasonable profit.

Once the Contractor's notice is received and before proceeding in accordance with Sub Clause 3.4 (Determination), the Engineer should decide whether the Contractor as an experienced contractor would have been able to discover such errors beforehand to avoid possible delay and additional cost.

Further the Engineer should be satisfied that the Contractor has made his best effort to verify the accuracy of the data and information given.

The modes of the Contractor's entitlement under this Clause are **Time, Cost and Reasonable Profit**.

#### *5.2.4 Sub Clause 4.11 – Unforeseeable Physical Conditions*

The Engineer and the Contractor should note the meaning of "Physical Conditions" given in this Sub Clause.

The Contractor should give the notice to the Engineer immediately after if he encounters adverse physical conditions which are considered to have been unforeseeable.

After receipt of the Contractor notice of unforeseeable Physical Conditions and the further notice of the Claim for the cost and time, the Engineer should inspect the physical conditions. Having done this and being satisfied with the accuracy of information provided by the Contractor to establish the fact that such physical conditions are unforeseeable to an extent which can cause problems and delays in the execution of the Works, the Engineer shall proceed to agree or determine quantum of delay and cost in accordance with the Sub Clause 3.4.

The modes of the Contractor's entitlement under this Clause are **Time and Cost**.



## 5.2.5 Sub Clause 4.16 – Fossils

Under this Sub Clause, the Contractor is required to give prompt notice to the Engineer upon discovery of items such as fossils, coins and items of geological and archeological interest.

The Engineer should issue instructions to the Contractor regarding the action and procedure to follow in respect of these items. If the Contractor suffers delay and/or incurs cost as a result of the compliance with the Engineer's instructions he shall give notice to the Engineer and inform him about his entitlements on Extension of Time and the cost. Once the Contractor's notice is received and before proceeding in accordance with Sub Clause 3.4 (Determination), the Engineer should decide whether the Contractor has taken reasonable precautions to avoid possible damage to these items and then shall agree or determine the Contractor's entitlements.

The modes of the Contractor's entitlement under this Clause are **Time and Cost**.

## 5.2.6 Sub Clause 7.3 – Testing

The party responsible for delay under this Sub Clause is not the Employer, as mentioned in paragraph 5 of this Sub Clause, but the Engineer.

Delay experienced under this Sub Clause has been caused by the Engineer's failure to attend testing in time. (Paragraph 4)

However, if the Contractor suffers delay and additional cost, as a result of the Engineer's failure to attend in time for the tests, the Contractor shall give a notice to the Engineer of his claim. Soon after the receipt of the Contractor's Claim, it shall be evaluated by the Engineer to agree and determine in accordance with Sub Clause 3.4 on the Contractor's entitlements.

The modes of the Contractor's entitlement under this Clause are Time, **Cost** and **Reasonable Profit**.

## 5.2.7 Sub Clause 8.9 – Consequences of Suspension

As a result of suspension of Works by the Engineer in terms of clause 8.8 (Suspension of Works), the Contractor is entitled to give notice of claim for Extension of Time and the cost.

During the process under Sub Clause 3.4 (Determination) the Engineer has to exclude the time taken and cost incurred in the rectification of the Works disturbed due to the Contractor's faulty design, workmanship and materials or his failure to comply with obligation with respect to the protection of suspended Works and consider only the remaining part of the Claim.

The modes of the Contractor's entitlement under this Clause are **Time and Cost**.

## 5.2.8 Sub Clause 10.2 – Taking Over of Part of the Works

According to this Sub Clause:

- (1) The Employer cannot use any part of the Works other than as a Temporary measure which is either specified in the Contract or agreed by the Parties unless the Taking Over Certificate for that part of the Works is issued.
- (2) If the Employer wants to use any part of the Works before the Taking Over Certificate is issued he may do so subject to the conditions stipulated in this Sub Clause. (Sub paragraph (a) and (b).)

The Engineer can also issue a Taking Over certificate for that part of the Works if requested by the Contractor.

If the Employer wants to use a particular part of the Works, it has to be in line with the above. If the Contractor incurs cost due to deviation from the above the Contractor, may give notice to the Engineer and follow up with his claim. On the receipt of such claim the Engineer is to proceed in accordance with Sub Clause 3.4 (Determination) to agree or determine cost, reasonable profit and the application of proportional reduction in the rate of liquidated damages.

It should be noted that the Employer can use his discretion and request the Engineer to arrange to take over any part of the Permanent Works.

The modes of the Contractor's entitlement under this Clause are **Cost and Reasonable Profit**.

### 5.2.9 Sub Clause 10.3– Interference with Tests on Completion

According to this Sub Clause:

- Due to an action by the Employer the Contractor may not be able to carry out Tests on Completion in accordance with Clause 9.0 for more than 14 days.
- Despite this, Employer shall be deemed to have taken over the Works or Section on the date when Test on Completion otherwise would have been completed and the Engineers shall then issue a Taking Over Certificate subject to the required Testing being done within 14 days of Engineer Notice.

As result of Delay in Testing, the Contractor can give notice of claim to the Engineer and follow up with his detailed claim.

On the receipt of Notices and the detailed claim from the Contractor, the Engineer should act in accordance with Sub Clause 3.4 (Determinations) to agree and determine the Contractor's entitlements.

The modes of the Contractor's entitlement under this Clause are **Time, Cost and Reasonable Profit**.

### 5.2.10 Sub Clause 11.7– Contractor to Search

Sometime at the initiative of the Engineer, the Contractor is required to search for defects in the Works completed. If no defects are found, costs incurred by the Contractor in searching for defects including reasonable profit can be claimed by the Contractor and the Engineer will have to act in accordance with Sub Clause 3.4 (Determinations) to agree or determine cost and reasonable profit that should be paid to the Contractor.

The modes of the Contractor's entitlement under this Clause are **Cost and Reasonable Profit**.

### 5.2.11 Sub Clause 12.4 – Omission

If the Contractor suffers a loss due to an omission of any Work which forms a part of a variation, he needs to send the Engineer a notice with the details of the omission. Then the Engineer will proceed with Sub Clause 3.4 (Determination) to agree or determine the cost which shall be included in the Contract Price.

The mode of the Contractor's entitlement under this Clause is **Cost**.

### 5.2.12 Sub Clause 16.1– Contractor's Entitlement To Suspend Work

If the Work is suspended or Progress of Work is slowed down by the Contractor due to non-certification by the Engineer or nonpayment by the Employer and as a result, if the Contractor suffers delay and/or incurs cost, he will give notice to the Engineer of his claim.

On the receipt of the required notices and detailed claim from the Contractor, the Engineer shall proceed with the Sub Clause 3.4 (Determination) to agree or determine on the extension of time and related cost including a reasonable profit.

The modes of the Contractor's entitlement under this Clause are **Time, Cost and Reasonable Profit**.

### 5.2.13 Sub Clause 17.4 – Consequence of Employer's Risks

If the Contractor suffers delay and/or incurs cost from rectification of damages/losses caused by any one of the Employer's Risk mentioned in Sub Clause 17.3, and a notice has been given to the Engineer to that effect, the Contractor can give his notice of claim for the delay and the cost.

The Engineer on the receipt of the claim shall proceed in accordance with Sub Clause 3.4 (Determinations) to agree or determine the Contractor's entitlements on the Extension of Time and the Cost.

The modes of the Contractor's entitlement under this Clause are **Time, Cost and Reasonable Profit**.



### *5.2.14 Sub Clause 20.4– Consequence of Force Majeure*

It is a requirement in the Conditions of Contract that there should be a notice of Force Majeure sent by the Contractor to the Engineer in accordance with Sub Clause 20.2 (Notice of Force Majeure) prior to the submission of a claim under this Sub Clause.

Once the detailed claim is submitted to the Engineer by the Contractor the Engineer shall proceed in accordance with Sub Clause 3.4 (Determinations) to agree or determine on the Contractor's entitlement for the time and the cost.

The modes of the Contractor's entitlement under this Clause are Time and Cost.

### **5.3 Determinations under Sub Clause 3.4 with respect to purposes other than the Cost and time entitlements.**

#### *5.3.1 Sub Clause 12.3 – Evaluation*

This determination by the Engineer under this Sub Clause is different from the determination that has to be made by the Engineer under other Clauses in the Conditions of Contract.

Most of other determinations are related to cost and time arising out of default by the parties.

Under this Sub Clause the determination that has to be made by the Engineer is related to the Works, their Measurements, Method of Measurement rates and Evaluation for the purpose of determination of the Contract Price.

#### *5.3.2 Sub Clause 13.2 – Value Engineering*

Determination by the Engineer under this Sub Clause is also different from the determination by the Engineer under other Sub Clauses.

If the Contractor is able to produce a Value Engineering Proposal for a part of the Works which makes changes to the design part of it and reduces its money value included in the Contract Price and if the proposal is accepted and approved by the Engineer, a fee will have to be agreed or determined by the Engineer in accordance with Sub Clause 3.4 (Determinations) using the amounts worked out in sub paragraphs C (i) and C (ii) of this Sub Clause.

#### *5.3.3 Sub Clause 15.3 – Valuation and Date of Termination*

Determination by the Engineer under this is also different from the determination by the Engineer under other Sub Clauses. There is no requirement as to a notice being sent to the other party other than the notice of termination. Then the Engineer has to take initiative and proceed with Sub Clause 3.4 (Determination) to agree or determine the Value of Works, Goods etc any other dues to the Contractor for the Works executed in accordance with the Contract. This may include the Contractor's Claims under Sub Clause 19.1 and the Employer's Claims under Sub Clause 2.4 both of which have been processed, agreed or determined.

- 6.0 It is observed that the majority of the Determinations under Sub Clause 3.4 are for entitlements on the extension of time (for Contractor), cost (for both Employer and the Contractor) or Reasonable Profit on the cost (for Contractor).