

Your Contractual Questions Answered

Can A Contractor Claim For Compensation For Extra Work When There Is No S.O. Instruction?

By The Entrusty Group

Entrusty Group, a multi-disciplinary group of companies, of which, one of their specialisation is in project, commercial and contractual management, has been running a regular contractual questions and answers section for Master Builders members in the Master Builders Journal.

In this instalment of this series, Entrusty Group will provide the answer to another frequently asked question above.

This topic of claiming for extra work without a formal instruction is very topical. Strictly, where there is a change or deviation to the Works, be it design, material or workmanship from the original contracted documents, such a change shall constitute a variation to the Works. However, in the construction industry, there are bound to be instances where the Contractor encounters difficulty to complete the Works due to the original design being imperfect; resulting in the need to carry out extra work in order to resolve the imperfect design to complete the Works entirely even though there is no formal instruction from S.O. (or Architect/Engineer/Project

Director). In all construction contract forms used in Malaysia, for a Contractor to claim for extra work, there must be an official Variation Order issued under the specific contract. So under such a case where there is no formal instruction to execute such extra work, can the Contractor be entitled for the 'extra work' as a variation order?

Before we go further to answer this question, let us understand the meaning of 'extra work'. Generally, there is no accepted meaning for 'extra work', but in a lump sum contract it may be accepted as the work which is not explicitly included and contemplated by the contracting

parties at the time of the execution of the contract.

Whereas a re-measurement contract or those quantities of the work which is stated as 'provisional' in the bills of quantities, the increase quantities from the original contract / bills of quantities can be considered as extra work. In this circumstance, the extra work to be carried out by the Contractor does not necessary require the instruction directly from the S.O.. For example, the original contract/bills of quantities stated the quantities to drive the reinforced concrete pile is say 10m depth but at site it was driven and set at 15m depth. The excess quantities of 5m depth is now considered as extra work payable to the Contractor.

However, most construction contracts are lump sum contracts and not subject to re-measurement upon completion of the Works. Therefore, it is pertinent that the Contractor understands his entitlement for the 'extra work' under a lump sum contract before executing.

Standard Forms of Contract

All standard construction contract forms in Malaysia utilise the principle that any instruction for varied and extra work must be issued in writing



Contractors can claim for extra work

and this can be found under the following clauses of the standard forms of construction contracts:-

- PAM 98 Clause 2 – Architect’s Instructions.
- PAM 98 Clause 11.2 – Variations, Provisional and Prime Cost Sums.
- JKR 203A Clause 5(a)(i) – S.O.’s Instructions.
- JKR 203A Clause 24(a) – Variations.
- IEM 89 Clause 5(a)(i) – Engineer’s Instructions.
- IEM 89 Clause 23(b) – Variations.
- CIDB Clause 3 – S.O.’s Instructions.
- CIDB Clause 28.1 – Power to Order Variations.

It was also noted that, most construction contracts contained provision for ‘subsequent sanction in writing’ by the S.O. of earlier orally ordered variations, or confirmation in writing by the Contractor to the S.O. in order to validate the variation. This generally means that if the S.O. gives an instruction orally whereas under the contract he has to do so in writing, the Contractor may confirm the instruction in writing to the S.O., and if the S.O. does not dissent in writing within a specified time, the instruction is deemed to be an instruction in writing of the S.O., entitling the Contractor to be paid for any extra work involved.

Under such a circumstance, an order in writing, or written confirmation of an oral instruction, or written sanction of work done, is made as a condition of the right to additional payment for extra work.

From the above, the general rule is that in the absence of a written instruction/order/ confirmation/ sanction of work done, the Contractor may lose his entitlement to additional payment for such ‘extra work’ but there are exceptions that can overrule this general rule; depending on the wordings of the contract and intention/action of the contracting parties. Now let us look at these



Construction work in progress

exception cases with some of the relevant decided case laws.

Case Law – Compensation for ‘extra work’ without formal instructions

In the American case of *Flooring System, Inc. v Staat Construction Co. (2003)*, the trial judge found that the requirement of written variation orders had been waived by the actions of the owner and the contractor. To establish a waiver, the contractor has to prove either ‘habitual acceptance’ or ‘by conduct’ of work completed upon oral variation orders or that the owner and the contractor agreed orally to the changes and they were then completed by the contractor. During the course of construction, the contractor met the owner frequently to discuss many changes and received oral approvals from him. In addition, the owner accepted the extra work performed by the contractor. Given that the contracting parties conducted in such a manner which basically deviated from the Contract conditions, the trial court agreed that the contractor was entitled for the extra work.

In another American case, *Missouri Department of Transportation, ex rel. PR Developers, Inc. v. Safeco Insurance Co. of America and Robertson Contractors, Inc. (2002)*, where Robertson, the main contractor argued at the trial that the contract required specific written

authorisation for extra work before the subcontractor, *PR Developers* can recover additional money. Since the sub-contractor did not do so, the main contractor was held to have waived this provision.

There was scant evidence of ‘habitual acceptance’ or ‘by conduct’ of work being done through oral variation orders. However, P. Mitchell Parris, president of *PR Developers*, testified that the main contractor had asked for equipment and labour from *PR Developers* to do the repair works which was outside the scope of the written contract. Hence, Parris’ testimony was enough to prove an oral agreement and thus a waiver of the requirement of written variation order. The court awarded in favour of *PR Developers*.

From the above case laws, it is envisaged that in the absence of any written instruction/order/confirmation/ sanction of work done, the Contractor’s rights and remedies to additional payment for the extra work rely on the conduct of both parties which must lead to reasonably belief that there is a ‘habitual acceptance’ or ‘by conduct’ of both parties, consequently, waiving the conditions precedent to payment for extra work.

Now back to the question in the first paragraph. In order to answer whether a particular item of work ought to

be construed as an 'extra work', the following need to be considered and established:-

- Work carried out by the Contractor with the instruction from S.O. including the owner, which is not explicitly included in the contract is considered extra work;
- Work carried out by the Contractor which is outside the contract is considered extra work;
- Work carried out by the Contractor under statutory requirement which is not provided in the contract is considered extra work;
- Work carried out by the Contractor under emergency circumstances when it is impossible to obtain instructions from the S.O. for the sake of preserving the owner's property is considered extra work;
- Items specifically provided for in the contract is not considered extra work;
- Materials supplied by the Contractor is more superior than that specified without any instruction is not considered extra work;
- Works carried out by the Contractor not required under the contract and without any instruction is not considered extra work;
- Work which are deemed to be indispensably necessary to the contract under lump sum contract is not considered extra work;
- Extra work arising from redesign due to difficult conditions under lump sum contract is not considered extra work;
- Any instructions to remedy Contractor's default is not considered extra work.

From the above, it can be said that the Contractor is not entitled for the additional payment for the reason of difficult conditions due to imperfect design. This can be illustrated by the English case of *Sharpe v San Paulo Railway (1873)* whereby the redesign became necessary as a result of difficulties in completing the work. The learned judge held that:

The (plaintiff) says that the original specification was not sufficient to make a complete railway and that it became obvious that something more would be required to be done in order to make the line. But their business, and what they had contracted to do for a lump sum, was to make the line from terminus to terminus complete, and both these items seem to me to be on the face of them entirely included in the contract. They are not in any sense of the word extra works.

In another English case *Williams v Fitzmaurice (1953)* whereby the work are deemed to be indispensably necessary even though not specifically mentioned. The learned judge held that:

It is clearly to be inferred from the language of the specification that the plaintiff was to do the flooring, for he was to provide the whole of the material necessary for the completion of the work; and unless it can be supposed that a house is habitable without any flooring, it must be inferred that the flooring was to be supplied by him. In my opinion the flooring of a house cannot be

considered an extra any more than the doors or windows.

Conclusion

Since all construction contracts forms in Malaysia contained the provision for a written instruction or order for varied and/or extra work, without which, the Contractor cannot recover nor get compensation for such 'extra work' unless he can prove that there has been a new and subsequent contract for him to be paid for such extra work. This subsequent contract may be an oral agreement or may be implied from the conduct of the parties. It must show an agreement by the parties that the extra work was to be done and an agreement by the owner to pay for it or at least the owner must have benefited from the extra work. Therefore, it is strongly suggested that the Contractor should at least put in writing any oral instruction/confirmation/agreement as well as the intention/conduct of the parties for such 'extra work' in order to provide a *prima facie* evidence for the Contractor to claim the additional payment for extra work, if a dispute arises. **MBM**

In the next issue of the MBAM journal the article will answer the question on **'What is a Quantum Meruit Claim?'**



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