

Is Final Account Final? If Not, What Are The Circumstances That Allow Revisions To Be Made?

By the Entrusty Group

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

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

Most standard forms of construction contract provide for submission and/or preparation of Final Account for the project. Finality of the said Account and/or its subsequent certification is often questioned when errors exist or revisions/changes are required or when the final account cannot be agreed by the Employer and Contractor.

STANDARD FORMS OF CONTRACT (RELEVANT CLAUSES)

PAM Form of Building Contract

PAM 69/98 Clause 30.6 requires the measurement and valuation of the Works be completed within the Period of Final Measurement and Valuation stated in the Appendix for the Architect then to issue a penultimate certificate of payment together with a copy of the measurement and valuation summary before the expiry of the said period and before the issue of the Final Certificate under Clause 30.7.

The sub-clauses (i) & (ii) requires the Contractor to send to the Architect all documents necessary for computation purposes of Contract Sum and settlement of accounts, including those relating to the accounts of NSCs and NSs before or within a six months after Practical Completion of the Works.

Clause 30.7 requires the Architect to issue a Final Certificate within three months after the end of the Defects Liability Period or from completion of making good defects or from receipt by the Architect of the said documents, whichever is later.

The Final Certificate shall state the balance due after taking into account the sums paid to the Contractor, amount of retention, Contract Sum adjustments and deductions allowed under the Contract provisions, payable from 14 days after its issue.

Clause 30.8, states that no Architect certificate shall be conclusive evidence that any work, materials or goods are in accordance with the Contract.

It is worth noting that under PAM 69- Clause 30.7, the Final Certificate shall be conclusive evidence that the Works have been properly carried out and completed in accordance with the Contract and any necessary effect have been given to all terms of the Contract which require adjustment, except where any sum in the said certificate is erroneous by:

- (i) Fraud, dishonesty or fraudulent concealment;
- (ii) Any defect (incl. omission) in the Works not disclosed;
- (iii) Any accidental inclusion or exclusion of any work, materials, goods or

figure in computation or any arithmetical error in computation;

The removal of finality or conclusiveness of the Final Certificate in PAM 98 has its merits by not excusing the Contractor of liability for possible breach of contract.

JKR/PWD Form of Contract (203A – Rev 10/83)

Similar to PAM, JKR Clause 48 (a) requires the Contractor to submit full particulars of all claims (including loss and expense) together with any documents, supporting vouchers, explanation and calculations including necessary documents relating to accounts of NSCs and NSs, to enable the SO to prepare the Final Account as soon as is practicable but not later than three months after practical completion of the Works.

Clause 48 (b) requires the S.O. to issue the Final Certificate within three months after the expiry of the Defects Liability Period or three months after the issue of the Certificate of Completion of Making Good Defects, whichever is the later.

Clause 48 (c) requires the Final Certificate be supported by documents showing the SO's final valuation of the Works in accordance with the Contract and allowing for all payments or expenditure or any permitted deductions (incl. LADs) made by the Government or the S.O. on

its behalf, and shall state any final balance due and payable to which party.

Clause 48 (d) stipulates a condition precedent to payment due under the Final Certificate on the Contractor to satisfy the SO made either by a Statutory Declaration a certificate signed by or on behalf of the Director General of Labour, that all workmen employed (including sub-contractors) have received all wages due to them in connection with such employment, and that all statutory contributions and payments have been paid.

Clause 49 stipulates that no SO's certificate shall be conclusive evidence as to the sufficiency of any work, materials or goods, nor relieve the Contractor of his liability to amend and make good all defects, imperfections, shrinkages, or any other faults whatsoever provided by the contract. No certificate shall be final and binding in any dispute.

IEM Conditions of Contract

IEM Clause 48 is almost identical to JKR Clause 48 (a) to (c). There is no provision under IEM for Statutory Declaration on payment to workmen as provided under JKR 48 (d). IEM Clause 49 is similar to JKR's Clause 49 which states that no certificate is conclusive evidence.

CIDB Form of Contract for Building Works

CIDB Form Clause 42.7 (a) & (b) requires the Contractor to submit to the SO a written statement (referred as the "Final Claim Statement") in a prescribe form setting out in detail with supporting documents, the amount he considers he is entitled to, within 30 Days of the issue of the Certificate of Making Good Defects.

42.7 (c) allows the SO to make such assessment, valuation and certification on fair and reasonable basis based on information available to him if the Contractor fails to provide the

supporting documents or are inadequate.

42.7 (d) empowers the SO, after giving written notice to the Contractor for failure to submit Final Statement within a further 30 days, to proceed with preparation of final account under 42.8.

42.8 (a) & (b) require the SO to provide the Contractor, not later than 90 days after issuance of Certificate of Making Good Defects, with the final account showing;

- (i) the adjustments made to the Contract Sum;
- (ii) the amounts the Contractor is entitled expressly under the Contract;
- (iii) the amounts the Employer is entitled expressly under the Contract.

42.8 (c) requires the Contractor, upon receipt of the Final Account, to notify the SO of his acceptance or disagreement, within 30 days.

42.8 (d) requires the SO to decide on any disagreement and inform the Contractor, accordingly.

42.8 (e) requires the SO to issue a Final Certificate (and inform each NSC) of the date of its issue within 30 Days:

- (i) of acceptance by the Contractor or amendment to the Final Account, whichever is the later; or
- (ii) after the expiry of the 30 Day period of receipt by the Contractor with no notification of disagreement; or
- (iii) after the SO has informed of the amendment or no amendment to the Final Account.

42.8 (f) stipulates that the Final Certificate to state the difference between the Contract Sum in the Final Account and amount certified for payment so far to be the debt payable.

42.8 (g) stipulates that the SO is not obliged to issue the Final Certificate

before the Certificate of Making Good Defects, and the issue of the Final Account before it shall not relieve the Contractor from his obligations and liabilities arising during the Defects Liability Period.

It is important to note that under Clause 43.1, no certificates, except Final Certificate, issued by the SO shall be considered conclusive evidence as to the sufficiency of any design, work executed or any equipment, materials or goods nor relieve him from liability of making good defects.

Under Clause 43.2, the effects of Final Certificate shall be as conclusive evidence that:

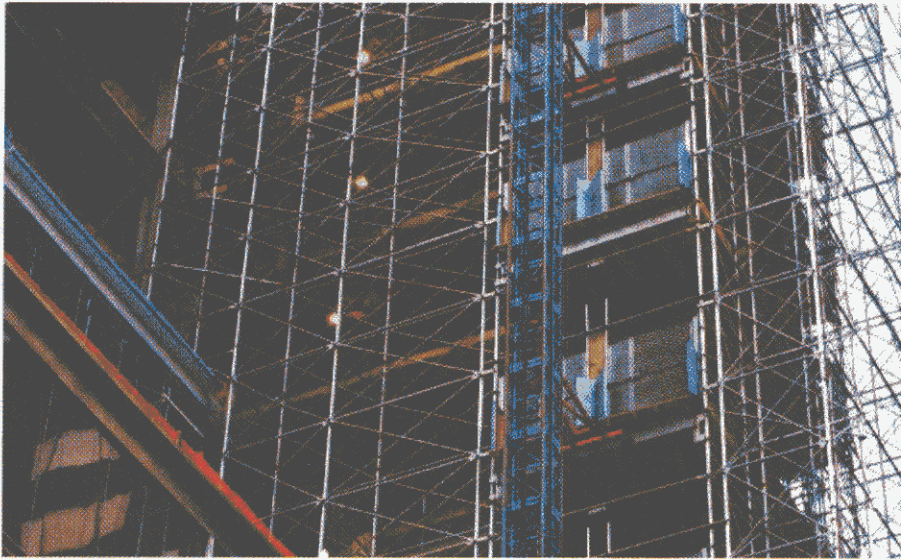
- (i) reasonable satisfaction of quality of work executed, or any equipment, materials or goods by the SO and/or Employer;
- (ii) all extension of time due under Clause 24 have been given;
- (iii) reimbursement of Loss and Expense under Clause 32, if any is in final settlement of all claims by the Contractor.

Relevant Case Law / Act

In the English case of *D and C Builders Ltd v Rees* [1965] 2 QB 617 the Court of Appeal held that there was no true 'accord and satisfaction' since there was no consideration present when the plaintiff acted by agreed and signed a written document accepting a substantially lesser sum resulting from the threat by the Defendant not to pay anything otherwise.

It is worth noting that the doctrine of accord and satisfaction is encoded in Section 64 of the Contracts Act 1950, which provides;

Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or he may extend the time for such performance, or may accept instead of it, any satisfaction which he thinks fit.



An agreement on a final account which includes a lesser balance amount due may be binding, when the recipient agrees to forego part of his claim.

In the circumstance where a mistake or error was made, Section 21 of the Contract Act 1950, provides:

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

It is important to note that for a mistake to be operative under this section, it must be one which is essential to the agreement. A mere computation error in quantity or rate will not give rise to a voidable contract.

The Specific Relief Act 1950, Section 25 also allows for rectification of mistakes. Rectification is a remedy for parties to a contract where due to a mistake, the true intent and terms of the agreement are not recorded. For a claim for rectification to succeed, it needs to show the following (Keating, pg 289):

- (i) One party (first) was mistaken as to the contents of the documents;
- (ii) The other party (second) had actual knowledge of the said mistake;
- (iii) The other party did not draw the first's party's attention to the mistake; and

- (iv) The mistake was to the benefit of the second party.

Solution/Conclusion

It would appear that apart from CIDB Form of Contract and the old PAM 69 Form, the other standard forms of contract do not have any express provision for revision/change to be made in the Final Account and Final Certificate, respectively.

In the absence of any such express provision, it would appear that any

change/revision after the issue of Final Certificate cannot be considered/allowed unless they are dealt with as a dispute in arbitration or the court, within a certain period.

However, in practice, the Architect/Engineer/SO may consider revision/change to the final account due to errors arising from its computation, provided it is brought to his attention prior to issuance of the Final Certificate.

Good practice prescribes the preparation of a draft Final Account for the parties to consider and agree before finalising for its execution. This practice of draft final account in Malaysia is usually where the Contractor draws up such draft final account for the review of the QS and consideration of the Architect/Engineer/SO. However such draft final accounts and practice are usually not a contractual requirement.

Perhaps it is overdue that such provision be incorporated into the standard forms to allow for the above matters and appertaining to errors, omissions and other mistakes in Final Accounts to be rectified, accordingly.

The next issue will be providing the answer to the question, **What is Loss and/or Expense under construction contracts?**



The **Entrusty Group** includes Entrusty Consultancy Sdn Bhd (formerly known as J.D. Kingsfield (M) Sdn Bhd), BK Burns & Ong Sdn Bhd (a member of the Asia wide group BK Asia Pacific), Pro-Value Management, Proforce Management Services Sdn Bhd/Agensi Pekerjaan Proforce Sdn Bhd and International Master Trainers Sdn Bhd. Apart from project, commercial and contractual management services, the group also provides risk, resources, quality and value management, recruitment consultancy services and corporate training programmes to various industries, particularly in construction and petrochemical, both locally and internationally.

Entrusty Group conducts both in-house and public seminars/workshops and contributes articles related to its service areas to various institutions, locally and internationally. Those who like to know more about the seminars/workshops, as well to download a copy of the selected past articles, kindly visit www.entrusty.com.

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