

# Must The Contractor Notify The Employer/ SO Of Its Loss And/Or Expense Claim?

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 Master Builders Journal.**

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

The standard forms of contract in Malaysia require that written notifications are provided for loss and/or expense claims. However due to poor understanding of the requirement of notification, bad notice or the lack of notice has led to disputes and disagreement amongst the various parties (i.e. Employer, SO and Contractor).

A written notice of claim or application by the Contractor is usually the precondition to evaluation, ascertainment and certification by the Architect/Engineer/SO for Loss and/or Expense payment. Unlike extension of time, lack of notice on loss and/or expense claim is often fatal.

## STANDARD FORMS OF CONTRACT (RELEVANT CLAUSES)

### PAM Form of Building Contract (1998)

Clause 24 - Loss and/or Expense of PAM 98 is more detailed and procedural when compared to its predecessor, PAM 69 especially in relation to its application and ascertainment. It also incorporates additional provisions on circumstances that have materially affecting the regular progress of works.

Clause 24.1 requires the Contractor to notify the Architect in writing if and when the regular progress of the Works or any part of it has been or is likely to be materially affected which he had incurred or is likely to incur direct loss and/or expense not reimbursable under any other provisions of the Contract.

The Architect (or QS if he is so instructed) shall then ascertain the amount of such

loss and/or expense which had been incurred by the Contractor, as and when necessary from time to time, provided that:

- The Contractor's application is made in writing as soon as it becomes or should be reasonably apparent to him that the regular progress of the Works or any of it had been or is likely to be affected; and
- The Contractor submits together with his application relevant information substantiating his claim so as to enable him to form an opinion; and
- The Contractor upon request submit to him any other additional details of loss and/or expense as are reasonably necessary for ascertainment.

Clause 24.1 list down the circumstances or situations that are considered as materially affecting the regular progress of the Works and these are:

- The Contractor not having received in due time the necessary instructions, drawings, details or levels from the Architect for which he had specifically applied in writing provided that it was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive them;
- The opening up for inspection of any work covered up or testing of any work, materials or goods in accordance with Clause 6.3, including its making good, unless the inspection or test showed that the work, materials or goods were not in accordance with this Contract;
- Any discrepancy in or divergence between the Contract Drawings and/or the Contract Bills;

- Delay on the part of artists, tradesmen, or others engaged by the Employer in executing work not forming part of this Contract;
- The Architect's instructions issued in regard to the postponement of any work to be executed under the provisions of this Contract;
- Delay or failure by the Employer to supply or provide materials and goods which the employer had agreed to provide or supply for the Work;\*
- Failure of the Employer to give in due time entry to or exit from the site of the Works (or any part thereof) through/over any land by way of passage adjoining/ connected to the site and in the possession and control of the Employer in accordance with the Contract Drawings and/or the Contract Bills;\*
- Any act of prevention or breach of contract by the Employer.\*

*[Note : These are not provided for under PAM 69].*

Under clause 24.3, this requires the Architect (or QS if he is so instructed) to ascertain the amount of such loss and/or expense if and when the Contractor makes written application within a reasonable time of it becoming apparent that the progress of the Work or any part of it has been affected. Failure by the Contractor to comply with the requirement of Clause 24.0 will entitle the Architect (or QS if he so instructs) to ascertain the quantum of the Contractor's entitlement to loss and/or expense payment on the basis of information available to them.

## **JKR/PWD Form Of Contract (203a – Rev 10/83)**

The Clause 44.1 of the JKR Contract states that if the regular progress of the Works or any part thereof has been materially affected by the following reasons only and the Contractor has incurred direct loss and/or expense that he would not be reimbursed under any other provisions of the Contract, then he shall within a month of the occurrence of such event give written notice to the SO of his intention to claims together with an estimate of the amount of the loss and/or expense:

- 43(c) - directions given by the S.O consequential upon disputes with neighbouring owners which is not due to any act or default of the Contractor or its sub-contractor;
- 43(f) - the Contractor not receiving in due time necessary instructions, drawings, levels or instructions on the nomination of sub-contractors and/or suppliers from the S.O, which he has specifically applied in writing on a date which was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same; or
- 43(i) – the Contractor is delayed on the part of artists, tradesmen or others engaged by the Government in executing work not forming part of this Contract.

This clause is subject to clause 48 which relates to final certificate.

Apart from Clause 43, the JKR Contract under Clause 5 – SO's Instructions also contain a provision under sub-clause 5 (d) that if in compliance with the SO's instructions involves loss and/or expense for which the Contractor would not be reimbursed under any other provision in this Contract provided the SO's instruction was not issued owing to some breach of the Contract by the Contractor, the Contractor shall within a month of such SO's instruction to give written notice of his intention to claim for such loss and/or expense to the SO together with an estimate of such loss and/or expense.

This clause is similarly subject to clause 48.

## **IEM Conditions Of Contract**

IEM Clause 44 is identical to JKR Clause 44, except that IEM has an additional provision to cover for delays in giving possession of the site as provided under clause 38(b)(i) [clause 43 (g)]. Like the JKR Contract, the Contractor is also required to give written notice to the Engineer within 30 days of the occurrence together with an estimate of the loss and/or expense amount and is subject to the final certification clause (clause 48). Similarly IEM Contract also contains an identical PWD sub-clause 5 (d).

## **CIDB Form Of Contract For Building Works**

There are various clauses relating to loss and/or expense. The definition is contained in Clause 1.1 and Clause 31 sets out the claimable situations for loss and/or expense. The procedure for claiming loss and/or expense is set out in some detail under clause 32 - Procedure for Claims. This clause is divided into 6 sub-sections/clauses:

- Sub-clause 32.1 - Notice of Claim;
- Sub-clause 32.2 – Contemporary Records;
- Sub-clause 32.3 – Substantiation of Claims;
- Sub-clause 32.4 - Access to Contractor's Books and Documents;
- Sub-clause 32.5 – Payment of Claims;
- Sub-clause 32.6 – Failure to Comply.

### Notice of Claims

Sub-clause 32.1 (a) requires the Contractor to give written notice to the SO of his intention to claim loss and/or expense, within 30 Days after the claim event first arisen, specifying:

- the event and its consequences;
- the appropriate Contract references to such event;
- an estimated Loss and/or expense value; and
- to comply with sub-clauses 32.2 to 32.4 requirements.

Sub-clause 32.1 (b) expressly states that the notice is condition precedent to the Contractor's entitlement under the Contract stating "The giving of such a notice shall be a condition precedent to any entitlement that the Contractor may have under the Contract."

Sub-clause 32.1 (c) requires the Contractor to comply with the notice requirement notwithstanding whether he knows or not that the valuation of the variation has been agreed or SO has decided to include any such claim amount in any certificate.

### Contemporaneous Records

Sub-clause 32.2 (a) to (c) requires the Contractor to keep contemporaneous records reasonably necessary to support any loss and/or expense claim. The Contractor is to allow the SO to inspect these records when so instructed and the SO may then further instruct additional records to be kept. These SO's instructions are without admission of Employer's liability.

The Contractor is required to supply copies of such records to the SO when instructed to do so.

### Substantiation of Claims

Sub-clause 32.3 (a) requires the Contractor to submit to the SO a written account with detailed particulars to adequately substantiate the amount claimed and its linkage of the event(s) giving rise to the claim.

Sub-clause 32.3 (b) deals with claim events that have continuing effect shall be treated as interim accounts until the end of the effects, where the Contractor is required within 30 days to submit to SO a final claim account supported with detailed substantiation of the claims.

### Access to Contractor's Books and Documents

Sub-clause 32.4 (a) empowers the SO to have access to all books, documents, papers or records in the possession, custody or control of the Contractor that are material to the claim for the purpose of making audit, examination, excerpts and transcripts to verify any claim submitted under this sub-clause 32 and the Contractor must make these records available until all claims, mediation, arbitration, or litigation have been finally disposed of or concluded.

Sub-clause 32.4 (b) also requires the Contractor to use his best endeavours to ensure that all the said documentation/ records in the possession, custody or

control of all his sub-contractors/suppliers that are material to the claim to be similarly made available.

#### Payment of Claims

Sub-clause 32.5 (a) requires the Contractor to comply with sub-clauses 32.1 to 32.4, before he is entitled to have the loss and/or expense claim amount included in any SO payment certificate under Clause 42, which the SO may consider due to him.

Sub-clause 32.5 (b) states that the Contractor is only entitled to payment of the substantiated part of the claim amount if he fails to supply and satisfy the SO with adequate substantiation of the whole claim amount.

Sub-clause 32.5 (c) provides that SO's inclusion of any loss and/or expense claim or any payment by the Employer in any certificate under Clause 42 shall not:

- Prejudice the Employer's right to dispute the Contractor's entitlement to the amount certified either in principle, or its quantification or referring such dispute for decision under clause 47 (Settlement of Disputes).
- Be taken into account by the SO or any arbitrator (or other tribunal) in deciding whether the Contractor shall repay to the Employer the whole or any part of such amount.

#### Failure to Comply

Notwithstanding sub-clause 32.5, under sub-clause 32.6 the SO is still entitled to make such assessment, valuation or opinion on fair and reasonable basis based on the information available to him if the Contractor have complied with Clause 32.1 but not complied fully or at all with any of the sub-clauses 32.2 to 32.4.

#### **RELEVANT CASE LAW**

Clause 23 of the PAM 98 Contract is in this respect of notice is similar to Clause 23 of the 1963 Edition of the JCT Contract in the U. K. which was considered in the case of *London Borough of Merton v. Stanley Hugh Leach Ltd.* in 1985.

In *London Borough of Merton v Stanley Hugh Leach Ltd* Vinelott J held that it is a requirement of the contract for the notice to be made within a reasonable time. He said that it must not be made so late that the Architect cannot form a competent opinion on the matters which he requires to satisfy himself that the contractor has suffered the loss and/or expense claimed.

#### **CONCLUSION**

The above standard forms of contract require the Contractor to give written notice to the Architect/Engineer/SO of his loss and/or expense claim. There is no notice requirement to give notice to the Employer.

The Contractor's entitlement to recover loss and/or expense incurred is subjected to the works being materially affected by specific events only as set out in the relevant clauses of the various contracts.

A loss and/or expense claim or application should be supported by relevant information and documents to substantiate it. The CIDB Contract contains a procedure basically codifies the good practice for loss and expense claims which ought to be followed even if other forms of contract are used. If this good practice is followed and practiced this should lead to less disagreement and disputes.

Only the CIDB Contract makes it a condition precedent that a notice is required before the SO can consider the loss and/or expense claimed by the Contractor. The Architect/Engineer/SO is responsible for assessing and ascertaining within a reasonable time the amount due to the Contractor of the said claim where the payment for this loss and/or expense amount is to be made by the Employer. **MBJ**

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In the next issue of the MBAM journal the article will answer the question **Should additional Preliminaries be evaluated on recurring costs basis or actual costs incurred?**

Entrusty Group is currently running a series of seminars/workshops in 2005. The up and coming ones are:

- Sub-Contracting - Overcoming The Problems July 27 2005
- Payment Claims, Valuation, Certification & Final Account Aug 10 2005
- Value Engineering / Management Aug 24 2005

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**Entrusty Group** provides both in-house and public seminars and will provide a 30 minutes of free consultancy (by prior appointment) to MBAM members on their contractual questions. Kindly contact HT Ong or Wing Ho at 22-1 & 22-2, Jalan 2/109E, Desa Business Park, Taman Desa, 58100 Kuala Lumpur, Malaysia.  
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