

Your Contractual Questions Answered

What Are The Obligations Of The Contractor During Defect Liability Period?

By The Entrusty Group

The Entrusty Group, a multi-disciplinary group of companies, of which, one of their specialisations is in projects, 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.

Defect Liability Period (DLP) is a common feature in all the standard form of construction contracts in Malaysia, i.e. PAM 98/JKR PWD 203/IEM/CIDB 2000. During the DLP, the Contractor is obliged and liable to rectify defects that appear between the period the Certificate of Practical Completion (CPC) is issued and the expiry of the DLP.

Before answering this question, let's define defects or defective works. In general terms defects or defective works is where the standard and quality of workmanship and materials as specified in the contract is deficient. Defects can be classified into two main categories, Patent Defects and Latent Defects. Patent defects are defects that can be discovered by normal examination or testing whereas Latent Defects are defects that are not discoverable by normal examination or testing which manifests itself after a period of time.

Standard Form of Contracts

The DLP provisions are found under the following clauses of the standard forms of construction contracts:-

- PAM 98 Clause 15 – Practical Completion & Defects Liability. *(Please see Flowchart 1)*

- IEM/JKR Clause 45 – Defects Liability and Making Good. *(Please see Flowchart 2)*
- CIDB Clause 27 – Defects Liability after Completion. *(Please see Flowchart 3)*

Under the PAM contract sub-clause 15.3, it allows the Architect to issue instructions requiring any defects, shrinkages or other faults appearing within DLP due to materials or workmanship not in accordance with the Contract. Such instruction for rectifying defects, shrinkages or other faults can no longer be issued after 14 days from expiry of the DLP

IEM/JKR sub-clause 45(a) and CIDB sub-clause 27.1 to 3 are similar to the PAM sub-clause 15.3 described above.

PAM sub-clause 15.2 allows the Architect to specify in a Schedule of Defects any defects, shrinkages or other faults appearing within the DLP due to materials or workmanship not in accordance with the Contract and deliver it to the Contractor within 14 days after the said Period expires. Upon receipt, the Contractor needs to make good such defects, shrinkages or other faults within a reasonable time, entirely at his own costs, unless otherwise advised by the Architect, in which case the Contract Sum is to be adjusted, accordingly.

IEM/JKR sub-clause 45(b) is similar to the above PAM sub-clause 15.2, except that it also requires the Contractor to make good the defects no later than three months after receipt of the defects Schedule.

IEM/JKR sub-clause 45(c) allows the Engineer/SO to make good such defects, shrinkages or other faults if the Contractor fails to comply and to deduct the costs incurred in making good the defects from the monies due or recover from the Performance Bond or as liquidated demand in money. If the defects, shrinkages or other faults are impracticable or inconvenient to the Employer to have the Contractor make good these defects and faults, sub-clause 45(d) allows the Engineer to ascertain the diminution in value of the Works due to the said defective or faulty works and deduct such value in the same manner.

CIDB sub-clause 27.4 is similar to IEM/JKR sub-clause 45(c) above, except for the Performance Bond and liquidated demand of money being excluded.

PAM sub-clause 15.4 requires the Architect to issue the Certificate of Making Good Defects (CMGD) when the defects, shrinkages or other faults have been made good.

IEM/JKR sub-clause 45(e) and CIDB sub-clause 27.6 are similar to PAM sub-clause 15.4. CIDB further provides that the said Certificate is to be copied to the Employer and Nominated Sub-Contractor(s)/Nominated Supplier(s) and it shall discharge the Contractor from any physical attendance at the Works for the purposes of remedying defects. It will not however prejudice the Employer's right on latent defects or other breaches of the Contract. Sub-clause 27.7 further emphasised that the provisions of sub-clause 27.1 to 27.6 do not derogate or relieve the Contractor from liability under the Contract or at law.

CIDB sub-clause 27.5 is unique as it allows the SO to instruct the Contractor to search for the causes of defects, and if the Contractor is liable for them, the Contractor shall bear such search cost and remedy the defects at his own cost. If not, the said cost shall be deemed a variation.

From the above, it is clear that during the DLP, the Employer via Architect/Engineer/SO is required to issue the necessary notices to the Contractor and he shall be obliged within reasonable time to rectify the defects at his own cost.

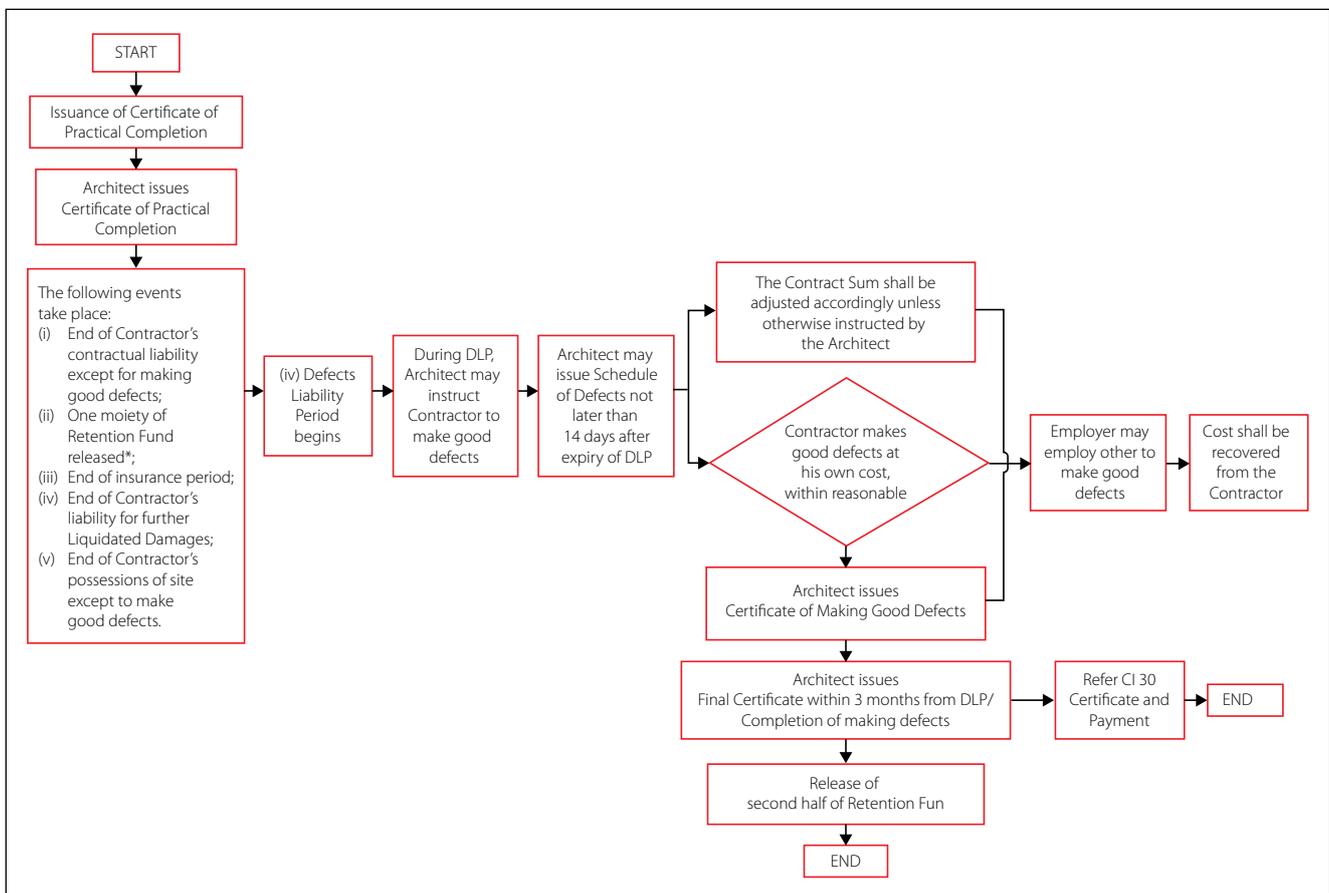
Case Law

In *P & M Kaye Ltd v Hosier & Dickinson Ltd (1972)*, Lord Diplock stated that "... the contractor is under an obligation to remedy the defects in accordance with the architect's instructions. If he does not do so, the employer can recover as damages the cost of remedying the defects, even though this cost is greater than the diminution in value of the works as a result of the unremedied defects."

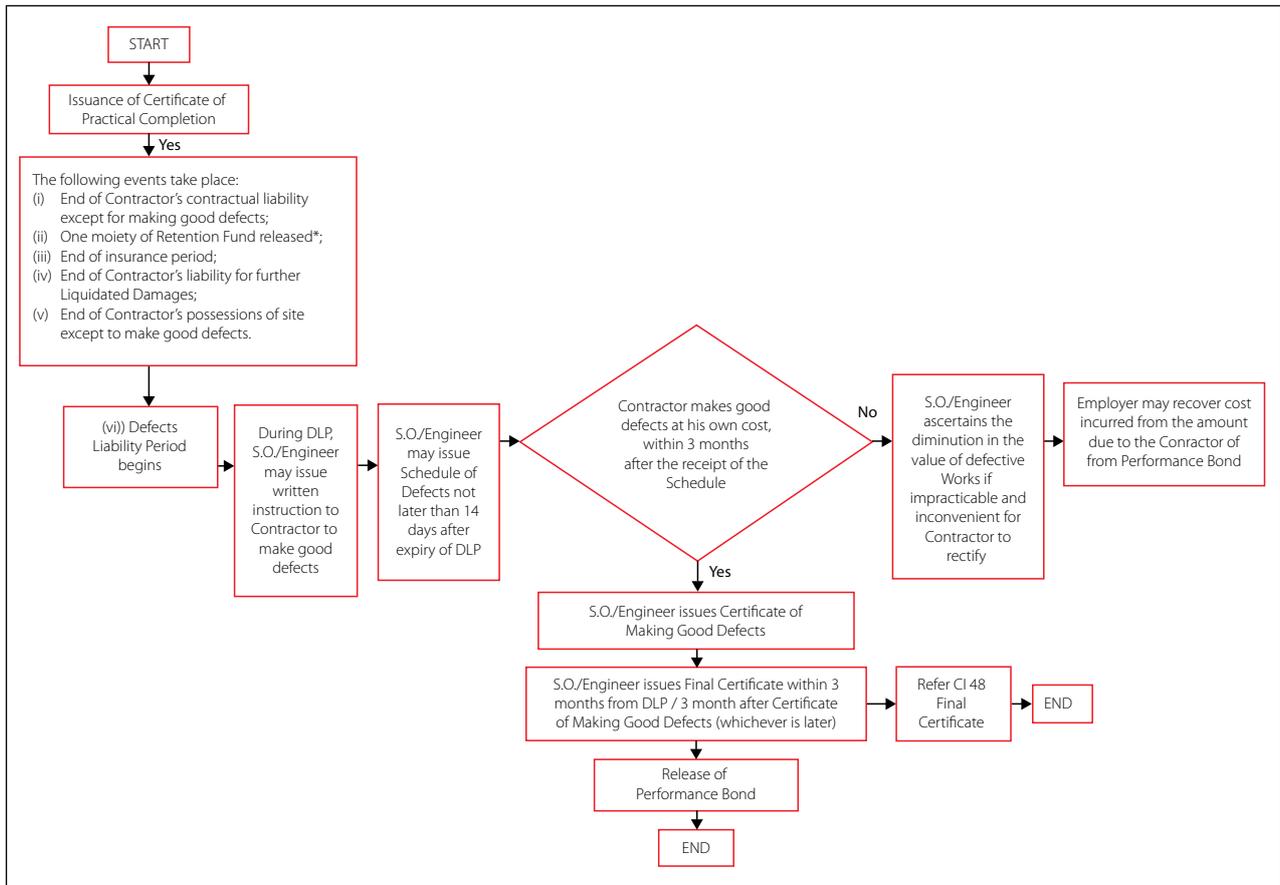
In another case, *H.W. Nevill (Sublest) v William Press and Son (1981)*, Judge Newey QC said that "the clause 15(2) and (3) (the clause relating to DLP) provided an efficient way of dealing with defects to the

advantage of both parties. If the owner have had seek contractors new to the site to do the remedial work it might well have had difficulty in finding them. It would also almost certainly have had to pay them more and would then have sought to have recovered from the Contractor more than the cost to the Contractor of making good the defects."

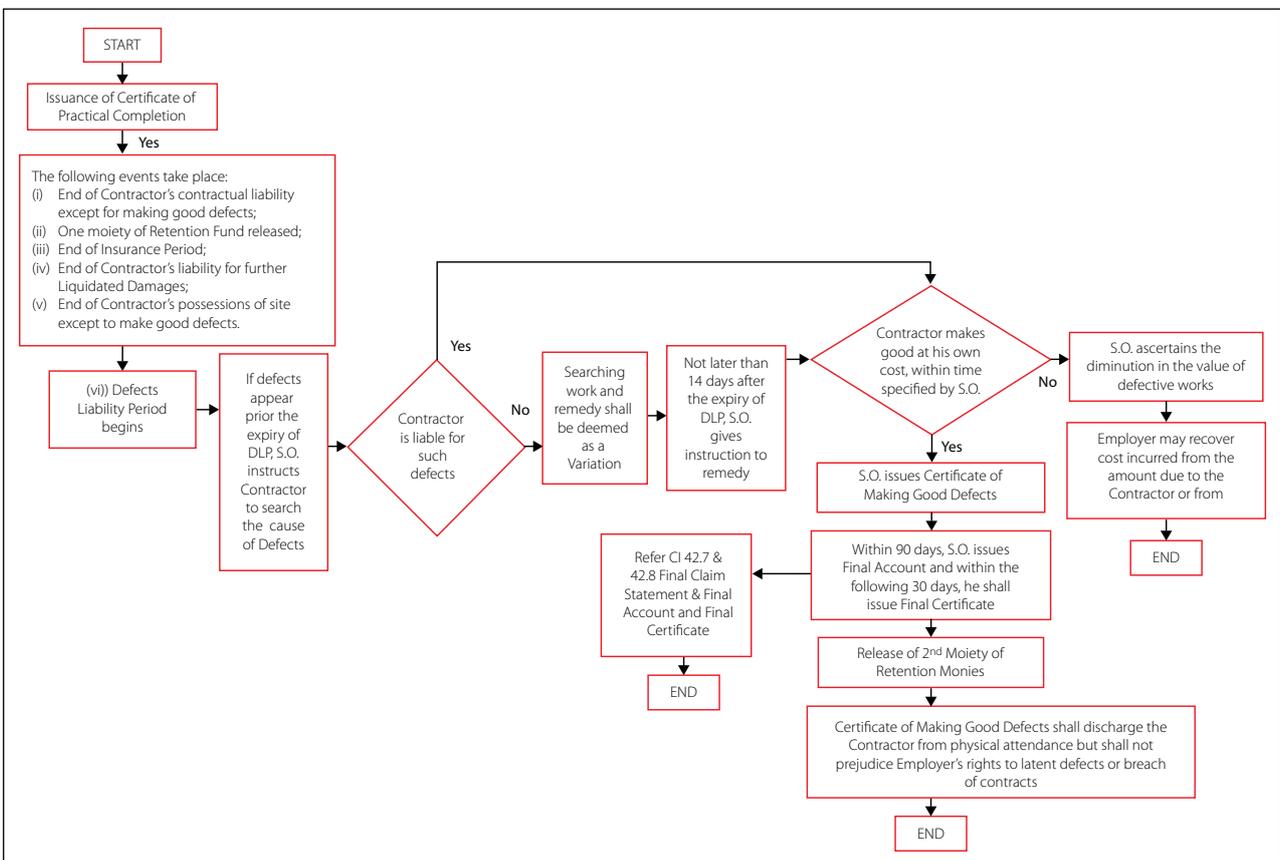
As the contracts envisage that the defects might occur during the DLP, and such defects shall not be considered as a breach of contract. Upon receipt of such notice, the Contractor is obliged to return to the site to make good and the Owner is obliged to allow the Contractor to do so. But the failing of the Contractor to rectify the defects upon receipt of such notice is clearly a breach of contract and the Employer has the right and remedy to recover the cost in the form of damages per Section 74(3) of Contracts Act 1950 as an alternative of recovering the cost of the remedying the defective works by



Flowchart 1 – PAM 98 Clause 15 – Practical Completion & Defects Liability



Flowchart 2 – IEM/JKR Clause 45 – Defects Liability and Making Good



Flowchart 3 – CIDB Clause 27 – Defects Liability after Completion

another contractor within the ambit of the contract provisions.

It is noted that the DLP provision requires such a notice to be given to the Contractor but what would the scenario if the Employer/Architect/Engineer/SO fails to issue the required notice to the Contractor? Would the Employer lose its rights and remedies to recover the cost of remedying the defects?

In considering this issue, it is essential to appreciate that the requirement of such notices impliedly imposes a duty to mitigate the loss on the part of the Employer. The decision had been held in the Court of Appeal (UK) in the case *Pearce & High Limited v Baxter (1999)*, where Evans LJ said that:-

"In my judgment, the contractor is not liable for the full cost of repairs in those circumstances. The employer cannot recover more than the amount which it would have cost the contractor himself to remedy the defects. Thus, the employer's failure to comply with clause 2.5 (the clause relating to rectification of defects), whether by refusing to allow the contractor to carry out the repair or by failing to give notice of defects, limits the amount of damages which he is entitled to recover. The result is achieved as a matter of legal analysis by permitting the contractor to set off against the employer's damages the amount by which he, the contractor, has been disadvantaged by not being able or permitted to carry out the repairs himself, or more simply, by reference to the employer's duty to mitigate his loss."

Evans LJ accepted that the giving of a notice with regard to defects should be regarded as a condition precedent to the Employer's right to require compliance with the defects liability clause. It was held that the Employer's failure in giving the required notice would limit the Employer's recovery if the rectification cost were more than the cost to the original Contractor.

However, it was also noted that the failing of the Employer/Architect/Engineer/SO to issue the required notice shall not preclude the Employer to employ another contractor to rectify the defects and recover the remedial cost. As Evans LJ further accepted that the Employer's common law right to recover for damages is not excluded by failing to issue such a notice, however, it would limit the damages recoverable by the principle of the Employer's duty to mitigate loss.

Conclusion

It has to be noted, whether or not the required notice is given to the Contractor, the Contractor is still liable to the Employer to rectify the defects that appear during DLP. It is prudent for the Contractor to carry out the defects rectification works within a reasonable period. It is advisable that the Contractor cater for defects rectification management in order to manage the defects systematically to avoid potential disputes and/or extra costs in fulfilling his contractual obligation to rectify all the defects.

The defects listing and rectification management generally cover the following activities:-

1. Preparation of defect lists identifying deficiencies against standards/requirements (i.e. snagging list);
2. All remedial works are to be carried out within the specified time under the supervision of qualified and experienced contractor's personnel;
3. Joint inspection, by the Architect/Engineer/SO of the rectified works;
4. Further defects (if any) identified by the Architect/Engineer/SO to be listed on a schedule of defects, to be rectified within an agreed period for subsequent inspection, leading to the issuance of the CPC.
5. Upon completion and inspection of the rectified works, to be signed off by the Architect/Engineer/SO i.e. to "close-out" all rectified works.
6. Any further defects occurring/identified within the DLP, to be rectified periodically, unless those requiring urgent repairs. 

In the next issue of the MBAM journal the article will answer the question on **Can a Contractor claim for compensation for extra work when there is no SO instruction?**



The **Entrust Group** includes Entrust 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.

Entrust Group will provide 30 minutes of free consultancy with prior appointment to MBAM members on their contractual questions. The Group also provides both in-house and public seminars/workshops in its various areas of expertise. For further details, please visit website: www.entrust.com or contact HT Ong or Wing Ho at 22-1& 2 Jalan 2/109E, Desa Business Park, Taman Desa, 58100 Kuala Lumpur, Malaysia. Tel: 6(03)-7982 2123 Fax: 6(03)-7982 3122 Email: enquiry@entrust.com.my