

CLIENT PRACTICE NOTE

IT'S HERE! THE REDAS DESIGN AND BUILD CONDITIONS – 2ND EDITION

A Client Practice Note by Eugenie Lip, Head of KPK Contracts Support Group

INTRODUCTION

"Change is the law of life, those who look only to the past or the present are certain to miss the future"

– John F Kennedy

Wise words of wisdom indeed in this day and age of change! As 2008 looms in the horizon, and new year resolutions are made and/or revisited, 2007 has been nothing short of a spectacular year which saw several interesting developments across the landscape of a booming construction industry.

The year started with the Indonesian sand ban which caught many by surprise, followed by the goods and services tax rate change and its transitional rules that affect transactions spanning the changeover date. Detailed amendments to the Building Control Act together with the new rules for en bloc sales were passed in Parliament in September. Adding to the slew of requirements on workplace safety and health, the Ministry of Manpower disseminated the Designing Out OSH Risk at Source (DO₂RAS) guidelines (still in draft at print time) for comments which are aimed at imposing on key stakeholders (clients, designers and project coordinators) wider and more comprehensive set of safety and health duties with emphasis on design reviews, planning, communications, provision of information, competency checks and contractor-selection. Then there were the pertinent legal cases, notably from the Singapore Court of Appeal like *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric [2007] SGCA 36*, *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency [2007] SGCA 37*, *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd & Another [2007] SGCA 39* and *Chief Assessor & Another v First DCS Pte Ltd (2007)*.

Rounding up the year, the Real Estate Developers' Association of Singapore (REDAS) published the Second Edition of the REDAS Design and Build Conditions of Contract (REDAS D&B) in October. This practice note summarises the key amendments brought about by the Second Edition to take into account the statutory payment regime and the inclusion of an optional clause to provide for fluctuations in the prices of certain specified materials.

KEY AMENDMENT 1 – STATUTORY PAYMENT REGIME

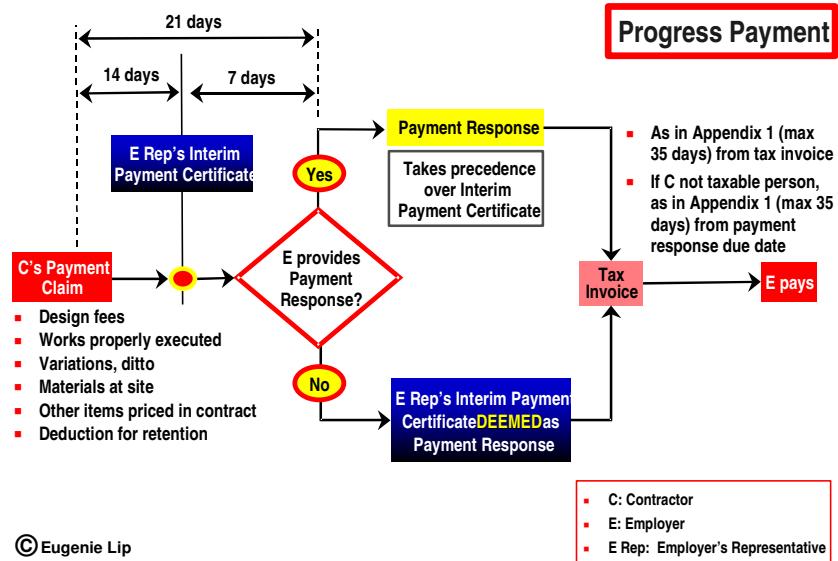
Before the launch of the REDAS D&B in August 2001, design-build work has been procured using a multitude of contract forms, some of which have and are still prepared in-house to produce an ad hoc set of conditions for design-build. Since the promulgation of the Building and Construction Industry Security of Payment Act (in short, the SOP Act) which came into operation on 1 April 2005, client bodies and organisations have relied on bespoke amendments to make the standard form SOP compliant. With the publication of the eagerly-awaited Second Edition, there should be less need now to include provisions to deal with the essentials of the prescribed payment security legislation and protocol.

Making and Responding to Progress Payment Claims

Progress payment claims are served on the Employer (and copied to the Employer's Representative) on the last day of each month following the month in which the contract is made or as stipulated in Appendix 1 – Specific Contract Information. Within 14 days of receipt of the Payment Claim, the Employer's Representative must issue an Interim Payment Certificate.

The REDAS D&B treats the Employer's Representative's Interim Payment Certificate as the Payment Response by way of a 'deeming' provision. If after 21 days from the service of the Payment Claim, the Employer does not provide any Payment Response, the Employer's Representative's Interim Payment Certificate is *deemed* as the Payment Response. Should the Employer decide to give a Payment Response, he must act within the 21-day period in which case the Payment Response provided will then take precedence over the Employer's Representative's Interim Payment Certificate.

The procedure and payment timelines for progress payments are illustrated in Figure 1.



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Figure 1:
Progress Payment Timelines

Final Payment Claims

The Contractor has up to the expiry of the Maintenance Period to submit his final claim documents which must be supported with full substantiation and showing all adjustments he considers should be made to the contract sum. The final claim documents must be accompanied by a written discharge confirming that the total amount claimed represents the full and final settlement of all monies due under the contract.

The Employer's Representative has 3 months from receipt of the final claim documents and the written discharge or the issue of the Maintenance Certificate, whichever is the later, to provide the Contractor with a Statement of Final Account. Within 14 days from the issue of the Maintenance Certificate or the receipt of the Statement of Final Account, whichever is the later, the Contractor serves a Final Payment Claim on the Employer (and copied to the Employer's Representative). The Final Payment Certificate is issued by the Employer's Representative within 14 days of receipt of the Contractor's Final Payment Claim.

The 'deemed' Payment Response provision for the Interim Payment Certificate equally applies in the case of the Final Payment Certificate. Hence, if the Employer does not provide a Payment Response within the 21-day period from the service of the Contractor's Final Payment Claim, the Employer's Representative's Final Payment Certificate shall be deemed as the Payment Response.

In the event where the Contractor fails to submit the final claim documents after the issue of the Maintenance Certificate, the Employer's Representative can make a written request to the Contractor to do so. If after 28 days from the date of receipt of such written request, there is still no submission from the Contractor, the Employer's Representative may proceed to prepare the Statement of Final Account and issue the Final Payment Certificate.

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The treatment of the Final Payment Claim in the REDAS D&B prevents an 'ambush' adjudication. This tactic happens where a claimant having the advantage of preparing his case over a period of time, surprises the respondent with massive and voluminous supporting files of documents, schedules, statements and the like. The respondent is given a limited and tight time frame to prepare his response to what may be large amounts of materials requiring detailed answers.

More importantly, the provisions also give regard to the decision of *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd [2007] SGHC 142*. In this recent legal case, the judge ruled that final payment claims fall within the ambit of adjudication under the SOP Act which should apply to both 'final and non-final payments'.

When to Pay

The Employer must pay the response amount stated in the Payment Response within the time frame stated in Appendix 1, or 35 days after the submission of a tax invoice by the Contractor.

If the Contractor is a non-taxable person under the Goods and Services Tax Act, the time frame is calculated from the payment response due date.

Refer to Figure 2 which illustrates the procedure and timelines governing final payment claims.

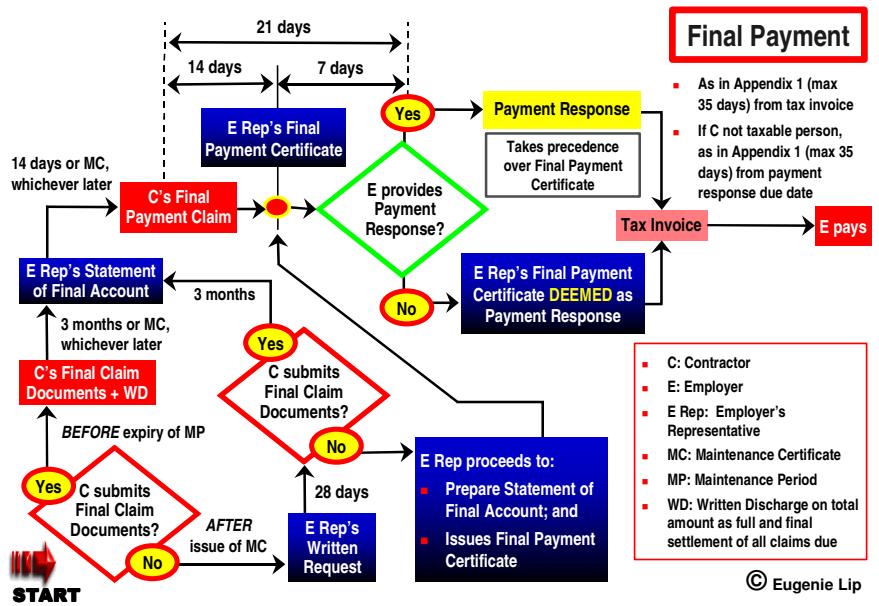


Figure 2:

Final Payment Timelines

KEY AMENDMENT 2 – OPTIONAL CLAUSE FOR FLUCTUATIONS

Recognising that the risk ownership of fluctuations in prices of materials cannot be allocated solely to the Contractor especially after Indonesia's ban on sand exports and to allay concerns that such costs may be far too much for some contracting firms to absorb on a fixed-price contract, the REDAS D&B has incorporated an optional fluctuations clause which only applies if it is expressly incorporated in the contract.

Fluctuations are limited to prices of the materials to be specified by the Employer in Appendix 1. The Contractor is paid or gives credit to the Employer for the difference between the current market prices of the specified materials prevailing at the date of their delivery to the site and at the Base Date stipulated in Appendix 1. The current market prices are based on the monthly published data of the 'Recognised Relevant Authority' named in Appendix 1 which by default is the Building and Construction Authority (BCA) if no other organisation is stated.

Given that the published current market prices from the BCA are only in respect of ordinary Portland cement, ready-mixed concrete grade 30 normal, 20mm high tensile steel bars, 20mm diameter granite aggregate and concreting sand, the REDAS D&B has made it clear that the current market prices to be used in the calculation of the difference shall be 'regardless of the different types, grades or sizes' of the specified materials to be incorporated into the permanent works.

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The Contractor is not entitled to any upward adjustment of the contract sum for fluctuations during the delay period beyond the Date of Completion (or as extended).

The fluctuations clause applies to materials purchased by the sub-contractors of any tier under the Contractor where the Employer has no involvement in the tender documentation and selection as such activities typically come under the purview of the Contractor. In contrast, the applicability of the clause is excluded in named sub-contracts unless expressly incorporated.

OTHER AMENDMENTS

The right to suspend work in consequence of non-payment of an adjudicated amount is reflected in a new replacement clause and as a new ground for extension of time.

The Contractor may also terminate his employment if the Employer fails to pay the adjudicated amount within 7 days after the service of the adjudication determination or such other period as stated by the Adjudicator, whichever is the later. This is activated by service of a notice to the Employer by the Contractor stating that if no payment is made within 14 days after receipt of this notice, a Notice of Termination will be given which takes immediate effect.

The other amendments made comprise legislative updates in the Employment of Foreign Manpower Act (Cap. 91A) and the reference to the revised Arbitration Rules of the Singapore International Arbitration Centre.

CONCLUSION

The release of the Second Edition is much welcome as it brings the REDAS D&B up to speed with what publishers of other standard forms of main contract and sub-contracts have already done by way of amendments to incorporate the statutory payment time frames and protocol, and align them with the consequences of non-payment like extension of time for and rights to suspension of work, and removing any pay when paid provisions which are unenforceable. The inclusion of an optional fluctuations clause will provide a more balanced risk allocation against changes in prices of the specified materials identified in the contract.

REDAS D&B users should be aware of the Second Edition amendments to be made in their contract documentation for new projects and to consider whether to incorporate the standard form for projects tendered but pending an award.

The Second Edition will certainly go in some way to further increase the use of the REDAS D&B without having it tweaked and tuned by legal advisers to address essential SOP Act matters. No doubt when the specimen contract administration templates and named sub-contract conditions become available, the suite of REDAS D&B contract forms will continue to grow in popularity to become the dominant form of contract in use for private sector design and build projects.



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