

CLIENT PRACTICE NOTE

WELCOME, SIA 8TH EDITION CONDITIONS OF BUILDING CONTRACT!

A Client Practice Note

by Eugenie Lip, Contracts Director and Head of KPK Contracts Support Group

INTRODUCTION

Three years ago, the Singapore Institute of Architects (SIA) published the Seventh Edition of the Articles and Conditions of Building Contract for the main contract and the Third Edition of the Conditions of Sub-Contract to take into account the statutory payment regime under the Building and Construction Industry Security of Payment Act (Cap. 30B) (the SOP Act) and to make the forms SOP-compliant.

The SIA launched the 8th Edition of the suite of contract forms, for both the Measurement Contract and the Lump Sum Contract versions of the main contract form, and also the 4th Edition of the sub-contract form at a seminar held in April 2008. There are no major surprises in the new editions and clients, consultants, practitioners, contractors and sub-contractors in the industry should have no difficulty in finding their way around the 2008 contracts. The layout and clause numbering are the same and new marginal headings have been helpfully added against the unnamed paragraphs whilst the words 'Clause' and 'Sub-Clause' have been capitalised for consistency. Amendments to certain clauses have also been made for clarity and in Clause 16.(2), the vesting in the Employer of the property of the materials and goods delivered to the site is made subject to section 25 of the SOP Act. Further, the old provisions for early final payment and direct payment to Designated and Nominated Sub-Contractors and Suppliers have been deleted in the light of the statutory rights now available under the SOP Act.

This practice note examines the key changes in the main contract form which include, importantly, the treatment of the final payment claim following the decision in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd [2007] SGHC 142* and the inclusion of a specified time frame for making good defects after the expiry of the Maintenance Period. The other changes made relate to termination of the Contractor's own employment in the event of non-payment of an adjudicated amount and the optional clauses on fluctuations which have been completely redrafted to provide for prices of only those materials specified by the Employer to be adjusted.

INTERIM PAYMENT CLAIMS

Interim payment claims are served by the Contractor on the Employer either at periodic intervals on the last day of the month following the month in which the contract is made (or on the day as specified in the Appendix to the Conditions) or by stage instalments where payments are made based on pre-determined instalments of the contract sum and upon completion of specific stages of work set out in the contract documents. A new paragraph in the payment clause makes it clear that the Contractor must comply with the rules used for valuation of the works for payment certification as set out in Clause 31.(4) when preparing his payment claim.

The Architect has 14 days from receipt of the payment claim to issue his Interim Certificate to the Contractor. In contrast to the 'deeming' provisions accorded to a payment certificate found in the REDAS Design and Build Conditions – Second Edition (REDAS D&B) and the PSSCOC contract form, the Employer under the SIA Eighth

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Edition is required to provide a payment response – or he can cause it to be provided – within 21 days from the service of the payment claim.

Under the 'deeming' regime in the REDAS D&B, if after 21 days (or in the case of the PSSCOC contract form, after 14 days) from the service of the payment claim, the Employer does not provide any payment response, the contract administrator's payment certificate is *deemed* as the payment response. If the Employer would like to provide a payment response, he has to act within the 21-day period (or the 14-day period) in which case his payment response takes precedence over the payment certificate issued by the contract administrator.

Figure 1 illustrates the procedure and timelines for processing of interim payments.

FINAL PAYMENT CLAIM

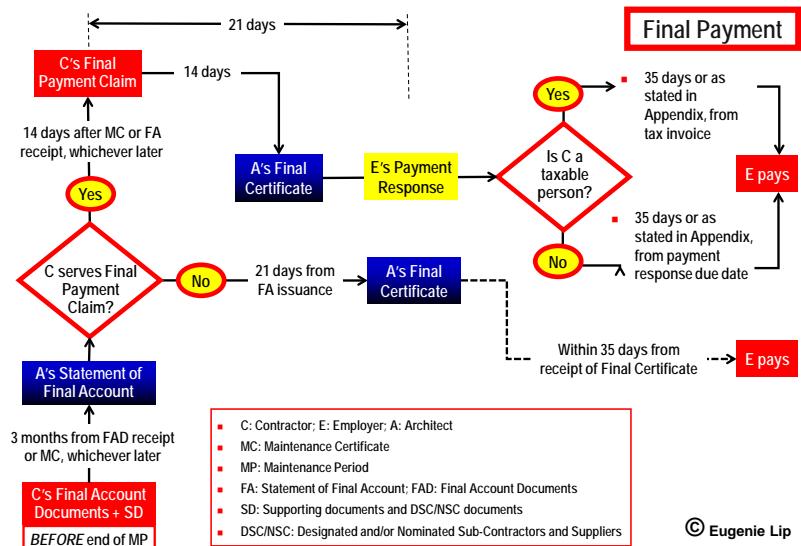
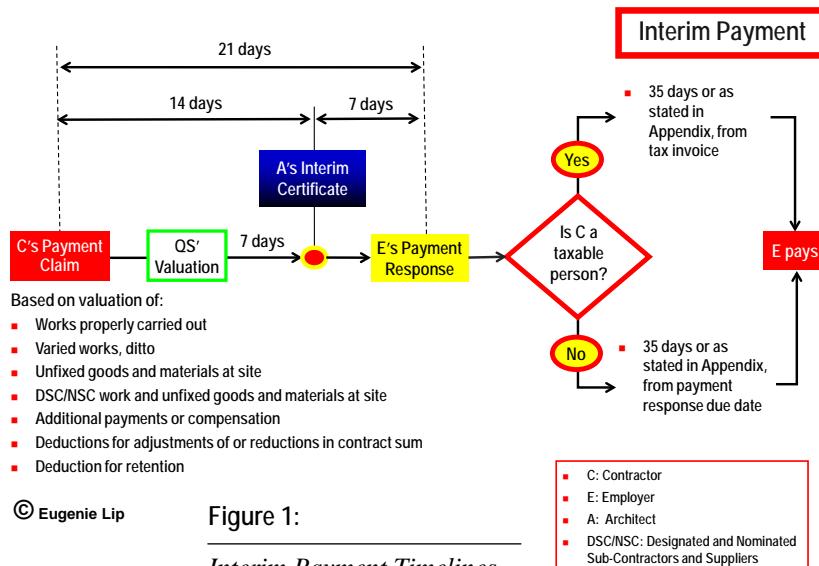
Important amendments have been made to the final payment claim provisions in response to the decision in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd [2007] SGHC 142* where it was ruled that there was no distinction between progress payments and final claims and that the ambit of adjudication under the SOP Act extends to both 'final' as well as 'non-final' payments.

Final Account Documents (in the Seventh Edition, it was called 'final claim') are submitted by the Contractor before the end of the Maintenance Period to the Architect. These documents set out the final value of the works executed including variations and any other contractual entitlements which the Contractor considers are due to him, the accounts of the Designated and Nominated Sub-Contractors and Suppliers together with any other supporting documents to enable the Statement of Final Account to be prepared.

The Architect has 3 months from the receipt of the Final Account Documents or the issue of the Maintenance Certificate, whichever is the later, to provide the Contractor with the Statement of Final Account. The final payment claim is served to the Employer by the Contractor within 14 days from the receipt of the Statement of Final Account or the Maintenance Certificate issuance, whichever is the later. Within 14 days from the receipt of the final payment claim, the Architect must issue the Final Certificate to the Employer.

In accordance with Clause 31.(11)(c), if the Contractor wishes to fast-forward the service of the final payment claim before the issuance of the Maintenance Certificate or the receipt of the Statement of Final Account, such early service does not trigger the 14-day period within which the Architect has to issue his Final Certificate.

Where the Contractor does not serve a final payment claim for whatever reason despite the issuance of the Maintenance



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Certificate and having been provided with the Statement of Final Account, the Architect can still proceed with his final certification within 21 days from the issue of the final account to the Contractor.

As with interim payment claims, the Employer has 21 days after service of the final payment claim by the Contractor to provide a payment response. Where no final payment claim has been served, there is no requirement for a payment response to be provided.

The procedure and timelines for a final payment claim are illustrated in Figure 2.

MAKING PAYMENT

If the Contractor is a taxable person under the Goods and Services Tax Act (Cap. 117A), payment is made within 35 days after submission of a tax invoice to the Employer or within such time as stated in the Appendix to the Conditions. For a Contractor who is not a taxable person, the time frame is calculated from the payment response due date.

The contract form is however silent on the period for honouring the Final Certificate in the situation where no final payment claim has been served by the Contractor (and accordingly there is no requirement for the Employer to provide a payment response) and the Architect proceeds to issue the Final Certificate. No doubt, this will hopefully be clarified in the subsequent amendments or editions to the contract form. In the meantime, prudence suggests that it will be wise for the Employer to make payment of the certified amount within 35 days from the date of receipt of the Final Certificate.

TIMELINE FOR MAKING GOOD DEFECTS

Within 14 days after the expiry of the Maintenance Period, the Architect shall deliver the Schedule of Defects to the Contractor who shall 'forthwith' repair and make good the defects and other faults notified.

Apart from his powers to open up and inspect work covered up for defects, carry out tests or inspections, remove defective work or accepting it unremedied with a corresponding reduction in the contract sum or issuing a variation in lieu of removal, demolition or reconstruction, where the Contractor fails to make good the defects within 3 months from the issue of the Schedule of Defects (or such other period as stated in the Appendix to the Conditions), the Architect is entitled to direct that the defects are not to be remedied and instead the contract sum be reduced.

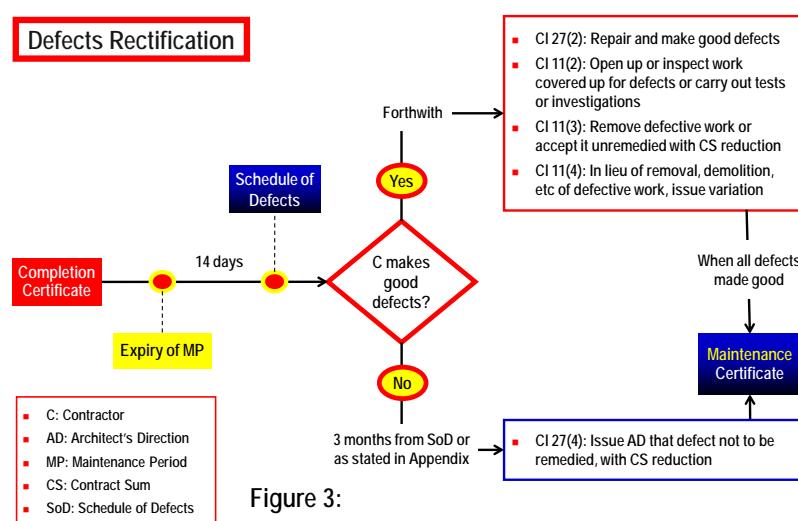


Figure 3:

Making Good Defects Timeline

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Refer to Figure 3 for an illustrated overview of the procedure and timeline for making good defects after the expiry of the Maintenance Period.

TERMINATION FOR NON-PAYMENT OF ADJUDICATED AMOUNT

In addition to the statutory rights under the SOP Act arising from non-payment of an adjudicated amount, the 2008 form has included a new ground for termination by the Contractor of his own employment.

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Failure of the Employer to pay the adjudicated amount within 7 days after the service of the adjudicator's determination or by such date as the adjudicator may determine, whichever is the later, entitles the Contractor to put the Employer on notice. If no payment is made within 14 days from such notice, the Contractor may terminate his employment by service of a Notice of Termination to the Employer which takes immediate effect with the same consequences governing the post termination rights and obligations of the parties as for other termination grounds.

OPTIONAL CLAUSE FOR FLUCTUATIONS

The old clauses on fluctuations have been redrafted to recognise current commercial sentiments and realities of the industry especially after the 2007 sand export ban by providing flexibility for the Employer to specify in the Appendix to the Conditions the materials that shall be subject to price adjustments.

The contracted prices of the specified materials are based on the monthly published data of the 'Relevant Recognised Authority' identified in the Appendix to the Conditions. By default provision, it is the Building and Construction Authority (BCA) unless some other organisation is named.

Adjustment of the contract sum for fluctuations is based on the difference between the contracted prices (which in the BCA's monthly Construction Price Update publication are referred as 'current market prices') of the specified materials prevailing at the date of delivery to the site and at the Base Date stated in the Appendix to the Conditions.

CONCLUSION

The launch of the suite of SIA 2008 contracts is timely and much welcome and it represents a laudable and admirable effort to carry out a comprehensive review of the forms whilst retaining the primary risk allocation between the contracting parties and most of the familiar clauses.

Users of the SIA contracts should exercise care when specifying the version in the tender documents during the transitional phase between the 2005 and 2008 forms. For example, the Seventh Edition main contract form can only be used in conjunction with the Third Edition of the Conditions of Sub-Contract and the Eighth Edition with the Fourth Edition. Hence, the Third Edition Sub-Contract Conditions should continue to be specified for ongoing projects where the main contract was based on the SIA 2005 Seventh Edition even after the 2008 sub-contract form becomes available.

Clients may also need to consider whether to incorporate the Eighth Edition main contract form for projects tendered but not yet awarded, and also to start specifying the SIA 2008 forms for new projects.

Moving away from the SIA 2005 forms and getting to know the SIA 2008 contracts is unlikely to cause any difficulties or encounter reluctance and everyone in the industry is encouraged to use them.

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