

CLIENT PRACTICE NOTE

SIA 9TH EDITION CONDITIONS OF BUILDING CONTRACT – WHAT IS NEW?

A Client Practice Note

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

INTRODUCTION

- "229. If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death.
232. If it ruin goods, he shall make compensation for all that has been ruined, and inasmuch as he did not construct properly his house which he built and it fell, he shall re-erect the house from his own means.
233. If a builder build a house for some one, even though he has not yet completed it; if then the walls seem toppling, the builder must make the walls solid from his own means."

– Code of Laws of King Hammurabi (ca. 1760 BC)

These extracts from the well-preserved ancient Code of Hammurabi provide the backdrop to the keywords in the amendments found in the Ninth Edition suite of contracts launched by the Singapore Institute of Architects (SIA) in September 2010 for both the Measurement Contract and the Lump Sum Contract versions of the Articles and Conditions of Building Contract for the main contract.

The amendments in the 2010 contract forms albeit not extensive add clarity and certainty to the processing of the Maintenance Certificate. Except for these amendments, users of the SIA contracts will find no difficulty in getting to know the 2010 contracts as most of the familiar clauses remain unaffected.

As no new edition of the sub-contract form has been published alongside the new Ninth Edition contracts, the current Fourth Edition of the SIA Conditions of Sub-Contract should continue to be specified for projects where the main contract form is based on the 2010 contracts.

This practice note examines the key changes made to the 2010 contracts which comprise in essence and significantly, specified time frames for dealing with defects at the end of the Maintenance Period and the issue of the Maintenance Certificate.

DEFECTS OBLIGATIONS

The Completion Certificate from the Architect heralds the following matters on the part of the Contractor:

- Completion of all outstanding work recorded in the schedule attached to the Completion Certificate; and

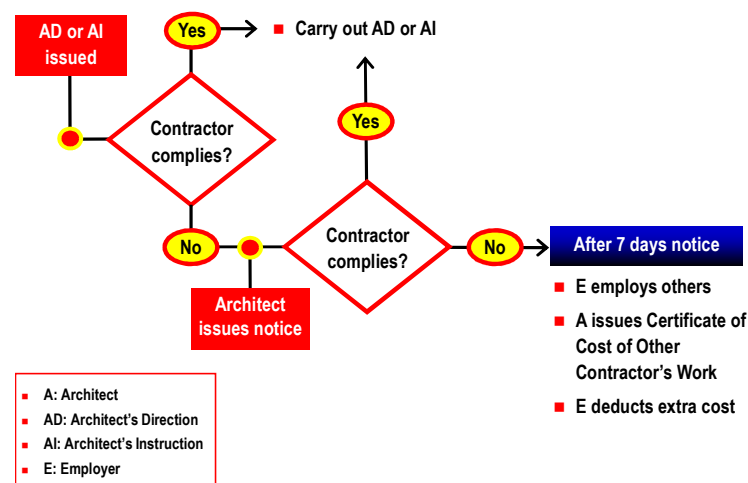
- Repair and making good of all defects which the Contractor (and/or any of his sub-contractors or suppliers, whether designated, nominated or direct) are responsible arising from a breach of their respective contractual obligations.

The Architect has up to 14 days after the expiry of the Maintenance Period to deliver the Schedule of Defects to the Contractor who is obliged to forthwith repair and make good the specified defects which still remain.

SPECIAL POWERS FOR DEALING WITH DEFECTS

The Architect is empowered during or towards the end of the Maintenance Period to open up and inspect work covered up for defects, carry out tests or inspections, remove or demolish 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.

In the 2010 contracts, the powers of the Architect in dealing with defects have been extended to include Clause 1.(7) which concerns with the remedies available to the Employer arising from non-compliance by the Contractor with a direction or instruction.



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Figure 1:

Non-compliance with Direction or Instruction

As illustrated in Figure 1, the Employer is entitled to employ other contractors to give regard to the Architect's direction or instruction to make good the defects where the Contractor has failed to comply with it within 7 days after receipt of a notice requiring him to do so.

Before the Employer can make any deduction for the extra cost of employing other contractors to make good the defects, the Architect is required to issue a Certificate of Cost of Other Contractor's Work. The certified extra cost is deducted at the discretion of the Employer in his payment response provided under Clause 31.(15).

In the case where the defects are accepted unremedied by the Architect without the need for removal or replacement, the measure of damages representing the reduction in the contract sum is assessed in one of two ways:

- Loss of value (or diminution in value) suffered by the Employer; or

- Cost saving to the Contractor in executing the work with defects,

whichever amount is the greater.

Loss of value is the difference between the market value of the building had it been built without defects and the value of the building if it were to be sold for a price which took into account of the defects. The second measure of damages, that is, the cost saving to the Contractor represents the amount which he saved in not carrying out the work in conformity with the contract specification.

It is to be noted that in the 2010 contracts, the reduction in the contract sum as assessed is effected by the Architect in an Interim Certificate or alternatively, in the Final Certificate.

NEW TIMELINES FOR ISSUE OF MAINTENANCE CERTIFICATE

If the Contractor fails to make good the defects notified within 3 months from the issue of the Schedule of Defects (or such other period as stated in the Appendix to the Conditions) and the cause of such defects is attributable to the Contractor (and/or any of his sub-contractors or suppliers, designated, nominated or direct), under the 2010 contracts, the Architect is obliged to give a direction within 14 days from the expiry of the 3-month period (or such other stated time frame) that the defects are not to be made good.

Following the Architect's decision, the Employer is entitled to deduct a sum representing the estimated cost of having to employ other contractors to make good the defects. Any other costs charged by these other contractors employed to make good the defects are also recoverable by the Employer.

The deduction when assessed by the Quantity Surveyor is not certified by the Architect but effected by the Employer in his payment response in accordance with Clause 31.(15). Such deduction made by the Employer is subsequently recorded by the Architect in his Interim Certificate or taken into account when the Final Certificate is issued, whether or not the defects as directed by the Architect not to be remedied are subsequently made good by other contractors.

The Architect is empowered in the 2008 contracts to give a direction on the unremedied defects after the expiry of the 3-month period (or such other stated time frame) with a corresponding reduction in the contract sum assessed by the reduced value of the work and any cost saving to the Contractor. Under the 2010 contracts, these measures of the amount of reduction in the contract sum have been deleted.

Refer to Figure 2 for an illustrated overview of the procedure and timelines for dealing with defects after the expiry of the Maintenance Period.

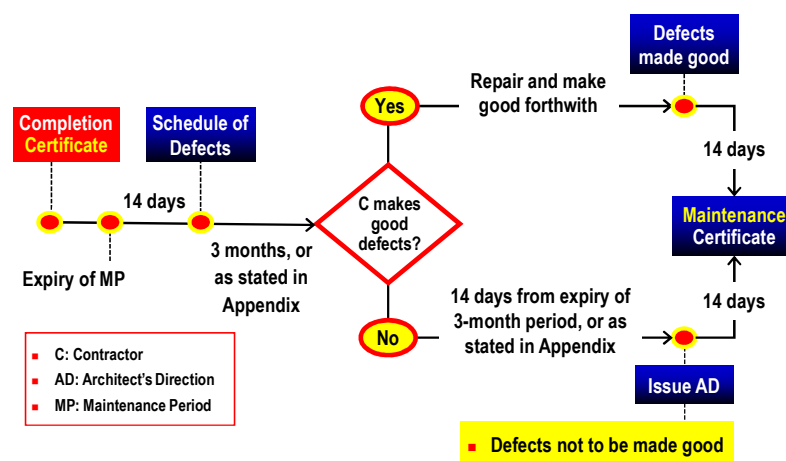


Figure 2:
Timelines for issue of Maintenance Certificate

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The 2010 contracts require the Architect to issue the Maintenance Certificate within 14 days after the occurrence of the following events, presumably whichever is the later albeit this is not expressly stated in the new contract forms:

- All defects notified in the Schedule of Defects have been made good by the Contractor; or
- The notified defects have been dealt with by way of an Architect's direction that they need not be remedied.

No doubt, the words 'whichever is the later' will hopefully be clarified in the subsequent editions of the contract form.

OTHER AMENDMENTS

The second release of the retention monies is in the 2008 contracts certified by the Architect and paid to the Contractor in an Interim Certificate at the expiry of the Maintenance Period or upon the issue of the Maintenance Certificate, whichever event occurs later. In the 2010 contracts, this balance of the retention monies is processed in the Final Certificate.

Paragraph numbering has also been added to Clause 23.(4) which relates to the request for sufficient explanation, information or particulars from the Contractor in connection with the assessment of the extension of time by the Architect. The provisions under this clause in the 2010 contracts are now numbered as Clause 23.(4)(a) and Clause 23.(4)(b).

CONCLUSION

The 2010 contracts are much welcome and with most of the provisions remaining unchanged including the risk profile, layout and clause numbering, there is no unfamiliarity with the new contract forms and everyone is encouraged to start using them.

Appreciation and understanding of the Ninth Edition amendments are essential for all users of the SIA contracts as standard tender documentation materials are updated for new projects. Clients may also wish to consider specifying the 2010 contracts for projects which have been tendered but are pending an award.

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