

## CLIENT PRACTICE NOTE

# IT'S ALL ABOUT INSTRUCTIONS!

### ***A Client Practice Note***

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

#### **INTRODUCTION**

*"I hear and I forget. I see and I remember. I do and I understand!"* – Confucius

Instructions are generically used to describe orders, requests and directions which are given to the Contractor and/or sub-contractors and suppliers to carry out work or supply goods and materials and may or may not have time or financial implications. Most standard contract forms contain provisions for giving instructions, how to treat verbal orders and the course of action consequent on a failure or refusal to comply with the instruction.

This practice note which is the first in a series of articles on contract administration discusses the key essentials and watchpoints for dealing with instructions under the prescribed protocol that a practitioner tasked with administering the contract must be cognisant of as entrenched in the commonly used standard forms published by the Singapore Institute of Architects (SIA Form), Real Estate Developers' Association of Singapore (REDAS Design and Build Conditions or REDAS D&B) and the Building and Construction Authority (Public Sector Standard Conditions of Contract for Construction Works or PSSCOC).

#### **DISTINGUISHING INSTRUCTIONS AND DIRECTIONS**

A unique feature of the SIA Form is the classification of orders and requests of the Architect as 'directions' or 'instructions'. The classification is accorded such importance that the Contractor is not obliged to comply with an order or request not expressed as a direction or an instruction. Under the REDAS D&B and PSSCOC, all orders and requests are given as instructions.

When a direction is given under the SIA Form, the Contractor is not entitled to additional payment or increase in the contract sum albeit it may involve a reduction. In contrast, compliance with an instruction entitles the Contractor in principle to either a reduction of or increase in the contract sum, or additional payment.

#### **VERBAL OR ORAL INSTRUCTIONS (AND DIRECTIONS)**

All instructions must be given in writing. Under Clause 1.(1) of the SIA Form, the Contractor has 14 days to confirm a verbal instruction (or direction) which if not dissented or withdrawn within 14 days of its receipt, is deemed as if it was given in writing. The PSSCOC has a similar regime except that the time period for confirmation by the Contractor and the Superintending Officer (SO) is 7 days. In contrast to the SIA Form, the Contractor is required to comply with the instruction of the SO given orally.

REDAS D&B is silent on whether instructions must be in writing albeit it is advisable for evidential purposes.

#### **FAILURE OR REFUSAL TO COMPLY WITH INSTRUCTION (OR DIRECTION)**

Under Clause 1.(7) of the SIA Form, if the Contractor fails to give regard to an instruction (or a direction) within 7 days of receipt of a notice from the Architect requiring compliance, the Employer can bring in another contractor to carry out the instruction (or direction). The extra cost arising from the Contractor's default in failing to comply with the instruction (or direction) is deducted from any monies otherwise due to the Contractor and may include not only the monies paid to other contractors but also any additional expenses incurred by the Employer as a result of having to get another party to carry out the work. A refusal or failure by the

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Contractor to comply after one month's notice also entitles the Employer to terminate the employment of the Contractor at any time within one month after receipt of the Termination Certificate issued by the Architect under Clause 32.(2).

In REDAS D&B, the Employer is entitled to terminate the employment of the Contractor under Clause 30.2.2.4 if he fails to comply with the instruction of the Employer's Representative within 28 days after the date of its receipt. There is no recourse for the Employer to employ other contractors to carry out the instruction except where it relates to the remedying of defects and the Contractor has not attended to it after 7 days' notice.

Under PSSCOC, non-compliance with an instruction of the SO within 14 days (or such other stipulated period) empowers the Employer to employ other persons and recover the amount incurred from the Contractor pursuant to Clause 2.6. The SO is also entitled to issue a Termination Certificate under Clause 31.1(f) for persistent refusal or failure by the Contractor to comply with his instruction. If such default is not made good within 7 days or repeated within 30 days of the Termination Certificate, the Employer may give the Contractor a notice of termination of his employment.

Prior to making any deduction from monies otherwise due to the Contractor for the extra cost of employing other contractors, under Clause 1.(7) of the SIA Form, the Architect is required to issue a Certificate of Cost of Other Contractor's Work. It is to be noted that the certified extra cost is deducted at the discretion of the Employer in his payment response. Any such sum deducted is recorded – not certified – by the Architect in his subsequent Interim Certificate. There is no such certification required under the REDAS D&B and PSSCOC in order for the Employer to recover the cost and expenses incurred from the Contractor.

## PROCESS FLOWCHARTS

The procedures, timelines and consequences of non-compliance by the Contractor with an instruction (or a direction) of the Architect (or SO) under the SIA Form and the PSSCOC are illustrated in Figure 1 and Figure 2 respectively.

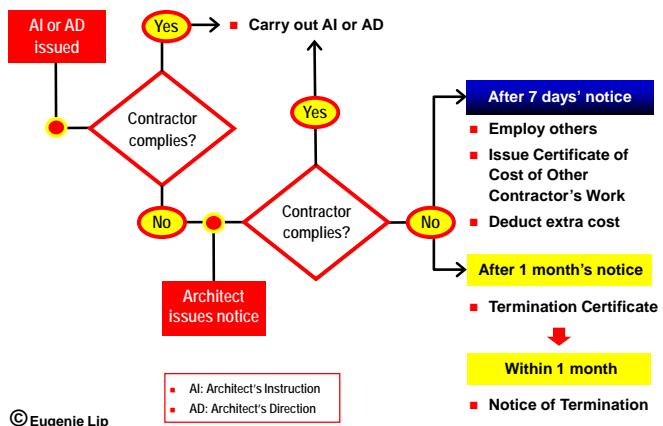


Figure 1. SIA Form

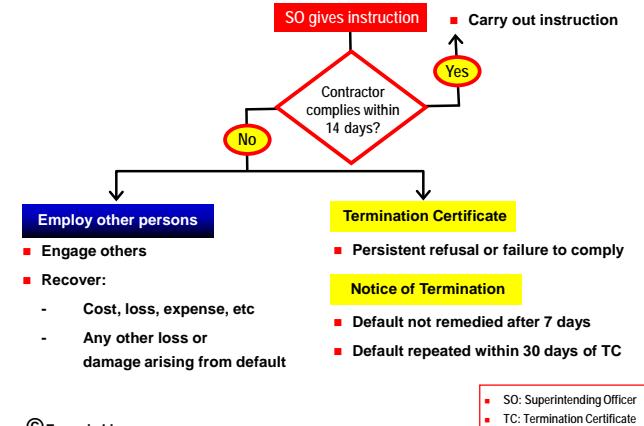


Figure 2. PSSCOC

## ISSUING INSTRUCTIONS DURING PERIOD OF CULPABLE DELAY

If subsequent to the issue of a Delay Certificate under Clause 24.(1) of the SIA Form, instructions are given or certain matters occur entitling the Contractor to an extension of time, the Architect has to issue a Termination of Delay Certificate under Clause 24.(3)(a). If the works still remain incomplete after the period of further extension of time granted, a Further Delay Certificate is given pursuant to Clause 24.(3)(c) to re-activate the accrual of liquidated damages. Under the PSSCOC, the extension of time granted during the period of culpable delay is added to the Time for Completion in accordance with Clause 16.4.

There is no comparable provision in the REDAS D&B.

## PRACTICE WATCHPOINTS

Whilst there is no prescribed form in which the instruction (or direction) must take, specimen templates have been helpfully published by the Singapore Institute of Architects and are also found in reference text such as the *Contract Administration Guide to the Singapore Standard Form of Building Contract*<sup>1</sup> and the *Contract Administration Handbook for use with REDAS Design and Build Conditions*<sup>2</sup>. To avoid any difficulties that may be raised on the authority of the named person to give the order, it is wise and good practice to refer to the actual empowering clause relied upon in the opening paragraph of the instruction (or direction). Any specific requirements on the timing and mode of delivery or service of the instruction (or direction) should also be observed.

<sup>1</sup> Eugenie Lip and Choy Chee Yean, LexisNexis, Second Edition (publishing end 2009).

<sup>2</sup> Eugenie Lip, KPK Contracts Support Group, First Edition (2008).

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Drawings sent to the Contractor with nothing but an accompanying 'Compliments' slip or under cover of a transmittal note and expecting the Contractor to know what is required of him does not in the absence of any express words instructing him to carry out the work constitute a proper and valid instruction. Neither are statements in letters or electronic communications confirming items of work with the Employer which are copied to the Contractor. Issuing an instruction (or a direction) by recording it in the site meeting minutes is also unwise albeit it can serve to inform the Contractor in advance of the impending work to be carried out. Ideally, an instruction (or a direction) should be headed 'Instruction' (or 'Direction') and describe clearly and unequivocally the work to be carried out, signed by the Architect (or the Employer's Representative or SO) and dated. The use of rubber-stamps bearing the impression of the signature of the person named as the contract administrator should be avoided unless he or she initials against the printed signature.

Where the Contractor defaults in complying with an instruction (or a direction), as the Employer is under a duty to mitigate the amount of loss, it is recommended that three competitive quotations be obtained from other contractors for the work to show that he has taken reasonable measures to mitigate his loss. This avoids any challenges from the Contractor claiming that the work could have been done at a lower price.

## CONTRACTUAL REGIME SNAPSHOT

A snapshot of the contractual regime under the various contract forms is illustrated in the matrix below:

Classification	SIA Form	REDAS D&B	PSSCOC
Verbal or Oral Instruction (or Direction)	<ul style="list-style-type: none"><li>▪ 14 days to confirm</li><li>▪ Deemed in writing if not dissented or withdrawn after 14 days</li></ul>	<ul style="list-style-type: none"><li>▪ No comparable provision</li></ul>	<ul style="list-style-type: none"><li>▪ 7 days to confirm</li><li>▪ Deemed in writing if not contradicted after 7 days</li></ul>
Failure or refusal to comply with an Instruction (or a Direction)	<ul style="list-style-type: none"><li>▪ Engage others after 7 days' notice</li><li>▪ TC after 1 month's notice</li><li>▪ Notice of Termination within 1 month of receipt of TC</li></ul>	<ul style="list-style-type: none"><li>▪ Employ others after 7 days' notice if it relates to remedying defects</li><li>▪ Notice of Termination after 28 days of receipt</li></ul>	<ul style="list-style-type: none"><li>▪ Employ others after 14 days' notice</li><li>▪ If default not made good within 7 days or repeated within 30 days of TC, termination notice</li></ul>
Instructions during period of culpable delay	<ul style="list-style-type: none"><li>▪ Termination of Delay Certificate</li><li>▪ If works still incomplete, Further Delay Certificate</li></ul>	<ul style="list-style-type: none"><li>▪ No comparable provision</li></ul>	<ul style="list-style-type: none"><li>▪ Extension of time added to Time for Completion</li></ul>

TC: Termination Certificate

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## CONCLUSION

Administrative procedures must be strictly adhered to, and in this regard, contract administrators have to understand the meaning and implications, apply the principles and appreciate what is expected of them as empowered by the terms of the contract when giving instructions (or directions).

Dealing with instructions (and directions) is simple and straightforward as there is a clear regime in almost all standard contract forms on whether such orders and requests must be in writing or verbal, confirmation to and by whom and when, and what can be done if they are not followed.

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# CONSTRUCTION COST SNAPSHOT

by KPK Research Group

This Construction Cost Snapshot provides a concise reference guide on the construction cost for a variety of building types based on information current as of 2<sup>nd</sup> Quarter 2009. It is published solely for information purposes and should not be used as a basis for investment strategy decisions or as a substitute to carry out detailed cost estimates and feasibility studies.

		2 <sup>nd</sup> Quarter 2009		
		Unit Cost per Gross Floor Area (\$ per m <sup>2</sup> GFA)		
<b>Retail and Commercial</b>	Offices	Standard	3,000	- 3,800
		Prestige	3,800	- 4,800
	Shopping Centres	Standard	2,500	- 3,400
		Prestige	3,400	- 5,300
<b>Hotels</b>	Hotels and Service Apartments	3-Star	3,500	- 4,300
		4-Star	4,300	- 5,300
		5-Star	5,300	- 6,700
		Resort Hotels	5,000	- 6,700
		Service Apartments	3,500	- 4,300
<b>Industrial</b>	Factories and Warehouses	Standard Factories	1,700	- 2,300
		Standard Warehouses	1,500	- 2,300
<b>Institutional</b>	Schools and	Primary	1,400	- 1,800
	Tertiary Institutions	Secondary	2,000	- 2,500
		Tertiary	2,500	- 3,500
<b>Residential</b>	Landed Homes	Terraced Homes	2,800	- 3,400
		Semi-Detached Homes	3,400	- 4,300
		Bungalows	4,300	- 5,300
		Cluster Homes	3,300	- 3,800
	Condominiums	Standard	2,000	- 2,400
		Prime	2,800	- 3,600
		Prestige	4,000	- 5,300
<b>Special Category</b>	Offices Fit-Out	Standard (comprising partitions, floor, wall and ceiling finishes and minor adaptations to existing property)	800	- 2,000

## NOTES

The gross floor area (GFA) is the total floor area of a building comprising the functional, circulation, ancillary and other areas counted as GFA under the URA's plot ratio control (maximum allowable GFA) and excludes car parks (above and below ground). The rate per square metre of Gross Floor Area includes piled foundation works, sub-structure works and M&E services. No allowances have been made for professional, accredited checker's and registered inspectors' fees, developer's site supervision expenses | land costs | financing charges | legal charges and authority fees | development charges | green mark certification and award provisions | furniture, fittings and equipment | infrastructure works | services diversions and connection fees | show units, advertisement and promotion costs | fluctuations in material prices | goods and services tax.

KPK makes no representation on the accuracy and/or completeness of the construction cost information set out herein which is subject to changes.

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