Hong Kong Institute of Surveyors

Seminar on Conditions of Building Contract

Questions and Answers

Conducted by

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1) How to determine whether the instruction in this regard is valid or not?

2) Is it depending on whether the instruction is critical to the completion of the Contract? If not, is the instruction invalid?

3) If the employer wants to deprive the contractor of a part of the site for the purpose of operating a sales office, is it infeasible without the Contractor's agreement in view of the clause 18.1(1)?

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2.13 In cl.24 said that contractor can claim L&E if works have been materially affected, what means by materially? If claim L&E under cl.24 will not exclude the contractor from common law damages later, how about if claim under clause 11(6)?

2.14 Under the New SFBC cl.32.1(6), the employer shall make any deduction authorized by the contract under an interim certificate. Does it cover the LD for non-completion under the contract?

In addition, could the LD be deducted in the final account under the New SFBC? Under clause 32.7(2)(g)?

3.0 Open Discussion

1.0 INTRODUCTION

In general, I have addressed my answers with respect to the latest edition of the Standard Form of Contract, i.e.

Agreement & Schedule of Conditions of
Building Contract
For use in the Hong Kong Special Administrative Region
Private Edition – With Quantities
2005 Edition

However, not all questions relate to this Form of Contract, and where I digress I have referred to the particular Form of Contract.

To make is easier for you to follow the questions I have extracted the relevant clauses from the Conditions which I will show on the screen.

1. Would it be possible to adopt Government Form of Conditions of Contract and Specification for Private Developments? Any issues needed to be considered in connection with legal and copyright aspects?

What do we mean by 'Copyright', firstly I should explain that the law of copyright is complex and detailed, so I will merely limit my comments to a simple definition :

Copyright is a legal concept, enacted by most governments, giving the creator of an original work exclusive rights to it, usually for a limited time. Generally it is "the right to copy", but also gives the copyright holder the right to be credited for the Work, to determine who may adopt the work to others, who may perform the Work, who may financially benefit from it, and other related rights.

So going back to the question, I am assuming we are talking about :

"The Government of the Hong Kong Special Administrative Region General Conditions of Contract for Building Works 1999 Edition" (for the present purposes I am ignoring other Government Forms of Contract, for example Civil Engineering)

Looking through the document I do not see any words about 'Copyright', however, contrast this with the :

"Standard Form of Building Contract Private Edition – With Quantities 2005 Edition" which states at the back of the document.

"Copyright © 2005 All rights reserved"

1. Would it be possible to adopt Government Form of Conditions of Contract and Specification for Private Developments? Any issues needed to be considered in connection with legal and copyright aspects? (Cont'd)

In essence, you cannot copy any of these Contracts and call them your own, however, you can purchase copies and use them in your contract.

So in answer to the question, I do not see any reason why one cannot adopt the Government Forms of Contract and Specification, however, you will probably need a series of Special Conditions to amend certain wording, in particular, reference to the Employer, defined as 'the Government of the Hong Kong Special Administrative Region'.

2. Is the cost of preparing a claim recoverable?

According to the Society of Construction Law Delay and Disruption Protocol October 2002.

Clause 1.20 Claim preparation cost : are they recoverable?

Clause 1.20.1 Most construction contracts provide that the Contractor may only recover the cost, loss and/or expense it has actually incurred and that this be demonstrated or proved by documentary evidence. The Contractor should not be entitled to additional costs for the preparation of that information unless it can show that it has been put to additional cost as a result of the unreasonable actions or inactions of the CA (Contracts Administrator) in dealing with the Contractor's claim.

Similarly, unreasonable actions or inactions by the Contractor in persecuting its claims should entitle the Employer to recover its costs.

What is reasonable or unreasonable will be a matter of judgment.

Quantity Surveyors Practice Pamphlet No. 7 Contractor's Direct Loss and/or Expense :

Clause 6.11 Cost of preparing claim

Clause 6.11.1 Whilst there is no contractual requirement for a contractor to prepare a detailed 'claim' for the amount of his direct loss and/or expense, he is obligated to provide such details of his loss and/or expense as are reasonably necessary, to enable the amount thereof to be ascertained.

2. Is the cost of preparing a claim recoverable? (Cont'd)

Clause 6.11.2 The contractor is not entitled to reimbursement of any costs that he may have incurred in providing such information, or in substantiating the amounts sought, or for the cost of preparing any claim which he may choose to make (including fees paid for professional advice or assistance)

Clause 6.11.3 In the case of *Tate & Lyle Food Distribution Ltd. V Greater London Council,* J. Forbes referred to the managerial time that 'had to be deployed on the initiation and supervision of remedial work (excluding anything that might properly be regarded as preparation for litigation)'.

Clause 6.11.4 A court or an arbitrator may, at their discretion, award either party 'costs', but these relate only to certain expenditure incurred after the commencement of an action.

Standard Form of Building Contract, 2005 Edition.

Clause 27.2 Quantity Surveyor's ascertainment of Contractor's claim

1) Upon receipt of the Contractor's claim under clause 27, the Architect shall instruct the Quantity Surveyor to ascertain the amount of any additional payment for direct loss and/or expense incurred by the Contractor if the Architect is satisfied that :

(a) the direct loss and/or expense was incurred because the progress of the Works was delayed or disrupted by the qualifying event set out in the Contractor's claim;

2. Is the cost of preparing a claim recoverable? (Cont'd)

Clause 27.2 Quantity Surveyor's ascertainment of Contractor's claim (cont'd)

1) …

(b) the Contractor has not been and will not be reimbursed by a payment under any other provisions of the Contract; and

(c) the Contractor has complied with clause 28.

2) The ascertainment of the Contractor's claim shall be made as soon as practicable but in any case within 60 days of receipt of the build-up of the claim and the particulars submitted under clause 28.2(a) to (d) or clause 28.2(4)(c), as the case may be.

Clause 28.2 Contractor to submit particulars

2) The Contractor shall as soon as practicable but in any case within 60 days of giving notice under clause 28.1, submit to the Architect:

(a) particulars of the circumstances giving rise to the claim;

(b) the amount of the claim;

(c) a detailed build-up of that amount; and

(d) a copy of the records kept in accordance with clause 28.2(1).

2. Is the cost of preparing a claim recoverable? (Cont'd)

(4) Where the event giving rise to the claim has a continuing effect the Contractor shall :

(c) within 14 days after it becomes possible to ascertain the total claim, make the final submission to the Architect as required under clause 28.2(2) paragraphs (a) to (d).

No suggestion that the Contractor will be paid separately for providing this information.

In conclusion, all the evidence points to the fact that the cost of preparing a claim is not recoverable. However, in practice it is always worth including such costs in a claim, you may strike lucky.

3. Why the standard provisions which deal with what is commonly called "making good defects" do not always achieve their aims?

What is meant by 'Defects', not to be confused with Outstanding Works/Incomplete Works.

A construction defect can be said to be :

'Any deficiency in the design or construction of a building, or in the material used in construction, or in locating or preparing the construction site that results in the building or structure not performing in a manner that is reasonably expected by the Buyer'.

In essence, a construction defect is the result of an improper act or failure to act of an architect, engineer, developer, contractor, sub-contractor, material supplier or manufacturer or other party involved in furnishing the labour and material for constructing the building or, structure.

I understand that although there can be considerable controversy in defining what are construction defects, it seems that the Courts have grouped construction defects into four categories :

1. Design deficiencies in Engineering
2. Material deficiencies
3. Substandard workmanship
4. Subsidence or geotechnical problems

3. Why the standard provisions which deal with what is commonly called "making good defects" do not always achieve their aims? (Cont'd)

Whilst time does not permit to further amplify these four categories, I think the headings are sufficiently self explanatory to give you an indication of the nature of the defect referenced in a particular group.

Of course we can further divide defects into minor or major defects,

For example, 'peeling paint' or 'poor tile grouting', would be easy and inexpensive to repair, whereas, in contrast, a problem with the 'foundations', or the 'roof' would be much more serious and could easily incur substantial cost to repair.

3. Why the standard provisions which deal with what is commonly called "making good defects" do not always achieve their aims? (Cont'd)

Having clarified by what is meant by 'defects' lets examine the Standard Form of Building Contract 2005 Edition :

Clause 8.3 Materials, goods, workmanship or work not in accordance with Contract.

The Architect may, if any materials, goods, workmanship or work are not in accordance with the Contract, instruct :

a) the removal from the Site and the replacement of materials and goods that are not in accordance with clause 8;

b) the repair or demolition, removal and reconstruction of work which, in respect of materials, goods or workmanship, is not in accordance with clause 8;

c) the acceptance, without replacement or reconstruction, of some or all of the materials, goods or work that are not in accordance with clause 8, subject to a reasonable reduction in the Contract Sum having regard to the reduction in the value of the materials, goods or work; and

d) a Variation for alternative remedial work to some or all of the materials, goods or work as is reasonably necessary in consequence of them not being in accordance with clause 8, with no extension of time or addition to the Contract Sum.

3. Why the standard provisions which deal with what is commonly called "making good defects" do not always achieve their aims? (Cont'd)

Clause 8.4 Rectifying defects

The Architect may instruct the Contractor to rectify defects which appear before the commencement of the Defects Liability Period.

Clause 17.3 Rectifying defects

1) The Contractor shall rectify all defects, shrinkages or other faults which are identified during the Defects Liability Period of the Works, a Section or a Relevant Part stated in the Appendix, and are caused either by materials, goods or workmanship which are not in accordance with the Contract, by natural causes or as a result of a Specified Peril occurring during the construction period prior to Substantial Completion.

2) The Architect shall list the defects to be rectified in schedules of defects which he shall issue to the Contractor as Architect's instructions from time to time during the Defects Liability Period. The final schedule of defects shall be issued not later than 14 days after the expiry of the Defects Liability Period.

3) The Contractor shall rectify the defects specified in the schedules of defects to the Architect's satisfaction within a reasonable time after receipt of those schedules.

4) If the Contractor does not comply with the Architect's instruction to rectify the defects listed in a schedule of defects within a reasonable time the provisions of clauses 4.3(3) and 4.3(4) shall apply.

3. Why the standard provisions which deal with what is commonly called "making good defects" do not always achieve their aims? (Cont'd)

Clause 17.3 Rectifying defects

5) The Architect may instruct the Contractor not to rectify some or all of the defects specified in the schedules of defects, in which case a reasonable reduction to the Contract Sum shall be made for the defects not rectified.

Clause 17.4 Defects Rectification Certificate for the Works

The Architect shall issue the Defects Rectification Certificate for the Works when :

a) the Defects Liability Period for the Works has expired;

b) the Contractor has satisfactorily completed all the uncompleted items of work on the list issued with the Substantial Completion Certificate and

c) all defects required to be rectified under clause 17.3 have been satisfactorily rectified.

Clause 17.7 Other rights and remedies

The issue of a Defects Rectification Certificate for the whole of the Works shall discharge the Contractor from any further obligation to carry out the work of rectifying defects on the Site (except for the fulfilment of his obligations under a warranty) but it shall not prejudice the Employer's other rights and remedies under the Contract or at law regarding defective work or other breaches of contract.

3. Why the standard provisions which deal with what is commonly called "making good defects" do not always achieve their aims? (Cont'd)

So why do such standard provision not always achieve their aims?

In my opinion there can be numerous reasons,

- Access restrictions once the building is handed over/occupied
- Having to work in a constrained environment
- Lack of performance/interest by subcontractor
- Outside of DLP

4. Is a contractor entitled to programme the works to finish early, and work in accordance with that programme to complete on the programmed earlier date? If the contractor programmes to finish the works early must the Architect or the Engineer issue drawings and details in time to enable such early completion? If the contractor programmes to finish the works early and a delay occurs which prevents such early completion, can the contractor claim its prolongation costs?

In answer to the first part of the question, generally, yes.

No obligation on the Architect or the Engineer to issue drawings and details in time to enable such early completion.

Standard Form of Building Contract, 2005 Edition.

Clause 3 : Master programme

3.1 Master Programme to be submitted

(1)(a) 6 copies of a master programme prepared for his own purposes for organizing, managing, planning, supervising and co-ordinating the carrying out of the Works and completing them by the Completion Date.

4. Is a contractor entitled to programme the works to finish early, and work in accordance with that programme to complete on the programmed earlier date? If the contractor programmes to finish the works early must the Architect or the Engineer issue drawings and details in time to enable such early completion? If the contractor programmes to finish the works early and a delay occurs which prevents such early completion, can the contractor claim its prolongation costs?

Clause 5.6 Further drawings, details, descriptive schedules and similar documents

1) The Architect shall provide the Contractor, without charge, and from time to time during the carrying out of the Works, with 3 copies of all further drawings, details, descriptive schedules or similar documents (referred to in clauses 5 as 'the supplementary documentation') that, in the Architect's opinion, are reasonably necessary for use in carrying out the Works or to explain or amplify the Contract Drawings, the Nominated Sub-Contract drawings and the Nominated Supply Contract drawings.

2) If in the Contractor's opinion he requires more supplementary documentation than that provided by the Architect under clauses 5.6(1) he shall submit a written request to the Architect specifying what further supplementary documentation he requires.

3) It shall be at the sole discretion of the Architect to decide which, if any, of the supplementary documentation requested by the Contractor the Architect will provide.

4. Is a contractor entitled to programme the works to finish early, and work in accordance with that programme to complete on the programmed earlier date? If the contractor programmes to finish the works early must the Architect or the Engineer issue drawings and details in time to enable such early completion? If the contractor programmes to finish the works early and a delay occurs which prevents such early completion, can the contractor claim its prolongation costs? (Cont'd)

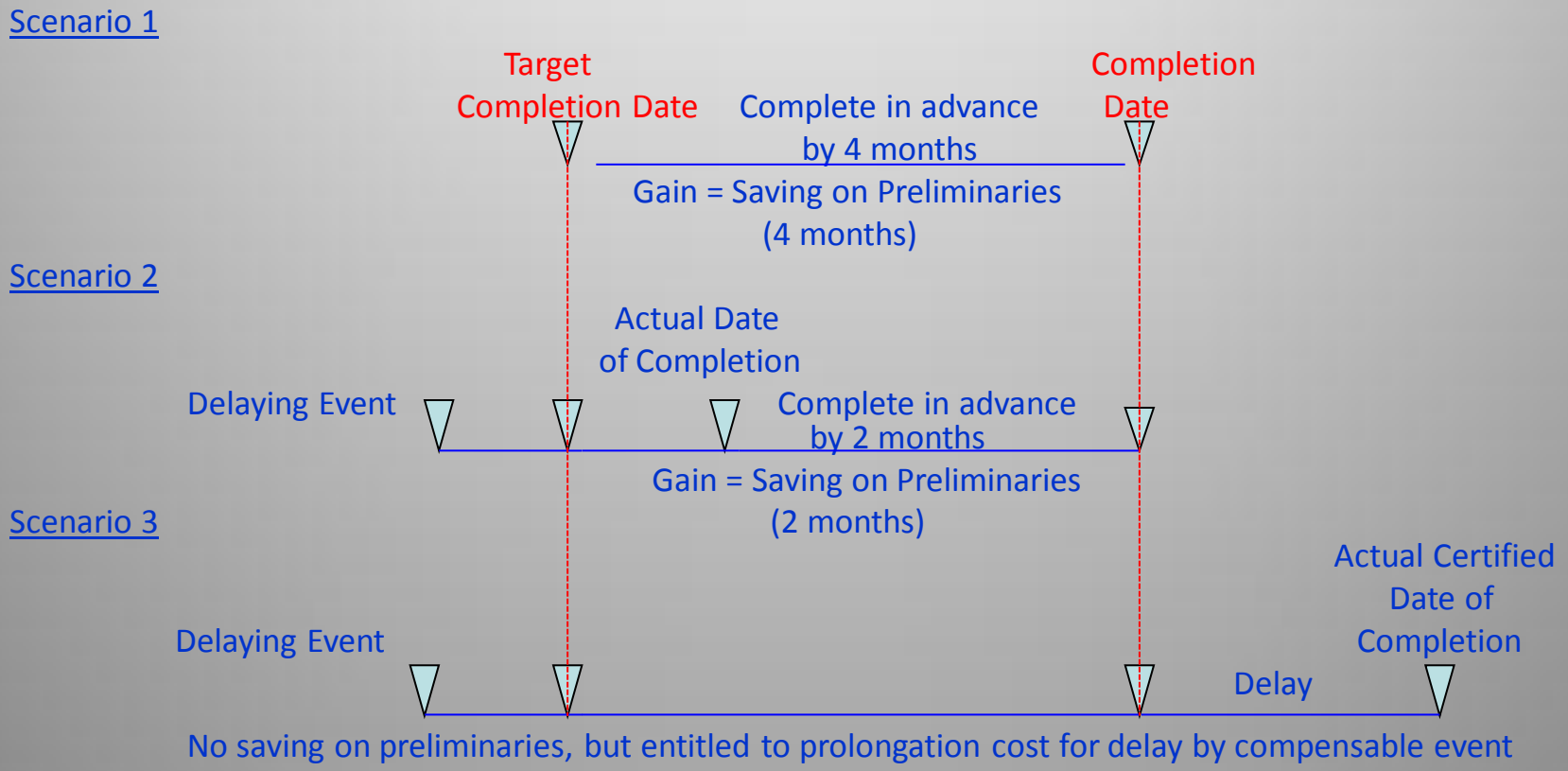
Clause 5.7 Documents to be provided to Contractor on time

1) The supplementary documentation referred to in clause 5.6 shall be provided when, having regard to the progress of the Works and the Contractor's procurement, fabrication and other lead in times, it is reasonably necessary for the Contractor to receive it.

2) The Contractor shall inform the Architect sufficiently in advance of the time that he requires the supplementary documentation to enable the Architect to fulfil his obligations under clause 5.7(1).

4. Is a contractor entitled to programme the works to finish early, and work in accordance with that programme to complete on the programmed earlier date? If the contractor programmes to finish the works early must the Architect or the Engineer issue drawings and details in time to enable such early completion? If the contractor programmes to finish the works early and a delay occurs which prevents such early completion, can the contractor claim its prolongation costs? (Cont'd)

In answer to the last question :



5. If a contractor has included an unrealistically high/low rate in the Bills of Quantities and there is a substantial increase in the quantity of the item concerned, either due to a variation order or resultant from the re-measurement of the works in a re-measurement contract, how should the Quantity Surveyor or Engineer value the works?

In general "in accordance with the rate in the Bills of Quantities" i.e. 'the rate is the rate'.

Case Law : Henry Boot Construction Ltd. v Alstrom Combined Cycles Ltd. (Formerly GEC Alsthorn Combined Cycles Ltd./[QBDTCC1999 BLR1999).

Briefly, in pricing piling work the Contractor erroneously inserted a price based upon an incorrect quantity. The Contractor benefitted greatly from his error, however, the Judge rejected any argument to the effect that the error nullified the rates for use in variations.

Standard Form of Building Contract, 2005 Edition

Clause 13 : Variations, Provisional Quantities, Provisional Items and Provisional Sums

Clause 13.4 : Valuation rules :

1) Where the Valuation relates to the carrying out of :

   a) additional or substituted work which can be properly valued by measurement;

   b) work which is the subject of Provisional Quantities or Provisional Items, or

   c) work involved in the expenditure of Provisional Sums.

5. If a contractor has included an unrealistically high/low rate in the Bills of Quantities and there is a substantial increase in the quantity of the item concerned, either due to a variation order or resultant from the re-measurement of the works in a re-measurement contract, how should the Quantity Surveyor or Engineer value the works? (Cont'd)

the work shall be measured and shall be valued in accordance with the following rules :

i. where the work is the same as or similar in character to and is carried out under the same or similar conditions to work priced in the Contract Bills, and the Variation does not substantially change the quantity of that work, the rates in the Contract Bills for that work shall determine the Valuation;

ii. where the work is the same as or similar in character to work priced in the Contract Bills but is not carried out under the same or similar conditions, or the Variation substantially changes the quantity of that work, the rates in the Contract Bills for that work shall determine the Valuation but with a fair adjustment for the difference in conditions or quantity;

iii. where the work is not the same as or similar in character to any work priced in the Contract Bills the work shall be valued at fair rates; and

iv. the word 'conditions' in clause 13.4(1) shall mean physical conditions and not financial conditions.

2) Where the Valuation relates to work which cannot be properly measured and valued under clause 13.4(1) the work may, with the prior consent of the Architect, be carried out as daywork and provided that the Contractor….

5. If a contractor has included an unrealistically high/low rate in the Bills of Quantities and there is a substantial increase in the quantity of the item concerned, either due to a variation order or resultant from the re-measurement of the works in a re-measurement contract, how should the Quantity Surveyor or Engineer value the works? (Cont'd)

3) Where the Valuation relates to the omission of work included in the Contract Bills :

a) the rates for the work in the Contract Bills shall determine the Valuation of the work omitted; and

b) if in the Quantity Surveyor's opinion the Contractor has reasonably incurred expense which has become wholly or partly unnecessary as a result of the omission of the work, a fair adjustment shall be made to the Valuation in respect of that expense.

4) Where the Valuation does not relate to additional or substituted work or the omission of work but relates only to other matters not involving measured work such as the imposition of or change to an obligation or restriction and the rules in clauses 13.4(1), 13.4(2) or 13.4(3) cannot reasonably be applied, a fair valuation shall be made.

6) If compliance with a Variation instructed under clause 13.1 or a deemed Variation under clause 14.3 substantially changes the conditions under which other work is carried out, and results in the rates in the Contract Bills for this work becoming unreasonable or inapplicable, then new rates shall be determined based upon the rates in the Contract Bills adjusted by a fair allowance for the difference in the conditions.

5. If a contractor has included an unrealistically high/low rate in the Bills of Quantities and there is a substantial increase in the quantity of the item concerned, either due to a variation order or resultant from the re-measurement of the works in a re-measurement contract, how should the Quantity Surveyor or Engineer value the works? (Cont'd)

So, in answer to the question, it seems that under the 2005 Edition there is the opportunity to change the rate if there is a substantial change in the quantity of an item, refer Clause 13.4 Rule (ii).

6. Can conditions precedent apply in both i) Additional money claims and ii) Extension of time claims?

What do we mean by 'conditions precedent'

'A legal term describing a condition or event that must come to pass before a specific contract is considered in effect or any obligations are expected of either party'.

In other words it is a condition that must precede or predate a specified event or action.

Standard Form of Building Contract, 2005 Edition

Clause 27 Direct loss and/or expense

Clause 27.1 Contractor's notice of claim for additional payment

(1) If, in the Contractor's opinion, he has incurred or is likely to incur direct loss and/or expense because the progress of the Works has been or is likely to be delayed or disrupted by an event set out in clause 27.1 (referred to in clause 27 as a 'qualifying event') and the Contractor intends to claim additional payment for this, be shall follow the procedures set out in clause 28 and shall also identify in his notice of claim which of the qualifying events he believes to be the cause of the direct loss and/or expense.

6. Can conditions precedent apply in both i) Additional money claims and ii) Extension of time claims? (Cont'd)

Clause 28 Notice of claims for additional payment

Clause 28.1 Contractor to give notice of claim

1) If the Contractor intends to claim any additional payment under the Contract, the Contractor shall give notice to the Architect of his intention to do so.

2) The Contractor need not give the notice required under clause 28.1(1) in the case of an Architect's Instruction under clauses 13.1 or 13.2 insofar as that instruction is subject to a Valuation under clause 13.

Clause 28.3 Condition precedent to Contractor's entitlement to additional payment

It shall be a condition precedent to the Contractor's entitlement to additional payment that the Contractor shall comply with the provisions of Clauses 28.1 and 28.2 and if he fails to comply with these provisions in respect of any claim, that claim will be deemed to have been waived by the Contractor.

6. Can conditions precedent apply in both i) Additional money claims and ii) Extension of time claims? (Cont'd)

Clause 25 Extension of Time

Clause 25.1 Contractor's first notice of delay

1) As soon as practicable but in any case within 28 days of the commencement of an event likely to cause delay to the completion of the Works or a Section beyond the Completion Date becoming apparent, the Contractor shall give notice (referred to in Clause 25 as the 'first notice') to the Architect.

Clause 25.2 Contractor's second notice

1) The Contractor shall, as soon as practicable but in any case within 28 days of giving the first notice, submit a second notice (referred to in clause 25 as the 'second notice') to the Architect giving….

Clause 25.3 Fixing new Completion Date

1) If the Contractor fails to submit the notices within the time frame prescribed under clause 25.1 or clause 25.2 but a first notice is nevertheless submitted, the Architect shall, if he is satisfied that the completion of the Works or a Section has been delayed by the listed event stated in the Contractor's first notice, give an extension of time to the Contractor under clause 25.3 to the extent that he is able to on the information available.

6. Can conditions precedent apply in both i) Additional money claims and ii) Extension of time claims? (Cont'd)

In conclusion, there is no reason why a condition precedent cannot apply to both claims for additional payment and extension of time claims

7. Under a lump sum without quantities Contract, is the Contractor entitled to payment when concluding the Final Account for the priced items in the Schedule of Rates but which are not required under the Contract (i.e. those items are neither shown on the drawings nor specifications) after termination? If yes, on what amount (full value of the said priced items or based on the percentage of the completed works)? If no, why?

Initially the Schedule of Rates is used to determine the Lump Sum, thereafter any quantities stated therein become redundant, whereas the rates form the basis for valuing variations and in many instances for determining interim payments.

In normal circumstances, in preparing the Final Account, the Lump Sum will only be varied based on variation(s) issued during the progress of the Works either instructing the omission of works or the addition thereof, or the adjustment of PC and / or Provisional Sums.

However, in the event the employment of the Contractor was determined, I suggest the situation will substantially change.

In essence, the work carried out by the Contractor up to the date of the determination will be valued based on the interim payments certified up to the date of determination. The exercise thereafter will be to assess the cost of the outstanding work which is carried out by the Employer in comparison with the cost estimated to complete the Work at the rates priced in the Schedule of Rates. The consequence being that any work priced in the original Schedule of Rates in making up the Lump Sum which has not been carried out will not be valued.

8. Why Cross Liability Clause is only required in Third Party Insurance but not the CAR.

What is meant by 'Cross Liability Clause'

"Such a clause means that should a loss occur, all insureds under the policy, including additional insureds, are treated as though separate policies exist for each."

Standard Form of Building Contract, 2005 Edition

Clause 21.2 Third Party Liability Insurance

1) The insurances shall include :

a) a cross liability clause to the effect that the insurances shall cover the Employer, the Contractor, his sub-contractors and their sub-contractors of all tiers as separate insured, and

b) a waiver of right of subrogation which the insurers may have against any of the insured.

Clause 22 Insurance of Works

Clause 22.4 Insurance of the Works to be in joint names and period of insurances

8. Why Cross Liability Clause is only required in Third Party Insurance but not the CAR. (Cont'd)

Clause 22.4 Insurance of the Works to be in joint names and period of insurances (cont'd)

1) The Contractor's All Risks Insurance of the Works shall be effected and maintained in the joint names of the Employer, the Contractor, his sub-contractors and their respective sub-contractors of all tiers and suppliers. The insurance cover shall run from the Commencement Date until 14 days after the issue of the Substantial Completion Certificate for the Works or 14 days after the determination of the employment of the Contractor, whether valid or not, whichever is earlier.

3) The Insurances shall include :

a) a cross liability clause to the effect that the insurances shall cover the Employer, the Contractor, his sub-contractors and their sub-contractor of all tiers and suppliers as separate insured, and

b) a waiver of any right of subrogation which the insurers may have against any of the insured.

So in the new Standard Form, a cross liability clause is required for both Third Party and CAR Insurances.

9. If a Contractor's All Risk policy needs to be procured by the successful Contractor, what essential terms to cover the existing building need to be included in the Contractor's (Contractor All Risk) policy such that the Employer's interest is protected.

Standard Form of Building Contract, 2005 Edition

Clause 22 : Insurance of the Works

Clause 22.1 : Alternative clauses for Contractors' all risks insurance of the works, either clause 22A, 22B or 22C shall apply according to which of those clauses is specified in the Appendix and both parties shall comply with all the conditions in the insurance policy effected by either party.

Clause 22A: Insurance of the Works by the Contractor

Clause 22B: Insurance of the Works by the Employer

Clause 22C : Insurance of existing building and insurance of the Works by the Employer

Clause 22C.1 : Employer to effect insurance against Specified Perils to the existing building.

Where the Works are to be carried out to and/or within an existing building, the Employer shall effect and maintain a policy of insurance against the Specified Perils for the full cost of reinstatement, repair or replacement of loss or damage to that existing building which is to be extended or within which the Works are to be carried out together with its contents and all other costs set out in clauses 22.2 and 22.3. The insurance cover shall run from the Date for Possession of the Site stated in the Appendix until 14 days after the issue of the Substantial Completion Certificate for the Works or 14 days after the determination of the employment of the Contractor, whether valid or not, whichever is earlier.

9. If a Contractor's All Risk policy needs to be procured by the successful Contractor, what essential terms to cover the existing building need to be included in the Contractor's (Contractor All Risk) policy such that the Employer's interest is protected.

Clause 22 : Insurance of the Works (cont'd)

Clause 22C.2 Employer to effect Contractors' All Risks Insurance of the Works

The Employer shall effect and maintain Contractors' All Risks Insurance of the Works for the full reinstatement value of the Works in and/or to the existing building and all other costs set out in clauses 22.2 and 22.3.

Existing Building not covered by CAR in general, if coverage of existing building needs to be included in the Contractor's CAR Policy, then a specific endorsement will be required.

I suggest a Special Condition will have to be added to the Conditions of Contract to include for Existing Building principal terms to be covered will be "Specified Perils".

Just to clarify, Specified Perils includes fire, lightning, explosion, storm, tropical cyclone, flood, rusting or overflowing water tanks, apparatus or pipes, earthquake, aircraft, and other aerial devices or articles dropped from them.

10. In the event of the determination of NSC, can the MC claim the following:
(1) the EOT for the re-nomination of the NEW NSC
(2) the Loss and Expense due to the higher contract sum of the NEW NSC.

What is meant by 'determination of NSC' :

Nominated Sub-Contract for use in the HKSAR : 2005 Edition :

Clause 36 : Determination by Contractor

Clause 36.1 : Default by Sub-Contractor

1) The Contractor may, with the Architect's consent, give a notice of default to the Sub-Contractor before Substantial Completion of the whole of the Work if the Sub-Contractor defaults by :

   a) Completely or substantially suspending the carrying out of the Sub-Contract Works without good cause;

   b) not proceeding regularly and diligently with the Sub-Contract Works;

   c) not complying with an instruction from the Architect under clause 8.3 for the replacement, repair or reconstruction of material, goods or work not in accordance with the Sub-Contract resulting in the Sub-Contract Works being materially affected;

10. In the event of the determination of NSC, can the MC claim the following:
(1) the EOT for the re-nomination of the NEW NSC
(2) the Loss and Expense due to the higher contract sum of the NEW NSC.

Clause 36.1 : Default by Sub-Contractor (cont'd)

d) not complying with clause 19.1 (Subcontractor not to assign the Subcontract without Consent), or

e) not complying with clause 19.2 (Sub-letting) by sub-letting the whole or substantially the whole of the Sub-Contract Works to the same person.

Clause 36.2 : Insolvency of Sub-Contractor

1) The Contractor may, with the Architect's consent, give a notice of determination of the employment of the Sub-Contractor if the Sub-Contractor :

a) becomes bankrupt;

b) makes a composition or arrangement with his creditors;

c) has a petition for compulsory winding-up presented or made against him;

d) enters into compulsory or voluntary liquidation except for the purpose of reconstruction; or

e) has a provisional liquidator or receiver appointed.

10. In the event of the determination of NSC, can the MC claim the following:
(1) the EOT for the re-nomination of the NEW NSC
(2) the Loss and Expense due to the higher contract sum of the NEW NSC.

In the event of the determination of NSC:

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Clause 29 : Nominated Sub-Contractors and Nominated Suppliers

Clause 29.13 Re-nomination

1) If the employment of a Nominated Sub-Contractor is determined or a supply contract is terminated for any reason, the Architect, as soon as practicable, shall nominate a replacement sub-contractor or supplier to complete the work sub-contracted to the original Nominated Sub-Contractor or to supply the materials and goods, or the equivalent of the materials or goods, that were to have been supplied by the original Nominated Supplier, and the Contractor shall immediately enter into a sub-contract or supply contract with the replacement sub-contractor or supplier.

2) If the employment of the original Nominated Sub-Contractor was determined or the original supply contract was terminated for any reason other than a breach of contract or other default by the Contractor or any person for whom the Contractor is responsible other than the original sub- contractor or supplier, then any increase in cost between the original and the new sub-contract sum or supply contract sum shall be added to the Contract Sum.

10. In the event of the determination of NSC, can the MC claim the following:
(1) the EOT for the re-nomination of the NEW NSC
(2) the Loss and Expense due to the higher contract sum of the NEW NSC.

Clause 29.13 Re-nomination (cont'd)

3) If the employment of a Nominated Sub-Contractor was validly determined by the original Nominated Sub-Contractor of the supply contract was validly terminated by the original Nominated Supplier because of a breach of contract or other default by the Contractor or any person for whom the Contractor is responsible other than the original sub-contractor or supplier, then any increase in cost between the original and the new sub-contract sum or supply contract sum shall be at the Contractor's expense and shall not be added to the Contract Sum.

Clause 25 Extension of Time

Clause 25.1 Contractor's first notice of delay

3) Listed event :

(o) delay caused by the nomination of a replacement Nominated Sub-Contractor or Nominated Supplier under clause 29.13 including any prolongation of the period of the relevant sub-contract or the time for the supply an delivery of materials and goods, provided that the determination of the employment of the original Nominated Sub-Contractor or the termination of the original Nominated Supply Contract was not in the opinion of the Architect a consequence of breach of contract or other default by the Contractor or any person for whom the Contractor is responsible.

10. In the event of the determination of NSC, can the MC claim the following:
(1) the EOT for the re-nomination of the NEW NSC
(2) the Loss and Expense due to the higher contract sum of the NEW NSC.

Clause 27: Direct loss and/or expense

Clause 27.1: Contractor's notice of claim for additional payment

2) Refers to qualifying events, however, no specific event similar to Clause 25.1(3)(o) perhaps, consider sub-clause (l).

(l) any other delay or disruption for which the Employer is responsible including an act of prevention or a breach of contract.

In conclusion, the Contractor will be entitled to EOT for the re-nomination provided that the Contractor was not the cause of the determination, further, the additional cost of completing the NSC Works will be absorbed by the Employer, again, provided the Contractor was not the cause of the determination. It seems, however, that the Contractor's own costs for the period of prolongation may not be recoverable.

11. Can the employer determine the NSC contract based on the collateral warranty?

What do we mean by 'Collateral Warranty'?

A collateral warranty is in effect a secondary contract usually given by main contractors, subcontractors and professional consultants in relation to construction contracts. Collateral Warrants are so called because they warrant (i.e. affirm) the effect of certain terms in the underlying contracts to which the warranty is collateral. In the case of a warranty given by a main contractor, the underlying contract would be the building contract, whereas in the case of an architect the underlying contract would be the appointment.

Collateral Warranties are commonly granted in favour of developers, funders, tenants, future purchases and mortgages of future purchases of the project in question.

The crucial point to note is that in each case the warranties are granted in favour of certain parties who have an interest in the project but are not a signatory to the underlying contracts.

So why is a Collateral Warranty necessary?

Collateral Warranties are necessary to protect third parties with an interest in the project because of the law of privity of contract. The effect of privity is that a person (be it a legal person such as a company or a natural person) may not enforce the terms of a contract unless that person is also a party to that Contract.

11. Can the employer determine the NSC contract based on the collateral warranty?

So in the context of the question being asked, the NSC has given a collateral warranty to the Employer, in essence the NSC is warranting that it will perform in accordance with the terms and conditions of the Nominated Sub-Contract, the underlying contract.

It is unlikely that a collateral warranty will contain a term that entitles the Employer to determine the NSC.

As we have seen from an earlier question, the Nominated Sub-Contract has provision for the Main Contractor to determine the employment of the NSC, not the Employer.

In answer to the question, the Employer cannot determine the NSC based on the collateral warranty, however, the Employer can sue the NSC for breach of the Collateral Warranty.

Employment of NSC determined, not the Sub-Contract

12. Under the clause 13.1(1)(a) of New Private Form, the Contractor can make objection to the instruction imposing the restriction to the "access of site, use of any part of the site..." and refer the dispute to arbitration.

1) How to determine whether the instruction in this regard is valid or not?

2) Is it depending on whether the instruction is critical to the completion of the Contract? If not, is the instruction invalid?

3) If the employer wants to deprive the contractor of a part of the site for the purpose of operating a sales office, is it infeasible without the Contractor's agreement in view of the clause 18.1(1)?

4) If the employer do so without the Contractor's agreement, can the contractor cease work?

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Clause 13 : Variations, Provisional Quantities, Provisional Items and Provisional Sums

Clause 13.1 : Architect's authority to issue instructions requiring a Variation

1) The Architect may issue an instruction requiring a Variation provided that :

a) the Contractor has the right of reasonable objection to a Variation which imposes or changes an obligation or restriction on the Contractor regarding access to the Site, use of any part of the Site or limitation of working space or working hours and the Architect shall, upon receipt of the Contractor's objection, either confirm or withdraw the instruction, and if the instruction is confirmed, the Contractor may refer the matter to arbitration under clause 41 (Settlement of Disputes).

12. Under the clause 13.1(1)(a) of New Private Form, the Contractor can make objection to the instruction imposing the restriction to the "access of site, use of any part of the site..." and refer the dispute to arbitration.

1) How to determine whether the instruction in this regard is valid or not?

2) Is it depending on whether the instruction is critical to the completion of the Contract? If not, is the instruction invalid?

3) If the employer wants to deprive the contractor of a part of the site for the purpose of operating a sales office, is it infeasible without the Contractor's agreement in view of the clause 18.1(1)?

4) If the employer do so without the Contractor's agreement, can the contractor cease work?

Clause 18 : Partial possession by Employer

Clause 18.1 : Partial possession

1) The Employer may, with the Contractor's consent, take possession of a part of the Works or where sectional completion is provided for in the Contract a part of a Section before Substantial Completion, and that part of the Works or part of a Section shall be referred to as a Relevant Part

Clause 41.5 : Timing of arbitration

1) The arbitrator shall have jurisdiction to hear the parties and commence the arbitration of a dispute arising out of, under or in connection with the Contract at any time on a question of whether :

f) the Contractor's objection to a Variation referred to in clause 13.1(1)(a) is reasonable.

12. Under the clause 13.1(1)(a) of New Private Form, the Contractor can make objection to the instruction imposing the restriction to the "access of site, use of any part of the site..." and refer the dispute to arbitration.

1) How to determine whether the instruction in this regard is valid or not?

2) Is it depending on whether the instruction is critical to the completion of the Contract? If not, is the instruction invalid?

3) If the employer wants to deprive the contractor of a part of the site for the purpose of operating a sales office, is it infeasible without the Contractor's agreement in view of the clause 18.1(1)?

4) If the employer do so without the Contractor's agreement, can the contractor cease work?

Clause 41.8 : Contractor to continue to proceed diligently

1) The Contractor shall continue to proceed regularly and diligently with the Works despite a dispute having arisen, and shall continue to give effect to all instructions from the Architect unless and until revised by agreement between the Designated Representatives, by mediation or in arbitration under clause 41.

2) The Contractor's compliance with clause 41.8(1) is without prejudice to any other rights and remedies that he may possess.

12. Under the clause 13.1(1)(a) of New Private Form, the Contractor can make objection to the instruction imposing the restriction to the "access of site, use of any part of the site..." and refer the dispute to arbitration.

1) How to determine whether the instruction in this regard is valid or not?

2) Is it depending on whether the instruction is critical to the completion of the Contract? If not, is the instruction invalid?

3) If the employer wants to deprive the contractor of a part of the site for the purpose of operating a sales office, is it infeasible without the Contractor's agreement in view of the clause 18.1(1)?

4) If the employer do so without the Contractor's agreement, can the contractor cease work?

So in answer to the question :

i. How to determine whether the instruction in this regard is valid or not.

Simply by reference to the Conditions, if the instruction is in accordance with the authority of the Architect then it will be deemed valid.

ii. Is it depending on whether the instruction is critical to the completion of the Contract? If not is the instruction invalid?

Not necessarily, but it may have some implication. In any event just because it is not critical to the completion of the Contract does not make it invalid?

12. Under the clause 13.1(1)(a) of New Private Form, the Contractor can make objection to the instruction imposing the restriction to the "access of site, use of any part of the site..." and refer the dispute to arbitration.

1) How to determine whether the instruction in this regard is valid or not?

2) Is it depending on whether the instruction is critical to the completion of the Contract? If not, is the instruction invalid?

3) If the employer wants to deprive the contractor of a part of the site for the purpose of operating a sales office, is it infeasible without the Contractor's agreement in view of the clause 18.1(1)?

4) If the employer do so without the Contractor's agreement, can the contractor cease work?

iii. If the employer wants to deprive the Contractor of a part of the site for a purpose of operating a sales office, is it unfeasible without the Contractor's agreement in view of Clause 18.1(1)?

Irrespective of the reason, clause 18.1(1) requires that the consent of the Contractor is a pre-requisite to the Employer taking possession of a part of the site, however, such consent shall not be unreasonably withheld.

iv. If the Employer do so without the Contractor's agreement, can the Contractor cease work?

I would suggest that this was not a sufficient reason for the Contractor to 'cease work', and in any event, Clause 48.1 obliges the Contractor to continue to work even though there is a dispute.

Perhaps the Contractor should consider taking out an injunction against the Employer.

13. In cl.24 said that contractor can claim L&E if works have been materially affected, what means by materially? If claim L&E under cl.24 will not exclude the contractor from common law damages later, how about if claim under clause 11(6)?

What do we mean by 'materially'.

Something which is significant in extent or degree, substantive and is relative to the matter in question.

e.g. a material fact is an occurrence, event, or information that is sufficiently significant to influence an individual into acting in a certain way, such as entering into a contract. In formal court procedures, a material fact is anything needed to prove one party's case, or, tending to establish a point that is critical to a person's position.

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Clause 24: Loss and Expense Caused by Disturbance of Regular Progress of the Works

1) If upon written application being made to him by the Main Contractor the Architect is of the opinion that the Main Contractor has been involved in direct loss and/or expense for which he would not be reimbursed by a payment made under any other provision in this Contract by reason of the regular progress of the Works or of any part thereof having been materially affected:

2) The provisions of this Condition are without prejudice to any other rights and remedies which the Main Contractor may possess.

13. In cl.24 said that contractor can claim L&E if works have been materially affected, what means by materially? If claim L&E under cl.24 will not exclude the contractor from common law damages later, how about if claim under clause 11(6)?

Clause 11	Variations, Provisional and Prime Cost Sums
Clause 11(6)	If upon written application being made to him by the Main Contractor the Architect is of the opinion that a variation or the execution by the Main Contractor of work for which a provisional sum is included in the Contract Bills….has involved the Main Contractor in direct loss and / or expense for which he would not be reimbursed by a payment in respect of a valuation made in accordance with the rates contained in sub-clause (4) of this Condition….then the Architect shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss or expense.

Whilst both clauses allow the Contractor to claim for direct loss and expense, Clause 11(6) is related to the valuation of variations whereas Clause 24 is for Loss and Expense caused by Disturbance to the Regular Progress of the Works, hence I am of the view that the provision under Clause 24(2) is particular to Clause 24 and is not applicable to loss and expense under Clause 11(6).

14. Under the New SFBC cl.32.1(6), the employer shall make any deduction authorized by the contract under an interim certificate. Does it cover the LD for non-completion under the contract? In addition, could the LD be deducted in the final account under the New SFBC? Under clause 32.7(2)(g)?

Clause 32: Certificates and payments

Clause 32.1: Interim Certificates and interim valuations

6) The Employer may make any deduction authorised by the Contract from the amount due to the Contractor under an Interim Certificate, whether or not any Retention is included in that Interim Certificate, provided that he gives a notice to the Contractor by special delivery stating the amount of the deduction, a build-up of that amount and the reason for it at least 7 days before making the deduction.

Clause 32.7 : Adjustment of the Contract Sum

1) The Contract Sum shall be adjusted as described in clauses 32.7(2) and (3).

2) The following amounts shall be deducted from the Contract Sum :

(g) any other amount which is required by the Contract to be deducted from the Contract Sum.

14. Under the New SFBC cl.32.1(6), the employer shall make any deduction authorized by the contract under an interim certificate. Does it cover the LD for non-completion under the contract? In addition, could the LD be deducted in the final account under the New SFBC? Under clause 32.7(2)(g)?

Clause 24 : Damages for non-completion

Clause 24.2 : Liquidated and ascertained damages

1) If the Architect issues a certificate under clause 24.1(1), the Contractor shall, if required to do so by a notice from the Employer, pay or allow to the Employer liquidated and ascertained damages at the rate per day referred to in clause 24.2(3) for the period between the Completion Date and the Date of Substantial Completion.

2) The Employer's notice under clause 24.2(1) shall not be given either before the certificate under clause 24.1(1) is issued or after the Final Certificate is issued.

4) The Employer may recover the liquidated and ascertained damages from the Contractor under clause 40 or as a debt.

14. Under the New SFBC cl.32.1(6), the employer shall make any deduction authorized by the contract under an interim certificate. Does it cover the LD for non-completion under the contract? In addition, could the LD be deducted in the final account under the New SFBC? Under clause 32.7(2)(g)?

Clause 40 : Recovery of money due to the Employer

Employer's power to recover damages etc.

1) The Employer may make any deduction authorised by the Contract or at law including without limitation, deductions for costs, damages, liquidated and ascertained damages, debts, expenses or other sums for which the Contractor is liable to the Employer from amounts due to the Contractor including Retention.

2) It is a condition precedent to the Employer's right of deduction under clause 40.1(1) that he gives a notice to the Contractor by special delivery stating the amount of the deduction and the reason for it at least 7 days before making the deduction.

In order for the Employer to deduct LD's, the Architect must first issue a certificate under clause 24.1(1), secondly the Works have to have been certified substantially completed otherwise there is no basis to calculate the amount of LD's.

Thirdly the Employer must issue a notice to the effect that he intends to deduct the LD's, this is a condition precedent.

So in answer to the question, I am of the view that the Employer is entitled to recover LD's under the provision of Clause 40, not Clause 32.

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