

## **REDAS DESIGN AND BUILD CONDITIONS OF CONTRACT (2<sup>ND</sup> Edition) – The Final Payment Claim and Tiong Seng Contractors Pte Ltd v Chuan Lim Construction Pte Ltd**

In the REDAS D&B Conditions of Contract 2<sup>nd</sup> Edition one of the new provisions introduced is clause 24. This clause essentially provides for the time and manner for the Contractor to serve his Final Payment Claim.

### **Effect of Section 11(1) of the SOP Act on Payment Response to Final Payment Claim**

Under section 11 (1)(a) of the Building and Construction Industry Security of Payment Act, ( “the SOP Act”) the Employer is required to respond to the service of the Contractor’s payment claim by his submission in turn of his payment response. However, section 11 (1) (a) requires the Employer’s payment response to be submitted within 21 days from the date of the service of the Contractor’s payment claim.

While this procedure does not pose any difficulty to the Employer in relation to the Contractor’s interim or progress payment claims, it is acknowledged by most in the construction industry, that it is extremely difficult for the Employer to adequately and meaningfully prepare a payment response to the Contractor’s Final Payment Claim within 21 days from the date of service of this Claim. This is because of the nature of the Contractor’s Final Payment Claim which will be examined below.

### **Nature of Final Payment Claim and the Final Payment Certificate:**

In most standard forms of building contract , the Final Payment Claim will be required to show the value of all works executed (including variations) together with all other claims for which the Contractor feels he is entitled to payment. As such, his Final Payment Claim will usually include (but not limited to) the following items of claim:

- a. loss and expense or additional preliminaries due to the delay in the completion of the works,
- b. costs incurred in the acceleration of the works,
- c. interest or bank charges for late payment of payment claims,
- d. loss of profits (if any) and
- e. release of the balance of the retention sum.

In the same vein as the Contractor's Final Payment Claim, in the REDAS D&B Conditions, the Final Payment Certificate, (which is deemed under clause 22.4 as the Employer's Payment Response if he fails to provide any payment response within 21 days), is intended to deal with and settle all of the outstanding payment issues and the respective claims between the Employer and the Contractor, including the Employer's claim for liquidated damages, reduction of the contract sum in lieu of rectification of defects or failure by the Contractor to complete outstanding works. The Final Payment Certificate will reflect either a sum due from the Employer to the Contractor or from the Contractor to the Employer as the case may be.

#### **Time for service of Final Payment Claim under Clause 24**

The newly introduced clause 24, acknowledges that the Employer will need more than 21 days to meaningfully respond to all of the items of claim in the Contractor's Final Payment Claim. Clause 24 achieves this by specifying the time for service of the Final Payment Claim. It provides for either the issue of the Maintenance Certificate or the Statement of Final Account by the Employer's Representative as an event which should occur before the Contractor may serve his Final Payment Claim.

Clause 24 provides for a procedure in which the Contractor is required to submit his Final Claim Documents (which shall set out the full value of all work executed and the items of claim which he intends to make in his Final Payment Claim) to the Employer's Representative prior to the expiry of the Maintenance Period. The Employer's Representative is then required to respond to Final Claim Documents within 3 months

from the receipt of the Final Claim Documents by providing his Statement of Final Account to the Contractor. The Statement of Final Account shall respond to the full value of work claimed as well as to all of the items of claim in the Contractor's Final Account Documents. The Final Claim Documents shall not be regarded as a payment claim for the purpose the SOP Act.

Under clause 24.3.1 of the REDAS D& B Conditions, the Contractor shall serve his Final Payment Claim only after the issue of the Maintenance Certificate or his receipt of the Statement of Final Account whichever is the later.

Under clause 24.4 the Employer's Representative shall within 14 days after the receipt of the Final Payment Claim from the Contractor, issue his Final Payment Certificate, stating whether there is an amount due to the Contractor by the Employer or an amount due to the Employer by the Contractor as the case may be. As mentioned above, the Final Payment Certificate shall be deemed as the Employer's Payment Response to the Final Payment Claim under clause 22.4 should he fail to provide a Payment Response within 21 days from the service of the Contractor's Final Payment Claim.

It will be seen that under the prescribed procedure in clause 24, the Employer will have a maximum period of 3 months to provide his response to all of the Contractor's intended items of claim in his Final Payment Claim. Further, the issue of defective works not rectified, outstanding works not completed, liquidated damages claim by the Employer and all of the Contractor's claims together with the release of the balance of the retention sum will be settled at the time when Employer provides his payment response to the Contractor's Final Payment Claim either in the Final Payment Certificate or his own Payment Response.

**Tiong Seng Contractors Pte Ltd v Chuan Lim Construction Pte Ltd,**

In the recent High Court case of *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd*, (2007) 4 SLR 364, which involved the submission of a Final Payment Claim by the Sub Contractor under a Domestic Sub Contract, the Court held that a “*progress payment*” claim under the SOP Act would include the Contractor’s Final Payment Claim as well. Accordingly, the Final Payment Claim submitted by the Sub Contractor was subject to the provisions of the SOP Act and could be referred to statutory adjudication as provided under the SOP Act.

One direct if unintended consequence of this decision for most Standard Forms of Building Contracts in use in Singapore, including the First Edition of the REDAS D&B Conditions and the 7<sup>th</sup> Edition of the Singapore Institute of Architects (“SIA”) Conditions of Main Contract, is that unless there are specific terms in the building contract providing for time for the service of the Contractor’s Final Payment Claim, the Employer will be required under section 11 (1) (a) of the SOP Act to prepare and serve his payment response (which for practical purposes may well be the Final Payment Certificate in many instances) within 21 days from the date of receipt of the Contractor’s Final Payment Claim.

However, it will be realized as discussed above that the nature and contents of the Contractor’s Final Payment Claim is contractually and in reality different from the Contractor’s interim or progress payment claims. In the same way, the nature and basis of the Final Payment Certificate is also different from the Interim or Progress Payment Certificates issued in the course of the Works.

In light of the decision in *Tiong’ Seng’s* case that a *progress payment* claim includes a Final Payment Claim for the purpose of the SOP Act, it would be necessary to expressly provide terms in the Second Edition of the REDAS D& B Conditions to specify the time for service of the Final Payment Claim in order to afford sufficient and reasonable time for the Employer to respond to the Final Payment Claim.

**Clause 24 in accordance with the SOP Act.**

To rebut allegations that clause 24 may contravene the provisions of the SOP Act, this discussion will next examine the statutory basis and support for clause 24 in the Second Edition of the REDAS D&B Conditions.

Contrary to the perception of some people in the construction industry, the SOP Act in fact allows the Contractor's entitlement to payment for works carried out to be based on the occurrence of an event or date. Under section 2 of the SOP Act., a *payment claim* means "a claim made by a claimant for progress payment". In turn section 2 provides that a "progress payment" means a payment for which a person is entitled for the carrying out of construction work and includes " **a payment that is based on an event or a date.**"

Clause 24 in providing for the time for the service of the Final Payment Claim to be based upon an event, namely, the issue of the Maintenance Certificate or receipt of the Statement of Final Account is in accordance with the definition of "progress payment" in section 2 of the SOP Act. Accordingly, it is difficult to see any valid basis for the allegation that clause 24 is in contravention of the SOP Act.

In this regard, clause 24 of the Second Edition of the REDAS D&B Conditions is not alone among other Standard Building Contract Forms in Singapore in providing for the service of the Contractor's Final Payment Claim to be based on the issue of a particular Certificate or document by the Employer's Representative.

In the Public Sector Standard Conditions of Contract 2005 ("PSSCOC 2005"), the time for the service of the Contractor's Final Payment Claim is based on the event of the issue the Certificate of Substantial Completion by the Superintending Officer.

Clause 32 .4 of the PSSCOC 2005 provides that within 90 days of the Date of Substantial Completion, (which Date can only be determined with the issue of the Certificate of Substantial Completion), the Contractor shall submit his Final Payment Claim.

Accordingly, to hold that clause 24 is in contravention of the SOP Act on the ground that its contract term providing for the time for the service of the Final Payment Claim is *ultra vires* the SOP Act would also necessarily mean that clause 32.4 of the PSSCOC 2005 is in breach of the SOP Act as well.

In fact, the provisions of the SOP Act contemplate that the Contract may contain terms specifying time for the service of the payment claim. For instance, section 10 (2) (a) of the SOP Act provides that :

*“ A payment claim shall be served at such time as specified in or determined in accordance with the terms of the contract.”*

The Regulations made under the SOP Act also acknowledge that the terms in the Contract may expressly provide for the time for the service of the payment claim. Section 5 of the SOP Regulations provides that :

*“ Where a contract does not contain any provision specifying time at which a payment claim can be served or by which such time may be determined, then a payment claim shall be served by the last day of the month following the month in which the claim is made.”*

It can be seen from a reading of the SOP Act and its Regulations that clause 24 is not in contravention of the SOP Act.

### **Purpose of the SOP Act**

One of the main purposes of the SOP Act is to ensure that the Contractor's cash flow is not interrupted or affected by the Employer unreasonably withholding payment during the course of the works. The SOP Act achieves this by providing in Section 8 that the payment of the Contractor's payment claims must be settled within certain fixed time periods. This will preclude the Employer from providing for unreasonably long time periods in the Contract for the Contractor to receive payment for works carried out.

It further achieves this purpose of ensuring the Contractor's cash flow through section 12 of the SOP Act by granting the Contractor the statutory right to refer any payment claim disputed by the Employer for speedy resolution and settlement through statutory adjudication. Such statutory adjudication ensures that the Contractor's cash flow during the Works is not obstructed (as in previous times) by lengthy court or arbitration proceedings encountered by the Contractor when he commenced legal proceedings to recover payment for work carried arising from deliberate attempts by the Employer to delay making payment.

Under the REDAS D&B Conditions, the Contractor is entitled to submit his progress claims for works done on a monthly basis and if the Employer disputes any of his progress payment claims or the full amount claims, the Contractor has the right under the SOP Act to apply for statutory adjudication for quick settlement of his progress payment claim. As such, the Contractor can expect under the REDAS D&B Conditions to receive regular and uninterrupted payments from the Employer for his progress payment claims during the course of his works.

As discussed above, the nature of the Contractor's Final Payment Claim includes all of his other contractual claims and is not limited to claims for work carried out unlike his progress payment claims. The Contractor is fully entitled to claim for all of his variation claims at any time during the Contract by including them in his progress payment claims. He does not need to wait until the time for the service of the Final

Payment Claim as provided under clause 24 before submitting his variation claims. In this sense, the requirement under clause 24 for the issue of the Maintenance Certificate or his receipt of the Statement of Final Account before the service of his Final Payment Claim does not affect his cash flow.

In fact there are no provisions in clause 24 or any other terms in the REDAS D& B Conditions which precludes the Contractor from submitting his variation claims at any time prior to the service of this Final Payment Claim under clause 24.

As a final word, it should be noted that Tiong Seng's case dealt with a Final Payment Claim in a Domestic Sub Contract Form. The Court was not asked to nor did it decide that specific terms providing for time for service of the Contractor's Final Payment Claim in a Standard Form of Building Contract such as the REDAS D& B Conditions or the PSSCOC 2005 Form are in contravention of the SOP Act.

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