

# Final Certificates: A Review Of Pertinent Substantive And Procedural Issues

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**A**s the contractor fulfills his various obligations under the contract, the satisfactory discharge of such matters is acknowledged by the issue of the corresponding certificates by the contract administrator. In a typical engineering/construction contract, this is evidenced by such documents as the Certificate of Practical Completion<sup>2</sup>, the Certificate of Making Good of Defects, etc. issued progressively with the flow of the contract activities and achievement of the performance milestones. The culmination of the said process is the issue of the so-called 'Ultimate' Certificate or the 'Final' Certificate; marking the apparent end of the contract proper and the obligations of the parties thereunder<sup>3</sup>. Whether such a certificate accords a temporary or permanent finality to the respective obligations of the parties with the lapse of the contract period is a moot point<sup>4</sup> but it nevertheless remains one of the most important documents that must be issued for and on behalf of the employer; any omission and/or neglect to do so constituting a breach of contract on the latter's part.

Recognising the importance of this topic, the subsequent write-up attempts to focus on the essential aspects of the subject in terms of the relevant substantive and procedural issues. The closely related subject of the Final Account is normally dealt with in connection with payments to which due reference be made whilst the necessary condition precedent of the certification of making good defects should also be addressed. Since there is a close nexus between the said topics, the reader is reminded to make the necessary cross-referencing to the said subject matters and consider these in conjunction with the instant topic if a thorough appreciation of the relevant issues is to be garnered.

## EXPRESS CONTRACTUAL PROVISIONS

Owing to the relative significance of the subject of the Final Certificate, all the standard forms of conditions of contract have incorporated suitably drafted provisions; a classic illustration being sub-clauses 30.7 and 30.8 of the PAM '98 Forms (With & Without Quantities Edns) which read:

### '30.7 Provision for Final Certificate

*Before the expiration of three months from the end of the Defects Liability Period stated in the Appendix or from completion of making good defects under clause 15.0 or from receipt by the Architect of the documents referred to in sub-clause 30.6(i) whichever is the later the Architect shall issue a Final Certificate which shall state:*

- 30.7 (i) *the sum paid to the Contractor under Interim Certificates and the amount stated in the Appendix as Limit of Retention Fund.*
- 30.7 (ii) *the Contract Sum adjusted as necessary in accordance with the provision in these Conditions.*
- 30.7 (iii) *the differences, if any, between the two shall be expressed as a balance due to the Contractor from the Employer or to the Employer from the Contractor as the case may be. Subject to any deductions authorised by these Conditions, the balance as from 14 days after the issue of the Final Certificate shall be a debt payable by the Employer to the Contractor or as the case may be from the Contractor to the Employer.*

### 30.8 No Certificate of Architect Shall of Itself be Conclusive Evidence

*No Certificate of the Architect shall of itself be conclusive evidence that any work, materials, or goods to which it relates are in accordance with the Contract'.*

The remaining standard forms have a variety of express clauses; a summary of which is listed out herebelow:

## JKR/PWD Forms

### JKR 203 & 203A Forms (Rev. 10/83)

- Clause 48: Final Certificate
- Clause 48(b): Final Certificate
- Clause 48(c): Sums Certified in Final Certificate
- Clause 48(d): Declaration before Final Payment
- Clause 49: Effect of S.O.'s Certificates

### PWD Form DB/T (2000 Edn)

- Clause 51: Final Account and Final Certificate
- Clause 51.2: Final Certificate

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1. Director, HSH Consult Sdn. Bhd.
  2. or Sectional Completion or Partial Occupation.
  3. Save for various unfulfilled obligations and/or their liabilities during the statutory period of limitation.
  4. See article *The Finality of Final Certificates* by Vinayak P. Pardhan & Khoo Guan Huat [1994] 2 MLJ Pxc.

- Clause 51.3: Final Certificate to be conclusive
- Clause 51.6: Condition Precedent to Final Payment
- Clause 52: Effect of P.D.'s Certificates and Payment by Government

#### CIDB Form (2000 Edn)

- Clause 1.1: Definitions (Final Certificate)
- Clause 42: Payment
- Clause 42.8: Final Account and Final Certificate
- Clause 43: Effect of Superintending Officer's Certificate
- Clause 43.1: Certificate Not Conclusive
- Clause 43.2: Effect of Final Certificate

#### IEM Forms

##### IEM.CE 1/89 Form

- Clause 48: Final Account Certificate
- Clause 48(b): Final Account Certificate
- Clause 48(c): Sums to be Certified in the Final Account Certificate
- Clause 49: Effect of Engineer's Certificates

##### IEM.ME 1/94 Form

- Clause 20: Certificates and Payment
- Clause 20.8: Application for Final Certificate of Payment
- Clause 20.9: Issue of Final Certificate of Payment
- Clause 20.10: Final Certificate of Payment Conclusive

#### Putrajaya Conditions of Main Contract

- Clause 45: Effects of E.R.'s Certificate
- Clause 53: Final Certificate

On a closer examination of the abovementioned express provisions, the following principal points became apparent:

- For most of the Forms, the topic of the Final Certificate is generally stipulated in conjunction with the requirements pertaining to the Final Account and final payment for the contract in question. Hence, such provisions deal essentially therefore with financial issues and gloss over the other relevant but related issues *vis-à-vis* the obligations between the parties;
- Most such provisions address the topical matters such as:
  - (a) The timing of the certificate;
  - (b) The conditions precedent;
  - (c) The necessary contents;

- (d) The formalities governing the issue of the certificate;
- (e) The effect of the certificate; and
- (f) Collateral issues/matters

- Though sharing similarities in the core matters, the various provisions show marked variations in terminology, language used in drafting and extent of detail. In terms of the latter, the CIDB Form is the most exhaustive; the others being concise but reasonably comprehensive.

#### TERMINOLOGY AND MEANING

Various labels have been assigned by different forms of conditions of contract to the said certificate; the more common of these being:

- Final Certificate;
- Final Account Certificate<sup>5</sup>;
- Ultimate Certificate;
- Final Payment Certificate<sup>6</sup>;
- Performance Certificate.

The majority of the local standard forms employ the term 'Final Certificate'; which term will be used for the rest of this discussion.

In terms of definitions, there are few authoritative sources that can be of assistance; some useful examples include:

- 'An Engineering Contract Dictionary' explains the meaning of the term in relation to the common English and FIDIC Standard Forms in the manner as reproduced herebelow<sup>7</sup>:

*'The last certificate issued by the engineer<sup>8</sup>, but of differing significance under various forms of contract. Under the Model Forms of General Conditions and FIDIC/EM it indicates that all matters arising out of the contract, as regards both the execution of the works and the payment therefore, have been satisfactorily concluded. Under GC/Works/there is no designated final certificate instead the Superintending Officer certifies that the works are in a satisfactory state when all defects have received proper attention. The certificate has no financial significance. The position is similar for the Final Certificate issued under the Model Form of Conditions of Process Plants whereas under ICE and FIDIC/CE and the ICE Minor Works Form Conditions, the Final Certificate related only to the conclusion of financial matters .....*

- Murdoch and Hughes in the authoritative text entitled 'Construction Contracts Law and Management' proffer the following comments as to the said term<sup>9</sup>:

*'The Final Certificate can signify the contract administrator's satisfaction with the work, or the amount which is finally due to the contractor, or both of these things. The extent of its effect depends upon the terms of the contract .....*

5. See IEM.CE 1/89 Form.

6. See FIDIC Conditions of Contract – Design and Build.

7. By Powell-Smith, Chappel and Simmonds at P 226.

8. i.e. the contract administrator.

9. At P 268. See also *Building Contracts* [4<sup>th</sup> Edn.] by D. Keating at P 77.

Summarising the above listed sources of reference, it can be noted that the Final Certificate exhibits the following characteristics:

- It is issued upon the expiry of the contract period<sup>10</sup>;
- The certificate is issued by the authorised person i.e. the contract administrator<sup>11</sup>;
- It is the last of the various certificates issued during the currency of the contract;
- From the contractual point of view, the issue of such a certificate, *prima facie*, signifies discharge of the contract by performance;
- It also generally renders the contract administrator ‘functus officio’<sup>12</sup>;
- The actual effect of such a certificate is dictated by the precise wording of the particular term(s) of the applicable conditions of contract.

### **PRE-CONDITIONS TO ISSUE**

Before the contract administrator issues the Final Certificate to the contractor, he must ensure that the relevant pre-conditions as expressly stipulated in the particular terms of the conditions of the contract have been satisfied. As can be observed from the various standard forms of conditions of contract employed in this country, such pre-conditions vary markedly between these forms. However, in general the following pre-conditions can be elicited from these forms:

- Certification of the satisfactory completion of the making good of defects<sup>13</sup> e.g. the issue of the Certificate of Making Good Defects, etc.;
- Official expiry of the Defects Liability Period inclusive of any official extension thereof;
- Certification of the satisfactory completion of the carrying out of the relevant servicing and maintenance e.g. issue of Certificate of Completion of Maintenance<sup>14</sup>, etc.;
- Preparation and finalisation of the Final Account;
- Formal application for Final Certificate by the contractor;<sup>15</sup>
- Satisfaction of all other obligations under the contract e.g. submission of warranties, guarantees, indemnities, authority approvals, records, documents, etc.

Notwithstanding the listing out of the abovementioned general pre-conditions, the practitioner must be aware of and strictly comply with the particular provisions of the contract being implemented as such stipulations actually govern the rights and obligations of the parties to the contract.

### **TIMING FOR THE ISSUE**

Here again, the particular requirements are expressly spelt out in the terms of the conditions of contract in question. Typical examples include:

- The PAM '98 Form (With & Without Quantities Edns)

Pursuant to sub-clause 30.7, the Final Certificate has to be issued within three months of the occurrence of any of the following events, whichever occurs last:

- (a) The expiry of the Defects Liability Period (DLP); or
- (b) The date of issue of the Certificate of Making Good of Defects (CMGD); or
- (c) The date of receipt by the Architect of the relevant documentation from the contractor under clause 30.6 (i).<sup>16</sup>

- JKR Forms 203 & 203A (Rev. 10/83)

Clause 48(b) mandates the issue of the Final Certificate within three months of the happening of any of the following events, whichever is the latest:

- (a) The expiry of the Defect Liability Period (DLP) for the whole of the works; or
- (b) The date of issue of the Certificate of Completion of Making Good of Defects (CCMGD) under clause 45.

- CIDB Form (2000 Edn)

Following sub-clause 42.8(e), the Superintending Officer must issue the Final Certificate within 30 days of the occurrence of the following events:

- (a) Acceptance by the contractor of the Final Account or the amendment to the Final Account, whichever is the later; or
- (b) After the expiry of the 30 day period following the receipt by the contractor of the Final Account during which no notification of disagreement has been received from the contractor; or
- (c) After the Superintending Officer has informed the contractor of the amendment to the Final Account and/or that he would not issue a notice of amendment to the Final Account (as the case may be) pursuant to sub-clause 42.8(d).

### **PRINCIPAL CONTENTS**

The essence of the contents of a typical Final Certificate is lucidly illustrated to the following effect by sub-clause 31.2<sup>17</sup> of the PWD Form DB/T (2000 Edn):

*‘..... the P.D. shall issue a certificate (hereinafter referred to as the Final Certificate) stating the amount which in his opinion is finally due under the Contract from the Government to the Contractor or from the Contractor to the Government as the case may be after giving credit to the Government for all amounts previously paid by the Government and for all sums to which the Government is entitled under the Contract.’*

Notwithstanding the statement on the debt due from one party to the other being the main content of such a certificate, most forms expressly require thy Final Certificate to indicate

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- 10. Inclusive of any official extension.
  - 11. And not the employer.
  - 12. See *Fairweather Ltd. v Asden Securities Ltd.* [1979] 12 BLR 40
  - 13. See clause 30.7 PAM '98 Form (With & Without Quantities Edn), etc.
  - 14. See clause 51.1 PWD Form DB/T, etc.
  - 15. See clause 20 IEM.ME 1/94 Form, etc.
  - 16. Entitled *Documents Required for Computing*.
  - 17. Entitled *Final Certificate*.

the essential computation in establishing the same; notable examples being sub-clause 30.7 of the PAM '98 Forms (With & Without Quantities Edn) and sub-clause 42.8 CIDB Form (2000 Edn). Accordingly there should be stated in the Final Certificate essential matters such as:

- The Contract Sum as set out in the Final Account i.e. the contract sum adjusted as necessary in accordance with the applicable provisions of the conditions of the contract; and
- The amount certified thus far for payment to the contractor under the Interim Certificates (whether or nor paid); and
- The difference between the above two amounts; being the debt payable by one party to the other: *Chew Sin Leng Construction Co. Ltd. v Cosy Housing Development Pte. Ltd.*<sup>18</sup>.

Further matters that need to be considered in relation to the said certificate are lucidly illustrated by sub-clause 48(c)<sup>19</sup> JKR Forms 203 & 203A (Rev. 10.83) and include:

- The Final Certificate must be supported by documents showing the contract administrator's final valuation of the works in accordance with the terms of the contract involved;
- It must also take into account any outstanding permitted deductions e.g. liquidated damages, etc. not yet made by the employer under the terms of the contract; and
- Any other relevant material/detail/information.

#### PROCEDURAL REQUIREMENTS<sup>20</sup>

Owing to the immense legal/ contractual significance of the said certificate, it is important that the formalities associated with its preparation and issue are strictly adhered to especially on the part of the contract administrator. The major procedural steps that must be duly undertaken include, *inter alia*, the following:

- The certificate must be signed by the contract administrator or the person authorised to effect the same i.e. under the letter of delegation of power. Examples of these include the Architect under the PAM '98 Form, the Engineer under the IEM Forms, etc.;
- The original certificate must be issued to the contractor and copied to:
  - (a) The Employer;
  - (b) All Nominated Subcontractors;
  - (c) All Nominated Suppliers;
  - (d) All Official assignees;
  - (e) The financial institutions issuing the Performance Security Deposit e.g. Performance Bond, Guarantees, etc.;
  - (f) The Consultants (if applicable);
  - (g) Any other party identified by the employer as an official recipient.
- Upon receipt of such a certificate, it is a duty of the contractor to check for authenticity, accuracy, compliance with formalities and validity. If found to be in order, the contractor should formally acknowledge

receipt of the document for purpose of administrative expedience. Henceforth, the contractor should keep the certificate in safe custody or archive it at least for the statutory period of limitation especially if the certificate is conclusive in nature and content; and

- It is to be noted that the date of issue of the certificate by the contract administrator and not the date of receipt of the same by the contractor is the official date for the purposes of the contract provided delivery is effected within a reasonable period of the issuance.

#### POST-ISSUANCE OF CERTIFICATE: ACTIVITIES

Following the issue of the payment certificate, there remains a number of activities that need to be undertaken especially on the employer's and the contract administrator's part before the contract can be closed off. These activities can be classified under the following categories:

- Enforcement of the Final Certificate Debt; and
- Preparation of the Closing Off Documentation.

#### Enforcement of the Final Certificate Debt

Depending on the party who is the net debtor, the following scenarios can be envisaged:

- If the contractor is the debtor, the employer must take all relevant steps to recover the amount due; which process may even involve pursuing legal action for a liquidated demand;
- On the other hand<sup>21</sup>, should the employer be the debtor, payment must be effected within the time frame stipulated in the contract<sup>22</sup> otherwise the employer will be in breach.

For the latter scenario, most forms of conditions of contract prescribe a number of pre-conditions which the contractor must satisfy before final payment is made to the contractor. These pre-conditions as stipulated for example in sub-clause 48(d) JKR Forms 203 & 203A, Sub-clause 51.6 PWD DB/T Form, Sub-clause 53.04 Putrajaya Main Contract Condition, etc. require either:

- (a) A statutory declaration made by or on behalf of the contractor; or
- (b) A certificate signed by or on behalf of the Director-General of Labour;

to the effect that:

- (a) All workmen employed by the contractor and his subcontractors<sup>23</sup> have been paid their wages; and

18. [1988] 1 MLJ 331.

19. Labelled 'Sums to be certified in the Final Certificate'.

20. See *A Guide on the Administration of Public Works Contracts* by JKR Malaysia at P 334.

21. Which is the more common scenario.

22. e.g. 14 days per clause 30(7) PAM '98 Forms (With & Without Quantities Edns).

23. Whether Nominated and/or Domestic.

- (b) All dues and contributions in connection with the employment of the workmen e.g. EPF, SOCSO, etc. have been paid.

Should such pre-conditions be incorporated into the relevant contract, these have to be satisfied before the employer is obliged to pay the contractor the debt due. Otherwise, the issue of the Final Certificate itself triggers the commencement of the prescribed period for the employer to effect the payment certified as due. In this respect, employers, contract administrators and contractors must be especially cognizant of such prescriptions, if any, and their consequential effects.

### **Preparation of Closing Off Documentation**

Notwithstanding the issue of the Final Certificate, it is good practice, even if not expressly required, for the contract administrator to prepare a number of relevant documents to enable the contract to be properly closed off. The main examples of such documents are afforded by requirements of Public Works Contracts and include<sup>24</sup>:

- The Project Completion Report;
- The Contractor's Performance Report; and
- The 'As-Completed Detailed Abstract'.

Other contracts or employers may have different requirements but the above examples illustrate a minimum list which must be targeted to be achieved.

### **EFFECTS OF THE FINAL CERTIFICATE**

#### **General**

As can be gleaned from the earlier discussion on 'Terminology and Meaning', the Final Certificate on a broad brush approach, is generally of the following effect:

- It signifies the contract administrator's satisfaction that the work carried out by the contractor conforms with the contract i.e. it is sufficient and that the completion criteria had been achieved, etc.; and/or
- It certifies the amount which is finally due to the contractor<sup>25</sup>; and/or
- It renders the contract administrator 'functus officio' i.e. he has discharged his duties under the contract and has exhausted his authority with the result that he cannot thereafter issue any valid certificate under the contract<sup>26</sup>.

Hence, consequently the contract administrator's decision as contained in the Final Certificate on the matters contained therein i.e. sufficiency of work and amount finally payable is often binding and conclusive on the parties. However, whether it is in actual effect really binding and conclusive is not that clear cut; there being no comprehensive test to establish the same. Much depends on the intentions of the contracting parties as expressed in the relevant terms of their contract and the construction that can be afforded to such terms. Additionally it may be necessary to look beyond the contract itself at collateral matters such as the possible grounds of challenging the certificate, the conduct of the contract administrator, etc.

### **Express Contractual Provisions**

To elicit the intention of the parties, the approach as advocated by Keating in the authoritative text entitled 'Building Contracts' and as reproduced herebelow is a useful starting point. It states<sup>27</sup>:

*'It is a question of construction in each case to determine whether it was intended that a particular certificate should be conclusive upon the matter with which it purports to deal. Express words are frequently used such as, for example that "the certificate of the engineer.....shall be binding and conclusive on both parties". It seems, *prima facie*, a Final Certificate, which is a condition precedent to payment is conclusive. Progress certificates are usually not conclusive. An arbitration clause may prevent a certificate from being conclusive'.*

A review of the common forms of conditions of contract used locally reveals that the various provisions as contained therein can be classified into the following categories, namely:

- Category I Provisions: Final Certificate Conclusive;
- Category II Provisions: Final Certificate Conclusive on Certain Matters Only;
- Category III Provisions: Final Certificate Not Conclusive At All.

#### **Category I Provision: Final Certificate Conclusive**

A classic illustration of such a provision is sub-clause 20.10<sup>28</sup> of the IEM.ME 1/94 Form which states:

*'A Final Certificate of Payment shall be conclusive evidence of the value of the Works, that the Works are in accordance with the Contract and that the Contractor has performed all his obligations under the Contract.'*

*'Payment of the amount certified in the Final Certificate of Payment shall be conclusive evidence that the Employer has performed all his obligations under the Contract.'*

*'A Final Certificate of Payment or payment shall not be conclusive:*

- (a) *to the extent that fraud or dishonesty relates to or affects any matter dealt with in the certificate; or*
- (b) *if any arbitration or proceedings under the contract have been commenced by either party before the expiry of 84 days after the issue of the Final Certificate of Payment'.*

24. See *A Guide on the Administration of Public Works Contracts* by JKR Malaysia at P 334.

25. i.e. a positive or negative figure.

26. See *An Engineering Contract Dictionary* by Powell-Smith, Chappel and Simmonds at P 236.

27. At P 81.

28. Entitled *Final Certificate of Payment Conclusive*.

The effect of the above provision and also of a typical Category I provision e.g. clause 30(7) of the PAM/ISM '69 Form<sup>29</sup> are far reaching and generally to the detriment of the employer. *Prima facie*, such a provision precludes the employer from proceeding against the contractor for breaches of contract and curtails the operation of the statutory period of limitation as spelt out in the various Limitation Acts/Ordinances: *Shen Yuan Pai v Dato Wee Hood Teck & Ors*<sup>30</sup>. Unless stipulated expressly to the contrary, the 'conclusiveness' or 'finality' of such a certificate can nevertheless be challenged on such grounds as:

- Fraud, dishonesty or fraudulent concealment, etc., by contractor;
- Defects not shown/disclosed by reasonable inspection or examination;
- Any accidental inclusion or exclusion of any work, materials, etc. or any arithmetical error in computation;
- Certificate not given in the correct form: *Token Construction Co. Ltd. v Charlton Estates Ltd.*<sup>31</sup>;
- Certificate not given on time i.e. either specified time requirements not met: *Miller v London County Council*<sup>32</sup> or certifier 'functus officio': *Fairweather Ltd. v Asden Securities Ltd.*<sup>33</sup>;
- Certificate given by unauthorised/wrong person: *Gunung Bayu Sdn. Bhd. v Syarikat Pembinaan Perlis Sdn. Bhd.*<sup>34</sup>;
- Certifier acting 'ultra vires' i.e. contract administrator has 'certified' on a matter on which the contract does not empower him to so certify: *Anglian Water Authority v RDL Contracting Ltd.*<sup>35</sup>;
- Certifier has been improperly pressurised or influenced by the relevant party: *Ling Heng Toh Co. v Borneo Development Corporation Sdn. Bhd.*<sup>36</sup>;
- Fraud or collusion between certifier and the relevant party: *Lazarus Estates Ltd. v Beasley*<sup>37</sup>;
- Certificate embodies a wrong decision on a point of law; and
- The effect of the presence of an arbitration clause in the contract which denies conclusiveness or restricts the scope of conclusiveness.

Save for the above challenges, which are apparently difficult to mount and sustain in many cases, a Category I Provision is not to the relative advantage of most employers and even to interested third parties e.g. a garnishee: *Thamesa Designs Sdn. Bhd. & Ors. v Kuching Hotels Sdn. Bhd.*<sup>38</sup>. Hence, it is rare for such a stipulation to be included in the more recent forms of conditions of contract, whether of the standard or 'bespoke' type.

#### Category II Provision: Final Certificate Not Conclusive on certain matters only

A typical example of this is provided by sub-clause 30.8 PAM '98 Forms (With & Without Quantities Edn) which reads:

'No Certificate of the Architect shall of itself be conclusive evidence that any work, materials or goods to which it relates are in accordance with the Contract.'

On examining the above provision in relation to the Final Certificate, it is clear that the contents of the said sub-clause precludes finality only to the matters as mentioned therein i.e. satisfaction with any work, materials or goods. It however, does not avoid the conclusiveness, evidence-wise of the other essential matters contained in the Final Certificate i.e. the balance due between the parties. Hence, the non-conclusiveness of the Final Certificate is limited to certain matters only and is not all encompassing. A similar situation is encountered in the JKR Forms 203 & 203A and IEM.CE 1/89 Form owing to the existence of clause 49<sup>39</sup> which has been drafted to the same effect as sub-clause 30.8 of the abovementioned PAM Form.

Other standard forms have adopted a similar approach to the one as adverted to hereabove, some useful references being:

#### ■ PWD Form DB/T (2000 Edn)

In this form, the overall ambit of the conclusiveness of the Final Certificate is established by reading clause 52<sup>40</sup> and sub-clause 51.4<sup>41</sup> together. The end result is that the Final Certificate is conclusive only to the amount or debt payable by one party to the other and no more.

#### ■ CIDB Form (2000 Edn)

The CIDB Form approaches the matter of conclusiveness of the Final Certificate by first holding vide sub-clause 43.1<sup>42</sup> that all certificates issued by the Superintending Officer (S.O.) shall not be considered as conclusive evidence as to the sufficiency of:

- (a) Any design works executed; and/or
- (b) Any equipment, materials or goods to which it relates.

It then proceeds vide sub-clause 43.2<sup>43</sup> to stipulate the effect of the Final Certificate in various situations involving mediation, arbitration or other proceedings pursuant to the particular provision of the contract. For instance, sub-clause 43.2(a) renders such certificate as conclusive evidence for matters listed hereunder in any

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29. i.e. the predecessor of the PAM '98 Forms (With & Without Quantities Edns).
  30. [1976] 1 MLJ 16.
  31. [1973] 1 BLR 48.
  32. [1934] 50 TLR 479
  33. [1979] 12 BLR 40.
  34. [1987] 2 MLJ 332.
  35. [1988] 43 BLR 98
  36. [1973] 1 MLJ 23
  37. [1956] 1 QB 702.
  38. [1993] 3 MLJ 28
  39. Entitled *Effect of S.O.'s Certificate* and *Effect of Engineer's Certificate* respectively.
  40. Labelled 'Effect of P.D.'s Certificate and Payment by Government'.
  41. Entitled *Final Certificate to be Conclusive*.
  42. Entitled *Certificate Not Conclusive*.
  43. Labelled 'Effect of Final Certificate'.

proceedings arising out of or in connection with the contract in accordance with clause 47:

- Satisfaction of the completion criteria where it is expressly stipulated to be to the reasonable satisfaction of the S.O. and/or the employer;
- That all and only such extensions of time as are contractually due have been given;
- That all the contractor's financial claims e.g. loss and expense have been properly accounted for.

The effect of such certificate in other situations involving similar proceedings is further addressed in sub-clauses 43.2(b) and 43.2(c) respectively.

Notwithstanding the above matter on reading sub-clauses 42.8, 43.1 and 43.2 together, it is apparent that the conclusivity of the Final Certificate in regard to the amount or debt payable by one party to the other is on 'all fours' with the other standard forms discussed earlier i.e. there is *prima facie*, finality as to the said amount or debt due; the only difference being to the other matters alluded to hereabove.

**Category II provision:**  
Final certificate Not conclusive At

A classic illustration of such a provision is to the following effect:

*'No certificate of the contract administrator under any provision shall be considered as conclusive evidence as to the sufficiency and/or correctness of any work, material, goods to which it relates or to any other matter whatsoever under the contract. In any case, no such certificate shall be final and binding in any dispute between the employer and the contractor if the dispute is brought whether before an arbitrator or in the courts.'*

*Prima facie*, the above provision effectively means what it stipulates i.e. the certificate is not conclusive at all on any matter whatsoever contained therein, whether it be in relation to the satisfaction of the completion criteria, the amount due, etc. Therefore, there is no finality status attached to such a certificate. For all intents and purposes, it defeats the main purpose of preparing and issuing such a document as it is of no evidential value especially to the contractor.

Examples of the incorporation of such provisions are uncommon in the standard forms used locally; even if such standard forms are not industry standard forms but of the larger institutional employers. However, there have been, and are likely to be instances where 'bespoke' forms involving particular private employers have used and may employ such provisions in their contract. Before these are incorporated into the contract in question, their usefulness and likely effect in the context of the implementation of the overall contract should be meticulously examined. It is submitted that the said provisions are of little significance and of very limited use and as such should be best avoided; where possible, Category II provisions may be the ideal compromise in terms of the apportioning the attendant risks between the various parties involved in the particular contractual arrangement and hence should be used in lieu.

## CONCLUSION

Final Certificates, despite their significant status in Engineering/Construction Contracts are rarely given the corresponding consideration; often being reduced to a mere formality obscured in the backwaters of a typical project's downstream activities. Yet unless and until the Final Certificate is satisfactorily sorted out and formally issued, from the contractual point of view there is no official certification of the mutual discharge of the parties' obligations under the particular contract. Neither is the contract administrator able to cast away the multitude of obligations and liabilities that he has been clothed with *vis-à-vis* the administration of the contract.

The situation is further muddied by the wide-ranging effects of such certificates; the latest twist being in ameliorating the 'finality' of such documents. This development has opened its own 'can of worms'; these being manifested in ambiguity, uncertainty on the rights and liabilities of the parties and the generation of claims and disputes. Hand in hand, procedural matters continue to wreak havoc on the finality and consequently the effectiveness of such documents.

It suffices to say that given the prevalence of the abovementioned state of affairs, it is timely for all the players in the local engineering/construction industry to approach the said subject on a more serious note and to help eradicate the various substantive and procedural impediments that have hitherto plagued this ultimate and important milestone of a typical contract cycle. 

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- Vinayak P. Pardhan & Khoo Guan Huat *The Finality of Final Certificates* [1994] 2 MLJ PXC.

## Lighter Moments

### Comprehending Engineers

*Normal people believe that if it ain't broke, don't fix it.*

*Engineers believe that if it ain't broke, it doesn't have enough features yet.*