

**PAM PRACTICE BUREAU**

**CATEGORY G: Contract Administration (PAM Contract, PWD 403A, etc)**

No.	DATE	INQUIRY	RESPONSE FROM TEAM
1.	18 December 2020	<p>PAM Contract 2006(with quantities) is used. Defect Liability Period.                      Can Employer claim for consequences loss from contractor? For example, floor tiles deboned, and damaged owner's built-in furniture / after rectification works, the contractor dirty the unit without cleaning up or damaged other built-in furniture during rectification works.                      If claimable, how can the Employer claim? Can it be set-off under Clause 30.4 of the Contract? Or under Common Law? Which Act to refer to? Thank you.</p>	<p>We refer to your queries which we have received on 18 December 2020, despite of the scarcity of information and details provided, we shall nevertheless reply as follows –</p> <p>1.Under PAM Contract 2006 (With Quantities), the contractor is obliged to make good the following defects during the Defects Liability Period ('DLP'):</p> <ul style="list-style-type: none"> <li>a. defects of minor nature as undertaken by the contractor to be completed within a specified time frame as accepted by the Architect prior to issuance of Certificate of Practical Completion;</li> <li>b. latent defects including material, workmanship and/or performance of works as stipulated in the contract;</li> <li>c. any other defects caused by the contractor and/or the nominated sub-contractors.</li> </ul> <p>2. However, the contractor shall not be liable for the following defects –</p> <ul style="list-style-type: none"> <li>a. defects due to fair wear and tear, abuse or misuse by the employer;</li> <li>b. any specific works agreed in the contract, which has a limited / shorter warranty period as compared to the Defects Liability Period</li> </ul> <p>3. Hence, it is prudent for the Architect as the contract administrator to carry out a fair investigation onto the category and root cause(s) of the defective work(s) as claimed; and to determine the actual party responsible, i.e.- whether it is due to poor workmanship by the contractor, inappropriate design / specification by the designer, misuse by the end user, etc.</p> <p>4. It is important that Clause 30.4 be exercised with care, where the conditions and procedures as stipulated in the Contract shall be fully complied with.</p> <p>5. Under Clause 30.4, if contractor does not comply with the Architect's Instruction to make good the defects for which he is liable for, the employer is entitled to set-off all costs incurred including loss and expenses, which shall be recoverable from the Contractor as a debt or from any monies due or are to become due to the Contractor.</p> <p>6. Unless otherwise specified in the contract, the making good of defects / rectification works commonly include proper preparation, protection, housekeeping, handing over, etc; all to be carried out by contractor in a workmanlike manner and in compliance with the contract.</p> <p>7. As for your query regarding consequential losses, we are of the opinion that there are no provisions in the contract for the employer to claim for such losses. As for claims beyond the contract's provision, i.e.- under common law, we suggest you seek legal advice that may better suit your situation and needs.</p>
2.	14 December 2020	<p>The owner purchases the tiles for tiling work. On completion, some of the tiling works are defective. The tiles for the defective area are no longer in production.</p> <p>The contractor cannot remedy the defective work. The owner demand that the contractor replaces all tiles in the space where the defects are. How to resolve this situation?</p>	<p>First, we are not provided with sufficient background information on the contractual scopes of works, i.e.- whether it was a supply and installation works, installation only, etc.</p> <p>Furthermore, we are also not provided the nature of the alleged defective tiling works, i.e. whether it is related to design, specification, workmanship and/or maintenance.</p> <p>The root cause(s) should be established in order to determine liability and the required course of action. We are also not provided with any contractual details between the parties (if any at all)</p> <p>Therefore, due to these limitations, we advise the following:</p> <p>1. Determine the root cause(s) of the alleged, defective tiling works based on the design, specification, workmanship and/or maintenance of the area(s) concerned.</p>

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			<p>2. An independent 3rd party report may be sought from Architect Centre SB to establish the condition and root cause(s) of the alleged defect.</p> <p>3. The liability of supply and/or repairs / remedial works should be based on the terms of contract between the stakeholders.</p> <p>4. Based on the above, outline possible scenarios for resolving the dispute to the contractual parties (and advise of consequences behind each proposal), i.e.;</p> <p>a. take the dispute to arbitration (and await a decision)</p> <p>b. negotiate a settlement between the two parties for the project to be completed.</p>
3.	4 December 2020	During the contract management stage, if the main contractor is changing their company to another company name, is there any implication to the building contract and any documents we need to request from them?	<p>We refer to your query as received on the 4th December 2020.</p> <p>As we unaware of the details of the Form of Contract which is being used in your case, we have difficulty in advising you accordingly.</p> <p>Kindly note though that under the PAM Forms of Contract, the term "Contractor" also includes all legal successors, i.e. there should be no major effect on the Contract.</p> <p>Irrespective of the form of contract employed, we would also advise that the name change be formalized in writing after receipt of proof of acceptance of such a name change by the relevant statutory authorities tasked with overseeing the registration of the Contractor, i.e. the Registrar of Business, the Companies Commission of Malaysia or the Construction Industry Development Board, etc.</p>
4.	26 November 2020	If a client persistently made late payment in response to interim certificates issued by the Architect, and the contractor suffered delays on site on account of not being able to pay the sub-contractors on time, can the contractor claim time at large if there was no provision in the contract for compensating the Contractor for late payment either by EOT or monetary compensation (e.g. loss & expense)?	<p>There is no mention of the Form of Contract employed nor details of your Conditions of Contract. Kindly note that time may only be set at large if the Completion Date cannot be determined and that based on the information received, we are unable to form an opinion on this issue.</p> <p>Nevertheless, assuming PAM Contract 2006 or 2018 is used for the project mentioned above, persistently late payment to Contractors is a default by an Employer of his Contractual obligations and can be grounds for a Contractor to either suspend his work (Clause 30.7) or determine his own employment (Clause 26.1).</p> <p>Should a Contractor decide to suspend his work, under Clause 23.8(m), he is entitled to claim for EOT and similarly, under Clause 24.3(g), he is also entitled to claim for Loss and</p> <p>Expense provided always that he gives written notice in accordance with the relevant clauses.</p> <p>Please also be reminded that under PAM Form, the Contractor is entitled to claim for interest based on the Maybank base lending rate plus 1%, for the late payment in accordance to clause 30.17.</p> <p>We would suggest that both the Contract Administrator and Contractor review the Conditions of Contract. If the PAM Forms of Contract are employed, please be reminded that the Contractor is entitled to write to the employer to give notice on the issue of late payment in order to 'kick start' all relevant events or suspension for non-payment.</p> <p>For additional information on the above, you may also refer to the PAM Contract 2006 Handbook.</p>
5.	26 November 2020	The setting out of piling works was based on boundary lines which later was found to deviate from the original boundary lines. Piling works had been completed. Other than instructing the Contractor to redo the piling (which will cost them heavy loss), is there any other measures that can be taken? Redesigning the main building to suit the as-piled layout is one option but will involve all the Authority approvals - ADO, ABP etc. Appreciate your advice.	<p>As we were not informed of the type of contract used and the parties responsible for providing the setting out information, we are unable to comment on whether it is the contractor's responsibility to bear the cost of re-doing the piling. In looking at the available measures, we are of the opinion that your primary concern should be whether the building can still be constructed in accordance with the Approved Plans and/or any controlling legislation (such as the Street, Drainage and Building Act, the Building By-laws, Town and Country Planning Act. and National Land Code).</p> <p>Depending on the severity of the error, you may want to check if the existing piling layout can be matched back the approved building plans by a re-design of the pile caps, ground beams and stumps. Should this not be possible, additional piling to supplement the piling already</p>

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			<p>carried out, may be combined with a re-design of the pile caps, ground beams and stumps.</p> <p>Should all the above also not be possible, you may then be left with no option but to re-design/re-locate the proposed building. The cost of having to re-submit plans for approval and the delays which may arise should then be balanced against the cost of having to re-do the piling to ascertain which of the above measures are the most cost-effective.</p>