

PAM PRACTICE BUREAU

CATEGORY G: CONTRACT ADMINISTRATION

NO.	DATE	ENQUIRY	RESPONSE FROM TEAM
1.	23 Sept 2022	<p>The client and contractor have come to a settlement agreement even though there are outstanding defects. Can we issue CMGD to the main contractor?</p> <p>PAM Clause 15.6 and 30.4 didn't mention we can issue CMGD after settlement and having outstanding defects.</p>	<p>We refer to your query as received on 23 September 2022 and write to note the following:</p> <ol style="list-style-type: none"> 1. For expediency, we shall assume that your query is related to the PAM Contract 2006 (PAM 2006). 2. Based on PAM 2006, please be reminded that there are specific procedures to follow for both the issuance of the Certificate of Making Good Defects (CMGD) and the setting off of sums in favour of the Employer. 3. Although you mention that there is a "settlement agreement", there are no details provided as to what has been agreed upon between both the Employer and Contractor. 4. Without further information on this agreement, it is difficult for us to advise on whether the CMGD may or may not be issued. 5. Nevertheless, it is worth reminding ourselves of the following: <ol style="list-style-type: none"> a. If a Contractor fails to make good any of the defects as contained within a Schedule of Defects under clause 15.4, the Employer is entitled to employ and pay others to rectify these defects and set off the cost of such rectification as a debt which is recoverable from the Contractor. b. Similarly, the Employer is also entitled to instruct the Architect to leave the above, outstanding defects unrectified but with an appropriate deduction being set off by the Employer for subsequent recovery from the Contractor. c. <u>By either instructing others to rectify the defects or to leave the defects unattended, with corresponding deductions for an appropriate set-off, it is our opinion that the Employer has deemed these defects as being no longer under the responsibility of the Contractor and should as such, be excluded from the Schedule of Defects.</u> d. With this exclusion of these defects, it is up to the Architect to exercise his professional judgement to determine if there are indeed <u>any further,</u>

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			<p><u>outstanding defects within the Schedule of Defects</u> if the procedure leading up to the issuance of the CMGD has been followed or complied with and if the CMGD may be issued. As with the issuance of any certificate under the Contract, the decision of such issuance lies solely with the Architect and should be based on his independent and professional judgement and not on either instructions or requests from the Employer.</p> <p>e. The above set-off has to be carried out in accordance with the procedure as laid out under clause 30.4, i.e.; details are required to be provided to the Contractor with the Contractor also being provided with an opportunity to dispute the amounts which are to be set-off.</p> <p>6. <u>In the absence of any further information, all we can advise at this stage, is for you to review the terms of the settlement agreement and check on whether this agreement has been formalized/executed before deciding on whether the terms of the Contract have been fulfilled and if the CMGD can indeed, be issued.</u></p>
2.	12 Aug 2022	<p>Due to the covid-19 pandemic, the control of country's border and the country's foreign labour policy, there is a shortage of construction workers in our country. These have caused serious work progress delays for some of the construction sites.</p> <p>The contractors are now writing in to request for the Extension Of Time, using clause 23.8(a) Force Majeure in the PAM form of Contract 2018 as the reason given. We found no official support from the related Ministry and Authority but only some news reported in the press.</p> <p>At the same time, I am advising the Employer to write to KPKT if extension of the date of vacant possession in the SPA could be granted by them giving the same reason that there is a shortage of construction labour in the country.</p> <p>I would like to seek PAM's advice on the above matter.</p>	<p>We refer to your enquiry dated 12 August 2022 but based on the limited information we have received; we are unsure about what specific advice you require. Nevertheless, we shall still provide our feedback regarding the subject matter raised in the enquiry -</p> <p><u>Application of Extension of Time (EOT) – PAM Contract 2018</u></p> <ol style="list-style-type: none"> 1. We would advise that you refer to Article 7 of the PAM Form for the definition of <i>Force Majeure</i> and remind that the contractor shall submit his application strictly in accordance to Clause 23.1, with reference to the Relevant Events under Clause 23.8 and substantiate with relevant, supporting information. 2. We would also advise you to evaluate the application of EOT fully in accordance with Clause 23.0 and any other relevant provisions in your Contract.

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			<p><u>Extension of Time for Vacant Possession (VP)</u></p> <p>-</p> <p>3. We are unsure about your enquiry in relation to Contractor's application of EOT; moreover, application of EOT for VP is the developer's prerogative and not under Architect's purview; we are also unable to comment further as we are not in a position to speak on behalf of the Ministry of Housing, Local Government and Urban Well-being. Nevertheless, please be reminded that any assessment of EOT by the Architect under the Building Contract should be carried out independently from any application a developer may make to the above Ministry for an extension to the date of delivery of vacant possession.</p> <p>We hope the above has been of assistance to you.</p>
3.	12 May 2022	<p>Dear Sir/Mdm, Need your kind assistance to further understand PAM Contract guidelines on the following:</p> <ul style="list-style-type: none"> • PAM (Paragraph 11.2) states 'pending the valuation of the Variations, the Contractor shall carry out with due diligence and expedition all Variations so instructed'. Q: Does this mean that per PAM, can the Project Manager /QS allow the Contractor to proceed with the variation in renovation work without first agreeing on the valuation/cost? • PAM (11.6(c)) states 'where work is not of a similar character to work as set out in the contract documents, the valuation shall be at fair market rates and prices determined by QS'. Q : Does this imply that there is no necessity to agree on the valuation/cost upfront given that it will eventually be assessed by QS or Consultant at fair market rate and prices during the finalization of the account? 	<p>We refer to your e-mail dated 12 May 2022 and would write in reply as follows:</p> <p>a. As far as we are aware, there are no "<i>PAM Contract guidelines</i>" as mentioned in your e-mail and we shall assume that you are referring to the <i>Conditions of Contract</i> for the PAM Contract. There is also no mention as to which version of the PAM Form you are referring to but as you refer to a "QS", we shall further assume that you are referring to the PAM 2006 or 2018 Contract (With Quantities).</p> <p>b. Regarding your first query, there are NO provisions for "project managers" or "Quantity Surveyors" to either issue instructions or "<i>allow the Contractor to proceed with the variation</i>" in any of the PAM Contracts; only the Architect is empowered to issue instructions for variations.</p> <p>Although it may be preferable to agree on the costs of any variation as early as possible, there are NO requirements for such an agreement to be in place before the execution of such variations. Execution of such variations should primarily be dependent on the circumstances on site and the Contractor's Works Programme.</p> <p>c. As for your last query, our reply would be similar to that given to the first one. We are unsure though as to what is meant by "<i>the finalization of the account</i>" and hope</p>

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			<p>that you do not mean the preparation of the Final Account (in accordance with Clause 30.10 of the PAM Contract).</p> <p>All variations should be valued in a timely manner in order for any amounts arising from the variation, to be included in any Interim certificate which may become due to the Contractor. Please further note that under Clause 11.5 of the PAM 2018 Contract, there is a specific time frame for the submission of details by the Contractor, followed by the valuation of the variation by the Quantity Surveyor with this time frame commencing <u>upon completion</u> of the variation.</p> <p>Should you have any other queries regarding the PAM Contract, we would advise that you contact your Architect.</p>						
4.	5 April 2022	<p>Dear Sir,</p> <p>Kindly seek direction on how a Contractor could address a grievance with a Project Architect, which we are of the view has not and continues to not be acting professionally as per the Codes and Conduct expected of this professional body.</p> <p>Please let us share a brief of our Project and the rationale of our coming to conclude the likelihood of the said esteemed Architect Firm being seen not having conducted himself professionally.</p> <p>Provide below details on Certifications duly issued with the requisite authentication.</p> <table border="1" data-bbox="432 1129 1097 1321"> <thead> <tr> <th data-bbox="432 1129 495 1257">S N</th> <th data-bbox="495 1129 804 1257">Contract Compliance Condition Precedent to Warrant Issuance of Final Certificate</th> <th data-bbox="804 1129 1097 1257">Date of Authentication</th> </tr> </thead> <tbody> <tr> <td data-bbox="432 1257 495 1321">1</td> <td data-bbox="495 1257 804 1321">Certificate of Practical Completion (CPC)</td> <td data-bbox="804 1257 1097 1321">18th. Mar 2019</td> </tr> </tbody> </table>	S N	Contract Compliance Condition Precedent to Warrant Issuance of Final Certificate	Date of Authentication	1	Certificate of Practical Completion (CPC)	18 th . Mar 2019	<p>Dear Sir,</p> <p>We refer to your query as received on 5 April 2022.</p> <p>We note your reference to Clauses 30.10, 30.12 and 30.14 of the PAM Contract 2006 (With Quantities) which outline the timeline, procedures and documents required, pertaining to the Final Account, Conclusiveness of the Final Account and Issuance of the Final Certificate. Nevertheless, as there are no details informing us on either your grievance or the conduct of the Architect in relation to the relevant Clauses mentioned, we have difficulty in advising you accordingly.</p> <p>If either of the contractual parties (i.e. the Employer or Contractor) should feel aggrieved as a result of the Architect's actions, we would normally advise that the aggrieved party should first approach the Architect to review and discuss the cause of such grief. If after such discussion, there is still a disagreement, either of the contractual parties may give notice that there is a dispute, and they may make use of the Alternative Dispute Resolution (ADR) Clauses stipulated in the PAM Contract 2006 (Clauses 34 and 35) to resolve this dispute. We are of the opinion that wherever possible, it is always advisable to negotiate a resolution of any dispute.</p>
S N	Contract Compliance Condition Precedent to Warrant Issuance of Final Certificate	Date of Authentication							
1	Certificate of Practical Completion (CPC)	18 th . Mar 2019							

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		2	Interim Certificate of Payment (ICP) No. 14 - Release of 1 st . Moiety	23 rd Aug 2021	<p>If you are of the opinion that the architect is not conducting himself in accordance with his Code of Conduct, you may consider filing a complaint with PAM. Kindly note though that PAM is a Professional Institute for architects and that we are only empowered to act if the architect in question is a PAM member. Furthermore, any disciplinary action that PAM may take is restricted to either a reprimand, suspension or expulsion from the Institute only.</p> <p>Alternatively, you may also file a complaint with <i>Lembaga Arkitek Malaysia</i> (LAM) as this is the statutory body empowered to regulate the conduct of all registered architects. The penalties from LAM extend to reprimands, suspension, imposition of fines or de-registration. Please be advised though that in accordance with our Constitution, PAM is unable to act on any complaint if a similar complaint has already been lodged with LAM.</p> <p>Lastly, you may also address your grievance by taking legal action against the architect and if this is indeed your intended course of action, we would suggest that you seek legal advice before taking any further action.</p> <p>We hope that this is helpful.</p>
3	Certificate of Making Good Defects (CMGD)	20 th . Sept 2021			
4	ICP No. 15 - Release of 2 nd . Moiety	24 th . Sept 2021			
5	Statement of Final Account	8 th . Nov 2021			
5a	Consultant Quantity Surveyor	Signed: 8 th . Nov '21			
5b	Contractor	Signed: 18 th . Nov '21			
5c	Architect	Signed: 23 rd . Nov '21			
	23 March 2022	<p>We are in the final stages of construction for a project administered under the PAM Contract 2006. The contract involves 4 NSCs (Fire services, plumbing, electrical, mechanical ventilation) appointed according to the PAM Subcontract Form 2006 as well. In December last year, a part of the site was subject to flood damage to a basement level mainly due to the OSD pumps not being operational at the time.</p> <p>The floodwaters damaged M&E equipment in the basement, several doors were to be replaced along with making good of wall surfaces.</p>			<p>We refer to your email entitled 'Contract Administration' dated 23 March 2022</p> <p>Kindly note the following: We presume the project is still under construction with the Certificate of Practical Completion yet to be issued.</p> <p>Question 1:</p> <p>It is our opinion that the party responsible for arranging, purchasing and maintenance of the relevant insurance policy should also be the principal party responsible for the bearing of the insurance excess. As you make mention in Clause 20.A.4 of the PAM 2006 Form of Contract, this party would be the Contractor.</p>

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		<p><u>Question 1</u> The insurance policy has an excess amount, say RM20,000. The contractor has proposed to split the cost of the excess amount proportionally between the NSCs affected and himself. As contract administrator, what should the advice be on this matter with regards to who should pay the excess amount, with regard to Clause 20.A.4?</p> <p><u>Question 2</u> A recurrence of flooding occurred after several months with a lesser degree of damage. This time, the OSD pumps were operational but one of the pumps caused the (temporary) electricity supply to trip. The contractor claims it is due to the fact that the site has no permanent power supply (due to delays by TNB) and therefore could not foresee the OSD pump failure. The NSCs contend that they should not be financially responsible for both the first and the second occurrence. Who should be responsible for the costs incurred relating to the repairs?</p>	<p>We note though that Clause 20.A.4 of the PAM Form (as well as Clause 20.4 of the PAM Sub-Contract 2006) makes no mention of the sharing of the excess among any of the affected parties. Hence, we are also of the opinion that the Architect has no contractual basis to direct for the sharing of the excess amongst any other affected parties.</p> <p>Nevertheless, the Contractor may take the initiative to negotiate with his sub-contractors for such a sharing of the excess but such an endeavour shall be solely his responsibility.</p> <p><u>Question 2:</u></p> <p>Under the PAM Form of Contract, there is only one party which is recognised as being responsible for the execution and completion of the Works (including any repair works which may be required during construction), which is the Contractor. Although it is in the Architect's interest to ascertain the cause of any faults or damage which may occur during construction, it is not within his purview to determine which of the participating parties (such as the various sub-contractors) should bear the responsibility for the rectification of such faults or damage as the task of managing the site and various sub-contractors is wholly the Contractor's responsibility. Under the above circumstances, we would advise that any decision on the bearing of such costs be left with the Contractor.</p> <p>We hope the above has been of assistance.</p>
	7 March 2022	<p>Dear PAM,</p> <p>I am M&E Consultant Engineer we had a project using PAM sub-contract in M&E Nominated Sub-Contract work.</p> <p>We want to clarify any clause in PAM Sub-Contract for a project, due to the contractor keeps delaying the work to completion after the promised date. The project had a delay in completion and after the completion, the system always has issue occur such as the lift always happening trapping</p>	<p>We refer to your email entitled " PAM sub-contract -queries' dated 7 March 2022 and note that we have difficulty understanding your query. As there was very little detail of your building contract provided, we shall, for convenience, base our reply on the PAM Contract 2018 / PAM sub-contract 2018 which is commonly used for private projects in Malaysia:</p> <p>Kindly note the following:</p>

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		<p>the passenger in the lift and the poor installation workmanship.</p> <p>Do we have the right to hold or omit their payment for the installation work portion from their contract since the works are not up to the satisfaction of the owner?</p>	<p>1. Firstly, the PAM Sub-contract 2018 is to be used only for <u>Nominated Sub-Contracts</u> where the main Building Contract between the "<u>Employer</u>" and "<u>Contractor</u>" is based on the PAM Contract 2018.</p> <p>The appointment of such a "<u>Nominated Sub-Contractor</u>" (NSC) has to be carried out in accordance with clause 27.2 of the main Building Contract with the Nominated Sub-Contract being an agreement entered into by the "<u>Contractor</u>" and "<u>NSC</u>" and in accordance with clause 27.10 of the Building Contract, there shall be no privity of contract between the Employer and the NSC.</p> <p>Kindly note that the terms "Employer, Contractor" and "Nominated Sub-Contractor" are clearly defined under Article 7 of the PAM Contract 2018 and as such, we have difficulty understanding your query regarding the "contractor's" delay/performance relative to the "PAM Sub-Contract" as in the PAM Sub-contract 2018, the main burden of the proper and timely execution of work falls on the NSC rather than the Contractor. We can confirm that there are clauses in the PAM Sub-contract 2018 detailing the NSC's obligations and the Contractor's right in the event of underperformance or late completion but in the absence of any details from yourself, we have difficulty in advising you of the specific clauses which you may refer to. We would advise that you review the PAM Sub-Contract 2018 to determine which of the clauses may be of relevance to you.</p> <p>2. Based on what we can gather from your query, we assume that the relevant work has since been practically completed. If there are defects now arising, we would suggest that you refer to clauses 17.5 to 17.8 of the PAM Sub-Contract 2018.</p> <p>.</p> <p>3. Clause 17.6 of the PAM Sub-Contract 2018 already provides that the Contractor (and not the Employer or Architect) may at any time during the defect liability period, issue written instructions requiring any critical defects which need urgent rectification, to be made good within a reasonable time specified by the Contractor at the NSC's cost. If the NSC fails to attend to such defects within the time specified by the Contractor, the Contractor may employ and pay another person</p>

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			<p>to rectify such defects and all costs incurred shall be set off by the Contractor (in accordance with clause 26.13 of the sub-contract)</p> <p>4. Based on the above, kindly note that the Employer is not empowered to withhold or omit any payment for the installation of such work, due to the NSC.</p> <p>5. We strongly advise that you discuss the above matter with the Architect (as the contract administrator), to review the possible courses of action to remedy any of your issues. As some of your recurring issues concern health and safety, these may have to be looked at urgently and if the "poor installation workmanship" is patently obvious, you may want to check with the relevant Consultant in charge to ascertain the basis upon which completion was certified.</p>