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The Relevance of the Contract Administrator's Certificates under the Principle Forms of Irish Building Contract.

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ABSTRACT

Decision-making is a key aspect of contract administration, and includes duties such as certification. This process requires the contract administrator to exercise judgement on various matters arising from the performance of the contract. In the Republic of Ireland, the principle forms of main contract are the Royal Institution of Architects in Ireland (RIAI) 'Yellow Form' for private sector work and the Government Construction Contracts Committee (GCCC) Public Works Contract for public sector contracts. These contracts require the contract administrator to issue certain certificates. This study identifies these certificates and explains the relevance of each.

The discussion describes the characteristics of certificates and examines whether liabilities may arise from their issue. The purpose, relevance and implications of the various certificates are explained. The study reveals that certificates are issued to provide cashflow, and to mark various routine and non-routine events which may, or may not, arise on a contract. Certificates are indicated to be conditions precedent to various duties such as payment and, with the exception of aspects of final certificates, are generally non-conclusive in nature.

The study is intended as an aid to Irish students undertaking undergraduate and conversion masters courses in quantity surveying and construction management related disciplines.

Certificates

Murdoch and Hughes (2008) claim that certification is the most important aspect of the contract administrator's powers. This process requires architects under the RIAI contract and employer's representatives under the GCCC contracts to act as independent professionals and to be fair to all parties to the contract. They approve of Wallace's definition of a certificate as: *'the expression in a definite form of the*

exercise of the judgement, opinion or skill of the engineer, architect or surveyor in relation to some matter provided for by the terms of the contract.’ They note that not every contract administrator’s opinion or decision amounts to a certificate. *‘It will only be a certificate if it is so described in the contract, or can be so treated by implication.’* They note that where a contract is silent on how certificates may be given, it need not be given in any specific format, but, there is a clear assumption that certificates should be in writing.

Murdoch and Hughes (2008) note that the wording of contracts may require the contract administrator to ‘make decisions’ or to ‘give opinions’. They refer to ‘certification by another name’ which may describe various actions carried out by administrators in the course of their duties. For example, they show that under the JCT contract, where an employer takes possession of part of the works before practical completion, the contract administrator must issue a *‘written statement’* identifying the part taken into possession, They argue that such a statement amounts, in effect, to a certificate of practical completion for that part. There could, therefore, be numerous similar actions within a contract which may be said to approach ‘certification’. These are not examined here and this study is confined to those certificates issued by the administrator which are commonly discussed within the literature, or are identifiable within the GCCC and RIAI contracts.

It should be noted that contract administrators also routinely issue various certificates which are not required by the contract itself but may be necessary to comply with statutory requirements or to provide warranties to third parties. Examples of such certificates include certificates of compliance to funders, fire certificates, and so on. Likewise, contractors may also be required to provide evidence in the form of certificates that certain requirements have been carried out, or that specified arrangements are in place. For example, test certificates, certificates of compliance with registered employment agreements etc. These certificates are not discussed here.

Liability for Certificates

An important question arising from the issue of certificates is whether these create a duty of care to which liability may be attached.

Murdoch and Hughes (2008) comment that in the past it was believed a contract administrator was acting in a '*quasi-judicial*' capacity when issuing certificates, and should therefore enjoy a similar immunity from claims in negligence as that afforded to arbitrators and judges. This principle was overturned in the 1974 case of *Sutcliffe v Thackrah* where an architect over-valued a series of certificates, and the contractor went into liquidation before completing the contract with the result that the employer could not recover the overpayment. The judgement in this case held that the architect was not acting in a quasi-judicial capacity and had no immunity from liability and was therefore liable to compensate the employer for the money lost. Liability to employers may now arise in various decision-making and certification situations such as negligently granting extensions of time to which a contractor was not entitled and which caused the employer to forfeit liquidated damages. Contract administrators are therefore advised to notify quantity surveyors of any defective work, so that it can be excluded from the quantity surveyor's valuation.

Murdoch and Hughes (2008) question whether there would be an equivalent liability to the contractor for negligent *under-certification*. They point out that late or underpayment for work, even where subsequently corrected, may cause a contractor substantial loss due to an expensive interruption of cash flow. They report the case of *Pacific Associates Inc. v Baxter*, where the court would not allow the law of tort to import additional obligations into a carefully structured contractual environment. They also report that the court did not favour tort claims as a matter of general principle in such circumstances. They are not clear, however, as to how far the authority of this decision extends, as the three trial judges stressed the importance of both an arbitration clause and an exemption condition included in that particular contract. They suggest that in the absence of one or both of these factors, there *might* be a contrary decision. They note, however, that this case has been used to justify a decision that an architect owes no duty of care whatsoever to a contractor in relation to certification duties under the contract.

On the other hand, a contract administrator who colludes with the employer instead of exercising independent judgement, or who *deliberately* misapplies the contract, will probably be liable to the contractor. (Murdoch and Hughes, 2008)

Certificates Under The RIAI and GCCC contracts

The issue of certificates invariably has a financial implication and usually confirms that a sum of money is due to the contractor. Certificates may provide for regular cash-flow or indicate that a certain event has, or has not, occurred. The reader is referred to Cunningham (2012) who explains the methodology for compiling valuations for interim, practical completion, partial possession, and final certificates under the RIAI and GCCC contracts. He also describes the roles of quantity surveyors in processing the valuations required by these certificates.

Table 1 sets out the various certificates which may be required by the RIAI and GCCC contracts. These form the focus of this study. Routine certificates are discussed first in the order in which they arise during the contract, and this discussion is followed by the examination of non-routine certificates.

Type of Certificate	GCCC Contract	RIAI Contract	Application
Interim	11.1.3	35 (b)	Routine
Practical completion	9.6	31	Routine
Penultimate	11.5.2	No RIAI equivalent	Routine GCCC contracts
Completion / Defects	8.7	32A (vi) (ii)	Routine
Final	11.5.3	35 (i)	Routine
Possession	9.7	32	Phased Contracts
Non-completion	9.8.3	29(a)	Delayed contracts (common)
Default / Termination	12.2.9 & 12.6.4	33 & 34	Contract default (rare)

Table 1 – Certificates Under The GCCC and RIAI Contracts

Routine Certificates

Interim Certificates

The purpose of interim certificates is to pay the contractor during the course of the project. For most contractors interim certificates form their only source of income,

from which they must fund the whole of their building operations, including paying wages, materials and subcontractors. They depend on full and timely payments to operate their business effectively. The effect of late or underpayment may range from causing inconvenience to creating major difficulties. Where this occurs on a number of separate projects the cumulative effects may be catastrophic and may force company insolvency.

The proper administration of the contract's payment provisions is vital to the smooth running of a contract. Failure to pay contractors on time or in full is one of the main causes of friction affecting working relationships on site, creating unnecessary strain and frustration, destroying goodwill and damaging professional reputations in the process.

Clause 35 of the RIAI contract provides that contractors are to be paid at four week intervals unless otherwise stated in its appendix. The certificate states the amount due to the contractor and identifies the amounts included for nominated subcontractors.

Section 11 of the GCCC Contract is broadly similar in approach to interim payments as the RIAI form, but includes a number of different payment particulars. The principle differences between the forms are: that payments are monthly, the payment timetable is longer, minimum value thresholds for payments may be stipulated, and that these contracts do not cater for nominated subcontractors.

Interim certificates create a duty for the employer to pay and these must be honoured when payment falls due. Failure by the employer to honour a certificate in full gives the contractor the right to charge interest on the outstanding amount. In more serious cases failure to pay is seen as going to the root of the contract and allows the contractor, subject to notice, to suspend work for 10 days (RIAI) and 15 days (GCCC) respectively. Where payment is still not received by the end of these periods, the contractor may determine his/her employment. Ramus, Birchall and Griffiths (2006) advise that this sanction should only be exercised where substantial amounts of money are outstanding.

It is important to note that interim certificates are not conclusive. This means that certified work or materials may not necessarily be in accordance with the contract. Murdoch and Hughes (2008) claim that this means that it is open to the employer to

show that, despite the certificate, the contractor is not entitled to payment. It also means that any interim certificate can be corrected by the contract administrator when the next interim certificate is issued. The 'provisional' nature of certificates allows them to be subsequently adjusted to take account of matters such as arithmetical errors, latent defects etc.

Murdoch and Hughes (2008) address the question of whether a contractor is entitled to demand interim payments in the absence of an interim certificate. They comment that wherever the contract provides for payment of money following the issue of a certificate, it becomes a 'condition precedent' to such payment. They claim that a contractor who feels that work has been undervalued on an interim certificate should either demand a further certificate or seek arbitration under the contract. They note however, that contractors have recovered money where an employer improperly ordered the architect not to certify more than a certain amount.

Practical Completion

Practical completion occurs when the contract administrator is satisfied that the works may be handed over to the employer. This event is recorded by the Certificate of Practical Completion under Clause 31 of the RIAI contract, and the Certificate of Substantial Completion under Section 9.6 of the GCCC contract. These certificates record that the work has been satisfactorily carried out and can be taken over by the employer. In practice this certificate may be issued despite the existence of outstanding minor snagging works which will need to be completed. Such works should not interfere with, or interrupt the occupation of the building. These certificates are therefore not conclusive - the contractor remains responsible for completing the works in accordance with the contract.

The Certificate of Practical Completion has several important consequences.

Work Scope

As the works are now complete, the contractor is not required to carry out architects' instructions ordering additional work. The contractor may, of course, welcome such work, but it will be seen as being a new agreement and the terms in the original contract, such as bill rates, would no longer apply. (Ashworth, 2006)

Insurance

The employer becomes responsible for insuring the physical works. This means that the contractor's all-risks insurance policies under clause 22(b) of the RIAI contract can be terminated by the contractor. Under the GCCC contracts contractors' all risks insurance must be maintained until the Defects Certificate is issued, to cover loss and damage for which the Contractor remains responsible. The contractor must, under both contracts, maintain full public and employer's liability insurance until the final completion of the works is achieved. This is usually achieved when the Certificate of Making Good Defects (RIAI) and Defects Certificate (GCCC) have been issued. (Keane, 2001).

Liquidated Damages

The contractor's exposure to liability for additional liquidated damages ceases with the issue of practical completion certificates. The employer may, nevertheless, apply liquidated damages for any period of delay for which the contractor was responsible between the original contract completion date and the actual date of practical completion.

Retention Arrangements

The practical completion certificates release retention monies. Under the RIAI and GCCC contracts full retention may be released where contractor provides a retention bond. More usually the first 'moiety' (half) of the retention is released. The practical completion certificates are usually issued in tandem with an interim certificate to give effect to the release of retention.

Defects Liability

The defects liability period commences. This commences the day after the issue of the Certificate of Practical Completion under the RIAI contract. During this period the contractor remains responsible for making good defective work within a reasonable time of receiving an architect's / employer's representative's instruction at no cost to the employer.

Period of Final Measurement

The period of final measurement commences after the deadline for the receipt of information has been passed. Under the RIAI contract the contractor must provide all such final account details within three months of practical completion. The appendix sets a subsequent default period of six months to complete the final account. The corresponding timetable under the GCCC contracts is two months for the submission of documentation and a further three months for the calculation of the final account.

Payment

After the date of practical completion interim certificates are to be issued as and when money becomes due to the main contractor, although the architect / employer's representative may not be required to issue an interim certificate within four weeks / one month of the previous certificate or where a minimum threshold applies. The final payment in this series is frequently linked to the certificate of making good defects has led to it being often described as the 'penultimate certificate' (see below).

Penultimate Certificates

The penultimate certificate is a requirement of Section 11.5.2 of the GCCC contract and is used primarily to expedite settlement of the final account. The RIAI has no specific requirements to issue a penultimate certificate *per se*, nevertheless the term is used to describe the last interim certificate in advance of the Final Certificate. this frequently is issued on completion of the making good of defects .

The GCCC contract requires the employer's representative to issue a Penultimate Certificate within three months of receiving the contractor's full and final statement following substantial completion of the work. Where the contractor does not submit a statement the Penultimate Certificate is to be issued within five months of substantial completion. The Penultimate Certificate certifies '*the amount that, in the Employer's Representative's opinion, will be due from the Employer to the Contractor, less any final retention to be paid after the Defects Certificate is issued, or from the Contractor to the Employer.*' In practical terms this would normally only leave the final release of retention as a balance to be paid in the Final Certificate.

Howley and Lang (2008) comment that the contractor's Final Statement must be comprehensive and complete and include all accounts which he/she believes they are entitled to. Failure to include any such items will result in the loss of entitlement to be reimbursed for them. This places a heavy onus on contractors to ensure that sub-contractors, in particular, provide the necessary accounts promptly.

Completion / Defects Certificates

These certificates are issued following the final snagging of the work, and the architect / employer's representative is satisfied that the defects have been rectified and the defects liability period has expired. These certificates release the remainder of the retention due to the contractor and satisfies one the prerequisites to issuing the Final Certificate. Contractors, however, remain responsible for defective work appearing during the period covered by the Statute of Limitations (Ashworth, 2006).

Clause 31 of the RIAI requires the architect to issue a final list of defects for the works within 20 working days of the expiry of the Defects Liability Period. Clause 32B (e) sets out similar requirements for the relevant part(s) on contracts involving sectional completion or partial possession of the building. When these are rectified the architect will issue a *Certificate of Completion of making good defects* to that effect.

Section 8.7 of the GCCC contract contains similar timetable arrangements and requires the employer's representative to issue a Defects Certificate to that effect. This certificate confirms that the defects period has ended and the contractor's requirement to co-insure the works is at an end.

The Final Certificate

The Final Certificate documents final performance, or discharge, of the contract. This in effect signals that the contract is finished. Final certificates are generally *conclusive* that the architects /employer's representative is satisfied with the quality of the completed work. i.e. it is in accordance with the contract. Final certificates are also generally *conclusive* that the contract sum and the contract period have been properly adjusted in accordance with the terms of the contract. Murdoch and Hughes (2008) comment, however, that certain contracts may permit clerical or arithmetical errors to be corrected, but all extensions of time are deemed to be correct, and all the contractor's money claims have been properly accounted for. There are exceptions to

the conclusive nature of the certificate where fraud, dishonesty, or fraudulent concealment is involved or where latent defects arise. The Final Certificate certifies the outstanding balance on the final account; this is usually in favour of the contractor.

Under the RIAI contract, the architect notifies contractor of his/her intention to issue the final certificate ten days after the last of the following events

- The end of the defects liability period or
- Completion of making good defects or
- Completion of all items of work outstanding at practical completion or
- End of the period of final measurement.

This action will usually bring to a head any outstanding disputes between the parties. If either of the contracting parties dispute the issue of the Final Certificate, they must refer the matter to arbitration. In such instances the issue of the Final Certificate will be delayed until the arbitrator makes his/her award (Keane, 2001). If there is no challenge following the service of the above notice it will be taken that both parties are in agreement with the final account.

If the architect fails to issue a Final Certificate the contractor is entitled to interest for outstanding period (unless referred to arbitration). If the employer fails to honour the Final Certificate then contractor is entitled to interest for outstanding period.

Section 11.5. 2 of The GCCC contract deals with final certificates and has similar consequences to the RIAI contract discussed above. The employer's representative is required to issue the Final Certificate within three months of the issue of the Defects Certificate. The final payment should normally be the outstanding balance of the retention fund unless any of the following matters arise: -

- compensation events after substantial completion,
- amounts owed by the contractor to the employer, or
- counter-charges under Section 11.4 for example failing to provide collateral warranties, certificates etc. and

- other amounts to be paid after Substantial Completion such as testing after Substantial Completion.

Howley and Lang (2008) comment that the Final Certificate '*cannot adjust any values contained in the Penultimate Certificate*' Likewise items which were not included in the contractor's Final Statement cannot be added at this stage.

The employer must pay the balance within 15 working days. If the employer is owed money the contractor must pay the amount due within 10 days.

The GCCC also states that the Final Certificate '*will not relieve the contractor of any obligations, or be evidence of the value of work or that work has been completed satisfactorily*'.

Non-Routine Certificates

Possession Certificates

Possession certificates are issued on contracts which specify phased completion, or where the employer takes over part of the works before overall practical completion. The various phases may almost be seen as separate contracts, and these certificates have similar payment and insurance implications to practical completion certificates on non-phased works. These certificates also trigger the defects liability period, the period of final measurement, and cease the contractor's exposure to liquidated damages for the particular sections.

Under Clause 32A of the RIAI form the *Possession Certificate* describes the relevant part and provides an estimate of the 'relevant percentage' of the overall contract value. The certificate is issued at least three days before handover to employer. The employer is then required to insure the relevant part two days after the issue of the certificate and the contractor's all risks liability is reduced pro-rata. The valuation will usually be prepared by the QS and will include components such as variations claims and fluctuations if appropriate. The certificate also releases half the retention for the relevant part.

Keane (2001) warns of the possible dangers when these provisions are not properly adhered to. He reports the case of *English Industrial Estates Corporation v George Wimpey and Co Ltd* [1972] where the employer had taken partial possession of the

works when a fire seriously damaged the building. The court held that *'the contractor was still liable as the architect had not issued the appropriate certificate.'*

A *Certificate of Substantial Completion of a Section of the Works*, is the corresponding certificate issued under Section 9.7 of the GCCC contract. The contractor must request this certificate and the employer's representative has 20 days in which to issue it. This certificate has a five day notice period to the contractor. Section 11.1 requires an interim payment to be made in conjunction with this certificate and the contractor must identify all monies owed in respect of the relative section in his application for payment.

Certificates of Non Completion

Murdoch and Hughes (2008) note that non-completion certificates record the contractor's failure to complete the works by the completion date. Its importance is that it triggers the contractor's liability to pay liquidated damages.

Under Clause 29 (a) of the RIAI contract if the contractor fails to complete the works by the completion date, or any extended period granted by the architect, the architect is required to issue a certificate to the effect that the work ought reasonably to have been completed. This certificate is sent to both the contractor and the employer, and gives the employer the option to deduct liquidated and ascertained damages as set out in the appendix, for the period between the date for completion and the Date of Practical Completion.

The corresponding wording of the GCCC contract at section 9.8.1 states:

'If the Works do not reach Substantial Completion by the Date for Substantial Completion of the Works, the Contractor shall pay the Employer [and the Employer may deduct from payments to the Contractor] liquidated damages calculated at the rate stated in the Schedule, part 1G, for the period from the Date for Substantial Completion of the Works to the date of substantial completion of the Works.'

Section 9.8.3. continues: *'substantial completion means the date certified by the employer's representative that the works or section reached substantial completion.'*

While this wording may not require a non-completion certificate *per se* there is a clear implication that a judgement is to be made regarding the duration of the contractor's period of culpable delay.

Termination Certificates

These certificates are rarely required in practice.

Where one of the contracting parties commits a fundamental breach of contract, such as where the employer fails to pay, or where the contractor fails to build, the building contract will usually provide that the injured party may determine the contract in these instances. Section 12 of the GCCC contract deals with termination, and sets out the various issues which entitle the parties to determine the contract. Section 12.2.9 requires the employer's representative to certify '*the termination amount*' which sets out the value of the works on termination, plus the cost of the 'completion contract'. In effect this certifies the additional costs borne by the employer in completing the contract. It is unlikely that a balance will be due to the contractor in these circumstances.

Section 12.6.2 of the GCCC provides for where a contract is terminated by either the contractor or at the employer's election, the employer's representative will be required to issue a certificate within ten working day of receiving a statement of the 'termination sum' from the contractor. This is likely to create a balance due to the contractor which the employer is required to honour within 15 days.

Similar procedures are set out in the RIAI contract at Clauses 33 and 34, (Determination by the Employer and Determination by the Contractor respectively.) Clause 33 (c) (iv) requires that '*the Architect shall certify the amount of expenses properly incurred by the Employer*'. Likewise, Clause 34 provides for outstanding work, loss and expenses which '*the Contractor shall thereupon be paid by the Employer*', this no doubt will require the issue of an architect's certificate.

Conclusion

This study has identified the various certificates which may be required under the principal RIAI and GCCC forms of contract. The discussion described the characteristics of certificates and examined whether liabilities may arise from their issue. The purpose, relevance and implications of the various certificates were then explained. The study revealed that certificates are issued to provide cashflow, and to mark various routine and non-routine events which may, or may not, arise on a contract. Certificates are indicated to be conditions precedent to duties such as

payment and, with the exception of aspects of final certificates, are generally non-conclusive.

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