

PAM PRACTICE BUREAU

CATEGORY G: CONTRACT ADMINISTRATION

No.	DATE	ENQUIRY	RESPONSE FROM TEAM
1.	24 Nov 2021	<p>1. Architect's Practice During DLP period, the cold-water pipe above the ceiling burst and caused the ceiling board to collapse. Such collision of the ceiling had directly caused bad damage to the bed and mattress below the ceiling. The Contractor has made good the affected pipes and ceiling to comply with his obligation under the Contract.</p> <p><u>Questions:</u></p> <p>a) Is the Contractor also liable to compensate the Developer for the damages to the bed and mattress caused by the defective pipe burst under the PAM Contract 2006?</p> <p>b) As the House Owner wanted to claim the Developer for compensation for the damaged bed and mattress instead of claiming from his own house fire insurance, is the developer liable to pay such compensation under the Standard Sales and Purchase Agreement?</p> <p>2. Contract Administration The developer had issued VP for a landed housing project. One of the house owners lodged a defect complaint 1.5 years after VP on most Sanitary fittings which occurred bubbling/blistering effect on the chrome surface.</p> <p>Only 5 house owners out of 450 houses lodged a similar complaint about the defective sanitary fittings.</p> <p>The contractor then submitted the test report run by the product Manufacturer which stated nothing wrong with the product and claimed the bubbling effect was due to the</p>	<p>We refer to your query as received on 24 November 2021, and we write to note the following.</p> <p>1. Architect's Practice</p> <p><u>Replies:</u></p> <p>a) Based on PAM Contract 2006, the Contractor is obliged to only rectify the defects which are detected/ occur, during the Defects Liability Period, to the building for which he was contracted to construct.</p> <p>b) With respect to the Sale & Purchase Agreements under the Housing Development (Control & Licensing) Regulations 1989, we are unaware of any contractual obligations on the part of the Developer to compensate the Purchaser for any damage to the contents of the property after the giving of vacant possession. Nevertheless, please be advised that Purchasers may still attempt to pursue their rights under the above regulations or common law and we would suggest that the Developer seek legal advice on the above.</p> <p>2. Contract Administration</p> <p><u>Replies:</u></p> <p>a) In accordance with PAM Contract 2006, It is the contractor's responsibility to rectify all defects which occur or are detected during Defects Liability Period.</p> <p>Irrespective of the innocence claimed by the various parties, it is the Architect's responsibility to assess the defect and determine if it is a <i>bona fide</i> defect as per Article 7(x) of the Contract.</p>

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		<p>wrongly use of strong acid for cleaning. The correct cleaning manual was also stated in the Home User Manual issued to the owner during VP.</p> <p>The Contractor claimed that he did not use any strong acid or inappropriate cleaning detergents for cleaning the sanitary fittings prior CPC. All units remained unattended until the issuance of VP by the developer to the owner.</p> <p>House Owner also claimed that he did not use any strong acid or inappropriate cleaning detergents for cleaning the sanitary fittings.</p> <p>Hence, the cause of the bubbling effects on the sanitary fittings remained uncleared and the developer is requesting the SO to resolve the issue.</p> <p><u>Questions:</u></p> <p>a) Since all parties claimed innocent on the cause of the sanitary fitting problem, is the Contractor still liable for changing and replacing all affected defective sanitary fittings as the DLP has not ended?</p> <p>b) What dispute resolution can be carried out for the above dispute involving among few parties (house owner, developer, Contractor and Manufacturer)?</p>	<p>All Architects should have the technical competence to carry out the above assessment but if there are disputes regarding this assessment, you may also advise the Employer to engage an independent and qualified consultant to carry out the assessment. We are of the opinion that such an independent assessment would be beneficial in determining subsequent action against the Developer, specifier or any other relevant party who is responsible for the defects</p> <p>Should you have difficulty finding an independent consultant, you may contact Architect Centre Sdn. Bhd [ACSB] at info@architectcentre.com.my or O: 03 2201 662.</p> <p>If it is determined that it is a bona fide defect, the Architect may issue instructions to rectify or repair the said defect.</p> <p>If there is a dispute between the Contractor and Employer on the defect, the Architect may still issue instructions to the Contractor to carry out the necessary rectification work and if the Contractor declines to carry out the instruction, the Employer may employ others to carry out the rectification in accordance with clause 15.4 of the Contract.</p> <p>If there is indeed a dispute between the Contractor and Employer on the defect, they can seek to resolve their dispute by arbitration (as allowed for in the Contract) or by negotiations.</p> <p>b) As there are two (2) distinct contracts with different contractual obligations and parties, we would advise that any disputes be confined to the respective contracts with their corresponding, contractual parties.</p> <p>For the Building Contract, a possible avenue for dispute resolution has already been given above.</p>

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			<p>For the Sale and Purchase Agreement, there are already provisions for the handling of defects and we would advise Purchasers and the Developer to refer to the Agreement for guidance.</p> <p>Please also be advised that Purchasers may also file complaints with the Tribunal for Homebuyer's Claims (Housing Tribunal) as established by the Ministry of Urban Well-being, Housing and Local Government or, if the property is stratified, they may also file a complaint with the Commissioner of Building in charge of the area in question.</p> <p>We trust the above has been helpful.</p>
2.	17 Nov 2021	<p>RE: CLAUSES IN THE PAM CONTRACT PAM Sub- Contract 2006 Date of award by main contractor: 16 October 2020 Date of determination of main contractor: 1 October 2021</p> <p><u>Outstanding/overdue payment</u></p> <p>a. Paycert 2 – 12/4/2021 with due date 12/5/2021 b. Paycert 3 – 28/5/2021 with due date 27/6/2021 c. Paycert 4 – 28/6/2021 with due date 28/7/2021</p> <p><u>Queries</u></p> <p>1. How do we recover debts from main contractor? 2. Can we initiate legal action towards the main contractor to recover debts? 3. Do we have to wait for final account claim to recover debts? If so, final account claim shall be under the previous main contractor or the new main contractor? 4. How does PAM protect NS/NSC in the case of determination and there is outstanding/overdue payment?</p>	<p>Dear Sir/Madam,</p> <p>We refer to your email dated 17 Nov 2021 and note that there are insufficient details on the project for us to reply comprehensively. Nevertheless, as you have mentioned that PAM Sub-Contract 2006 ('Sub Contract') was in use, we shall respond to your query (without prejudice) based on the PAM Sub-Contract 2006 but note that this reply is not applicable to Nominated Suppliers, Domestic Sub-Contractors or Suppliers.</p> <p>1. You have mentioned that the Main Contractor has been determined; as we are not sure whether such determination was by the Contractor himself or by the Employer, we advise that you refer to Clause 25 of the Subcontract to ascertain your contractual rights. Regardless of either way of determination, kindly note that your Sub Contract should also have been automatically determined.</p> <p>2. All existing debts or outstanding payments from the main contractor can still be recovered by yourself in accordance with clause 26.0 of the NSC Form. Any other amounts may be recovered by following the provisions as provided under Clause 23.6 and 23.7, or Clause 26.4 and 26.5 of the Main Contract.</p>

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		<p><u>Outstanding uncertified claim</u> Claim 5 submission date 23/9/2021. The inspection was done and verified on 26/10/2021.</p> <ol style="list-style-type: none"> 1. If this claim is parked under final account claim, does this mean the final account claim under the previous main contractor or the new main contractor? 2. How does PAM protect NS/NSC in the case of determination and it is parked under the final account claim of the new main contractor? 3. Is there a method to remove this claim and resubmit it under the new main contractor? <p><u>Issuance of Letter of Demand via official transmittal (aconex system)</u></p> <ul style="list-style-type: none"> • 1st letter issued 24/6/2021 • 2nd letter issued 4/8/2021 	<ol style="list-style-type: none"> 3. Contractually, any dispute with regard to the final account or payment shall be referred to Arbitration under Clause 29.0 of the Sub Contract. Nevertheless, you are also at liberty to take legal action to recover any sums due to you. Please be advised that legal action may also include the pursuit of your claims based on using the provisions of the Construction Industry Payment and Adjudication Act 2012 (CIPAA). Should you decide to take legal action, we would suggest that you first seek legal advice on the matter. 4. Based on the information provided, you have only entered into an agreement with the previous Contractor. Therefore, all the 3 outstanding payments remain under the responsibility of the said Main Contractor. 5. Unless otherwise stated in your Contract, there are no provisions in the Main Contract or Sub Contract for the transfer of claims from one Main Contractor to another. 6. Kindly note that PAM (Malaysian Institute of Architects) is a professional institute representing architects in Malaysia and when the PAM Contract and Sub Contract Forms were drafted, it was PAM's intention to have <i>equitable</i> contract documents for the benefit and protection of the contractual parties. However, it must be remembered that PAM as a private institute, is not in the position to govern the conduct, intentions and competence of the various contractual parties.
3.	2 Nov 2021	<p>May I check with PAM if a small-scale project comprising (Package A: 10 units of Terrace House, Package B: 10 units of Shop House) can be tendered and awarded as 1 Contract under the PAM Form of Contract, whereby the Consultant Team comprises 1 Architect but with 2 different Civil & Structural Engineer and 2 different Mechanical & Electrical Engineer, each responsible for Packages A & B respectively?</p>	<p>We refer to your email received dated 3 November 2021 our reply is as follows: Please be advised that our reply is based on the PAM 2006 Form of Contract but that our comments would also equally apply to the PAM 2018 Form as well.</p> <p>Generally, the PAM Form of Contract is designed for:</p> <ul style="list-style-type: none"> • one job package (Works) as stipulated under the Article 7(bf); • at one job location (Site), as stipulated under the Article 7(az); • which is to be awarded to one main contractor (Contractor), as stipulated under Article 7(t); and

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		<p>Does the PAM form of Contract allow for 2 different C&S Engineers and 2 M&E Engineer to be bound as 1 Contract?</p>	<ul style="list-style-type: none"> • which is to be administered by one Architect as stipulated under Article 3 of the Form of Contract. <p>However, there are no specific clauses that restrict the engagement of the consultants as stated in Article 4 to Article 6 to be only ONE person/company. The consultants can be expanded as per intended Work sections as long as the consultants fulfil the qualifications as stated in the Contract and their appointment is aligned with their statutory obligations and codes of conduct.</p> <p>Where necessary, it is up to the Employer and Consultants to sort out any alternative arrangements in accordance with different Works sections. However, it's prudent that each section of work is properly defined and demarcated to prevent possible overlapping of responsibility, mainly infrastructure works such as earthworks, pipelines etc.</p> <p>Although there is no mention of statutory approval in the PAM Form of Contract; it is always essential to ensure the Works / Sections are related to the respective submitting persons and corresponding authority approvals, so that the submitting persons have full knowledge of the Works as carried out on the job site, prior to issuance of relevant certification, i.e. the G Forms for the Certificate of Completion and Compliance (CCC).</p> <p>Taking into consideration the above, if the Employer intends to carry out the procurement and contract documentation beyond the "normal" and "conventional" practice, we strongly advise the Employer to assess the impact with the relevant consultants and to seek legal advice on the intended approach.</p> <p>For additional information on the above, you may refer to your PAM Contract 2006 or 2018.</p>

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4.	24 Sept 2021	<p>Hi Sir, We are having a contract with the main contractor claiming this contract is following the PAM contract. The contract is:</p> <ol style="list-style-type: none"> 1. Traffic Management 2. Environmental management 3. Occupational safety and health 4. Road furniture 5. Pavement works 6. Temporary Diversion Road Works <p>All the scope are temporary items except pavement works. Our queries are:</p> <ol style="list-style-type: none"> a. The contract starts February 2020 and finishes August 2021 but continues as normal, no E.O.T. given until today. [progress only 15%] b. from the first certificate itself main-con deducting 10 % from our monthly payment which is monthly salary, supply of material [until today we never did permanent road works.] c. the contract indicated only 5% retention. <p>Please advise us on this matter.</p>	<p>Thank you for your email dated 24 Sep 2021.</p> <p>First, we are not sure about the clarification required by you as there was basically no question asked in your email.</p> <p>Secondly, you have not provided clear information about your case, including the contractual positions, the exact version of the PAM Contract, terms and conditions, etc.</p> <p>Nevertheless, we would still try our best to provide you with some feedback on the 3 “queries” that you have stated in your email, based on the general conditions of PAM Contract. Please refer to the followings -</p> <p><u>Extension of time (EOT)</u></p> <ul style="list-style-type: none"> • If the Contractor fails to complete the Works by the Completion Date, the Works will deem to be non-completion and will be subject to Liquidated Damages ('LD'). The amount of LD will be ascertained until the date the Contractor has completed the Works. • We are unable to advise further as we do not know the terms and conditions of your Contract. <p><u>Deduction from monthly payment</u></p> <ul style="list-style-type: none"> • We are unable to provide you with any feedback as we have no knowledge whether the terms of your award state any retention sum of your interim payments. <p><u>Retention</u></p> <ul style="list-style-type: none"> • In PAM Contract 2006, unless otherwise stated, the Conditions have stated 10% as the Percentage of Certified Value Retained in the interim payments, and the total value retained shall not exceed the Limit of Retention (5% of the Contract Sum); whereas in PAM Contract 2018, only Percentage of Certified Value Retained has been prescribed at 5%.

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			<ul style="list-style-type: none"> • We advise you to verify the conditions in your Contract. <p>For your information, please also note that PAM Contract is designed for the use between a contractor and an employer, whereas another form of contract - PAM Sub Contract is designed for the use between the main contractor and a nominated sub-contractor('NSC'). It is prudent for you to find out which form of Contract are you referring to.</p> <p>Finally, we strongly suggest that you refer to all relevant terms and conditions as included in your Contract, and study the details as well as the implications. Where necessary, we also advise you to consult the contract administrator or to seek professional legal advice</p> <p>We hope the above answers your queries.</p>
5.	5 Aug 2021	<p>Defects Liability Period (DLP) from March 2021 to September 2022.</p> <p>During June 2021, PPN or new lockdown is implied to the location of the said project.</p> <p>If the contractor cannot do rectification works at these moments, can we extend the DLP later for them to complete the said defects?</p> <p>Are there any professional guidelines for contract administration in relation to Covid-19 in 2021?</p>	<p>We refer to your email dated 5th August 2021 and are pleased to reply as follows:</p> <ol style="list-style-type: none"> 1. This reply assumes that you are using the standard PAM Forms of Contract and that there were no amendments to the conditions of the contract 2. There are no provisions in the PAM Contract to extend the Defects Liability Period which commences upon the issuance of the Certificate of Practical Completion (CPC). However, under Clause 15.4, please note that the Contractor shall make good the defects specified within twenty-eight (28) days after receipt of the schedule of defects (<u>or within such a longer period as may be agreed by the Architect</u>) at the Contractor's costs. You may wish to request the Architect to exercise his discretion to set such a period which is agreeable to the Contractual parties 3. While there are no specific professional guidelines for contract administration in relation to Covid-19 from PAM during 2021, you may wish to refer to the earlier Practice Note which may offer you some insights into any queries you may have on the PAM Form by following this link.

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			<p>http://www.pam.org.my/images/resources/practice_notes/PN3_2020_Covid19-Act.pdf</p> <p>4. We also note though that the current situation regarding SOP's is very fluid as we understand that certain repairs may now be carried out. We would advise as such, that you check with the relevant authorities on whether the defect rectification in question may be carried out by either the contractor or his appointed representatives.</p>