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GCC: EMPLOYER'S UNAVOIDABLE OBLIGATIONS TO HONOUR PAYMENT OF INTERIM PAYMENT AMOUNTS CERTIFIED BY THE ENGINEER

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This article will deal with the Contractor's entitlement for payment of interim payments under the GCC standard form contracts. Although this particular subject and the procedure associated with it should be familiar ground, further discussion and clarification would be of benefit.

In the case of *Johnny Bravo Construction CC v Khato Consulting Engineers CC*, heard in the High Court, Free State Division during February 2015, the Contractor sought to enforce an interim payment certificate which was issued in his favour by the Engineer. However, the Employer refused to make payment on the basis that the quality of the work rendered by the Contractor was not up to standard.

In addition, the allegation was also made that there was collusion between the Contractor and the Engineer and on this basis the Employer justified its refusal to make payment of the entire certified amount.

Accordingly, the question must be asked and the subject of this article is, under what circumstances, if any, under the GCC forms of contract, could the Employer refuse making payment of amounts certified in interim certificates.

What is the Engineer's role? The Engineer administers the contract as agent of the Employer and therefore carries out duties and functions required in terms of the contract.

Under the clauses 6.7.2 and 6.10.1 of GCC 2010, the Contractor is entitled to be paid interim payments after it has submitted its monthly statements to the Engineer who then issues a signed payment certificate to the Employer and Contractor.

Clause 6.10.4 of the GCC 2010 places an obligation on the Engineer to deliver the payment certificate to the Employer and the Contractor within 7 days after the Engineer has received the Contractor's monthly statement, and the Employer is then required to pay the amount due to the Contractor, within 28 days after receipt by the Employer of the Engineer's payment certificate.

Clause 6.10.4 of the GCC 2010 takes it further and requires that in the event of any dissatisfaction in respect of such payment certificate, it should be dealt with in terms of the claims provision. Furthermore payment shall be subject to the Contractor submitting a tax invoice to the Employer for the amount due.

Having followed this process, under what circumstances could the Employer refuse to pay in whole or in part, the amount certified by his agent, the Engineer?

Clause 49.7.1 (GCC 2004) entitles the Employer to deduct any amounts which he is entitled to in terms of the contract or by law, subject to the further requirement by stating in a notice (Clause 6.10.6 of the GCC 2010), the reasons for such deductions, which should accompany the payment.

Another question raised by the *Johnny Bravo* case, was whether the Employer may justify non-payment by pleading that the quality of the work rendered by the Contractor was not up to standard?

The GCC itself provides a period where such defective under standard workmanship can be remedied, which is at a stage prior to final completion, during the defects liability period.

Generally speaking, the Employer is bound by the certificate issued in accordance with the contract by his agent, the Engineer.

Our courts in South Africa have dealt with this issue in the following matters:

In *Job Job Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)*, the agreement provided for interim certificates to be issued by the Employers Agent. The Employer had also refused to make payment of the certified interim certificates based on a defence that "*the principal agent exceeded his mandate by completing the certificates in question*". However, the issue whether the principal agent had exceeded his mandate or not, the court held "*is a dispute between the employer and his agent*".

The Employer in the *Job Job* case, did not succeed with its case and the Contractor had to be paid the amounts certified by its agent.

In another matter of *Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd 1973 (4) SA 181 (D) at 183H – 184H*, the court held that a... “certificate is treated as a liquid document since it is issued by the employer’s agent, with the consequence that the employer is in the same position it would have been in if it had itself signed an acknowledgement of debt in favour of the contractor”... and further that the... “certificate thus embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action subject to the terms of the contract”.

In *Ocean Diners (Pty) Ltd v Golden Hill Construction CC 1993 (3) SA 331 (A)*, the Employer had a quantity surveyor and an architect acting on its behalf as agents and on whose professional expertise the Employer was relying on and in turn expected that these agents would protect its interests. The court held that to the extent that the Employer “has suffered damage through a negligent failure” on the agent(s) part “to act in its best interests, it would (subject to prescription) have an action for damages against them”.

Accordingly, when the Employer’s agent, acts within its mandate in accordance the contract and has in the Employer’s view, certified an incorrect amount for interim payment under the GCC (or under any other standard form construction contract for that matter), the Employer remains obliged to make payment to the Contractor.

If the Employer is dissatisfied with the amount certified in an interim and or penultimate payment certificate, prior the issue of a final payment

certificate, the Employer should notify its dissatisfaction to the Engineer. If it is found that the agent has erred in its certification, the agent should correct or modify its previous certification, in the next certificate.

The situation would differ with regards to the certification of the final payment certificate. What is the Employer to do if the agent issued an inaccurate or incorrect final payment certificate, which certificate is final and binding?

In such case, the Employer is still not deprived from pursuing fair justice. The Employer can either dispute (prior to final agreement) a certified amount by exercising its rights under the dispute resolution procedures, or he may pursue a direct claim against the agent that has arisen due to the agent’s default.

An Employer’s obligation is to make payment against the interim certificate issued by the Engineer. He can however require the Engineer to investigate any mistake that may have occurred and if found, the offending amount can be omitted in subsequent certificates. Interim payment certificates are advances against the final account and can be corrected under clause 6.10.7 in subsequent certificates.

Where amounts are paid against a certificate negligently issued by the Engineer and they are not recoverable from the Contractor, the Employer has a claim against the Engineer to recover such sums that have been incorrectly paid.