

# MDA PRESENTS



## FIRST AID FOR CONTRACTS



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### CLAUSE 3.2.3 – THE EMPLOYER’S RIGHT OF FINAL APPROVAL OF CLAIMS UNDER CLAUSE 10.1.5

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Clause 3.2.3 of the GCC 2015, Third Edition (“*the Contract*”) makes provision for the possibility of the Employer’s Agent requiring the Employer’s specific approval in certain instances for carrying out a part of his functions and duties. Any such requirement must be set out in the Contract Data.

An example of where the Employer’s Agent would require the Employer’s specific approval before carrying out a part of his functions or duties is where the Employer reserves the right to have the right of final approval of claims under clause 10.1.5. This will mean that the Employer will have the final say on any claims submitted by the Contractor in accordance with clause 10.1.1 for extensions of time and additional payment.

Clause 3.2.3 and clause 10.1.5 reads as follows:

*“3.2.3 In the event of the Employer’s Agent being required in terms of his appointment by the Employer to obtain the specific approval of the Employer for carrying out any part of his functions or duties, such requirement shall be set out in the Contract Data.”*

*“10.1.5 Unless otherwise provided in the Contract, the Employer’s Agent shall, within 28 days after the Contractor has delivered his claim in terms of Clause 10.1.1 as read with Clause 10.1.2, give effect to Clause 3.2.2 and deliver to the Contractor and the Employer his written and adequately reasons ruling on the claim (referring specifically to this Clause). The amount thereof, if any, allowed by the Employer’s Agent shall be included to the credit of the Contractor in the next payment certificate;  
provided that:*

10.1.5.2 *Any amount that has been established to the satisfaction of the Employer's Agent, before his ruling on the whole claim, shall be included to the credit of the Contractor in the next payment certificate."*

Any claim for an extension of time for the Practical Completion and additional payment or compensation will be submitted by the Contractor in terms of clause 10.1.1. Clause 3.2.2 then requires the Employer's Agent to consult with the Contractor and the Employer before he makes his ruling on the claim submitted. In circumstances where no agreement can be reached during this consultation, the Employer's Agent "*shall act impartially and make a decision in accordance with the Contract, taking into account all relevant facts and circumstances*". The Employer's Agent will therefore have the authority to either approve or reject the Contractor's claim.

If the Employer had, however, reserved the right to have the right of final approval of claims under clause 10.1.5 in the Contract Data, it is the Employer who will essentially rule on any claim submitted by the Contractor.

To better understand the impact of the Employer reserving his right under clause 3.2.3 to have the right of final approval of claims under clause 10.1.5, and the powers the Employer has in terms thereof, we have created the following scenario:

1. The Employer reserved his right in the Contract Data under clause 3.2.3 to have the right of final approval of claims under clause 10.1.5.
2. The Contractor submitted a claim for an extension of time for the Practical Completion and additional

payment.

3. The Employer's Agent consulted the Employer and the Contractor under clause 3.2.2 and the Employer raised no objection to the claim.
4. The Employer's Agent made a ruling in terms of clause 10.1.5. Once again, the Employer raised no objection against the ruling.
5. The Employer's Agent includes the amount awarded to the Contractor in his clause 10.1.5 ruling in the next payment certificate.
6. The amount of the payment certificate exceeds the budget established by the Employer in consultation with the Employer's Agent.

The above situation now raises the following questions which will be dealt with below:

1. Is the Employer obligated to pay?
2. Can the Employer serve a notice of dissatisfaction under clause 10.2?
3. Can the Employer veto the claim, after the event, under his special authority under clause 3.2.3?
4. Can the Employer summarily reject the payment certificate?

#### **Question 1 – Is the Employer obligated to pay?**

Clause 6.10.4 determines as follows:

*"6.10.4 The Employer's Agent shall deliver to the Employer and the Contractor the payment certificate referred to in Clause 6.10.1 within 7 days of the receipt by the Employer's Agent of the Contractor's said statement. Any dissatisfaction in respect of such payment certificate shall be dealt with in terms of Clause 10.2.*

*The Employer shall pay the amount due to the Contractor within 28 days of receipt by the Employer of the payment certificates signed by the Employer's Agent. Payment shall be subject to the Contractor submitting a tax invoice, if required by law, to the Employer for the amount due."* (Our emphasis)

In short, the Employer is obligated to pay the amount certified by the Employer's Agent. The payment certificate was validly issued, and clause 6.10.4 obligates the Employer to make payment within 28 days of receiving the payment certificate. Should the Employer fail to make payment of the amount certified within 28 days, he will be in breach of the Contract.

**Question 2 - Can the Employer serve a notice of dissatisfaction under clause 10.2?**

Clause 6.10.4, as quoted above, states that *"(a)ny dissatisfaction in respect of such payment certificate shall be dealt with in terms of Clause 10.2"*.

Clause 10.2.1 determines that the Contractor or the Employer has the right to deliver a written dissatisfaction claim to the Employer's Agent, which written claim shall be supported by particulars and substantiated, in respect of any matter arising out of or in connection with the Contract. The Employer can, therefore, serve a notice of dissatisfaction under clause 10.2.

Clause 10.2.3, however, determines as follows:

*"10.2.3 The Employer's Agent shall, within 28 days*

*after the Contractor or Employer has delivered the dissatisfaction claim, give effect to Clause 3.2.2 and give his adequately reasoned ruling on the dissatisfaction, in writing to the Contractor and the Employer, referring specifically to this Clause. The amount thereof allowed by the Employer's Agent, if any, shall be included to the credit of the Contractor or the Employer in the next payment certificate."* (Our emphasis)

Although the Employer will be within his full right to serve a notice of dissatisfaction, in the current circumstances he will not have the right to approve the ruling on the dissatisfaction as this ruling will be given under clause 10.2.3 and not under clause 10.1.5.

**Question 3 - Can the Employer veto the claim, after the event, under his special authority under clause 3.2.3?**

No, the Employer will not be able to veto the claim after the fact. The Employer would have to overrule the Employer's Agent during the clause 3.2.2 consultation. If the Employer failed to raise any objections during the clause 3.2.2 consultation, his only option will be to serve a notice of dissatisfaction in terms of clause 10.2.

The Employer reserving his right under clause 3.2.3 to have the right of final approval of claims in terms of clause 10.1.5 does not give the Employer the authority to veto the approval of a claim, which the Employer initially approved, after the fact.

**Question 4 – Can the Employer summarily reject the certificate?**

Clause 6.10.4 of the Contract obligates the Employer to make payment of a payment certificate within 28 days after delivery of the payment certificate. Should the Employer fail to make payment of the amount due in terms of the payment certificate within this time frame, the Employer will be in breach of his obligations in terms of the Contract and will open the door to a possible termination of the Contract by the Contractor in terms of clause 9.3.1.2.

The Employer can, therefore, not summarily reject the certificate. The only option the Employer will have is to serve a notice of dissatisfaction in terms of clause 10.2

**Conclusion**

Employers will very often grant themselves special authority in terms of clause 3.2.3, such as the hypothetical scenario described above. This authority will, however, in all circumstances be limited to certain clauses and actions. It is very important for Contractors to determine what the Employer can and cannot do, and to exercise the remedies the Contract affords them in instances where the Employer oversteps its authority.