

How final is a Final Certificate under Clause 37.4 of AS4000?

Clause 37.4 of AS4000 (that is, Australian Standard™ General conditions of contract AS4000-1997) provides that after expiry of the defects liability period, the Superintendent issues a final certificate “*evidencing the moneys finally due and payable between the Contractor and the Principal on any account whatsoever in connection with the subject matter of the Contract*”.

How “final” is this “Final Certificate”?

Clause 37.4 also provides that the final certificate “*shall be conclusive evidence of accord and satisfaction...*” except for:

- fraud
- latent defects
- computational error; and
- “unresolved issues” the subject of a notice of dispute served before 7 days after the final certificate.

Two cases illustrate the impact of the “*unresolved issues*” exception.

In *Martinek Holdings Pty Ltd v. Reed Construction (Qld) Pty Ltd* [2009] QCA 329:

- Reed, the builder, had an unpaid progress claim of \$919,634.91;
- on 17 September 2009 a Security of Payment adjudication decision was made in Reed’s favour on the progress claim in that sum;
- on 24 September 2009 the Superintendent issued a final certificate under clause 37.4 of AS4000 stating that \$72,027.27 was owing by Reed to the developer Martinek, taking rectification of defects into account;
- on 30 September 2009 Reed served a dispute notice in relation to the final certificate.

Did the final certificate trump the adjudication decision?

The Court of Appeal held that it did not – the intent of the contract is that the Superintendent’s final

certificate is not final while the notice of dispute remained unresolved.

So, even though the Superintendent had issued a final certificate that money was owed to Martinek, Martinek was required to pay Reed \$919,634.91, pending resolution of the dispute notice under the dispute resolution provisions of the contract.

In *Mainstream (Aust) Pty Ltd v Gilpip Bayside Projects Pty Ltd* [2013] VSC 610:

- In July 2013, Mainstream, the builder, submitted a final payment claim;
- On 16 August 2013, the Superintendent issued a final certificate, certifying that Mainstream owed Gilpip, the developer, \$70,166.62;
- On 22 August 2013, served a dispute notice in relation to the final certificate;
- Gilpip immediately served notice of its intention to draw down on the bank guarantee provided by Mainstream as security under the contract.

Was the developer allowed to draw down on the bank guarantee on the basis of the final certificate?

The Court held that it was not – it was arguable that the final certificate was not effective while subject to dispute, and given that drawing down on the bank guarantee would put Mainstream’s entire business at risk, the balance of convenience favoured granting an injunction restraining Gilpip from drawing down on the bank guarantee.

From a contractor’s point of view, the moral of the story is that if you do not agree with the final certificate, a notice of dispute disputing the certificate must be served quickly. Under AS4000, the time is 7 days.

Failure to dispute makes the final certificate truly final, with a number of consequences, including that Security of Payment adjudications are trumped, and the principal has unfettered access to bank guarantees.

Roland Burt
Partner

Expert advice. Practical solutions. Personal service.

Level 11, 575 Bourke Street, Melbourne Vic 3000 Australia | GPO Box 38, Melbourne 3001 | DX 400

T 03 8621 2888 F 03 9614 0880 | www.mckeanpark.com.au