

Zero certificates: What they are and how to avoid them

By [Brad Boertje](#)

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A growing number of MBA North members are alerting us to the practice of issuing zero - or even negative - certificates. This means that contractors can end up being paid less than expected, thus negatively affecting their cash flows, or even, in extreme circumstances, finding that they owe money to the employer.



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While we have no firm data on how much of a problem this is, the fact that we are receiving this complaint from long-standing MBA North members is concerning, especially as some are convinced that this practice is being used unethically. Several members have alleged that unethical practices relating to the issuing of zero or negative certificates led directly to their businesses going under.

To be clear, the improper issuing of zero certificates is not the norm, but it is concerning that it seems to be on the increase.

It's worth pointing out that there are two sides to any story, and there will be instances in which the issuing of a zero certificate is justified by the circumstances, especially when a contractor is penalised for being in breach of its contractual obligations. However, what we are concerned with here is the unethical use of zero certificates to improve the employer's cash flow or to offset increasingly tight margins.

A contributing factor could be South Africa's talent exodus, creating a gap that opens up the way for inexperienced or even unethical people.

Understanding the process

The issues arise from the way payments are made in the construction industry. Once the work begins, the contractors submit monthly payment requests based on the work they have done and the material that has been delivered on site. This request is then assessed by the employer's principal agent (in conjunction with the quantity surveyor). A payment

certificate is then issued as requested, or revised in line with what the principal agent believes is the true state of affairs. This is when a zero or even negative certificate could be issued.

So far, so very logical. But a problem arises when the payment request is not assessed quickly and the contractor only gets told what it will be paid just before the payment is due. At that point, disputing the principal agent's calculations would delay the payment potentially for months, something that no contractor can afford. Even alternate dispute resolution is too slow and expensive to be practical, especially in the midst of a contract with wages and accounts to be paid. So the aggrieved contractor hopes that the mistake, if it is a mistake, can be rectified in the following month or at the end of the contract.

As noted above, there will certainly be instances when the contractor gets things wrong, but one can also see how an unscrupulous principal agent or employer could manipulate the process. Given the wafer-thin margins that prevail, this kind of manipulation can be enough to propel an apparently stable contractor into receivership – devastating for its employees and owners and for the industry's ecosystem as a whole.



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Mitigating the risk

All the indications are that some elements of the construction industry could be taking some shortcuts to improve their profits at the expense of contractors. Contributing factors might be the dire state of the industry and the general culture of lawless impunity that increasingly prevails.

Whatever the causes, hard-pressed contractors find themselves vulnerable to these tactics, not least because a contract, any contract, seems better than no contract. Presumably, things will right themselves when and if business picks up, but until then, there are ways they can protect themselves:

- Submit comprehensive back-up documentation to payment applications. This makes it easier for the quantity surveyor to do his or her work and makes it harder to dispute the contractor's request.
- Don't leave things to the last minute. For example, get work signed off in sections or phases, so there is no room for dispute weeks later. Similarly, remeasure your work as the project progresses to ensure you are verifiably on track.
- Put gentle pressure on the principal agent to get your payment certification issued as early in the month as possible so there is time to register a dispute well before the payment due date. If the certification is issued the day before payment is due, the contractor finds itself with little wriggle room.
- If certifications are incorrect, make the time to challenge them immediately with well-argued reasons and comprehensive back-up documentation.
- If MBA North members are involved, get the organisation involved at an early stage. Other professional bodies should

be involved too, if appropriate.

Contractors might argue that these remedies require resources that they do not have. It's true that tight margins force unpleasant choices on everybody, but putting in good processes will not only make it less likely they will find themselves being issued with zero or negative certificates, it will also make their companies much more resilient in general. And that is worth a lot.

ABOUT THE AUTHOR

Brad Boertje, construction risk management consultant and ADR practitioner for MBA North

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