




PUJA (B) TRAINING PROGRAM

ONE-DAY TALK ON CONTRACT ADMINISTRATION AND DESIGN&BUILD

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ONE-DAY TRAINING MODULE PROGRAMME OVERVIEW

**PART 1
CONTRACT ADMINISTRATION**

Overview of contract administration

- Variation
- Delay & Extension of time
- Contractual troubleshooting

**PART 2
DESIGN & BUILD**

- Overview of D&B
- Allocation of risks
- Critical elements of D&B
- Contractual troubleshooting

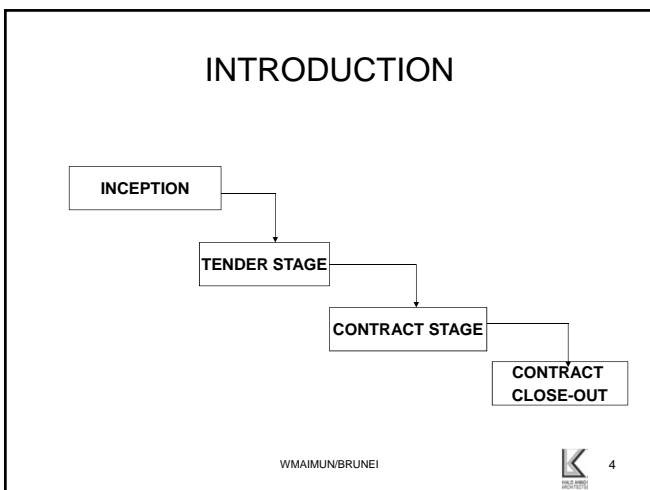
MORNING
8.30AM - 12.00PM

AFTERNOON
2.00PM - 5.00PM

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CONTRACT

A contract is an agreement i.e. an agreement between two parties to construct and complete a proposed facilities/development.


Parties to the contract

- Employer (Superintending Officer)
- Contractor

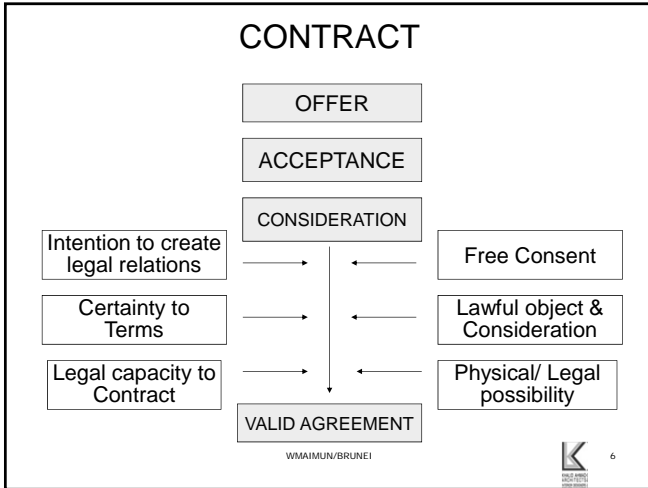
Main elements of a contract :

- Offer
- Acceptance
- Consideration

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- ### CONTRACT
- #### PROCUREMENT METHOD
1. Traditional General Contracts
 2. Package Deal Type of Contract
 3. Management Type of Contract
 4. Build-Operate-Transfer
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CONDITIONS OF CONTRACT

	JKR 203A (2010)	JKR D&B (2010)	Brunei COC with quantities
Contractor's Obligations	10	3	
Duties and rights of SO/ PD	3, 4	8	
SO's/ PD's Instructions	5	8	
Variations	24	23	
Completion of Works	39	44	
Damages for Non-Completion	40	45	
Delay and Extension of time	43	49	
Loss and Expense	44	50	
Defects after Completion	48	47	
Payments	28	53	
Final Account	31	54	

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- ### CONDITIONS OF CONTRACT
- Content of conditions of contract
 - Obligations and rights of parties
 - Remedy and damages
 - Contract procedures
- Note: Any reference to contract clauses are on JKR 203A
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CONDITIONS OF CONTRACT

TERMS OF CONTRACT :

Expressed term

- Agreed by parties
- Expressed

Implied term

- Intention of contract (law/ normal practice)
- Reasonable and equitable
- Necessity
- Obvious and it goes without saying
- Not contradictory

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CONTRACTOR

CONTRACTOR'S OBLIGATIONS

- Quality and Safety
- Execution and Construction
- Inspection and Testing & Commissioning
- Completion of whole Works
- Make good defects

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CONTRACTOR

CONTRACTOR'S RIGHTS TO/FOR

1. Interim payments
2. Fluctuation of Price
3. Site without disturbance
4. Extension of time
5. Adjudication/ Arbitration on disputes
6. Loss and/or additional expenses

due to reasons provided in contract

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SUPERINTENDING OFFICER

S.O's ROLE AND RESPONSIBILITIES

- Overall supervision & direction of work
- Issue further drawings
- Issue instructions on Variation
- Act in respect of other Contractual matters
- Giving Consent and Approval
- Payments and Final Account.

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SUPERINTENDING OFFICER

S.O's right to take action if the contractor default/ non-compliance/ fails to fulfill obligations

Common remedies:

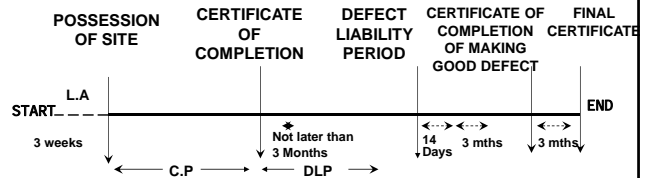
- Engage another party
- Deduct payment
- Defer possession of site
- Diminution in value
- Termination

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CONTRACT ADMINISTRATION JKR 203A



- C.P** = Construction/ Contract Period
- DLP** = Defect Liability Period – Contractor make good defects
- ◆ = Contractor submit claims
- ◀---▶ = Schedule of Defects
- ◀---▶ = Contractor make good defects as per schedule of defects
- ◀---▶ = Final Account

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VARIATION

DEFINITION

A change in the CD which necessitates the alteration or modification of the *design, quality* or *quantity* of the Works and includes:

- Addition/ Omission/ Substitution of any works.
- Alteration of the kind or standard of any of the material or goods to be used in the work.
- Removal from the site of any work, material or goods executed or brought thereon.

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VARIATION

LIMITATION

1. Nature or extent contemplated
 - Watson v O'Beirne
 - Held: Not extra work done under the contract
2. Genuine omissions
 - Carr v J.A Berriman Pvt Ltd (1953)
 - Held: Employer is in breach

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VARIATION

WORKS INCLUDED IN CONTRACT

- Indispensably necessary work – impliedly included
- Contingently necessary work – implied warranty
- Promise to pay where already bound
- Instruction to assist contractor in difficulty
- Method of construction expressed in contract
- Contractor supply better quality material
- Contractor execute work not called for in contract
- Fees and charges (standard or normal)

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VARIATION

Issues \ Clauses	Malaysia JKR 203A	BRUNEI COC with quantities
Instructions	5	
Variation	24	
Valuation	25	
EOT	43.1(e)	
L&E	44	
BQ (Fixed/Provisional)	26	

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VARIATION

Basically disputes in Variation arise in three areas:

1. Scope - is it a Variation or was the contractor bound to do it anyway?
2. Procedural requirements – what is the impact of procedural non-compliance by either parties?
3. Valuing Variations – which valuation rule to be used for the valuation of the variation works?

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SCOPE

- ❖ Error in quantity for works in BQ.
- ❖ Works measured in accordance with SMM.
- ❖ Discrepancies between documents in CD.
- ❖ Drawings for Variation Works compiled in CD.
- ❖ Error in information regarding site/ soil condition causes error in setting out.
- ❖ Changes to statutory authorities requirement.
- ❖ Capital Contribution.

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PROCEDURAL REQUIREMENTS

- General rule: In absence of written instruction/ order/ confirmation/ sanction of work done, contractor may lose entitlement to additional payment for the extra work.
- But there are exceptions: Depend on wording of contract and intention/ action of contracting parties.
- Legal cases: The exceptions to overrule the general rule rely on the conduct of both parties which must lead to reasonably belief that there is a "habitual acceptance" or "by conduct" or "work outside contract" or "oral agreement established"

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PROCEDURAL REQUIREMENTS

CLAUSE 3: S.O's INSTRUCTIONS

- S.O may issue further drawings, detail and written instructions in regards to Variations, etc.
- S.O's instruction shall be in writing. If oral, S.O shall issue written instruction within 7 days.
- Remedy for non compliance - within 7 days after receipt, pay others to execute. All cost, expenses including on-cost charges deducted from contractor.

CLAUSE 24: VARIATIONS

- S.O may issue written VO. Contractor shall forthwith comply.

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VALUATION OF VARIATION

	Malaysia JKR 203A	Brunei COC with quantities
RULE 1: BQ RATE Similar character & condition	25.1(a)	
RULE 2: BASED ON BQ RATE Similar character but not similar condition, so far as reasonable	25.1(b)	
RULE 3: MARKET RATE Not or similar character & not similar condition	25.1(b)	
RULE 4: DAYWORK RATE Work cannot be properly measured	25.2	
RULE 5: If omission substantially vary conditions of remaining items	25.1(c)	

VALUATION OF VARIATION

RULE 1: BQ RATE - Similar character executed under similar condition.

- Similar- "of like nature" not necessarily identical
- Similar character
 - Similar item as describe in BQ with a rate
- Similar condition
 - Similar physical, timing and extent

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VALUATION OF VARIATION

RULE 2: BASED ON BQ RATE – Executed not under similar condition

- Change in physical condition, timing and extent.
- Not similar condition, so far as maybe reasonable.
- Significant change in condition with fair adjustment.
- Pro rate – direct or indirect or fair adjustment

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VALUATION OF VARIATION

RULE 3: FAIR VALUATION/MARKET RATE – Not similar character

- Not of similar character or not similar condition not reasonable to base on BQ rate.
- Fair valuation/ fair market rate implied to be agreed by contractor.

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VALUATION OF VARIATION

RULE 4: DAYWORK RATES – works that cannot be properly measured

- If no daywork rates in contract, actual net cost of materials, plant and labour.
- Plus a % for ordinary plant, tools, scaffolding, supervision and profit.
- Contractor to produce records after work completed.

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VALUATION OF VARIATION

RULE 5: RATE AS IN RULE ABOVE – omission substantially vary condition of remaining items

- Rates in BQ used to value items omitted.
- Rates as in rule 2 or 3 for remaining items.
- What constituted “substantially vary condition” depends on the justification by contractor.

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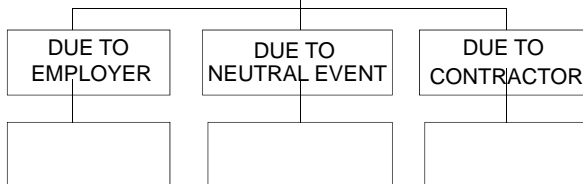
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DELAY

CONSEQUENCES OF DELAY AN OVERVIEW



DELAY

Issues regarding delays:

1. Notice of delay - is there a time-bar on notice?
2. Concurrent delay – what if there several events contributing to delay?
3. Float – who owns the float?
4. Acceleration – acceleration cost in lieu of EOT
5. CNC – can LAD be imposed without CNC?
6. Time at large – no date of completion?
7. EOT – duration for EOT?
8. LAD – is this a penalty for late completion?

NOTICE OF DELAY

- Most contract require contractor to serve notice before S.O grant EOT.
 1. What if no notice served?
 2. When & in what form?
 3. Full information to be given?
 4. Is minutes of meeting sufficient?
- In contract with a time bar clause, late or failure to give notice limit the time rights can be enforced.
- S.O's discretion in absence of notice of delay.
- Distinction between notice of delay and notice of intention to claim for loss and expenses.



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CONCURRENT DELAY

COMMONLY APPLIED TO 3 SITUATIONS:

1. Contractor delayed by relevant event that entitles him to EOT. Later, he suffers a problem of his own making that delayed him. It does not add to the existing delay.
2. Contractor is delayed by two problems at the same time, one of which is a relevant event, one is his own fault. They both cause a similar delay over the same period.
3. Contractor suffers a delay due to his own fault and during the period of that delay, a relevant event occurs that would have delayed him if he was not already in delay.

In these 3 situations, is the contractor entitled for EOT as he is also delayed due to his own fault?



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THE FLOAT

- Float - Contingency/spare time
- Float is the time available for an activity in addition to its actual duration required to perform the activity.
- It gives flexibility to contractor if not able to carry out on intended start date – float used to absorb the delay as it is built into program for each activity and at end of program.
- Who owns the float ?
 - ✓ Contractor? – he built-in the float into the program as a contingency to accommodate his own risk/ delay.
 - ✓ Employer? – The V.O has not caused delay as whole work can be completed within completion date.



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ACCELERATION

- If there is delay and contractor rightfully entitled for EOT, instruction can be issued by S.O for contractor to increase resources to complete work by contractual completion date.
 - Acceleration of work in lieu of the right for EOT.
 - Contract provision or supplementary agreement.
- Constructive acceleration:
 - If contractor entitled to EOT but none awarded and fearing LAD, without any instruction increase resources.
 - S.O persistently ignores contractor's request for EOT as such contractor accelerated to complete on time.
 - Can contractor claim for L&E or additional cost?
 - Is it within jurisdiction of S.O to approve if there is no contract provision for it?



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CERTIFICATE OF NON-COMPLETION

- CNC as a pre-requisite to claiming LAD.
- It serves as a formal written notice that contractor failed to complete works by completion date.
- S.O must give due consideration to any applications for EOT before issuing CNC.
- If there are subsequent approved EOT and contractor fails to meet the new completion date, a new CNC to be issued.
- If contract provides for sectional completion, separate CNC must be issue for each section.

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TIME AT LARGE

- ❖ Time at large is describe as a situation where there is no date for completion, or where the date for completion has become invalid.
- ❖ Consequences:
 - ✓ Contractor no longer bound by obligation to complete Works by the contractual completion date and only have to complete the works in a reasonable time.
 - ✓ The employer would not be able to claim for LAD.
- ❖ Employer maybe entitle to damages if they could establish contract was not completed within a reasonable time.
- ❖ What constitutes "reasonable time" is also a dispute.

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EXTENSION OF TIME

- If delay is not due to the contractor's fault, he cannot be blamed as he has already lost time in the contract, and he should be compensated for this loss of time. This compensation is known "extension of time"
- EOT provision is as much benefit to the Employer as is to the contractor (to ensure LD provision enforceable).
- Contract recognizes several reasons for EOT. S.O has no power to grant EOT on any matter with falls outside the grounds provided in the contract.
- The power of granting extension of time for delays, when acted upon, fixes a new date for completion, and the obligation of contractor is then to complete by that date.

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EXTENSION OF TIME

CLAUSE 43: REASONS FOR EOT

- a. force majeure
 - b. exceptionally inclement weather
 - c. suspension of Works
 - d. S.O's instructions
 - e. contractor not receiving in due time instructions, provided he has specifically applied for in writing
 - f. delay in possession of site
 - g. delay on parts of artist etc engaged by Employer
 - h. contractor's inability to secure materials/ services
 - i. delay on part of NSC/ NS
- Provided contractor has taken all reasonable steps to avoid and reduce delay and proceed with the work.

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LIQUIDATED DAMAGES

- ❖ LD/ LAD are not penalties.
- ❖ Pre-determined damages set during tender based on a calculation of actual loss the employer is likely to incur if contractor fails to meet the completion date.
- ❖ Loss include rent on temporary accommodation, removal costs, loss of revenue, extra running cost etc.
- ❖ Method of calculation must be formally documented.
- ❖ If LD amount is challenged in court, the court generally enforce the amount as parties will be required to stand by what has been set out in the contract.

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CLAIMS

DEFINITION

The assertion of a right to payment arising under the express or implied terms of a contract, other than under the ordinary contract provisions for payment of the value of the work.

TYPES OF CLAIMS

1. Common Law claims
2. Quantum Meruit claims
3. Ex gratia claims
4. Contractual claims

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CLAIMS

"DISRUPTION CLAIM

If in compliance with SO's instruction involves expense or loss beyond reasonably contemplated by the contractor for which the contractor would not be reimbursed by a payment made under any other provision, the contractor shall claim for direct loss and expenses"

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CLAIMS

(PAM form of contract)

Clause 11.7: Additional expenses caused by Variation

- Contractor may make a claim.
- Written notice of his intention to claim with an initial estimate and justification within 28 days.
- Submit complete detail within 28 days after completion of Variation works.
- Failure to submit deemed waived his right.

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CLAIMS

PROLONGATION CLAIM

If the regular progress of Works has been materially affected by relevant reasons for extension of time and the contractor incurred direct loss and/or expense for which he would not be reimbursed by payment made under other provision of the contract, then the contractor shall claim for direct loss and expenses

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CLAIMS

CLAUSE 43: REASONS FOR EOT:

- a. force majeure
- b. exceptionally inclement weather
- c. suspension of Works**
- d. disputes with neighboring owners**
- e. S.O's instructions issued under clause 5**
- f. not receiving in due time instructions, etc**
- g. delay in giving possession of site
- h. delay by artists etc engaged by Employer**
- i. contractor's inability to secure materials
- j. delay on the part of NSC and/or NS

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CLAIMS

Clause 44.0: CLAIMS FOR LOSS AND EXPENSE

- Notice of claim within 30 days of occurrence of such event/ circumstances/ instructions.
- Submission of full particulars of claim with supporting documents not later than 90 days.
- S.O ascertain claims based on documents submitted.
- If contractor fails to comply procedure he is not entitle to claim

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CLAIMS

Heads of claims normally allowed

- a. Site overheads
- b. Headquarters overheads
- c. Loss of profit
- d. Idling labor, plant and materials

Not normally allowed to claim

- a. Finance charges
- b. Interest
- c. Cost of claim consultant

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CONTRACTUAL TROUBLESHOOTING

VARIATION

- Procedural Requirements:
 - ✓ Flooring System v Straat Construction Co (2003)
 - ✓ Missouri DOT, ex rel PR Developers v Safeco Insurance and Robertson Contractors (2002)
- Valuation of Variation
 - ✓ Weldon v The commission of new towns (2000)
 - ✓ Henry Boot Construction Ltd vs Alstom Combined Cycles Ltd (2000)

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CONTRACTUAL TROUBLESHOOTING

DELAY

- Notice of Delay
 - ✓ *Re Multiplex Constructions Pty Ltd* (1999)
 - ✓ *Australian Dev Corp (ADC) v White Constructions* (1996)
 - ✓ *Peninsula Balmain PL v Abigroup Contractors PL* (2002)
- Concurrent Delay
 - ✓ *Henry Boot v Malmaison Hotel.*
 - ✓ *The Royal Brompton Hospital NHS Trust v Hammond*
 - ✓ *City Inn v Shepherd Construction*

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CONTRACTUAL TROUBLESHOOTING

DELAY

- Float
 - *Royal Brompton Hospital NHS Trust v Hammond*
- Certificate of Non-Completion
 - ✓ *Hock Huat Iron Foundary vs Naga Tembaga S/B* (1999)
- Extension of time
 - ✓ *Gasing heights v Pilecon Building construction* (2001)
- Liquidated damages
 - ✓ *Watts, watts & Co v Mitsui & Co* (1917)

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OVERVIEW OF
CONTRACT ADMINISTRATION AND
DESIGN & BUILD CONTRACT

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ANY QUESTIONS?

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