PAM CONTRACT 2006

PAST - PRESENT - FUTURE

Updated Version as at July 2018

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PREFACE.

An earlier version of this paper was first prepared in April 2017 and presented in May 2017.

This is now an updated version which takes into account the coming into existence of the new PAM Contract 2018.

INTRODUCTION.

The PAM Form of Contract is not a static document but one which is continually subject to review and change to keep up with the ever-changing context it finds itself in. Lest we forget, the PAM Contract 2006 in itself, is a product of change and is an evolutionary revision of the earlier 1998 PAM Form of Contract (which in turn, can trace its roots back to the JCT (Joint Contracts Tribunal) Forms of Contract).

With the launch of the PAM Contract 2018 though, many may question the relevance of any paper which uses the PAM Contract 2006 as its centrepoint. The writer's response to this is as follows :

a. **At the time of preparing this paper, it is the writer's understanding that the PAM Contract 2018 is still in its final stages of preparation for printing (and eventual release).**

b. **Based on the above, it is the writer's opinion that for the short term at the very least, the PAM Contract 2006 shall remain the *de-facto* Contract Form of choice for PAM members (and a significant part of the Building Industry) ,**

c. **Due to its continued presence and use, it is still a document of importance.**

This paper is divided into 2 parts.

The 1st part (PART A) attempts to high-light (what the writer believes are) key changes between the preceeding and 2006 Form whilst the 2nd and final part (PART B) hopes to high-light some of the key changes between the 2006 and 2018 Forms of the PAM Contract.

PART A - PAST to PRESENT

PART A - PAST to PRESENT

As a matter of policy, PAM continually undertakes to review the Forms of Contract (and Sub-Contract) which it publishes for its members' use.

The 1998 Form underwent a major revision around the mid 2000's resulting in the official launch of the 2006 Form in 2008.

Apart from almost all the clauses in the 1998 Form being either re-written or revised, new clauses were also added.

Although re-written though, the general gist or spirit of much of the Contract remains. Nevertheless, this Part of the Paper seeks to high-light (what, in the opinion of the writer are) the salient changes between the two Forms.

It is hoped though that all Architects should review the two Forms to form their own opinions as to where the major difference lie.

For the purposes of simplicity, the PAM Form (with Quantities) is referred to. Most of these salient changes though will also apply to the PAM Form (without Quantities).

PART A - PAST to PRESENT

ARTICLE 7.

Starting right at the beginning, one of the major changes are to the "Definitions" under Article 7.

Apart from this list being expanded extensively, a major change is in the definition of "Architect" which was amended (to keep in line with similar amendments to the Architects Act) to also recognise Architectural Practices (as opposed to *just* individuals) registered under the Act.

PART A - PAST to PRESENT

CLAUSE 3 – Contract Documents, Programe And As-Built Drawings.

The major (and obvious) revision to this Clause is the inclusion of the "Programme" and "As-Built Drawings" in its title.

The 2nd change (for the convenience of the Contractual Parties and Architect) is the establishment under Clause 3.1 – Contract Documents, of the order of descending importance of the documents making up the Contract Documents.

A wholly new Clause, Clause 3.10 – As-Built Drawings and operation and maintenance manuals, finally recognises the industry-wide practice of (specialist) Nominated Sub-contractors, i.e.; Lift Suppliers, Swimming Pool Specialists, etc.,.... having to prepare as-built drawings along with operations and maintenance manuals.

PART A - PAST to PRESENT

CLAUSE 11 – Variations, Provisional And Prime Cost Sums.

It would seem that under the 2006 Form, revisions to Clause 11.1 – Definition of Variations, Architects are no longer, specifically empowered to change the "ultimate use" of the Works, i.e.; changing an apartment block into an office block.

Another new Clause, Clause 11.3 – Issue of Variations after Practical Completion, now empowers the Architect though to instruct Variations *after* Practical Completion subject to these Variations being required to comply with the requirements of "Appropriate Authorities and Service Providers".

In keeping with existing legislation, revisions to the Clause, such as in Clause 11.5 – Valuation of Variations and Provisional Sums, now explicitly recognise that all measurement and valuation is solely under the province of the Quantity Surveyor.

PART A - PAST to PRESENT

CLAUSE 14 – Materials And Goods

A wholly new Clause, Clause 14.4 – Warranty of title of goods and materials, now requires Contractors to ensure that any goods or materials included under any Interim Certificate, are free from encumbrances, i.e.; are wholly paid for.

PART A - PAST to PRESENT

CLAUSE 15 – Practical Completion And Defects Liability

A very important Clause which has also undergone major revisions.

The 1st major revision is the *clear* definition of *Practical Completion* under Clause 15.1 – Practical Completion.
In essence, so long as the Employer may have full use of the Works for their intended purpose, the Architect may deem the Works to be *Practically Completed* even if there are still works and defects of a minor nature which have still to be executed or rectified, as long as the Contractor has given a *written undertaking* to complete the outstanding works or defects rectification within a reasonable time (Clause 15.1(a)).

PART A - PAST to PRESENT

CLAUSE 15 – Practical Completion And Defects Liability, Cont.

An equally important revision is the establishment of a specific procedure and time frame for the issuance of the Certificate of Practical Completion under Clause 15.2 - Certificate of Practical Completion.

The 1st step under the Clause now requires the Contractor to give *written notice* that the Works have been practically completed.

The Architect in turn, now has 14 days to either ;

a. **give written notice giving the reasons why the Works cannot be deemed to be practically completed OR**
b. **issue the Certificate of Practical Completion, the date of this Certificate being either the date of receipt of the Contractor's original written notice (if there are no defects) or the date of receipt of the Contractor's written undertaking to complete the outstanding works or defects rectification.**

PART A - PAST to PRESENT

CLAUSE 15 – Practical Completion And Defects Liability, Cont.

Correspondingly, there is also a revision regarding the rectification of defects with Clause 15.4 – Schedule of Defects now requiring the Contractor to rectify all defects listed under the final Schedule of Defects (issued no later than 14 days from the expiration of the Defects Liabilty Period), within 28 days (or a longer period as agreed in writing) of receipt of such Schedule.

PART A - PAST to PRESENT

CLAUSE 16 – Partial Possession By Employer.

To be read in conjunction with the revisions to the previous Clause 15, are also the revisions to this clause which now introduces the *Certificate of Partial Completion* (Clause 16.1(a)).

Perhaps the most important revision under this clause though, is to be found under Clause 16.2 – Possession of Occupied Part without consent.

The Employer is now empowered to take partial possession *without* the Contractor's consent if ;

a. **a Certificate of Non-Completion has already been issued under Clause 22.1 and**
b. **possession of the occupied part does not present any unreasonable disturbance to the Contractor's progress for the completion of the remaining works.**

PART A - PAST to PRESENT

CLAUSE 18 – Injury to Person Or Loss And/Or Damage of Property And Indemnity to Employer.

A change to this Clause can be found under Clause 18.3 – Contractor's indemnity against claims by workmen, which now specifically requires the Contractor to indemnify the Employer against any claims by any and every workman employed in and for the execution of the Works.

A major change to the Clause though is under Clause 18.4 – Indemnities not to be defeated. With this revision, the Contractor's obligations to indemnify are now maintained irrespective of whether the Employer (and his agents) have contributed to the injury to persons and/or damage to property through either their own negligence or any other act of omission.

PART A - PAST to PRESENT

CLAUSE 19 – Insurance Against To Person And Loss/Or Damage to Property.

A major change to this Clause is in the realisation that the existing Construction Industry already employs many different types of workers (either local, foreign, self-employed, etc.,...) within an existing statutory structure.

Insurance coverage of workmen is now divided into ;

a. local employees registered under the Employees' Social Security scheme ("SOCSO") (Clause 19.2 – Employees' social security scheme for local workmen),
b. local workmen NOT covered by SOCSO (Clause 19.3 – Insurance for local workmen not subject to SOCSO) and
c. foreign workmen (Clause 19.4 – Workmen's compensation insurance for foreign workers).

A further point to note is that the insurance coverage under Clauses 19.3 and 19.4 are required to be valid up to the Defects Liability Period (plus a further 3 months).

PART A - PAST to PRESENT

CLAUSE 20 – Insurances.

For the following Clauses ;
- Clause 20A – Insurance of New Buildings/Works – By The Contractor,
- Clause 20B – Insurance of New Buildings/Works – By The Employer,
- Clause 20c – Insurance of Existing Buildings Or Extension – By The Contractor,

the following revisions are worth noting :

a. an enlargement of the list of "Clause 20 perils",

b. the extension of the insurance period up to the Defects Liability Period (plus a period of 3 months),

c. the requirement for all insurance payments to be made to the Employer for eventual disbursement through Architect's Certificates and

d. finally, a recognition of the existing industry wide practice of using the "Contractor's All Risk" (CAR) Insurance Policy.

PART A - PAST to PRESENT

CLAUSE 21 – Date of Commencement, Postponement and Completion Date.

A key revision under the Clause is in the introduction of the "Period of Delay".

This "Period of Delay" is now a pre-agreed period as stated in the Appendix to the Contract.

Under Clause 21.1 – Comencement and Completion, the Employer may delay giving site possession to the Contractor so long as this delay does not exceed the "Period of Delay". Architects though are obliged under this same Clause, to grant an extension of time for this delay.

Under Clause 21.4 – Postponement or suspension of the Works, Architects are also empowered to postpone or suspend all or part of the Works for a continuous period of time not exceeding this "Period of Delay".

PART A - PAST to PRESENT

CLAUSE 22 – Damages for Non-Completion.

The 1st and most noticeable revision is the change in Clause 22.1 from "Liquidated and Ascertained Damages" to "Liquidated Damages". The obvious implication is that these damages now do not need to be "ascertained" and as explained under Clause 22.2 – Agreed Liquidated Damages, they are now, a "genuine pre-estimate of the loss and/or damage which the Employer wil suffer in the event that the Contractor" does not complete the works by the Completion Date.

As in the previous 1998 PAM Form, there is no requirement for the Employer to prove his actual loss and/or damage BUT the 2006 Form adds on the proviso, "unless the contrary is proven by the Contractor".

Whilst there was also a requirement for the Architect to certify whether in his opinion, the works "ought reasonably" have been completed (in the event the Works remain incomplete at the Completion date) under the 1998 Form, the 2006 Form now under Clause 22.1 requires the Architect to specifically issue a "Certificate of Non-Completion".

PART A - PAST to PRESENT

CLAUSE 22 – Damages for Non-Completion, Cont.

Other noticeable features, under Clause 22.1 are ;

a. the requirement of the Employer to inform the Contractor in writing of his intention to recover such damages and

b. the specific instruction for the Architect not take into account the imposition of Liquidated Damages in the issuance of any payment certificates and the Final Certificate.

A wholly new clause, Clause 22.3 – Certificate of Non-Completion revoked by subsequent Certificate of Extension of Time, now automatically revokes any CNC issued by the Architect, in the event the Architect issues a Certificate of Extension of Time which fixes the new Completion Date later than that stated in the CNC.

PART A - PAST to PRESENT

CLAUSE 23 – Extension Of Time.

A Clause which is much referred to but which has also undergone major revisions, the 1st being the need under Clause 23.1 – Submission of notice and particulars for extension of time, for the Contractor to submit a written notice of his intention to claim along with an initial estimate of the required extension and the particulars of the cause of delay with such notice having to be given within 28 days of the commencement of the "Relevant Event". This giving of written notice is now a condition precedent before any extension of time can be considered or granted.

The above written notice is to be followed within 28 days of the end of the cause of delay, by the submission of a Final Claim for extension of time along with full particulars of the delay and claim. If the Contractor fails to submit these full particulars within the above 28 days (or any longer period as agreed in writing by the Architect), it may now be deemed that the Relevant Event has not caused any delay.

PART A - PAST to PRESENT

CLAUSE 23 – Extension Of Time Cont.

Just as there are now specific protocols and a time frame for the Contractor to follow, the Architect also has a time frame to respond in a specific manner.

If there are insufficient details, the Architect has to inform the Contractor within 28 days of receipt of the above submission of particulars.

Under Clause 23.4 – Certificate of Extension of Time, the Architect also has to either reject the claim or issue a Certificate of Extension of Time within 6 weeks of receipt of the full particulars.

It is also worth noting that under the 1998 Form, The Architect grants an extension of time whilst under the 2006 Form, the Architect issues a Certificate of Extension of Time. This change does have implications with respect to other clauses (such as Clause 26.1(b) – Defaults by Employer).

PART A - PAST to PRESENT

CLAUSE 23 – Extension Of Time Cont.

Other major revisions are as follows :

- Major enlargement under Clause 23.8 – Relevant Events, of the list of Relevant Events (for which a Contractor may claim for an extension of time).

- Under a wholly new clause, Clause 23.9 – Extension of time after the issuance of Certificate of Non-Completion, the Architect is now empowered to grant extensions of time for Relevant Events which occur after the issuance of the CNC.

- Under another wholly new clause, Clause 23.10 – Architect's review of extension of time after Practical Completion, the Architect is also empowered to review any extension of time previously granted, within 12 weeks after Practical Completion and fix a revised Completion Date later than that previously fixed. The Architect though is not allowed to decrease any extension of time previously granted.

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CLAUSE 24 – Loss And/Or Expense Caused By Matters Affecting The Regular Progress Of The Works

Just as for the submission of claims under Clause 23, all claims made under this Clause now require the submission of a written notice of intention to Claim, followed by a submission of full particulars of the claim within a similar time frame to that found under Clause 23.

A new clause, Clause 24.2 – Access to Contractor's books and documents, now requires the Contractor to keep "contemporaneous record of all his claims for loss and/or expense" and also empowers the Architect (and Quantity Surveyor) to have access to the Contractor's books, documents, reports, etc.,.. that are material to the claim (as well as provide a copy of all the above, free of charge).

Similar to Clause 23.8, the list of "matters" (under which a Contractor may claim) has under Clause 24.3 – Matters materially affecting the regular progress of the Works, been extensively extended.

PART A - PAST to PRESENT

CLAUSE 27 – Nominated Sub-Contractors.

A clause which has been heavily revised and expanded and some noteworthy points are the revision of responsibilties and imposition of time frames.

In recognition of the ever increasing specialistion and complexity of Sub-Contracting work, Clause 24.1 – P.C. Sums and Provisional Sums -Nominated Sub-Contractors, has ben revised for instances where alternative designs are proposed by the Nominated Sub-Contractor (NSC) or where the sub-contract leaves any matter of design, specification or choice of materials, goods and workmanship to the Nominated Sub-Contractor, the Nominated Sub-Contractor and not the Contractor, shall be responsible to ensure that the sub-contract works are fit for purpose.

PART A - PAST to PRESENT

CLAUSE 27 – Nominated Sub-Contractors Cont.

Just as a NSC's responsibilities may have changed, the Architect's empowerment has also been revised in the 2006 Form as under Clause 27.2(e), the Contractor may only grant an extension of time to a NSC if this is accompanied with a written recommendation by the Architect, unlike in the 1998 Form where the Architect's consent is required instead.

As a counter-point, under Clause 27.8 – Determination of the Nominated Sub-Contractor's employment, the Contractor may only determine the employment of a NSC with the consent of the Architect and even then, this is subject to the Contractor having submitted a written report of the NSC's defaults first.

Carrying on with regards to responsibilities, under Clause 27.11 – Re-nomination of sub-contractor due to determination by the Contractor and Clause 27.12 – Re-nomination of sub-contractor due to determination by the Nominated Sub-Contractor when either a Contractor determines the employment of the NSC or, when the NSC determines his own employment, it is now the Architect's responsibility to re-nominate a replacement NSC.

PART A - PAST to PRESENT

CLAUSE 27 – Nominated Sub-Contractors Cont.

As for imposition of time frames, under Clause 24.2 – Nomination of sub-contractor, a revision now requires any reasonable objections which a Contractor may have towards the nomination of a sub-contractor, to now be made in writing within 14 days of receipt of the Architect's Instruction concerning the nomination.

At any time before the the issuance of any Interim Certificate or Penultimate Certificate, the Architect , like in the 1998 Form, may request for proof of payment to a NSC under any previous certificates under Clause 27.6 – Failure of Contractor to pay Nominated Sub-Contractors.

The Contractor now has 14 days to submit such proof and after the expiry of this 14 days, and in the event the Contractor has not submitted such proof of payment (or any valid reasons for withholding payment), the Architect may issue a certificate stating the amounts for which the contractor has failed to provide proof of payment. Once this certificate has been issued, The Employer may pay such amounts directly to the NSC and deduct the same from any sums which are due or are to become due to the Contractor.

PART A - PAST to PRESENT

CLAUSE 30 – Certificates And Payment.

This is probably the clause most referred in the Contract – Architects generally, will have cause to issue at least one certificate a month (and it is hoped that they do so with full knowledge of the clause).

It is also a clause which has undergone major revisions.

First change is that for Interim Certificates, Contractors no longer submit details and particulars but instead, now under Clause 30.1 – Payment Application and issuance of Architect's certificate, have to submit a "payment application" at the Interim Claim interval. Should a Contractor fail to submit this payment application, Architects now have the power to decide if an Interim Certificate should be issued.

Second change is that Architects now have a set time frame (21 days) to respond and issue the Interim Certificate.

PART A - PAST to PRESENT

CLAUSE 30 – Certificates And Payment Cont.

A third, significant change is that Certificates are no longer issued to the Contractor for presentation to the Employer but are now instead, issued directly to the Employer (with a copy to the Contractor).

A fourth change, under Clause 30.3 – Errors in payment certificate, now allows Architects to only correct/revise an interim certificate for clerical, computational and typographical errors.

A fifth change is the insertion under Clause 30.4 – Set-off by Employer, of the specific procedure which the Employer is required to follow, should he intend exercising his rights to set-off any cost or loss and expense which are allowed for in the Contract.

A sixth (and interesting) change is the addition of Clause 30.7 – Suspension of Works for non-payment, which now allows a Contractor to suspend the execution of works, should the Employer default in honouring any interim certificate within the period of honouring certificates (subject to the correct notice being served)

PART A - PAST to PRESENT

CLAUSE 30 – Certificates And Payment Cont.

A seventh change relates to the Final Account. Under Clause 30.10 – Final Account, there is now a set time frame for the submission of all necessary documents for the preparation of the Final Account, followed by another set time frame for the actual completion of the Final Account.

There are also set time frames for either the agreement or the settlement of disputes with respect to the Final Account.

A new (and interesting) clause, Clause 30.11 – Items in Final Account, also clearly details all items which are to be included and excluded in the Final Account.

PART A - PAST to PRESENT

CLAUSE 30 – Certificates And Payment Cont.

A eighth significant change under Clause 30.13 – Issuance of Penultimate Certificate, is the change in purpose of the "Penultimate Certificate. Under the 2008 form, the Penultimate Certificate is now for the release of retention sums or any outstanding sums for all Nominated Sub-Contractors and/or Nominated Suppliers.

A final change is the addition of a new clause, Clause 30.17 – Interest. Should an Employer fail to honour any certificate within the period of honouring certificates (*less* any liquidated damages or set-off) OR if the Contractor owes any amount to the Employer and fails to pay such sum within 21 days of receiving written notification, Interest (at a prescribed rate) may now be levied on such sums.

PART A - PAST to PRESENT

CLAUSE 34 – Adjudication And Arbitration,

The major and obvious change under Clause 34 is the addition of the provision for "Adjudication" (as is self-evident in the revised heading to the clause).

It is important to note that Adjudication though under this revision is ONLY for disputes related to "Set-Off by Employer" under Clause 30.4 which occur before the date of Practical Completion. This reference to Adjudication for any disputes related to Clause 30.4 is also now, a condition precedent before any such disputes may be referred to Arbitration.

Although any decision made by an Adjudicator may lack the supposed finality when compared to decisions made by an Arbitrator, Clause 34.4 – Decision of the Adjudicator, makes it quite clear that both Contractural Parties have to abide by the Adjudicator's decision until Practical Completion. Any of the parties intending to dispute the Adjudicator's decision by referring it to Arbitration (after Practical Completion) are still required though, to give notice of their intention within 6 weeks of the date of the Adjudicator's decision.

PART A - PAST to PRESENT

CLAUSE 36 - Notice,

A Wholly New Clause, this clause now clearly sets out how any written notice or document must be sent in order for it to be deemed to have been served along with the necessary qualifications required for the Proof of Notice.

CLAUSE 37 – Performance Bond.

Another Wholly New Clause which recognises/formalizes the existing, Industry-wide practice of using Performance Bonds.

The added benefit though of this clause is the setting out of (hopefully) uniform terms for the Performance Bond.

PART B – PRESENT to FUTURE

PART B – PRESENT to FUTURE

Due to the continually changing context which Architecture and Construction finds itself in, PAM is cognizant of the need to continually review the PAM Contract and check if it is still applicable and relevant.

In the beginning of 2016, PAM established a sub-committee to carry out such a review. It must be noted that the intention of this sub-committee was not to re-write the whole Contract but rather update or improve parts of it.

After much discussion (along with input from the Construction Industry), an updated draft of the Contract was finalized with the PAM Contract 2018 now having been officialy launched. This contract form is currently being prepared for printing (and distribution).

The rest of this paper does not seek to be a detailed and exhaustive study of the proposed revisions contained within the PAM Contract 2018. Its intention instead, is to high-light *some* of the changes we can expect in this new Form. For a more detailed review of the changes in the contract forms, it is the writer's understanding that PAM is currently organising presentations in the forthcoming months for its members and the Building Industry.

PART B – PRESENT to FUTURE

NOTABLE REVISIONS BETWEEN THE 2006 AND 2018 FORM.

a. Updating of the definition of a Service Provider under Article 7 (of the Articles of Agreement).

b. Revising Clause 3.3 – Copies of Documents to ensure that the Architect (and Consultants) provide Contract Drawings and unpriced Contract Bills to the Contractor, upon award of the contract.

c. Expanding the Relevant Events under Clause 23.0 – Extension of Time, to include the Contractor not having received the Drawings and Documents under the above item b.

d. Expanding the definitions of a Variation under Clause 11.1 – Definitions of Variations, to include the changing of the execution of any temporary Works.

e. Emphasizing that the Valuation of Variations under Clause 11.5 – Valuation of Variations and Provisional Sums , requires the submission of full details by the Contractor.

PART B – PRESENT to FUTURE

NOTABLE REVISIONS BETWEEN THE 2006 AND 2018 FORM. Cont.

f. Clarification of the amounts payable to a Contractor upon the determination of his employment under Clause 25.4 – Rights and Duties of Employer and Contractor, in line with recent Court Judgements.

g. Rationalizing the time frame for the calculation of the Final Account upon the Contractor's Determination by an Employer under Clause 25.6 – Final account upon determination.

h. Requirement under Clause 27.14 – Contractor permited to tender for P.C. Sums, for the omissions of any P.C. Sums by an Employer to be carried out only with the Contractor's consent.

i. Clarification as to the amounts an Employer may set-off under Clause 30.4 – Set-off by Employer, when only *part* of the set-off is disputed by the Contractor.

PART B – PRESENT to FUTURE

NOTABLE REVISIONS BETWEEN THE 2006 AND 2018 FORM. Cont.

j. Probably the most notable of all the revisions, the omission under Clause 30.5 – Retention Fund, of the Limit of Retention Fund with the Retention now being a constant percentage of the value of the works completed to date.

k. Revision of the Alternative Dispute Resolution (ADR) Clauses to now allow for "Expert Determination".

l. The *conditional* allowance of electronic transmission for the service of notices and documents.

m. A revision to the Clause on Performance Bonds with a requirement that payment from a Performance Bond is subject to the Architect certifying the breach upon which a bond may be caled upon by the Employer.

PART B – PRESENT to FUTURE

"ELEPHANTS IN THE ROOM"

As noted earlier, the PAM Contract 2018 was always intended to be just a minor revision of the 2006 Form. Even though minor, there are still some issues which are conspicuously absent from the revision.

The notable issues are as follows :

PART B – PRESENT to FUTURE

"ELEPHANTS IN THE ROOM" Cont.

a. G.S.T. (*Goods & Services Tax*).

Although there were earlier requests from Industry to allow for provision of G.S.T., this is an item that does not make an appearance in the 2018 Form.

Some of the reasons cited for its exclusion are that ;

i. the PAM Form is a *General* form of Contract which may be used for a variety of projects by Contractors whom may OR may not be required to charge GST,

ii. Architects (and the Consultants) are NOT experts in the calculation of the GST nor are they privy to the information which may be pertinent in its calculation,

iii. the best party to actually ascertain the G.S.T. chargeable (if required), is the Contractor (i.e.; the person empowered to collect the tax on behalf of the Royal Malaysian Customs Department),

PART B – PRESENT to FUTURE

"ELEPHANTS IN THE ROOM" Cont.

iv. payment of the G.S.T. is a requirement by law anyway, of the Party receiving the goods or services (i.e.; the Employer), *irrespective* of whether this requirement is stated in the Contract.

The above reasons, although valid, still do not address some of the areas of confusion surrounding the obligations to value the work completed, honour payment certificates or tax invoices, calculate set-off, etc.,.....

The arguments though regarding the inclusion (or exclusion) of any mention of G.S.T. are perhaps, rendered academic with its imminent repeal and replacement with the Sales and Services Tax (S.S.T.), details of which, at the time of preparing this paper, are still not clearly defined.

PART B – PRESENT to FUTURE

"ELEPHANTS IN THE ROOM" Cont.

b. CIPAA (Construction Industry Payment & Adjudication Act)

The Construction Industry Payment & Adjuducation Act 2012 is a piece of legislation which was introduced into the Malaysian Construction Industry in 2014. The purpose of this Act was for the resolution of disputes relating to payments within the Construction Industry,

Although some other forms of Malaysian Building Contracts have made mention of the Act, the PAM Contract 2018 remains silent with regards to the Act. It must be emphasized clearly though that this silence should not be interpreted as either ignorance or a disregard of the Act as the following points should also be taken into account :

i. CIPAA is NOT the only method of resolving disputes regarding payment which is available to any of the Contractual Parties.

PART B – PRESENT to FUTURE

"ELEPHANTS IN THE ROOM" Cont.

ii. The PAM Forms of Contract (both 2006 and 2018) also have Alternative Dispute Resolution Procedures (ADR) which may be employed and it is up to the discretion of the disputing parties to choose the method (either through CIPAA or within the Form of Contract) which they feel, suits them best.

Iii. The PAM Forms of Contract do NOT PRECLUDE the use of CIPAA in resolving disputes related to payment. It must be remembered that CIPAA is an Act of Parliament which is incorporated into the Malaysia legal system and using the PAM Contract 2006 as an example, Clause 38.1 – Governing Law, clearly states that the law governing the Contract shall be the *Laws of Malaysia*.
As long as the Act is not repealed, the provisions under CIPAA are still available, irrespective of whether it is mentioned specifically or not in any of the PAM Forms of Contract.

PART B – PRESENT to FUTURE

"ELEPHANTS IN THE ROOM" Cont.

ADR was historically conceived as a cheaper, speedier form of resolving disputes without having to involve lawyers, the courts/legal system whilst affording a degree of finality to the resolution for the benefit of the Contractual Parties.

With the ever increasing presence of lawyers and claims consultants even in minor disputes along with disputes being moved up the legal chain all the way into the Federal Court over very lengthy periods, the writer leaves it up to the audience to decide on the efficacy of the current ADR provisions as allowed for under legislation (CIPAA) or under the contract.

Nevertheless, given that there are DISPUTES arising with the Dispute Resolution Process, there is a possibility that there will be changes to the process and it may be less than prudent to tie any Standard Building Contract Form to any specific process which may be subject to these changes.

PART B – PRESENT to FUTURE

CONCLUSION.

With the launch of the PAM Contract 2018, the *immediate* future of the PAM Form of Contract would seemingly, have already been charted and decided upon.

Nevertheless, as mentioned earlier, the PAM Forms of Contract are creatures requiring constant and continuous review and if the writer were to be pressed for a prediction of its future, it would be *that it will change*.

THANK YOU.