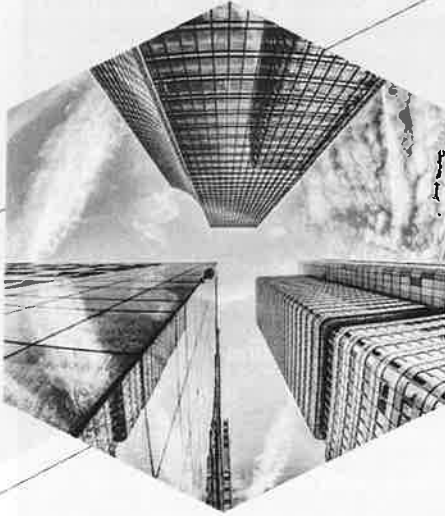


# PAM PROFESSIONAL PRACTICE FORUM 12.0: "INTEGRITY: PROBITY AND ETHICS OF AN ARCHITECT"



## Instructions, Variations, Extension of Time, Liquidated Ascertained Damages & Determination

On  
Saturday, 7<sup>th</sup> December 2019

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## PRESENTATION CONTENTS

### A: Instructions and Variations

1. What is Instruction?
2. Verbal v Written Instruction
3. Instructions in Standard Forms
4. Instructions ≠ Variations
5. Definition of Variation
6. Instruction to Vary Contract Works
7. Scope of Variations
8. Valuation of Variations

### C. Non-Completion/LAD

1. Relevant Provisions
2. LAD generally
3. Case Law

### B: Extension of Time (EOT)

1. General
2. Delay Categories
3. Grounds
4. Notification/Case Law
5. Assessment/Certification

### D. Determination

1. Introduction
2. Determination of Employment
3. - By the Employer
4. - By the Contractor

### E: Summary/Conclusion

## A. Instructions and Variations

### A1. What is Instruction?

- Most standard forms of contract contain **express provisions** empowering **S.O./Architect/CA/Engineer/PM** ("S.O.") to **issue instruction** on any expressly empowered matters.
- In AIAC 2019, the term "Architect" was replaced by "Contract Administrator" or "CA".
- **Contractor failing to comply** with valid instructions can lead to S.O. employing 3<sup>rd</sup> party or to determine Contractor's employment.
- Instructions may be given until practical completion.
- **Instructions** must be valid, if not Contractor can challenge.
- Instructions must not be:-
  - **'ultra-vires'** - beyond contractual or delegated powers.
  - **in breach** specific contract provision or procedural requirements.

### A2. Verbal v Written Instruction

- Instruction can be either **oral or in writing**.
- **Oral or verbal instruction** can be forgotten, misinterpreted or modified.
- **Verbal instruction**, should be **confirmed in writing** either S.O. or Contractor, to take effect.
- **A written instruction** - a letter, memo, facsimile, drawing, detail, minutes of meeting, written in site diaries or record.
- **Written instructions** are records that enable Contractor to claim for variation, extension of time, loss/expense, etc.

## A3. Instructions in Standard Forms

- PAM 06/18 CI 2.2 "All instructions issued by the Architect shall be in writing expressly entitled "Architect's Instruction" ('AI'). All other forms of written instruction including drawings issued by the Architect shall be an AI:
  - a) upon written confirmation from the Contractor entitled "Confirmation of Architect's Instruction" ('CAI'); or
  - b) upon subsequent confirmation of written instruction by the Architect with an AI."
- PAM 06/18 CI 2.4, that if Contractor fails to comply with instruction within 7 days of the AI's receipt, Employer may employ 3<sup>rd</sup> party and any incurred cost shall be set-off by Employer.

No.	Description	Standard Form of Contract				
		PAM 2006/2018	PWD 2010	IEM 2011	CIDB 2000	AIAC 2019
1	Vary works under contract	11.2	24.1	51.1	28.1(a)	11.4
2	Resolve any discrepancy in or between the contract documents	1.4	8.2(b)		7.4(c)	1.4
3	Remove materials from site	6.5(a)	36.3	38.1	15.7(a)(iii)	6.4
4	Open up for inspection		35.2	37.1(4)	15.6(a)	6.3
5	Rectify and/or make good defects	15.5	48	48.2(1)	15.7(a)	15.4
6	Dismiss any person from the works	8.3	23.6	15.3(2)	13.4(d)	8.3
7	Expend any Provisional sum/PC Sum	11.4	34.2	56.3(1)	41.2(a)	11.5
8	Termination of Sub-Contractor		47.5			
9	Takes possession - remove contractor facilities	16.3			23.3(b)	
10	Suspension of works	21.4	50.1(a)	42.1	19.1(a)	21.4
11	Make good damage to any property (not forming part of the Works)			22.4(1)		
12	Carry out specific requirements of the contract			13.2(1)		

## A. Instructions and Variations

### A4. Instructions ≠ Variations?

- Not every **instruction** constitutes a **variation** but every **variation** requires S.O./Architect/CA/Engineer/ PM's instruction.
- Contractor cannot expect additional payment for compliance with instruction.
- Contractor cannot carry out variation works without a proper instruction. If not, Contractor may:
  - not be paid for the work done.
  - breach the contract for not carrying out work accordingly.
  - may need to remove non-compliant work and replace it with work according to the contract.
- In most construction projects, there are circumstances where **changes or variations** to the Works is inevitable.
- A **variation clause** in construction contract **allows for changes** not be foreseeable at tender to be made, without having to re-negotiate or enter into a new separate contract each time there is a change to the Works.

## A. Instructions and Variations


### A5. Definition of Variations

- 'Variation' defined by various standard forms of contract differently but principally the same.
- "Variation" usually means a **change, modification, alteration, revision or amendment to the original intent of the contract and/or its Works.**

- Changes or Variations may stem from:
  - additions/omissions/substitutions/alterations;
  - changes in quality / form / character / position / dimension / line / level;
  - changes in any specified sequence / method / timing.

- Changes or Variations may stem from:
  - Changes in Employer's needs;
  - Changes in local building by-laws or other laws;
  - Original materials or supplies no longer available;
  - Design revision/modification;
  - Addition or omission to the "scope" of works.

A. Instructions and Variations		BAsiaPacific
A6. Instruction to Vary Contract Works		
PAM 06/18	CIDB (2000)	
<p>Cl. 11.2 - Architect may issue instructions requiring a variation and he may sanction in writing any variation made by the Contractor otherwise than pursuant to an instruction of the Architect. Variation required by Architect or subsequently sanctioned by him shall not vitiate this contract.</p>	<p>Cl. 28.1 empowers S.O. to issue an instruction involving Variation.</p> <p>NB: if Bill of Quantities ("BOQ") forms part of the contract, no instruction is required for provisional quantities.</p>	
AIAC (2019)	IEM CE 2011	
<p>Cl. 11.4 - CA may issue instructions in writing requiring a Variation at any time before issuance of Certificate of Practical Completion (CPC). After CPC has been issued, CA may not be empowered to issue such instruction unless required to instruct Contractor to correct defects or remedy non-compliance in the Works, or to comply with any Appropriate Authority and Service Provider requirements.</p>	<p>Cl. 51.1:</p> <ol style="list-style-type: none"> <li>1) Engineer must issue instructions for Variation for any part of the Works if Variation is necessary for its completion.</li> <li>2) Engineer may issue instruction for any part of the Works if;               <ol style="list-style-type: none"> <li>a) In his opinion variation is needed; or</li> <li>b) If variation is resulting from subsequent change in the original contract</li> </ol> </li> <li>3) Engineer's instruction for Variation will not nullify the Contract.</li> </ol>	
JKR / PWD 203A (2010)		
<p>Cl. 5.1(a) - S.O. may from time to time issue further drawings, details, and/or written instructions (collectively referred to as "S.O.'s instructions") for variation as referred to in clause 24 hereof;</p> <p>Cl. 24.1 - S.O. may issue instructions requiring a Variation in a form of a Variation Order. No variation required by the S.O. shall vitiate the Contract. Upon issuance of such Variation Order, the Contractor shall forthwith comply with it.</p>		

A7. Scope of Variations		BAsiaPacific
- Works That Do Not Constitute Variations		
<ul style="list-style-type: none"> <li>• <b>Materials</b> supplied by the Contractor is more superior than that specified without any instruction. <i>[Re Chittick v Taylor (1954) 12 W.W.R.653]</i></li> <li>• <b>Works</b> carried out by the Contractor not required under the contract and without any instruction. <i>[Re Chittick v Taylor (1954) 12 W.W.R.653]</i></li> <li>• Works which are deemed to be indispensably necessary to the contract - lump sum contract. <i>[Williams v. Fitzmaurice (1953) 27 A.L.J.R. 273]</i></li> <li>• <b>Extra work</b> arising from redesign due to difficult conditions - lump sum contract. <i>[Sharpe v. San Paulo Railway (1873) L.R. 8 Ch. App. 597]</i></li> </ul>		
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## A7 : Scope of Variations

Variation Description	PAM 06/18	PWD203A (2010)	IEM CE 2011	CIDB 2000	AIAC (2019)
1) Addition, omission or substitution of any work	11.1(a)	24.2(a)	51.2(1)(a) & (b)	1.1	11.1(a)
2) Alteration of design, quality or quantity of works shown in Contract Drawings & described in Contract Bills			51.2(1)(d)	1.1	
3) Changes in character, quality and/or nature of Works			51.2(1)(c)	1.1	11.1(b)
4) Change in levels, elevations, layout and dimensions				1.1	11.1(d)
5) Alteration of kind or standard of any materials and goods to be used in works	11.1(b)	24.2(b)			11.1(b)
6) Demolition or removal from site of any work executed or materials & goods brought thereon by Contractor for purposes of works other than work, materials & goods which are not in accordance with Contract	11.1(c)	24.2(c)	51.2(1)(e)	1.1	11.1(c)
7) Postponement of works				1.1	
8) Expedition of works				25	
9) Conforming to Statutory obligations	4	21.2	24.3	10	4.3
10) War damages	32.1(d)				32.1(d)
11) Antiquities and fossil				39	
12) Insurance				38B&C	
13) Change in Contractor's temporary works, working method and/or construction plant not desired by Employer/S.O.				1.1	
14) Damage rectification – indemnity provisions				35	
15) Any changes to the provisions in Contract with regards to					
i. any limitation of working hours;	11.1(d)(i)				11.1(e)
ii. working space;	11.1(d)(ii)				11.1(e)
iii. access to or utilisation of any specific part of the Site; and	11.1(d)(iii)				11.1(e)
iv. execution and completion of work in any specific order.	11.1(d)(iv)		51.2(1)(f)	1.1	11.1(e)
v. the execution of temporary works	11.1(d)(v)				

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 Sr. H.T Ong - 7 Dec 2019

## A8. Valuation of Variations - Rule 1

- PAM, JKR, IEM and CIDB forms have principally similar rules for valuation of variations – PAM 06/18 cl. 11.6, JKR 203A (2010) cl. 25(b), IEM CE 2011 cl. 52.1, CIDB (2000) cl. 29.1 and AIAC (2019) cl. 11.7.
- **Rule 1** - where varied work is of **similar character executed under similar conditions**, the work price or rate in the contract shall be used for the valuation.
  - PAM 06/18 and CIDB (2000) includes "does not significantly change quantity of such work described in the contract".

- What is the difference between 'similar character' and 'similar conditions' for variation work?
  - Word "similar" means "of a like nature" and does not mean have to be "identical".
  - **Similar character** usually refers to similar item of work already described and has a rate/price in contract BOQ. e.g. concrete columns/beams, brickwalls, etc.
  - Variation work **not of similar character** e.g. installation of floor and ceiling tiles.
  - **Similar condition** of usually refer to **physical conditions, timing and extent** of the variation work which is similarly described and allowed in the Contract.
  - Variation work **not of similar condition**, may be affected by the said 3 factors e.g. addition of a concrete beam after completion of all concrete works.

## A8. Valuation of Variations - Rule 2

- **Rule 2** - where varied work is of **similar character** to work included in the Contract but **not executed under similar conditions** the **work price or rate in contract** (as far as may be reasonable – PAM 98/IEM) shall be the **basis of valuation**, (with a fair allowance for the difference in conditions – PAM 06 & 18/CIDB/AIAC).
  - PAM 06/18, CIDB 2000 include work executed under similar conditions but with a significant change quantity of the work carried out.
  - JKR/PWD 203A (2010), varied work not executed under similar condition can be considered under this Rule, as the said Form provides for varied work **not of similar character or not executed under similar condition**.

## A8. Valuation of Variations - Rule 3

- **Rule 3** - where **rules 1 & 2 do not apply** or where work is not of similar character, (or not executed under similar condition – JKR 203A (2010) as above described), **valuation shall be at a fair market rates and prices** (PAM 06/ PAM 18/IEM/CIDB/ AIAC (2019)) determined by:
  - Quantity Surveyor (PAM 06/18),
  - Engineer (IEM CE 2011),
  - S.O. (CIDB, 2000),
  - CA (AIAC, 2019), or
- BOQ rates shall be the basis of rates for the same, so far as may be reasonable, in failing which **a fair valuation** shall be made (JKR/PWD 203A (2010))

## A8. Valuation of Variations - Rule 4

- **Rule 4** - where the varied work **cannot be properly measured and valued** (above rules is inapplicable or inappropriate in the circumstances - CIDB), the **valuation shall be based upon daywork rates or prices** (as far as may be reasonable and where no such rates or prices at actual prime costs – PAM 98) **plus fifteen percent (15%)**, which percentage shall include for the use of all ordinary plant, tools and scaffolding, supervision, overheads and profit (PAM 06, 18 & AIAC (2019)).
  - CIDB (2000) includes for all other loss, expense, costs and damages incurred or in-connection with varied works.
  - Similar valuation under this Daywork Rule also provided under JKR/PWD 203A (2010) Clause 25.2.

## A8. Valuation of Variations - Rule 5

- **Rule 5** – where varied work involves **items to be omitted, rates or prices in the contract** shall determine the **valuation of items omitted**. If **omissions substantially vary the conditions** under which any remaining items of work are carried out, the **rates or prices of such remaining items shall be valued under Rule 2** (and Rules 1 or 3 – PAM 06/18) (and Rules 3 or 4 – CIDB) (and Rule 3 – JKR 203A (Rev. 2010) (and Rules 3 or 4 – AIAC (2019))).
  - All standard forms require **submission of documents** such as vouchers, receipts, delivery orders, etc. **to support the dayworks for verification** by Architect/CA/Engineer/S.O.
  - CIDB (2000) cl. 29.2, has additional procedural provision for agreement of said variation valuation.

## A8. Valuation of Variations

### - CI 11.5 Valuation of Variations and Provisional Sum (PAM Contract)

#### PAM Contract 2006

All Variations shall be measured and valued by the Quantity Surveyor. Where any recording of site information and/or Site measurements are carried out at the Site, the Contractor shall provide the Quantity Surveyor with such assistance as may be necessary to carry out the works and the Contractor shall be given the opportunity to be present to take such notes and measurement as he may require.

#### PAM Contract 2018

All Variations shall be measured and valued by the Quantity Surveyor. Upon completion of the Variations, the Contractor shall submit **complete details and particulars** as required by the Architect and Quantity Surveyor for valuation of Variations. Where any recording of site information and/or site measurements are carried out at the Site, the Contractor shall provide the Quantity Surveyor with such assistance as may be necessary to carry out the works and the Contractor shall be given the opportunity to be present to take such notes and measurements as he may require. If the Quantity Surveyor is of the opinion that the **details and particulars submitted by the Contractor are insufficient** to enable him to carry out the measurement and valuation, the **Quantity Surveyor shall within twenty eight (28) Days from receipt of the Contractor's submission, inform him of any deficiency in his submission and may require the Contractor to provide such further details and particulars within a further twenty eight (28) Days.** When the Contractor has **submitted sufficient details and particulars, the Quantity Surveyor shall measure and value the Variations within thirty days (30) Days or any other extended date as agreed between the Architect and Contractor.**

- No express provision of any effect if QS fails to measure and value variations within the time frame.
- Apart from breach of contract term, can be implied professional incompetence or negligence.
- All submitted Variations need to be measured and valued progressively throughout construction period, rather than at the end, as commonly practiced.

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15

## A8. Valuation of Variations

### - CI 11.6(f) Variation Rules

#### PAM Contract 2006

The valuation of Variations and of work executed by the Contractor for which a provisional sum is included in the Contract and the expenditure of Provisional Sums (other than for work for which a tender had been accepted under Clause 27.14) shall be made in accordance with the following rules:

11.6(a) ...

11.6(f) in respect of Provisional Quantity, the quantities stated in the Contract Documents shall be re-measured by the Quantity Surveyor based on the actual quantities executed. The rates and prices in the Contract Documents shall determine their valuations.

#### PAM Contract 2018

The valuation of Variations and work executed by the Contractor for which a Provisional Quantity is included in the Contract and the expenditure of Provisional Sums (other than for work for which a tender had been accepted under Clause 27.14) shall be made in accordance with the following rules:

11.6(a) .....

11.6(f) in respect of Provisional **Quantities**, the quantities stated in the Contract Documents shall be re-measured by the Quantity Surveyor based on the actual quantities executed **within sixty (60) Days after the said works are completed.** The rates and prices in the Contract Documents shall determine their valuations.

- Amended cl. 11.6(f), Valuation Rules in respect of Provisional Quantities, requires QS to re-measure based on actual quantities executed within 60 days after the said works are completed.
- Extent of Provisional Quantities works will determine time required to complete the re-measurement, whether within 60 days is sufficient.

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by Sr. H.T Ong - 7 Dec 2019

16



**B. Extension of Time**  
**B1. General**

- **Primary** reason of Extension of Time ("EOT") is to **allow for alteration to completion date.**
- **Secondary** reason to preserve **Employer's rights to deduct Liquidated Damages.**
- Two major effects of EOT clause(s) :
  - Extent Contractor is **liable for liquidated damages** for delay to Works completion.
  - Basis for Contractor's claim against Employer for time related **losses/expenses and damages.**
- Without such clauses, Architect/Engineer/SO/PD is not empowered to extend contract period : **'TIME AT LARGE'.**
- 'Time at large' means Contractor's obligation is to complete Works within a reasonable time and **Employer may lose right to impose delay damages or liquidated damages** under Contract.

**B. Extension of Time**  
**B1. General**

- Delay events can be divided into **3 categories:**
  - Default by Contractor (no EOT and L & E)
  - Default by Employer or its representative/s (with L&E);
  - Natural/neutral events or those beyond either party control(no L&E);
- EOT provisions in standard forms of construction contract commonly;

PAM 06/18	Clause 23.0	CIDB 2000	Clause 24.0
PWD 203A (Rev 2010)	Clause 43.0	AIAC (2019)	Clause 23.0
IEM CE 2011	Clause 44.0		

- Most standard forms of construction contract empowers Architect/Engineer/SO/PD/CA ("S.O.") to **grant an EOT on specific grounds.**
- Failure to do so, normally relieves Contractor from his liability to pay Liquidated Damages.

## B. Extension of Time

### B2. Delay Categories

#### i) Delays caused by Contractor

- **Avoidable delays** if Contractor proceeds regularly and diligently and uses his best endeavours to prevent delays to the Works.
- Contractors need to take all **measures** to ensure:
  - adequate labour force;
  - necessary goods and materials are on site;
  - Works are not delayed by Sub-Contractors.

#### ii) Delays caused by Employer and/or its Representatives

- These include:
  - compliance with S.O. instructions;
  - **deferment site possession** or any section of Works;
  - **delay or failure in supply of materials/goods** by Employer;
  - **delay or failure of craftsmen, tradesmen or contractors engaged by Employer** to execute Works not part of contract;
  - Contractor **not having received in due time necessary instruction** for which he had specifically applied for in writing;
  - suspension of performance obligations under contract by Contractor due to **Employer's failure to fully pay a certified amount**;
  - **any act of prevention** or breach of contract by Employer;
  - **any impediment, prevention or default**, whether by act or omission by Employer or his representatives, except those caused or contributed by Contractor or his personnel.

## B. Extension of Time

### B2. Delay Categories

#### iii) Natural/neutral events or those beyond either party control

- Delays arise due to circumstances neither Employer nor Contractor has any control, which affect the Works, include:
  - a **statutory undertaker** executing, or failing to execute, work in pursuance of its statutory obligations;
  - loss or damage caused by **contingencies** such as fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, etc;
  - **riot or civil commotion, workmen strike** or lockout ;
  - compliance with any **change in law, regulation or by-law** or terms and conditions of any authorities or service providers;
  - exceptionally **inclement weather conditions**;
  - appointment of a **replacement Architect or Consultant/s**;
  - compliance with S.O.'s instructions on discovery of **antiquities**;
  - **suspension of whole or part of Works** by Authority order, provided not due to any negligence, omission, default or breach of contract by Contractor or Nominated Sub-Contractors;
  - **force majeure**;

## B. Extension of Time

### B3. Grounds – Tabulation of Relevant Events

Relevant Events/Contract Clause	PAM 06/18	JKR 203A (2010)	IEM CE 2011	CIDB 2000	ALAC (2019)
1 Force majeure	23.8 (a)	20.4	43 (a)	24.1 (a)	23.8(b)(i)
2 Exceptionally inclement weather	23.8 (b)	20.4	43 (b)	24.1 (b)	23.8(b)(ii)
3 Loss, damage injury occasioned by one or more of the contingencies	23.8 (c)		43 (d)	24.1 (m)	23.8(b)(iii)
4 Civil commotion, strikes, lockouts, etc	23.8 (d)	20.4(c)	43 (b)	24.1 (c)	23.8(b)(i)
5 Late drawings, information, confirmations and/or instructions	23.8 (e)	44.1	43 (f)	24.1 (e)	23.8(c)(i)
6 Ditto, in regard to P.C. Sums & Provisional Sums	23.8 (e)				23.8(c)(ii)
7 Failure or delay in giving possession of site	23.8 (f)	41.2	43 (g)	24.1 (i)	23.8(c)(iii)
8 Compliance with the contract administrator's instructions, eg. to resolve discrepancies	23.8 (g)		43 (e)	24.1 (f)	23.8(c)(iv)
9 Variation	23.8 (g)		43 (e)	24.1 (f)	23.8(c)(v)
10 Postponement of any work by Contract Administrator	23.8 (g)				23.8(c)(vi)
11 Suspension of works by the Contract Administrator	23.8 (g)	44.2(1)		24.1 (k)	23.8(c)(vii)
12 Delay on part of Nominated Sub-Contractors	23.8 (h)				23.8(b)(iv)
13 Re-nomination of Nominated Sub-Contractors	23.8 (i)				23.8(b)(v)
14 Delays by artist, tradesmen or others employed by the Employer	23.8 (j)		43 (i)	24.1 (j)	23.8(c)(viii)
15 Delay or failure supply of goods and materials by the Employer	23.8 (k)				23.8(c)(ix)
16 Test and Inspection	23.8 (l)		43 (e)	24.1 (h)	23.8(c)(x)
17 Any acts of prevention or breach of contract by the Employer	23.8 (m)	44.1 (e)			23.8(c)(xi)
18 War damage	23.8 (n)	20.4			23.8(b)(vi)
19 Contract Administrator's instruction on antiquities and fossils	23.8 (o)	44.1(d)	43 (e)	24.1 (n)	23.8(c)(xii)
20 Compliance with Statutory Requirement	23.8 (p)		43 (e)	24.1 (g)	23.8(b)(vii)
21 Delay or failure caused by Statutory Agencies or Services Providers in carrying out their work	23.8 (q)				23.8(b)(viii)
22 Appointment of a replacement Architect/Engineer/ QS/ Specialist Consultant	23.8 (r)				23.8(c)(xiii)
23 Dispute with neighbouring owners	23.8 (s)		43 (c)		23.8(c)(xiv)
24 Delay on the execution of work for Provisional Quantity which the Architect is not a reasonably accurate forecast of the quantity of work required	23.8 (t)				23.8(c)(i)
25 Failure of the Employer to give access to site in time or any passage to the site which is in possession or control of the Employer	23.8 (u)				23.8(c)(xv)
26 Suspension of works by the Contractor due to late payment and the withdrawal of the Architect and/or Consultant	23.8 (v)				23.8(c)(xvi)
27 Suspension of works by the Authority but not due to the Contractor's Nominated Sub-Contractor's negligence, omission, default and/or breach of contract	23.8 (w)				23.8(c)(xvii)
28 Any other ground for EOT mentioned in the Contract	23.8 (x)	20.4(d)		24.1 (q)	23.8(c)(xviii)
29 Delay on part of Nominated Sub-Contractors or Suppliers			43 (k)	24.1 (p)	
30 Once or more of the Excepted Risk		44.1 (c)		24.1 (d)	
31 Instruction on P.C. & Provisional Sum giving rise to a variation				24.1 (o)	
32 Contractor's inability to secure goods or materials			43 (j)		
33 Adverse physical conditions		12.2			

## B. Extension of Time

### B4. Notification

- Notification provisions are usually **linked to certain contractual entitlements**, which arise when specified conditions or requirements are met.
- Entitlements are often related to time and/or costs, usually EOT and/or loss and expense claims.
- **Timely written notice of intention to claim**, is often a condition precedent to assessment of these entitlements by Architect/Engineer/S.O/Project Manager, depending on the form of contract used.
- **Condition precedent provision means** that failure in complying can impede a contractor from his entitlement/s in respect of a particular or relevant event, which he is not culpable for, under the contract and/or at law.

## B. Extension of Time B4. Notification

### PAM 2018/2006 Clause 23.1:

"the Contractor shall give written notice to the Architect his intention to claim for such extension of time together with an initial estimate of the extension of time he may require supported with all particulars of the cause of delay... The giving of such written notice shall be a condition precedent to an entitlement of extension of time."

### AIAC (2019) Clause 23.1:

"As soon as practicable, but not later than twenty-eight (28) Days after the Contractor became aware, or should have become aware of the regular progress of the Works having been delayed by such Time Impact Events, the Contractor shall give written notice to the Architect indicating his intention to claim for an EOT and describing the Time Impact Events giving rise to an EOT."

If the Contractor either fails to:

- (i) give such written notice under Clause 23.1(b), or
- (ii) submit the required particulars within the stipulated 28 Days or such other period as approved by the Architect under Clause 23.1(c),

the Architect is not obliged (until after the Practical Completion of the Works) to assess and grant any EOT in respect of the Contractor's application for EOT...

### PWD 203A (2010) Clause 43.1

"Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice to the S.O as to the causes of delay and relevant information with supporting documents enabling the said officer to form an opinion as to the cause and calculation of the length of delay ....."

### IEM (2011) Clause 44.2

"If the Contractor considers that there will be or has been delay to the completion of Works beyond the Date for Completion which are caused by the events listed in Clause 44.1(1), he must then serve a notice to the Engineer."

### CIDB Clause 24.2 (a):

"if the Contractor is of the opinion that the progress or completion of the Works or any section of the Works is or will be or has been delayed by any events including but not limited to the events stated in Clause 24.1, he shall forthwith notify the S.O. of such event within 30 days of the occurrence of such event ....."

## B. Extension of Time B4. Notification (Condition Precedent)

- For Notice of Delay to be condition precedent to Contractor's right for an EOT, clause has to be such worded that a **failure to serve notice** would result in loss of that right. (*Bremer Handelsgesellschaft mbh v. Vanden Avenne-Izegem (1978) 2 LLR 109*)
- Notice is **not** stated as a "**condition precedent**" for granting of EOT under PAM 98, PWD 203A, IEM CE 2011 and CIDB 2000.
- Notice **is** stated as a "**condition precedent**" for granting of EOT under PAM 2018/2006 Contract & AIAC (partly) .
- However, notice **is** a **condition precedent** for financial claims under many contracts and failure to serve them can be fatal.

## B. Extension of Time

### B4. Notification (Case Law)

- **Water Lilly Construction v G.P.C. Mackay and D.M.W. Developments Ltd [2012] EWHC 1773 (TCC):**

➤ Akenhead J referred to Gaymark case and ruled in relation to **written notice as condition precedent to entitlement of claim**, as follows:-

*"It is legitimate to bear in mind what knowledge and information the Architect already has. For instance, the Architect (as in this case) attended meetings regularly and frequently throughout the project and was the recipient of scores of applications for extensions of time from WLC; it might legitimately be thought that the Architect already had a very substantial amount of information at its fingertips so that, arguably, less information needed to be provided by the Contractor in its application because all that is required is that the Architect must be reasonably put into a position in which it can form an opinion that "direct loss and/or expense has been incurred or is likely to be incurred...because the regular progress of the Works...has been materially affected" by the given events. This is consistent with the decision of Mr Justice Vinelott in London Borough of Merton v Leach (1985) 32 BLR 68 at page 97 and 98..."*

## B. Extension of Time

### B4. Notification (Case Law)

- **Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 TCC:**
- Obrascon were employed to construct a road tunnel beneath end of the runway at Gibraltar airport, used FIDIC Contract - **Plant Design-Build (1999)**, required the Contractor to **submit adequate written notice (cl.20.1)**, accordingly.

- Akenhead J held:

*"...no reason why this clause should be construed strictly against the contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer..."*

- Akenhead J provided further guidance by stating:

*"The entitlement to extension thus arises if and to the extent that completion 'is or will be delayed by the various events, such as variations or 'Unforeseeable' conditions. This suggest that the extension of time can be claimed either when it is clear that there will be delay (a prospective delay) or when the delay has been at least started to be incurred (a retrospective delay)."*

**B: Extension of Time****B5 - Assessment (Certification) – PAM 2006 vs PAM 2018****PAM Contract 2006**

When the Contractor has submitted sufficient particulars for the Architect's consideration, the Architect shall subject to Clause 23.5, 23.6 and 23.8, consider the Contractor's submission and shall either reject the Contractor's application or issue a Certificate of Extension of Time within six (6) Weeks from the receipt of sufficient particulars. The Architect may issue the written notice of rejection or the Certificate of Extension of Time before or after the Completion Date.

**PAM 2018**

When the Contractor has submitted sufficient particulars for the Architect's consideration, the Architect shall subject to Clauses 23.5, 23.6 and 23.8, consider the Contractor's submission and shall either reject the Contractor's application **with reasons** or issue a Certificate of Extension of Time **with details** within six (6) Weeks from the receipt of sufficient particulars. The Architect may issue the written notice of rejection or the Certificate of Extension of Time before or after the Completion Date.

- Amended cl. 23.4 requires Architect to **provide reasons** of his rejection of Contractor's EOT submission.
  - If Architect issue a Certificate of EOT, he/she needs to provides details.
  - Avoid ambiguity and argument as to why Architect rejects Contractor's EOT Application, which is commonly practiced in the past PAM forms.
  - Reduce/avoid bad practice of EOT application not being assessed or not granted without any reason.
  - Avoid Architect to grant EOT on "global" extension basis where no details given to granted extension.
  - Lessen dispute on Loss and/or Expense entitlements which are mainly dependant on entitlement of EOT.

**C. Non-Completion/LAD****C1: Relevant Contract Provisions**

- PAM 98/06/18 Cl. 22, if Contractor **fails to complete Works** by Date(s) of Completion or within any extended period, then **Employer may to deduct LAD** (rate stated in Appendix) for the incomplete Works period, from any monies due/become due .
- PAM 06/18, IEM, PWD and CIDB forms empower Architect/ Engineer/SO/PO to issue a **Certificate of Non-Completion (CNC)**, a **condition precedent** to levy of LAD.
- PAM 06/18 cl. 22.1 stated "...*The Employer may recover such sum as debt or may deduct such sum from any monies due or to become due to the Contractor under the Contract or the Employer may recover such sum from the Performance Bond. The Employer shall inform the Contractor in writing of such sum from the Contractor. The imposition of Liquidated Damages by the Employer shall not be taken into account by the Architect in the issuance of payment certificates and Final Certificate, and is not subject to the set-off procedures under Clause 30.4 and adjudication.*"

## C. Non-Completion/LAD

### C2: LAD Generally

- If Employer **waives his right to LAD claim** by express/implied agreement, he is estopped to claim. (*Puncak Niaga Holdings Bhd v NS Water Sdn Bhd & 2 Ors [2003] 1 LNS 510*).
- If Contractor awarded with extension of time (EOT) with **new Completion Date fixed after CNC issuance** and LAD deduction, the **CNC is automatically revoked**. Any excess LAD deducted need to be returned to Contractor. (PAM 06/18 cl. 22.3)
- **If LAD amount is not inserted in Appendix** (e.g. stated as NIL), then **no LAD can be imposed** (*Temloc Ltd v Errill Properties Ltd (1987) 39 BLR 30*).
- **Employer cannot claim for any loss** resulted from Contractor failure to complete by agreed time; which time is the essence of contract, if **during acceptance of the delayed performance**, the Employer **did not notify his intention to claim for damages**. (Contract Act (1950) Section 56(3)).
- Claim on **unliquidated damages** based on actual loss can still be possible under a common law action (IEM CE 2011 cl. 46.3, CIDB (2000) cl. 26.3).
- LAD amount should be a proper **estimate of damage** Employer is likely to suffer for uncompleted Works beyond the time period [**Section 75 of CA 1950/Selva Kumar v Thiagarajah (1955)**]. If **actual suffered** is much less than LAD amount, then Court will refuse to enforce it. **Proof of actual loss is essential.**

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by Sr. H.T Ong - 7 Dec 2019

29

## C. Non-Completion/LAD

### C2: Case Law

#### Cubic Electronic S/B (in liquidation) vs Mars Telecommunication S/B [2019] 1 AMR 737

##### • Federal Court's judgment:

- There is no need to prove actual loss or damage incurred where there is a LAD clause in the contract.  
*"With respect and for reasons we shall set out below, we are of the view that **there is no necessity for proof of actual loss or damage in every case where the innocent party seeks to enforce a damages clause**. Selva Kumar (supra) and Johor Coastal (supra) should not be interpreted (as what the subsequent decisions since then have done) as imposing a legal straightjacket in which proof of actual loss is the sole conclusive determinant of reasonable compensation. **Reasonable compensation is not confined to actual loss**, although evidence of that may be a useful starting point."* (para 65).
- The innocent party seeking to enforce LAD must first show that **there was a breach of contract** and the **contract contains a clause specifying a sum to be paid** upon such breach.  
*"We turn now to the issue on burden of proof. The **initial onus lies on the party seeking to enforce a clause under section 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach**. Once these two elements have been established, the **innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven**, subject always to the **defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.**"* (para 70)

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by Sr. H.T Ong - 7 Dec 2019

30

## D: Determination

### D1- Introduction

- **Serious provision** unique to construction industry.
- Often misquoted or misunderstood by various professionals (including lawyers) as determination of contract and/or termination of contract.
- Unlike termination of contract, where remedy is usually **damages at common law**, determination of employment allows such remedy to be found within ambit of contract.
- **Determination of employment** is usually available to both contracting parties i.e.
  - Determination of Contractor's Employment by Employer
  - Determination of Contractor's own employment.
- Any determination to be carried out is usually **serious and must be considered carefully** and done in **strict accordance** with contract provisions and procedures.
- For determination to occur, **specified default/s** by defaulting party must have been committed.
- When determination is effected, **provisions and procedures** are available for non-defaulting party (Contractor or Employer as case maybe) to have appropriate remedies and recovery of loss/expense incurred.

## D: Determination

### D1- Introduction

<b>PAM 06/18</b> <ul style="list-style-type: none"> <li>○ Cl. 25 – Determination of Contractor's Employment by Employer</li> <li>○ Clause 26 – Determination of Own Employment by Contractor</li> </ul>	<b>AIAC 2019</b> <ul style="list-style-type: none"> <li>○ Clause 25 – Determination by Employer</li> <li>○ Clause 26 – Determination by Contractor</li> </ul>
<b>IEM CE 2011</b> <ul style="list-style-type: none"> <li>○ Clause 61 – Termination by the Employer</li> <li>○ Clause 62 – Termination by the Contractor</li> </ul>	<b>PWD 203A (2010)</b> <ul style="list-style-type: none"> <li>○ Clause 51 – Events and Consequences of Default by the Contractor</li> <li>○ Termination on National Interest</li> <li>○ Termination on Corruption</li> </ul>
<b>CIDB (2000)</b> <ul style="list-style-type: none"> <li>○ Clause 44 - Determination by Employer</li> <li>○ Clause 45 - Determination by Contractor</li> <li>○ Clause 46 - Termination without Default</li> </ul>	<b>FIDIC Green Book (1999)</b> <ul style="list-style-type: none"> <li>○ Clause 12 - Default</li> </ul>



## D: Determination

### D2- Determination of Employment

#### - BY THE EMPLOYER

- Architect/CA/Engineer/SO/PM (hereafter referred as "SO") may give Contractor notice by **registered post** specifying defaults provided that such notice is not given unreasonably or vexatiously.
- If Contractors **continues with defaults for 14 days** after receipt of such notice, then Employer may within **further 10 days determine Contractor's employment** under contract.
- These provisions are in similar wordings under PAM 98/06/18 cl 25.2, PWD 203A cl 51(a), IEM CE 2011 cl 61.1, CIDB cl 44.1 (a)&(b) & AIAC (2019) cl 25.2.

#### - BY THE CONTRACTOR

- Contractor usually is required to issue notice by **registered post** or **recorded delivery** to determine his employment under the contract, provided not given **unreasonably or vexatiously**.
- PAM 06/18 cl 26.2, IEM CE 2011 cl. 62.1, CIDB cl 45.1(b) & AIAC (2019) cl. 26.2 & FIDIC Green Book cl 12.2, Contractor must give **14 days default notice (or 7 days)** to Employer.
- If Employer **continues with default**, Contractor may within 10 days (7 days for IEM & 28 days for FIDIC Green Book) after expiry of 14 days notice by **further notice** determine his own employment.
- **Notice of default** is not required under PAM 06/18 cl 26.3, AIAC (2019) cl. 26.3, NEC4 (2017) cl. 91.1 IEM CE 2011 cl. 62.1(1) and optional under FIDIC Green Book cl. 12.3.

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by Sr. H.T Ong - 7 Dec 2019

33



## D: Determination

### D3 - Determination of Employment (By Employer)

	Contractor's Defaults:	PAM 2006/18	PAM 1998	JKR 203A (rev 10)	IEM CE 2011	CIDB (2000)	AIAC (2019)	FIDIC Green Book
1	Fails to commence Works in accordance with the Contract	cl 25.1(a)			cl 61(c)	cl 44.1(a)(i)	cl 25.1(a)	12.1
2	Fails to provide Performance Security Deposit				cl 61(g)	cl 44.1(a)(ii)		
3	Suspension of Works	cl 25.1(b)	cl 25.1(i)	cl 51(a)(i)	cl 61(a)	cl 44.1(a)(iii)	cl 25.1(b)	12.1
4	Fails to proceeds regularly and diligently	cl. 25.1(c)	cl 25.1(ii)	cl 51(a)(ii)	cl 61(b)	cl 44.1(a)(iv)	cl 25.1(c)	12.1
5	Fails to execute Works in accordance with the Contract			cl 51(a)(iii)	cl 51(a)(iii)			
6	Fails to remove defective works		cl 25.1(iii)	cl 51(a)(iv)	cl 51(a)(iv)	cl 44.1(a)(v)		
7	Assignment or Sub-letting without consent	cl. 25.1(e)	cl 25.1(iv)	cl 51(a)(v)	cl 51(a)(v)	cl 44.1(a)(vi)	cl. 25.1(e)	
8	Abandoned the Contract.	cl. 25.1(f)	cl 25.1(v)		cl 61(h)		cl. 25.1(f)	
9	Failure to comply with Architect/S.O.'s Instructions	cl. 25.1(d)	cl 25.1(vi)		cl 61(f)	cl 44.1(a)(vii)	cl. 25.1(d)	12.1
10	Contractor's bankruptcy	cl. 25.1	cl 25.3	cl 51(b)(i) to (iv)	cl 61.2	cl 44.2(a) to (d)	25.30	12.3

**Table: Express Rights of Employer to determine Contractor's Employment upon Contractor's defaults**

34

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by Sr. H.T Ong - 7 Dec 2019



## D: Determination

### D3 - Determination of Employment (By Employer)

- PAM 06/18 cl 25.4, JKR 203A cl 51(c), IEM CE 2011 cl 61.3, CIDB cl 44.3, AIAC (2019) cl. 25.5 provide in detail respective rights and liabilities of parties in event of determination.

Brief Description of Relevant Contract Clauses	PAM 18/06	PAM 98	JKR 203A	JKR DB/T	IEM CE 2011	CIDB	AIAC 2019	FIDIC Green Book
The Contractor must vacate the site and remove all equipment and personnel (including his subcontractors)	25.4 (a) & (c)	25.4 (i) & (iii)	51 (c) (i) & (iv)	54.3 (a) & (d)	61.3(1)(b) & (e)	44.3 (a) & (b)	25.5(a)	12.1
The Employer is entitled by himself or to employ others to complete the outstanding works	25.4 (a)	25.4 (i)	51 (c) (ii)	54.3 (b)	61.3(2)	44.3 (c)	25.5(a)	
The Contractor is not entitled to any monies until after completion of the outstanding works by the Employer	25.4 (d)	25.4 (iv)	51 (c) (v) & (vi)	54.3 (e) & (f)		44.3 (e) & (f)	25.5(e)	
Contractor is not entitled to any payment until Engineer issue Certificate of Termination Cost					61.4(7)		25.5(e)	12.4
The Contractor must assign to the Employer, contracts with his suppliers and sub-contractors upon notice by the Employer	25.4 (a) & (b)	25.4 (ii)	51 (c) (iii)	54.3 (c)		44.3 (d)	25.5(b)	
The Employer to claim expenses, loss and damages suffered.	25.4 (d)	25.4 (iv)	51 (c) (v)	54.3 (e)	61.4(3)	44.3 (f)	25.5(e)	12.4

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by Sr. H.T Ong - 7 Dec 2019

35

## D: Determination

### D4. Determination of Employment (By Contractor)

- Express rights of Contractor to determine his own employment under various standard contracts upon Employer's defaults:

Employer's Defaults:	PAM 06/18	PAM 98	JKR 203A	IEM CE 2011	CIDB	AIAC 2019	FIDIC Green Book
Failure to pay	Cl 26.1 (a)	Cl 26.1 (i)	No provision for Contractor to determine his employment	Cl 62.1(a)	Cl 45.1(a) (i)	26.1(a)	12.2
Interference with Certificates	Cl 26.1 (b)	Cl 26.1 (ii)		Cl 62.1(b)	Cl 45.1(a)(ii)	26.1(b)	
Suspension of Works	Cl 26.1 (d)	Cl 26.1 (iv)		-	-	26.1(d)	
Failure to appoint Architect/Engineer/S.O upon his stop/death	26.1 (c)	-		Cl 62.1(c)	Cl 45.1(a)(iii)	26.1(c)	
Employer's insolvency	Cl 26.3	Cl 26.1 (iii)		Cl 62.2	Cl 45.2 (a), (b), (c)&(d)	26..3	12.3

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36

## D: Determination

### D4- Determination of Employment (By Contractor)

#### - CI 25.4(d): Rights and duties of Employer and Contractor

##### PAM Contract 2006

the Contractor shall allow or pay to the Employer all cost incurred to complete the Works including all loss and/or expense suffered by the Employer. Until after the completion of the Works under Clause 25.4(a), the Employer shall not be bound by any provision in the Contract to make any further payments to the Contractor, including payments which have been certified but not yet paid when the employment of the Contractor was determined. Upon completion of the Works, an account taking in consideration the value of works carried out by the Contractor and all cost incurred by the Employer to complete the Works including loss and/or expense suffered by the Employer shall be incorporated in a final account prepaid in accordance with Clauses 25.6.

##### PAM Contract 2018

the Contractor shall allow or pay to the Employer all cost incurred to complete the Works including all loss and/or expense suffered by the Employer. Until after the completion of the Works under Clause 25.4(a), the Employer shall not be bound by any provision in the Contract to make any further payment to the Contractor, including payments which have been certified **but not yet due but excluding payments which have been certified and are due but remain unpaid** when the employment of the Contractor was determined. Upon completion of the Works, an account taking into consideration the value of works carried out by the Contractor and all cost incurred by the Employer to complete the Works including loss and/or expense suffered by the Employer shall be incorporated in a final account prepared in accordance with Clause 25.6.

- Amended cl. 25.4(d) gives clarification of the amounts payable to Contractor upon determination, in line with recent Court Judgement (*Econpile (M) Sdn Bhd v IRDK Venture Sdn Bhd* [2017] 7 MLJ 732).

## D: Determination

### D4- Determination of Employment (By Contractor)

#### - CI 25.6: Final Account upon determination

##### PAM Contract 2006

The Architect or Quantity Surveyor shall within **six (6) Months on completion** of the Works, submit to the Employer and Contractor for their agreement, a final account for all cost incurred to complete the Works including the sums previously certified to the Contractor before the date of determination, Liquidated Damages, set-off and all other loss and/or expenses suffered.

##### PAM Contract 2018

The Architect or Quantity Surveyor shall within **three (3) Months on the availability of the final cost incurred to complete** the Works, submit to the Employer and Contractor for their agreement, a final account for all cost incurred to complete the Works including the sums previously certified to the Contractor before the date of determination, Liquidated Damages, set-off and all other loss and/or expense suffered

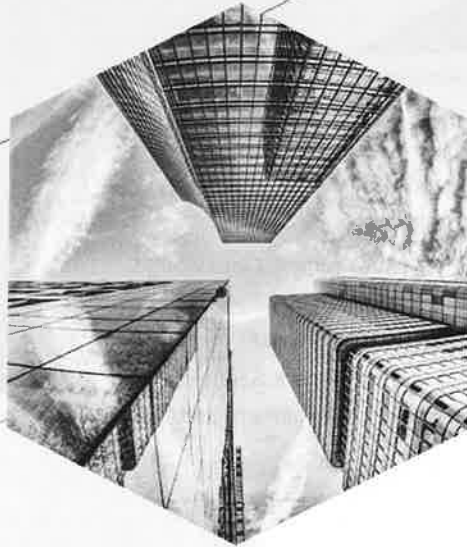
- Amended cl. 25.6 bring forward the final account (final cost) incurred to complete the works from **6 months** on completion of the Works to **3 months** on the availability of said final cost.
  - This speeds up overall dispute issues, including payment.

## E. Summary/Conclusion

- **Instructions must be in writing** and oral/verbal instruction must confirmed in writing by the Contractor.
- All standard forms of construction/building contract provide for variation/change and its **meaning/definition** and similar **rules for valuation** of variations.
- **'Variation'** usually means a **change, modification, alteration, revision or amendment** to original intent of contract.
- Contractor is entitled to **fair and reasonable EOT**, subject to Contract requirements/procedures and "allowable" **grounds of EOT**, divided under **Employer's or Non-Employer's events**.
- Entitlement to EOT depends on **type of delaying events**, impacted and their sequence.
- **The serving of timely and adequate written notice** for EOT should be adhered so as to **avoid of defaulting party to benefit from its own breach**. **Failure to notify** is not fatal generally.
- On **Condition Precedent**, based on recent legal cases, **Courts have adopted a more flexible or broad approach** to determine on its liability, **based on facts and merit**.
- If Contractor **fails to complete works** by Date of Completion or within extended time, the Employer may be imposed LAD, if CNC is issued by the SO/Architect/Engineer.
- In **Cubic Electronic vs Mars Telecommunication (2019)**, Federal Court held there is **no need to prove of actual loss or damage incurred where there is a LAD clause in the contract**.
- **Termination of contract or determination of employment** are serious step which should be taken only after careful consideration and appropriate professional advice sought.

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- 4) BK Entrusty (2006) "*Is the contractor still entitled to Extension of Time when there is concurrent delay?*" Master Builders Journal Volume 3, 2006
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- 9) May, Anthony, Williamson, Adrian, Uff, John, *Keating on Building Contracts*, 6th Edition, London Sweet & Maxwell, 1995.
- 10) References are also made to several Malaysian standard forms of contract, namely;
  - a) PAM Forms of Building Contract (2006 & 2018)
  - b) JKR/PWD Forms of Contract (203A – Rev. 2010)
  - c) IEM Form of Contract for Civil Engineering Works (2<sup>nd</sup> Edition 2011)
  - d) CIDB Form of Contract for Building Works (2000 Edition).
  - e) AIAC Standard Form of Contract (2019).



**Thank You.**

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Sr Ong Hock Tek ("HT") is a Fellow of nine professional institutions, a well qualified multi-disciplinary and specialist consultant, experienced in pre and post contract quantity surveying duties, commercial and contractual administration / management of various types of construction projects, gained from over 30 years of working experience with architectural practice, quantity surveyors, project managers, civil engineering and building contractors and specialist consultants.

His specific experience and expertise include project and contracts management/administration, claims preparation /defense, risks and value management, specializing in alternative dispute resolution, particularly in arbitration advisory and support services, documentation and proceedings. He also acts as an Arbitrator, Mediator and/or Negotiator on technical, commercial and contractual disputes/differences between the contracting parties, at both main and sub-contract levels on various types of project in the construction industry.

Being a Master Trainer, he has organised and delivered in many public and in-house conferences, seminars and workshops for professional institutions and private/public listed companies on several subject areas, in particular construction contracts, ADR, risks and value management. He has also lectured part-time for bachelor and master degree programmes in the same areas for several years and has been a regular contributor to the Master Builders Journal on construction contract and management issues since 2002.

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