CONTRACT FORMATION AND CONTRACT DOCUMENTATION IN BUILDING CONTRACTS

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1.0 INTRODUCTION

This lecture, as its title suggests, will focus on two issues at the very commencement of a typical building contract. The reason why the two issues are discussed together is because they are closely linked; a clear understanding of the contract formation process will lead to compilation of contract documents which are consistent and free from ambiguity, even pitfalls, and thus may assist in avoiding possible disputes arising from differing interpretations and constructions. The parties' intentions can thus be clearly, and unmistakably, translated into words, figures and drawings.

Though it may be surprising to so state, it is the writer's observation from his practice that these two issues, i.e. contract formation and contract documentation, form a considerable proportions of the issues that arise in building dispute arbitrations. Though there are no reported cases in Malaysia, it will not be wrong to say that a quantity surveyor who compiles contract documents[1] negligently is exposing himself/herself to possible professional negligence suit.[2] Further, it is also the case that quantity surveyors do take an active part in tendering process leading to contract formation. The legal ramifications of these will thus need to be properly understood.

In this lecture, references and illustrations will be made with particular emphasis on PAM 1998 Form, which at the time of writing is the most widely used of the standard building form.[3] However, it is to be appreciated that the principles discussed are equally applicable, perhaps with minor adjustments, when other standard forms of contract are used.

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[1] It is a common practice for building projects in Malaysia that it is the quantity surveyors who prepare and compile contract documents, not the architects. See further sections 8(1) and (2) Quantity Surveyors Act 1967.

[2] The duty of the quantity surveyors can be owed to the Employer, the Architect or the Contractor.

[3] The other standard building contract form in Malaysia is the CIDB Standard Form of Contract for Building Works – 2000 Edition which is relatively new and un-tested as it was only launched on 13 September 2000.

PART A: CONTRACT FORMATION

2.0 THE FUNDAMENTAL PRINCIPLES and THE PROBLEMS

Though it has been academically criticised[4], it is perhaps not wrong to state that, generally the unqualified acceptance of an offer, supported by consideration,[5] matures it into an agreement[6] and this agreement, if it is legally enforceable, is a contract.[7] In fact, the phrase "offer and acceptance" is as common a phrase in contract law as that of "supply and demand" in conventional classical textbook economics.[8] This apparently neat model, however, camouflages the following problems, not infrequently encountered in the formation of building contracts.

2.1 Non-Acknowledgment of Letter of Award

It is not infrequent that the Employer (the promoter of the project) will issue to the main contractor, or the main-contractor will issue to the sub-contractor, what is usually called a letter of award, occasionally also referred to as a letter of acceptance. Frequently, too, no formal tendering exercise is carried out and the contractor is merely asked to quote by filling its proposed rates against each item in a blank bill of quantities[9]. More often than not, the letter of award will refer to terms and conditions which were never made known to the contractor when the contractor was asked to put its rates in the corresponding items in the bill of quantities. The letter of award or letter of acceptance will usually end with the following words or words to similar effect:

> "This letter of award is issued to you in duplicate. Please sign in the spaces below to signal your agreement and acceptance of the terms and conditions of this letter of award. You are to return to us the copy marked "ORIGINAL" retain the copy marked "DUPLICATE".

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[4] See, for example, John N. Adams & Roger Brownsword, *Understanding Contract Law*, 3rd Edition (2000), Chapter 4. See also Ewan McKendrick, *Contract Law*, 4th Edition (2000), pp. 53 – 55 where he discussed the limits of the offer and acceptance model of contract law but went on to conclude, on p. 54, "It is submitted that the present law strikes a reasonable balance between the need for certainty and the desire to achieve a just result which is consistent with the intention of the parties." See further the suggestion by Lord Denning MR in *Butler Machine Tool Co.* v. *Ex-cell-O Corp* [1979] 1 All ER 965 that the analysis of the existence of agreement by demonstrating offer and acceptance should be abandoned and be replaced by the court's examination of all the available evidence. In Malaysia, the existence of Contracts Act 1950 is such that this formalistic approach to contract law is statutorily recognised.

[5] Section 2(d) Contracts Act 1950.

[6] Sections 2(a), (b) and (e). However, it is noted that the word used for the equivalence of "offer" in Contracts Act 1950 is "proposal" and there is the intermediate concept of "promise" before a "promise" becomes an "agreement".

[7] Sections 2(h) and 10(1) Contracts Act 1950.

[8] To draw a parallel, this supply and demand "model" of classical economics, like the formalistic approach of offer and acceptance in contract law, is also not without its academic critics in the like of Professors John K. Galbraith and Joan Robinson, to name one protagonist on each side of the Atlantic.

[9] It is to the writer's disappointment, and concern, that a recent letter of award issued in this manner has a contract sum of not less than RM 35 million!

The contractor, occasionally, will write back to protest and express its disagreement on some of the terms and conditions of the letter of award but nevertheless proceed with the execution of the works, and get paid. The letter of award is never signed and matter is then left at that, until a dispute arises that is.

The questions to ask are, "Is there a contract between the parties?" "If so, what are the terms of this contract?"

It is trite law that the acceptance of an offer must be "absolute and unqualified": one cannot accept what is not offered; offer and acceptance must correspond.[10] The quotation of the contractor is in law the offer; the letter of award or the letter of acceptance operates as the formal acceptance of that offer. However, since the letter of award or letter of acceptance has added additional terms which are not in the original offer, the letter of award/acceptance thus has the legal effect of constituting what is in law a counter-offer.[11] This counter-offer effectively puts an end to the original offer.[12] This counter-offer can be subject to analysis again using our offer and acceptance model. In our case, the contractor has written stating that he does not accept the terms and conditions of the letter of award/acceptance (i.e. the counter-offer) and state what he thinks the terms and conditions should have been. This counter to the counter-offer has the effect of an offer which, however, there has been no formal acceptance. In this case, since the Employer or the main-contractor has not responded and both parties have proceeded with no further actions, it is submitted that a contract has been formed: the acceptance of the Employer/the main-contractor of the counter-counter-offer by the contractor can be inferred by its conduct if it has benefited from the contractor's performance for which he has failed to object even though he has reasonable opportunity to do so.[13]

With the conclusions reached thus, the terms of the contract formed are evident.

2.2 Letter of Award Marked "Without Prejudice"

It is also the writer's observation that a letter of award is sometimes marked "without prejudice". Why this should be so marked defies comprehension. A document which is marked "without prejudice" may bar its disclosure in any arbitral or legal proceeding.[14]

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[10] Section 7(a) Contracts Act 1950.

[11] See *Jones* v. *Daniel* [1894] 2 Ch 332 the material facts of which were substantially similar to our example here; the counter-offer in this case was never accepted. In *Brogden* v. *Metropolitan Railway Co.* (1877) 2 App. Cas. 666, it was held that as the acceptance contained an additional term where the name of an arbitrator was added into the prepared contract document which name was not in the original offer, the act of despatching the draft contract document amounted to a counter-offer which was later accepted by conduct. See also *A Davies & Co (Shopfitters) Ltd* v. *William Old Ltd* (1969) 67 LGR 395 and section 7(b) Contracts Act 1950.

[12] *Hyde* v. *Wrench* 49 E.R. 132.

[13] *Way & Waller Ltd* v. *Ryde* [1944] 1 All ER 9.

[14] See section 23 Evidence Act 1950.

A letter of acceptance or award may be the end result of a protracted negotiation which the two parties to a contract have their intentions recorded in words and documented: it is thus bewildering to thought if such a document should be accorded the privilege from being disclosed when the rule relating to without prejudice documents is to encourage negotiation with a view of the parties coming to a consensus or settlement. It is submitted that in this case, the letter of award or letter of acceptance, even though marked "without prejudice" is nevertheless admissible in an arbitral or judicial tribunal.[15]

2.3 Letter of Award Marked "Subject to Contract"

It is also an experience of the writer in his practice that a letter of award or letter of acceptance is sometimes prominently marked "Subject to Contract". As discussed above, the letter of award is very frequently the final act of signaling to a contractor that his tender ("proposal" or "offer") is accepted thus maturing the tender into a contract between the parties. The rationale of such a marking thus defies comprehension. The more important question to ask is this, "Is there a valid contract between the parties?"

In the Court of Appeal's decision of *Charles Grenier Sdn Bhd* v. *Lau Wing Hong*,[16] Gopal Sri Ram JCA held that where the "subject to contract" formula is used, it would generally be presumed that the parties are still in a state of negotiation and do not intend to be bound until and unless a formal contract is executed. The learned judge went on to state that it is for the court in each case to construe from the exchange of correspondence between the parties if this is the result desired by the parties. The rationale of the law on this is provided by Sri Ram JCA as follows:

> "... unless the approach we have stated is adopted, a party to the contract who – after having concluded his bargain – entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from the solemn promise. Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill."[17]

In *Charles Grenier's* case, the Court of Appeal found that there was an enforceable contract.

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[15] See the (then) Federal Court's decision of *Malayan Banking Bhd* v. *Foo See Moi* [1981] 2 MLJ 17. It is noted that even though section 2 Evidence Act 1950 provides that the Act shall not be applicable in arbitrations, this "without prejudice" rule is such a well-entrenched common law rule that it would not be violated by arbitrators.

[16] [1996] 3 MLJ 327. See also *Low Kar Yit* v. *Mohd Isa* [1963] MLJ 165.

[17] *Ibid*, on p. 335.

The *Charles Grenier's* case, however, was distinguished in the more recent Supreme Court's case of *Lee Chin Kok* v. *Jasmin Arunthuthu Allegakoen & Ors*.[18] In *Lee Chin Kok*, the Supreme Court concluded that whether the phrase "Without Prejudice and Subject to Contract" would prevent a contract from coming into existence must really depend on the facts available and each case must accordingly be so construed.

It is thus submitted that whether a letter of award prevents a contract from coming into existence must depend on the facts of the case and no straightforward answer can be given to the question posed earlier.

However, it is submitted that the phrase below and its variants and modifications, which are commonly found in many letters of award or letters of acceptance[19], will give rise to a valid contract:

> "This Letter of Award is subject to the execution of a formal contract which is in the course of preparation and you will be asked to sign it when it is ready. Meanwhile, this Letter of Award and your tender shall form the contract between us."[20]

2.4 Parties Still in Negotiation

It is trite law that if the parties are still in negotiation, the parties have not come to an agreement; there would thus be no enforceable contract. In *Lau Brothers & Co* v. *China Pacific Navigation Co Ltd*[21], Lee Hun Hoe JC (as His Lordship then was) held that, taking the whole of the correspondence between the parties into consideration, the parties were still in a state of negotiation and there was thus no binding contract between the parties. This case is to be contrasted with *Ace King Pte Ltd* v. *Circus Americano Ltd & Ors*[22] where Zakaria Yatim J (later FCJ) held that from the evidence adduced, the parties had concluded their negotiations and the only thing not done was the conclusion of a formal contract prepared by a solicitor, there was thus an enforceable contract in existence.

It is thus to be ascertained from the available evidence if the parties are still in negotiation. This is a good illustration of the difficulty, even the artificiality, of ascertaining when the interplay of offer and acceptance is concluded. The test to be used for such an ascertainment is generally the objective test.[23]

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[18] [2000] 4 MLJ 481.

[19] This is because of the usual time lag between the commencement date of a contract and the completion of the compilation of the contract document.

[20] As an illustration, see *Ng Bros Construction* v. *Kaolin (Malaysia) Sdn Bhd* [1985] 1 MLJ 245 where the acceptance letter states, "We would be sending you at a later date an official contract agreement for you to sign to complete the usual formality." Held that there was a concluded contract.

[21] [1965] 1 MLJ 1.

[22] [1985] 2 MLJ 75.

[23] See *Centrovincial Estates Plc* v. *Merchant Investors Assurance Company Ltd* [1983] Com LR 158, where Slade LJ stated, on p. 158, that "It is a well-established principle of the English law of contract that

3.0 THE TENDERING EXERCISE

It is very often the case in commercial contracts, in particular building contracts, that tendering exercises are carried out before their award.[24] The process of tendering is essentially the process of inviting contractors to give priced offers of certain scope of works which are defined to various degrees of details. It is thus to be distinguished from the offers themselves.[25] The legal aspects of this tendering process will thus be of utmost importance to contract formation.

It will readily be appreciated from what had been discussed above on the strict requirement of the "absolute and unqualified" acceptance of a proposal/offer before it becomes a promise. This promise, if supported by consideration, becomes an agreement and if it is enforceable is a contract. Careful thoughts should thus be accorded to this seemingly simple legal requirement. Therefore, the tender documents should be prepared with care for the properly completed tender documents constitute the contractor's offer in the strict legal sense. It therefore does defy one's comprehension as to the extended length of time required for the compilation and finalisation of contract documents as this compilation and finalisation process should be largely a re-compilation exercise.[26] At any rate, this should follow naturally from a "properly" conducted tendering exercise.

Following from the above, it needs to be stressed that any negotiation between the employer (or its agent such as the architect) and the contractor which results in any amendment to the contractor's offer should be properly recorded and incorporated to form part of the contractor's (revised) offer and this should also be accepted *in toto*: the recorded amendments will form parts of the concluded contract between the parties.

3.1 Costs of Tendering

Participation of tendering can incur a contractor considerable amount of expenditure and questions will surface as to who should bear the costs of unsuccessful tenders. Generally, it is accepted that a contractor who participates in a tendering exercise should bear its own costs of arriving at a priced offers to the employer if the contractor's effort does not result in a contract.[27] The reason for this general rule is provided by Barry J in the following terms:

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an offer falls to be interpreted not subjectively by reference to what has actually passed through the mind of the offeror, but objectively, by reference to the interpretation which a reasonable man in the shoes of the offeree would place on the offer."

[24] It is common nowadays for companies which are accredited, or attempting to be accredited, to various ISO's to include as part of its operating procedures a procedure for calling tenders. It is however the observations of this writer that most of these procedures are more often than not procedures for commercial convenience to suit certain practice, the legality of this appears to have been overlooked at times.

[25] The process is sometimes referred to by the rather archaic phrase of "invitation to treat".

[26] See footnote 19, above.

[27] See *William Lacey (Hounslow) Ltd* v. *Davis* [1957] 1 WLR 932.

> "... if a builder is invited to tender for certain work, either in competition or otherwise, there is no implication that he will be paid for the work ... involved in arriving at his price: he undertakes this work as a gamble, and its cost is part of the overhead expense of his business which he hopes will be met out of the profits of such contracts as are made as a result of tenders which prove to be successful."[28]

It is however a common experience of some contractors that after the submission of his priced offers, it occurs to him that what the employer or its agent was merely trying to achieve was to "have a feel of market rates at the moment"[29] and there had no intention from the very beginning to proceed with the award of the project. Alternatively, the same situation may arise for a more "acceptable" reason that market changes dictate that the project would not proceed. In either of these two scenarios, can the contractor recover the expenditure which he had incurred in preparing and submitting his tender?

It is submitted that if a party invites another party to tender with no intention whatsoever of accepting that particular tender submitted, or the whole tendering exercise is a sham, the party will be liable for any expenses which the latter incurs.[30] The tenderer who submits a conforming tender will at least have the legitimate expectation of it being *considered*, though not necessarily accepted even if his is the only tender submitted.[31]

3.2 Withdrawal of Tender

As has already been highlighted, the tender submitted by a contractor is in law his offer and since it is only an offer, it may be revoked at any time before it is accepted.[32] It also follows of course that if the offer has been accepted and the acceptance is complete, an agreement results and the question of withdrawing the tender does not arise.

It is sometimes the practice to guard against early withdrawal of tender that the party who invites the tender will specify in the tender document a specific date before which the tender is not to be withdrawn. It is however to be noted that the tenderer and the party who invites the tender has no contractual relationship and it will be impossible for the party that initiates the tendering exercise to prevents early withdrawal of the tender. To enforce this, the tender document sometimes

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[28] *Ibid*, at p. 934.
[29] Sceptics may tout this as the employer's "free" market survey and studies at the contractor's expense.
[30] See *Richardson* v. *Silvester* (1873) LR 9 QB 34.
[31] Compare and contrast the twin cases of *Blackpool and Fylde Aero Club Ltd* v. *Blackpool Borough Council* [1990] 3 All ER 25 and *Fairclough Building Ltd* v. *Borough Council of Port Talbot* 62 BLR 82.
[32] See section 5(2) Contracts Act 1950.

requires the submission of a tender bond[33] or to require the tenderer to give an undertaking to that effect. Forfeiture of the deposit is also an option.

3.3 Acceptance of Tender

It was stated above that a party has no absolute duty to accept a tender, or for that matter any tender among the conforming tenders that have been submitted. However, if the invitation to tender expressly provides, for example, that the lowest tender shall be accepted, then the party calling the tender exercise is duty bound to accept the lowest conforming tender submitted.[34]

3.4 Misrepresentation

There is generally a divorce between the provisions of the contract and the contractual implications of the tendering process.[35] This is not a desirable state of affairs as information provided to the tenderers during the conduct of the tendering exercise may have an effect on the legality of the contractual provisions incorporated into the contract; or excluded from the contract. What can constitute misrepresentation is provided for in Contracts Act 1950.[36] The remedies which a contractor can have if there is misrepresentation are also provided for in Contracts Act 1950.[37]

It is a common situation in building contracts for a contractor to allege that the information provided for in the tender documents is inaccurate and he has been misled as to his pricing. To this end, there is inevitably a clause in the tender documents that negatives and disclaims the employer's (and also the architect's or the engineer's) liability with respect to the inaccurate or manifestly false information contained in the tender documents. The question as to the legal effect of this disclaimer clause is thus of interest.

It is submitted, on the strength of the Australian case of *Morrison-Knudsen International Co Inc & Anor* v. *Commonwealth of Australia*[38] that this disclaimer clause is only valid and enforceable to the limit of the misrepresentation. It may be relevant to add that with respect to PAM 98 contract, any claim made by the contractors alleging misrepresentation is beyond the jurisdiction of the architect: such a claim can only be pursued in arbitration or in court.

The question if an architect, an engineer or a quantity surveyor can be held liable for any negligent misrepresentation if a contractor pursues his claim against him (the architect, engineer or the quantity surveyor) is a vexed question and this issue

[33] Also called in the industry a bid bond.
[34] See section 8 Contracts Act 1950 and the principle enunciated in the well-known case of *Carlill* v. *Carbolic Smoke Ball Co* [1892] 2 QB 484.
[35] This is certainly the case with respect to PAM/ISM 69 and also PAM 98.
[36] See section 18 Contracts Act 1950.
[37] Sections 19(b), 65 and 66 Contracts Act 1950.
[38] 13 BLR 114.

is in the centre of a heated and continuous debate throughout the Commonwealth.[39] It is to be appreciated that the contractor has no contractual relationship with the architect, the engineer or the quantity surveyor and the contractor can only claim for what is in law called pure economic loss in tort for professional negligence. In Malaysia, relevant cases so far are all High Court judgments and have gone either way and it will be left to higher judiciary or the legislature to have the final say.[40]

4.0 LETTERS OF INTENT

It is quite common in the construction industry for an employer to issue to a contractor first what will be referred to as a letter of intent pending the conclusion of a contract with the likely reason that though the intention to award the contract is agreed and finalised, negotiations are still ongoing to finalise remaining items of the contract. It is trite law that if the parties are still negotiating, there can be no intention of a concluded contract. In *Kokomewah Sdn Bhd* v. *Desa Hatchery Sdn Bhd*[41], the court held that as the parties were still negotiating, the letter of intent issued remained what it was and the parties had not concluded the contract.

It however has to be appreciated that whether a document marked "letter of intent" is a contract will depend on the intention of the parties objectively assessed and the wordings of the document itself: a mere marking of "letter of intent" *per se* is not conclusive. If the document itself evidences an intention to be legally bound, and there are no vitiating factors, an enforceable contract may be inferred and the parties are consequently bound.

The question which follows naturally will be this: "Can the contractor get paid for work done and expenditure incurred in reliance of a letter of intent?"

It is submitted that it is a question of fact whether a letter of intent will give rise to any liability and even if no contract has come into existence, a claim may still be

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[39] In United Kingdom, see the landmark case of *Murphy* v. *Brentwood* [1991] AC 398 which overrules *Anns* v. *Merton London Borough Council* [1978] AC 728 and all cases decided based on *Anns* and also the earlier case of *Dutton* v. *Bognor Regis Urban District Council* [1972] QB 373. The effect of *Murphy* is reverberated throughout the Commonwealth and it can be said that there have been recent dissenting voices which seem to be thundering louder: in Canada see *Winnipeg Condominium Corporation* v. *Bird Construction* (1995) 121 DLR (4th) 193; in Australia see the cases of *Sutherland Shire Council* v. *Heyman* (1985) 60 ALR 1 and *Bryan* v. *Maloney* (1995) 128 ALR 163; in New Zealand see *Invercagill CC* v. *Hamlin* [1994] 3 NZLR 513 and on appeal to Privy Council [1996] 2 WLR 367; in Singapore see *RSP Architects Planners & Engineers* v. *Ocean Front Pte Ltd* [1996] 1 SLR 113.

[40] See *Chin Sin Motor Works Sdn Bhd* v. *Arosa Development* [1992] 1 MLJ 23, *Kerajaan Malaysia* v. *Cheah Foong Chiew* [1993] 2 MLJ 439 and *Teh Khem On* v. *Yeoh & Wu Development Sdn Bhd* [1995] 2 MLJ 663; compare and contrast these cases with *Dr Abdul Hamid Abdul Rashid* v. *Jurusan Malaysian Consultants* [1997] 3 MLJ 546 and *Steven Phoa Cheng Loon* v. *Highland Properties Sdn Bhd* [2000] 4 MLJ 200.

[41] [1995] 1 MLJ 214.

founded on a letter of intent and the contractor may be entitled to be paid upon a *quantum meruit*.[42]

5.0 FAILURE OF CONTRACT FORMATION

It will be appreciated that there can be instances when there is failure of contract formation and the parties nevertheless proceed with works. It is however submitted that this situation can be rare as judges will attempt to give effect to the parties' intentions. The failure of contract formation may thus be most likely due to factors such as illegality, policy considerations and others.

The consequences of a building agreement declared to be void *ab initio* can be far reaching as these may mean that the architects will have no power to exercise his authority under the contract: thus there is no extension of time, no certificates etc and if at all the contractor has executed works and incurred expenditure on the project anticipated by the agreement, he can recover them upon a *quantum meruit*, no more, no less.

PART B: CONTRACT DOCUMENTATION

6.0 PRELIMINARY CONSIDERATIONS

The first issue which anyone involved in contract documentation will need to consider is what documents collectively constitute the Contract or what are comprised in Contract Documents. From the discussion above, it will be appreciated that the documents comprising the Contract will be substantially similar to those constituting the tender documents. The following discussions will make references to PAM 1998 (With Quantities Edition) Standard Building Form and use its provisions as illustrations.

6.1 Contract Documents Which Are Not

Article 7(i) of the Articles of Agreement defines "Contract" or "Contract Documents" to include

(a) Articles of Agreement,
(b) Summary of Tender,
(c) Form of Tender,
(d) Letter of Acceptance[43],
(e) Conditions of Contract,
(f) Contract Drawings,
(g) Specifications,

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[42] See *British Steel Corporation* v. *Cleveland Bridge & Engineering Co Ltd* 24 BLR 94 and *Turiff Construction Ltd and Turiff Ltd* v. *Regalia Knitting Mills Ltd* 9 BLR 20.
[43] Not referred to as Letter of Award.

(h) Contract Bills, and
(i) Appendices.[44]

It can thus be concluded, contrary to a considerable number of Contract Documents that the writer has seen, that the following documents do NOT form parts of the Contract:

(a) performance bond,
(b) programmes,
(c) insurances including Contractor's All Risks policy, Workmen Compensation etc, also the associated cover notes,
(d) method statement,
(e) contractor's proposed organisation chart,
(f) contractor's proposed list of plant and machinery,
(g) contractor's proposed labour returns, and
(h) contractor's projected cashflow.

An elaboration on some of the abovementioned documents will be necessary. It is expressly stated in the Conditions of Contract that the programme shall not form a part of the Contract even if it is included and bound together as forming the Contract.[45] The undesirability of the programme, for that matter also the Contractor's proposed method statement, forming parts of the Contract Documents was evident in *Yorkshire Water Authority* v. *Sir Alfred McAlpine and Son (Northern) Ltd.*[46] If the programme and method statement are incorporated as parts of the Contract Documents[47], these would become the contractually binding sequence of working and specified method of construction and any variations to these will be variations to the Contract for which the Contractor will accordingly be entitled.

The performance bond is a separate contract between the provider of the bond which is usually a financial institution or an insurance company and the Employer. The provider of the bond gives the bond at the request of the Contractor: the provision of the bond may be a requirement of the Contract but it is not part of the Contract; it is merely a submission which is required under the Contract.[48] Similarly, the rest of the documents mentioned above may be submissions required by the Contract but are not themselves Contract Documents.

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[44] See also Clause 3.1 of Conditions of Contract. These apply for PAM 98 'With Quantities' Edition. For PAM 98 'Without Quantities' Edition, there will be no "Contract Bills" and there shall include Instruction to Tenderers, Conditions of Tendering, Prime Cost and Provisional Sums and Schedule of Rates: note that there seem to be some discrepancy between what are stated in the Articles of Agreement and Clause 3.1 of PAM 98 for the Without Quantities Edition. It is submitted that the Articles of Agreement shall prevail over the provisions of Clause 3.1 here.
[45] See Clause 3.5 of the Conditions of Contract and also *Moody* v. *Ellis* 26 BLR 39.
[46] 32 BLR 114.
[47] This includes "accidental" inclusions as was the case in *Yorkshire Water Authority*, see note 44 above.
[48] Note however that PAM 98 does not have any provision for the submission of a performance bond.

It will thus need to be appreciated that a document which is bound together with the rest of the documents forming the Contract does not *per se* make the document a part of the Contract Documents: the contract formation process discussed earlier and the provisions of the Articles of Agreement and/or those of the Conditions of Contract will need to be studied. The following quote from the judgement of Raja Azlan Shah J (as His Royal Highness then was) will be instructive:

> "The unconditional acceptance of a tender by the employer binds both parties and a contract is thereby formed the terms of which are ascertainable from invitation to tender, the tender, the acceptance and other relevant documents."[49]

7.0 ARTICLES OF AGREEMENT

The Articles of Agreement comprise opening parts, recitals, and a total of seven articles; a detailed look at some of these will be useful.

7.1 Opening Parts and Recitals

One question that will surface immediately will be when is the agreement made? It will be incorrect to fill in the date of commencement, neither should the date of tender be inserted in the spaces provided. It is suggested that this date is not a very critical piece of information and it will need to be borne in mind that stamping will need to be accomplished within thirty days from the date of the agreement.[50] The writer nevertheless recommends that this date should coincide with the date of the letter of acceptance on the strength of *Cheng Keng Hong's* case.

"The Employer" and "the Contractor" are the two contracting parties to the contract which is formed. The Employer or the Contractor can be a sole proprietor, a partnership, an incorporated entity pursuant to Companies Act 1965 (i.e. a "Sdn Bhd" or a "Berhad"), or a joint venture. The joint venture can either be a contractual joint venture or a joint venture company, i.e. a company incorporated under Companies Act 1965.

It the contracting party is a sole proprietor (which in modern day commerce should be rare), the party's name as it appears in his identity card together his identity card number (preferably both the new and the old) should be inserted.

If the contracting party is a partnership, it is recommended that the names of the partners together with their identity card numbers (preferably both new and old) should be inserted together with words describing the entity such as "... trading as Perfect Construction"; a certified true copy of the certificate of registration of the

[49] *Cheng Keng Hong* v. *Government of the Federation of Malaysia* [1967] 2 MLJ 33 at pp. 37 – 38.
[50] At the moment the stamping fee is RM 10.00 per copy of agreement.

partnership under Partnership Act 1961 should however be obtained. The reason for so doing is that a partnership is not a *legal persona*, for example it cannot be a party to a legal suit in the Courts. This legal position is illustratively explained by Lee Hun Hoe CJ (Borneo) in *Wong Yoon Yar* v. *Lin Yin Thai & Ors*.[51]

If the two parties are both incorporated entities which in modern day commerce would be the most common, it is recommended that a copy of their certificates of incorporation[52] should be obtained, certified by either a director or the company secretary. The company numbers should also be inserted after the respective company names.

In the case of a joint venture, it is recommended that this should be similar to that done for partnership as it will be appreciated that a joint venture (a contractual joint venture and not a "JV company") is not a legal entity. A suggested way of putting this will be, for example, "Perfect Construction Sdn Bhd (Company No. 1234-A) and Supreme Construction Sdn Bhd (Company No. 5678-B), contracting jointly and severally as Perfect – Supreme Joint Venture". Preferably a copy of the joint venture agreement should be obtained.

The addresses to be filled in assume some significance specifically for the Contractor in the failure of any notice to the Architect by the Contractor of an address where notices, Architect's instructions and other documents may be served.[53] It is however to be noted that for incorporated companies, the company registered addresses should be inserted.[54] The registered addresses have no relevance for other types of business entities.

One remaining point remains to be made. It will need to be borne in mind that the Contractor must be one that is registered with the Construction Industry Development Board.[55] In the case of an unincorporated joint venture, all the joint venture partners must similarly be registered.

Most architects and quantity surveyors whom the writer knows personally give a brief description of the nature of the works for what is defined as the Works. This is also evident from the writer's review of some contract documents. In some sense, this is rather unfortunate; but this is partly contributed by the asterisked note at the end of the recitals which instructs for the filling of "*nature* of the Works" (emphasis supplied). *Nature* of the Works should not be equated to the Works themselves. A more comprehensive and in some sense more "exact" definition of "the Works" is found in Article 7(h) of the Articles of Agreement. This definition is of considerable importance as it has a direct bearing on other

[51] [1987] 2 MLJ 714 at 715.
[52] Form 8 or Form 9 depending whether it is a public (not necessarily listed on a stock exchange) or a private company respectively.
[53] See Clause 2.6 of the Conditions of Contract.
[54] See section 350 Companies Act 1965.
[55] See section 25(1) Construction Industry Development Board Act 1994.

important provisions of the Conditions of Contract such as Variations[56], insurances[57] and others.

It also seems that the recitals have equated what are called "Bills of Quantities" (which does not seem to have been defined in the Articles of Agreement) to "Contract Bills" which is defined in Article 7(m) of the Articles of Agreement to mean a collection of documents of which bills of quantities are not specifically mentioned. What complicates matters is that the said Article 7(m) has defined "Contract Bills" as "the Contract Bills referred to in the Articles of Agreement comprising ..." and the documents listed in Article 7(m) (v) may be what are commonly known in the construction industry as the bills of quantities.

7.2 Article 3

The phrase "the Architect" is defined in Article 1, Article 3 and Article 7(c) of the Articles of Agreement. The definition in Article 7(c) provides that the Architect must be one who is registered with the Board of Architects Malaysia. This begs the question, "Must the Architect be a natural person?" Posing the question in another way, "Can a firm or a body corporate be 'the Architect' for the purposes of the Contract?"

The definition provided for in Article 7(c) and the reference to the "death" of the Architect suggest that for the purposes of PAM 98, the Architect must be a natural person; a firm or a body corporate cannot be "the Architect" within the meaning and for the purposes of the Contract.[58] A strict and a lateral reading of Architects Act 1967 will also support this view.[59] The writer does not, with respect, subscribe to this view. Architects Act 1967 provides for a firm or a body corporate to practise architecture.[60] A firm or a body corporate if it has been given a "written approval" and a "valid permit" by the Board of Architects Malaysia to so practise should thus also be "the Architect" within the meaning of the Contract even if it is strictly, and based on a lateral reading of Architects Act 1967, not "registered with the Board of Architects".

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[56] See Clause 11 of the Conditions of Contract.
[57] See Clause 20 of the Conditions of Contract.
[58] See a conclusion to this effect in Sundra Rajoo, *The Malaysian Standard Form of Building Contract (The PAM 1998 Form)*, 2nd Edition (1999), pp. 39 – 40.
[59] Reading section 5(a) of Architects Act 1967 where Section A of the Register of Architects lists "Architects" which is defined in section 2 of the Act means "a person registered under section 10(2)"; section 10(2) of the Act does not include a firm or a body corporate permitted to practise architecture under section 7A of the Act; a firm or body corporate may not therefore in this sense be "registered" with the Board of Architects, Malaysia; it is only being given a "written approval" and a "valid permit" to so practise. The Registration of Engineers Act 1967 has similar provisions, *mutatis mutandis*. The Quantity Surveyors Act 1967 however has a Section C in the Register of Quantity Surveyors for Registered Quantity Surveyors which are practising as firms or bodies corporate. The difference in the earlier two acts with the third defies comprehension.
[60] As provided for in section 7A(1) Architects Act 1967.

If a firm's or a body corporate's name is inserted in the spaces provided for in Article 3, who will then be the certifier for the purposes of the Contract? The following view advanced by I. N. Duncan Wallace QC will be instructive with which the writer concurs:

> "In many building contracts, the certifier is named in the contract as an individual. If a firm is named, it is submitted that a certificate issued by a partner for and on behalf of the firm will satisfy the contractual requirement."[61]

However, as correctly and perceptively pointed out by the late Professor Vincent Powell-Smith, this may give rise to evidential difficulties in an arbitral or judicial tribunal:

> "It is clearly permissible for the name of architectural service to be inserted, and this is commonly done, although this may cause evidential difficulties if disputes arise in which the architect's opinion is called into question."[62]

It is thus recommended that for good contracts administration practice, the name of the certifier should be informed to the Contractor and this certifier be maintained throughout the duration of the Contract. Further, it may be recommended, if the Employer has appointed a firm or body corporate, to add after the word "Malaysia" in Article 7(c) of the Articles of Agreement on the definition of "Architect" the phrase "or firm or body corporate which has been given a written approval and a valid permit to so practise by the said Board".

With respect to Articles 4, 5 and 6 of the Agreement relating to the Engineer, the Quantity Surveyor and the Specialist Consultant respectively, the discussion above will largely be applicable.

7.3 Attestation

Two forms of attestation are provided: one for the agreement to be executed by hand and the other under seal. It is suggested that execution under seal is not necessary: this seems to be an outdated practice; the rationale for the use of the seal has been diluted over the years. In Malaysia, there is no question that the agreement can be declared null and void upon it being challenged on the ground of the company's lack of capacity to enter into the said agreement.[63] It is however recommended that, if both are corporate entities, each should obtain from the other a board resolution authorising a particular individual of that company to sign on behalf of the company.

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[61] I. N. Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th Edition (1995), p. 841.
[62] Vincent Powell-Smith, *The Malaysian Standard Form of Building Contract (PAM/ISM 69)*, (1990), p. 9.
[63] Section 20(1) Companies Act 1965.

8.0 CONDITIONS OF CONTRACT

A detailed analysis of PAM 1998 Form is not, and cannot be, attempted here; it has been competently accomplished elsewhere.[64] A brief discussion will however follow on those provisions of the conditions of contract which have some relevance in contract documentation.

8.1 Clause 5.1

This clause provides that the Architect "shall determine *all levels which may be required for the execution of the Works*, and shall provide the Contractor by way of *accurately dimensioned drawings* with such information as *to enable the Contractor to set out the Works at ground level.*" (italics added)

The Contract Documents, likely by way of Contract Drawings, should thus ensure that this information is adequately provided.

8.2 Clause 12.1

It needs to be appreciated that "the Standard Method of Measurement of Building Works sanctioned by the Institution of Surveyors, Malaysia" is not a contract document.

8.3 Clause 12.2

Clause 12.2 provides as follows:

> "Nothing contained in the Contract Bills shall *override, modify or affect* in any way whatsoever the application or interpretation of that which is contained in these Conditions." (italics added)

It needs to be ascertained first what documents constitute "the Contract Bills".

"Contract Bills" is defined in Article 7(m) of the Articles of Agreement as comprising the following:

(a) Instructions to Tenderers,
(b) Form of Tender and Conditions of Tendering,
(c) Specifications,
(d) Preliminaries and Generally,
(e) Measured Works, Provisional and Prime Cost Sums and Final Summary, and
(f) Appendices.

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[64] Sundra Rajoo, *The Malaysian Standard Form of Building Contract (The PAM 1998 Form)*, 2nd Edition (1999).

It is to be noted that as Contract Bills are parts of Contract Documents, the documents listed above will accordingly be parts of Contract Documents.[65]

It is the observations of this writer that the compiler of contract documents frequently breaches this clause. A few examples will suffice to be used as illustrations.

It is commonly stipulated in "Instructions to Tenderers" that the Contractor is deemed to have visited the site but this requirement is nowhere to be found in the Conditions of Contract.

The requirement for the submission of a performance bond is frequently contained in "Preliminaries" but this requirement is also nowhere to be found in the Conditions of Contract.

It is frequently provided in "Preliminaries" a long list of abbreviated conditions of contract and the Contractor is asked to price each and every of the abbreviated conditions. Very often, a detailed study of these abbreviated conditions will very often reveal that these abbreviated conditions in the Preliminaries are at variance to the Conditions of Contract.[66]

It is to be noted that bills of quantities are not specifically stated as forming parts of the Contract Documents but documents identified as (d) and (e) above are collectively what would normally be referred to as bills of quantities: see a discussion on this in paragraph 7.1 above.

9.0 PAM 1998 FORM 'WITHOUT QUANTITIES' EDITION

The discussion above will largely apply if the "Without Quantities" Edition of PAM 1998 Form is used. However, the following is to be noted.

There is no "Contract Bills" as is the case for the "With Quantities" Edition. The implication is that the Contract Drawings and the Specifications should adequately describe the Works.[67] There is also the Schedule of Rates in the "Without Quantities" Edition the importance of which is to be appreciated[68] and which is to be agreed with the Architect before the issue of the letter of acceptance[69].

The documents that are comprised within the Contract Documents are listed in Article 4(f) of the Articles of Agreement.

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[65] It may be pertinent to point out that Contract Bills do not form parts of Contract Documents for the "Without Quantities Edition"

[66] For a discussion on the legal implications of this, see Sundra Rajoo, *ibid.*, pp. 126-130.

[67] See Clause 12.1 of the Conditions of Contract (Without Quantities Edition).

[68] For example, see Clause 11.5 (Without Quantities Edition).

[69] As provided for in Clause 13.3 of the Conditions of Contract (Without Quantities Edition).

10.0 CONCLUSION

From the above discussions, it can be seen that the process of contract formation and the process of contract documentation are closely linked. In fact, the earlier process follows closely from the conclusion of the later process and has a direct impact on the correctness or otherwise of the later process. Good and correct contract documentation will be one which arises from correct contract formation. The importance of grasping the details of the contract formation process is thus an important first step to the success or otherwise of a building project. Many disputes can be directly avoided as a consequence of this.

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