THE INSTITUTION OF ENGINEERS, MALAYSIA

RESPONSE TO THE PROPOSED AMENDMENTS TO THE CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ACT, 1994

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EXECUTIVE SUMMARY

The comments and observations contained in this Response relate to IEM's views on the proposed amendments to the Construction Industry Development Board Act 1994 (Act 520). It is suggested that some proposed amendments to the Act be studied in more detail and recommendations are made to some of the proposed provisions that they be dropped.

Some of the proposed amendments have encroached into the traditional roles of the engineers and some of the roles of the engineers which are statutorily recognized are duplicated. It is viewed that the jurisdiction of the Lembaga is as a consequence of the proposed amendments enlarged and widened and it covers virtually all aspects of the construction process from its inception to its completion. The definition of construction personnel is suggested to be narrowed and caution is urged in the proposed registration of construction project management firms. The control of quality and the choice on the use of codes of practice should be the duties of the professionals such as the engineers and these should be left to the engineers and should not be statutorily regulated. The powers given to Enforcing and Investigating Officers are too all encompassing and these are suggested to be narrowed. It is further suggested that parties to contracts should be free to enter into contracts on terms and conditions which they freely choose subject to only certain controls and not, as in the case of the proposed amendments, the manner and form of construction contracts are regulated by the Lembaga.

IEM reiterates that it is prepared and willing to take an active part to assist in the finalisation of the proposed amendments before they have the force of law.

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1.0 INTRODUCTION

1.1 The Construction Industry Development Board Act 1994 ("the Act") came into effect in 1994 and the Construction Industry Development Board ("the Lembaga") which was set up pursuant to section 3 of the Act came into existence and commenced operations in December 1994 that year.

1.2 The Institution of Engineers, Malaysia ("IEM") which is the learned professional organization of engineers in Malaysia expressed its regrets that it had not been informed nor consulted earlier on the proposed amendments ("the Proposed Amendments") to the Act in view of the fact that construction industry in Malaysia is one which engineers in general and IEM members in particular have been playing an important role.

1.3 IEM was only informed at short notice (one day if weekends are discounted) to attend a roundtable meeting convened by Master Builders Association Malaysia on 3 May 2002 to deliberate on the Proposed Amendments.

1.4 It must however be said that the Lembaga has, *via* a letter dated 3 May 2002 but received by IEM on 7 May 2002, invited IEM to provide feedback to the Proposed Amendments. The said letter provides the following two documents:

1.4.1 document titled "Executive Brief – Salient Features of the Act (Amendment) 520 Construction Industry Development Board Malaysia" (*sic*); and

1.4.2 document titled "Deraf Pindaan Akta Lembaga Pembangunan Industri Pembinaan Malaysia 1994 – Akta 520" ("the Proposed Amending Act").

1.5 This initial and preliminary response of IEM, pending a further and fuller study of the Proposed Amendments, is largely based on a study of the two documents referred to in paras 1.4.1 and 1.4.2 above. The present response focuses mainly

on the policy aspects of the Proposed Amendments especially where they relate to engineers and engineering. It is believed that whatever drafting deficiencies in the Proposed Amending Act would be eliminated and removed in the due process before they ultimately have the force of law.

2.0 THE LEMBAGA

2.1 It is noted that section 4(1) of the Proposed Amending Act has considerable widened the scope of the functions of the Lembaga. The existing provisions have been amended from those that the Lembaga is only required to "encourage", "provide", "promote", "stimulate" and "advise" to those that the Lembaga is statutorily bound to "regulate", "accredit and register", "determine" and "prescribe".

2.2 It is submitted that broadly and generally this would have the following implications:

2.2.1 the functions of the Lembaga have duplicated the functions and duties which are traditionally, and statutorily recognized, duties and functions of professionals such as engineers and architects;

2.2.2 the basic character of the Lembaga is in the process altered to one which is actively ***regulating*** virtually all aspects and stages of the construction process from inception to completion;

2.2.3 effectively the Lembaga is acting as a licensing authority for what is called in the Proposed Amendments "construction project management firm"; and

2.2.4 cost of compliance and the follow on effects on construction cost.

2.3 Listed below are the increased scopes of the Lembaga as proposed by the Proposed Amending Act which will be discussed further hereinbelow:

2.3.1 section 4(1)(g): "to ***regulate*** the quality and standardization of construction materials" (emphasis supplied);

2.3.2 section 4(1)(i): "to provide, promote, review, coordinate ***and regulate*** training in the construction industry"(emphasis supplied);

2.3.3 section 4(1)(j): "to accredit and register contractors, construction project management firm and construction personnel and to revoke, suspend or reinstate the accreditation and registration … to such contractors, construction project management firm and construction personnel";

2.3.4 section 4(1)(k): "to determine skill standard and ***to certify*** the competency of construction personnel"; (emphasis supplied); and

2.3.5 section 4(1)(l): "to prescribed (*sic*) the minimum standard of facilities at construction site".

2.4 It is pertinent to state at this juncture that "construction personnel" is defined to mean, *inter-alia*, "any employee or class of employee (*sic*) as may be determined by the Lembaga, and ***includes a person who is involved or undertakes to involve in any construction activities***" (emphasis supplied). The phrase "construction activities" is not defined in the Proposed Amending Act but "construction project" is defined as "any ***pre-construction works*** activities and construction works" (emphasis supplied) and these two definitions, if read together with the definition of "construction work" (not amended by the Proposed Amending Act) will mean that the Lembaga will potentially have the jurisdiction ***to certify*** engineers, architects, town planners, quantity surveyors and other professionals!

2.5 What is more burdensome is a general provision in section 1(3) of the Proposed Amending Act that any other written laws which are inconsistent with the Proposed Amending Act will be construed as superseded. The implications of this on The Registration of Engineers Act 1967 (Act 138), Architects Act 1967 (Act 117), Registration of Quantity Surveyors Act 1967 (Act 67) and others will thus need to be carefully considered.

2.6 Other than the increased scope of the functions of the Lembaga, it is also noted that the Lembaga is also given the power to be involved in construction activities directly thus enabling it to compete directly with the private sector: see the provisions of the Proposed Amending Act sections 4(2)(c)(i), (ii), (iii), (iv) and (v). This is not viewed to be desirable and should not be advocated in an era where private sector is generally perceived to be the engine driving the economy forward.

3.0 REGISTRATION OF CONTRACTORS

3.1 It is not viewed to be desirable that the Lembaga is empowered to, by notice in any prescribed form, compel any person (including a registered contractor) to disclose and provide information relating to, *inter-alia*, other contractors or other construction industry personnel (as defined) and makes a failure to comply with such a notice an offence: see sections 27(1) and 30(2) of the Proposed Amending Act.

3.2 Whereas it may be reasonable to compel any person who employs contractors to ensure that such contractors are registered contractors within the meaning of the Act, it is suggested that it is not reasonable to make this an offence for so doing if the contractors subsequently lost their registration. It is suggested that a distinction is made between what is initial invalidity and subsequent invalidity of the registration of the contractors pursuant to section 30(1)(1B) of the Proposed Amending Act. At any rate, if a contractor loses his registration with the

Lembaga he is thus barred under the Act to undertake construction works (see section 25(1) of the Act), further performance of the contract already entered into is as a consequence of this frustrated for being legally impossible of performance.

4.0 CONSTRUCTION PERSONNEL

4.1 Part VII of the Proposed Amending Act deals with the registration, accreditation, certification and training of construction personnel. IEM repeats the concerns that have been expressed in para 2.4 above. The provision of section 32(3) of the Proposed Amending Act relates a further concern as it provides that a certificate issued by the Lembaga is condition precedent of a construction personnel (as defined) to be one!

4.2 With the term "construction personnel" defined widely as it has been, it is thus a concern that, by virtue of section 33(2) of the Proposed Amending Act, the Lembaga is granted the power to register "any training institution and its directors, employees, servants or agents which accredits or certifies any construction personnels (*sic*)." IEM opines that this is duplication of the powers of other statutory organizations and functions of professional institutions such as The Institution of Engineers, Malaysia. This is more so especially in view of the provisions of section 1(3) of the Proposed Amending Act (see para 2.5 above) and section 32(5) of the Proposed Amending Act where Education Act 1996, Lembaga Akreditasi Negara Act 1996 and Private Higher Educational Institution Act 1996 are expressly stated to be not applicable to the Lembaga.

4.3 IEM urges caution in this issue and voices its concern on the provisions of the Proposed Amending Act in its un-amended form. ***It is suggested that categories (d), (e) and (f) of the definition of "construction personnel" be studied in more detail and, if possible, dropped***.

5.0 QUALITY IN THE CONSTRUCTION INDUSTRY

5.1 Part VIIA of the Proposed Amending Act empowers the Lembaga to be involved directly on matters concerning quality. The Lembaga has the jurisdiction to be so involved *via* the triple mechanisms of what is referred to in the Proposed Amending Act as the "prescribed construction materials", "codes of practice" and "prescribed construction workmanship".

5.2 Section 33A(1) of the Proposed Amending Act allows the Lembaga to bar the manufacture or import of any construction materials not prescribed by the Lembaga and makes a failure to observe this an offence. It is pertinent at this juncture to state that the "construction material" is defined widely to include "any raw material, ***initial, intermediate or finished*** whether local or imported products of all types and sizes" (emphasis supplied).

5.3 Added to the above is the provision in section 33E(1) of the Proposed Amending Act which provides that "The Lembaga may from time to time device (*sic*), formulate, develop, revise ***and approve*** codes of practice comprising such directions as may appear to it to be necessary for the compliance by arty (*sic*) person of the requirements of the Act"(emphasis supplied).

5.4 Further provision in the same direction is to be found in section 33E(2) of the Proposed Amending Act which allows the Lembaga to authorize any person to "certify prescribed construction workmanship"; and "construction workmanship" is defined widely to include "the ***techniques, manner or process*** of building or constructing in construction works ***and their end results***" (emphasis supplied). This effectively allows the Lembaga to even certify the construction techniques on how a construction is to take place!

5.5 IEM views the above provisions with grave concerns as the above functions are traditionally performed by engineers. Whether certain construction materials can

be incorporated into the construction works is subject to the certification of engineer as "the Engineer" (as in IEM, FIDIC or ICE Conditions of Contract), or as "the Superintending Officer" (as in CIDB 2000 and JKR 203 Conditions of Contract) in standard construction contracts commonly in use in Malaysia. The same also applies to "the Architect" (as in PAM 1998 Standard Form). Reference is also made to the Scale of Fees (Revised 1998) P.U.(B) 548 which is made pursuant to the powers conferred by section 4(1)(d) of the Registration of Engineers Act 1967 (Act 138) clause 3(1) of which provides that "… the consulting engineer shall be in full control of, and be responsible for, construction supervision of the works on site". See also clause 5(1) of Scale of Fees for Housing Development (1997) P.U. (B) 288 to similar effect.

5.6 As an illustration, attention is also drawn to the provision of by-law 5, Uniform Building By-Laws 1984 on the obligation of the "qualified person" to supervise the erection of any building and by virtue of the definition in by-law 2, a "qualified person" can be an architect, registered building draughtsman or engineer.

5.7 As a further illustration with reference to the quality of materials, attention is drawn to the provisions of by-law 53(1) of Uniform Building By-Laws 1984 where the quality of materials used in buildings is regulated by making reference to "Standard Specification or Code of Practice" and compliance with this specification or code of practice "shall be deemed to be sufficient compliance with the requirements of paragraph (1) of by-law 53". The Engineer's supervision, and the required compliance with standard specification or code of practice, would be sufficient as far as the quality of the materials is concerned.

5.8 It is further noted that IEM, in conjunction with SIRIM Berhad, is compiling a series of codes of practice and standards for use in the construction industry and it is suggested that the laudable aim of the Lembaga in this regard should be focused elsewhere.

5.9 Construction activities and the technologies associated with them, and the adoption of novel construction techniques and materials, are not ones which are, and can be, efficiently regulated by a statutory authority. This may have an adverse effect on the speed and economy of construction; worse, it may have an undesirable effect of stifling the creativeness and innovativeness of engineers in attempting to adopt new construction techniques and materials. The loss of this ability of Malaysian engineers, it is submitted, is also the loss of the competitiveness of Malaysian engineers, and with it, the loss of the competitiveness of Malaysian construction industry in a globalised world.

5.10 In summary, it is IEM's view that the Lembaga should not, with the greatest respect, be given the jurisdiction to be involved in the area of regulating quality of construction materials, and also the regulation of construction techniques, as these have been amply provided and catered for by the traditional functions and roles played by engineers. Further, there are also sufficient statutory provisions to regulate these areas of the construction process.

5.11 The discussion above will also extend to sections 37(2)(j), (k), (l), (n) and (o) of the Proposed Amending Act where the Lembaga is given the powers to make regulations on the obligations of any person in the construction industry to comply with codes of practice, quality, minimum standards and specifications in designs and others.

6.0 CONSTRUCTION PROJECT MANAGEMENT FIRM

6.1 Part VIIB of the Proposed Amending Act (a new part not found in the Act) provides for the registration and regulation of what is referred to in the Proposed Amending Act as the "construction project management firm". From the definition accorded to the term "construction project management firm", construction project management seems to include management, supervision, control or (*sic*, and?) coordination of construction projects; and "construction

projects" is defined to mean "any pre-construction works activities and construction works".

6.2 It seems to IEM that by doing so, the Lembaga is giving statutory recognition to a new "profession" called "construction project management". It is true that in some mega projects in Malaysia such as North-South Expressway and Kuala Lumpur International Airport, the concept of construction management (or project management) was practised. However, there is available academic literature which cast some doubt on the viability of, and the success claimed by, construction project management. It is suggested that may be a more detailed study should be commissioned by the Lembaga before this new profession be given statutory recognition, and seemingly be given authority (?) to manage, supervise, control and coordinate the works of recognised professionals such as engineers, quantity surveyors and architects.

6.3 Nevertheless, it is suggested that project management, in its informal sense, has already been practised in the Malaysian construction industry. In East Malaysia, it has taken the name of "prime contracting" and some form of project management has been practised by main contractors in Malaysia for years without any formal name being given to it.

6.4 It is true that unlike engineering and architecture, there is as yet no statutory provision regulating "construction project management" as it is understood from the provisions of the Proposed Amending Act. However, it is submitted that common law will fill the gap here by imputing liability to one who professes to be a professional who practises construction project management and the common law concept of "reliance" will also impute such a liability. The fear that without some statutory safeguard there would not be any control of construction project management firms (or managers) is, with respect, misplaced. A possible serious lacuna in the provision of "construction project management firm" in the Proposed Amending Act is that it is the firm which is being registered, not

individuals as in the case for The Registration of Engineers Act 1967 and Architects Act 1967.

6.5 IEM further views that "project management" (possibly the term is interchangeable with the term "construction project management") is also the traditional function which can be performed by engineers as can be inferred from Scale of Fees (Revised 1998) P.U.(B) 548, Part A, clause 2(3)(a)(xiii). The same can also be inferred with respect to the position of architects as can be inferred from Architect (Scale of Minimum Fees) Rules 1986 Rule 6(6).

6.6 IEM is of the view that it would not comment further at this stage on the issue of registration of construction project management firms as the criteria of registering such construction project management firms are believed to be forthcoming by way of regulations made under the Act. ***IEM will only state that no members of any particular professional organisations shall have the monopoly of being registered as the construction project management firms pursuant to the provisions of the Proposed Amending Act. IEM further requests that IEM be consulted during the drafting of any regulations for the registration of construction project management firms.***

7.0 LEVY

7.1 Though it is believed that it has not been put into effect, it is the statutory requirement under the Act that each and every contract, i.e. including sub-contracts in the various tiers pursuant to a main contract, is bound to pay the levy of a quarter per centum of the corresponding contract sum. It is gratifying that the Lembaga has sensibly not construed the provisions on the collection of levy literally. However, instead of clarifying the issue of levy payment by sub-contractors and subsequent-tier contractors, the Proposed Amending Act *via* section 34(6) has provided the following:

> "In the case where there are (*sic*) more than one contract in a construction work, each contract including its contract sum shall for the purpose of this Act be treated as separate and distinct irrespective of the fact that the contract sum is derived from or constitutes an intergral (*sic*) part of another contract."

7.2 IEM thus suggests that the provision of section 34(6) of the Proposed Amending Act be studied in detail with the possibility of clarifying its intent. It is further suggested that the discretion given to the Lembaga in sections 34(9)(a) and (b) of the Proposed Amending Act is not desirable in this regard.

8.0 ENFORCEMENT AND INVESTIGATION

8.1 IEM appreciates that, to ensure compliance with the provisions of the Act and the Proposed Amending Act, the Enforcing and Investigating Officers (as defined in the Proposed Amending Act) will need to be equipped with certain authority and powers for them to properly perform their duties. IEM however views that the Enforcing and Investigating Officers may have been given too wide-ranging powers and this may have the effect of interfering with the engineers (or architects) in the performance of their duties. There may be instances that engineers may be put into a very awkward position, see for example the provisions of sections 35(3)(a), (c), (e), (f) and (g).

8.2 Further, some of the areas purportedly to be within the jurisdiction of the Enforcing and Investigating Officers would also be within the jurisdiction of, for example, local authorities, officers or inspectors authorised under Factories and Machinery Act 1967 (Act 139), Occupational Safety and Health Act 1994, Customs Act 1967 (Act 235) and a host of others. There seem to be a lot of duplications here in terms of enforcement especially when the Enforcing and Investigating Officers are given the authority, as per section 35(1) of the Proposed Amending Act to investigate "accidents, negligence, or misconstruction".

8.3 It is thus suggested that the scope of the authorities given to the Enforcing and Investigating Officers be narrowed.

9.0 CONSTRUCTION CONTRACTS

9.1 Though there are several provisions which are grouped under the heading "Part X General", these nevertheless have important implications to the construction industry, and, in an indirect way, engineers and the practice of engineering in Malaysia. IEM will only raise issues on matters which relate to construction contracts.

9.2 Section 37(2)(b) of the Proposed Amending Act provides that the Lembaga may make regulations for "prescribing the manner, form and procedure for the submission of contracts ***including prescribing the value of the contract sum*** …" (emphasis supplied) and section 37(2)(p) provides that the Lembaga may make regulations for "***prescribing the manner and forms of standard construction contract***" (emphasis supplied). It is suggested this has seriously encroached into the freedom of parties entering into contracts and is a serious erosion of the doctrine of the sanctity of contracts.

9.3 Even though it is accepted that ***absolute*** freedom of entering into contracts in terms that the parties view to be their province is not possible, it is nevertheless suggested that any form of regulation by the Lembaga, if at all, should be to control and regulate certain practices which are not viewed to be conducive to the development of the construction industry and not, as is now the case in the Proposed Amending Act, a wholesome regulation and blanket control. For example, section 113 of the English Housing Grants Construction and Regeneration Act 1996 has made unenforceable what are commonly called the "pay-when-paid" provisions in construction contracts. The part of this English Act, which is popularly referred to as "the Construction Act" in England, only regulates certain construction practices in construction contracts and does not

impose a blanket control and regulation on what terms and conditions, including contract sum, that the parties want them to be.

9.4 For the reasons stated above, IEM suggests that the above provisions be studied in details and, if possible, IEM recommends that they be dropped.

10.0 CONCLUSIONS AND RECOMMENDATIONS

10.1 IEM is of the opinion that some of the Proposed Amendments are of far reaching implications and the Lembaga should consult widely before they are recommended to the Minister who has primary function for construction. IEM further views that some of the existing provisions of the Proposed Amending Act which are highlighted and discussed above should not be enacted in their present un-amended forms.

10.2 IEM appreciates being given the opportunity to respond to the Proposed Amendments and sincerely hopes that its views can be taken into consideration in finalising the Proposed Amending Act. IEM being a learned professional institution shares the objectives of the Lembaga in its noble objectives of improving the standard of Malaysian construction industry. IEM reiterates that it is prepared and willing, and requests that it be given the opportunity, to participate in the finalisation of the Proposed Amending Act.

Prepared by

@ 12 May 2002