FEASIBILITY OF ADOPTING MINOR BUILDING WORKS AGREEMENT IN MALAYSIAN CONSTRUCTION INDUSTRY

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A dissertation submitted in fulfillment for the award of the degree of Master of Science in Construction Contract Management

Faculty of Built Environment
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NOVEMBER, 2009
DECLARATION

I declare that this thesis entitled “Feasibility of Adopting Minor Building Works Agreement in Malaysian Construction Industry” is the result of my own research except as cited in the references. The thesis has not been accepted for any degree and is not concurrently submitted in candidature of any other degree.

Signature : .................................................................
Name : SITI HAIZAN AZMI
Date : .................................................................
DEDICATION

Assc. Prof. Dr Rosli Abdul Rashid...
“Success is your blessing. I would always be thankful to you.”

To my beloved parents, Azmi Jaafar and Fauziah Ahmad...
“Thanks for your patience and encouragement”.

My Brother Ahmad Fatimi and 2 pretty sisters Siti Hairani and Siti Hariati..

The very best friend of mine, Nurul Sakina Mokhtar Azizi and family..

Fiancé. Muhamad Nabiel Fikri Ismail..
“Thanks very much for your strong support”

Dearest family and friends...
ACKNOWLEDGEMENT

The preparation of this dissertation would not have been possible without the support, hard work and endless efforts of a large number of individuals.

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Special thanks to my parents, for their willingness to motivate me contributed tremendously to my project. Besides, I would like to thank Muhamad Nabil Fikri for his assistance.

An honorable mention goes to my families and friends for their understandings and supports on me in completing this dissertation. Without helps of the particular that mentioned above, I would face many difficulties while doing this dissertation.

Finally, my sincere thanks to all the people who have contributed to and worked on this dissertation.

Thank you.
ABSTRACT

The method of procurement and contractual arrangement differ from one country to another. However, it is not wrong for Malaysia to adopt the system and material used in the developed country like United Kingdom for it will hopefully bring the light to the Malaysian construction industry. For decades, JCT Minor Building Works Agreement has been looked upon more and more as an acceptable substitute for the standard form of building contracts to be used for small or minor works. As in Malaysian, minor works are an established and vital part of the construction economy. The PWD 203 form of contract is used for this type of contract. However, the provisions inside this form of contract seem too be lengthy and extensive for this type of works. The JCT Minor Building Works Agreement on the other hand, appears to be simpler and practical with only 8 clauses compared to 78 clauses in PWD 203. Hence, this research objective is to see the feasibility of adopting the JCT Minor Building Works Agreement in Malaysian Construction Industry. The methodology that has been applied in this study is a detail analysis of the structure, language and content of Minor Building Works Agreement. From this analysis, the flexibility, simplicity and suitability can be identified. Books, journals and written materials are referred to in getting the information about the subject. The suggestion is then made. This research revealed that it is feasible to implement our own minor building works agreement but it must be given extra concern by the parties to the conditions that they need to agree because this simplicity and brevity have price to pay.
ABSTRAK

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CHAPTER 1

INTRODUCTION

1.1 Background of Research

Small works are an established and vital part of the construction economy. They account for a growing proportion of construction output and are prominent in each and every sector of the construction industry.\(^1\) To be carried out successfully, minor building works must be properly procured. Basically, minor works are recognize as new works, alterations, modifications, improvements and aspect of maintenance work of a general building nature up to a cost value of approximately RM 300,000. Forms of approach can accommodate minor building works. Works such as this, shall be procured on a formal level under explicit forms of contract with considerable documentation.

The vast majority of construction work is performed under contract. A legal system requires a contract to be made in a certain form if it lays down the manner in which the conclusion of the contract is to be marked or recorded. In modern legal systems, such formal requirements generally consist of writing, sometimes with additional requirements.

It has even been said that consideration is a form, but more usually ‘form’ refers to requirements which have nothing to do with the content of an agreement. Form may be sufficient to make a promise binding. The purposes of the form are to promote certainty. Form also has a cautionary effect. Besides that, form has a protective function used to protect the weaker party to a contractual relationship by ensuring that he provided with a written record of the terms of the contract. In essence, the main reason for requiring a written contract is because an oral contract could lead to problems if the parties have a disagreement regarding the specific terms of a contract or whether a contract actually exists.2

The construction industry has relied on formal contracts to define and enforce the obligations and rights of contracting parties.3 Typically, a construction contract may be between a client and a contractor. It is essential to remember that the contractual obligation by any party in any contract will be interpreted by terms and contents of the documents laid down in the contract.

It is a normal practice for the construction industry to express a contract in a formal document such as standard form of contract or as specific conditions.4 Standard forms of contract documents are widely used in the construction industry. The use of standard forms serves many functions and benefits to all the contracting

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parties. According to Nayagam and Pathmava (2005), “Standard forms of construction contract provide a basic legal framework identifying the rights, obligations and duties of the parties, establish the ambit of the powers and duties of the contract administrator.”

All standard forms of contract must be read and construed together with common law principles and the statutory provisions. The form set out the terms or conditions on which the contracts between the parties are to be carried out. These terms or conditions are generally suitable for a wide range of common projects or works.5

Unfortunately, this standard form of contracts then becomes excessively complicated and confrontational with opportunities for disputes at every turn. The tinkering of contracts was generally done in an amateurish way by non legal professionals usually the Quantity Surveyors or by lawyers oblivious to the practicalities of the construction process in responding to the employer’s demand in private sectors.

In July 1994, Sir Michael Latham has identifying thirteen (13) principles, which should be included in an “effective form of contract in modern conditions” as follows in Table 1.1:

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<td>A specific duty for all parties to deal fairly with each other, and with their subcontractors, specialists and suppliers, in an atmosphere of mutual cooperation.</td>
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<td>Firm duties of teamwork, with shared financial motivation to pursue those objectives. These should involve a general presumption to achieve “win-win” solutions to problems which may arise during the course of the project.</td>
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<td>3</td>
<td>A wholly interrelated package of documents which clearly defines the roles and duties of all involved, and which is suitable for all types of project and for any procurement route.</td>
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<td>Easily comprehensible language and with guidance notes attached.</td>
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<td>5</td>
<td>Separation of the roles of contract administrator, project or lead manager and adjudicator. The project or lead manager should be clearly defined as client’s representative.</td>
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<td>6</td>
<td>A choice of allocation of risks, to be decided as appropriate to each project but then allocated to the party best able to manage, estimate and carry the risk.</td>
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<td>7</td>
<td>Taking all reasonable steps to avoid changes to pre-planned works information. But where variations do occur, they should be priced in advance, with provision for independent adjudication if agreement cannot be reached.</td>
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<td>8</td>
<td>Express provision for assessing interim payments by methods other than monthly valuation, i.e. milestones, activity schedules or payment schedules. Such arrangements must also be reflected in the related subcontract documentation. The eventual aim should be to phase out the traditional system of monthly measurement or re-measurement but meanwhile provision should still be made for it.</td>
</tr>
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<td>9</td>
<td>Clearly setting out the period within which interim payments must be made to all participants in the process, failing which they will have an automatic right to compensation, involving payment of interest at a sufficiently heavy rate to deter slow payment.</td>
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10 Providing for secure trust fund routes of payment.

11 While taking all possible steps to avoid conflict on site, providing for speedy dispute resolution if any conflict arises, by a predetermined impartial adjudicator/expert.

12 Providing for incentives for exceptional performance.

13 Making provision where appropriate for advance mobilization payments (if necessary, bonded) to contractors and subcontractors, including payments in respect of off-site prefabricated materials provided by part of the construction team.

Table 1.1: The most effective form of contract in modern conditions. (Latham M, 1994)\(^6\)

The choice of most appropriate form of contract for any particular project depends on a variety of factors such as time available before the building must be completed and ready for occupation, the time available for the preparation of the tender documents, the detailed knowledge of the scope of the work and employers’ requirements at the outset, the possibility of variations being required to be incorporated during the progress of the work and the possibility of having to have consultants and specialist sub-contractors chosen and appointed by the employer before the main contract is left.\(^7\)

1.2 Problem Statement

As what has been discussed earlier, the most important features of the relationships between the contractor and the employer are defined and governed by a

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\(^6\) Latham, M., Sir (1994) *Constructing the Team*. HMSO

contract. A building contract, like any other contract, is made by an offer, acceptance and consideration. The contractor’s tender is the offer, and a properly worded letter of acceptance from the client will create a binding contract. Acceptance of the contractor’s must be unqualified.

The nature of small works and their method of procurement differ from larger types of work. Knowledge and experience of small works, their own internal organization, the management philosophy they hold, the system they use, the commercial markets in which they operate, and the degree of risk they are prepared to assume are different from those in major works.

It is advantageous to use a standard form of agreement wherever possible. Unfortunately there are a few standard forms available that cover the types of contractual agreement required for the general run of minor works. Even though a number of forms of contract have been developed for different agencies and governments, directed to small labour–based contracts, what has tended to happen is that either more clauses are added to already complex documentation.

The style and practices of the standard form contracts are assumed to be descriptions of good industry practices and are accepted as the industry standard as to colour even the bespoke and ad hoc contract forms. In Malaysia, there are several standard forms of contracts which are applicable for construction depending on the categories of works and types of clients. Among the several standard forms of contract in Malaysia, use of the PWD Forms is compulsory for government works. There are two types of the PWD Forms, PWD Form 203A (Rev. 10/83) (Standard Form of Contract to be used where Bills of Quantities form part of the Contract) and PWD 203 (Rev. 10/83) (Standard Form of Contract to be used based on Drawings and Specifications without Bills of Quantities).

Regrettably, there is no standard form of contract available for minor building works. In fact, PWD 203 (Rev. 10/83) is often used for minor or small works in Malaysia where Bills of Quantities do not form as part of contract. Therefore, PWD 203 is taken as the representative standard form of contract in undertaking this dissertation. The PWD forms are applied for all projects funded by the Malaysian public sector.9

1.3 Objective of Research

The objective of the research is to examine the feasibility of adopting the JCT Minor Building Work Agreement United Kingdom in the Malaysian construction industry.

1.4 Scope and Limitations of Research

Although Minor Building Work Agreement (MW) was introduced in the United Kingdom back in 1968, Malaysia has never utilized this form of contract.

As the research is concerned with examining the feasibility of implementing Minor Building Works Agreement in the Malaysian construction industry A comparison of both Minor Building Work Agreement (MW) 1980 and JKR 203 Standard Form of Contract 2007 will be made. All the panels will be given Minor

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Building Work Agreement (MW) 1980 for them to study before the interviews start. These two are used due to the availability of information.

1.5 Research Methodology

i. Study on the Minor Building Work Agreement (MW) 1980 and related published work relating to MW for a strong understanding.

ii. Comprehensive study on write up, journals, and commentary to the development and significance of the principles underlying preparation of the MW as well as the background and application of it. These will be then be related to the scenario of Malaysian construction industry. Comparison between Minor Building Work Agreement (MW) 1980 and JKR 203 Standard Form of Contract 2007 will be made. From the comparison, suggestion will be made.

iii. Interview session will be conducted and responses from each interviewee were recorded for each question successfully to form a database. This database was then carefully examined to identify points of ideas which were collated and analysed into summary result. The rest of the chapter presents and discusses the result obtained.
1.6 **Significance of Research**

The research will take a chance to investigate the industry to look into the importance of shorter contracts rather than lengthy contracts that do little to diffuse the augmenting litigious nature of the industry. Though much was written on Minor Building Work Agreement on its success in the implementation in United Kingdom, no write-ups were found on its presence or rather it’s usage in Malaysia.

Since small building works are so often understated, yet there can be no doubt that they require professional procurement and contract administration, this research will highlight the importance of minor building works. JCT Minor Building Works Agreement that has long been adopted in United Kingdom construction industry will be used as the basis in achieving the objective of this research. Hence, this research is vital to determine whether MW can be use to replace PWD 203 standard forms of contract.

1.7 **Organisation of Chapters.**

This research covers four (4) segments as follows:-

1.7.1 **Chapter 1: Introduction**

This chapter introduces the foci of the research. An introduction to minor building works and the current standard form of contract is made. This chapter also discusses on the importance of standard form of contract and the characteristic it must posses to become effective. The objective undertaken for this thesis is presented
in Chapter 1. It also presents the scope and limitations; significance of the research; as well as the methodology and the outline of this research.

1.7.2 Chapter 2: Minor Building Work Agreement in Malaysian Construction Industry

This chapter critically defines minor works and their characteristic. Types of contractor and client who undertake this project is described and the importance of procurement of Small or Minor Works is discussed. This chapter also provides information on the Minor Work Agreement (MW). It looks at how the MW was created and implemented in the United Kingdom (UK). Also, the chapter reviews the structure of the MW 80.

1.7.3 Chapter 3: Research Analysis.

This chapter describes the conduct of this dissertation. The research instruments, or tools, used for data collection are discussed in the methodology section. The answers obtained from the interview will be analyzed. The structure, content and language used in Minor Building work agreement in Malaysia will also be studied. This chapter carries an assessment of the Minor Work Agreement by comparing it with PWD 203 Standard Form of Contract. From the comparison, the coverage of each clause in MW 80 will be identify and see the feasibility of implementing the Minor Building Works Agreement in the Malaysian construction industry.
1.7.4 Chapter 4: Conclusion and Recommendations.

This chapter consolidating the research results and findings infers conclusions from this study. This section also includes recommendations and suggestions for future research.
2.1 Introduction

Before discussing any further, it is important to discuss the definition of minor building works and its characteristics.

2.1.1 Definition Minor Building Works.

Small or Minor building projects may be defined as ‘those building works procured under a standard shorter form of building contract’ However, it can be problematic in presenting a precise definition of small works. This is due to the divergence of opinion about its nature and composition, which arises from the different perspective of those connected with the small works sector of the
The various types or categories of small building works is shown in Figure 2.1

Figure 2.1 Variations in types of small building works. (Griffith, A. 1992)

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Small works may range from the construction of a simple factory unit with production shed and administrative wing, to the renovation and rehabilitation of a large country house. Definition of small works, depending on the original source may vary considerably in criteria such as scale and value, the latter being the most common source of variation.12

London Building Acts (Amendment) Act 1939 defined Minor Works as any alterations works in buildings which do not result in substantial modifications to the structural or fire safety aspects. Minor building works sometimes may be referred as small building works. According to Griffith, small works includes maintenance, alterations, refurbishment and small-scale new building works.13

The definition of small projects covers many types of small work efforts. In most companies, these small projects are not viewed as “projects” at all. However, these types of small work efforts should be considered to be a project because they meet all the criteria of a project. The work is unique, has a beginning and end-date, results in the creation (or enhancement) of a deliverable. It’s just that the work is small and so the project itself is small.

Generally, small projects are unique work efforts that are clearly projects but have short durations and small numbers of effort hours. Enhancements to existing production processes and systems are those considered as small works.14 Improvement works to the property which needs specialist tools, knowledge and supplies are all considered as small works. Thus, the variety covered by small works contracts is therefore immense and requires a high degree of adaptability, exceptional competence and the wide experience from those employed to supervise these works.

12 Faculty of Architect and Surveyors Minor Works Contract, Institute of Registered Architect.
In the United Kingdom construction industry, Agreement for minor Building Works is used for this type of work. Standard form is used where the size, extended contract period or complexities of the works are such as to need contractual conditions; these conditions cover a large variety of likely situations.\textsuperscript{15} The Agreement for Minor Building Works on the other hand, is a simple document providing for the minimum of eventualities and is employed for relatively simple contract of short duration. Minor Building Works Agreement can be applied in any simple works and usually the value of the works is below RM 300,000 and sometimes up to RM 3 million type of project.

\subsection*{2.1.2 Key Characteristic of Small Works}

Small building project in general, may be said to display a number of discernible characteristics which distinguish them from other building works. These are\textsuperscript{16}

- **Scale.** The have limited scale – may be measured in terms of cost value, although different ranges of value may be denoted by cost band, each with an upper cost limit. The limit may be lower or higher depending upon circumstances.

- **Content.** Minor building works have limited content – usually, although not exclusively, small building works have low technical complexity although, nevertheless, they are often highly labour intensive and may require the input of

most building trades and skills and necessitate the usual operational sequence of production activities.

- **Quantities.** The building operations involved usually entail small quantities in terms of materials required and labour task performed.

- **Time.** Minor building works have short production duration. Usually, most of small building works though not all, will be completed within a short duration, i.e. within three to six months from their commencement.

Small-scale maintenance work, alterations, improvement work and small new works have many properties that differentiate them from larger building works. This is shown in the table below. (Figure 2.1). These include:\textsuperscript{17}

- Many of the individual items of small works within the total workload will be of a maintenance or alteration or improvement nature. These are generally subject to more change once underway than is usual for new work and demand a rapid response when variation occur.

- The percentage cost of administration and management in small works, expressed as proportion of the cost of the works itself, can be much greater than they would be for higher value building work. This is particularly significant at the lower end of the small works spectrum.

- The complexity of a typical item of small building work may be much less than that of higher value building work, resulting in a reduced requirement for consultant input and less documentations.

- The contractor will not normally be able to incur high supervisory and managerial costs for low-value work – which makes small works a less attractive

proposition for medium-sized or large contractors who inevitably incur much higher head office and supervisory overheads than do the smaller building firms and will not be awarded the job in a competitive market unless the client is prepared to pay premium.

- The duration of an item of small works is commonly much shorter than higher value work.

- Much small works activity takes place occupied buildings where the considerations of causing minimal disturbance and health and safety regulations are of paramount importance.

- Small works usually involve small quantities of materials, with reduced discounts from suppliers, and a low number of labour tasks.

- Owing to the high level of uncertainty attendant at many small works operations, it is often difficult to specify the extent of the work prior to commencement on site.

- Subcontracted work is less common in small works than building work of a greater magnitude owing to the relatively few different labour tasks involved.
2.2 The Clients

A client has a great many factors to consider within his operational marketplace and this is true irrespective of construction sector. A client must dynamically ‘manage’ his building assets, increase or at least maintain their value,
develop and improve their use and upgrade and maintain their structural and functional integrity.¹⁸

As the construction output for minor building works is currently reflected in a figure of approximately one-fifth of total construction activity and future demand looks set to rise rather diminish, the increasing significance of minor building works should be reflected in the level of importance demonstrated by clients.¹⁹ Certainly, if statistic for the future come to fruition, the growing demand for repair, maintenance and small new works is likely to increase the propensity for minor building works growth largely in parallel. In overall terms therefore, clients are unlikely to regard minor building works in the future as anything other than a serious building activity.

The construction industry has a very broad spectrum of client types, ranging from highly experienced clients who build regularly and understand the industry very well to very small, inexperienced clients who may only ever build once in their lives. Plainly, the client’s level of experience and understanding will have a serious impact upon the briefing and procurement process and contract conditions.²⁰

Generally, minor building works is to be procured in a way depending on its characteristic which differs from major works. It needs to be procured using shorter standard forms of building contract suitable to the nature of it. Whilst some major clients utilise a planned and structured approach, perhaps adopting a term contract with one contractor to look after all their repair and maintenance and small building requirements, other clients use a more ad hoc approach, procuring each job individually. Similarly, some clients use directly employed labour whilst other clients have to contract out all their work. The philosophy and concepts underlying

the various approaches are very involved and will, obviously, vary from client to client. Certainly, no one role fits all organizations. Whilst the basis of approach may be somewhat common amongst all organizations, the different and unique characteristics of individual organizations will make each application different.

It is difficult to be specific on the proportion of annual expenditure that clients are likely to spend on small building works. It is influenced by many factors. In commercial sectors particularly, markets change rapidly due to user or customer trends. New working methods, innovation and even consumer fashion may dictate the need for property upgrade, alterations and extensions. A client cannot ignore these factors. Similarly, legislation must be recognized and the range of planning and building control act will impart great influence upon how the client manages building assets. Many buildings may well be properties listed as being of historical importance and this to will influence quite significantly how a client seeks to undertake small works to such building.

2.3 The contractors

In general, it may said that there is never quite enough construction work to go around and indeed this is true of the small building works market, Large contractors diversify and come in to bid for medium size projects, medium size firms chase smaller projects and in extreme cases, the small builders may be pushed out of the market completely. Such a situation means that those smaller and medium size builders who rely upon small works activity must be organized and very specialist in what they do.
Small building works are undertaken by small contractors operating within both general and specific fields of activity and amongst major contracting organizations who have specialist small works departments or divisions within their broader organizational frameworks.

As what has been mentioned earlier, small contractors are directly or indirectly involve in most small projects. To a small size contractor, a project which is small to the client may be the biggest one to the company has ever handled. In spite of this difference in perspective, the small-company project is usually done without the highly trained personnel or sophisticated systems which large companies can afford. Small-company projects can also be critical if they represent a lump-sum contract on which the profit margin is important. It is important for the contractor to procure this type of work properly and to use the appropriate forms of contract.

In Malaysian construction industry, the contractors who undertake small/minor building works is classified as class E and F contractor. CIDB classified these contractors under grade G1 until G3. These categories of contractors have low finance capacity and posses low education background in construction. They often operate in a minimum cash flow and have few liquid assets. The project value they usually undertake is in a range of RM 300,000 and below. The statistics of contractors in Malaysia according to grade are show below.22

2.4 Importance of Procurement of Small or Minor Works.

When entering into any relationship and contract for work, whether the works is small and simple or extensive and complex, the client will assume some degree of risk. There is always a chance, however small, that something will go wrong on the project.

In the case of building works of sufficient size and complexity to require the use of a standard comprehensive form of building contract and full tendering procedures, it is generally recognized that clients can gain many benefits from the
selection of the most appropriate method of procurement for a particular project – procurement meaning the framework under which the design and construction of the project is purchased and controlled.23

Procurement is a generic term embracing all those activities undertaken by a client seeking to bring about the construction or refurbishment of a building. Variously referred to as a method, path or system, procurement is initiated by devising a project strategy, which entails weighing up the benefits, risks and financial constraints which attend the project and which eventually will be reflected in the choice of contractual arrangements.

In every project, the concerns of the client will focus on time, cost, and performance or quality, in relation both to design and to construction of the building. The project strategy will necessitate making an analysis of the situation, making a choice from the procurement options and then devising a method of implementing that choice, using well established rules and procedures.24 The client’s policies, available resources, organizational structure and preferred contractual arrangements will need to be taken into account.

There are natural risks associated with using any particular procurement strategy but equally important is the need for all parties to comply with their respective obligations; this is particularly important where responsibility for design and construction are separated. Risk assessment is a crucial aspect of procurement and contract arrangement. Client must consider risk carefully when selecting a form of contract as this set out the formal relationship between the two main parties.

In addition, the selection of procurement route in small works management is important because it sets up the framework and degree of formality within which the client and contractor must work together. It is obviously desirable if a harmonious and cooperative working relationship can be established at the start and maintained thereafter. This should reduce the potential for disputes to become acrimonious and damaging.  

The procurement route selection process is important because it is one of the major influences on the ultimate success of a construction project and it is also one of the first decision made affecting the undertaking of the work. In selecting the appropriate procurement route options for each project, the most important criterion will normally be the complexity of the work.

The main characteristics of the work influencing procurement approach and contract arrangement are:

- **Types**
  - Complexity
  - Design input
  - Management input required

- **Scale**
  - Cost
  - Extent to which scope of work can be defined precisely at tender stage
  - Degree of financial management required

- **Volume**
  - Amount of similar work in the overall workload

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25 Ibid.
• Benefits accruing from economies of scale.

The client should, in addition appreciate the type, scale and volume of small building works, determine the procurement and contract arrangement with consideration to other factors which include:

• Time
• Cost
• Quality
• Work locations etc.

Basically, there are three main procurement options. There are traditional method, design and build procurement and management procurement. Each procurement should come with their own types of contract. In selecting the most appropriate type of contract, the following are worthy to mention:26

Composition of the team

The form of contract, when completed, will confirm who is to undertake certain specific duties and accept certain obligations. For example, the extent to which construction and design responsibilities are allocated as between the professional consultants, the main contractor and specialist subcontractors should be evident from the provisions of the contract.

Compatibility of Agreements

It is essential; however, that what might be required of the professional consultants as expressed in the building contract is also reflected in the schedules of professional services included as part of the appointing documents for those consultants.

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Documents for tendering purposes

With traditional procurement, the realism (or otherwise) of lump sums will obviously depend on tenders having been prepared on the fullest possible information. Where that information is unlikely to be available at preconstruction stage, lump sum contracts are unlikely to be satisfactory and alternatives will have to be considered. JKR documents generally do not include tender procedures covering tenders for the main contract works, but, where the main contract conditions refer to the use of specific documents, there is a requirement that such tenders be invited in accordance with the relevant documents. Although PWD 203 does not generally prescribe the tender procedures to be followed Practice Note –Tendering provides model forms for use in tendering for main contract works.

Law and Statute

There are various obligations arising from statute, some of which will be implied in the terms of the contract, and others expressly stated. For example, responsibility for obtaining the necessary planning consents or building regulations approvals will normally rest with the employer through his professional consultants. Nevertheless, the contractor will still be liable for compliance with statute in respect of building law.

It is suggested that a certain degree of tailoring of the small works procurement approach to accommodate the particular characteristics of each category of work carried out in both appropriate and necessary. In conclusion, tailoring small works procurement must be based on both of the industry custom and the facets of small works itself.
2.4.1 Interest of Contracting Parties: Key Requirement for Small Building Contract

Clients Interest

The first essential pre-requisite is that the document must protect the client’s interests. The contract must ensure that the contractor produces work of the required quality, in the stated time, and at the agreed price. This is especially important, as many shorter contracts are not very rigorous on the requirements for a detailed work programme, method of working, or proof of skills of the contractor’s employees. The reasoning is that if the nature of the works is relatively simple, and the contract period short, the risk for the client should be low and thus contract clauses can be safely simplified.27

Contractors Interest

Secondly the contractor’s position must be secured. As previously noted, most of these works will be awarded by one client especially the Government. The contractor is thus in quite an exposed position with possibly only one major client. Making claims or complaints in this situation can spell commercial suicide.28

2.5 Simplicity of a contract

A contract is a document that outlines an agreement between two or more persons, two or more organizations. The simpler the work contract, the clearer are the expectations on both sides. It's important to have a clear and complete contract so that everyone knows what to expect and when. A contract is a legal agreement between parties to do or not do certain things in exchange for other things, and is enforceable in court.

Basically there are three main elements of a contract. Those elements are an offer, acceptance, and consideration. A simple construction contract provides only a skeleton yet precise intention and it must fit to the characteristic of the work. From the Reverso Dictionary\(^2^9\), the singular word simple, is defined as something that is not complicated, and it is therefore easy to understand.

The actions by the parties are defined precisely so that there should be few disputes arise. A contract is said to be simple when it is arranged and organized in a structure which helps the readers to gain familiarity with its content.

Thus words like ‘fair’, ‘reasonable’ and ‘opinion’ have been used as little as possible. This does not mean that the flexibility of administering the contract has been reduced. This would significantly reduce uncertainty about the outcome of the contract.

The quantity of text used is much less than existing standard forms and the amount of text needed to give effect to the options is small. The number of clauses used and the amount of text are less than PWD 203.

A guideline has been given in order to write a simple contract.

\(^{2^9}\)http://dictionary.reverso.net/english-cobuild/simple%20contract#
Part 1 of the contract - parties involved
The beginning of the contract stipulates the parties that are involved in the contract. It usually states names, companies with their addresses and contact information.

Part 2 of the contract - objectives
The document then continues with the objectives that will be achieved through the associations of the parties. Objectives are measurable and tangible.

Part 3 of the contract - Scope of Work
This section articulates specifically what will be done by each party with specifics about the maximum amount of time that will be allocated or permitted for each activity.

Part 4 of the contract - Compensation for Work Done
This paragraph stipulates what will be given to each party in exchange of the work or service provided. In this section it is important to identify the budget that will be permitted to spend to achieve the objectives, define the compensation for each party and clarify that the compensation will be provided only if the objectives are achieved. It may explain how the compensation will be prorated if the objectives are partially met. If there is a pre-payment required, it would be mentioned in this part of the document.

Part 5 of the contract - Assumptions
Important to list are the assumptions that have been made while identifying the terms of the contract. Often these refer to other conditions that need to be in place or met for one or more of the parties to be able to execute the plan. For instance, for a contractor, "good weather conditions" may be stated as something that would need to be present for the contractor to be able to finish the work on time.

Part 6 of the contract - Lists What Would Happen If There Was A Breach Of Contract
This would explain what the consequences would be if one of the parties wanted to step out of the contract. Consequences may be financial, legal, or other. Usually, this
is the section where parties state that they agree to settle their differences outside of the court.

The Conclusion
The conclusion is usually a positive statement about the potential of positive outcomes that will derive from the contractual partnership.

The Signatures
The document needs to be signed by all parties that are involved in the contract as well as dated.

2.5 Form of Contract for Minor Building Works in Malaysian Construction Industry

The choice of contract form is dependent upon the consideration of a great many factors such as the type and nature of the work; the level of client knowledge and expertise; the client’s requirements; time; cost; performance and quality; employment of subcontractors and suppliers; and many other factors, some of which appear to be quite extraneous to the characteristics of the building process itself.\(^3\)

The fundamental differences between the various types of contractual arrangement relate mainly to the methods of procuring the work, the way in which it is measured and valued and the respective levels of financial risk borne by the client

and the contractor. This is the reason why it is important to have standard form of contract for each type of construction contract. (according to the size of the project)

The Malaysian construction industry almost universally relies on the use of standard forms of contract conditions in particular sectors. The principal ones are the PAM, IEM, PWD and CIDB forms. The PAM Form is recommended by the Institute of Architects, the IEM Form is that recommended by the Institution of Engineers. The PAM and IEM have their origins from architects and engineers who have traditionally acted as construction contract administrators. The CIDB form is that issued by the Construction Industry Development Board. The public sector uses the PWD forms. All of these contain relevant provisions to be applied in the undertakings of the projects.

However, there is no specific form of contract for minor building works in Malaysian construction industry. Over the years, Malaysia has been using PWD 203 Standard form of contract for minor building work. This standard form of contract consist of 78 clauses which some of those clauses are not even relevant to the characteristic of the works itself. Besides that, PWD 203 has many legal jargons and phrases that sometimes associated with irrelevant materials. The legal jargons cause difficulties to the contracting parties to understand the contract while irrelevant materials may lead to misinterpretation of the actual need of the contract. Ambiguity in the understanding of these conditions commonly gives rise to disputes as to what has actually agreed between the two parties.

CHAPTER 3

MINOR BUILDING WORKS AGREEMENT

3.1 Introduction

JCT Minor Building Works Agreement 1980 will be used as the basis of undertaking this research. This section will discuss on the background of Minor Building Work Agreement 1980, its application in the United Kingdom construction industry and the arrangement and content of it.

3.1.1 The background of Minor Building Work Agreement in United Kingdom

The JCT Agreement for Minor Building Works was first published in June 1968. The adverse criticism of JCT 1963 which greeted its introduction is increasing and the use of alternative and simpler forms of contract are being advocated. The evidence suggest that architects were becoming increasingly dissatisfied with the
length and complexity of the main JCT standard form contract (JCT 63) and wished to use simple contract conditions wherever possible.  

The changes of pattern of the work also contributed in issuance of the first Agreement for Minor Building Works by the Joint Contracts Tribunal (JCT). Attention falls naturally, therefore, on Minor Building Works Agreement as a possible alternative form of contract that has the attraction not only of brevity and simplicity but of being issued by the Joint Contract Tribunal (JCT). Sales of the 1968 edition of the Agreement for Minor Building Works were increasing steadily long before the publication of JCT 1980 and this would seem to reinforce the view that it is being looked upon more and more as an acceptable substitute for the standard forms of building contract. Despite its shortcomings, it was widely used for small projects, and even for larger ones for its brevity and apparent simplicity.

This form was initially drafted by George Davies, the Senior Partner of Gleeds, the Quantity Surveyors of Nottingham. He achieved what everyone until then considered impossible, a condensed version, in four pages, of the JCT 63 Standard Form which at the time ran to thirty-eight pages. Although not actually stated in the headnote of the form, MW 68 was said to be suitable for contracts of a value of no more than £8000 which was equivalent approximately to RM400,000. The form rapidly gained acceptance and was adopted for a wide variety of projects. During the currency of the 1968 version, changed circumstances resulted in substantial amendments becoming necessary. By 1976, MW 68 had grown from

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fifteen clauses on four pages to seventeen on eight pages plus a supplement. By the
mid-seventies however, it had become apparent that a more radical approach to the
Standard Form of Contract was required a draft ‘short form’ was approved by RIBA
Council in June 1978 and then submitted to the JCT for consideration. The Minor
Works form was extensively revised by a JCT working party in 1979 under the
chairmanship of J. Barkey FRICS who was a British Property Federation
representative.

The next edition was published in January 1980. In effect, MW is a
completely new set of contract conditions. The head note to the form as issued in
1980 set out its purpose:

‘The Form of Agreement and condition is designed for use where minor
building works are to be carried out for an agreed lump sum and where an Architect
or Supervising Officer has been appointed on behalf of the Employer. The Form is
not for use for works which Bills of Quantities have been prepared, or where the
Employer wishes to nominate sub-contractors or suppliers, or where the duration is
such that full labour and materials fluctuations provisions are required; nor for
works of a complex nature or which involve complex services or require more than a
short period of time for their execution. ’

However, the Architect found it to be very misleading. It was thought that the
Architects would have no problem in using the form for appropriate work, and a
practice note, published in the RIBA journal, pointed out that this head note had no
legal validity. It was then agreed by the Joint Contracts Tribunal to delete the head
note. It was then withdrawn in August 1981 and replaced by Practice Note M2. 38

3.1.2 The use of Minor Building Work Agreement.

Britain: Architectural Press legal guides
It is wise to understand the circumstances where Minor building Work Agreement could be applied. In United Kingdom Construction Industry, Practice Note M2 sets out the criteria for the use of the form. There are:

i. Minor building works to be carried out for an agreed lump sum price under the supervision of an architect. The lump sum price is what the employer will pay, subject to the operation of the clauses dealing with variation, fluctuations and the expenditure of provisional sums.

ii. The lump sum offer is based drawings and specifications and/or schedules but without detailed measurements. This means, no bills of quantities have been prepared.

iii. The contract period must be such that full of labours and materials fluctuation provisions are not required.

iv. MW 80 is generally suitable for contracts up to the value of £50,000 which were equivalent to RM 300,000.00.

v. Where the employer wishes to control the selection of sub-contractors for specialists work the use of the form is prima facie.

The practice note points out that this may be done by naming a firm in the tender documents or in a provisional sum instruction, but ‘there are no provisions in the form which deal with the consequences...nor is there any standard form of sub-contract which would be applicable to such selected sub-contractors’.

As mentioned above, Minor Building Works Agreement is highly suitable for use on projects which have simple work content and where bills of quantities are not required. Three things debar the use of MW 80:
i. Complexity of work
ii. The wish or needs for nominated sub-contractors and/or nominated suppliers.
iii. The wish to make the contractor wholly or partly responsible for design.

3.1.3 Limitation

This contract shall not be used for:

- Maintenance or repair work involving primarily labour only and little or no supply of materials or equipment (e.g. landscape maintenance, elevator maintenance, window cleaning, etc.).
- Contracts for the supply only of materials or equipment.
- Contracts based on a "cost plus" arrangement.
- Unit price contracts, including time based (e.g. hourly rate) contracts.

3.2 Term of the Contract
A contract may be valid and tenable at law by having all the essential elements necessary for its enforceability. However, it may be necessary to examine its contents so as to establish the rights and liabilities of the parties and the remedies prescribed thereto in the event of any doubt or dispute. The terms of a contract describe the duties and obligations that each party assumes under their agreement. Terms are the mutual promises and undertakings given by parties to the contract. Terms are embodied in the contract so as to form part of the contract. The breach of a term may lead to a breach of contract entitling the injured party to seek remedies for the breach of contract. However, the Contract Act does not contain any provision which deals specifically with the contents of a contract. No provision is made as to the classification of terms nor as to the extent of the obligations of the parties to the contract.

3.2.1 Classification of Terms


The content of a contract consist of terms that can be classified as express terms and implied terms\(^{43}\). According to the Engineering Contract Dictionary, the word ‘term’ of a contract means:\(^{44}\)

“A provision or stipulation in a contract describing some aspect of the agreement. It may be express (written down), implied (included by the action of common law or statute), or incorporated. Important terms are generally known as ‘conditions’, less important as ‘warranties’.”

3.2.1.1 Express Terms

Once it has been established that a statement forms a term of the contract, it is necessary to consider what is its precise importance and effect.\(^{45}\) Express terms are those specifically mentioned and agreed by the parties at the time of entering into the contract.\(^{46}\) In essence, express terms are terms that have been formally asserted or expressed\(^{47}\). Various definitions have been proffered. Curzon speaks of an express

\(^{43}\) Supra note 2, p. 144.


\(^{46}\) Supra note 4, p. 102.

\(^{47}\) See Bentsen v. Taylor, Sons & Co (No 2) [1983] 2 QB 274.
term as “an express statement of undertakings and promises contained in a contract or other written instrument”. 48 Vincent Powell-Smith in An Engineering Contract Dictionary describes express term as:

“Term which are actually recorded in a written contract or which are expresses and agreed openly at the time the contract was made. An express term will prevail over any term which would otherwise be implied on the same subject matter.” 49

Prima facie, an express term is normally taken to be the one in a written form for contracts that have been reduced to writing. However, for contracts that are wholly oral or partly written and partly oral (hybrid types) it may be in a verbal form, so long as it is formally asserted. In the latter scenario, it is for the law of evidence to establish the existence and extent of such a term. 50

3.2.1.2 Implied Terms

48 Supra note 7, p. 144.

49 Supra note 8, p. 130.

50 Supra note 2, p. 144.
According to the Anson’s Law of Contract, the definition implied term is given as follow:

“a term which will be implied (e.g. from statute or custom) where it is necessary to carry out the presumed intention of the parties to a contract and is so obvious that the parties must have intended it to apply. Such a term will not override an express term”\textsuperscript{51};

and;

“A term which is not written down in a contract or openly expressed at the time it is made but which the law implies. The expression is used in several different senses... An implied term must not be in conflict with or be inconsistent with an express term. It must be based on the imputed or presumed intention of the parties...”\textsuperscript{52}

From the above definitions, it is apparent that though an agreement may contain express terms manifesting the intentions of the parties, there may be terms that, though not normally asserted or expressed, are nevertheless essential for giving ‘business efficacy’ to the agreement or realising the parties true manifested intention.\textsuperscript{53} Besides, implied terms are enforced on the ground that the law infers from surrounding circumstances of the case that the parties intended to add such a stipulation to their contract, but did not out it into express words.\textsuperscript{54}

\textsuperscript{51} \textit{Supra} note 7, p. 179.

\textsuperscript{52} \textit{Supra} note 8, p. 299.

\textsuperscript{53} \textit{Supra} note 2.

\textsuperscript{54} \textit{Supra} note 4, p. 103.
These labeled implied terms as depicted in Table 1.0 can be classified into the following categories in Table 2.0.\textsuperscript{55}

\textit{Table 2.0 Classification of Implied Terms}

\begin{tabular}{|p{3cm}|p{12cm}|}
\hline
\textit{i) Terms Implied by Custom and Usage} & Terms can be implied into a contract if there is evidence that under local custom they would normally be there.\textsuperscript{56}  
This rule as expounded in \textit{Produce Brokers Co Ltd v. Olympia Oil & Coke Co Ltd}\textsuperscript{21} is to be the effect that a contract may be subject to terms that are sanctioned by custom, whether commercial or otherwise, although they have not been expressly mentioned by the parties. \\
\hline
\textit{ii) Terms Implied by Statute} & A contract may be subject to terms that are sanctioned by the relevant statutes applicable to the transaction in question, although these terms have not been expressly mentioned by the parties in their formal agreement. Common statutes which provide that certain terms are to be implied into particular contracts are the Sale of Goods Act 1957, the Hire Purchase Act 1967 and the National Land Code 1965. \\
\hline
\end{tabular}

\textsuperscript{55} \textit{Ibid.}, pp. 146-149.

\textsuperscript{56} \textit{Supra} note 3, p. 110.
iii) Terms Implied by the Courts

- The court will not hesitate, if necessary, to imply terms in order to give full effect to the intention of the parties and in extreme cases to save a contract for being void for uncertainty: *Abdul Razak Valibhoy v. Abdul Rahim Valibhoy*. In a nutshell, courts, when faced with the question of implying a term, resort to tests inclusive of the ‘business efficacy test’, the ‘officious bystander’ test or the ‘Oh, of course!’ test and a combination of ‘business efficacy test’ and ‘officious bystander test’.

3.3 Interpretation of the Contracts

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57 See *Yong Ung Kai v. Enting* [1956] 2 MLJ 98.


59 The *Moorcock* [1889] PD 64 at p. 68.

60 *Reigate v. Union Manufacturing Co Ltd* [1918] 1 KB 592; See also *Shirlaw v. Southern Foundries* (1926) Ltd [1939] KB 206.

3.3.1 Fundamental Principles.

The proper way to read a contract is to read it in its entirety and seek harmony and concord in the meaning, not discord\(^62\). One cannot focus on one clause where other clauses may provide a consistent or contrary meaning.

Due to the ambiguous phrase that leads to different interpretation, it is an established principle that in construing an agreement, the various clauses in the agreement must be considered as a whole and not singly or independently of one another in order to construe the true intention of the parties to the same.

This principal whereby reading the contract as a whole to get the true meaning of the ambiguous phrase was adopted in the case of Bandar Raya Development Bhd v Ang Yoke Lian Construction Sdn Bhd. The approach was adopted beforehand of the said case. It was in the case of Jagathesan v Linggi Plantations Ltd. Ong Hock Thye CJ stated

The cardinal rule of construction of the terms of a written agreement is to discover therefrom the intention of the parties to such agreement. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that consideration which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. (See Ford v Beech (1948) 11 QB 852)

Hence, based on this statement, the extent of the contractors effort can be over viewed by analyzing relevant cases that are in relation to mitigation of delay. This is particularly in the construction law cases whereby the obligation to mitigate the delay by the contractor forms a legal obligation of the party to the contract.

3.3.2 Rules of Interpretation of the Contracts

Rules of construction are applied to enable the courts to ascertain the intensions of the parties, as expressed, and to give effect to those intensions. Rules of law are applied to bring the parties within the framework of established legal rulings and these apply even though the parties may have expressed, and intended, something contrary. On the rule governing the interpretation of contract terms, three may be mentioned: 63

3.3.2.1 Literal Interpretation

The starting point in the construction of any contract term is consider its literal meaning (the ‘literal rule’) unless such a reading renders an absurd set of

results which the parties could not have possibly intended. Literal rule is where the language is clear and explicit, it must be given effect whatever the consequences.  

The principle was demonstrated recently in *Interpro Engineering Pte Ltd v. Sin Heng Construction Co Pte Ltd*, a case concerning a building sub-contract. Clause 2 of the sub-contract had provided that the only profit which the sub-contractors were entitled to make five per cent of the builder’s work of $4.65 million. The court ruled that this should be read literally. Accordingly, it should not be construed so as to entitle the subcontractor to claim a percentage of payment in respect of variation or additional works, even though such works were contemplated at the time of the contract.

In court judgement, interpretation are according to the grammatical and ordinary sense of the words used in the agreement. It was further added in the judgement of the case Trollope Colls Ltd that interpretation of the term of a contract is not to impose new terms or rewrite contract and his function is only to express his intention of the parties to the contract. Therefore, the ambiguous phrase in the conditions of contract that expressly states the contractors’ obligation which is on mitigation of delay can be generally overviewed through court judgement to see to what extent is the contractor required to mitigate the particular delay regardless whether the delay is at the fault of the contractor or not.

### 3.3.2.2 The Contra Proferentum Principle

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Of the various rules of construction, the contra proferentum rule has historically proved the most significant in connection with cases on extension of time and liquidated damages.\(^{65}\)

This expression means “against the Profferer”.\(^{66}\) The contra proferentum rule applies to a situation where there is doubt as to the meaning and scope of some excluding clause or provision in a contract. By operation of the rule, the courts will construe the subject provision against the party who drafted and relied on it. The classic cases on this subject concern provisions which support to exclude liability on the happening of some event. In *Hollier v. Rambler Motors (AMC) Ltd*\(^ {67}\), a clause which attempts to exclude a party’s liability for damage caused by fire to customer’s cars on its premises was held to be insufficient clear to exclude liability for negligence. It was suggested that while this rule would apply to construction contracts which have been drafted by the employer (as would be the case with contracts produced by government agencies and local authorities\(^ {37}\)) it should not apply to construction contracts where the conditions have been drawn up by bodies which seek to represent substantial constituencies within the industry.\(^ {68}\) Furthermore, the courts appear to take a more moderate approach when applying the rule to provisions which merely limit liability as opposed to provisions which totally exclude liability.\(^ {69}\)

### 3.3.2.3 The Ejusdem Generis Rule


\(^{66}\) Supra note 1, p. 43.

\(^{67}\) [1972] 1 All ER 399.


\(^{69}\) *Aisla Craig Fishing Co Ltd v. Malvern Fishing Co* [1983] 1 All ER 101, at pp. 105-106.
The ejusdem generis rule applies to the interpretation of words which purport to describe a class of objects. Where words describe a general class of objects, they may be interpreted by relying on the words which describe the specific objects. In other word, this rule is that where there are words of a particular class followed by general words, the general words are treated as referring to matters of the same class.\textsuperscript{70}

An example of the kind of situations contemplated here is the extension of time provision in a construction contracts. Extension of time clause typically lists the relevant events in respect of which time may be extended under the contract. In determining whether a particular event comes within the ambit of a particular class of events provided in the clause, the general words may be read ejusdem generis with the particular events specified. Thus, in Wells v. Army & Navy Co-operative Society\textsuperscript{71}, the court held that the words ‘other causes’ in the extension of time clause in that contract should be read ejusdem generis with preceding words such as ‘strikes’ and ‘default of sub-contractors’.

\textsuperscript{70} Supra note 1, p. 42.

\textsuperscript{71} [1902] 86 LT 764.
4.1 Introduction

The aim of this chapter is to analyse the feasibility of implementing Minor Building Works Agreement in Malaysia construction industry from the construction professionals’ perspective and capture the opinion of these contractual issues faced in the construction industry as a result.

This chapter reports the findings of this study. Fifteen constructions professional comprises the Quantity Surveyor, Engineers, Architect, Project Manager and class F contractor agreed to take part with the interview.

The method of analysis adopted involved the following. First, responses from each interviewee were recorded for each question successfully to form a database.
This database was then carefully examined to identify points of ideas which were collated and analyzed into summary result. The rest of this chapter presents and discusses the result obtained.

In addition, clauses in JCT Minor Building Works Agreement 1980 has also being elaborate in this chapter base on the literature analysis from journals, books etc.

4.2 Background of the Respondents.

All of the panels have vast experience in construction contract related aspects and experiences dealing with minor building works undertaken by the small class contractor which is Class F contractor. Here is the list of respondents involved

<table>
<thead>
<tr>
<th>Role</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quantity Surveyor</td>
<td>6</td>
</tr>
<tr>
<td>Architect</td>
<td>3</td>
</tr>
<tr>
<td>Engineer</td>
<td>3</td>
</tr>
<tr>
<td>Class F contractor</td>
<td>2</td>
</tr>
<tr>
<td>Project Manager</td>
<td>1</td>
</tr>
</tbody>
</table>
4.3 The Interview

The interview consists a total of 12 questions. The interview covers areas from general opinion of standard forms of contract and Minor Building Works Agreement to specific ramifications of the construction industry.

4.4 Data Analysis

In this section, the questions is analysed one by one and a summary is defined at the end.

QUESTION 1:

In your opinion, do you find PWD standard form of contract difficult for a Contractor Class F to understand?

Answers: In question 1, when asking about the opinion of the respondents on the PWD standard form of contract, 12(2 Class F contractors, 3 Engineers, 3 Architect, 1 Project Manager and 3 QS) out of 15 of them agree that the form is difficult to understand. Some of the clauses are unnecessary and makes it more difficult to understand. Subcontracting, are the clauses given by the respondent as the examples of unnecessary clauses. On the other hand, the remaining do not have any problems
understanding the contract but it turned to be a problem for them when the other contracting party do not understand the contract. Those unnecessary clauses will be summarized in the next subtopic.

**QUESTION 2:**

What are the persisting problems in engaging PWD standard form of contract for small/minor building works?

**Answers:** All 15 respondents believe that the conditions in the PWD standard form of contract are excessive or too much for small building works. The content of the contract conditions in the PWD forms of contract, most of the times hinders the contract participants especially the contractor and the clients to really understand the contractual needs and obligations of the parties. The backgrounds of the contractors in Malaysian construction industry especially the Class F contractor who are lack of formal education on the contract itself contribute to difficulties in delivering the required product to the client. According to a study done by M. Mohamad Ibrahim and M. Zulkifli, the level of understanding toward contract document by the contractors is still at medium level and if they were given a rating of scale zero to ten, they will qualify between five and six.

**QUESTION 3:**

Is 'Legal Language' needed?

**Answers:** All of the panels said that, it is important to be improvised in terms of language. 12 of the panels agreed that the Minor Building Works Agreement still
could not eliminate the legal phrases. 3 of the panels said that the language used in Minor Building Works Agreement is simpler than PWD Standard Forms of Contract and the great advantage that their contents become known and understood with constant use, so that they have reduced the number of disputes and misunderstandings.

QUESTION 4, 5 and 6:

Do you agree that there are excessive clauses in PWD form of contract for a small minor work?

Do you agree that these clauses are unnecessary?

Can you explain further why it is unnecessary?

Answers: From the interviews result, it is found that all the fifteen respondents agreed that there are many excessive clauses in PWD form of contract to be used for small and minor works. All of the panel members also agreed that some clauses are unnecessary. The respondents had given various opinions when saying that these clauses are unnecessary. The reasons are because:

- The nature of the works does not require those clauses to be included in the contractual agreement.

- Some additional clauses in PWD are not important can be eliminated in minor building works agreement.

Those clauses will be discussed under the next sub clause in this chapter.
QUESTION 7:

By looking at Minor Building Work Agreements structure, do you agree that that it is simple as compared to PWD?

Answers: All the contractors agree that the structure in Minor Building Work Agreements is much simpler compare to the current condition of contract that has long being utilised for minor building works. In terms of content, Minor Building Work Agreements contains only 8 clauses compared to PWD standard forms of contract which contains 78 clauses. It shows that the content of the contract is simpler when it managed to allocate the duty and risks of the contracting parties and compact the provisions into a short contract to suit the characteristic of minor building works. A study found out that contractors in Malaysian construction industry do not bother to understand the contract documentation until when problem persist. This could be an advantage is the contract is short and simple. In spite of those advantages in brings in terms of structure, the language in Minor Building Works Agreement remains in traditional legal language. All of the panels suggest that the contract language to be plain and simple English or Malay so that the layman can understand what are their own duties and obligations and what are those of the architect.

QUESTION 8:

Do you agree with the fact that a simple structure of contact gives easier understanding to the users?

Answers: 14 of the respondents agreed that a simple structure of contract gives easier understanding to the readers. While one of the panels, the quantity surveyor did not agree with the statement of “simple structure of contract gives easier
understanding” on the concerned on the language used in the contract itself are confusing.

QUESTION 9:

This agreement has been tested in the UK, and was found to be successful. Do you think Malaysia would have the same result upon usage of the contract?

Answers: All of the panels agreed that the main attraction of this Minor Building Works Agreement is its brevity and apparent simplicity. The contract conditions provide only a skeleton where simplicity of administration is desired. Based on this characteristic it posses, they tend to believe that it will receive positive response and acceptance from the construction players.

QUESTION 10:

Do you think there should be a specific contract for minor building works?

Answers: 14 panels out of 15 suggest for minor building works to have its specific form of contract. From the analysis of their response in the interview, contractors do not only differ in terms of the class they were registered but also in terms of knowledge in construction and contract. Other reasons given were based on the nature of minor building works itself which is very straightforward and simple and low risk. 1 of the respondent gave negative response to this question by saying “This is not a matter of simple; it is the matter of attitude. It may not bring any benefit if the contracting parties do not have the initiative to read and understand the contract conditions”
QUESTION 11:

Do you think it is necessary to have our own Minor Building Works Agreement in Malaysian construction industry and from your observation and experience is it feasible to implement this form of contract in Malaysia Construction Industry?

The 14 respondents whom agreed that a specific contract should be proposed for Minor Building works also suggests that it is feasible to use such contract. Their supporting reasons is that the form of contract seems simple as the numbers of clauses included were sufficient enough for a minor building work scope. When explained on the unnecessary clauses, the respondents too agreed that the clauses were not necessary for a building scope of work that is small. It became to an agreement that with additional unnecessary clauses conjure up confusion especially among the laymen contractors. Further consequences may lead to disputes due to the misunderstanding of each parties’ obligation as agreed in contract. Hence in conclusion, it is feasible to implement our own Minor Building Works because of the simplicity it brings. With the aid of this form of contract, the ability and the capability to accomplish the objective is certainly large due to the breakdown of the complexity state of the existing contract form. Such improvements such as reduction of disputes is likely to occur with the engagement of the contract taking examples of other countries such as in the United Kingdom where minor building work agreement is used.
4.5 Summary

4.5.1 The Structure of Minor Building Work Agreement.

The structure of Minor Building Works Agreement is simple compared to PWD 203. This simplicity has been achieved by the omission of many of the clauses in PWD 203 and the reduction of others to basic requirements. This was shown in Chapter 3.

Minor Building Works Agreement is organized in a very simple way which consists of four articles, four articles of agreement and 8 clauses expressing contract conditions. Consequently, MW 80 is without detailed provisions and administrative procedures. Many questions will occur to the clients or contractors who are experienced in the used of standard forms of building contract especially PWD 203. Many of these questions will remain unanswered even after careful scrutiny of MW 80. This is one of the penalties to be paid for a contract reduced to basic elements. Some potential employers may think this is a small price to pay for the advantages gained.

4.5.2 Language.

The panels of experts through one of the open-ended question used in a study of ‘Clarity and Improving Level of Understanding of Contract Documentation’ have expressed their views of how to ensure better understanding of the contract
documents by the contractors. Among the most frequent is the use of simple language. Unfortunately, the contract is still written in legalese. For example, what does “determine the employment of the Contractor” mean?

Meanwhile, from the analysis of this study, the panels agreed that if Minor Building Works Agreement to be implemented in the Malaysian construction industry, the language must be improvised to make it in favor over the current PWD 203.

Contract should be in plain and intelligible language. Many of the conditions in Minor Building Work Agreement 1980 contract do not meet the requirement. Hence they might be considered in court as ‘unfair’, and hence not binding on a client. A counter argument, however, is that the client’s architect can explain the meaning of all the conditions to the client, and hence they are not unfair. 72

In spite of the legalese language, the simplicity and brevity of this contract may somehow overcome this problem. Unlike traditional contracts, there is less cross-referencing. If Minor Building Works Agreement is to be implemented in Malaysia, some modification and improvement on the language by eliminating those legalese terms and phrases.

4.5.3 Content and Clauses

PWD 203 contains 78 clauses but MW 80 only has 8 clauses. This might bring advantages and disadvantages to this contract. In this section, the content and clauses of both will be compared in a tabular form and the differences will then be discussed.

4.5.3.1 Comparison between clauses in Minor Building work Agreements and PWD 203

<table>
<thead>
<tr>
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<th>MW 80 clause</th>
<th>PWD 203 clause</th>
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<td>Scope of contract</td>
<td>–</td>
<td>6.0</td>
</tr>
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<td>Contract Documents</td>
<td>–</td>
<td>8.0</td>
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<td>Unfixed materials and goods</td>
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<td>20.0</td>
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<tr>
<td>Materials, goods and workmanship</td>
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<td>35.0</td>
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<tr>
<td>Representations, warranties and undertaking of the</td>
<td>–</td>
<td>9.0</td>
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<td>Contractor</td>
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<tr>
<td>Inspection of Site</td>
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<td>11.0</td>
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<tr>
<td>Programme of work</td>
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<td>12.0</td>
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<tr>
<td>Instructions as to inconsistencies, errors, or omissions</td>
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<td>Further drawings and details</td>
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<td>General Duties and performance standard</td>
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<td>Partial Occupation/ Taking over by Government</td>
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<td>Practical Completion</td>
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<td>Payment to Nominated or sub-contractor or supplier</td>
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<td>No liability of Government to Nominated and/or sub-contractor or supplier</td>
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<td>Responsibilities of Contractor to Nominated and/or subcontractors or supplier</td>
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<td>The S.O.'s and S.O.'s representative</td>
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<tr>
<td>S.O.'s right to take action</td>
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<tr>
<td>Design</td>
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<tr>
<td>Employment of Workmen</td>
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<tr>
<td>Site agent and Assistants</td>
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# Sub-contracting

**Nominated Sub-Contractors and/or nominated supplier**

**Payment to Nominated or sub-contractor or supplier**

**No liability of Government to Nominated and/or sub-contractor or supplier**

**Responsibilities of Contractor to Nominated and/or subcontractors or supplier.**

**Contractor's person-in-charge**

**The S.O.'s and S.O.'s representative**

**S.O.'s right to take action**

**Design**

**Employment of Workmen**

**Site agent and Assistants**

**Architect's/ S.O.'s instructions**
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<td>Computation of adjusted contract sum</td>
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**Table Notes:**
- Interest payment in percentage withheld: 28.6
- Computation of adjusted contract sum: 29.0, 33.0
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<td>Termination on Corruption</td>
<td>5.5</td>
<td>53.0</td>
</tr>
<tr>
<td>Consequences of determination by employer</td>
<td>7.1</td>
<td>51.2(b)</td>
</tr>
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<td>54.0</td>
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<tr>
<td>Certificate of Termination Costs</td>
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<td>Surviving Rights</td>
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<td>56.0</td>
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<tr>
<td>Determination by Contractor</td>
<td>7.2</td>
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<td>Topic</td>
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<tr>
<td>Employer becoming bankrupt, etc.</td>
<td>7.2</td>
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<tr>
<td>Consequences of determination by contractor</td>
<td>7.2</td>
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<tr>
<td>Effect of Force Majeure</td>
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<tr>
<td>Interpretation</td>
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<td>Supplementary Memorandum</td>
<td>8.0</td>
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<tr>
<td>Miscellaneous</td>
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<tr>
<td>Intellectual property rights</td>
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<tr>
<td>Notice etc</td>
<td>–</td>
<td>66.0</td>
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<tr>
<td>Amendment</td>
<td>–</td>
<td>67.0</td>
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<tr>
<td>Confidentiality</td>
<td>–</td>
<td>68.0</td>
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<tr>
<td>Stamp Duty</td>
<td>–</td>
<td>69.0</td>
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<tr>
<td>Severability</td>
<td>–</td>
<td>70.0</td>
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<tr>
<td>Waiver</td>
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<td>71.0</td>
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<tr>
<td>Law applicable</td>
<td>–</td>
<td>72.0</td>
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<tr>
<td>Successors bound</td>
<td>–</td>
<td>73.0</td>
</tr>
<tr>
<td>Epidemics and Medical attendance</td>
<td>–</td>
<td>74.0</td>
</tr>
<tr>
<td>Technology Transfer</td>
<td>–</td>
<td>75.0</td>
</tr>
<tr>
<td>Restriction and procedures on use of imported</td>
<td>–</td>
<td>77.0</td>
</tr>
</tbody>
</table>
4.6 Discussion and comparison of Minor Building Works Agreement and PWD 203.

From the comparison tables, it can be seen that there are some provisions in PWD 203 do not appear in MW 80. These provisions may be inserted in certain clauses of MW 80 in general way or the conditions are intentionally ignored because of the nature of minor works. In undertaking this analysis clauses in MW 80 will be discussed and the reason for its simplicity and brevity will be identified by comparing them with clauses in PWD 203.
Recitals

Recitals normally do not form any part of the contract or create contractual obligations, but it specifies the assumptions and representations upon which the parties have undertaken the obligations contained in the contract. In this case, however, the recitals are the only place in the contract where the exact nature of the work to be undertaken by the contractor is specified.\textsuperscript{73}

It is important to give extra concern in drafting this recitals in order to ensure that no opportunity can be afforded to the contractor to complain that variations subsequently ordered are such a nature as to alter fundamentally the work he is being asked to undertake and to bring to an end his contractual obligations and to entitle him to be paid a quantum merit for work done.\textsuperscript{74} \textsuperscript{75}

MW 1980 consists of four recitals. The first recital defines the work the employer intends to be carried out. It also defines the contract documents and states the name of the Architect. Contract documents referred to in this contract may be:

\textsuperscript{74} Ibid.
\textsuperscript{75} Holland, Hannen & Cubitt (Northern) Ltd. V. WHTSO(1981)
• The contract drawings and the reference numbers of which have to be stated, together with the contract specification and schedule.

• The contract drawings and the contract specification

• The contract drawings and schedules,

• The contract drawings

• The contract specification and schedules

• The contract specifications

• The schedule.

In PWD 203, the definition of contract documents is stated in clause 1.1(b). The provisions for the custody of the contract documents and sufficiency of the contract documents is also stated under clauses 8.1 and 8.2 PWD 203 but not MW 80. It must also be noted that Bill of Quantities is not included in the first recital of MW 80 obviously because the intention of the contract itself.

The second recital states that the contractor has priced either the specification or the schedules, both of which are contract documents, or has provided a schedule of rates. This is included to enable the Architect/ S.O to arrive at a ‘fair and reasonable valuation of variations and interim payment. In PWD 203 the valuation of variations and interim payment had been stated in clause 25 in detail. It is repeated in clause 26.0 and again in Clause 27.0.

In the third recital, it is stated that the contract documents have been signed by or on behalf of both parties. The courts will endeavour to give effect to the
parties’ intentions particularly where the work has already been executed even if the documents were not signed. Same thing applies in PWD 203.

The fourth recital is made for the appointment of a Quantity Surveyor in connection with the contract. PWD 203 does not mention anything about Quantity Surveyor but this may be specified indirectly under clause 3.0 on the S.O and the S.O representative with detail.

Articles

There are four Articles in MW 1980.

The obligations of the contractor to carry out and complete the works are fully set out in detail in the Clause 1.1 MW 80, but it was nevertheless considered advisable to repeat them clearly and unequivocally in the Article 1. In PWD 203 contractors obligations are stipulated under clause 10.1.

Article 2 states the amount of the sum of consideration which the employer will pay the contractor in return. Article 3 names the person appointed as architect for the purposes of the contract and gives the employer the right to nominate some other person to act as architect. This will automatically cease the previously named architect for any reason to be the architect. Article 4 follows the lead set by JCT 80 and makes the arbitration clause part of the Articles of Agreement. Any disputes or differences concerning the contract that may arise between the employer or the architect and the contractor, including some that may arise from the operation of Part

76 Modern Building v. Limmer and Trinidad (1975)
C of Agreement for minor building works: Supplementary memorandum 1980, shall be referred to arbitration at any time whether or not practical completion of the works has been achieved. The Minor building Works Form however does not contain the words about the powers of an arbitrator.77 78

**Conditions of Agreement**

Clause 1.0: Intention of the Parties

It is all too commonly assumed that the whole of the contractor’s contractual obligations are contained and set out in the printed contract form. Implied conditions will apply when the contract silent on this matter.

The three most important implied terms in building contracts are that the builder will not only “exercise reasonable skill and care” but will:

- Carry out the work in a good and workmanlike manner
- Use materials of a good quality and reasonably fit for their purpose
- Ensure that the completed work will be reasonably fit for the purposes required.

78 Crestae Ltd v. Carr and Ano. (1985)
Clause 1.1: Contractor’s Obligation

It is very important to set out contractor’s obligation in every contract. It is all too commonly assumed that the whole of the contractor’s contractual obligations are contained and set out in the printed contract form. When most of the contract silent the contractor’s obligations and apply the implied conditions, MW 80 apparently intends to override these implied obligations by stating the contractor’s obligations specifically.

Clause 1.1 sets out the contractor’s obligation as “The contractor shall with due diligence and in a good and workmanlike manner carry out and complete the Works in accordance with the contract documents using materials and workmanship of the quality and standards therein specified provided that where and to the extent that approval of the quality of materials or of the standards of workmanship is a matter for the opinion of the Architect/ Supervising Officer such quality and standards shall be to the reasonable satisfaction of the Architect/ Supervising Officer.”

The word “with due diligence…carry out and complete the Works..” appear in many recognized form of contract including MW 80. Under most form of contract it is the right of the contractor to carry out his own building operations as he thinks fits, provided always that on completion they comply with the contract. PWD 203 explained the same but in a lengthier sentence by saying “the contractor shall perform the works and discharge its obligations as contained in this contract by professional judgement and practice, requisite skill, care and diligence,”

Furthermore, although MW 80 does not contain a lengthy clause on contractor’s obligation as in clause 10.1 PWD 203, these obligations are inclusive in other clauses of MW 80. The obligations of the contractor are shown in Table 3.2.
<table>
<thead>
<tr>
<th>MW 80 Clause</th>
<th>Contractor’s Obligation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
<td>Carry out and complete the works in accordance with the contract documents in a good and workmanlike manner and with due diligence.</td>
</tr>
<tr>
<td>2.1</td>
<td>Complete the works by the specified date.</td>
</tr>
<tr>
<td>2.2</td>
<td>Notify the Architect/ S.O of delay.</td>
</tr>
<tr>
<td>2.3</td>
<td>Pay liquidated damages to the employer.</td>
</tr>
<tr>
<td>2.5</td>
<td>Make good at his own cost any defects, excessive shrinkages or other faults.</td>
</tr>
<tr>
<td>3.3</td>
<td>Keep a competent person in charge upon the works at all reasonable times.</td>
</tr>
<tr>
<td>3.5</td>
<td>Carry out all architect’s/ S.O’s instructions forthwith</td>
</tr>
<tr>
<td>4.4</td>
<td>Supply the Architect/ S.O with all documentation reasonably necessary to enable the final sum to be computed.</td>
</tr>
<tr>
<td>5.1</td>
<td>Comply with and give all notices required by any statute, etc.</td>
</tr>
<tr>
<td>5.1</td>
<td>Pay all fees and charges in respect of the works.</td>
</tr>
<tr>
<td>5.1</td>
<td>Give immediate written notice to the Architect/ S.O specifying any divergence.</td>
</tr>
<tr>
<td>5.4</td>
<td>Comply with the fair wages resolution.</td>
</tr>
<tr>
<td>6.1</td>
<td>Indemnify the employer against any expense, liability, loss, claim or proceedings in respect of personal injury or death.</td>
</tr>
<tr>
<td></td>
<td><strong>Contractor’s obligations under MW</strong></td>
</tr>
<tr>
<td>---</td>
<td>--------------------------------------</td>
</tr>
<tr>
<td>6.1</td>
<td>Maintain and cause his sub-contractors to maintain the insurances necessary to meet his liability under clause 6.1</td>
</tr>
<tr>
<td>6.2</td>
<td>Indemnify the employer against and insure and cause his sub-contractors to insure against any expense, liability, loss, claim or proceedings for damage to property.</td>
</tr>
<tr>
<td>6.3A</td>
<td>Insure against the specified risks</td>
</tr>
<tr>
<td>6.3A</td>
<td>Restore or replace work or materials, etc., dispose of debris, and proceed with and complete the works.</td>
</tr>
<tr>
<td>6.4</td>
<td>Produce evidence of insurances and cause sub-contractors to do so when required by the employer.</td>
</tr>
<tr>
<td>7.1</td>
<td>Immediately give up possession of the site where the employer determines the contractor’s employment.</td>
</tr>
</tbody>
</table>

**Table 4.2 80 Contractor’s obligations under MW**

**Clause 1.2: Architect’s/ Supervising Officer’s Duties**

In this clause, the sentence goes as “The Architect/Supervising Officer shall issue any further information necessary for the proper carrying out of the Works, issue all certificates and confirm all instructions in writing in accordance with these Conditions.”

The question of “further information” has always been unclear but it is accepted as a matter of practice that some further clarification of the drawings and specification is generally required, and this additional information is issued in the
form of architect’s instruction, only those involving a variation to the contract, which may or may not have financial consequences, having to be so identified.79

It may seem that the architect’s duties are specifically described in MW 80 by looking at clause 1.2 only. Clause 1.2 sets out the architect’s duties under the terms of the contract as:

- To issue further information (clause 1.2)
- To issue all certificates (both those involving completion and those involving payment.)
- To confirm all instruction in writing.

However, Architect’s duties are more than these. They are covered under clauses of MW 80. The manner in which the Architect/ S.O to carry out these duties is detailed in later conditions, but not as detail as in PWD 203.

Table 4.3 below shows the Architect’s / S.O’s obligations under MW 80

<table>
<thead>
<tr>
<th>MW 80 Clause</th>
<th>Architect Duties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.2</td>
<td>Issue any further information necessary for the proper carrying out of the Works.</td>
</tr>
<tr>
<td>1.2</td>
<td>Issue all certificates</td>
</tr>
<tr>
<td>1.2</td>
<td>Confirm all instructions in writing.</td>
</tr>
</tbody>
</table>

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2.2</strong></td>
<td>Make in writing such extension of time as may be reasonable.</td>
</tr>
<tr>
<td><strong>2.4</strong></td>
<td>Certify the date when in his opinion the works have reach practical completion.</td>
</tr>
<tr>
<td><strong>2.5</strong></td>
<td>Certify the date when the contractor has discharged his obligations in respect of defects liability.</td>
</tr>
<tr>
<td><strong>3.5</strong></td>
<td>Confirm oral instructions in writing</td>
</tr>
<tr>
<td><strong>3.6</strong></td>
<td>Value variation instructions in writing</td>
</tr>
<tr>
<td><strong>3.7</strong></td>
<td>Issue instructions as to expenditure of the provisional sums.</td>
</tr>
<tr>
<td><strong>4.1</strong></td>
<td>Correct inconsistencies in or between the contract drawings, specification and schedules.</td>
</tr>
<tr>
<td><strong>4.2</strong></td>
<td>Certify progress payments to the contractor.</td>
</tr>
<tr>
<td><strong>4.3</strong></td>
<td>Certify payment to the contractor</td>
</tr>
<tr>
<td><strong>4.4</strong></td>
<td>Issue a final certificate.</td>
</tr>
<tr>
<td><strong>6.3B</strong></td>
<td>Issue instructions for the reinstatement and making good of loss or damage.</td>
</tr>
</tbody>
</table>

**Table 4.3 Architect’s/ S.O’s obligation under MW 80.**

It should me noted that the Architect’s/ S.O’s obligations in MW 80 are inclusive.\(^{80}\) The duties are stated, the procedures are given generally but the consequences are not given at all.

\(^{80}\) including or tending to include. [http://www.yourdictionary.com/](http://www.yourdictionary.com/)
Clause 2.0: Commencement and completion

The employer’s main concern besides of keeping the contract within the authorized expenditure limits is to ensure that the commencement and completion dates are maintained.

Clause 2.1 Commencement and completion

In PWD 203 and MW 80 the commencement and completion date appear within the conditions, with space for the date to be inserted in accordance with the tender particulars. However, in PWD 203, the date of commencement is once again repeated in the appendix.

Clause 2.1 is the provision where the date of commencement and the date of completion of the Works are agreed. The date of commencement is given as that on which the work ‘may’ be commenced not ‘shall’ be commenced as in PWD 203.

The date of completion of the works is, on the other hand, quite specific with the use of the word ‘shall’. It does however give the contractor the opinion of completing the works before the contract completion date stated (the contract wording is ‘by’, not ‘on’), and if this is happening, the architect has no option but to issue his certificate under clause 2.4 which stated “The Architect/ Supervising Officer shall certify the date when in his opinion the Works have reached practical completion.”
In PWD 203, the date of site possession is stipulated in the appendix and its procedures and consequences are particularly specified in Clause 38. MW 80 conversely silent about this matter. When the date is silent, possession of the site implies that the employer will give the contractor such possession, occupation or use as is necessary to enable him to perform the contract. The court held that it is a breach of contract if the employer fails to give site possession to the contractor on the date so specified. Hence, the contract cannot be implemented until such time as the commencement and completion dates have been corrected and the new date inserted.

On the other hand, there is no obligation on the contractor to take possession of the site on the date on which the employer can hand it over to him. It is at the discretion of the contractor to commence the Works, provided that it is on or after the date inserted as ‘the date of commencement. However, if the contractor does this, he needs to have persuaded the Architect that he was preceding with ‘due diligence’ or the architect may determine the employment of the contractor in accordance with clause 7.1.

So, even though there is no date stipulated in the Minor Building Works Agreement 1980 for possession of site as in PWD 203, implied condition can always be applied.

Clause 2.2: Extension of Contract Period

Compared to the complexities and detailed provisions of PWD 203 where clause 43.1 runs to one page and a half and includes eleven relevant events which permit the S.O to extend the contract period, MW 80 is refreshingly simple.

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Clause 2.2 MW 80 states “If it becomes apparent that the work will not be completed by the date for completion inserted in the clause 2.1 hereof (or any later date fixed in accordance with the provisions of this clause 2.2) for reasons beyond the control of the contractor, then the Contractor shall so notify the Architect/ Supervising Officer who shall make, in writing, such extension of the time for completion as many as reasonable.”

The obligation to apply for an extension to the contract period rest clearly with the contractor as the clause reads: “if it becomes apparent… the Contractor shall so notify the Architect/ Supervising Officer” The same has been mentioned in clause 43.0 PWD 203. Both clauses do not say when the notice should be given.

However, this clause may not be applied to delays which are the fault of the employer. The words “... for reasons beyond the control of the Contractor…” covers every factor that may delay completion of the works provided only that they are outside the control of the contractor and, it is suggested, will include the failure of the employer to give the contractor possession of site on the date agreed in Clause 2.1.

MW 80 allows all reasons beyond the control of the contractor as justifiable grounds for an extension to the contract period. Under PWD 203, the S.O / architect can only grant an extension to the contract period if delay has been caused by one of the eleven ‘relevant events’, which stipulated specific reasons for delay beyond the control of the contractor. This is what makes the MW 80 contract simpler.

In the Minor Building Work Agreement, the architect has no power to extend the contract period unless he has been notified. Any increased cost arising from extension of time is not being mentioning by any clause in MW 80 either money recoverable by direct loss and expense or in any other way. Failure by the architect to
grant an extension of time or to grant, in the opinion of the contractor, an adequate extension of time can be referred to immediate arbitration under Article 4.

Delay and extension of time, may somehow incur loss and expense. In MW 80, there is no provision allowed for claims for loss and expense as allowed under clause 44 PWD 203.

In conclusion for this sub-clause, the contract is simpler because:

- There is no provision for possession of site in MW 80 thus implied term applied.
- The eleven relevant events listed in clause 43.1 PWD 203 is simplified by only saying “for reasons beyond the control of the contractor”

The provision doesn’t not say anything about delay arise from act, negligence, default or breach of NSC/ NS. This can be considered since NSC/ NS is not really important to the nature of the small works

The power of Architect/S.O of issuing Certificate of Delay and Extension of time is not mentioned at all. No provision on claims for loss and expense as mentioned in clause 44.0 PWD 203.

Clause 2.3: Damages for non-completion

In the case when the contractor is not be granted with extension of time, clause 2.3 reads: “If the Work are not completed by the completion date inserted in clause 2.1 hereof or by any later completion date fixed under clause 2.2 hereof then
the Contractor shall pay to the Employer liquidated damages at the rate of £ …… per week for every week or part of a week during which the works remain uncompleted.”

As PWD 203 imposes the duty of the S.O to issue Certificate of Non-Completion, MW 80 does not mention about this matter. The clause clearly states that the damages shall be paid to the employer, and does not provide for damages to be allowed as an alternative payment, the employer cannot contractually deduct damages from monies due under the contract. The amount of the LAD is specified in the space provided in the contract.

This is different from PWD 203 since Clause 40.0 of the contract allows the S.O to deduct such damages from any money due or to become due to the contractor and this amount should be referred in the appendix.

From the above analysis, provision for damages for non-completion is comprised into only one clause of MW 80 (Clause 2.3) instead of two sub-clauses in PWD 203 (Clause 40.1 and 40.2). This is one of the reasons for the simplicity of MW 80.

Clause 2.4: Completion Date.

“The Architect/ Supervising Officer shall certify the date when in his opinion the works have reached practical completion.”

The date certified is the date

- On which practical completion of the works was reached. The state of practical completion is a matter for the opinion of the Architect.
• On which the defect liability period stated in Clause 2.5 begins.

• Within 14 days of which the penultimate certificate required by Clause 4.3 must be issued by the architect.

• On which the period set out in Clause 4.4 begins, during which all the documentation for the computation of the final account must be provided by the contractor.

• On which the contractor should write to the employer stating that the contractor’s risk for the insured perils listed in Clause 6.3A ceases.

• After which no amount shall be included in or deducted from any amount due in respect of fluctuations in the rates of contribution, levy and tax which occur after that date.

• On which the contractor’s liability for frost damage ceases.

In MW 1980, no definition of Practical Completion is given. Instead, it relies solely on the opinion of the Architect that the building is ready and sufficiently complete to be used for the purpose for which it was designed. This is not to say that the building is complete in every aspect.

The clause is simple. However, the simplicity of the clause must not obscure the basic essential need for strict compliance with its requirement. The certificate of practical completion sets the time for the start of the contractor’s defect liability period.

This provision does not rule the meaning of practical completion as in Clause 39.5 PWD 203. However this matter may be referred to common law. Viscount Dilhorne held that “It follows that a practical completion certificate can be issued when, owing to latent defects, the work do not fulfill the contract requirements and
that under the contract the works can be completed despite the presence of such defects. Completion under the contract is not postponed until defects which become apparent only after the work has been finished have been remedied.**82

It can be conclude from the discussion of this sub-clause that,

- MW 80 eliminates the procedures of issuing CPC.
- MW 80 eliminates the obligation of the contractor to notify the S.O upon practical completion.
- The meaning of ‘practically complete’ is not determined.

Clause 2.5: Defect Liability

The employer’s interest against patent defects, ‘excessive shrinkage or any other faults which may appear during the defect liability period are adequately covered in MW 80 under Clause 2.5.

The clause states that, “Any defects, excessive shrinkage or other faults which appears within three months……of the date of practical completion and are due to materials or workmanship not in accordance with the contract or frost occurring before practical completion shall be made good by the contractor entirely at his own cost unless the Architect/ Supervising Officer shall otherwise instruct.” It is added, “The Architect/Supervising Officer shall certify the date when in his opinion the Contractor’s obligation under this clause have been discharged.”

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82 City of Westminster v. Jarvis
This clause is quite flexible. Originally the period stated is three months suitable to the nature of small works itself. However, a space has been left for the insertion of another period upon agreement of both parties. The issuance of this certificate is a condition precedent to the issue of the final certificate under Clause 4.4 but it does not entitle the contractors to the release of the retention money still outstanding.

Contrary to PWD 203, there is no provision for a list of defects to be issued and the architect/ S.O will presumably issue an instruction under Clause 3.5 listing the defects to be made good. PWD 203 states it very clear for the steps to be taken by the architects/ S.O during Defect Liability Period. This is the reason why the provision for Defect Liability Period is extended in four sub-clauses.

Clause 3.0: Control of the Works

The following clauses are deals with control of the works.

Clause 3.1: Assignment

A clause precluding either the employer or the contractor from assigning the contract without the written consent of the other is included in MW 80. The same had been stated in a longer sentence in PWD 203 Clause 47.6.

Clause 3.2: Subcontracting

Usually, only a small proportion of the work on a building contract is carried out by direct employees of the main contractor. Indeed, it is difficult to find one project on which it would appear that the only employer of the main contractor on
site was the general foreman. However, it is not important to have NSC/NS in minor building works compared to larger projects.

MW 80 in Clause 3.2 prevent a contractor chosen for his particular capabilities assigning his responsibilities for the proper performance of the contract to another without the knowledge and consent of the Architect. At the same time, “the architect consent shall not be unreasonably withheld” and this consent in no way relieves the contractor of his own responsibility for its satisfactory execution. When MW 80 only has one provision for subcontracting, PWD 203 provides five sub-clauses of this matter. The reason why this is happening is because PWD 203 provides the responsibilities and liabilities of the contractor on his subcontractor.

It must also be noted that there is no specific provision in the contract for NSC/NS be employed by the main contractor concurrently on the works but the provisions for NSC/NS are stated in clause 59.0, 60.0, 61.0 and 62.0 PWD 203.

These clauses could be eliminated in MW 80 because the nature of minor works which do not require the involvement of the NSC/NS.

Clause 3.3: Contractor’s Representative.

Clause 3.3 of MW 80 affirm that “The contractor shall at all reasonable times keep upon the Works a competent person in charge and any instruction given to him by the Architect/Supervising Officer shall be deemed to have been issued to the Contractor.”

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A competent person for the purposes of this clause does not have to be employed full-time on site throughout the currency of the works, nor does it appear that it always has to be the same person. However, it is essential that the contractor’s representative or agent on site is clearly identified so as to avoid instructions being given to or by the wrong person.\textsuperscript{84}

It should be perceived that the identity of the person in charge is not a matter for the approval of the Architect, nor is his consent necessary should the contractor wish to replace him. The choice of a representative, with the necessary quality and capabilities, is clearly the sole responsibility of the contractor.

In PWD 203, the Contractor’s representation is mentioned under clause 58.0 (Site Agent and Assistant) with a clearer sentence.

Clause 3.4: Exclusion from the works

Contrary to the position with regard to the contractor’s representative, the Architect has every right to object to the employment of certain individuals on the site, who he thinks incompetent or with offensive behavior.

Clause 3.5: Architect’s/ Supervising Officer’s instruction.

All instruction should be in writing in accordance with clause 1.2. Clause 3.5 repeated the same with the additional requirement by saying;

\textsuperscript{84} Clayton v. Woodman & Son (1962)
“The Architect/ Supervising Officer may issue written instructions which the Contractor shall forthwith carry out. If instructions are given orally they shall, in two days, be confirmed in writing by the Architect/ Supervising Officer.” The clause goes on “If within 7 days after receipt of a written notice from the Architect/ Supervising Officer requiring compliance with an instruction the contractor does not comply therewith then the Employer may employ and pay other persons to carry out the work and all cost incurred thereby may be deducted by him from any monies due or to become due to the Contractor under this Contract or shall be recoverable from the Contractor by the Employer as a debt.”

Clause 5.0 PWD 203, go to elaborate lengths with regard to the confirmation of any oral instruction. These include a provision for the contractor to confirm them within seven days and the S.O to dissent within a further seven days. However MW 80 does not envisage any such instructions other than in clause 1.2 which require the architect to confirm all instruction in writing, from which it may be inferred that the use of the word confirm acknowledges that some instructions may in practice be given orally.

The shorter period of two days compared with the seven plus seven in PWD 203 probably arise from the shorter contract period which is likely when MW 80 is used, and from the need to have instructions implemented more quickly.

MW 80 simply allows the architect to issue written instruction which the contractor shall carry out forthwith.

Under clause 3.5, MW 80 empowers the employer to employ and pay others to carry out the work in case the contractor fails to comply within seven days of that written notice and the incurred are then deducted from the monies due to the contractor. There is no specific reference in MW 80 to immediate arbitration and in
the event of the contractor refusing to comply with an instruction, this is not considered it itself a dispute any more than is failure to perform. From this it can be concluded that;

The shorter period for the S.O’s instructions to take effect in MW 80 is more suitable compared to as provided in PWD 203. A short-period project requires immediate actions from the parties.

Clause 3.5 MW 80 does not list down the scope of instructions the Architect/ S.O are allowed to give.

Clause 3.6: Variation

According to clause 3.6, the architect’s power to vary the contract includes the alteration or modification of the design or the quality and standards of materials and workmanship or the quality of the works, all as set out and described in the contract document; including the addition, substitution or omission of any work. Changes ordered by the architect would result in a significant change in the scope or nature of the work may invalidate the contract.

PWD 203 specifies the variation matters under clause 24.0, 25.0 and 26.5 in a very detail sentences.

Clause 3.7: Provisional Sum

Provisional Sum is a sum included in a bill of quantities for work that is required but cannot be sufficiently designed or specified at the outset of the contract.

The head-note to MW 80 quite clearly indicates that the contract does not allow for the nomination of sub-contractor or supplier. There is nothing to prevent the Architect from naming in the tender document a single sub-contractor or supplier
or giving a list of approved firms for the carrying out of work or for the supply of materials or good, provided that details of the work or goods are given. The contractor will then have the opportunity to make such allowance as he thinks necessary in his tender price.

Clause 4.0: Payment

Payment has been referred to as the lifeblood of the construction industry. The primary obligation upon the employer is to give the contractor the sum of money which forms the consideration for the contract. The following clauses are very important since the contractor’s right to payment depends on the wording of the contract.

Clause 4.1: Correction of Inconsistencies.

“Any inconsistency in or between the Contract Drawings and the Contract Specification and the schedule shall be corrected and any such correction which results in an addition, omission or other change shall we treated as a variation under clause 3.6 hereof. Nothing contained in the contract Drawing or the Contract Specification or the schedule shall override, modify or affect in any way whatsoever the application or interpretation of that which is contained in these condition.”

Contract conditions take precedence over the drawings and specification according to clause 4.1 MW 80. The same goes in JKR PWD under clause 8.1(c). As in PWD 203, contractor should inform the architect and ask for the other documents

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to be rectified when a contradiction between the conditions and the other contract documents is discovered.

The case of Patman and Fotheringham v. Pilditch (1904)86, was on a contract of £17000 based on plans, invitation to tender specification and bills of quantities, which included everything necessary, whether described in the specification, shown on drawings or not, without any expressed provision for the measurement of the works. It was held that if the quantities were less than those required by the drawings, the contractor was entitled to be paid an appropriate addition to the contract sum.

Clause 4.2: Progress payments and retention.

MW 80 is a lump sum contract which means that the contractor is entitled to payment provided he completes substantially the whole of the work. Despite of it, Clause 4.2 is inserted in the contract as to encourage the use of stage payment as in PWD 203. The use of the words ‘not less than four weeks’ the option exist for the issuance of certificate at calendar monthly intervals without amendment to the conditions or completion of an Appendix should this be more convenient to the parties, as it usually is, and provided it is so stated in the tender document.87

Under MW 80, the architect has to certify progress payment at not less than four weekly intervals on all contracts, if so requested by the contractor. The words ‘….if requested by the contractor…’ indicates that, without a request from the contractor, the Architect is under no obligation to certify progress payment. MW 80 has inserted the adjective ‘properly’. It indirectly enables the architect to deduct from his certificate the value of work which in his opinion has been improperly executed.

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86 Patman and Fotheringham v. Pilditch (1904)
However, MW has no specific provisions for the Architect to issue instruction for the removal of work not in accordance with the contract, as in clause 5.1(d) of JKR 203, so the problem occurred in the case of Holland, Hannen and Cubitt (Northern) Ltd v. WHTSO (1981)88 will not arise.

The form of contract used in this case was JCT 63. In this case, hospital windows installed by the nominated sub-contractor, let in water as result of defect in design and workmanship. However since the architect did not specifically issue an instruction under JCT 63 clause 6(4) requiring their removal, Judge Newey held that the architect’s agreement to the sub-contractor’s proposed remedial work was not a valid notice under 6(4), and that the architects ought to have issued a valuation instruction to the main contractors under clause 3(4) detailing changes required to overcome the design failures. As a consequence, the employer had to pay the sub-contractor for the windows provided and the Architects were liable to the employer for breach of contract and tort.

If the architect becomes aware that any of the work does not comply with the contract documents or conditions, clause 1.1 places a duty on the architect to issue necessary instruction to the contractor for its removal and proper replacement. This clause must be read together with clause 3.5 in the event of non-compliance by the contractor.

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88 Holland, Hannen and Cubitt (Northern) Ltd v. WHTSO (1981)
Clause 4.3: Penultimate Certificate.

This clause requires the Employer to pay to the contractor the monies due to the contractor in 14 days after practical completion. The percentage of this amount; agreed between them is inserted in the space given. In this clause, retention money is to be deducted from being released to the contractor until the end of defect liability period.

Clause 4.4: Final Certificate

The final certificate establishes the amount remaining due to the contractor or the employer. Final certificate does not provide conclusive evidence that the contract sum has been properly adjusted. It cannot also be the evidence that the contractor has discharge his contractual obligations. The final certificate would be open to review on all these matters.

In contrast to PWD 203, MW 80 clause 4.4 contains only one of the few procedural requirements in the contract. Yet, clause 4.4 does not make provision similar to that made in PWD 203, for establishing specifically what is meant by reasonable satisfaction of the architect.

The Architect could not be sued for negligence in issuing final certificate since he was acting as a quasi arbitrator. However a case in 1974 had overturned this position. The architect must completely impartial in the exercise of the duties entrusted to him and issue the necessary certificates which are due. Once a

89 Chambers v. Goldthorpe (1901)
90 Sutcliffe v. Thackrah
91 Hickman v. Roberts (1913)
92 Hoeing v. Isaacs(1952)
certificate is issued contractors have no difficulty in recovering the monies due to them.

Clause 4.5: Contributions, levies and tax changes.

This is an optional clause. It is suggested this clause should be deleted if the contract period is of a limited period so that any cost fluctuations will be financially insignificant.

Clause 4.6: Fixed Price

No fluctuations of any kind are allowable or payable under the contract unless Clause 4.5 is included and this strictly limits these fluctuations to changes in contributions, levies and tax.

Clause 5.0: Statutory Obligations

The obligation to comply with the regulations is in terms absolute. The implied term to comply with the regulations must override any matter in the plans incorporated into the contract which it conflicts with.93

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93 Street v. Sibbbridge Ltd. (1980)
Clause 5.1: Statutory Obligations, notices, fees and charges.

“The contractor shall comply with, and give all notices required by, and statute, any statutory instrument, rule or order or any regulation or byelaw applicable to the Works (hereinafter called ‘the statutory requirements’) and shall pay all fees and charges in respect of the works legally recoverable from him. If the Contractor finds any divergence between the statutory requirements and any instruction of the Architect/ Supervising Officer he shall immediately give to the Architect/ Supervising Officer a written notice specifying the divergence. Subject to this latter obligation, the Contractor shall not be liable to the Employer under this contract if the Works do not comply with the statutory requirements where and to Works results from the Contractor having carried out work in accordance with the Contract Documents or any instruction of the Architect/ Supervising Officer.”

Although very much simpler, this clause broadly follows the intention of Clause 21.1 and 21.2 of PWD 203. Unlike PWD 203, provision is made to rates and taxes. The assumption may be that as the works will be of a short duration, site hutting will not be ratable. If rates are payable, or become payable within the contract period, the rates should be recoverable from the Employer unless there are express provision in the tender documents requiring the contractor to allow for them in his tender price.

The Architect has an express duty to his client under contract to ensure that all necessary planning consent are obtained and that plans comply with the current building regulations, and to ensure that all charges due to the local authority are paid at that stage.94 The obligation to comply with the regulations is in terms absolute.

94 Townsend Ltd v. Cinema News (1959)
The implied terms to comply with the regulations must override any matter in the plans incorporated into the contract which it conflicts with.95

On the other hand, the contractor is under no obligation to establish that any divergence exists. In spite of that, he cannot take advantage of his failure to notice any divergence which ought to have been obvious to him as a competent contractor and in these circumstances would lose the protection given by this clause. Both PWD 203 and MW 80 do not speak much on this matter.

Clause 5.4: Fair Wages Resolution

This clause has the same intention as in Clause 23.0 of PWD 203. However the provision goes simpler by asking the contractor to comply with the conditions of relating to this matter. Unlike MW 80, PWD 203 repeats the obligations of the contractors towards his workmen in Clause 23.4 and 23.5

Clause 5.5: Prevention of Corruption

This clause has the same intention as in JKR 203 Clause 53.0 but in JKR 203, the procedure of termination and the consequences are guided in detail.

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95 Street v. Sibbbridge Ltd (1980)
Clause 6.0: Injury, damages and insurance.

Building work, by its nature, is likely to be dangerous and the risks of injury to people and damage to property are high.

Thus it is essential that the responsibility of the various parties involved in the work with regard to these aspects of the contract must be clearly defined. MW 80 was arranged differently with three clauses, the first covering the obligation of the contractor to indemnify and insure the employer against injury to or death of person arising from carrying out of the works (clause 6.1), against damage to property (clause 6.2) and damage to the works (clause 6.3).

There was however, no provision for insurance to cover damage to property other than the works for reasons other than that due to the negligence of the contractor.

Clause 6.1: Injury to or death of persons

The contractor’s liability and indemnity to the employer is covered by the same words as are used in PWD 203 clause 14.1(b) and his liability for insurance in clause 21.1, with the exclusion of the liability of the contractor to insure in respect of negligence or breach of duty by the employer.

The reference to ‘any statute’ will include ‘Akta Keselamatan dan Kesihatan Pekerjaan 1994’ as applied in Malaysia. The words ‘any person whomsoever’ will ensure the inclusion of injury to third person excluding trespassers. In Malaysia, duty of the contractor to trespassers is also governed by the common law principle. Occupier was not liable to injury to trespassers unless he had acted intentionally or recklessly.96 According to Lord Morris, even though there was no duty of the

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96 Robert Addie & Son (Collieries) v. Dumbreck (1929)
contractor to ensure that no trespasser enters his land, the contractor still owe the duty of care to those who came to the site.\textsuperscript{97}

Clause 14.0 PWD 203 added the provisions whereby the contractor shall indemnify and keep indemnified the Government from being liable in respect of the negligent use, misuse or abuse by the Contractor or its personnel, servants, agents or employees appointed by the Contractor. The content of these two clauses are more and less the same, but PWD 203 has divide it into sub-clauses.

Clause 6.2: Damage to property

The obligation to indemnify the employer and the extent of the indemnity follows the wording of Clause 14.0 of PWD 203 as well. As far as damage to property is concerned, the contractor’s liability only extends to claims arising from his own negligence, omission or default and merely covers damage to any property beyond the site boundary due to his own negligence.\textsuperscript{98} There is no insurance provision for damage arising from the negligence of the employer.

There is no provision in MW 80 for the employer to take out his Clause 14.0 own insurance, the employer will either do this or arrange for insurances to be in the joint names of himself and the contractor, should the need for this protection be considered necessary. Where employers were in doubt that the contractor had sufficient insurance for a particular project, this could be remedied by the powers under the later clause 6.4 requiring the contractor to produce evidence that sufficient insurance cover is provided.

\textsuperscript{97} Lim Seow Wah & Anor v. Housing & Development Board & Anor (1991)

Clause 6.3: Insurance of the Works- Fire, etc.

The departure from decimal numbering in clause 6.3A in MW 80 is deliberate and the affix A or B, given to those clauses with alternative provisions, is a reminder that one or other requires deletion.

Clause 6.3A: New works

This clause is to be deleted if Clause 6.3B applies. Clause 6.3A requires the contractor in the joint name of the contractor and the employer to insure the works against damage by fire, etc on terms similar to Clause 18.0 PWD 203 but without the detail requirements for the period of the insurance, the choice of insurers and the procedure in the event of the contractor having a policy already in existence – these being implied in the overall responsibility and the opportunity for the employer to inspect. The perils to be insured against are the same as those described as Clause 18.1 perils in PWD 203.

The words “...unfixed materials and goods…intended therefore..” implies a wider obligation to insure than that imposed under Clause 18.1 of JKR 203 to insure “...unfixed materials and goods… intended therefore”.

While the payment of insurance in the event of any loss/ damages is comprised in the same clause of MW 80, PWD 203 take out this provision and put it under separate sub-clause which is 18.3. This the sentence goes very long and hard to understand compare to 63A.
Clause 6.3B: Existing Structure

This clause which is to be deleted if Clause 6.3A applies generally follows the wording of Clause 18.0 PWD 203.

According to this clause, the contractor is not required to give notice that any loss or damage has occurred although as a matter of common sense he should do so. The value of any reinstatement and making good will be ascertained in Clause 3.6.

However, MW 80 does not give the contractor the option of determination in the event of damage to the works such as exists in JKR 203, and the architect is empowered to issue such instructions for reinstatement as are appropriate under clause 3.5.

Clause 6.4: Evidence of Insurance.

The employer has the right to evidence from the contractor that he maintains or has taken out the necessary insurance to cover his liabilities under the contract.

In MW 80 because of the additional clause making the contractor responsible for insurance in the case of new works, a similar obligation on the employer to produce the necessary evidence has been added. The words ‘taken out and in force at all material times’ are quite clear and safeguard the rights of the parties in ensuring that the necessary insurance exist.

This clause even though seem a bit extensive, the provision is not repeated as in JKR 203 whereby this matter is specified in Clause 15.2 and Clause 18.1(b).
Clause 7.0: Determination

Under the general law, a serious breach by one of the parties to a contract may entitle the other (innocent) party to treat his obligations under the contract as at end. MW provides for the either party to determine the contractor’s employment under the contract by going through a prescribed procedure. The determination clause attempts to improve on the common law rights of the parties; indeed, the clause goes on to specify what the rights of the parties are after there has been a valid determination.

Clause 7.1: Evidence of Insurance

Clause 7.1 provides a number of grounds on which he may determine the contract. The grounds for determination are:

- Failing without reasonable cause to proceed diligently,
- Suspending the carrying out of the works,
- The bankruptcy of the contractor.

Default in respect of progress of suspension allows the employer to give notice that the employment of the contractor is forthwith determined. The employer is not required to give preliminary warning notice that the contractor is in default.
Firstly, the employer may determine the employment of the contractor when the contractor fails to proceed diligently or wholly suspends the carrying out of the work without reasonable cause. However, what constitute a failure to proceed diligently is uncertain. In the absence of contractual requirement for a progress schedule, a very difficult question will be arise to establish legally if any disputes arise.

In the event of the bankruptcy of the contractor, the employment of the contractor is not automatically determined as it would be under JKR 203; notice must be given.

Similar to PWD 203, the contract is not determined; only the contractor’s employment under the contract is determined and this preserves the contractual rights and liabilities of both parties to the contract.

MW 80 Clause 7.1 also includes a provision obliging the contractor, in the event of a proper determination, to give up possession immediately and relieves the employer of any obligation to make any further payment to the contractor until completion of the works. Unlike PWD 203, MW 80 is silent on the other financial consequences of determination and on the use by the employer of unfixed materials, temporary buildings, plaint and equipment on site.
Clause 7.2: Determination by the Contractor.

Clause 7.2 of MW 80 starts with identical words to clause 7.1 and gives the contractor the option to determine his own employment. As in the case of the employer, the contractor may forthwith determine his own employment for four reasons though ‘not unreasonably or vexatiously…by registered post or recorded delivery…’

Unlike determination by the employer, the employer has 7 days to correct any defaults under sub-clauses of 7.2 notified to him by the contractor. If the default ceases within seven days the employment of the Contractor cannot be determined. If the employer subsequently defaults then further notice must be given and the process begins all over again.

In this clause, the Architect does not have the power to postpone or suspend the works as he does under Clause 50.0 PWD 203.

There is also a provision in the event the employer becomes bankrupt. The contractor is not required to give a seven days warning notice and determination will occur forthwith, once notice has been given in accordance with Clause 7.2
4.6.1 Excessive clauses in PWD 203.

Clauses in PWD 203 are found to be very excessive to the nature of minor building works. Some of the clauses are not relevant to this type of work. These clauses are eliminated in MW 80. For example, the technology transfer provision is not applicable to small minor works because small works only involves domestic contractors.

Table 4. Excessive Clause of PWD 2003

<table>
<thead>
<tr>
<th>EXCESSIVE CLAUSE OF PWD 2003</th>
<th>PWD 203 Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intellectual property rights</td>
<td>63.0</td>
</tr>
<tr>
<td>Antiquities</td>
<td>64.0</td>
</tr>
<tr>
<td>Notice, etc</td>
<td>66.0</td>
</tr>
<tr>
<td>Amendment</td>
<td>67.0</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>68.0</td>
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<tr>
<td>Stamp Duty</td>
<td>69.0</td>
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<tr>
<td>Severability</td>
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<tr>
<td>Waiver</td>
<td>71.0</td>
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<tr>
<td>Law applicable</td>
<td>72.0</td>
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<tr>
<td>Successors bound</td>
<td>73.0</td>
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<tr>
<td>Epidemics and Medical attendance</td>
<td>74.0</td>
</tr>
</tbody>
</table>
From the analysis, it can be concluded that MW 80 is simpler compare to PWD 203 because:

- Some of the clauses in JKR 203 are compacted into one clause in MW 80. For instance, clause 4.4 in MW 80 comprises all provisions under Clause 29, 31, 32 and 33 in PWD 203.

- Some provisions are not stated in detail compare to PWD 203. For example, instead of having 5 clauses of nominated sub-contractor, there is only one clause about Sub-contracting in MW 80. MW 80 does not go into detail of the procedure and sequences of this matter. This may relate to the nature of minor building works itself.

- Some provisions in PWD 203 are not included in MW 80. For example, there is no provision for possession of site in MW 80. Based on a common law case, if there is no express term in the building contract, a term will always be implied that the contractor must have possession in sufficient time.99

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99 Freemen v Hensler (1902)
There are many excessive clauses in PWD 203 that is irrelevant and unsuitable to apply has been eliminated.

4.7 Implementing Minor Building Works Agreement in Malaysian Construction Industry.

It is proven that Minor Building Works Agreement is much simpler and brief. The feasibility of implementing Minor Building Works Agreement in Malaysian Construction Industry can be determined from the above analysis.

Before that, it is essential to take into account the scenario of the Malaysian Construction Industry itself for the objective of this research is to see feasibility of implementing Minor Building Works Agreement in the context of Malaysian Construction Industry.

Fenn and Gameson in their Construction Conflict Management and Resolution,\textsuperscript{100} pages 209-218 have identified the various disputes which are brought for resolution in arbitration which is equally applicable in Malaysia. The provisions on this aspect will be referred. They are:

i. Determination of Agreement

Minor Building Works Agreement does establish the grounds on which the contractor’s employment can be determined. However the procedures of this determination are not clearly specified. Time given for the notice to be served and determination to take effect does not mention at all. Effect of such determination is neglected in MW 80. This may lead to more disputes later on.

ii. Interim Payment.

Provision for interim payment is defined quite clearly in MW 80. The provision on payment is specified in detail with procedures given for the parties to follow. The guideline for the calculation of interim payment is also mentioned. The discussion had been made in the above sub-topic.

From the analysis, it can be concluded that it is feasible to implement Minor Building Works Agreement in Malaysia Construction Industry mostly for its simplicity and brevity, but these two provisions must be given extra concern. This is to prevent more disputes from happening in the future.
CHAPTER 5

CONCLUSION

5.1 Introduction

This chapter is the last chapter that summarizes the finding of the research according to the research objectives. Other than that, discussion will be focused on the problems which arises when conducting this research. A suggestion will also be made for future study.

5.2 Research’s Overview

This research exists due to the awareness of the lack of appropriate contractual arrangement for minor building works in Malaysian construction industry. Hence, the research is undertaken to achieve a specific objective set out in Chapter 1, which is to examine the feasibility of implementing the Minor Building Works Agreement issued
under the sanction of JCT, United Kingdom in the Malaysian construction industry. This section covers an overview of the objective.

This research commences by looking at the definition of minor works, the characteristic of this type of project, its clients and contractors. This research also highlights the importance of procurement and contractual arrangement of minor building works and the lack of Minor Building Works Agreement in Malaysian construction industry is brought up. The background, application and structure of Minor Building Works Agreement 1980 are all included in chapter two.

In order to examine the feasibility of implementing the Minor Building Works Agreement in the Malaysian construction industry, an analysis was conducted with all the relevant literature resources available. The comparison between PWD 203 and Minor Building Works were made to see whether Minor Building Works really covers all the aspects needed. Interviews with 15 panels were also being conducted. The analysis also takes into account the scenario of Malaysian construction industry. Chapters 2 and 3 on the Minor Building Works Agreement help to achieve the objective of this research. The analysis and the outcome of this research is concluded in chapter 4.

5.3 Methodology Accomplished

To achieve the objective of this research, certain methodologies were established. A comprehensive study starting from background and structure of Minor Building Works Agreement until the language used has been done. The most crucial method aimed at accomplishing the objective was by making comparison between Minor Building Work Agreement 1980 and PWD 203 2007. Interviews session with
15 panels have been conducted to achieve the objective of this research. Each of them was provided with a copy of Minor Building Works Agreement to get the view of it. Lastly, the findings were assembled to resolve the objective of this research.

5.4 Research’s Findings

The main conclusion ascertained in this research is as follows.

i. **Suitability**

This contract is essentially a shortened form of PWD 203 that is currently used in Malaysia. The simplicity and the brevity it provides may leads to insufficient provisions for a larger type of works. By looking at the scenario of Malaysian construction industry where determination, payment and delay are the major problems to the industry, the provisions for those are quite insufficient for large projects. Nonetheless, it would seem ideal for the type of work envisage for small-scale contractors. Minor Building Works Agreement is suitable to be used in Malaysia for

a) Minor building works to be carried out for an agreed lump sum price

b) The lump sum offer is based drawings and specifications and/or schedules but without detailed measurements. This means, no bills of quantities have been prepared.

c) The contract period is short which is less 6 months

d) The value of the contract is approximately RM 300, 000.00.
e) The works do not nominated subcontractors or nominated supplier.
ii. Simplicity and Brevity.

The Conditions of Contract are not as extensive as the general conditions and preliminaries contained in other standard form contracts in the JKR 203. The clauses have been selected to suit the lower risks anticipated in projects to be delivered using the MW standard form. So, some of the conditions in the PWD 203 has been omitted for minor building works agreement. Here are the factors contributed for its simplicity are because:

- The clauses in Minor Building Works Agreement are inclusive.
- Some provisions rely on implied term.
- Some important provisions are neglected.
- Excessive clauses in PWD 203 are eliminated.

5.5 Research’s Constraints

The central of the research is Minor Building Works Agreement and the feasibility of implementing the Minor Building Works Agreement in the Malaysian construction industry. MW is virtually non existence in Malaysia. Hence, the lack of information on Minor Building Works Agreement in the context of Malaysian construction industry may impair the accuracy of the findings. Most of the panels were not familiar with it so a copy of MW was given earlier for them to study.

Minor Building Works Agreement is used in United Kingdom construction industry but not yet in Malaysia. The literature sources about minor building works are also hard to find because of the limited availability. The main sources of the literature study are from the books and journal at the Perpustakaan Sultanah Zanariah
and through the internet. In addition, only significant differences of the MW were included in the assessment.

It is beyond the capacity of this research to look into every aspects of the Minor Building Works Agreement when only two months are given to execute this study and to prepare this report.

5.6 Recommendations

Based upon the research’s finding and the interview, it indicated that Malaysia construction industry should implement its own Minor Building Works Agreement. Perhaps, JCT Minor Building Works Agreement may be the basis of it. Minor Building Works Agreement may be a new thing to Malaysian construction industry but the simplicity and brevity of the structure and presentation of Minor Building Works Agreement 1980 is wise to be considered.

5.7 Future Research

Based on this research, the following could be possible area for future research that may also be beneficial to the industry:
i. Even though the research found out that Minor Building Works Agreement is feasible to implement in construction industry, this is only by looking at its structure and the clauses. A further research on the attitude and acceptance toward Minor Building Works Agreement to be implemented in Malaysia should also be studied.

5.8 Conclusion

In conclusion, it is feasible to have our own Minor Building Agreement in Malaysian construction industry. The interviews from the professional panels have proven this statement. However, the provision for determination, payment and completion of works which contributes the greater disputes in this industry should be given extra attention. Through the analysis and literature review, the objective of this research has been successfully determined.
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