

**AN APPROACH TO MANAGE TERMINATION DUE TO NATIONAL
INTEREST IN CLAUSE 52.0 OF PUBLIC WORK DEPARTMENT FORM
203A (REV.1/2010).**

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DEDICATION

Alhamdulillah...

Allahuma Ya Rahman, Ya Rahim, Ya Mateen, Ya Wasi', Ya Bari, Ya Mujib..
All with HIS will, for all tests, for all beautiful lessons in life, the courage to
overcome, and the willpower to emerge from them..!

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I Live Life To The Fullest.

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ABSTRACT

National Interest has never been defined clearly in the construction contract and construction industry. Perhaps, it was never discussed before. As the development surrounding and political waves are unpredictable, it is crucial to complete these studies to fill the knowledge gap.

As stated clearly in Clause 52.1 (a) and (b) of the PWD Form 203A (Rev.1/2010), a government as the employer can terminate the construction contract due to National Interest. Hence, the objectives of this study are to determine what is National Interest in the termination of a government contract and also to identify a new approach to managing the termination of contractors by the Government due to National Interest in Malaysia under Clause 52.1 (a) and (b) of the PWD Form 203A (Rev.1/2010).

This basic research applies the qualitative method by selecting 6 respondents based on their role, participation in the construction industry, and experience concerning construction contracts, particularly with PWD Form 203A (Rev.1/2010).

Therefore through the interviews sessions conducted, it can be concluded that the government may utilize any of the suggested approaches before the termination takes place to ensure the termination due to the national interest is made fairly without any political and unnecessary intervention, which can lead to speculation made by the public and international media, that may affect the economic growth shall not be misuse or manipulate to ensure fairness and justice to all key players in the construction industry.

ABSTRAK

Kepentingan Negara tidak pernah ditakrifkan dengan jelas di dalam kontrak pembinaan dan di dalam industri pembinaan. Mungkin, ia juga tidak pernah dibincangkan sebelum ini. Oleh kerana perkembangan dan gelombang politik yang tidak dapat diramalkan, kajian ini amat penting untuk menyelesaikan dan mengisi jurang pengetahuan.

Sepertimana yang dinyatakan dengan jelas dalam Fasal 52.1 (a) dan (b) Borang KERJA JKR 203A (Rev.1/2010), kerajaan sebagai majikan boleh menamatkan kontrak pembinaan kerana Kepentingan Negara. Oleh itu, objektif kajian ini adalah untuk menentukan apakah yang dimaksudkan dengan Kepentingan Negara di dalam penamatan kontrak kerajaan dan juga untuk mengenal pasti pendekatan baru untuk menguruskan penamatan kontraktor oleh Kerajaan kerana Kepentingan Negara di Malaysia di bawah Fasal 52.1 (a) dan (b) Borang KERJA JKR 203A (Rev.1/2010).

Kaedah kualitatif sebagai asas penyelidikan dengan memilih 6 responden berdasarkan peranan mereka, penyertaan dalam industri pembinaan, dan pengalaman mengenai kontrak pembinaan, terutamanya dengan Borang JKR 203A (Rev.1/2010).

Oleh itu, melalui sesi temuduga yang dijalankan, dapat disimpulkan bahawa kerajaan boleh menggunakan mana-mana pendekatan yang dicadangkan sebelum penamatan berlaku untuk memastikan penamatan kerana kepentingan negara dibuat secara adil tanpa sebarang politik dan campur tangan yang tidak perlu, yang mana ianya boleh membawa kepada spekulasi yang dibuat oleh media di dalam negara dan

media antarabangsa, yang boleh menjejaskan pertumbuhan ekonomi yang mana perkara ini tidak boleh disalahgunakan atau dimanipulasi untuk memastikan kesamarataan dan keadilan kepada semua pemain utama dalam industri pembinaan.

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LIST OF ABBREVIATIONS

P.W.D	-	Public Work Department
IEM	-	The Institute of Engineers, Malaysia
PAM	-	Pertubuhan Arkitek Malaysia
JKR	-	Jabatan Kerja Raya
CIBD	-	Construction Industry Development Board
KLRC	-	Kuala Lumpur Regional Center for Arbitration
GDP	-	Gross Domestic Product
RGNP	-	Real Gross National Product
UTM	-	University Technology Malaysia
GLC	-	Government-Linked Company
PhD	-	Doctor of Philosophy
SFC	-	Senior Federal Counsel
LL.B	-	Bachelor of Laws
CSR	-	Corporate Social Responsibilities

CHAPTER 1

INTRODUCTION

1.1 Background of Research.

This research will indicate the best possible approach to be measured before the construction contract termination occurs due to National Interest in Malaysia. Although termination due to National Interest in Malaysia is not commonly happening before, but since 2018, it has been reported in the media involving a few infrastructure projects with Government as the employee and parties to the contract. Thus, it is still possible to happen in Malaysia.

Generally, a construction contract involves various parties and liabilities of all related parties. In apparent situations, a contractor or a builder as an employee owes an obligation to complete the works according to the building contract. They provide the quality and materials as required by the specifications given by the architects and engineers. This contract can be found in various standard contract forms as instruments that bind all parties involved.

A standard building contract is essential in the construction industry to facilitate potential fractious relationships to achieve an expected end. Generally, a contract exists when autonomous and definite parties reach a consensus to create legal relations. In Malaysia, Section 2, Contracts Act 1950 clearly emphasises that agreement is formed when an acceptance is expressed according to an offer or proposal

made with the element of consideration, such as a mutual exchange of something in value.

Like any other industry, construction requires a formality of an enforceable agreement in the standard form of contract, which mutually binds the related parties. Hence, a construction contract identifies the parties' rights, duties, and liabilities to the agreement. The contractor will construct following the drawings and specifications within the specified completion date. Failing to comply with the stipulated time and terms and conditions will cause the contractor to be liable for the damages resulting from his failure.

Few institutions and organisations in Malaysia produce standard forms of construction contracts. These are:

- a) The Institution of Engineers, Malaysia ("IEM");
- b) Pertubuhan Arkitek Malaysia ("PAM");
- c) Construction Industry Development Board ("CIDB");
- d) Jabatan Kerja Raya ("JKR") or Public Work Department ("PWD");
- e) Kuala Lumpur Regional Centre for Arbitration (the "KLRCA") since 2018.

These Standard Form Contracts employ standardised, non-negotiated provisions, usually in pre-printed forms. These are sometimes referred to as 'boilerplate contracts', 'contracts of adhesion', or 'take it or leave it' contracts (The Construction Wiki, 2020).

In Malaysia, most of the Standard Contract Forms that deal with termination clauses are in PAM 2006, PWD Form 203A (Rev.1/2010), IEM 1989 and CIDB Standard Form of Contract for Building Works 2000 Edition. Above all, only PWD Form 203A (Rev.1/2010) include termination due to National Interest under clause 52.0. The other standard form of the contract contains termination and determination that enable the termination to take place.

Even though termination due to National Interest is odd in the Malaysian Construction Industry, it is still possible since 2018. The term termination due to National Interest in Malaysian is derived from Clause 52.0 of the P.W.D Form 203A by the Public Work Department (Jabatan Kerja Raya) (Rev.1/2010). This contract binds the contracting parties with the Government as the employer in the construction industry. Clause 52.0 are as below:

52.0 TERMINATION ON NATIONAL INTEREST

52.1 Termination

- (a) Notwithstanding any provision of this contract, the Government may terminate this contract by giving not less than thirty (30) days written notice to that effect to the contractor (without any obligation to give any reason thereof) if the Government considers that such termination is necessary for national interest, national policy or national security.
- (b) For the purpose of this clause, what constitutes "national interest", "national policy" and "national security", shall be solely made and determined by the Government and such

determination shall for all intent and purposes be final and conclusive and shall not be open to any challenge whatsoever.

52.2 Consequences of Termination

Upon such termination of this contract under clause 52.1-

- (a) Payment obligation including all costs and expenditure incurred by the Government and the Contractor shall be ascertained in accordance with clause 54; and
- (b) Clause 51.1 (c)(1) and clause 51.1 (c)(ii)(B) and (C) shall apply.

National Interest is not explicitly defined in the PWD Form 203A (Rev.1/2010). Clause 52.1 (b) illustrates that the National Interest shall be solely made and determined by the Government only. Hence any determination will be final by the Government and will not be open to challenges or other inquiries.

Thus, this research will only narrow to the termination due to National Interest without approaching other limbs for the national policy or national security. This research shall unveil the possible and suitable approach before the termination of national interest took in the construction contract.

1.2 Problem Statement.

Referring to clause 52.0 of PWD Form 203A (Rev.1/2010), it can be articulated that termination due to National Interest is conclusive and close to any

challenge, as the Government as the employer and parties to the contract may terminate without having any obligation to provide any reason for it to the contracting parties.

This ongoing discussion leads us to several important issues to be determined because of this clause. This clause is silent and close to any interpretation. There is no definition or illustration of what constitutes National Interest in the standard contract form. There is no clear definition in The Interpretation Act 1948 and 1967 [Act 388] and the Contract Act 1950.

Termination due to National Interest does not commonly occur in Malaysia until 2018 recently. Until today, no reported cases for this matter can be referred to as a ratio decidendi or obiter dicta. No factual case has been decided, and most are persuasive only without further clarifications on this matter.

Hence, the gap of knowledge that this study will fill is the question of what is National Interest and the approach that can be taken before termination due to National Interest. These issues must be resolved and explored as they open for discussions, which may lead to several ideas and approaches.

Apart from the above, the question of fairness and validity of this clause is essential as parties are bound to the employer's contract that had been prepared and ready-made by the government. Moreover, it is helpful to comprehend the perception and insight of the stakeholder or the government before selecting termination due to national interest in the construction contract. Doing so will aid the employer as an

approach to be taken before selecting termination due to national interest as the conclusion of the construction contract.

The reason for doing so is, National Interest can be anything to the ordinary person since there is no clear meaning and precisely what it means by National Interest. Besides that, it is pertinent to know whether the clause without a clear definition is fair, just as the right to terminate under this clause only supplements the employer.

The focus is on the development of national construction industries to enable them to meet the huge demands to improve the capacity and effectiveness of the construction industry to meet the Infrastructure Facilities, National Economic and Social Development, Money Value to Industry, Domestic Competitiveness, Role of Participants and Stakeholders, Technological and Human Resource Development (Sabarish P, 2017).

Thus, this research will determine the definition of National Interest in the Malaysian construction contract and the new approaches or approaches for the preliminary action to be taken before termination due to National Interest taking place. It will only focus on government contracts. It is crucial as any decision-making will affect socio-economic factors in developing countries closely related to the national policy, national economy and foreign investment in Malaysia.

1.3 Objectives of the study.

Based on the above issues, the followings are the objectives of this study :

1. To identify the meaning of termination due to National Interest in Malaysia.
2. To identify the approach to be taken before deciding on termination due to National Interest as preamble in Clause Clause 52.1 (a) and (b) of the PWD Form 203A (Rev.1/2010).

1.4 Scope of the study.

The scope of this study is limited and focuses on the interpretation aspects and Definition of the Termination due to National Interest in construction projects related to Clause 52.1 (a) and (b) of the PWD Form 203A (Rev.1/2010).

This research also will determine issues and approach for the termination due to National Interest as preamble in Clause 52.1 (a) and (b) of the PWD Form 203A (Rev.1/2010).

The scope of the study will focus on an interview session which selected six [6] respondents currently active in the Malaysian construction contract construction Industries.

1.5 Significant of the study.

This research is significant as the findings will guide the parties in the construction project, especially in connecting to Government as the employer. The researcher believes that this study will benefit all key players in the construction industry in Malaysia, particularly those contracting with the Government as the employer. The contracting parties must consider the risks and benefits of the construction project to ensure the project will benefit the public and the nation as a whole.

Thus, this research perhaps would contribute towards the gap of knowledge and enhancement of knowledge in the industry by providing some information, knowledge, and current issues regarding their termination due to National Interest.

1.6 Previous Study.

Several past studies were conducted related to the termination of the construction contract. Such as follows:

1. "Termination Procedure of Projects By The Public Works Department (PWD) by Intan Safina Binti Sanusi (2015)".
2. "Termination of Contractor Due to The Corruption, Unlawful or Illegal Activities by Hasnita Hana Binti Hassan (2011)".

3. "Termination for Convenience By Employer in Construction Contract by Lau Siew Soon (2017)
4. "Terminations of Construction Contract by Employer by Mohammad Mahdi Hosseini (2012)".

However, none of the studies above discusses termination due to National Interest in Malaysia as all studies discuss termination in Malaysia generally. There is little discussion on what is National Interest as one factor that contributes to construction contracts. As such, there is no current standing that can form a solid finding as to the best possible approach to be taken by the Government as an employer before deciding on termination Clause 52.0 and 52.1 (a) (b) of the PWD Form 203A (Rev.1/2010).

Hence this study will focus on what are the approaches that the Government can choose as an employer before deciding on termination under Clause 52.0 and 52.1 (a) (b) of the PWD Form 203A (Rev.1/2010). The rationale is to ensure the Government are neutral and unbiased by taking all the possible steps before deciding on choosing termination under Clause 52.0 and 52.1 (a) (b) of the PWD Form 203A (Rev.1/2010).

1.7 Research Methodology

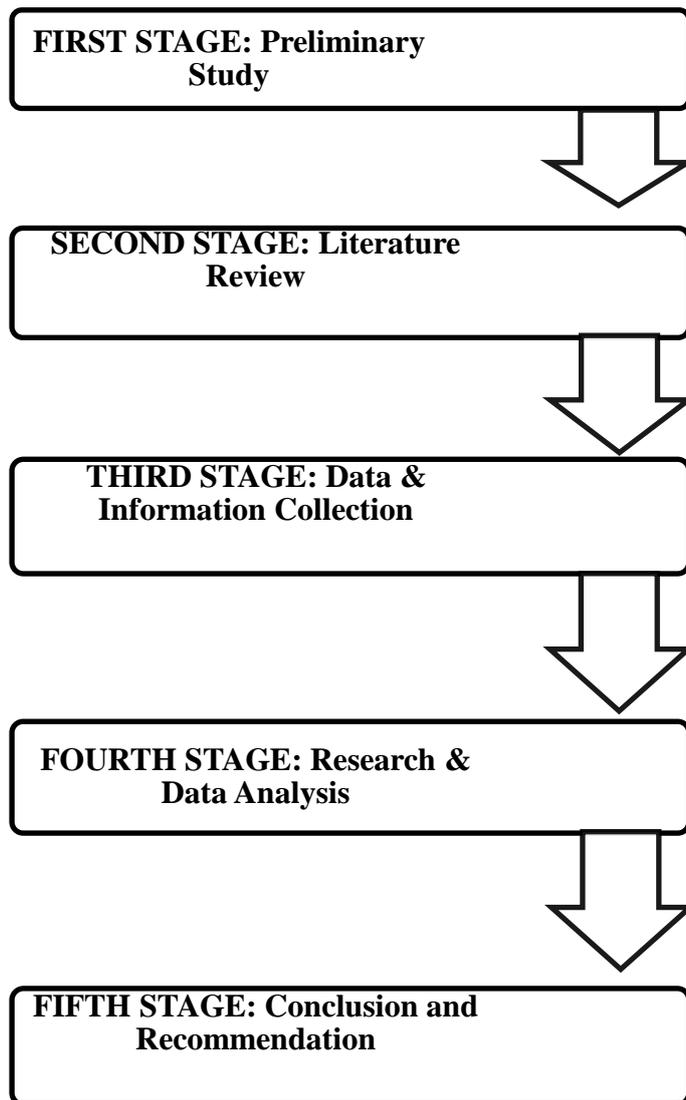


Figure 1.1 Research Methodology Flowchart

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