

CLARITY AND IMPROVING LEVEL OF UNDERSTANDING OF CONTRACT DOCUMENTATION

Mohamad Ibrahim Mohamad¹, Zulkifli Madon², Rosli Zin¹
Shaiful Amri Mansur¹

¹Construction Technology and Management Centre, Universiti Teknologi Malaysia, 81310
Skudai Johor, ²Construction Director, JKR Gerbang Selatan Bersepadu Project,

* Corresponding Author: *mibrahim@utm.my*

Abstract: The contractual obligation by any party in any contract will be interpreted by terms and contents of the documents laid down in the contract. Effective interpretation and understanding of the contractual obligations will be much dependent on the clarity of the documents in translating the needs and requirements implied as in the agreement. Improper understanding of the documents may lead to the different interpretations that may result in unnecessary contractual problems such as disputes, unnecessary claims, reworks, shoddy works, and even litigation. This paper presents the results of the study related to issue of understanding of construction contract documentation in Malaysia. Also presented are the factors that inhibit understanding of the contract as well as factors that can help to make the interpretation process much easier. Eventually, a proposal of various factors that can be used to improve the level of understanding of contract document is suggested in this paper.

Keywords: *Clarity of contract, construction procurement, contract documentation, improving contract document*

1.0 Introduction

Contractual obligation by any party in any contract will be of questionable state if the understanding of the terms and interpretation of the contents of the contract documents is not fully appreciated. The contract documents drafted for any contract should fulfill the intended roles of being the references and guidelines for the relationships between the contracting parties throughout the project. Contract is frequently expressed in a formal document such as standard form of contract or as specific conditions (Keating and Uff, 1978). Factors of contractual language and its judicial interpretation may lead to the

problem of understanding of the needs of the contract which may lead to misinterpretation and misunderstanding of the facts in contract obligations. This situation may prevail an opportunistic party to take the unfair advantage of another party when an adjustment to be made in the contract. Therefore, it is necessary to have proper understanding of the contents of the contract documents that leads to the enhancement of the contractual relation and assurance of the intended deliverance of the product.

The complexity of the contract documents is one of the contributors to the contractual problems such as conflicts (Harmon, 2003). The complexity may also hinder the contract participants especially the contractors and the clients to really understand the contractual needs and obligations of the parties. Various backgrounds of the contractors in our construction industry especially in the Public Sectors in Malaysia also contribute to difficulties in delivering the required product to the clients. Therefore, understanding the contents and requirements of the contract documents will have great influence in the smooth and good performance of the construction projects. Although the problem can easily be resolved by the use of translator, the technical jargons that often appear in construction documents such as in construction contracts can be problematic for translators, especially for those without a construction background (Chan and Suen, 2005).

The constructions contracts express the intent of parties and memorialize their principal risk allocation decisions (McCallum, 2002). To understand the contract requirements is to understand the contents of the documents and the spirit of the contractual relationships. Contracts are formed and signed based on the fair basis where parties agree amicably to discharge their obligations to satisfy each other needs and requirements. Indeed as construction are a complex and challenging process, it requires interpretation of conformance with myriad laws, code and regulations, marshalling of considerable resources including labor, equipments, materials and good communication and coordination among multiple parties involved in the project (Dennis, 1982). Many factors are unknown or unknowable at the start of any project. This detail understanding of the whole requirements and process of the contract are essential in order to minimize the construction risks that may lead to unnecessary problems such as disputes, claims, litigation, shoddy works, and reworks even lost of future business relations. The effects of construction disputes are detrimental. If disputes are not properly managed, they may cause project delays, undermine team spirit, increase project costs, and, above all, damage continuing business relationships.

The proper allocation of responsibilities is a crucial factor in determining whether a particular construction contract should be considered 'a good' contract. Mc Callum (2002) characterized a good contract clearly informed such party what it must do and to what it is entitled. It also informs each party of its right if the other party does not performed as pronounced. It anticipates the likely problems and resolves them clearly and in a way strikes the parties as a proper allocation of risks and responsibilities. A good construction contract of course, includes well drafted drawings and specifications that

inform the contractors what he must do to earn the promise compensation and provide a method of determining whether the objective has been reached.

2.0 Methodology

The first stage of this study includes the appointment of 15 panels of experts that have vast experience in construction contract related aspects. These include lawyers, senior engineers, quantity surveyors and project managers. The data were collected using face-to-face interviews and structured where open-ended questionnaire forms were given to these experts to respond. In many cases, more than one meeting was arranged with them. The panel of experts was asked on the issues related to the importance of understanding contract documentations, the expected level of understanding of contract documentation as well as factors that support and inhibit its understanding. This was followed by the distribution of the industry wide questionnaire survey to the 65 respondents which represent the contractors involved in public sector projects. The questionnaire investigated most of the issues as being addressed to the panel of experts but in a more comprehensive and structured manner. As a strategy for simplicity to generate the responses in the form of quantitative data from the industry wide questionnaire survey, a Likert's Scales of 1 to 5 in the increasing order of agreement had been used for the respondents to rate their opinions for the statements given to them. The results of the responses presented are calculated using Relative Index method (RI) which represents the strength of response from 0.2 to 1.0 for each statement where 1.0 indicate 100% strongly agreed by all respondents and 0.2 is 100% least agreeable. Relative Index is calculated by using the following equation:

$$RI = \frac{\sum(n_1(1)+n_2(2)+n_3(3)+n_4(4)+n_5(5))}{\sum n(5)}$$

Where: n_i represents the number of responses for each scale.

3.0 Importance of Understanding of Contract Documentation

Construction activities are usually very complex which involved inputs from professionals of different disciplines such as engineers, architects, surveyors and contractors. In discharging their responsibilities towards delivering a successful project and achieving the desired goal, problems may arise in interpreting their commitments and responsibilities. When this happened, reference has to be made to the legal aspects of the contract documents as the primary evidence of the agreements extended by the parties and the ensuring legal relationships between these parties. Therefore, understanding of what has been stipulated in the contract is absolutely necessary for all contracting parties to avoid any unnecessary dispute and misunderstanding.

By using panel of expert opinions to determine the importance of understanding of contract documents the following facts have been established with the level of agreement of more than 90% towards each of the factors:

- Serious contractual problems will arise when contractors did not understand the contract documents thoroughly.
- The best output in term of cost, quality and time of the contractors can be achieved by improving the level of understanding of the contract document.
- The contractors seldom read the contact document and have the problem in understanding the contract documents.
- The level of understanding of contract documents is influenced by factors which include attitude, education background, past experience and commitments.

4.0 Expected Level of Understanding of Contract Document

The questions related to the level of understanding are also presented to the panel of experts. In the content analysis of the interviews results, it is found that all the 15 respondents agreed that contractor has to be well versed in interpreting the conditions and requirements of the contract. All the panel members also agreed that contractors in Malaysian construction industry do not bother to understand the contract documentation until when problem arises. The level of understanding of the 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. This indicates that much effort has to be done in order to improve the understanding of these contractors on the contract document. The panels also feel that contractors need to have the right attitudes in order to excel in the understanding of contract documents.

5.0 Factors that Influence the Understanding of Contract Document

Based on the analysis done on the structured question given to the panel of experts they strongly agreed that the understanding of contract document are very much influenced by the factors related to the attitude which is shown by relatively high scores in relative index of 0.89. This followed by education background (RI 0.87); past experience (scores RI 0.85) and commitment (RI 0.85). These factors are also agreed by the respondents in the industry wide survey as shown in Table 1.

The experts have the opinions that among all the four factors, attitude prevails in the rank followed by education background, past experience and commitments. This is in contrary with the opinions of the contractors in the industry who feel that past experience will have the priority followed by competency, attitude and education background, past experience and commitment. Having instilled these as their priority then experience will be of benefit to ease the undertaking together with the commitment in their selfness in striving for future excellence. It is noted that the contractors in the industry believed that

experience and competency are the first two most important factors followed by attitude and education background.

Table1: Factors Influence the Understanding of Contract Documents

Factors presented in industry-wide questionnaire survey	Relative Index (RI)
Past experience	0.91
Competency	0.90
Attitude	0.87
Education background	0.86
The complexity of contract documents always hinders the contractual parties to understand the actual need of the contract	0.84
Different class of contractor has deferent level of understanding toward contract documentations.	0.80

The findings have shown slight differences in ranking priority of the factors but the analysis shows that contractors are having experience of two to more than 20 years experience and 61% are having experience of 11 to more than 20 years. In this situation, they may feel that experience will prevail in all respect in order to master the understanding of contract documents. Nevertheless, in both cases, the study has shown that all factors have relatively high scores, which indicate that both categories of respondent have the same opinion that all factors have strong contribution to the understanding of contract documents.

Based on the content analysis of the open-ended questions given to the experts, there are additional factors given by the expert panel that influence the understanding of the contract document. These factors were suggested based on the experts' experience in their undertaking pertaining to the subject matter. These factors are the use of simple language, adequate knowledge, clarity in document, and regular training.

6.0 Factors that Inhibit Understanding of Contract Document

The study continues with the determination of the factors that inhibit the understanding of the contract document. The results of the analysis of the interviews with the expert panel have established the following factors that can inhibit the understanding of the contract document. These factors are contractors experience, competencies, negative attitude towards effort to understand, lack of good education background, and complexity of contract document itself.

Based on the analysis of the questionnaires in the industry wide questionnaire survey, the main factors that inhibit the understanding of contract documentation are presented in Table 2. It is noted that complexity of contract documents will also influence the contracting party to understand the contract documents. This is particularly

true when the contract documents have 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. The complexities of the documents are due to many reasons such as the use of difficult languages, use of vague and illogical specifications, unclear requirements and no familiarization with the types and form of contract used. These elements will create confusion to most parties in the contract and will lead to irrelevant materials being included in the documents, which eventually increase the thickness of the documents.

Table 2: Factors Inhibit Understanding of Contract Document

Question	Relative Index (RI)
Documents are too thick with too many legal phrases.	0.81
Client do not aware of their requirements	0.76
Never having any training	0.75
Fully delegate to subordinates	0.74
Requirements are not clear and too general	0.74
Language used is difficult to understand.	0.73
Time consuming in understanding the contract.	0.69
Specifications are too stringent and not practical.	0.68
Not familiar with the contract forms used	0.68
Seldom read the documents.	0.68
Never had any experience with the same project	0.66

As shown by the experts, the contractors in our local industry do not have the habit of reading the contract documents. Additionally, there are cases where the misunderstanding of the documents is caused by the lack of qualified personnel in the contractor organization. This is particularly true for small contractors. With limited financial resources, training needs of the personnel are not in the priority agenda of the organization.

7.0 Improving the Understanding of Contract

The panels of experts through one of the open-ended question used in this study have expressed their views of how to ensure better understanding of the contract documents by the contractors. Among the most frequent quoted factors as proposed by the expert panels are regular training for contractors, engagement of qualified personnel, clarity in the contract document, and the use of simple language. Some of these factors and proposals have been given in the structured questionnaires for the panel in this study. Nonetheless,

they were proposed again in the open-ended question indicating their importance. The same issues have been explored in the industry wide questionnaire survey and the findings are tabulated in Table 3.

As mentioned in the previous discussion, contract documents are sometimes complex and contain legal phrases and are prepared by the qualified personnel. Thus, interpreting the documents likewise need a qualified personnel too. In this situation, the contractors have to be prepared to have equivalent qualified personnel in order to be able to understand the documents. Regular training program is one of the effective ways to improve the level of understanding of the contract documents. This is also recommended by the contractors in responding to the questionnaires. They strongly agreed that the contractors have to be well trained and should attend the mandatory induction course prior starting any contract activity.

The responsible agencies that govern the contractors are recommended to rank the contractors based on their qualifications and training backgrounds. Furthermore, test on qualification assessment has to be carried out in order to sustain the contractors' qualified status. In this respect, it is proposed that the agencies be responsible in initiating proper guidelines for registration of the contractors with respect to their qualifications, training needs for skills and competencies development, and controlling the requirements for qualified registered contractors.

The clarity of the contract documents is considered as another important factor to improve the understanding of contract documents. Clarity means ease of understanding with no difficulty in translating the documents. All respondents strongly agreed that this factor has to be considered when preparing the contract documents. Clarity is also related to the use of simple language and includes many other factors as stipulated in Table 3. These include clarity and completeness of drawings, clear understanding of client requirements, objectiveness and practicality of the documents, clear explanation of regulatory requirements and general conditions, minimum use of complicated legal phrases, use of suitable documents for different class of contractors and use of only relevant documents that suit the contract.

The respondents in the industry also agreed that sincerity is also contributing towards improving the understanding of contract documents. This factor is closely related to other personal factors such as attitudes and commitments. The respondents also suggest that a discussion session being held to assist the needy contractors in every award of the contract prior to commencement of the works. The suggestions may be included in the training program or can be addressed by the governing agency when giving litigation assistance to the contractors.

Table 3: Improving contract document understanding

Factors that can help to improve understanding of contract document	Relative Index (RI)
Sincerity in contracting	0.95
Drawing must be clear and checked by all parties.	0.95
Clarity in contract document for better understanding toward contract documents.	0.93
Client’s requirements must be clearly understood.	0.92
Contract document should be written in simple language.	0.91
Establish good communication relationship.	0.91
Contract document must be precise, objective and practical	0.90
Qualified personnel to prepare the contract document.	0.90
Regulatory requirement to be clearly explained.	0.89
Bill of Quantities to be clearly and objectively detailed.	0.89
Minimise use of complicated legal phrases.	0.88
Provide well trained personnel for every project to interface the contract.	0.87
General condition of the contract to be made familiar	0.86
Construction work specifications to be simple and suit class of contractor.	0.81
Mandatory induction session for a contractor before any contract to be implemented	0.76

8.0 Conclusion

This paper has highlighted a critical issue related to the understanding of the contract document in ensuring successful delivery of a construction project. It has been determined from this study that the main factors that can influence the understanding of contract documentation are attitude problems, educational background and past experience of the users. The main factor that inhibits the understanding of contract document that has been determined in this study is the complexity of document itself. There is a need for the contract document to be written in simple language. The lack of training on the contractor’s side is also considered as a contributing factor. The training on contract document understanding must be made available to the contractors.

The study has also determined various factors that could support the process of improving the understanding of contract document. The highest ranked factor is sincerity in contracting. This issue is related to the complexity of the contract documentation itself. The contract document must be written with the intention of a ‘win-win’ attitude in mind.

The contract document must be clear and precise. On top of everything, the contract document must be fully understood by the stakeholders.

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