

**CLAIMS FOR ADDITIONAL PRELIMINARIES COSTS DUE TO
PROJECT PROLONGATION**

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PROJECT PROLONGATION

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DEDICATION

Specially dedicated.....

To my beloved wife and children:

Hajjah Haslena Othman

Muhammad Amir Hamizan Aminuddin

Muhammad Hazman Aminuddin

Siti Najihah Aminuddin

Abdul Mu'izz Aminuddin

Abdul Hadi Aminuddin

Nur Nabihah Aminuddin

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ABSTRACT

Claims for additional preliminaries cost due to project prolongation is actually a part of loss and/or expense claim. The principle governing this claim was established in *Hadley v Baxendale (1854)* which provides that the party who suffers direct and reasonably foreseeable costs entitled to damages. This principle has been adopted in most of the standard forms of contract in Malaysia. As required by the contractual provisions such as in the PWD 203A (Rev. 2010/1), PAM Contract 2006, CIDB Form 2000 and IEM Form 1989, the contractor's entitlement to loss and/or expense is limited to selected delaying events. In addition, the submission of claim must be made in specific time period as provided in the contract. There are cases when everything else was in order, the contractor was denied a claim due to his own failure to abide by the procedural requirement for submission of claim. The heads of claim under the loss and/or expense generally can be grouped under seven categories i.e. additional expenditure, interest and financing charges, loss of productivity, inflationary cost increase of materials and labour, site overheads or preliminaries, offsite or head office overheads and loss of profit. The objective of this research is to determine the preliminaries items that are considered and recommended for payment by contract administrators in claims for additional prolongation costs in the Malaysian construction industry. As a general guide, a possible list of claimable preliminaries items established from this study may be useful to contractors in their submission of loss and/or expense claims due to project prolongation in the future. It is also beneficial to contract administrators to learn how others evaluate the claims and thus, able to improve themselves on the way loss and/or expense being evaluated as compared to the settled law in this regard.

ABSTRAK

Tuntutan untuk kos tambahan bagi kerja-kerja awalan atau “preliminaries” disebabkan lanjutan tempoh siap projek merupakan sebahagian daripada tuntutan untuk kos kerugian dan/atau perbelanjaan (“loss and/or expense”). Prinsip asas berkaitan tuntutan ini telah diputuskan dalam *Hadley v Baxendale (1854)* dimana pihak yang menanggung kerugian secara langsung dan boleh dijangkakan (semasa pelaksanaan kontrak), layak untuk membuat tuntutan terhadap kos tambahan yang ditanggungnya. Kini, prinsip ini telahpun digunapakai dalam kebanyakan borang kontrak piawai di Malaysia. Sepertimana diperuntukkan di dalam kontrak seperti Borang PWD 203A (Rev. 2010/1), PAM Contract 2006, CIDB Form 2000 dan IEM Form 1989, kontraktor adalah layak untuk menuntut kos kerugian dan/atau perbelanjaan tertakluk kepada sebab-sebab kelewatan yang tertentu. Sebagai tambahan, tuntutan mestilah dikemukakan dalam tempoh masa tertentu seperti yang diperuntukkan oleh kontrak. Terdapat kes dimana tuntutan kontraktor ditolak disebabkan kegagalan mematuhi kehendak prosedur membuat tuntutan. Secara umumnya, tuntutan untuk kos kerugian dan/atau perbelanjaan bolehlah diletakkan dalam tujuh kategori iaitu perbelanjaan tambahan, caj faedah dan kewangan, kehilangan produktiviti, kenaikan kos bahan binaan dan buruh, ‘overhead’ di tapak bina ataupun kerja-kerja awalan, ‘overhead’ luar tapak bina atau ibu pejabat dan juga kehilangan keuntungan. Objektif kajian ini adalah untuk menentukan item kerja-kerja awalan yang diambil kira dan disyorkan untuk bayaran oleh pentadbir kontrak dalam tuntutan untuk kos berkaitan lanjutan masa projek dalam industri pembinaan di Malaysia. Sebagai panduan umum, satu senarai item kerja-kerja awalan yang boleh dituntut akan dihasilkan dimana ia mungkin berguna untuk membantu kontraktor dalam tuntutan kos kerugian dan/atau perbelanjaan di masa hadapan. Ianya juga bermanfaat kepada pentadbir kontrak untuk mengetahui bagaimana perunding lain melaksanakan penilaian tuntutan, dan selanjutnya dapat memperbaiki kaedah yang digunakan sekarang berbanding ketetapan undang-undang.

TABLE OF CONTENT

CHAPTER	TITLE	PAGE
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGEMENTS	iv
	ABSTRACT	v
	ABSTRAK	vi
	TABLE OF CONTENT	vii
	LIST OF TABLE	xi
1	INTRODUCTION	
	1.1 Background of the Study	1
	1.2 Statement of Issue	4
	1.3 Research Question	5
	1.4 Objective of Research	5
	1.5 Scope of Research	5
	1.6 Significance of the Research	6
	1.7 Research Methodology	6
	1.8 Chapter Organization	7
2	CLAIMS IN CONSTRUCTION CONTRACT	
	2.1 Introduction	8
	2.2 Date of Commencement	8
	2.3 Date for Completion	10
	2.4 Liquidated and Ascertained Damages	11
	2.5 Extension of Time	12
	2.5.1 Contractual Provision for Extension of Time	16
	2.5.1.1 PAM Contract 2006	17
	2.5.1.2 PWD Form 203A	19
	2.5.1.3 CIDB Contract 2000 Edition	20
	2.6 Claim for Loss and/or Expense	21
	2.6.1 Definition of Claim in General	22

TABLE OF CONTENT

CHAPTER	TITLE	PAGE
	2.6.2 Direct Loss and/or Expense Claim	23
	2.6.3 Categorization of Claim for Loss and/or Expense	26
	2.6.4 Contractual Provisions for Loss and/or Expense	28
	2.6.4.1 PAM Contract 2006	28
	2.6.4.2 PWD Form 203A	30
	2.6.4.3 CIDB Contract 2000 Edition	31
	2.6.4.4 IEM Form (1989)	33
	2.6.4.5 Summary of Contractual Provisions	33
	2.6.5 ‘Extra Contractual’ or Common Law Claim for Loss and/or Expense	35
	2.6.6 Heads of Claim for Direct Loss and/or Expense	37
	2.6.6.1 Additional Expenditure	38
	2.6.6.2 Interest and Financing Charges	40
	2.6.6.3 Loss of Productivity	42
	2.6.6.4 Inflationary Cost Increase of Materials and Labour	42
	2.6.6.5 Site Overhead s/Preliminaries	43
	2.6.6.6 “Offsite” Or “Head Office” Overheads And Profit	43
	2.6.6.7 Loss of Profit	45
3	CLAIM FOR ADDITIONAL COST OF PRELIMINARIES	
	3.1 Introduction	47
	3.2 What is the Preliminaries	47
	3.3 Cost Components of Preliminaries	49
	3.4 Preliminaries in the SMM2	53

TABLE OF CONTENT

CHAPTER	TITLE	PAGE
	3.5 Preliminaries in the Bill of Quantities	57
	3.6 Evaluation of Claim for Additional Cost of Preliminaries	58
	3.6.1 Methods of Evaluation	64
	3.6.1.1 Amended Contract	64
	3.6.1.2 Formula	65
	3.6.1.3 Negotiation/Agreement	67
	3.6.1.4 Actual Cost	67
	3.6.2 Evaluation of Major Preliminaries Items	68
4	RESEARCH METHODOLOGY	
	4.1 Research Methodology	72
	4.1.1 Identification of Research Problem Statement	72
	4.1.2 Stage 2: Confirmation of Research Problem Statement	72
	4.1.3 Stage 3: Collection of Data	73
	4.1.4 Stage 4: Data Analysis	73
	4.1.5 Stage 5: Writing Up and Presentation of the Research Findings	74
5	DATA ANALYSIS	
	5.1 Introduction	75
	5.2 Analysis on Cases of Claim for Additional Cost of Preliminaries	75
	5.2.1 Table 2: Case 1 – Government Administration Building in Kedah	76
	5.2.2 Table 3: Case 2 – Government Research & Development Centre in Selangor	76
	5.2.3 Table 4: Case 3 – Shopping Complex and Mixed Development in Kuala Lumpur	78

TABLE OF CONTENT

CHAPTER	TITLE	PAGE
	5.2.4 Table 5: Case 4 – Office Renovation and Installation of Office Equipment in Kuala Lumpur	80
	5.2.5 Table 6: Case 5 – Government Staff Accommodation Building in Kuala Lumpur	82
	5.2.6 Summary of Findings	83
6	CONCLUSION AND RECOMMENDATION	
	6.1 Introduction	94
	6.2 Research Findings	94
	6.3 Research Constraints	96
	6.4 Future Research	96
	REFERENCES	97

LIST OF TABLE

TABLE NO	TITLE	PAGE
1	Summary of Grounds for Loss and/or Expense Claim	33
2	Case 1 – Government Administration Building in Kedah	76
3	Case 2 – Government Research and Development Centre in Selangor	76
4	Case 3 – Shopping Complex and Mixed Development in Kuala Lumpur	78
5	Case 4 – Office Renovation and Installation of Office Equipment in Kuala Lumpur	80
6	Case 5 – Government Staff Accommodation Building in Kuala Lumpur	82
7	Summary of Preliminaries In Claim For Additional Cost Due To Project Prolongation	84

CHAPTER 1

INTRODUCTION

1.1 Background of the study

Generally all construction contracts expressly state the date of commencement of work, date of completion and remedies for delays. So, the contractor is obliged to complete the work before or on the stipulated date of completion. If for some reasons he cannot complete the work on time, he may be slapped with liquidated and ascertained damages (LAD). But the contract also contains provisions that entitle the contractor for extension of time and to claim for loss and expenses due to such extension of time.

There are various reasons that may cause construction projects to delay beyond the contract date for completion. The issuance of certificates of delay and extension of time relieves the contractor of the duty to complete the works on or before the original date for completion. The extension of time avoids the time for completion of contract being at large that allows the contractor to complete the works within reasonable time without any remedy to the employer. The extension of time sets a new date for completion for the contractor to oblige and at the same time keep alive the employer's rights under the contract to impose liquidated damages if the contractor fails to complete the works by the new date for completion.

“Act of prevention” by the employer such as (1) not giving sufficient possession of the site for the contractor to properly proceed with the works and (2)

late or non issuance of instructions by the employer's agents that hinders the progress of the works, are considered a breach of the employer's duties under the contract¹.

The significance of contract clauses with regards to extension of time can be categorised as follows:

- i. One, that entitle the employer to claim for liquidated and ascertained damages from the contractor;
- ii. Two, that entitled the contractor to extension of time; and
- iii. Three, that entitled the contractor to claim for loss and expense.

The extension of time being granted to the contractor prolongs the construction period and as a direct consequence to the delay, the contractor may incur additional costs. Being fair to the contractors, most contracts provide venues for the contractor to claim for the additional costs due to the delays as they are beyond the contractor's power and ability to avoid such incidents. The contractor may in some instances mitigate delays but the ones which are due to acts of prevention by the employer and some excusable or neutral events² such as force majeure, exceptionally inclement weather, etc. are really unavoidable.

In practice, it is common that the contractor will be required to claim for extension of time first before he is allowed to claim for additional costs due to project prolongation. When the extension of time is granted, there is a belief that the contractor is given an automatic entitlement to claim for extra costs termed as loss and/or expenses. This misconception which is common in the construction industry has been dismissed by The Society of Construction Law Delay and Disruption Protocol³ and many other authorities⁴. Knowles (2012) added that most standard

¹ Fong, CK (2012), *Law and Practice of Construction Contracts Fourth Edition*, Sweet and Maxwell Asia Singapore, see page 509

² Events beyond the control of the contracting parties.

³ Issued by The Society of Construction Law (2002), UK

forms of contract deal with the entitlement for extensions of time quite separately from the entitlement for payment of loss and expense.⁵

In Malaysia, most of the standard forms of contract allow the contractor to claim for loss and/or expenses with expressed provisions of contract. In the PAM Contract 2006, entitlement for loss and/or expense claim is provided under clause 24. There are fourteen grounds or relevant delay events that entitled contractor to claim for loss and/or expense. In PWD Form 203A, this contractor's right is given in clause 44 with only five reasons of delay that entitled him for loss and expense. Meanwhile in CIDB Form (2000 Edition), clause 31 defines loss and expense and detailed out the reasons for the contractor's entitlement to claim it. Clause 32 then sets the procedure for the claim which includes notices, records, substantiation, etc. Entitlement for loss and expense claim in IEM Form (1989) is similar to the one provided in PWD form, except that IEM allows the failure or delay in giving possession of site as additional reasons for claim. All these standard forms make notices as a condition precedent to successful claims for loss and/or expense.

The meaning of loss and/or expense and its heads of claim which includes the additional cost of preliminaries will be discussed at length in the next chapters.

As a consequence to delay in a construction contract, the site overheads or commonly termed as 'preliminaries' will be required at a prolonged period. As they involve various resources such as manpower, plant and machineries, the additional cost incurred should be reimbursed in order to avoid losses on the contractor's part. Most construction contracts provide for contractors to claim their loss and/or expense due to breaches caused by the employer that hinder the progress of contractor's works. The premise to claim this type of loss or damage is provided for under the specific conditions in most of the standard form of contract that relates to loss and/or expense. Even if the loss or damage suffered by the contractor in performing works within prolongation period is not stipulated in the contract, the contractor is still secured as the law safeguards his right to be reimbursed under this circumstance.

⁴ Introduction to *'Demystifying Direct Loss And/Or Expenses Claims'*, Ir Harbans Singh KS (2007), 4 MLJ xxix

⁵ *'200 Contractual Problems and Solutions (3rd Ed)'*, 2012 at p 185

It is common in the construction industry in Malaysia that the contractors value their claims based on the period that a project has overrun i.e. from the original completion date to the actual completion date. They also rely upon their priced preliminaries as the basis for claim for additional cost at the end of original contract period and continuing them during the extended period. This type of claim is known as a 'pro rata preliminaries claim'.

As of to date, most of the standard forms of contract in Malaysia categorized this type of claim under the category of 'loss' and 'expense' which already a settled law that they relate to 'actual cost' incurred by the aggrieved party. As such, it is considered inappropriate or wrong to pay additional preliminaries due to project prolongation based on pro rata claim.

1.2 Statement of Issue

The foregoing discussion highlighted the problems of claim for loss and expense due to project prolongation with regard to additional cost of preliminaries as follows:

1. There is no expressed provision in all the standard forms of contract that indicate which preliminaries items can be claimed under the loss and expense provision for project prolongation.
2. The practice in the Malaysian construction industry indicates that claims for additional cost of preliminaries are evaluated using a number of approaches even though the contract clearly shows that loss and/or expense only relates to actual cost incurred.

1.3 Research Question

The discussion and the abovementioned statement pointed out to several pertinent questions:

1. Which preliminaries items can be claimed as additional cost due to project prolongation under the loss and expense provision in the contract?
2. How usually the claims for additional cost of preliminaries are evaluated by the players in the construction industry?

This study will only focus on question no. 1 i.e. on the preliminaries cost items that can be claimed under the loss and expense claims.

1.4 Objective of Research

The objective of this research is to determine the additional cost of preliminaries that can be claimed under the loss and expense provision due to project prolongation.

1.5 Scope of Research

This study is limited to the following:

1. Cases in the Malaysian construction industry; and
2. Terms and conditions in the standard forms of contract used in Malaysian construction industry i.e. the PWD, PAM, IEM and CIDB.

1.6 Significance of Research

Based on the findings of this research, the preliminaries items that are being considered and valued by contract administrators as additional cost to contractors in cases of project prolongation in the Malaysian construction industry could be established. As a general guide, a possible list of claimable preliminaries items may be useful to contractors in making loss and expense claim in relation to additional preliminaries in future. At the same time, the contract administrators who perform the evaluation of these claims on behalf of the employers would also benefit from the findings by knowing the industry practice as compared to the settled law regarding the loss and expense claims.

1.7 Research Methodology

In order to achieve the objective of this study, a proper research methodology is required to be established and sets as a framework towards performing a structured and organized approach and steps during the whole period of the study.

The research and report writing will be conducted in five identified stages of study and is outlined below for initial information, detailed of will be elaborated in Chapter 4 of this report:

1. Stage 1: Identification of research problem statement
2. Stage 2: Interview with relevant industry professionals
3. Stage 3: Collection of data
4. Stage 4: Data Analysis
5. Stage 5: Writing up and presentation of the research findings

1.8 Chapter Organization

Chapter 1 is the research proposal which inter alia present the structure of the proposed research topic which among other includes the background of the study, problem statement where the issue of this topic arises and the most important is the research objective of this study. In order to achieve the research objective the scope of this study, it will define the limitations and briefly explain the approach for the research methodology and finally the overall chapter organisation of this report.

Chapter 2 will focus on the theory and principles of construction contract such as the date of commencement, date of completion, briefly on the liquidated and ascertained damages and extension of time. It also discuss in detail about claims for loss and expense.

Chapter 3 will deal at length the theory and principles of claim for additional cost of preliminaries due to project prolongation. It discuss about the meaning of preliminaries and its cost components. List of items of preliminaries as given by the standard method of measurement and bill of quantities are also given here. Finally the methods of evaluation of claim for additional preliminaries cost will also be discussed within this chapter.

Chapter 4 will discuss on the methodology adopted in the preparation of this report which details out the stages of research study from inception until completion.

In Chapter 5, the data samples will be analysed objectively and the findings of each sample are tabulated. The basis of comparison between available data will be based on the requirement of standard method of measurement against the practice by industry players. Preliminaries items claimed by contractors are compared with the one evaluated by the contract administrators.

Finally, in Chapter 6 which is be the conclusion and recommendations chapter, the result of findings and analysis will be summarised. Difficulties faced in this research will be listed down and recommendations will be given for those who want to continue this research. This will be the end chapter for this research.

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