

OMISSIONS OF MAIN CONTRACTORS ORIGINAL SCOPES

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DEDICATION

To my dear parents, wife and my children, brothers, and sisters.

Thank you for your support, guidance, and everything.

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In the name of Allah, the Most Kind and Merciful

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ABSTRACT

“Omissions” is a term that can be described as removal part of the scope of work from original scope of work. Normally, cost of removal scope of work is deducted from the original contract value. In the event to agree on the omissions; The Contractor may argue that omissions of the original scope could reduce their profit “*loss of profit*”. Hence, there shall be a series of discussions on it and sometimes it will be required litigations to resolve the issues. This research was conducted to determine the issues that prevented the contractor from successfully claiming the loss of profit due to omissions. Legal research methodology was used to conduct this research. Cases related to omissions and loss of profit was used to conduct this research. These legal cases were reported in the Malayan Law Journal (MLJ), which was retrieved from the online database LexisNexis. To achieve the purpose of this research, 4 cases were selected for analysis. Based on the finding of the analysis, there are a few elements that require by the contractor to ensure successfully claims on loss of profit. That element is “*Termination of the principal subcontract shall lawful and follow the process as required*”, “*Contractor must not fail in its counterclaim for damages*”, “*Balance of probabilities means that all the proof or fact must be consistent*” and “*Interpretation of the clause must be consistent*”.

ABSTRAK

"Omissions" bermaksud pengurangan sebahagian skop kerja daripada skop kerja yang asal. Kebiasaannya kos untuk skop kerja yang dikeluarkan ditolak dari nilai kontrak asal. Kebiasaannya kontraktor akan cuba untuk mendapatkan atau cuba untuk memastikan mereka mendapat pampasan akibat daripada pengurangan skop kerja atau cuba dapatkan pampasan daripada "loss of profit". Sekiranya perbincangan tidak mencapai kata sepakat maka ianya perlu di bawa ke proses pengadilan untuk menyelesaikan masalah tersebut. Objektif utama penyelidikan adalah untuk mengetahui isu-isu yang menghalang kontraktor daripada berjaya menuntut kehilangan keuntungan daripada pengurangan skop kerja. Metodologi penyelidikan undang-undang telah digunakan dalam menjayakan penyelidikan ini. Penyelidikan ini telah dilakukan berdasarkan kes-kes yang berkaitan dengan "Omissions" dan "loss of profit". Kes undang-undang yang dilaporkan dalam Malayan Law Journal (MLJ) diambil daripada "LexisNexis". Sebanyak 4 kes dipilih untuk dianalisis bagi mencapai objektif penyelidikan ini. Berdasarkan penemuan analisis, terdapat beberapa elemen yang diperlukan oleh kontraktor untuk memastikan berjaya menuntut "loss of profit". Elemen itu adalah "*Termination of the principal subcontract was lawful follow the process as required*", "*Contractor must not failed in its counterclaim for damages*", "*Balance of probabilities means that all the proof or fact must be consistent*" and "*Interpretation of the clause was inconsistent*".

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LIST OF ABBREVIATIONS

BOQ	-	Bill of Quantities
SOR	-	Schedule of Rates
PWD	-	Public Work Department
PC	-	Package Contractor

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CHAPTER 1

INTRODUCTION

1.1 Background Of Study

Omission is usually a variation of the employer's instructions, that is, most of the work is omitted. Most contractors believe that under the contract, they have the right to omit the project. However, due to the following reasons, many employers instructed the project to be omitted:

- **Funding problems:** During the project life cycle, the employer cannot continue to provide funding for the project. For employers, the project has become too expensive.
- **Better deals:** The employer has found another contractor who can complete the rest of the project in a faster or cheaper way.
- **Contractor's incapability:** Employers have doubts about the contractor's ability to complete the work (whether financial or technical).
- **Poor performance:** The employer is not satisfied with the contractor's performance.

Most standard construction contracts give employers the right to release project changes through negligence. It means the employers can simply omit the original contract; it does not have to go through the dispute of terminating the contract. Omission is a non-confrontational method. If employer don't want to get into the dilemma on terminating the contract, the employer will choose this method to solve the issues. Usually, the termination of the contract for convenience or negligence will cause disputes between the employer and the contractor. Many employers hope to avoid this situation by omitting all or part of the work. Most of

construction contracts maintain the main characteristics of the contract form, but there are also many subtle changes.

These changes often destroy the balance of risk distribution between the two parties. In Malaysia, many contracts appear to be drafted in unilateral languages that favor employers. In this regard, such unilateral contracts are usually not suitable for the private sector, so contractors will be very careful when signing such agreements. However, most construction contracts include variation clauses. Without such clauses and regulations, neither the employer nor the contractor has a legal right to deviate from the agreed scope of work. If there is no change to the terms, the contractor cannot be forced to perform other work, as an example, the employer cannot omit any work that has been agreed without breaking the contract.

Variation clauses introduce much-needed flexibility into some rigid rules that would otherwise restrict the parties' obligations under construction contracts. In other words, if there is no change clause, the law requires the parties to work on the work in the way they agree, and any change to the scope of the work should be agreed upon in writing by the parties in accordance with the amendment. The change clause gives the employer the right to unilaterally modify the scope of the project without having to modify the contract itself. When reviewing omission clauses, the following standard contract format stipulates:

(i) **CIDB (2000)**

Clause 18.1 - Employer's Right to Employ Other Contractors

- (a) The Employer reserves the right to employ any person or contractor to carry out on the Site work which does not form part of the Contract, whether information in respect of such work is provided in the Contract. Every person or contractor so employed shall be deemed to be a person or contractor for whom the Employer is responsible for and not to be a sub-contractor.

(b) The Contractor shall permit the execution of any work by such person or contractor employed by the Employer.”

(ii) **PAM (2006)**

Clause 25 – Default by the Contractor

“Sub clause 25.4 –Right and duties of the Employer & Contractor:”

The Contractor shall vacate the site and return possession of the site to the Employer who may employ and pay other person to carry out and complete the works and make good any defects..... “

(iii) **PWD FORM 203A**

Clause 51 – Events and Consequences of Defaults by the Contractor

“Sub-clause 51.1(c)(ii)(C)”

The Government may carry out and complete the Works departmentally or employ and pay a contractor; or other persons to carry out and complete the Works and he or they may enter upon the Works and use all temporary. Buildings, plant, tools, equipment, goods, and materials intended for, delivered to and placed-on or adjacent to the Works, and may purchase all materials and goods necessary for the carrying out and completion of the Works.

(iv) **AIAC (2019)**

Clause 16 – Partial Possession by Employer

16.1(a) At any time before the issuance of the Certificate of Practical Completion of the Works in accordance with Clause 15.0, the Contractor may give consent to the Employer taking possession of any part or parts of the Works or a Section (any such part shall hereinafter be referred to as “the Relevant Part”) that is determined by the CA to be practically completed according to the requirements of the Contract.

(v) **PETRONAS (2016)**

Article 27 – Suspension Steps in Rights

“Without Prejudice to OWNERS other rights or remedies under the contract, owner may under the contract at its discretion by giving written notice suspend the performance of all or any portion of the package works. Package contractor shall continue package works to which suspension does not apply.”

1.2 Problem Statement

Project omissions, sometimes referred to as negative changes, involve the removal part of the project scope or removal all the project scope awarded. In Hong Kong's *Ipson Renovation Limited v. Connie Towers* [2016] HKCFI 2117, the employer tried to remove certain items from the contractor's entire project scope (reducing the contract amount by approximately 13%). The project involves the structural, fire protection and sanitation performance of the existing residential towers. The works that the employer tried to omit include important aspects of these works. The employer also refused to pay the contractor for the missing works. The change clause in the contract focuses on the employer's right to instruct the addition, change, or change of the work required to complete the restoration and maintenance project, and includes the right to omit the project. In addition, the Hong Kong court held that:

- The use of clear contract language is required to give the employer the right to ignore the contractor's work items. Although it has the power to omit projects, the main question is whether the parties intend to exercise their power to omit projects that represent important aspects of the project in terms of construction.

- For this case, the court held that the contractual power to omit the work was not drafted in sufficiently broad terms so that the employer could ignore the main scope of the work in question.
- Without compensating the contractor in any way, the employer mistakenly omitted the project, combined with other factors (the employer also suspended the project), leading the court to conclude that the employer had rejected the contract.

For example; the engineer's omission change description must meet the basic requirements of a written or oral statement, and then need to be confirmed in writing; proper respect for the form, quality or quantity of the work or any part of the work; and, the engineer deems necessary or other appropriate methods . Whenever a project is ordered to be cancelled in accordance with the relevant terms, especially if the omitted project is substantive, the contractor will usually argue that if the project is carried out, they should be entitled to compensation for their due profits. In principle, if the omission to change the work is invalid, such as no written form, or unnecessary or inappropriate; then such invalid negligence can be interpreted as a breach of contract, causing the contractor not only to lose profits, but also to damage due to breach of contract Compensation. If the work is omitted and handed over to others, it can be clearly determined that it is a breach of contract and is not a valid change order.

Similarly, if the employer or other contractors perform the missing work, they can claim compensation for profits and losses, unless it can be proved that the contractor is technically or economically incapable of performing such missing work. However, in many scenarios of construction contracts, the employer often reserves the right to delete part of the scope, and another contractor will complete it according to a separate contract. In this case, because of this omission, the employer can be exempt from claiming compensation for profit or loss.

1.3 Research Questions

The following questions arises in inspiring the research problem:

- i. What are the issues that prevent the contractor from successfully claims loss and expense?

1.4 Objective of the Study

The purpose of this study was to identify the issues that prevented the contractor from successfully filing a claim for loss of profit due to omissions.

1.5 Scope of the Study

The scope of this research is limited to research based on case law and articles on issues related to disputes between the employer and the main contractor or between the main contractor and subcontractors, and these disputes are related to the issues on omissions of the scope of the main contractor original scope.

1.6 Significance of the Study

The significance of this research is to gain insights into the current situation of contract omissions in the Malaysian construction industry and to provide the latest information on legal issues related to scoping. The research can help the parties to a construction contract have a more complete understanding of the exact situation that is happening in the industry. In addition, the results of the study can be used as a guide for both parties to avoid any breach of contract when they encounter any related problems.

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