



**Construction Claims and ADR
Conference
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**Conditions Precedent
in EOT Clauses**

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Conditions Precedent - What is it?

Requirements that must be met before contractor's contractual right for EOT is exercisable. E.g.,

(1) providing notice of delay within a specified timeframe.

(2) demonstrating that the delay was caused by a relevant event as defined in the contract.

(3) showing that the delay has impacted the critical path of the project.

Are they all the same?

- Different CPs in different contracts.
- Standard form contract v bespoke.
- Substance over form.
- Term "condition precedent" need not be used in the clause.
- Test: Is it clear contractor loses right to EOT if condition is not fulfilled?

- *Sunissa Sdn Bhd v Kerajaan Malaysia & Anor [2020] MLJU 283* - directory or mandatory tone.

- *Jabatan Kerja Raya Malaysia & Anor v Sunissa Sdn Bhd [2022] 8 CLJ 901* - cl. 44.1 JKR - consequences of non-compliance clearly spelt out in clause.



Non-compliance with Condition Precedent

- No EOT
- *KL Eco City Sdn Bhd v Tuck Sin Engineering & Construction Sdn Bhd & Anor [2020]*
- Contractor failed to comply with 28-day requirement for notice of intention to claim EOT.
- Fatal non-compliance.
- Even though Architect awarded 2 EOTs prior, Architect has no authority to waive contractual rights of Employer on the CP.
- Thus, the EOTs awarded are not binding. Employer may accept or ratify if they wish. Here, Employer has accepted by conduct.

- Construction of link bridge between Megamall and KL Eco City

PAM 2006, cl.23.1(a)

23.1(a) the Contractor shall give written notice to the Architect his intention to claim for such extension of time together with an initial estimate of the extension of time he may require supported with all particulars of the cause of delay. Such notice must be given within twenty eight (28) Days from the date of the AI, CAI or the commencement of the Relevant Event, whichever is earlier. The giving of such written notice shall be a condition precedent to an entitlement of extension of time; and

23.1(b) - within 28 days at the end of the cause of delay, the Contractor shall send to the Architect his final claim for extension of time duly supported with all particulars to enable the Architect to assess any extension of time to be granted. If the Contractor fails to submit such particulars within the stated time (or within such longer period as may be agreed in writing by the Architect), it shall be deemed that the Contractor has assessed that such Relevant Event will not delay the completion of the Works beyond the Completion Date.



Seremban-Gemas Double Track project

PWD DB (Rev 2007), cl. 49.1

Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice to the officer named in **Appendix 1 as to the causes of delay and relevant information with supporting documents enabling the said officer to form an opinion as to the cause and the length of delay**. If in the opinion of the said officer the completion of the Works is likely to be delayed or has been delayed beyond the Date for Completion stated in Appendix 1 or beyond any extended Date for Completion previously fixed under this clause ... (the 10 limbs of delaying events are then set out)

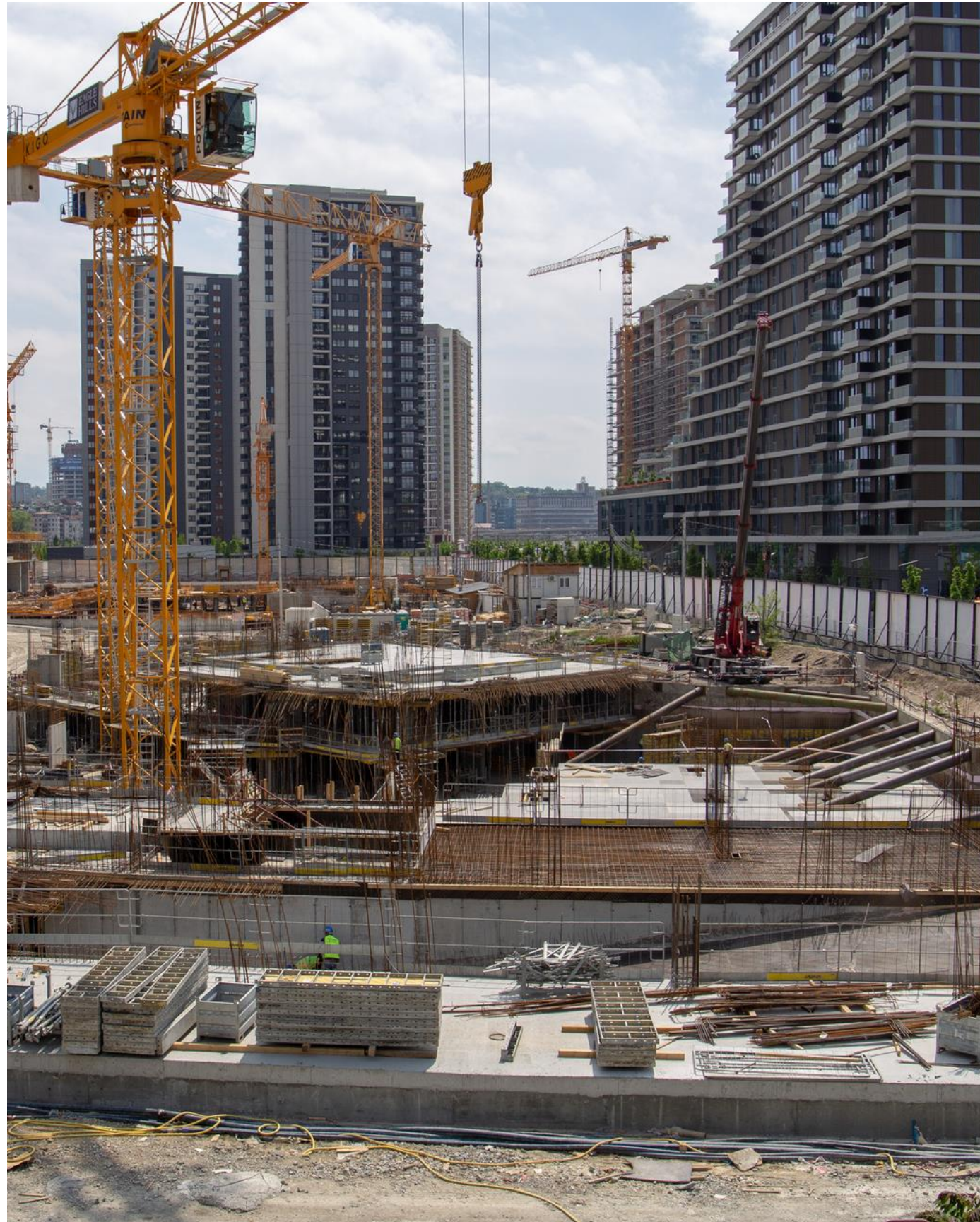
... then the officer named in Appendix 1 may, **if he is of the opinion that an extension of time should be granted, so soon as he is able to estimate the length of the delay beyond the date or time aforesaid issue a Certificate of Delay and Extension of Time giving a fair and reasonable extension of time for completion of the Works.**

- *PSI Incontrol Sdn Bhd v Ircon International Ltd [2022] 5 CLJ 360 (CA)*
- Project Director had granted 606 days EOT.
- CA overruled HC decision to invalidate EOT for non-fulfilment of EOT CPs.
- By granting EOT, Project Director deemed satisfied that EOT CPs in cl 49.1 were fulfilled.
- No room for blanket refusal of loss and expense. Entitlement to L&E follows entitlement provisions in contract, i.e., no L&E only if EOT had been granted under cl. 49.1(b), (d), (e), (h) or (i).
- Unclear if KL Eco City (HC) was cited to Court.
- c/f Waiver by contract administrator in *KL Eco City v waiver by contracting party in PSI*.



Can Compliance with Condition Precedent be waived?

- Only by contracting party, i.e., Employer, not Contract Administrator.
- If contracting party is the one who administers the contract and grants EOT, possible to raise waiver of compliance with CP.
- However, if the contract is administered by an agent, e.g., Project Architect, agent is not in a position to waive compliance with CP.
- Even if agent contract administrator has granted EOT, the EOT is invalid (unless ratified by Employer).



For Contractors

- What can be done?

- Be vigilant and comply with CP clauses.
- As easy as it sounds, non-compliance with CP is quite a regular occurrence.
 - Tiered notice requirements (fulfil one & not the other or fail to fulfil both)
 - What needs to be included in EOT submission
- Non-compliance with CP usually due to erroneous assumptions. Do not assume all contracts work the same! Even standard form contracts can be amended. No 2 contracts are the same.
- Establish protocols to deal with EOT applications for particular projects.
- Ensure site team is well-coordinated.



For Employers

- If contract is self-administered, check whether CP have been fulfilled first, before considering EOT proper.
- If administered by agent, Employer still has a right to challenge EOT (if granted) if there is non-compliance with CP.
- If the situation above occurs, best to record objection at the earliest opportunity.

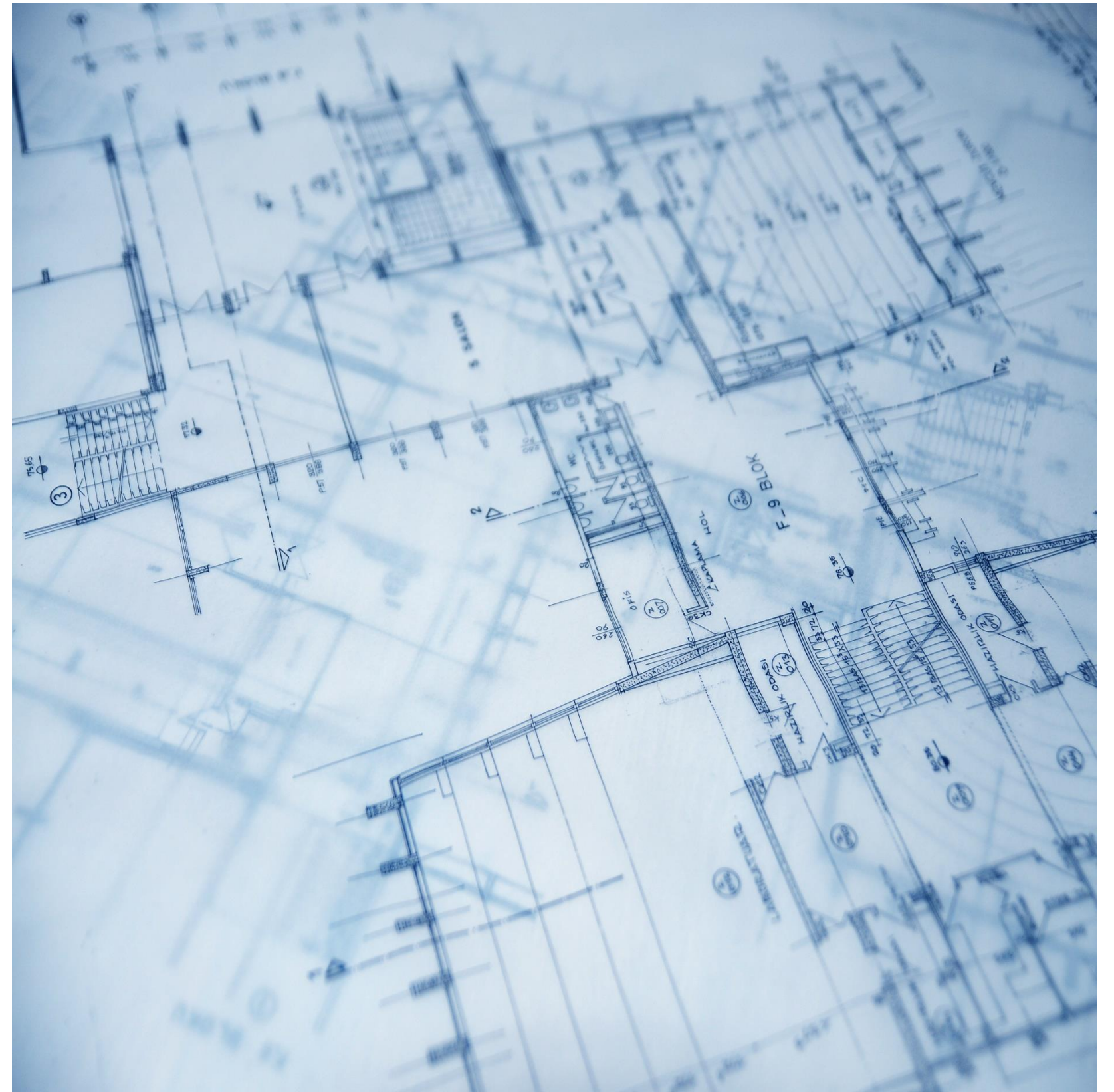


For Contract Administrators

- Ensure to go through provisions of the Contract and understand what is required to be done and how it is to be done.
- Failure to administer the contract properly may expose one to liability – negligence.
- Role as administrator cannot be taken lightly.

For Contract Administrators

- All parties involved must take extra caution & care.
- Onset of EOT issues can happen even at the start of the project itself e.g. site possession issues.
- if not dealt with properly, ramifications not limited to just EOT but loss and expense as well.
- Great impact on connected issues such as validity of termination (if grounded on delay).



Thank you

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