



CONSTRUCTION DISPUTE RESOLUTION: EVIDENCE ESSENTIALS FOR VARIATIONS

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Common areas arising from construction dispute resolution

- Extension of time;
- Variation works;
- Defects;
- Termination of contract;
- Set-off and/or Deductions; and
- Etc.



Variations

Overview

1. What are variations?
 - a. Contractual
 - b. Extra-contractual
2. Valuation of variations
3. Omissions

What are variations?

PAM Contract 2018 (With Quantities)

	11.0	Variations, Provisional And Prime Cost Sums
Definition of Variation	11.1	<p>The term “Variation” means the alteration or modification of the design, quality or quantity of the Works including:</p> <p>11.1(a) the addition, omission or substitution of any work;</p> <p>11.1(b) the alteration of the kind or standard of any materials and goods to be used in the Works;</p> <p>11.1(c) the removal from the Site of any work executed or materials and goods brought thereon by the Contractor for the purposes of the Works other than work, materials and goods which are not in accordance with the Contract; and</p> <p>11.1(d) any changes to the provisions in the Contract with regards to:</p> <p>11.1(d)(i) any limitation of working hours;</p> <p>11.1(d)(ii) working space;</p> <p>11.1(d)(iii) access to or utilisation of any specific part of the Site; and</p> <p>11.1(d)(iv) the execution and completion of the work in any specific order,</p> <p>but shall exclude any changes intended to rectify any negligence, omission, default and/or breach of contract by the Contractor and such changes shall be executed by the Contractor entirely at his own cost.</p>

What are variations?

PWD Form DB (Rev. 2007)

23.0 VARIATIONS

23.1 The term 'variation' means a change in the Government's Requirements which makes necessary the alteration or modification of the design, quality or quantity of the Works as described by or referred to therein and affects the Contract Sum, including:

- (a) the addition, omission or substitution of any work,
- (b) the alteration of the kind or standard of any of the materials, goods to be used in the Works; and
- (c) the removal from the Site of any work executed or materials or goods brought thereon by the Contractor for the purposes of the Works other than work, materials or goods which are not in accordance with this Contract.

What are variations?

IEM Form of Contract, 3rd Edition 2017

51.2 What Can be Variations

- (1) A Variation which must be incidental and relating to the Works can be in any of the following manner or form or a combination of them:
 - (a) an increase or decrease in the quantity of the Works or any part of it;
 - (b) an omission of any part of the Works;
 - (c) a change in the character or quality of any part of the Works;
 - (d) a change in the Drawings;
 - (e) any required demolition or removal of any part of the Works as a consequence of a change in the Drawing; and
 - (f) a change in any specified sequence or timing of construction of any part of the Works.
- (2) An instruction which is issued to cure, or which is necessitated by, a breach of the Contract by the Contractor cannot give rise to any Variation.
- (3) There cannot be any Variation without a written instruction to that effect by the Engineer. A confirmation of verbal instruction under Clause 3.2 is a properly issued instruction within the meaning of this Clause.
- (4) The Engineer cannot by way of an instruction omitting any part of the Works and award the omitted works to any other person. The Contractor is entitled to claim for the loss of profit by reason of this omission.

What are variations?

CIDB Standard Form of Contract For Building Works (2022 Edition)

28 VARIATION

28.1 The term “Variation” means any change in the original Contract intention as deduced from the Contract Documents as a whole describing or defining the Works to be carried out and shall include but is not restricted to:

Definition of Variation

- (a) changes intended to alter the use to which the Works will be put;
- (b) an increase and/or decrease in the quantity of any part of the Works;
- (c) an addition to or omission from the Works (but not if the omitted work is to be carried out by the Employer or by another contractor);
- (d) a change in the character, quality and/or nature of any part of the Works, including the goods and materials;
- (e) a change in the levels, elevations, layout and dimensions of any part of the Works;
- (f) the demolition of or removal of any part of the Works, Equipment, materials or goods no longer desired by the Employer or the Superintending Officer;
- (g) a change in the Contractor’s Temporary Work and/or method of working and/or Construction Plant imposed by the Employer or the Superintending Officer;
- (h) any limitation of working hours, working space, access to or utilization of any specific part of the Site;
- (i) the execution and completion of the Work in any specific order;
- (j) the postponement of any part of the Works desired by the Employer;
- (k) a requirement to complete the Works or any part or section of the Works by a date earlier than the Time for Completion.

For the avoidance of doubt the term “Variation” shall include changes which may be intended to alter the use to which the Works will be put, but shall exclude any instruction which has arisen due to or is necessitated by or intended to cure any default of or breach of contract by the Contractor.

What are variations?

Variations or changes may be necessitated by different reasons: -

- change of design and methodology of executing the work
- financial issues faced by the employer
- errors and omissions in design
- discrepancies and conflicting information
- requirements provided in contract documents
- impact of new and additional government regulation
- substitution of materials due to unavailability
- difficulties arising from the supply chain, etc.

No provisions for variations?

If there is no provision for variations in the construction contract, the employer is not entitled as of right to direct variations and contractors cannot recover payments for variations. Parties who then intend to introduce changes to the contract may be able to do so by way of a separate agreement, orally or by conduct.

Common issues with variations

- Whether the work constitutes as a variation under the contract
- Disputes as to the applicable rate of a variation

What Constitutes a valid Variation?

11.2 The Architect may issue an AI ordering a Variation or sanctioning any Variation made by the Contractor. No Variation ordered by the Architect or subsequently sanctioned by him shall vitiate the Contract. Pending the valuation of the Variations, the Contractor shall carry out with due diligence and expedition all Variations so instructed.

Generally, variations under the PAM 2006 Contract are given in the form of an AI issued by the Architect.

Must meet procedural requirements as well.

Are variations instructed by the Employer or its other consultants or variations instructed during site meetings valid variations?

Q: Are variations instructed by the Employer or its other consultants or variations instructed during site meetings valid variations?



The answer is YES!!

In **Sykt Pembinaan Anggerik Sdn Bhd v Malaysia Airports Holdings Bhd [2022] 9 MLJ 391**, the Court held:

“[163] ...This court agrees with the plaintiff that where a variation is approved or instructed at a management meeting or site meeting chaired by the SO or the SO’s representative at the meeting or is approved or authorised by a letter or document of a consultant or a project staff delegated or authorised by the SO, it constituted sufficient authorisation of the variation work binding upon the defendant in the circumstances of this project.”

Oral Instructions

Are instructions to carry out variation works that are given orally valid?

(assuming the Contractor is able to prove the existence of such oral instruction)

To be discussed...

Oral Instructions

In the Court of Appeal case of **KSK Sawmill Sdn Bhd v FW Solutions Sdn Bhd [2020] 2 MLJ 423**, s.92(d) of the Evidence Act 1950 is referred to which states *“the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents”*.

Oral Instructions

In the Court of Appeal case of **KSK Sawmill Sdn Bhd v FW Solutions Sdn Bhd [2020] 2 MLJ 423**, the court held that “[19] *Here the nature of the MRA with respect to mining rights and profit sharing does not fall into the category of contract which is by law required to be in writing and as such there is nothing wrong for a party to the contract to adduce evidence of ‘the existence of any distinct subsequent oral agreement to modify the terms of the contract’*”

Valuation of Variation

11.6(a) where work is of a similar character to, is executed under similar conditions as, and does not significantly change the quantity of work as set out in the Contract Documents, the rates and prices in the Contract Documents shall determine the valuation;

Contract Rates

11.6(b) where work is of a similar character to work as set out in the Contract Documents but is not executed under similar conditions or is executed under similar conditions but there is a significant change in the quantity of work carried out, the rates and prices in the Contract Documents shall be the basis for determining the valuation which shall include a fair adjustment in the rates to take into account such difference;

Pro-Rated Rates

11.6(c) where work is not of a similar character to work as set out in the Contract Documents, the valuation shall be at fair market rates and prices determined by the Quantity Surveyor;

Market Value

Valuation of Variation

11.6(d) where work cannot be properly measured and valued in accordance with Clause 11.6(a), (b) or (c), the Contractor shall be allowed:

11.6(d)(i) the daywork rates in the Contract Documents; or

11.6(d)(ii) where there are no such daywork rates in the Contract Documents, at the actual cost to the Contractor of his materials, additional construction plant and scaffolding, transport and labour for the work concerned, plus fifteen (15) percent, which percentage shall include for the use of all tools, standing plant, standing scaffolding, supervision, overheads and profit.

In either case, vouchers specifying the time spent daily upon the work, the workers' names, materials, additional construction plant, scaffolding and transport used shall be signed by the Site Agent and verified by the Site Staff and shall be delivered to the Architect and Quantity Surveyor at weekly intervals with the final records delivered not later than fourteen (14) Days after the work has been completed;

11.6(e) the rates and prices in the Contract Documents shall determine the valuation of items omitted. If omissions substantially vary the conditions under which any remaining items of work are carried out, the prices of such remaining items shall be valued under Clause 11.6(a), (b) or (c); and

11.6(f) in respect of Provisional Quantity, the quantities stated in the Contract Documents shall be re-measured by the Quantity Surveyor based on the actual quantities executed. The rates and prices in the Contract Documents shall determine their valuations.

Daywork rates

Cost + P&A

The valuation of varied works

- Duty of valuation of varied works
- The stipulated timelines for valuation of variation
- Failure of contractor to provide further details
- Site measurement
- Content of the detailed particulars to be submitted
- Options available for the parties to reach agreement (or record disagreement).

Fee quotes by Contractors

Consider the following situation:

- Architect issues a Variation to the Contractor
- Contractor provided a fee quotation for carrying out the variation works
- Architect / Employer did not respond to the Contractor on the fee quote
- Contractor proceeded to carry out and completed the variation works
- Contractor now is claiming for the variation works based on its fee quotation
- Employer contends that the fee quotation was never agreed

Architect's Instructions

**No Variations
required by
Architect shall
vitiate Contract**

11.2

The Architect may issue an AI ordering a Variation or sanctioning any Variation made by the Contractor. No Variation ordered by the Architect or subsequently sanctioned by him shall vitiate the Contract. Pending the valuation of the Variations, the Contractor shall carry out with due diligence and expedition all Variations so instructed.

Definition of Architect's Instructions

AI

2.2

All instructions issued by the Architect shall be in writing expressly entitled "Architect's Instruction" ('AI'). All other forms of written instructions including drawings issued by the Architect shall be an AI:

2.2(a)

upon written confirmation from the Contractor entitled "Confirmation of Architect's Instruction" ('CAI'); or

2.2(b)

upon subsequent confirmation of the written instructions by the Architect with an AI.

Architect's Instructions

**No Variations
required by
Architect shall
vitate Contract**

11.2

The Architect may issue an AI ordering a Variation or sanctioning any Variation made by the Contractor. No Variation ordered by the Architect or subsequently sanctioned by him shall vitiate the Contract. Pending the valuation of the Variations, the Contractor shall carry out with due diligence and expedition all Variations so instructed.

Architect's Power to Issue Variations

Clause 11.2 seems to give the architect unfettered power to issue an architect's instruction ordering a variation.

There is a limit on the permissible extent of the variations that can be ordered in terms of extent and nature. Limits are circumscribed by the other provisions of the contract and also the applicable common law rules.

Contractually, unless the variation order falls within the ambit of clause 11, the contractor is entitled to refuse to perform such work.

Effect of Variation Orders

No Variations
required by
Architect shall
vitate Contract

11.2

The Architect may issue an AI ordering a Variation or sanctioning any Variation made by the Contractor. No Variation ordered by the Architect or subsequently sanctioned by him shall vitiate the Contract. Pending the valuation of the Variations, the Contractor shall carry out with due diligence and expedition all Variations so instructed.

Clause 11.2 separates the duty of compliance and the valuation of the variation.

So long as a variation is properly ordered the duty of compliance is on the contractor.

The contractor is obliged to accept the instruction and carry out the changes ordered expeditiously with due diligence.

Omissions

- Whilst power to order variation orders appear to be unfettered, not all variation orders are valid, especially omissions where works are omitted in order to give it to third party

The court in *Abbey Developments Limited v PP Brickwork Limited* held that it is a breach of contract if the employer omits the works and give to someone else:

“The justification for these decisions [certain overseas authorities which the judge had been discussing] is, in my judgment, to be found in fundamental principles. A contract for the execution of work confers on the contractor not only the duty to carry out the work but the corresponding right to be able to complete the work which it contracted to carry out. To take away or to vary the work is an intrusion into and an infringement of that right and is a breach of contract. (The work has to be defined sufficiently for there to be a right to execute it.) Hence, contracts contain provisions to enable the employer to vary the work in order to achieve lawfully what could be achieved without breaking the contract or by a separate further agreement with the contractor. By entering into a contract with a variations clause such further agreement is obviated as the contractor’s consent to changes in the work is in the primary contract. So such clauses enable an owner to remove work from the contractor just as they oblige the contractor to carry out additional work or to make alterations in the work, none of which could be achieved without the consent of the contractor.”

Omissions of All Works

The general principle was applied in *Carr v JA Berriman Pty Ltd* (1953) 27 ALJR 273 (cited by the Federal Court in *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308) which was followed in *Commissioner for Main Roads v Reed & Stuart Pty Ltd & Anor* (1974) 48 ALJR 461, where both Australian cases held that the omission of works clause in a construction contract could not permit the taking away of works from the contractor in the absence of bona fide omissions.

Omissions of All Works

In the Federal Court case of *Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd* [2013] 2 MLJ 620, it is held that

“It is our considered view that the words ‘to omit wholly or in part of the works’ in cl 19 cannot be equated to mean ‘to omit wholly the Sub Contract Works’. This would appear to be the correct interpretation if we were to look at the second sentence of cl 19 which states that the value of the omitted works is to be deducted from the subcontract sum. This deduction can only apply if the omission is for part of the subcontract works, otherwise the whole of the subcontract sum would be deducted against itself, which in our view is absurd.”

Extra-contractual variations?

Contracts Act 1950, s.71 reads as follows: “Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered”

Question & Answer Session

The End