

DETERMINATION OF OWN EMPLOYMENT BY CONTRACTOR -
IMPLICATION ON THE PERFORMANCE BOND

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A project report submitted in partial fulfillment of the
requirements for the award of the degree of
Master of Science in Construction Contract Management.

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NOVEMBER 2009

ABSTRACT

Determination of a contract occurs when a valid and enforceable contract is brought to an end prematurely. The common method of termination of construction contracts is by application of the determination provisions of contract. Where there are no contractual provisions for determination the innocent party may rely wholly on his common law rights. Generally under the common law, any parties may determine the contract if the breach is a breach of conditions. It is normal when a contractor breaches a contract, the employer will determine the contractor's employment and will call on the performance bond. Performance bonds are traditionally categorized as being of two types. The first type of bond is the conditional bond which is conditioned upon a particular event or events. The second type is the unconditional or on demand bond, which is payable on demand, of whatever additional evidence the bond itself may specify. If a contractor determines his own employment and the employer challenges it and does not accept the determination and instead determines the contractor's employment, what rights do contractors have to restrain the employer from calling and receiving the performance bond? In fact, the contractor cannot restrain the employer from calling on the performance bond if the employer has fulfilled the conditions on calling on the bond. The contractor however may be able to restrain the employer from calling on the performance bond by giving notice to the employer to resolve their dispute by arbitration. This is based on precedent case where the court held the disputes be resolved at the trial or arbitration before deciding on performance bond. Therefore to avoid this matter, it is better for the contractor to complete the works and then can claim back the bond.

ABSTRAK

Penamatan kontrak terjadi bila kontrak yang sah diberhentikan . Cara yang biasa digunakan untuk penamatan kontrak pembinaan adalah melalui peruntukkan yang terdapat didalam kontrak tersebut. Sekiranya tiada terdapat peruntukkan untuk penamatan, pihak yang terlibat bolehlah merujuk kepada peruntukkan ‘common law’. Biasanya dibawah peruntukkan ‘common law’ sesiapa sahaja yang mengikat kontrak adalah dibenarkan untuk menamatkan kontrak sekiranya melakukan perlanggaran terhadap kontrak. Adalah perkara biasa sekiranya pihak kontraktor melanggar kontrak, pihak pelanggan akan mengambil langkah dengan menamatkan kontrak dan akan menuntut bon pelaksanaan. Bon pelaksanaan terbahagi kepada dua, iaitu ‘bon bersyarat’ dan ‘bon atas permintaan’. Sekiranya pihak kontraktor menamatkan kontrak dan pelanggan tidak menerima penamatan tersebut, sebaliknya pihak pelanggan menamatkan kontrak, apakah hak bagi pihak kontrak untuk menghalang pihak pelanggan daripada menuntut bon pelaksanaan tersebut? Adalah jelas pihak kontraktor tidak berhak untuk menghalang pihak pelanggan daripada menuntut bon pelaksanaan sekiranya pihak pelanggan telah memenuhi syarat yang ditetapkan dalam menuntut bon tersebut. Pihak kontraktor mungkin boleh menghalang pihak pelanggan daripada menuntut bon pelaksanaan dengan memberi notis menuntut supaya perselisihan antara mereka dikemukakan ke timbangtara untuk keputusan berdasarkan kepada kes mahkamah yang terdahulu yang mahu perselisihan diputuskan dahulu sebelum memberi keputusan berhubung dengan tuntutan bon pelaksanaan. Oleh itu untuk mengelakkan perkara ini, adalah lebih baik bagi pihak kontraktor untuk menyiapkan kerja-kerja kontrak dan selepas itu menuntut balik bon tersebut.