

SUSPENSION OF WORKS AS REMEDY FOR NON-PAYMENT

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ABSTRACT

Construction industry is vital for the nation's growth and will only continue to function with the basis of payment by the employer. However this industry has been plagued by the non-payment scenario, and directly affecting contractor's cashflow. In properly securing payment and remedying non-payment by the employer, contractor nevertheless can choose to suspend works. This right is a self-help remedy that can be an effective means of securing payment without the need to instigate other formal procedures and remedies which are time and money consuming. In Malaysia, this right has been introduced in CIDB 2000, and later in PAM 2006 for building works; while the other countries such as UK, New Zealand, Australia, Isle of Man, and Singapore has incorporated this right in their building acts since a very long time. Despite of this convenience, studies have shown many contractors in Malaysia do not favour this right in remedying non-payment, and similiarly there is almost no case law (except one case in New Zealand) that illustrate contractor exercising this right. This research therefore has been done to explore what are the possible problems that the contractor may encounter and to what extent it may arise when exercise this right in relation to PAM 2006 and CIDB 2000. The result shows that the contractor's right in suspension of work can be challenged by the employer for several grounds such as the validity of notice to suspend works, validity of interim certificates and the right to set-off as grounds for non-payment. Secondly, without proper fulfillment such as mitigation of loss, prevention of delay, and submitting notices, contractor can be held to have lost his rights in these claims. Thirdly, contractor may face problems in suspending works downstream as there is lack of back-to back provisions in sub-contracts. This research will shed a light of what are the possible problems that the contractors may encounter under PAM 2006 and CIDB and forms a guideline for the contractors to suspend work optimistically.

ABSTRAK

Industri pembinaan adalah penting kepada pembangunan negara, dan kesinambungannya hanya akan berterusan berasaskan pembayaran daripada majikan yang mapan. Akan tetapi, industri ini telah dibelenggu dengan masalah ketidakbayaran dan mengganggu status kewangan pihak kontraktor. Penangguhan kerja dapat dipilih dan dilihat sebagai satu cara yang efektif dan alternatif kepada cara-cara yang lain yang hanya memakan masa dan wang dalam menangani ketidakbayaran. Di Malaysia, penangguhan kerja telah diperkenalkan di borang setara CIDB 2000, dan seterusnya di PAM 2006 untuk kerja-kerja bangunan. Negara-negara lain seperti UK, New Zealand, Australia, Isle of Man, and Singapore telah memperuntukkan penangguhan kerja sebagai satu hak untuk kontraktor dalam akta pembinaan. Walaupun demikian, kajian telah menunjukkan banyak kontraktor di Malaysia tidak memilih alternatif ini. Malah, sehingga hari ini hampir tidak ada satu kes mahkamah (kecuali satu kes di New Zealand sahaja) yang mampu memberi ilustrasi di mana kontraktor telah menggunakan alternatif ini terhadap ketidakbayaran majikan. Dengan itu, kajian telah dilakukan di sini untuk mencari potensi masalah-masalah yang akan dihadapi kontraktor apabila menggunakan hak penangguhan kerja di bawah borang setara PAM 2006 dan CIDB 2000. Daripada kajian ini, potensi masalah yang dihadapi meliputi cabaran daripada majikan dalam notis, sijil interim dan hak “set-off” sebagai satu alasan untuk ketidakbayaran. Malah, hak kontraktor dalam menuntut kerugian dan pemanjangan masa akan dipertikaikan sekiranya kontraktor tidak memitigasikan kerugian dan mengurangkan kelewatan dan memberi notis. Akhir sekali, kontraktor akan mengalami masalah untuk melaksanakan penangguhan kerja terhadap pihak bawahan disebabkan ketiadaan klausa di borang sub-kontrak. Kajian ini akan memberi petunjuk yang berguna kepada kontraktor supaya optimis untuk menanggung kerja di bawah PAM 2006 dan CIDB 2000.