

THE LEGAL ASPECT OF PROCUREMENT SYSTEM –
*DOCTRINE OF VARIATION ORDER WITH RESPECT TO DESIGN
AND BUILD PROCUREMENT SYSTEM*

MASIDAH BINTI ABDUL MAJID

A dissertation submitted in partial fulfillment of the
requirements for the award of the degree of
Master of Construction Contract Management

Faculty of Built Environment
Universiti Teknologi Malaysia

10 OCTOBER 2007

ABSTRACT

The current scenario in Malaysia perceived design and build as a procurement system that caused lots of mishap in the construction industry. This is due to the notorious Martrade Building, Middle Ring Road 2 project and also Navy Recruitment Training Center which had suffered major cost overruns and delays. Nevertheless, undoubtedly design and build is a procurement system that offers lots of benefits as compared to the traditional lump sum system. Apart from single point responsibility that a client may enjoy it is also a system that gives guaranteed in terms of cost and time completion. Despite all advantages that the system could offers, there are still some disadvantages on this system. The most apparent is the system works whereby it is not accommodative to change. This is due to the nature of the system, i.e. there is no comprehensive documents been prepared for reference; and the fact that the design was prepared by the contractor, it is tedious for the varied works to be evaluated. Other than that, it will affect the works programme and eventually it may leads to time and cost overruns. However, it is impossible for the clause on variation order to be omitted from a design and build contract. The clause on variation order is important due to the unpredictable nature of construction project. With the existence of variation order clause, it permits a client to impose changes in order to suit the current site condition or authorities' requirement. From the study which had been conducted, the legal issue on variation order pertaining to design and build procurement system had been identified. The issues were concerned on the problem of contracting parties to understand the definition and concept of variation order; issues on understanding the procedure to instruct variation order; issues on liability for a party to pay the other party; the liability of party to bear the burden of proof; and finally the valuation of variation works. Out of all these identified issues, the problem to understand the procedure to instruct variation order is the most common to all cases. Therefore, by conducting this research, the judgment made by the court on issues pertaining to variation order can be made as a reference to establish a guideline so that the same problem will not repeating in future project using design and build procurement system. The issues highlighted and the judgment delivered is hoped to become a lesson learned to improve the construction industry in Malaysia.

ABSTRAK

Senario masakini di Malaysia beranggapan bahawa sistem reka dan bina oleh kontraktor telah mengakibatkan kegagalan beberapa projek di dalam industri pembinaan kita. Kegagalan kontraktor menyiapkan projek-projek mega mengikut jadual dan kos bagi projek pembinaan Bangunan Martrade, Lingkaran Tengah Lebu Raya 2 dan Pusat Latihan Rekrut (Pularek) telah meletakkan satu persepsi bahawa sistem reka dan bina oleh kontraktor lebih membawa kecelakaan daripada kejayaan. Namun demikian, tidak dapat disangkal lagi, sistem reka dan bina sebenarnya lebih mendatangkan kebaikan jika dibandingkan dengan sistem perolehan tender secara tradisional. Selain kebaikan daripada segi satu pihak menanggung semua liabiliti, sistem ini juga memberi jaminan dari segi kos dan juga tarikh penyiapan projek. Sungguhpun begitu, tidak dikecualikan, sistem reka dan bina juga mempunyai kelemahannya tersendiri. Kelemahan yang paling ketara adalah sistem ini tidak mudah melakukan penyesuaian dengan perubahan. Ini disebabkan oleh sifat sistem ini sendiri dimana ia tidak didatangi dengan satu dokumen yang lengkap sebagai rujukan, ditambah dengan keadaan dimana proses rekabina dilakukan oleh kontraktor. Oleh yang demikian, proses untuk penilaian perubahan kerja akan menjadi rumit. Selain daripada itu, program kerja kontraktor akan terjejas dan klien tidak lagi akan menikmati kelebihan dari segi masa dan kos. Namun demikian, adalah sukar untuk menidakkan kewujudan klausa arahan perubahan kerja di dalam kontrak reka dan bina. Ini kerana klien akan bergantung kepada klausa ini jika keadaan tapak dan arahan daripada pihak berkuasa tempatan memerlukan perubahan kerja dibuat. Melalui kajian yang telah dijalankan, isu-isu perundangan yang timbul berkenaan perubahan kerja di dalam sistem reka dan bina telah dikenal pasti. Isu – isu tersebut melibatkan pemahaman tentang maksud perubahan kerja; prosedur mengeluarkan arahan perubahan kerja; isu liability bagi satu pihak untuk mengelukan bayaran bagi pihak yang lain; isu tentang pihak yang perlu menanggung beban bukti dan masalah penilain perubahan kerja. Antara semua isu, didapati isu tentang prosedur mengeluarkan arahan perubahan kerja merupakan isu utama yang paling kerap berulang dalam kes-kes yang dikaji. Dengan mengendalikan kajian ini, keputusan-keputusan yang dikeluarkan mahkamah dapat diteliti agar satu landasan dapat diwujudkan untuk mengelakkan masalah yang sama daripada berulang. Isu-isu yang diketengahkan diharap dapat menjadi panduan untuk kebaikan industri pembinaan dimasa hadapan terutama bagi projek-projek sistem reka dan bina.