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ENHANCING THE CONTRACTUAL PROVISION FOR SUSPENSION OF WORK IN MALAYSIA: A COMPARATIVE ANALYSIS WITH EMPHASIS ON A CASE STUDY OF GOVERNMENT CONTRACT FORM PWD203A

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Abstract

The government possesses the authority to halt or delay work on-site, either partially or entirely, through the suspension of works as outlined in Clause 50 of the Public Work Department's PWD203A contract form. However, the global outbreak of the COVID-19 pandemic has revealed the lack of attention towards the proper implementation of work suspension. This study proposes for the improvement of contractual procedures and provisions on the suspension of works of government projects. It addresses the issues pertaining to work suspension in construction projects, examines the existing contract provision in the contract forms, and suggests enhancements of government project contracts. Through a comparative analysis and case study approach focusing on PWD203A, this study identifies the need for establishing clear suspension of work activities, and a fair time restriction mechanism as crucial enhancements to be incorporated into contractual provisions of work suspension. Subsequently, an expert validation process validates the proposed enhancement of the contractual provisions. These findings offer stakeholders valuable insights into practical solutions for more effective management of work suspension of government projects.

Keywords: government, contract, suspension, enhancement, provision

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INTRODUCTION

The issue of work suspension has been much discussed due to the outbreak of the COVID-19 pandemic that hit the whole world. During that time, in Malaysia, many construction projects that did not fall within the definition of “critical work” had to be suspended due to the government issuance of the Movement Control Order (MCO). The pandemic was an unforeseen event that brought about various forms of losses to all parties involved in a project. Various perspectives are thoroughly considered when preparing and asserting claims to mitigate losses in accordance with the available contract clauses. Therefore, it is imperative that the provisions and procedures for work suspension outlined in the contract are thorough and comprehensive to effectively address the given circumstances.

Typically, issues regarding the suspension of construction work are addressed either by granting an extension of time, and/or terminating the contractor's work. However, the efficacy of these measures in resolving such problems is questionable. For instance, with numerous construction projects halted during the MCO period, the implications on the contract itself become significant. Several authors have argued that contractors may seek for the extension of time (EOT) to complete the work, but may not be eligible to claim for the loss and expenses (L&E) incurred during this period (Lee, 2020; Naveen Sri Kanth, 2020). Generally, contractors have the right to seek for the compensation of any losses and expenses resulting from project delays if they are not attributable to the contractors' own fault. Nevertheless, the contractors' entitlement for the EOT and/or L&E claim is contingent upon the terms of the contract agreed upon by the parties. Standard forms of the contracts typically specify the rights, obligations, and remedies of each party concerning the suspension and termination of work under specific circumstances (Surahyo, 2018).

The Malaysian Public Works Department standard form of contract to be used where the bills of quantities form part of the contract or commonly known as PWD203A (Rev.1/2010) or in short PWD203A, include the provisions for the suspension of work. The suspension of work is a prerogative of the government, as stipulated in Clause 50 of the PWD203A form. This clause grants the authority to the government to instruct for the suspension of work, either entirely or partially. Nevertheless, the contract frequently lacks clarity regarding the specific circumstances that would trigger for the suspension of work under this clause. Hence, it is crucial to exercise caution when contemplating the suspension of contractors' on-site work. Francisco (2016) emphasized that inadequate administration increases the risk of incurring additional expenses and budgetary increase. This risk is attributed to factors such as the potential of damage to assets in projects of industrial nature, which often constitute a significant portion of the

overall cost, as well as the absence of adequate planning and control during the suspension, resulting in the loss of time and/or financial resources.

Considerations when deciding to suspend work of a project include extending insurance, maintaining bond performance, potential price increase of goods, addressing current client needs, assessing contractors' ability to resume work, ensuring safety of construction site assets, and estimating costs for taking care of the completed work on-site. It is important to note that in contracts allowing for work suspension, the contractors cannot unilaterally terminate the contract upon receiving suspension instructions; they must continue work upon project reinstatement (Wittbrodt & Eaton, 2009). Clause 50 of the PWD203A form empowers the Superintending Officer (S.O.) to instruct for work suspension at any time. Additionally, under Clause 43.1(c) of the same form, the S.O. can grant an Extension of Time (EOT) due to work suspension. However, failure to issue an EOT as per this clause may result in the contract being considered 'time at large'.

Thus, neglecting the proper procedure for suspending work in government projects can result in significant losses for the government in terms of energy, cost, and time. Any delay, suspension, or termination of the contractors' employment is likely to lead to additional expenses. Establishing a clear framework is thus essential to provide certainty regarding the rights and obligations of the contracting parties regarding work suspension instructions. For instance, the COVID-19 pandemic has ignited debates regarding its possibility to qualify as a force majeure event under the existing construction contract. The enforcement of the Movement Control Order (MCO) by the Malaysian government, which mandated for the immediate suspension of all construction activities to curb the spread of COVID-19 infection, has resulted in considerable uncertainty on this issue. Hence, this study proposes for the improvement of the contractual procedures and provisions concerning the suspension of work, particularly in government projects.

LESSONS LEARNT FROM COVID-19

During the COVID-19 outbreak, many construction projects have been instructed to temporarily suspend work due to different reasons, ranging from government orders, COVID-19 preventive measures, and economic issues. It is therefore essential to examine the contract provisions related to the term "pandemic", "epidemic", "endemic" and "force majeure" to ascertain the applicable clauses and subsequent actions due to the suspension of work.

Pandemic, epidemic, and endemic

To achieve this, reference is made to standard forms of contract, such as PWD203A, PAM2018 (a contract form published by the Malaysian Institute of

Architects (*Pertubuhan Akitek Malaysia*), CIDB2000 (a contract form published by the Construction Industry Development Board of Malaysia), and FIDIC Red Book 2017, which shall be subsequently referred to as FIDIC RB2017 in this paper (a contract form published by the International Federation of Consulting Engineers). According to the World Health Organization (2010), a pandemic refers to the global outbreak of a new epidemic, characterized by the widespread occurrence of an infectious disease affecting a significant portion of the population. The declaration of COVID-19 as a pandemic by the World Health Organization (WHO) was made when the disease exhibited critical severity and rapid spread across a wide geographical area. Unlike seasonal epidemics such as influenza, pandemics involve a broader scope and impact. Robinson (2020) defines a pandemic as a contagious disease or illness that manifests unexpectedly in large numbers, spreads rapidly beyond anticipated levels, and traverses multiple countries or continents, resulting in significant fatalities. Thus, a pandemic can be understood as an exceptionally severe and widespread form of epidemic that extends globally. Initially, none of the standard forms of contract included the provisions that specifically address the pandemic. Nevertheless, the pandemic has recently been incorporated as a force majeure event under Clause 58 of PWD203A. This underscores the recognition of the pandemic as a significant event necessitating for contract amendments to address its impact on the contract. The amendment to the contract conditions was made through KPKR Instruction Letter No. 26/2021 on 30 September 2021, which now stipulates the following:

58.0 EFFECT OF FORCE MAJEURE

58.1 Events of Force Majeure

Neither the Government nor the Contractor shall be in breach of its obligations under this Contract if it is unable to perform or fulfil any of its obligations under this Contract (or any part of them) as a result of the occurrence of an Event of Force Majeure. An event of “force majeure” shall mean an event, not within the control of the Party affected, which that party is unable to prevent, avoid or remove and shall mean –

(a)....

(f) pandemic or epidemic; or

(g).....

On the other hand, an epidemic is defined as an infection that occurs more frequently and spreads more rapidly than usual, leading to an unexpected surge in the number of cases within a specific community or region where it is not typically prevalent (World Health Organization, 2019; Porta, 2014). Unlike a pandemic, an epidemic occurs when a disease rapidly spreads within a community or region, whereas a pandemic occurs when an epidemic spreads

across continents or globally, affecting a significantly larger population. Presently, the PWD203A, PAM2018, and FIDIC RB2017 forms include provisions for epidemics. For instance, Clause 77 of PWD203A includes provisions for epidemics and medical attendance, requiring the contractors to maintain site cleanliness and adhere to all regulations, orders, and requirements issued by the government or local medical or health authorities to address any outbreak of the epidemic. The requirements of this clause align with the implementation of the SOPs for construction projects in response to the COVID-19 outbreak.

In contrast, an endemic refers to the persistent occurrence of a disease over time, typically confined to a specific geographical area or population, with a predictable rate of spread (Porta, 2014; Cambridge Dictionary, 2021; Columbia University Mailman School of Public Health, 2021). It has been observed that epidemics can transition into the endemic state when a community develops immunity to the disease through either vaccination or prior infection (Medley & Vassall, 2017). Additionally, while an endemic does not necessarily indicate a mild outbreak, it does imply that the disease is less severe and results in fewer cases of infection. Many experts speculate that COVID-19 may never be completely eradicated, but could potentially transition from a "pandemic" to an "endemic" phase.

Presently, none of the established standard contract forms have included a specific provision in addressing endemics. However, the inclusion of such provision should be considered due to the potential risk of a resurgence in COVID-19 cases in the event of the emergence of new variants of the virus, despite current preventive measures such as vaccination, booster shots, and continued use of face masks. This consideration is particularly crucial if the execution of a project is hindered by a significant number of project workers testing positive for COVID-19. Numerous studies on the ramifications of sudden outbreaks have underscored the importance of taking requisite precautions during the planning phase of a construction project to mitigate against worst-case scenarios (Gamil & Alhagar, 2020; Muniandy & Mydin, 2022; Hatoum et al., 2021; Ogunnusi et al, 2021)

Force Majeure

The definition and extent of force majeure vary globally as different legal systems and jurisdictions employ diverse approaches in determining its occurrence (Augenblick & Rousseau, 2012). Generally, force majeure is understood as an unforeseen event or circumstance beyond the control of the contract parties. This was exemplified in the case of *Magenta Resources (S) Pte. Ltd. v China Resources (S) Pte. Ltd.* [1996] 3 SLR 62, where Rajendran J. remarked:

What is referred to as force majeure in our law (as opposed to French law from which that term originates) is no more than a convenient way of referring to contractual terms that the parties have agreed upon to deal with situations that might arise, over which the parties have little or no control, that might impede or obstruct performance of the contract. There can therefore be no general rule as to what constitutes a situation of force majeure. Whether such a (force majeure) situation arises, and, where it does arise, the rights and obligations that follow, would all depend on what the parties, in their contract, have provided for.

Under a force majeure clause, one or both parties in the contract may be excused from fulfilling their obligations. The specific entitlements under force majeure are determined by the contract provision for such events, as outlined in the agreed-upon standard form of contract, which may include requirements such as providing written notice of the event to the S.O. Typically, the contractor is granted an extension of time, but is not eligible to claim for the compensation of expenses incurred due to the force majeure event. A prerequisite for invoking a force majeure provision is that the contractor has taken all necessary measures to prevent and mitigate the effects of the force majeure situation.

The contractor must demonstrate that the performance of the contract has become physically or legally impossible due to the force majeure event (Moore, 2020). According to Clause 43.1(a) of the PWD203A form, the contractor is eligible to seek for an extension of time if the delay is attributable to a force majeure event. However, Clause 43.1(a) does not encompass the provision for claiming loss and expenses under Clause 44.1. The definition of a force majeure event in PWD203A was recently refined through KPKR Instruction Letter No. 26/2021 dated 30 September 2021, as specified in Clause 58.1, which explicitly includes the pandemics and MCO within its scope. Nevertheless, the contractors' ability to claim under various circumstances warrants consideration. In cases where there is written instruction from the S.O. to suspend or halt all work during the MCO, contractors may be entitled to claim for loss and expenses under Clauses 43.1(c) & (e), Clause 44.2, and Clause 50.

In the PAM2018 form, while Clause 23.8(a) does not explicitly define force majeure, Article 7(ad) offers the definition of a force majeure event as, "Any circumstances beyond the Contractor's control caused by terrorist acts, governmental/regulatory action, epidemics, and natural disasters". Therefore, the pandemic and MCO are likely to be classified as force majeure events under the PAM2018 contract. Just like in the PWD203A form, Clause 23.8(a) of the PAM2018 form allows the contractors to request for an extension of time, but it does not encompass claims for the loss of expenses. Additionally, the entitlement to claim for loss and expenses arises when there is a written instruction to suspend or stop work.

In the CIDB2000 form, force majeure is mentioned under Clause 24.1 that allows the contractors to claim for an extension of time due to a force majeure event. However, similar to the other standard form of contracts discussed earlier, contractors are not entitled to claim for the loss of expenses. Unlike PAM2018, CIDB2000 form does not define the scope of a force majeure event. While in FIDIC RB2017 form, a force majeure event could be addressed under Clause 18 as within the scope of exceptional events. Clause 18 defines exceptional events as an event or circumstance that:

- (i) is beyond a Party's control;
- (ii) the Party could not reasonably have provided against before entering into the Contract;
- (iii) having arisen, such Party could not reasonably have avoided or overcome; and
- (iv) is not substantially attributable to the other Party.

Hence, under the FIDIC RB2017 form, the pandemic and MCO may possibly fit as an exceptional event although they are not part of the examples listed under Clause 18.1. Nevertheless, the contracting parties must determine the obligations that are affected by this exceptional event and issue a notice according to Clause 18.2. The contractors may only be entitled to an EOT for any consequent delay and/or claims for payment once the contract requirements for the exceptional event are met as per Clause 18.4.

METHODOLOGY

Case study research serves as a suitable method for elucidating phenomena or situations within the construction field (Yin, 1994, 2009; Fellow & Liu, 2008). Case study offers descriptive insights into specific topics and often yield rich information compared to other research designs. Moreover, document review proves to be a valuable technique for data collection in case study research, involving the examination of existing documents such as policies, reports, and written materials (Creswell & Poth, 1997). Chynoweth (2008) has advocated for the use of qualitative research, specifically through a case study approach, to complement legal research, particularly in the realm of interdisciplinary methodology. For this study, a case study is conducted focusing on the PWD203A standard form of contracts, with data collection carried out through document review to analyze contract provisions related to the suspension of work, current procedures, and legal precedents concerning work suspension, in comparison to other contract forms.

Subsequently, expert validation is conducted through focus group discussion sessions via in-depth interviews with experts in the field of

government agency, particularly those with more than 10 years of experience in contract administration (Saeb, 2018; Mohd-Danuri, 2015). The objective of the focus group discussion is to look into the suggestions, namely the proposed enhancement to the PWD203A contract form. Purposive or convenience sampling was employed for the focus group discussion as it enables the researcher to choose suitable participants for the research in obtaining vital data that might otherwise be unavailable (Maxwell, 1996).

RESULTS AND DISCUSSION

A standard contract form proves beneficial when it not only delineates the parties' responsibilities, but also offers clarity and certainty for the avoidance of disputes (Che Haron & Arazmi, 2020; Yan, et al., 2023; Mohd-Danuri et al., 2015). To improve the contractual procedures and provisions related to the suspension of work, this study seeks to identify the key issues through a thorough examination of the relevant provisions. Table 1 summarises the findings and illustrates the two (2) suggestions that emerged from the findings which necessitate the enhancement to the PWD 203A form, i.e., to identify the potential events that could lead to the suspension of work and to incorporate them into the suspension of work provision, and to provide a fair time restriction procedure for the suspension of work. The findings are specifically related to the provision of the suspension of work, and the prolonged suspension that is commonly available in the contract. This involves anticipating various circumstances or events that could arise during a project that might necessitate for the suspension of work. The provision should clearly outline the type of events or circumstances that could trigger a suspension, the responsibilities of each party (e.g., client, contractor, subcontractors), notification procedures, and any other relevant details. The goal is to ensure that all parties involved in the project understand their rights and obligations in the event of a suspension, and to establish a framework for managing such situations efficiently and fairly. Providing a fair time restriction procedure for the suspension of work involves establishing guidelines on the duration that the work can be suspended before it must resume or be terminated.

Table 1: Summary of Contract Provisions Related to Suspension

Key Provisions related to Work Suspension	PWD203A Clause 50.0 Clause 43.0 Clause 44.0 Clause 50.0	PAM2018 Clause 21.4 Clause 23.8 Clause 24.3 Clause 30.7 Clause 30.8	CIDB2000 Clause 17.3 Clause 19.0 Clause 24.0 Clause 32.0	FIDIC RB2017 Clause 8.9 Clause 8.10 Clause 8.11 Clause 8.12 Clause 16.1
Suspension of work	S.O. can instruct suspension	- Architect can instruct suspension - Contractor suspends his obligations under Clauses 30.7 and 30.8 - Suspension by order of the appropriate authority	- Suspension due to failure to give site possession - S.O. can instruct suspension - A list of relevant events that led to the suspension of work is provided under Clause 19.2	- Engineer can instruct suspension (employer's suspension) - A list of events that may have led to suspension by contractor under Clause 16.1
Extension of time	Contractor may be entitled for EOT	Contractor may be entitled for EOT	Contractor may be entitled for EOT	Contractor may be entitled for EOT
Loss & expenses	Only costs that arise from protecting and securing the work under Clause 50.1 (b), as well as any repairs under Clause 50.1 (d).	Only costs that arise in complying with suspension instructions.	Only costs that arise in complying with suspension instructions subject to Clauses 19.2 32 and 42.	Only costs that arise from protecting and securing the work under Clause 8.9, as well as any repairs under Clause 8.12.
Prolonged suspension	If suspension exceeds 12 months, mutual termination may be considered.	The contractor may determine his own employment if the work is suspended for a continuous period exceeding the period of delay in the appendix. If none is stated in the appendix, the period of delay is for a continuous period of three (3) months.	If it exceeds the suspension period specified in the appendix (3 months if none is stated), the contractor may determine his own employment, or, treat such suspended part as an omission.	If suspension exceeds 84 days, the contractor may issue a notice requesting permission to resume work. If the engineer does not give a notice for work to be resumed, the contractor may either:

Key Provisions related to Work Suspension	PWD203A Clause 50.0 Clause 43.0 Clause 44.0 Clause 50.0	PAM2018 Clause 21.4 Clause 23.8 Clause 24.3 Clause 30.7 Clause 30.8	CIDB2000 Clause 17.3 Clause 19.0 Clause 24.0 Clause 32.0	FIDIC RB2017 Clause 8.9 Clause 8.10 Clause 8.11 Clause 8.12 Clause 16.1
				1) agree to a further suspension, or 2) give a second notice to omit the affected part of the work, or to terminate if the suspension involves the whole project.
Findings	- Relevant events to trigger suspension are not provided. - Allowable prolonged suspension is considered too long, i.e., 12 months	- Relevant events to trigger suspension are provided. - Allowable prolonged suspension is considered as fair, i.e., 3 months	- Relevant events to trigger suspension are provided. - Allowable prolonged suspension is considered as fair, i.e., 3 months	- Relevant events to trigger suspension are provided. - Allowable prolonged suspension is considered as fair, i.e., 84 days

Expert Validation

Table 2 shows the details of the focus group participants. Expert validation seeks to further improve the research findings and enhance the provisions related to the suspension of work in the PWD203A contract form by analyzing the views and comments from the experts.

Table 2: Details of Focus Group Participants

Code	Designation	Department	Years of work experience	Number of Projects Involved	Experience with Suspension of Work
E1	Senior Quantity Surveyor	Contract	17	>100 projects	Yes
E2	Senior Quantity Surveyor	Project Team	20	>100 projects	Yes

Code	Designation	Department	Years of work experience	Number of Projects Involved	Experience with Suspension of Work
E3	Senior Quantity Surveyor	Contract	14	>100 projects	Yes
E4	Senior Quantity Surveyor	Project Team	17	>100 projects	Yes
E5	Senior Quantity Surveyor	Contract	18	>100 projects	Yes
E6	Senior Quantity Surveyor	Contract	21	>100 projects	Yes

Events of Suspension of Work

All experts concurred that revising and updating the current provision for work suspension within the PWD203A form is imperative to address complications arising from past experiences and lessons learnt. While there was varied feedback from the experts regarding the inclusion of a list of events for work suspension in the contract, it was unanimously agreed that the availability of a criteria serves as a valuable guideline for the government to predefine the events. The consensus among the experts was that having such a list would facilitate the identification of suspension events by the S.O., therefore enabling prompt and appropriate action. The primary concerns associated with work suspension also extend beyond mere extensions of time (EOT) and loss and expense (L&E) to include the possibility of mutual termination.

Recommendations put forth by the experts intersect with various clauses within the PWD203A form. For instance, Expert E5 emphasized that despite the presence of a predefined list, the S.O. retains the authority to identify and declare “any other events” warranting the suspension of work. The expert recommended that events leading to the suspension of work include circumstances related to national interest and technical issues, as directed by the S.O. Additionally, Expert E2 proposed replacing the term “special event” with “any other events” to mitigate potential misinterpretations. Among the contentious issues discussed by the experts were events related to force majeure and the government’s failure to provide site possession. The consensus achieved is that these events should not fall under the suspension clause, as the contractor should only be entitled to an EOT in such cases.

Prolonged Suspension

In general, the experts have unanimously advocated for the improvement of the clause concerning prolonged suspension in PWD203A. They emphasized the

necessity of establishing a specific time frame for work suspension and providing additional guidance in the case of prolonged suspension, considering the current 12-month period stated under Clause 50.2 is excessively lengthy. Expert E4 highlighted the importance of proactive involvement from both the government and the contractors to address issues leading to the prolonged suspension promptly. The consensus among the experts is that prolonged suspension leads to significant losses for both parties, necessitating a provision to mitigate these losses by compelling the contractual parties to take necessary action at the soonest possible, i.e., after 90 days of suspension. Expert E6 recommended enhancing the time limit for submitting comprehensive details of the L&E claims in the case of prolonged suspension. These details, together with the supporting documentation, should be submitted within 3 months after the project resumes to prevent administrative complications arising from the change in personnel. Overall, the proposed enhancements to the contractual procedures and provisions are outlined in Figure 1.

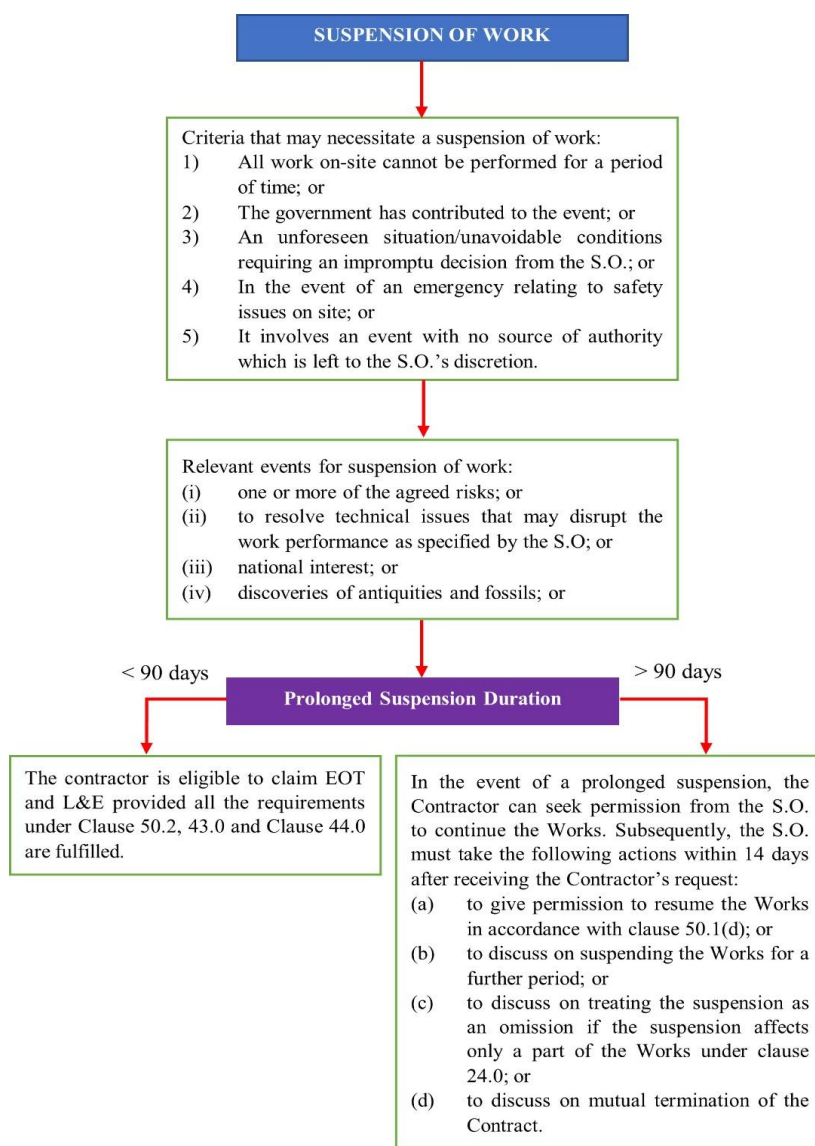


Figure 1: Proposed Enhancement of the Contractual Procedures and Provisions for the Suspension of Work

The findings from the expert validation consistently indicate that the process of identifying the potential events leading to the suspension of work and incorporating them into the suspension of work provision involves a thorough risk assessment process, clear documentation of procedures and responsibilities,

and the establishment of fair time restriction procedures to manage suspensions effectively within a project.

CONCLUSION

Enhancements to the contractual procedures and provisions governing work suspension in government projects were implemented to instil certainty regarding the instruction to suspend work. This issue stems from the absence of key elements of a robust construction contract, particularly in the standard form of contract provisions for work suspension. The main enhancements to the work suspension procedures in government projects focused on refining the process flow that determines whether work should be suspended, and outlining the actions for implementing prolonged work suspension. Despite various recommendations for further enhancements, the experts unanimously endorsed the proposed improvements as reliable and suitable for adoption in government projects. The proposed enhancement of the contractual provisions for work suspension established in this research also seeks to facilitate more effective work suspension management in government projects. Furthermore, future research on related provisions in the PWD203A form, specifically concerning EOT and L&E, holds potential benefits for government projects as a whole. Further research endeavours may encompass case studies examining the implementation of work suspension across various types of construction contract. Increased research efforts in this area have the potential to yield a more conclusive and comprehensive understanding of the challenges associated with work suspension in the construction industry.

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