

Seminar Perundangan
Jabatan Perdana Menteri
6 -7 December 2021

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GOVERNMENT CONTRACTS AND PROCUREMENT

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Objective



- Understanding Government's Contractual Documents.
- Application of Government's Contractual Documents.
- Understanding Government's procurement and approval process.
- Ensure Compliance to Government's Contractual Documents and approval process.
- A fair and reasonable price for a high quality on-time Scope of Work.



Government Contract Signatories

- Who can sign Government contracts?
 - JPM Circulars – 01/1984, 11/1984 & 06/2007
 - [MOD Circular + JPM Circular]
- Director?
- Permanent Secretary?



Public Officers' Responsibility

- Project manager must be familiar with essential activities in contract planning, tendering and contract administration.
- Sanctions are in place against errant or negligent Government / public officers who have not properly discharged their duties in accordance with the procedural, regulatory and legal framework of tendering.
- Public officers are subject to Financial Regulations



The Importance of Contract Management

- Money is involved
- Goods and Services are being procured
- Failure can result in:
 - lack of compliance
 - missed opportunities
 - broken relationships
 - costly arbitration





Procurement & Contract Process

- Tender
- Contract Drafting:
 - Pre or Post Tender
 - Negotiated Contract
- Contract Signing
- Contract Performance
- Contract Closure/Closeout



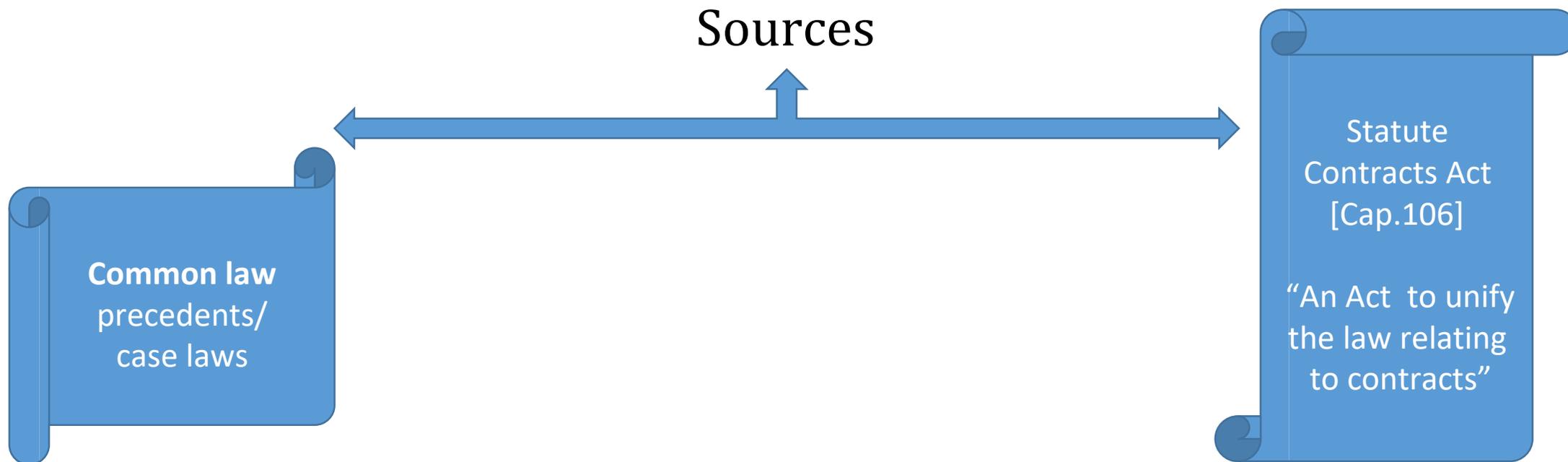
Tender / Invitation to Tender

4 sections:

- Section 1 – Instructions to Tenderer
- Section 2 – Specifications
- Section 3 – Requirements (Schedules to be used)
- Section 4 – Contract



Contract law in Brunei





Elements of Contract Formation

- Offer
 - &
 - Acceptance
 - Considerations
 - Intention to create legal relations
 - It is to note that a contract does not have to be formed in a single document (where X and Y sign on the same piece of paper)
- } Mutuality - x offers, Y accepts



Contract Format

1. Main Contract
 - Contains general agreed terms
 - Usually not changed

2. Schedules
 - Contain specific information
 - Project Specific



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The contract	Names and signatures of the parties to the contract
Definitions	Definition of names and terms, to avoid repetition of long sentences in the body of the contract.
General terms	<ul style="list-style-type: none">▪ General agreements clause▪ Changes, alterations and variations clause▪ Notice clause: how and by what method any notice relating to the contract is to be sent
Commercial provisions	Rights and obligations of the supplier and of the purchaser. Standard terms of purchase, for example, might include: <ul style="list-style-type: none">▪ Passing of title/ownership; time of performance; inspection/testing▪ Delivery/packing; assignment; liability for damage or loss in transit▪ Rejection; payment terms
Secondary commercial provisions	<ul style="list-style-type: none">• Confidentiality and intellectual property protection (where relevant)• Indemnity• Guarantee clause• Termination• Arbitration
Standard clauses	These may include: <ul style="list-style-type: none">• Waiver• Force majeure• Law and jurisdiction



Contractual Documents - examples

- Agreement for the Purchase of Goods & Services
- Master Supply & Services Agreement
- Consultancy Services Agreement
- Technical Services/ Maintenance Agreement
- Construction/ Building & Civil Work Agreement
- Non-Disclosure Agreement
- Tenancy Agreement



Contract Terms



- the Parties to the Contract
- Commencement date and Duration of the Contract.
- Type of Procurement (an outright purchase / leasing / hybrid)
- the Scope / Specifications of such services or goods.
- the Project Schedule
- the Payment Schedule
- Performance Bond or banker's guarantee (if any)



Contract Terms

- Liquidated Agreed Damages
- Acceptance Procedure
- Intellectual Property Rights
- Warranty
- Maintenance

Commencement	Duration	Response times	Down times
Severity Level	Resolution time	Compensation	Local/Foreign support

- Termination



Boilerplate Clauses

- Liability
- Waiver
- Confidentiality
- Severability
- Personnel
- Entire Contract
- Gifts
- Amendments and Variations
- Force Majeure
- Taxes and Duties
- Notices
- Assignment and Sub-contract
- Compliance with Law
- Collusion
- Conflict of Interest
- Indemnity
- Governing Law & Dispute Resolution



IDENTIFICATION OF RISKS

- A contract can PROTECT or EXPOSE you to RISK depending on how it is drafted.
- By identifying risks prior to drafting and preparing contracts, a party is able to address those risks and minimize their impact.



RISKS IN CONTRACT DRAFTING



UNCERTAINTY

- Contractual terms must be clear and complete. If not the contract is said to be 'void for uncertainty'
- If the terms are complete but their meaning is unclear, it is then difficult to establish what constitutes PERFORMANCE and BREACH.
- **TWO ASPECTS of UNCERTAINTY – LACK OF COMPLETENESS and LACK OF CLARITY**
- Section 30 , Contracts Act, Cap 106 – “Agreements, the meaning of which is not certain, or capable of being made certain, are void”.



AMBIGUITY

- Ambiguity in contracts leads to disputes about the intended meaning or interpretation of a clause/clauses.
- Accordingly, it is essential that ambiguity is managed effectively.
- E.g. adopt meaning which favours both parties.



TYPES OF RISKS IN CONTRACT

- Financial risks
- Operational and environmental risks
- Legal/contractual risks
- Privacy and information risks
- Litigation risks
- Sovereign risks



MANAGEMENT OF RISKS THROUGH CONTRACTUAL TERMS



What are the options?

- Good drafting practice
 - Avoid the risks in drafting
 - Address and Allocate the risks in contract



FINANCIAL CONTRIBUTION

- Parent Company Guarantee

This is provided by the contractor's immediate parent or other holding company and operate as a guarantee to ensure a contract is properly performed and completed.

- Performance Bond

It gives a party payment of up to a stated amount of money should they suffer a loss as a result of the contractor's breach of its obligations – MOFE Circular 1/2014.



Force Majeure

- **Examples of force majeure:**
 - Destruction of the subject matter
 - Personal incapacity
 - Where the contract becomes illegal to perform
 - Where a contract cannot be performed in the specified manner
 - Where the contract is deprived of its commercial purpose
- **No frustration where:**
 - **It is more difficult or expensive to perform**
 - **Impossibility of performance is the fault of either of the parties**
 - **Where there is a force majeure clause**
 - **Where the frustrating event could be foreseen**



Exclusion/ Limitation of liability

■ Exclusion

- Exclusion of liability anticipate breach of contract and then exclude all liability for that breach

■ Limitation of liability

- Limitation of liability clause **limits** liability for breach



Personal Injury / Death

No exclusion or limitation of liability allowed for personal injury & death under the law



INDEMNITY

- An indemnity is an undertaking by one party to meet the specific liability of another party.
- It is essentially a contractual promise to “make good” losses suffered by another party if a specified event occurs.



INSURANCE

- This is transfer of financial risk from one person (the insured) to another (the insurer) in return for payment of a sum of money usually called the 'premium'.
- The existence of insurance does not remove the liability of a party for its actions.
- Insurance requirements are included in contracts to ensure that the supplier has the financial resources to respond to claims where it is found liable for negligent acts or omissions appropriate to the type of services provided and the associated risk exposures involved in performing the obligations under the contract.



TERMINATION

- It gives parties rights to terminate in certain circumstances – breach, change of control of party to contract, insolvency



Liquidated Damages



- LD is allowed by the Courts and is not penalty. LD is a genuine pre-estimate of the damage which seems likely to be incurred if the breach provided for should occur. Court will look at the intent not the term.
- The **effect** of LD: once enforced the defaulting party will be allowed to delay delivery/performance by making payment of LD and contract cannot be terminated yet.



Liquidated Damages

Example of Liquidated Damages clause in Government contracts-

“The Government shall have the right to impose liquidated damages for each and every occasion that the Contactor fails to meet the timelines set out in the Work Plan or such timelines as agreed in writing with the Government. Liquidated damages shall be imposed at the rate of percent (X%) of the Fees each day (including Fridays, Sundays and public holidays) up to a cumulative maximum of percent (X%) of the Fees.”



Common & Practical Issues in Contracts

- Payment
 - Payment Schedule
 - Payment upon signing
 - Advance Payment Bonds
 - Verification and supporting documents
- Stamp Duties
- Indemnity & Liability
- Termination for Convenience



Contract Closure/ Closeout

- The process for completing and settling each contract
- Ensuring that all deliverables are received and services performed as per the agreement
- Documenting final acceptance
- Considering any outstanding obligations from either party
- Considering any outstanding claims or issues
- Ensuring that final payment is made
- Collecting Liquidated Damages and returning Performance Bond
- Ensuring that contract documentation are filed
- Ensuring certifications, warranty, spare parts list, operation manuals and training have been provided
- Procedures for record maintenance
- Post contract review meeting for evaluation

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THANK YOU

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QUESTION AND ANSWER SESSION