



GOVERNMENT CONTRACTS MANUAL

Civil Division

“To provide quality legal advice & representation for Government Ministries, Department and Agencies”



Civil Division

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ATTORNEY GENERAL'S FOREWORD



*Assalamualaikum warahmatullahi
wabarakatuh*
and Salam Sejahtera

Under the Constitution, the Attorney General is the principal legal adviser to the Government. The Civil Division is responsible for providing legal advice on a wide spectrum of matters. Drafting and vetting of contract and other legal documents in accordance with the law, Government guidelines and policies is a large part of that important responsibility.

Chambers has pledged to always strive to improve its services through all Divisions. This Government Contracts Manual (hereinafter referred to as “Manual”) is published by the Civil Division as part of its ongoing efforts in raising awareness to instructing agencies including Government ministries, departments and statutory boards, particularly on managing Government contracts besides organising a series of muzakarah (dialogue) sessions.

Regulation 339 of the Financial Regulations provides,

“It is the responsibility of the Heads of Departments to ensure that Contracts are drawn up in accordance with current requirements, particularly with regard to the provision for guarantees, penalties, and damages.”

The Manual's main objective is to provide detailed insight to information which instructing agencies need to provide before referring their requests to Chambers. In addition, the Manual seeks to provide better understanding on the provision of boilerplate clauses in every Government's contracts. These boilerplate clauses are generally very crucial in upholding the interest of the instructing agencies. It is our hope that all Government ministries, departments and statutory boards concerned will use this Manual as a useful tool and resource and thereby support our joint efforts to enhance efficiency and productivity.

I sincerely congratulate and convey my deepest appreciation to everyone who were involved in the compilation and publication of this Manual. I am also pleased to launch the 'Civil Division Work Manual' along with this Manual. I proudly welcome both publication as another laudable initiative which goes a long way to achieve the fulfillment of our vision "**To be the Highest Quality Legal Service Provider for His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam**".

Wassalam.

**DATIN SERI PADUKA HAJAH HAYATI BTE PEHIN
ORANG KAYA SHAHBANDAR DATO SERI PADUKA
HAJI MOHD SALLEH**

ATTORNEY GENERAL

Article 81, The Constitution Attorney General and his functions.

- (1) There shall be an Attorney General who shall be appointed by His Majesty the Sultan and Yang Di-Pertuan by notification published in the Gazette.*
- (2) The Attorney General shall advise on all legal matters connected with the affairs of Brunei Darussalam referred to him by His Majesty the Sultan and Yang Di-Pertuan or by the Government.*
- (3) The Attorney General shall have power exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence other than-
 - (a) proceedings before a Syariah Court, subject to the provisions of any written law to the contrary; or*
 - (b) proceedings before a Court Martial, subject to the provisions of any written law to the contrary.**
- (4) In the exercise of this power, the Attorney General shall not be subject to the direction or control of any person or authority.*
- (5) The Attorney General shall have the right of audience in, and shall take precedence over any other person appearing before, any court or tribunal in Brunei Darussalam.*
- (6) The Attorney General shall hold office during His Majesty the Sultan and Yang Di-Pertuan's pleasure, but he may at any time resign his office.*

1 INTRODUCTION

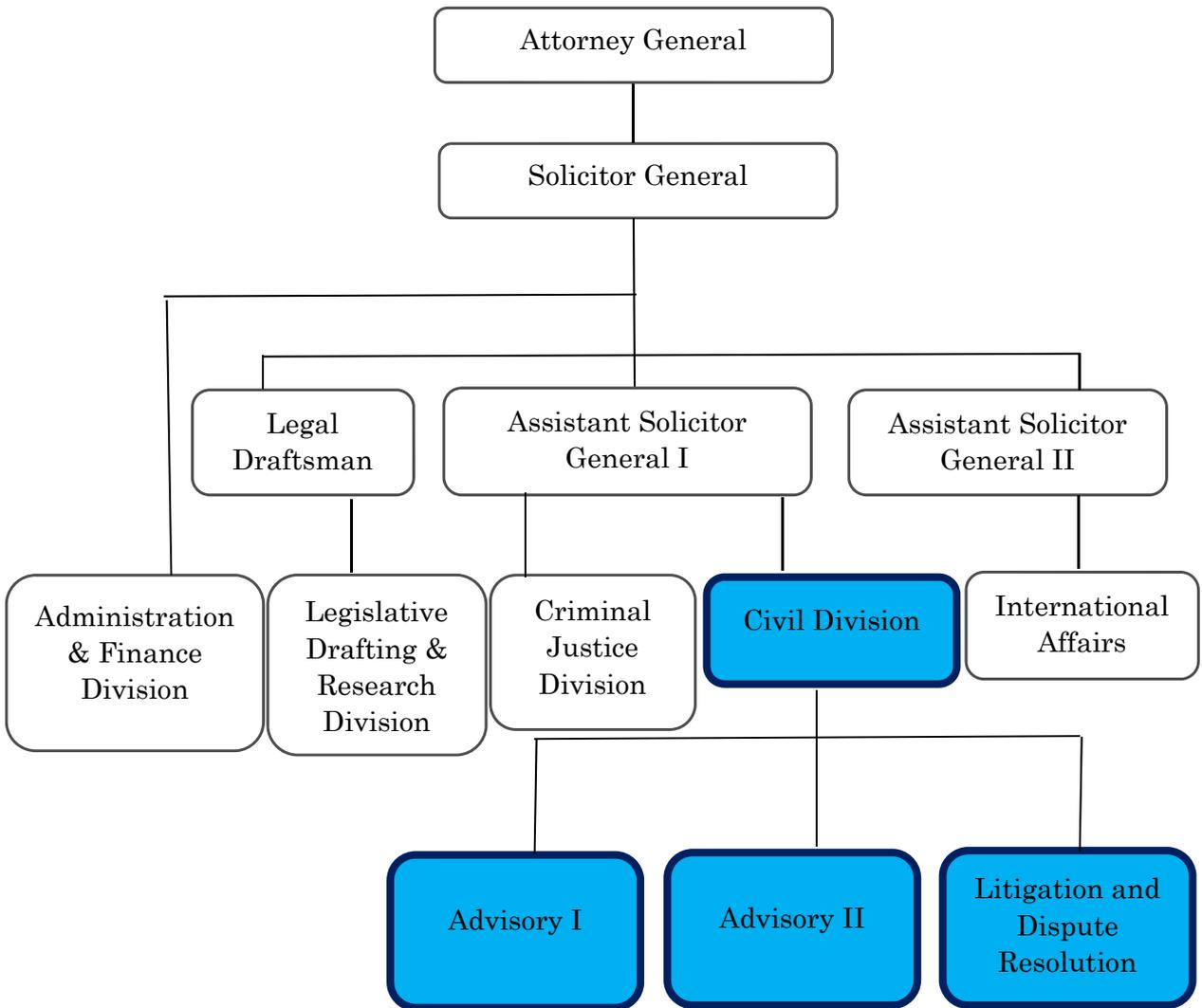
In line with the Attorney General’s Chambers vision and mission to maintain and uphold the rule of law for the country’s stability and prosperity, the Civil Division’s mission statement is “To Provide Quality Legal Advice and Representation for Government Ministries Department and Agencies”.

The main purpose of this Manual is to give the Government ministries, departments and statutory boards concise guidelines providing invaluable insight to the principles that govern contracts in Brunei Darussalam to provide assistance to Government ministries, departments and statutory boards to take the most appropriate decisions and situate the various issues in their projects and/or procurements. The Civil Division in the Attorney General’s Chambers having specific competency and experience is the entrusted division in the field of contracts.

The Civil Division was formed in 1996 when the Attorney General’s Chambers was formally divided into 5 divisions. The Civil Division comprises of three major units:

- 1) Advisory I
- 2) Advisory II
- 3) Litigation and Dispute Resolution Unit (LDRU)

1.1 ORGANISATIONAL STRUCTURE



1.2 ROLES & FUNCTION

1.2.1 Civil Division

The Civil Division plays a major role in providing quality legal advice and representation for the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on a wide range of legal issues including the drafting, vetting and negotiating of contracts, carrying out statutory interpretation and formulating legislative proposals in areas such as agriculture, finance, oil and gas, education, social welfare, employees provident fund, ICT, electronic transactions and civil aviation. Its two Advisory Units each has its own portfolio of ministries, departments and statutory boards, and the Litigation and Dispute Resolution Unit represents the Government in legal proceedings and alternative dispute resolutions, and also assists in the recovery of unpaid debts and charges owed.

The Civil Division also assists the Attorney General with assessing a petitioner's qualification for admission to be an advocate and solicitor of the Supreme Court of Brunei Darussalam.

1.2.2 Advisory Units

Providing advisory services including drafting, vetting and negotiations of contracts, Memorandum of Understandings and deeds, statutory interpretations for the ministries and all departments thereunder / statutory boards / subject matter as follows:

1.2.2.1 *Advisory I*

- His Majesty's Office
- His Majesty Sultan's Flight (HMSF)
- Prime Minister's Office
- Ministry of Communications
- Ministry of Primary Resources and Tourism
- Ministry of Culture, Youth and Sports
- Statutory Boards include:
 - Authority for Info-Communications Technology Industry (AiTi)
 - Employees Trust Fund (TAP)
 - Supplemental Contributory Pension Scheme (SCP)
 - Centre of Strategic and Policy Studies (CSPS)
 - Brunei Economic Development Board (BEDB)

- Matters:
 - Media and Entertainment
 - Syariah (family matters)
 - Employment, Workmen's Compensation, Retirement and Disability Benefits

1.2.2.1 *Advisory II*

- Ministry of Finance
- Ministry of Defence
- Royal Brunei Armed Forces
- Ministry of Foreign Affairs and Trade
- Ministry of Home Affairs
- Ministry of Education
- Ministry of Religious Affairs
- Ministry of Development
- Ministry of Health
- Statutory Boards include:
 - Autoriti Monetari Brunei Darussalam (AMBD)
 - Brunei Investment Agency (BIA)
 - Minister for Finance Corporations
 - Universiti Brunei Darussalam (UBD)

- Universiti Islam Sultan Sharif Ali (UNISSA)
- Kolej Universiti Perguruan Ugama Seri Begawan (KUPUSB)
- National Disaster Management Centre
- Board of Architects, Professional Engineers and Quantity Surveyors (APEQS)
- Matters:
 - All Syariah matters (except for family)

1.3 IMPORTANCE OF CONTRACTS

It is important for Government procurements/projects utilising government funds and for the public purpose to be embodied and finalised in a contract.

The general law applicable to contractual transactions in Brunei Darussalam is at present governed mainly by Contracts Act (Chapter 106) of the Laws of Brunei and specifically applicable for Government procurements/projects is the Financial Regulations, 1983.

A contract is generally formed upon the fulfillment of four elements which are:

1. offer
2. acceptance (agreement)
3. consideration (the price of the contract)

4. intention to create legal relations (the intention of the parties to be contractually bound)

Points to be taken into consideration:

- contracts provide a description of responsibilities.
- contracts bind parties to their duties.
- contracts can establish a time frame for duties.
- contracts can secure payment.
- contracts provide recourse when the relationship falters.

2 REFERRAL OF WORK TO AGC & RESPONSIBILITIES OF INSTRUCTING AGENCIES

2.1 REFERRAL OF WORK TO AGC

Any request for contracts or agreements shall be by official letter or memorandum addressed to The Honourable Attorney General.

Required information in the request should include:

- summary of project;
- contact details of officer-in-charge (including official email address)
- draft contract or agreement (if instructing agencies have in-house legal counsel);
- relevant documents e.g. Government's requirements and specifications (pre-tender), successful tenderer's submission (post-tender) schedules (payment, implementation plan/milestones);
- confirmation of approved budget.

Further information required:

- confirmation by Ministry of Finance for Performance Bond requirement and its amount or percentage;
- confirmation of the amount or percentage of Liquidated Damages;
- other financial-related provisions.

2.2 RESPONSIBILITIES OF INSTRUCTING AGENCIES

Instructing Agencies are to adhere to the following regulations found in the Financial Regulations, 1983:

- Regulation 286: Responsibility of Officers for Losses

“Should it appear that public money or public stores have sustained a loss by reason of the neglect of an officer, the officer may be surcharged under the provisions of article 16 of The Constitution (Financial Procedure) Order 1959.”

- Regulation 339

“It is the responsibility of Heads of Departments to ensure that Contracts are drawn up in accordance with current requirements, particularly with regard to the provision for guarantees, penalties and damages.”

[Note: such as Performance Bonds and Liquidated Damages]

- Regulation 340

“It is the responsibility of Heads of Departments to ensure that any variation to a Contract receives due authorisation. In the event of any default by a Contractor, the State Financial Officer shall be informed without delay.”

Instructing Agencies are also to adhere to the following Government Circulars:

- Prime Minister’s Office Circulars: 01/1984, 11/1984 and 06/2007 on signatories for Government contracts.

- Ministry of Finance Circular: 01/2014 on the requirement for Performance Bonds for Government contracts of certain values.

3 STRUCTURE OF INVITATION TO TENDER (ITT)

SECTION 1: INSTRUCTIONS TO TENDERERS

Covers the rules and procedures which the Tenderers have to adhere to when submitting their tenders.

SECTION 2: GOVERNMENT REQUIREMENTS

Describes the specifications for the project what the instructing agency requires from the Tenderers.

SECTION 3: TENDER SCHEDULES

The schedules provide how the Tenderers should submit their proposals. The ministry or department has to come up with appropriate contents for this section which depends on how the ministry or department intends to evaluate the tenders received.

SECTION 4: CONTRACT

This section makes up the legal obligations of parties.

4 BOILER PLATES

Boilerplate clauses are typical clauses that are contained in the latter part of a contractual agreement. The usual boilerplate clauses are explained below.

AMENDMENTS AND VARIATIONS

- The procedures that must be followed if any terms of the contract are to be changed are usually that it must be in writing and all parties consented.

ASSIGNMENT AND SUB-CONTRACT

- Assignment refers to the transfer of a party's rights and obligations under a contract to another person.
- Sub-contracting occurs where a party to an agreement (the Contractor/Consultant) arranges for another person to perform some or all of its obligations under the agreement but remains

contractually bound to the other party (the Government) to perform those obligations.

- In most Government contracts, the other party is not permitted to assign or sub-contract without the prior consent of the Government.

CONFIDENTIALITY

- Confidential information is any information belonging to or in possession or control of a party that is of a confidential, proprietary or trade secret nature and that is furnished or disclosed to the other party. Confidential information will remain the property of the disclosing party and the receiving party will not acquire any rights to that confidential information.

COLLUSION

- Collusion occurs when two persons or representatives of an entity or organization make an agreement to deceive or mislead another. Such agreements are usually secretive and involve fraud or gaining an unfair advantage over a third party, competitors, consumers or others with whom they are negotiating.

- The collusion, therefore makes the bargaining process inherently unfair. Collusion can involve price or wage fixing, kickbacks or misrepresenting the independence of the relationship between the colluding parties.
- In the interest of the Government, this clause is inserted to give the Government the right to terminate the contract if such collusion happens. In addition to that, under the process of procurement by way of tender, every tenderer has to fill in the Tenderer's Declaration to avoid collusion.

DISPUTE RESOLUTION

- The Parties' agreed method of resolving disputes.
- The method of resolving disputes for Government contracts is by way of arbitration. [exception: in tenancy agreements where the Government is the Landlord, the method of resolving disputes is by way of litigation (Courts)]

- Unless agreed otherwise, the seat and place for the arbitration shall be Brunei Darussalam.
- For local/foreign vendors/contractors/consultants – arbitration will be governed by the Arbitration Order, 2009/ International Arbitration Order, 2009.

ENTIRE CONTRACT

- Except prior exchanges of correspondence, the entire contract include all the terms of the contract (includes annexes, schedules, exhibits, etc) contained within such written agreement signed by both parties.

FORCE MAJEURE

- Except in respect of payment liabilities, neither party will be liable for any failure or delay in its performance due to reasons beyond its reasonable control as stated in this clause including acts of war, acts of God, earthquake, floods and etc.

GIFTS

- Gifts are defined as a voluntary transfer of property or interest from one individual to another, made gratuitously to the recipient. The individual who makes the gift is known as the donor and the individual to whom the gift is made is called the donee. The Gifts clause forbids the party contracting with the Government from accepting any favours or inducements and accepting such, would have abetted to committing an offence under the Prevention of Corruption Act (Chapter 131) of the Laws of Brunei.

INDEMNITY

- As a result of the contractor's negligence *et al*, if the Government or Government's employees suffer injury or property damage, the contractor will reimburse the Government for that portion of any damages for which the contractor is found to be liable for.

INSURANCE

- The recommended policies of insurance would cover risks of injury or death during the performance of the services and policies of insurance against loss or damage to the consultant's property however in some matters there is the relevance of a professional indemnity insurance or other types of insurance relevant to the project.
- A professional indemnity insurance protects not only the Government just in case the Government sues the other party but also protects the other party as not having such an insurance policy may cause them to go out of business. It is strongly advisable in consultancy agreements or agreements which require professional services.

LIABILITY

- Should the Government become entitled to claim damages from the Contractor, the Contractor will be liable for the items agreed in this clause. This clause should survive the contract.

NOTICES

- Notices required under the Contract are to be sent to the address and persons specified. Notices are to be sent in writing by either registered post, courier, fax, to be delivered personally or any other methods.

PERSONNEL

- Specifies the representatives of each party for the proper performance of the contract.

RISK & TITLE

- The risk aspect addresses the point at which the risk is transferred from seller to buyer, for example, the risk of damage or loss to the goods can pass to the Government from the supplier the moment it has passed the ship's rail at port of shipment.
- The title aspect addresses at which point ownership is transferred from seller to buyer. For example, in some instances, the title is only transferred when the supplier has received full payment when the goods have been delivered.

SEVERABILITY

- The severability provision is when the contract has a provision that is deemed severable and then unenforceable. Therefore, with this provision, it shall not affect the enforceability of other provisions. Parties to the contract shall substitute the unenforceable provisions with an enforceable one to preserve the original intent and position of the parties.

TAXES AND DUTIES

- Subject to the agreement of both parties and the Incoterms, the contractor (including the consultant) would usually be entirely liable and responsible for all taxes, duties, license fees and/or other levies imposed or payable whether occurring or imposed within or outside Brunei Darussalam.
- If the ministry or department wishes for withholding tax to be excluded from the contract price, the ministry or department must request so from Ministry of Finance.

TERMINATION

- The ministry or department needs to know the circumstances in which they can terminate a contract and that they would have to issue a notice to the other party within the timeframe stipulated in the contract.
- If there is a breach, the ministry or department should immediately notify this to the other party and tell them to rectify the breach. The ministry or department should consider from the nature of the procurement/contract, which cause of termination will be relevant.
- The Government may terminate for:
 - (i) contractors default i.e. if they don't perform;
 - (ii) convenience i.e. without assigning any reasons but should always be used as a last resort; and
 - (iii) force majeure i.e. when something happens beyond the control of the parties.
- In the event of termination for any cause, the contractor will be paid up to the effective date of termination for any fees/costs/expenses for the goods and services delivered up to that date.

WAIVER

- A non-waiver clause in a contract is to protect a party who excuses the other party's non-compliance with contract terms and to prevent the parties' course of conduct under the contract from resulting in the loss of enforceability of the actual terms of the contract.

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