HKIA

Study Guide for HKIA Professional Assessment

Paper 2

Building Contracts, Professional Practice, Professional Conduct & Conditions of Agreement

The Hong Kong
Institute of Architects
香港建築師學會

This Study Guide is an online live document prepared by HKIA Professional Assessment Committee. It will be regularly updated for improvement and refinement due to changes in codes and its interpretation and application.

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HKIA Professional Assessment Committee

Editorial team (HKIA):
Carmen Cheung, Wincy Chow, Kay Choy, Phoebe To, Jennifer Yan

Vetting advisors:
Rider Levett Bucknall – Ling Lam (HKIS)
Ringo Chan (HKIA/Solicitor)

The Hong Kong Institute of Architects
19/F, 1 Hysan Avenue,
Causeway Bay,
Hong Kong

This Study Guide aims to help candidates identify and apply the basic principles of Building Contract, Professional Conduct and Conditions of Agreement into daily practical use, from the perspective of an Architect. There is no single answer to each situation, as each case should be assessed based on its individual merits. It is therefore important to base on the uniqueness of the project to carry out a critical appraisal and balance the possible risks which may be arisen.

The suggested issues and considerations are to provide some lines of thoughts in addressing the various scenarios as illustrated in the questions in this study guide, whether they come up in professional examinations or in daily practice.

The Standard Form of Building Contract, Private Edition - With Quantities (2005 edition) or Without Quantities (2006 edition), published by the Hong Kong Institute of Architects, the Hong Kong Institute of Construction Managers and the Hong Kong Institute of Surveyors, of Hong Kong SAR, China, are used as basis for this Study Guide.

Project Type

The questions set in this Study Guide are based on the following project types:-

Scenario A - Redevelopment of a new 30-storey Grade A office building with basement carpark
Scenario B - Alterations and additions to an existing 6-storey primary school building

At various stages of the building project, you as the **Architect**, may be approached by your Client (also named "the Employer" in this Study Guide once the Building Contract is awarded) to give advice to different scenarios. Some of the scenarios may be specific to any of the two project types listed above.

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HKIA Standard Form of Agreement provides a convenient basis for the Architect to prepare a fee proposal on architectural consultancy services. It contains standard terms and conditions which set common expectations for the mutual benefit of the Client and the Architect.

A number of remuneration methods are suggested in the Standard Form of Agreement:-

1. Percentage of construction cost
2. Lump sum to be agreed with the Client
3. Time charge
4. Combination of the above
5. Any other method to be agreed with the Client

The Architect should base on the uniqueness of the project type, scope and work stages, etc., to suggest a suitable type of renumeration method, or combination of various methods, for agreement with the Client.

SITUATION

How should we **charge our Client** for full services of the architectural consultancy services for Scenario A and B?

CONSIDERATION

- **OPTIONS**
  - Percentage fee based on construction cost?
  - Lump sum to be agreed?
  - Hourly charge?
  - Any others?

- **BASIS**
  - HKIA Standard Conditions of Agreement Clause 1.1

- **ISSUES**
  - Certainty over extent of services
  - Certainty over service duration

- Certainty over staffing requirements including competency
- Market competitiveness over fee competition

♦ APPLICATION

SCENARIO A - A NEW OFFICE BUILDING

- A lump sum fee is generally submitted provided that the Client's brief gives clarity and certainty over the extent of works, scope of services and service duration. It would not be unreasonable to assume that changes to these issues might not be substantial and hence the Architect's remuneration will less likely be affected.
- Alternatively, the fee could be based on a percentage over the construction cost.
- If the project involves planning applications or design feasibility studies or works where the time and scope of works cannot be easily foreseen at the time of tender, hourly charge can be applied for these uncertain tasks.

SCENARIO B – A&A WORKS TO EXISTING SCHOOL BUILDING

- The construction cost for A&A works depends on many unforeseen variables such as the conditions of the existing buildings, the extent of works only to be determined after "opening-up" and the accuracy of the available information. These issues may affect the scope of services and service duration.
- It may therefore be more appropriate to consider the fee based on both lump sum and hourly charges. It should also be noted that in general, A&A projects may be more complex than new buildings, in particular considering the time and effort to be anticipated during construction stage.
- Should the Client request for a lump sum fee only, it is advisable to state the basis of the fee, for example, the service duration, extent and scope of works involved, and the like.
- Similar to (A), if the project involves planning applications or design feasibility studies or works where the time and scope of works cannot be easily foreseen, hourly charge can be applied for these uncertain tasks.

SCENARIOS A AND B

- The overall consultancy fee can therefore be either one of the above methods or a combination of the above. Consideration should be given to the overall fee level based on market fee benchmark.

SECTION A – APPOINTMENT OF ARCHITECT AND GENERAL OBLIGATIONS

CONTRACTUAL DUTY AND LIABILITY OF ARCHITECT

PRINCIPLES

The Architect has a contractual relationship with the Client and may be sued for failure in fulfilling his/her obligations as stated in the consultancy agreement, either expressly or impliedly. The Architect owes a duty to the Client with reasonable degree of skill and care when delivering the professional services as stated in the consultancy agreement. The standard of skill and care required from the Architect is that of an ordinary architect holding himself out as competent professional who offers the same or similar advice.

The Code of Professional Conduct and Architects Registration Ordinance set out the principles of professional conducts as expected of an architect.

SITUATION *(HKIA exam question 2012)*

After the transfer plate is completed on site, the Structural Engineer reports that there is insufficient loading allowed to cater for a roof feature approved by the Client. The Architect submits a revised drawing to the Client for approval in which the roof feature is deleted. The Client **accuses the Architect of negligence**. Explain if the Client's accusation is valid.

CONSIDERATION

- **ISSUES**
  - Architect's duties in design coordination
  - Timely advice to the Client and project communication protocol
  - Associated risks associated with the variation

- **BASIS**
  - Duty of care?
  - Breach of duty?
  - Causation?
  - Remoteness of damages?

♦ APPLICATION

- A discussion on different scenarios is expected before a conclusion can be made if any party is accountable.

- If the roof feature is presented to the Client before the loading schedule is prepared, the Structural Engineer should take into account the loading of the roof feature. If the roof feature is a newly added design, the Architect has the responsibility to coordinate with the Structural Engineer for feasibility.

- More context will be required to determine if any party is accountable. This may include, such as, the reason for proposing the new design feature after the loading schedule is prepared, and the Architect ought to have exercised reasonable degree of skill and care when advising the Client on the implications of the design change, including risks in obtaining statutory submission, constructability, time and cost implications, etc. such that the Client can make an “informed” decision.

- In any case, the duty of the Architect is continuing throughout the service duration. The Architect is informed by the Structural Engineer that the loading allowed is not sufficient for the roof feature. The Architect and the Structural Engineer are under their duties to inform the Client and exercise the same standard of skill and care in attempting to correct the consequences, for example, modifying the roof feature or proposing other alternatives to reduce the loading.

- Damages to be claimed should be flowing directly from the negligent act and such damages must be foreseeable. Based on the case above, it may be difficult to quantify the damages caused by the omission of approved roof feature.

SECTION A – APPOINTMENT OF ARCHITECT AND GENERAL OBLIGATIONS

CODE OF PROFESSIONAL CONDUCT

PRINCIPLES

The Code of Professional Conduct issued by HKIA explains the principles of professional conduct that every HKIA Member shall comply. It can be summarized in four Principles:-

Principle 1

Members are required to practice their profession impartially and to a high standard, and to serve both their clients and future users of their product conscientiously.

Principle 2

Members shall avoid situations or conflicts of interests that could raise doubts about his integrity, and to upkeep their public professional image and trustworthiness with clients.

Principle 3

Members shall rely only on their ability and achievement as the basis for their advancement. Unfair competition for work and supplanting other architects are in breach of this principle.

Principle 4

Members shall try their best to promote architectural excellence through his works or participating in local and internal affairs and participate in continuing education and facilitate their employees to do the same.

SITUATION

You are the Architect of an A&A project for an existing school. Your close friend is the Project Manager (PM) of the school and is in charge of your project. The project is currently at the Main Contract tender stage. One day, the PM offers you a free dinner and asks you to recommend one of the tenderers for the award of the Main Contract. This tenderer has submitted all tender submissions with acceptable standard; however, you have heard very bad reputation on the tenderer's quality of workmanship. Would you **accept the free dinner and recommend the tenderer** according to your friend's request?

CONSIDERATION

- **ISSUES**
  - Contravention of professional conduct / bribery ordinance?
  - Should "bad reputation" be considered in assessment of tenders?

- **BASIS**
  - Principles 1 and 2 of the HKIA's Code of Professional Conduct (C.P.C.) / Bribery Ordinance

- **APPLICATION**
  - The Architect shall act impartially and provide unbiased comments to the Client (C.P.C. Principle 1 & Rule 1.3). Tender recommendation should be subject to the Architect's assessment of the tenders based on criteria as set out in the tender documents, instead of relying on the PM's instruction. The assessment should be based on factual submission of the tender submissions.

  - As both the Architect and the PM are working on the same project, it is best to reject any free dinners from the PM to avoid any potential conflict of interest during this sensitive period of tendering (C.P.C. Principle 2 & Rule 2.1, 2.2, 2.8).

  - Also take note of the implications in contravention as set out in the Bribery Ordinance.

  - It is the Architect's obligation to give a full picture to the Client to assist the Client's decision making process throughout the project. However, we should first consider the reliability of the source about the tenderer's bad reputation. For example, the Architect may verify with the tenderer's previous project clients whether there is any substance in the bad reputation in quality of workmanship.

  - In such case, although such information is not detailed in the submitted tender documents, if it is from a reliable source, we should inform the Client on the information for his /her best interest.

  - The Architect shall consider and question the tenderer whether any of the key members of the proposed project team were also responsible for the previous project with bad reputation, when assessing the competence of the tenderer's proposed team structure, and may request replacement with other team members.

SECTION B - TENDER ADMINISTRATION

PRE-TENDER STAGE (SELECTION OF CONTRACTS)

PRINCIPLES

There are many types of procurement approaches commonly adopted in Hong Kong including:-

a. Lump sum contract with quantities

b. Lump sum contract without quantities

c. Design and build contract

d. Management contract

e. Target cost contract / cost plus contract

f. Remeasurement contract, etc.

Each type of procurement approach has its own merits and demerits, and its suitability to be used depending on different project nature. As the Architect who is often the Contract Administrator, it is therefore important to facilitate prior discussion with the Client and the consultant team at an early stage (well before tender preparation) and to agree on the procurement and contract strategy for the project. A good procurement and contract strategy aims to balance the risks to be taken and provides an effective cost and time control mechanism throughout the construction process.

Note:
Many candidates may get confused over “Types of Building Contract” with “Standard Form of Contract”. A **standard form of contract** is applicable to any type of building contract, i.e. design-and-build contract and management contract can both have their own “standard form of contract”. The “Standard Form” or “Private Form” that HKIA members always refer to is the “Standard Form of Building Contract for use in **Lump Sum Contract with or without quantities”**.

SITUATION

You are the Architect for the projects of Scenario A and B. The Client asks for your advice on the **type of procurement approach(es)** suitable for use for the Superstructure Main Contract. What are your considerations and suggestions?

CONSIDERATION

- **ISSUESS / CRITERIA THAT AFFECT PROJECT OUTCOMES**
  - Scale / complexity of the project
  - Design, functionality and quality of the project
  - Robustness of the project brief
  - Certainty of the site situation
  - Contractor's input required
  - Time factor
  - Cost control
  - Risk profiles and any special considerations

- **BASIS**
  - Considering how risks can best be managed under different procurement arrangements in order to minimize threats that affect project outcomes.
  - Identifying and managing risks using suitable procurement approaches is one of the critical success factors in project delivery.

- **APPLICATION**

SCENARIO A – A NEW OFFICE BUILDING

- Lump sum contract ("traditional approach") with or without quantities may be appropriate for the superstructure works due to the following rationales:
  - Scale / complexity of the project: Client takes ownership over design and functionality requirements. This project is not overly complex technically, traditional approach facilitates effective management of the project, and familiarization of using this approach means less uncertainty of risks.
  - Robustness of project brief: As the Client is able to give certainty in the project brief requirements, this approach provides effective change management and good cost control of variations.
  - Certainty of site situation: it therefore imposes less risk on the Contractor. A balanced allocation of risks and mitigation measures should be considered when dealing with foundation / ground condition which generally imposes high risks.
  - Time factor: better control over programme certainty for obtaining the necessary approval from the statutory authorities and incorporating the requirements in the design. This minimizes the risk of project delay if any design issues are not resolved prior to construction starts.

- Cost control: the detailed BQ / Schedule of Rates facilitate good cost control for future design changes as changes will be valued using contract rates. The approach encourages competitive tenders from the market due to certainty of design / programme.

- Design and Build Contract may not be appropriate as ownership of the design and requirements is held by the Contractor. Changes to the design requested by the Employer at post award will have adversarial time and cost implications.

- Remeasurement and cost-plus contracts are not likely for this type of project as cost control is less effective due to lack of certainty in the overall construction cost during the early stages of the project. Moreover the works concerned are relatively straightforward with low degree of uncertainty.

SCENARIO B – A&A WORKS TO EXISTING SCHOOL BUILDING

- Lump sum contract ("traditional approach") without quantities may be more appropriate for A&A works due to the following rationales:

  - Similar to the rationales for Scenario A, except on the certainty of site situation: working around existing conditions will impose risk onto the project. This risk if cannot be mitigated, shall be allocated between the Employer and the Contractor. Using a traditional lump sum contract approach without quantities means the Contractor shall take full ownership of the actual quantities / exact extent of the works based on the contract drawings and specifications.

- A&A projects involve modifications to the existing building for which conditions may be unforeseeable. Lump sum with quantities may involve risks in variations which may result from discrepancies from existing drawings or unforeseen site situations. Lump sum without quantities should therefore be more appropriate.

- Remeasurement and cost-plus contract can tackle the problem of uncertainty in interface works with existing conditions, but it will be a costly solution if the extent of such work is great. Also the construction sequence for the renovation works should not be complicated and therefore early involvement of a management contractor may not be required.

- Alternatively, we can allow in the lump sum contract some provisional sums/items which may be subject to future re-measurement. In this way, we can keep the confirmed design in a fixed lump sum price, while those with risks of change due to interface with existing buildings can be included in the provisional sums.

SECTION B - TENDER ADMINISTRATION

PRE-TENDER STAGE (SELECTION OF CONTRACTORS)

PRINCIPLES

After the type of procurement approach to be used is confirmed, it is time to decide how to select the Main Contractor. The most common procurement methods for selection of contractors for the building industry in Hong Kong are:

a) Open tendering
   - All contractors (usually from the Public Works approved contractors list) are invited for tendering; or companies who have expressed an interest in undertaking the works in response to a public tender notice.

b) Selective tendering
   - Only selected contractors, based on their expertise, relevant experience or reputation, etc. are invited for tendering.

c) Negotiated tendering
   - Only a single contractor is invited to tender for the work and the tender price is to be negotiated. Where two stage tendering method is adopted, a long list of contractors (similar to Method (b)) will be invited to tender under the first stage, and subsequently when one or two contractors are shortlisted, the final tender submission will be based on negotiation.

SITUATION

The Client asks for your **advice on the method of tendering** for Scenarios A & B. What are your considerations and suggestions?

CONSIDERATION

- Issues
  - Scale and complexity of the project
  - Level of pricing and competitive pricing
  - Resources of tenderers, including financial and manpower
  - Relevant project experience
  - Past performance of tenderers including site safety, workmanship, records against convictions, attitude to claims, etc.
  - Tenderer's technical proposal including method statement, programme and delivery schedules, quality assurance plans, site safety plan, environmental management plan, risk management, etc.

- **BASIS**
  - Consider commonly adopted types of tendering and pros and cons of each tendering approach

- **APPLICATION**
  - Obtaining competitive pricing from the open market by tendering is key in providing effective value for money in project delivery, unless there are other prevailing reasons not to do so. Tendering provides transparency and accountability which are keys in many clients' organizations, whether in the public or private sectors

  - Open tendering is normally adopted in simple projects with least technical and/or design requirements; and the clients' main project objective is to obtain the lowest competitive tender from the market. Open tendering is not suitable for projects under Scenarios A and B.

  - Selective tendering usually results in better standard of works suitable for projects of specific technical and/or design requirements, when compared with open tendering, as tenderers for selective tendering are selected according to a list of assessment criteria including the contractor's expertise, relevant project experience, etc. which are fundamental in delivering successful project outcomes.

  - Selective tendering could be conducted in two stages: (1) based on an Expression of Interest (EOI) submission and/or a prequalification exercise; and (2) carrying out a tender process. Under stage (1), a limited number of tenderers will be prequalified / short-listed from a long list of contractors based on a set of selection criteria. The limited number of tenderers depending on the clients' procurement policy, normally 5 to 10 tenderers will be selected who shall then proceed to stage (2) tendering.

    – Stage (1) EOI submission and/or prequalification: prospective tenderers should provide evidential submissions based on the shortlisting criteria, for example, to demonstrate relevant past experience, technical capability, proof of financial status, etc. for assessment.

  - Stage (2) Tender process and selection of the contractor: After shortlisting, tender invitation will be sent to the shortlisted tenderers. Following tender submissions, each tender is assessed using different marking system based on scores assigned to each of the selection criteria. The tender assessment may include tender price, technical submissions and/or other submissions as appropriate. A weighted score for tender price and technical submissions in the ratio of 40%:60% or 50%:50% is not uncommon. The winning bid will be one that scores the highest aggregate score. This practice is adopted by the public and quasi-government sectors.

  - Alternatively, as in many private practices, the tender is assessed based on tender price only, with the winning bid being the lowest bid.

- In selective tendering, the clients and/or the project team usually recommends a long list of tenderers, based on their past experience or other relevant criteria, who shall then be asked to express their interest in tendering based on a brief statement of the project requirements. Reference may also be made to the list of approved Contractors for Public Works kept by the Development Bureau.

- In particular for the school project under Scenario B, one of the shortlisting criteria should be on the tenderers' experience in carrying out modification or extension works to existing buildings, where special working sequence / arrangement is required, or compliance with stringent housekeeping rules of the school or similar institutions is necessary.

SECTION B - TENDER ADMINISTRATION

CONTRACT DOCUMENTATION (CONTENTS OF TENDER DRAWING / DOCS)

PRINCIPLES

Information to be included in the tender documentation depends on the type of building contract of the project. As the lead consultant, the Architect shall advise the project team on the agreed contract strategy before commencing the preparation and compilation of tender documents/drawings. Different contract strategy will affect both the level of details to be indicated in the drawings/documents and also the time required for preparation of such.

SITUATION

What are the **usual contents in the tender drawings/documents** to be prepared for the following contracts:-

1. Foundation Contract for Scenario A – Piling and excavation & lateral support (ELS) works for basement
2. Main Contract for Scenario A – Superstructure works for office building
3. Main Contract for Scenario B – A&A works to existing school building
4. Curtain Wall Nominated Sub-contract for Scenario A

CONSIDERATION

- **ISSUES**
  - Type of building contract
  - Architect's / engineer's design or contractor's design
  - Time available for preparation of the tender documents
  - Extent of variations after contract award
  - Need for an effective cost control mechanism
  - Equitable allocation of risks

- **BASIS**
  - Consider the characteristics of different types of building contract

♦ APPLICATION

1. Foundation Contract for Scenario A – Piling and excavation & lateral support (ELS) works for basement

Design-and-build contract is a common approach for foundation contracts as contractors are able to optimize the design of the foundation and ELS systems (not visible items) using the Contractor's available piling plant and equipment and using the most appropriate construction method. This in turn encourages competitive pricing of the tenders.

Loading schedules, schematic design intent drawings and performance specifications are prepared by the Engineer/Architect for tender purpose.

Ground investigation reports and topographical survey are issued for reference only. Schedule of rates are sometimes provided in the tender document.

2. Main Contract for Scenario A – Superstructure works for office building

Following the discussion in Section 4 of this study guide, lump sum contract with quantities is considered suitable for construction of a new office building for which the scope can be clearly defined. The term "with quantities" shall mean the quantities given in the Bills of Quantities (BQ) for works to be undertaken by the Main Contractor and/or named sub-contractors, form part of the contract and risks over the accuracy of such quantities are borne by the Employer. The BQs are prepared based on detailed drawings and specifications prepared by the design consultants. Adequate time should be allowed for the QS's preparation of the BQ.

A contract packaging strategy should be agreed between the Client and the project team, under which parts of the works will be procured using Nominated Sub-contracts (NSC) to be tendered separately. The list of NSCs including the respective prime cost sums will be included in the tender documents.

3. Main Contract for Scenario B – A&A works to existing school building

Following the discussion in Section 4 of this study guide, lump sum contract without quantities is considered suitable for the A&A works, where part of the scope is not clearly defined. Detailed drawings and specifications, which are prepared after design development stage, shall be included as part of the tender documents. The term "without quantities" shall mean any quantities (either provided or not provided) shall have no contractual standing. The Main Contractor shall assume ownership of the quantification of the works.

Schedules of Rates with referenced quantities are sometimes provided for tender. This is to facilitate ease in tender price comparison.

Where the exact extent pf the works cannot be defined at the time of tendering, provisional sums or provisional quantities items can be allowed in the tender document. They can be determined by carrying out a rough estimation of the work with related quantities. Provisional sums shall be subject to detailed measurement and valuation of the cost of the work. All provisional quantities items shall be subject to re-measurement.

Conditional survey reports, record plans, records of existing utilities services and the like are issued for reference only.

4. Curtain Wall Nominated Sub-contract (NSC) for Scenario A

Design-and-build contract approach is considered suitable for procuring specialist systems such as curtain wall systems. Design intent drawings and details for the external envelope and performance specifications are prepared by the Architect for tender purpose. Structural drawings and interface details between the curtain wall and the parent structures are provided for reference.

Schedules of Rates with referenced quantities are sometimes provided for tender. This is to facilitate ease in tender price comparison.

The demarcation of the scope of works between the Main Contract and the NSC should be clearly defined on the drawings / specifications of the Main Contract and NSC. Lists of attendances and facilities (for e.g. use of tower cranes, scaffolding, temporary power supply, etc.) to be provided by the Main Contractor free of charge, shall be given in the NSC tender documents.

SECTION B - TENDER ADMINISTRATION

AWARD

PRINCIPLES

In general, the tender stage of a project involves the following **Steps**:

- Issuance of tender according to the Client's confirmed tenderer list
- Issuance of tender addendum or clarifications, if required
    - Revised tender documents/ drawings
- For complex projects, a tender briefing is arranged to brief tenderers the salient points related to the tender requirements.
- Tender return
- Issuance of technical queries (TQ) as required
    - TQ includes issues we would like to clarify/revise or issues for the tenderer to clarify
    - Tenderers are expected to reply to the TQ before a given date
- Tender interview as required. The aim is for the tenderers to provide an overview of their tender submission (including proposed project team, method statements, site planning, programmes, etc.) and to demonstrate their understanding of the project.
- Tender assessment and tender report
    - QS oversees the commercial submission of the tenders
    - Architect & other design consultants oversee the technical submission
    - Architect consolidates and draws conclusion; and prepares recommendation of contract award.
- Contract award.

SITUATION

Part 1:
During the Main Contract tender, several rounds of queries had been issued to the tenderers, and a tender interview was held. You are now asked to submit a tender report with a recommendation of the winning tender to the Client. What should be included in the **tender report and on what basis would your recommendation** be based?

Part 2:
After considering the commercial and technical aspects of the submitted tenders, the Client has decided to award the tender to Contractor X. As the Architect, what is **your duty** in this process?

CONSIDERATION

- **ISSUES**
  - What information should be taken into consideration for award of tender?
  - Are there any special concerns of the project?
  - Inputs from consultants?

- **APPLICATION**

Part 1

- Issues to be considered during tender assessment should include:-
  - Tenderer's understanding and appreciation of the project including project requirements, constraints, risks, etc. that affect the successful delivery of the project.
  - Tenderer's provision of suitable and adequate site management, manpower and plant resources.
  - Tenderer's work plan and strategy in order to achieve key milestones and programme requirements including statutory timelines for design submissions, FSD inspection, obtaining of OP, etc. which are critical activities to fulfill completion.
  - Tenderer's capability in managing the project including sub-contract management, site safety and environmental control management, etc.
  - The key question is whether the tenderer to be recommended is able to meet the project objectives and successfully delivered the project?

Generally, the Architect should consolidate the following (but not limited to) into the tender report: -

- General information of the tender, list of tenderers, tender issuance history and interview.

- Assessment in financial and contractual aspects (prepared by the QS):
  - Summary and comparison of tender prices;
  - Irregularities in tender rates, either over or under priced, which may impose potential financial risk to the Employer in case of variations;
  - Verification check to ensure the tender sum breakdown is arithmetically correct;
  - Any contractual qualifications which differ from tender requirements and whether they should be withdrawn by the tenderers or could be accepted.

- Assessment in technical aspects (prepared by the Architect and other technical consultants)
  - Proposed team structure and manpower resources, key personnel's relevant experience and current commitment / availability;
  - Technical submissions such as site layout, method statements, risk mitigation measures, etc.
  - Adequate construction duration to meet key milestones and programme requirements;
  - Issues related to sub-contract management, site safety and environmental control management, etc.;
  - Any technical qualifications which differ from tender requirements.

- Any special concerns of the project
  - Special features or challenges that could affect the project outcome;
  - Any special technical submissions that may be required.

- Conclusion and recommendation

Part 2

- To formalize the confirmation of award to Contractor X, the Architect will issue a Letter of Award, which forms a valid agreement between the Client and the Contractor before the formal contract is signed.

- The Letter of Award typically includes contents such as the awarded Contract Sum, the Commencement Date and/or the Date for Site Possession, the Contract Period and key milestones, any clarifications / acceptable amendments to the submitted tender, a list of correspondences exchanged with the Contractor during tender, etc.

- The letter is usually issued in duplicate by the Architect and shall be countersigned by Contractor X.

SECTION C - CONTRACT ADMINISTRATION

COMMENCEMENT OF CONTRACT

PRINCIPLES

"Commencement Date" refers to the day of which the contract commences, and the contract period shall be counted from and including such date. On this day, the Contractor shall commence the Works as stated in the Contract.

"Date for Possession of the Site" refers to the day when the Employer shall give possession of the site to the Contractor.

In the case for a design and build contract, the Commencement Date could be earlier than the Date for Possession of the Site, such that lead time is allowed for the Contractor to prepare his design and submission prior to taking possession of the Site.

The Architect shall issue an Architect's Instruction to the Contractor to confirm these two dates. The dates are generally given with a 5 to 7 days' notice, but subject to the contract conditions.

SITUATION

You are the Architect for a renovation project of an existing Primary School. The School can only allow 2 months during their summer vacation for the Contractor to carry out renovation works to the School library. You have checked that the order and delivery of the School's selected vinyl flooring requires at least 3 months. **How would you advise the Employer to set the Commencement Date** of the Contract?

CONSIDERATION

- **ISSUE**
  - The Commencement Date should be earlier than the Date for Possession of the Site

- **BASIS**
  - Refer to Clause 23 and Appendix of the Standard Form of Contract.
  - The Commencement Date can be different from the Date for Possession of the Site.

- **APPLICATION**
  - For the works to be completed by the end of the summer vacation, the Contractor will need an advance period before the Possession Date to order vinyl flooring and to prepare material submissions, etc.
  - As the Site is only available at the start of summer vacation, the Date for Possession of the Site shall be set at around that time.
  - The Commencement Date should be set at least 3 months before the Site is available, to allow sufficient time for Contractor to order material.

SECTION C - CONTRACT ADMINISTRATION

ARCHITECT'S INSTRUCTIONS / VARIATIONS

PRINCIPLES

All Architect's Instructions (AI) shall be in writing.

The Contractor shall comply with all instructions that the Architect is empowered under the Contract to issue. If there is any disagreement whether or not an instruction involves a variation, the Contractor shall still carry out the work while he has the right to refer the disagreement to dispute resolution under the Contract.

There is an underground utility running across the site and the Architect has asked the Contractor to divert it at his own costs. The Preliminaries of the Contract specifies that all utility diversion works are under the scope of the Contractor. The Contractor writes to the Architect insisting that the concerned work is a variation to the Contract because the utility was not shown in the tender drawing. He **asks for an Architect's Instruction** to cover the associated costs before he will start work. The site has been idle for more than one month because of such argument and nothing has been done by the Contractor.

SITUATION

CONSIDERATION

- **ISSUES**
  - Is the diversion part of the Contractor's obligation under the Contract or is it a variation?
  - Is AI required to cover the Contractor's obligation under the Contract?
  - What can the Architect do if the Contractor does not carry out his obligation?

- **BASIS (Standard Form of Contract)**
  - Clause 4(3)(1) - Obligation to comply with AI; Clause 4(3)(3) - Failure to comply with AI;
  - Clause 4(3)(1) - Disagreement on whether an AI involves a variation;
  - Clause 41.8(1) - Contractor to continue to proceed diligently

♦ **APPLICATION**

- As it is specified in the Preliminaries that utility diversion is under the scope of work of the Contactor, the work is considered an obligation as it is stated in the Preliminaries even though not on shown on the drawings. It is therefore not considered as a variation.

- Although AI is not required to cover an obligation under the Contract, as the Contractor is not cooperative, the Architect may still consider issuing an AI to instruct the Contractor to carry out the works under Clause 4(3)(1), and to pave the way for further action under Clause 4(3)(3).

- This AI, with no time and cost implication, will serve as a written notice requiring the Contractor to carry out his obligation and if in 7 days he does not begin to comply, further action can be taken by the Architect/Employer to employ others to carry out the work on the Contractor's behalf. Note the formal procedures listed in Clause 4(3)(3).

- Although the Contractor may also bring the case to dispute settlement under Clause 4(3)(1) & 41.8(1), he shall still carry out the instruction despite the dispute has not been settled.

SECTION C - CONTRACT ADMINISTRATION

MATERIALS, GOODS & WORKMANSHIP

PRINCIPLES

In the Standard Form of Contract, there are different clauses that ensure good quality of the project in terms of materials, goods and workmanship. In cases where the quality is unacceptable or not in accordance with the drawings/specifications, the Architect may base on the Contract to instruct the Constructor to fix or remove and reconstruct such work. The Architect may also accept Contractor's alternative proposal but subject to reduction of contract sum.

It is therefore important for the Architect to incorporate requirements specific to the project in various parts of the tender documents (e.g. preliminaries, technical specifications, drawings, etc.) to ensure good quality of the project.

SITUATION

The Architect's design involves a feature wall with fair-faced concrete finish. A very detailed specification is included in the Contract. The Contractor constructed this wall poorly without following the specification. There are honeycombs and severe colour differential everywhere. **The quality of work is far from acceptable to the Architect** as this wall is right at the main entrance of the Project. The Contractor argues that his work is up to standard, but nevertheless proposes to apply cement rendering to this wall to cover up the defects.

CONSIDERATION

- **ISSUE**
  - Workmanship is not in accordance with the Contract

- **BASIS (Standard Form of Contract)**

  Clause 8.1(1) – the standard and quality of work shall be up to the Architect's satisfaction;
  Clause 8.3(b) – removal and reconstruction of work;
  Clause 8.3(c) – acceptance of alternative proposal with reduction in Contract Sum

- **APPLICATION**
  - It is the Contractor's responsibility to build the fair-faced concrete finish according to the requirement in the Specification.
  - The standard of workmanship and quality of work shall be up to the Architect's reasonable satisfaction, but not according to the Contractor's subjective opinion.
  - The honeycombs and color differential are considered as substandard and it is likely to be unacceptable because the concerned work is located in a prominent location.
  - The Architect should instruct the Contractor to propose remedial works to rectify the problem. If the non-compliance is too serious, the Architect may consider removal and reconstruction of the concerned work pursuant under Clause 8.3(b).
  - However, if after many trials of reconstruction, the quality of work is still far from satisfactory, the Architect may consider the Contractor's alternative proposal as a practical way-out or assurance of works quality. Any cost saving shall be adjusted in the Contract Sum.

SECTION C - CONTRACT ADMINISTRATION

NON-COMPLETION / LIQUIDATED AND ASCERTAINED DAMAGES

PRINCIPLES

If the Contractor fails to complete the works as stipulated in the Contract by the Completion Date and all claims for extension of time (EOT) have been addressed by the Architect, the Architect may issue the Non-Completion Certificate, confirming that all claims for the EOT have been addressed and stating the date by which the works ought to have been completed.

After the issuance of such certificate, the Employer has the right to issue a notice to the Contractor to deduct Liquidated and Ascertained Damages (LAD). In some cases, the Employer may decide not to make such deduction.

Note: The amount of LAD is determined by the rate stated in the Contract and the number of days the project has been delayed from the Completion Date with no entitlement for EOT.

SITUATION

The Completion Date has just passed and the Employer calls to complain that the works are yet to be completed. He is very upset and asks you to make deduction of LAD in the forthcoming Interim Certificate. Knowing the Employer's intention, yesterday the Contractor submitted ten EOT claims, none of which you consider is valid. **Can you follow the Employer's request?**

CONSIDERATION

- **ISSUES**
  - Has the Architect certified the non-completion of the works?
  - Has the Contractor's EOT claim submissions been assessed by the Architect?
  - What are the considerations for the Architect to recommend deduction of the LAD from the forthcoming Interim Certificate?

- **BASIS (Standard Form of Contract)**
  - Clause 24.1(1) – Address Extension of Time (EOT); Issue Non-Completion Certificate
  - Clause 24.2(2) – Employer's notice to deduct Liquidated and Ascertained Damage (LAD)

- **APPLICATION**
  - An Architect shall act fairly and impartially as the contract administrator in a Contract.
  - Instead of relying on the Employer's opinion, the Architect shall first inspect the status of the works professionally and judge whether the works indeed has not been completed in accordance with the Contract.
  - Assuming the works are far from completion, there are a few actions required to be taken in the contract before LAD can be deducted.
  - As per Clause 24.1(1), the Architect needs to address all submitted EOT claims of the Contractor in accordance to Clause 25. The Architect shall assess and respond to the Contractor the validity of the ten EOT claims or any EOT entitlement. Given that the Contractor has no further entitlement of EOT, the Architect shall then issue the Non-Completion Certificate to the Contractor and state that the works ought to have completed by the Completion Date, which shall remain unchanged.
  - As per Clause 24.2(2), if the Employer decides to deduct LAD from the Contractor, he shall then issue a notice to inform the Contractor of such deduction and it follows that the LAD can be deducted from the forthcoming Interim Certificate.
  - Before advising the Employer for making any LAD deduction, other considerations shall be taken into account:
    - Contractor's cashflow position.
    - No incentives for the Contractor or the sub-contractors to expedite work progress.
    - The validity of the EOT claims may be re-assessed subject to the Contractor's proper substantiations.

SECTION C - CONTRACT ADMINISTRATION

SUBSTANTIAL COMPLETION & DEFECTS LIABILITY PERIOD

PRINCIPLES

Taking over any part of the completed Works from the Contractor leads to important implications under the Contract. It infers that substantial completion of the Works has been achieved and responsibility of the site is no longer under the Contractor. This shall mark the commencement of the Defects Liability Period (DLP). Therefore, the Employer should not be advised to take over any part of the Works unless the Works or a part thereof has been substantially completed.

Substantial completion is said to have occurred provided that all statutory inspections and tests as required under the Contract have been passed and criteria as specified in the Contract have been fulfilled by the Contractor, for example, the completed building has obtained an Occupation Permit (OP). This is to safeguard the rights of the Employer that the Contractor shall not be relieved of his contractual and statutory obligations under the Contract.

However, in real practices, a project which is experiencing delay in handing over may create hardship to the Employer in terms of operational and financial burden, if he can only take over the completed Works when all the whole of the Works are finished. As a way to mitigate such hardship, the Employer may consider taking partial possession of a part of the Works (a "Relevant Part").

It should be noted that as partial possession was not anticipated by both contracting parties during formation of the Contract and that it will result in a change in rights and liabilities under the Contract, it shall always be subject to the consent with the Contractor.

SITUATION

The Contractor is experiencing delay in completion of the Office Building (Scenario A) of which the Completion Date should have been on 1 July 2020. On this day, although the OP for the whole building has been obtained but the landscaping works for the podium have yet been completed at the end Aug 2020. The Employer asks to negotiate with the Contractor on his intention to take over the top five floors of the building for his own renovation work on 1 July 2020. There is no pre-defined Section under the Contract. **Can your Employer's request be enforced under the Contract?**

CONSIDERATION

- **ISSUE**
  - Definition of Substantial Completion and partial possession

- **BASIS (Standard Form of Contract)**
  - Clause 17 – Pre-requisites for achievement of Substantial Completion
  - Clause 18 – Partial possession

- **APPLICATION**
  - The subject area here is the top five floors of the building.

  - The pre-requisites for Substantial Completion under Clause 17 are completion of all works as stated in the Contract, and passing of all relevant and required tests and inspections. The OP has been obtained and therefore the statutory tests / inspections for the top five floors have been fulfilled.

  - It is prudent to check whether the Contractor is required to fulfil other contractual obligations, for example, the architectural and MEP works that are not subject to statutory inspections, document submission (e.g. warranties) shall have been submitted, tests / inspections like water tests, etc. have been satisfactorily completed.

  - If the requirements under the Contract have been fulfilled, under Clause 18, the Employer may consider accepting the Contractor's proposal and taking over the top five floors of the building.

  - Special attention should be made to the MOE/MOA for the occupied floors, temporary and protective measures to segregate the top five floors from the rest of the construction site, the right of access of vertical transportation, e.g. lifts/stairs, etc. shall be properly maintained. Once the top five floors are agreed to be handed over to the Employer, partial possession shall deem to have taken place and Substantial Completion of the said area shall be deemed to have occurred.

  - Special attention should also be made to whether the supporting facilities for the top five floors have been completed or in working condition, as many of those may be located outside the top five floors (e.g. air-conditioning plant and equipment, electrical works, etc.). This shall be discussed and agreed with the Employer and Contractor.

SECTION C - CONTRACT ADMINISTRATION

SUBSTANTIAL COMPLETION & DEFECTS LIABILITY PERIOD

PRINCIPLES

The definition of "defect" and what is considered as a "defect" is always a subject of argument between the Contractor and the Architect. Some questions to ask when considering whether it is a defect:-

- Flawless, imperfections?
- Non-compliance with the Contract?
- Design / material / workmanship issues?
- Patent / latent defects?

SITUATION *(HKIA exam question 2019)*

After issuing the Certificate of Substantial Completion, cracks are found in the floor screeding during the DLP. The Architect issues an instruction and requests the Contractor to re-lay the screed at no additional cost. The Contractor, however, argues that the Architect was satisfied with the condition of the screeding at completion when he issued the said Certificate, and therefore this request is considered as a **variation.**

CONSIDERATION

- **ISSUE**
  - Are the cracks considered as "**defects**"?
  - Defects occur during DLP are considered as latent defects.

- **BASIS (Standard Form of Contract)**
  - Clause 17.3 – Rectifying defects

♦ **APPLICATION**

SCENARIO A – A NEW OFFICE BUILDING

- Discuss whether the cracks are considered as "defects". Reference should be made to the Specifications (both General Specification and Particular Specification) and/or drawings which stipulate the requirements of the completed screeding or the degree of tolerance for any cracks.

- Has the Contractor carried out the screeding works in accordance with the Specification and/or unique method statement as may be required by the propriety material?

- Are there any external factors (e.g. excessive loading or mis-treatment of the screeding) that have caused the cracks on the screeding?

- Other than the contract provision, check the coverage of the material warranty (if any).

- It should be noted that issuance of a Certificate of Substantial Completion does not relieve the Contractor's responsibility to rectify defects found within the DLP.

SCENARIO B – A&A WORKS TO EXISTING SCHOOL BUILDING

- In addition to those issues discussed in (A) above, would the cracks be due to the dilapidating building conditions of the School building?

- Is there any condition survey done before commencement of the site works? It is common for such to be carried out so that a fair comparison can be made in case a defect arises due to the building conditions.

SECTION C - CONTRACT ADMINISTRATION

EXTENSION OF TIME (EOT)

PRINCIPLES

As a contract administrator, the Architect shall impartially assess all extension of time (EOT) applications made by the Contractor. Clause 25.1(3) forms a clear and solid basis for the listed events in the assessment of EOT. Listed events include both neutral events (which are not caused by either the Employer or the Contractor) and events caused by the Employer/any person for whom the Employer is responsible. The most common claim for EOT is due to the Architect's Instruction covered by sub-clauses (f) to (l) of the listed events.

The Contractor is obliged to issue a notice of delay whether or not the envisaged delay is entitled to an EOT claim. There are many times that the Contractor forgets submitting the first notice of delay in accordance with Clause 25.1 (1) in a timely manner. In such case, 25.3(4) should be observed and the Architect should still be required to assess the EOT application.

It is important to note that according to Clause 25.1(4), the Contractor shall use his best endeavours to prevent or mitigate delay whether or not the delay entitles the Contractor for an EOT. This is an important concept to bear in mind while assessing the extent of EOT entitlement.

SITUATION *(HKIA exam question 2019)*

Due to the Employer's request for changes in the user's requirements, variations were required to the Contract at a very late stage. The Architect issued Architect's Instructions (AI) to the Contractor to cover such changes. The Contractor submitted a notice of delay right after receiving the Architect's Instructions. Discuss the **issues that the Architect should consider when considering granting EOT.**

CONSIDERATION

- **ISSUES**
  - Whether the variation falls within the definition of **listed events**?
  - At the time of issuing the AI, whether the variation work was on the **critical path**? If yes, the variation work would have an impact on the Contract Completion.
  - Did the Contractor provide **notices of delay** to the Architect on a timely basis?
  - Did the Contractor use his **best endeavours** to prevent or mitigate delay?

- **BASIS (Standard Form of Contract)**
  - Clause 25.1(1) and (2) & 25.2(1) and (2) – First and Second Notices
  - Clause 25.1(3)(l) – Late instructions?
  - Clause 25.2(1)(a) – Cause of delay?
  - Clause 25.1(4) – Best endeavours?

- **APPLICATION**
  - Taking into the account the Contract Completion and the critical path at the time when the variation works were instructed – discuss with the Contractor the duration of the works involved and check against master programme.

  - The instruction could be considered as a "late" instruction if it affects the critical path of the completion programme which leads to delay.

  - Did the Contractor use his best endeavours to prevent or mitigate the delay?

  - If it was "at a very late stage" and the works affected the critical path of the master programme leading to a delay, then EOT should be granted.

SECTION C - CONTRACT ADMINISTRATION

EXTENSION OF TIME (EOT)

PRINCIPLES

During the course of the Contract, it is not uncommon for Contractors to submit alternative proposals to replace certain part of the Works as specified in the Contract. Apart from justifications in compliance with the performance requirements of the Contract, the Contractor should also submit any implications to the master programme for the Architect's consideration. The programme shall demonstrate compliance with the Contract dates as well as any programme and/or cost benefits for the alternative proposal.

If the alternative proposal is accepted by the Architect, the Contractor shall bear the design responsibilities including preparing any statutory submissions and obtaining statutory approvals in a timely manner. Any additional time in obtaining statutory approval and/or additional cost incurred for implementing the alternative proposal shall be borne by the Contractor.

SITUATION

The Contractor submitted an alternative piling proposal and promised that it would provide programme and cost benefits to the project. The Architect accepted the proposal but such acceptance is subject to obtaining BD's approval of the piling system. Subsequent to the design submission, it took about 6 months for the BD to issue an approval for construction. The reasons for the delay were due to incomplete information and errors in structural calculations prepared by the Contractor. **The Contractor then submitted a claim** for a 4 month EOT claiming that the BD had taken 4 months longer to process the submission, and referred to the listed event under Clause 25.1(3)(t).

CONSIDERATION

- **ISSUES**
  - The Contractor's alternative proposal and time and cost consequences.
  - Principles in "listed event", "critical path", "notices of delay" and "best endeavours" in assessing EOT shall also apply.

- **BASIS (Standard Form of Contract)**
  - Clause 25.1(3)(t) – Time not reasonably foreseen in obtaining approval/ consent from a government department;
  - Clause 25.2(1)(a) & 25.4 – Cause of delay and Contractor's default involved in a delay?

- **APPLICATION**
  - Once the Contractor's alternative proposal is adopted, the responsibility for obtaining any statutory approval from the BD shall rest with the Contractor.
  - The listed event under Clause 25.1(3)(t) is to grant EOT in case of delay in obtaining statutory approvals which takes unreasonably "long" time which is out of control of the project team. However, it does not apply to the case where it was caused by the default of the Contractor.
  - In this case, the unexpected long approval time is due to the Contractor's failure in submitting the necessary information and correct structural calculations. The delay is not qualified as a listed event for "unreasonable delay by a Government department".
  - The Contractor shall be responsible for the delay. It is not considered to be a "listed event" and therefore no EOT shall be granted.

SECTION C - CONTRACT ADMINISTRATION

DELAY RECOVERY MEASURES

PRINCIPLES

The Contractor is obliged to use his best endeavours to mitigate delay caused by himself or others. However, the Contractor is not obliged to spend additional money for acceleration to catch up any delays which are not caused by him.

Compare Clause 25.5 and 26:-
Under Clause 25.5 - Rate of progress, the Contractor has the obligation to expedite the progress of works to catch up with the delay caused by him at his own cost.
Clause 26 - Delay recovery measures cover the scenario where the Contractor is explicitly requested and paid to recover the delay by reducing the extent of EOT entitlement.

When a delay is identified, the Employer sometimes requests the Contractor to provide delay recovery measures including deploying additional manpower resources, re-sequencing the work, etc., in order to catch up with the delay. At this juncture, the Architect should make the Employer aware that it is likely to have cost implication to the Contract. The Employer should be advised on the benefits between the two different cases: either granting an EOT which may have cost implication; or the cost implication due to implementing the delay recovery measures.

The other point to note is that the delay recovery measures aims at reducing delays resulting from an eligible EOT. This clause should not be applied with the aim to shorten the original contract period.

SITUATION

The progress of piling works has been delayed for about 6 months due to delay in delivering the waterproof concrete by the Nominated Supplier to the Site. Despite the Contractor's best endeavours, the Employer is very eager to catch up with the delay by 3 months and hence **requested the Architect to instruct the Contractor to expedite the progress** by deploying more labour manpower on Site. How would you advise the Employer?

CONSIDERATION

- **ISSUES**
  - Did the Contractor cause the delay?
  - Is the Contractor entitled to any EOT?
  - Will the Contractor spend additional costs to catch up with the delay ?
  - Is this request an acceleration or delay recovery measures?
  - Any payment to the Contractor involved?

- **BASIS (Standard Form of Contract)**

  Clause 25.1 – the Contractor to issue notice of delay to the Architect

  Clause 25.1(4) - the Contractor shall continuously use his best endeavours to prevent or mitigate delay however caused without the Contractor spending additional money

  Clause 26.1 - delay recovery measures

- **APPLICATION**
  - Nominated supplier caused the delay. The Contractor already exercised his best endeavours under such circumstances.
  - The Contractor should be entitled to EOT for 6 months.
  - The Employer's request for a 3-month catch up is not a request for acceleration but a request for delay recovery measures. Clause 26.1 applies.
  - The Architect is empowered to issue an instruction to the Contractor to implement the delay recovery measures under Clause 26.1 after receiving Employer's written directions and accepting of the Contractor's proposal.
  - The delay is not caused by the Contractor's fault. He is not obliged to spend additional cost to catch up with the delay. The Employer should be advised that the Contractor should be paid additional costs for implementing the delay recovery measures.

SECTION C - CONTRACT ADMINISTRATION

DETERMINATION OF CONTRACT

PRINCIPLES

Clause 35 & 36 of the Standard Form of Contract set out the conditions and procedures to be followed for determination of the Contractor's employment, and the rights and duties of the parties, until final settlement. These procedures have to be strictly followed in cases of determination.

SITUATION *(HKIA exam question 2011)*

The Contractor has claimed for an extension of time (EOT) of 120 days for three variations instructed by the Architect. They claim that these variations were all agreed with the Employer. The Architect has granted an EOT of 60 days. However, the Contractor argues that the EOT granted falls short of the delay and disputes the Architect's granted EOT.

It is now becoming apparent that the extended Completion Date will not be met. Both the Architect and the Employer are of the view that the Works will be delayed for at least 9 months based on the Contactor's progress.

The Employer now seeks the Architect's advice that he wants to **determine the Contractor's** employment. He wishes to engage another contractor to take over and complete the remaining Works as soon as possible. He considers that this is the only way to avoid financial loss of the project.

♦ **APPLICATION**

- Clause 35 – Determination by Employer, provides two situations when the Employer can determine the Contract: (1) Default by Contractor; (2) Insolvency of Contractor.

- **Reasons for determination**: For the situation above, the Architect should review if the Contractor is in default by any of the reasons as stated Clause 35.1(1) (a) to (e).

- **Determination Procedures**: The Architect and the Employer must follow the determination procedures strictly as stipulated in Clause 35.1:

  a. The Architect gives a notice of default to the Contractor, specifying the default. It should state in the notice that a notice of determination may be served if the default for a further 14 days after receipt of the notice of default.

  b. The Contractor should have an opportunity of remedying his default. Once the Contractor receives the notice, he may:

     - Dispute the notice and give notice of arbitration

     - Accept that he is in default and rectify immediately. He should inform the Architect that the default specified in the notice has ceased.

     - Ignore the notice and risk the consequences of the Employer determining his employment under contract.

  c. The Employer may give a notice of determination of the employment under the conditions of Clause 35.1(3).

- According to Clause 35.4(6), The Employer may employ and pay other persons to complete the Works and to rectify defects of the kind referred to in Clause 17.3.

- Determination of Contractor's employment is always the last resort. It may lead to longer time and excessive cost to engage others to complete the Works, and is usually not beneficial to both parties. The determination may be challenged by the Contractor and may even involve dispute resolution and legal involvement.

- Alternatively as a more proactive approach, the Employer and the Architect should identify the reasons of not performing and attempt to work out a strategy with the Contractor on improving the situation; and where necessary, carry out negotiations with the Contractor to resolve the matters and to bring the Works back on track.

SECTION C - CONTRACT ADMINISTRATION

DISPUTE RESOLUTION

PRINCIPLES

Settlement of disputes by litigation and arbitration can be expensive and time-consuming. It is common nowadays to resolve disputes arising from building contracts by alternative dispute resolution methods such as mediation.

SITUATION

The Employer refuses to honour payment after an Interim Certificate is issued. He explains that this is to compensate the loss caused by the Contractor's delay. The Contractor argues that **the Architect's assessment** of Extension of Time is wrong. He therefore requests to settle the dispute based on the provisions in the Contract. The Employer intends not to respond before Substantial Completion. Discuss how you would advise the Employer.

CONSIDERATION

- **ISSUES**
  - Timing of the dispute resolution?
  - Decisions?

- **BASIS (Standard Form of Contract)** –
  - Clause 41 – Settlement of dispute
  - Clause 40 – Recovery of money due to the Employer

- **APPLICATION**
  - The Architect should explain to the Employer his power to recover damages, according to Clause 40(1). However, the Employer should give a notice to the Contractor by special delivery stating the amount of deduction and the reason for it at least 7 days before making the deduction. If the procedure mentioned in Contract has not been followed, the Employer cannot withhold payment.

  - Either party of the Contract, i.e. the Employer or the Contractor, has the right to request for settlement of disputes. There are procedures and time frame set out in Clause 41.

- Since the payment issue and assessment of Employer's loss of value are under 41.5(1)(c) & (d), the arbitrator shall have jurisdiction to hear the parties and commence the arbitration at any time.

SECTION C - CONTRACT ADMINISTRATION

DEFECTS RECTIFICATION CERTIFICATE/FINAL CERTIFICATE

PRINCIPLES

The Contract clearly defines the timing and conditions for issuance of Defects Rectification Certificate. A reasonable time is set, usually 12 months, for rectification of any defects revealed after Substantial Completion. During this period, the Contractor shall be obliged to rectify all defects discovered. Any defects found after the Defects Liability Period will be considered as latent defects. The Final Certificate that follows Defects Rectification Certificate should be conclusive of all works done and final contract sum adjusted.

SITUATION

After issuance of the Defects Rectification Certificate and the Final Certificate, the Architect discovers 5 No. doors are painted with a wrong colour shade and requires the Contractor to rectify it under Clause 17.3(1). The Contractor argues that the said defects were not in the previous schedules of defects and refuses to rectify the new defects items. The Employer wishes to exercise his rights under Clauses 4.3(3) and 4.3(4) to engage other contractors to carry out rectifications at the expense of the Contractor i.e. deduct the cost from the amount stated in the Final Certificate. **How will you advise the Employer?**

CONSIDERATION

- **ISSUES**
  - Are the defects reasonably discoverable within Defects Liability Period?
  - Is the defect raised before expiry of DLP?
  - Has the Defects Rectification Certificate been issued?
  - Has the Final Certificate been issued?

- **BASIS (Standard Form of Contract)**
  - Clause 17.3(1) – the Contractor shall rectify defects identified during DLP
  - Clause 32.9(1) – the Final Certificate shall be conclusive evidence that the Works had been duly completed in accordance with the Contract.

- **APPLICATION**
  - The said defects are very visual and should have been reasonably discoverable during the DLP. However they were not identified and included in any schedules of defects.
  - All lists of defects should be issued no later than 14 days after the expiry of the DLP.
  - The Defects Rectification Certificate and the Final Certificate have been issued. The latter is conclusive of all works done and final contract sum adjusted. The Employer cannot therefore deduct money from the Final Certificate.
  - As this does not fall within the definition of latent defect, the expenses incurred in the Employer's employment of others to carry out the rectification works shall be borne by the Employer himself.

SECTION C - CONTRACT ADMINISTRATION

DEFECTS RECTIFICATION CERTIFICATE/FINAL CERTIFICATE

PRINCIPLES

The sequence of key events to be observed prior to issuance of the Final Certificate is listed below:-

1. The Architect shall certify Substantial Completion of the whole of the Works;
2. Defects Rectification Certificate for the whole of the Works shall be issued;
3. The QS shall prepare the final account within the remeasurement period and obtain the Contractor's agreement of the final contract sum;
4. The QS shall obtain the Employer's approval of the final contract sum;
5. The QS shall obtain confirmation from the Architect with regards to any defective works that will not be rectified and appropriate deduction should be made in the final account;
6. The QS and the Contractor shall sign the final account;
7. The QS shall prepare the final Valuation of Works;
8. The Architect shall issue the Final Certificate to all parties;
9. The Architect shall notify all NSC and NS regarding the issue of the Final Certificate.

Issuance of Final Certificate is a very important milestone which relates directly to many other clauses in the Contract, for example:-

- Clause 4.1 – The Architect may not issue instructions after the issue of the Final Certificate.
- Clause 24.2(2) – Employer's notice requesting LAD to be paid shall not be issued after issuance of the Final Certificate.
- Clause 32.9 – Final certificate is the conclusive evidence of:
  (a) Works are completed to the specified standard
  (b) Contract sums are adjusted
  (c) EOT has been given
  (d) Direct loss and/or expense are settled

  Exceptions:
  - Matters under proceedings (Clauses 32.10 & 32.11)
  - any defect/omission from the works not reasonably discoverable at the time of the issue of the Defects Rectification Certificate

SITUATION

The Final Certificate has recently been issued for a shopping mall A&A project. A number of newly installed façade glass were found broken recently. Upon opening up inspection after the incident, it is found that the fixing method of the subject glass differs from the Contract drawings and hence the ability of the glass to withstand natural deflection is affected. The Contractor argues that the Final Certificate signifies Architect's satisfaction of the Works and considers the fixing method an accepted alternative proposal instead of a defect. The **Contractor refuses to rectify the defects** at his own cost.

CONSIDERATION

ISSUES

- Are the defects reasonably discoverable within Defects Liability Period?
- Is the Final Certificate a conclusive evidence that the Works are completed to Architect's satisfaction even covering latent defects?

♦ BASIS (Standard Form of Contract)

- Clause 32.9 (1) Effect of Final Certificate

♦ APPLICATION

- The defects were not reasonably discoverable before the DLP as the fixing was hidden by cover plates.

- Under Clause 32.9 (1), the Final Certificate shall be conclusive evidence except where any defect in the Works was not reasonably discoverable at the time of the issuance of the Defects Rectification Certificate.

- The Contractor is obliged to rectify the defect.