Evaluation of the Standardised form of contract at Sultanate of Oman

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Abstract
The use of standardised forms of contracts has been generally considered practical and economical in the construction industry. Originally produced in the 1980s, the standardised form of construction contract for government works is the only standard contract document available and recognised for public works in the Sultanate of Oman. In Oman, government contracts for the construction of public works are required by statutory law to be fixed-price contracts awarded through competitive bidding. The standardised form of contract has never really been reviewed and updated. Unfortunately, there is limited research in the Omani construction industry particularly in the contractual management field. Based on this, a PhD research has been set up intending to evaluate the use of the standardised form of construction contract in Oman and to formulate recommendations of necessary improvement to incorporate the contemporary and future needs and trends in the Omani construction industry. This paper discusses the background and rationale of conducting the research followed by the research methodology applied in this study. The earlier stages findings are also presented followed by discussion. The paper is concluded by summarising the progress and findings so far as well as the further stages of this research guided by the findings.

Keywords
Clarity, Construction Law, Standardised form of Contract at Sultanate of Oman.

1. Introduction
The construction industry has generally been considered playing a powerful role in sustaining economic growth and typically considered an important industry for most countries. In many countries, it contributes to domestic economies as both a large employer and as a sector of considerable economic value (Thompson, et al. 1998). Construction industry is normally a major source of jobs, making a large contribution to the GDP and is a major purchaser of other sectors.

In many projects, the growth of construction industry with its inherent increased complexity has resulted in higher number of claims. Claims are common in construction projects and can happen as a result of several reason, that can contribute to delaying projects or increasing there cost. For this reason, the well drafted construction contracts should include some kind of clauses for addressing disputes and claims at the germane stage in a project. This includes for instance, clauses containing carried provisions and instructions for parties to resolve disputes.
as they arise, during the course of the project (Jannadia et al. 2000). Additionally Broome and Perry (1995) extended the discussion by asserting that the clauses within a contract should fit together to form a logical whole, be procedurally correct and relevant to modern construction practice in distinguishing the factor affecting the clarity of the standard forms of contract. A good construction contract should include well drafted drawings and specifications that inform the contractors what he must do to earn the promise compensation and provide a method of determining whether the objective has been reached (Ibrahim and Madon, 2006).

At the Sultanate of Oman, the standardised form of construction contract (OSFC) is the only standard contract document available for public works. The form of contract was statued by the Ministry of Finance and National Economy of the Sultanate of Oman in 1980s and has been used in the construction of all types of public projects leading to the large industry projects. In line with the common ways of working in the 1980’s for instance, the government contracts for the construction of public works are required to be fixed-price contracts awarded through competitive bidding. Over the years, the OSFC has never really been reviewed and updated to keep up with the development and trend in the global and local Omani construction industry.

Limited research in the field of standardised form of contract in the context of Omani construction industry has necessitated further study on the matter. Therefore this research intends to collect evidences of practices in OSFC and provide directions for future study in the field. The main aim of the research is to study the standard form of Omani contract, and to recommended frame work that can be used to improve the OSFC and contracting practice in Oman. This research provides a framework for comparing the contracting practices in the UK and in Oman. It starts by reviewing previous studies on OFSC and two of the standard form of contract, i.e. FIDIC standard of contract and NEC3 form of contract practices and explores the main delivery methods, inform of comparison with different aspects of contracting systems. It examines construction contracting types, processes and procedures and interaction between the client and other parties. This study was based on a literature review and the result shows the similarities and differences between the NEC3, FIDIC and OSFC within each practice and between both practices; the distribution of responsibilities and risks both in pre-construction and during the construction stages; and allocation of responsibility in both practices. The literature has show different aspects for each of standard form of contract.

2. Standardised Form of Contract

2.1 Standardised Form of Contract Construction Industry.

The construction industry generally uses many types of contracts. Each one allows responsibilities and risks to be allocated in various ways and integrate different payment mechanism. Moreover, standardised form of contracts such as NEC are progressively flexible in determining, for example, which party takes responsibility for design, what performance incentives are adopted and how risks are to be allocated (Stovin et al. 2004).

Contract is defined as an agreement between the parties in exchanging promises giving them rights and duties bound by the law (Owen, 1998). In order to create a legally binding contract, it is sufficient for the parties to express their agreement
and intention. However, in order to avoid potential disputes, the contract terms should be set out in writing in a document, subsequently signed by the parties, which can be used as a legal-evidence (O'Reilly, 1999). A construction contract is then made between two parties, the ‘Employer’ and the ‘Contractor’. Their roles are defined clearly in the contract. However, there is normally a need for daily supervision of the construction that the two parties may agree for a third party to carry out such duties. The third party can be designated as ‘the Engineer’ under the contract; or may be designated ‘the Project Manager’ or ‘Employer’s Representative’ with different roles suitable for the project (Twort and Rees, 1995).

In creating a contract, in many cases, there is a necessity for contractual arrangements to be entered into in one of the many standard forms of contracts available (Capon, 1990). Standard forms of contracts are conditions of contracts that have been prepared jointly by professional bodies and organisations to distribute the risk fairly and equally to the parties (Abrahamson, 1985). The use of standard forms of contract intends to ensure that all parties are familiar with the terms as a result of common usage that reduces the likelihood of disputes arising over the interpretation of the clauses. The parties are then aware of their rights and obligations under the terms of the contracts that are well documented.

2.2 Standardised Form of contract at Sultanate of Oman

Construction contracts in Oman are usually set out from FIDIC forms of contracts. The changes made by FIDIC to transform the ICE form to an international form of standard contract can be considered insubstantial (Bunni, 1999). Oman’s legal system is based on civil code principles and in particular, the Egyptian Civil Code. This has been cited the first legal issue with Oman Construction contracts (Mansour and Al Sharji, 2008) as this contrasted by the general practice of directly translating FIDIC into the Arabic language in some Arab countries in the contracts and related documents, including in Oman (Arrowsmith et al. 2000).

In public sector, the OSFC drafted in 1980s is the only standardised form of contract available. This OSFC consists of two parts. Part one is entitled ‘the principal document of the contract’ and is composed of eight articles dealing with matters similar to some of those generally stated in standard agreement and/or bid forms of construction contracts. Part two is called ‘general conditions’ and is composed of 61 clauses expressing terms and conditions similar to some of those usually found in standard general conditions of those contracts (Ministry of National Economy, 2005). However OSFC has never really been reviewed and updated. Thus, taking into account the vast development in the global local (Omani) construction industry, there is a need to review/evaluate the OSFC and recommending potential improvement to the OSFC to enable it accommodating or even embracing current days needs characteristics of the Omani construction industry.

2.3 Methods of Evaluating Standardised Form of Contract

There are many aspects to be considered in evaluating general conditions of construction contracts, Abdulaziz et al. (2001) defined many aspects to be considered to ensure the “smoother” completion of the construction process. The general condition should anticipate the potential trouble spots of the relationship between the contracting parties. The other aspect to be considered is the language
which should be clear to the parties. The ‘workability’ of the rules prescribed in the
general conditions is related to this aspect. Responsibilities and fairness are other
important aspects: the general conditions should be fair to the contracting parties
whilst the best principle for allocating responsibility is that controllable risks should
lie with the party who is in control. In addition, the general conditions should
elevate the achievement of the more palpable dimensions of project success in
terms of cost, time, quality and safety. As a starting point, the OSFC has been
compared against other standardised form of contract (FIDIC and NEC) in this
research. This stage has been defined to capture updates that have been
implemented in another standardised form of contracts that reflect the current
situation and trends in the global construction industry.

3. Research Methodology

There is a strong suggestion within the research community that research, both
quantitative and qualitative, is best thought of as complementary and should
therefore be mixed in research of many kinds (Amaratunga et al. 2001). Thus, the
combining of the research methods is intended to be complementary, i.e. adding
different dimensions to the research. In collecting data, the use of in depth
interview combined with a postal questionnaire are considered appropriate to
provide breadth and depth for the research. Moor (2000) discussed the technical
term for combining research methods in this way to provide a number of different
views on an issue is triangulation. It is useful to concept and one that it well worth
considering when designing projects as it adds consider-able value to the research
result. The link between the quantitative and qualitative methods enables the
transfer of idea from each other and provides richer details. It enables the idea to
be developed as well as initiating new lines of thinking and providing fresh insights.

Following an in depth literature review and archival study of construction law cases
in Oman and comparative analysis between OSFC and other standardised form of
contracts, the research intends to conduct semi structured interview and
questionnaire to facilitate data collection. As stated by Naoum (1998), this form of
interview uses ‘open’ and ‘close-ended’ questioning but the questions are not asked
in a specific order and no schedule is used. Semi-structured questionnaire and
interview has been considered as the most appropriate technique for this research.
The independents targeted are Questionnaire survey designed to evaluate various
aspects of the standardised form clauses in the Sultanate of Oman. Thus
questionnaire survey will designed to identify best practice in Omani construction
sector in implementing the standardise contract clauses. On return of the
completed questionnaires, data analyses will be performed. After refinement of the
data, various stages of data analyses will be conducted. The analysis of the survey
results will be conducted using descriptive statistic tool, subsequent to this, follow
up will be by semi structured interviews will be conducted to further discusses as
well as the validating the finding.

4. Comparison Study Between OSFC, NEC3, and FIDIC

This part of this paper presents the findings of the comparison study between the
OSFC and two other standard form of contracts ex NEC3 and FIDIC form of
contracts. The OSFC standard forms are intended to be applicable to a wide variety
of types of work including building, civil engineering, mechanical and electrical
engineering and for major and minor works in the Sultanate of Oman. All
government-awarded construction and civil engineering contracts use a standard
form of contract: the ‘Standard Documents for Building and Civil Engineering Works’ (Fourth Edition, September 1999). The forms in fact are applicable more to domestic civil engineering projects than building contracts. Ideally, substantial amendment would be necessary to deal adequately with building contracts, where the other standard forms may be more appropriate. Among various differences, two major differences have been identified, namely the dispute management and subcontracting.

In term of dispute management the OSFC contains terms that provide for disputes not capable of resolution determination by the project’s engineer to be referred to arbitration. The adoption of the standard form of contract in building projects between private parties is widespread throughout Oman thus requiring any disputes arising in relation thereto to be determined by way of arbitration also. The arbitration process, and the interpretation of the agreement to arbitrate itself, is governed by Sultani Decree 03/07, promulgating the Law of Arbitration in Civil and Commercial Disputes (the Arbitration Law). Whereas in FIDIC the clause for arbitration is one part of a comprehensive dispute resolution process in which at several stages decisions will be made as to entitlement and/or quantum, including a Dispute Resolution Board whose goal is to prevent the parties from engaging in an arbitration.

NEC3 alternatively provides for a dispute to be referred to an adjudicator under option W1 (W2 for the UK). Whatever reservations there may be about some aspects of adjudication, there is now no doubt that decisions made by adjudicators are generally either accepted by the parties or are used by them as the basis for an agreement to settle the dispute finally. A party that is dissatisfied has the right to take the resulting dispute to the tribunal (court or arbitrator as designated in the contract data). That tribunal decides the dispute referred to it. It does not of course act as an appellate tribunal but as a tribunal of first (and possibly last) instance with the obligation to reach its own decision. However acceptance of an adjudication decision may turn on the competence and experience of the adjudicator, as the guidance notes explain. NEC3 provides for an adjudicator to be named by the employer in the contract data. If an employer or its legal advisers are concerned that a dispute might arise about a “tricky” legal point then a lawyer (or someone with legal qualifications) whose ability is not in doubt should be selected. It is impossible to guarantee that a legal point will be decided ‘correctly’—one has only to look at the decisions of appellate courts in countries where the judges are familiar with construction contracts Lloyd (2008).

In subcontracting term the FIDIC Conditions of Contract for Construction (Red Book) do not permit the Contractor to subcontract the whole of the works. These conditions of contract hold the Contractor responsible for the acts or defaults of any of his domestic subcontractors as if they were the acts and defaults of the Contractor himself. However the NEC3 Engineering and Construction Contract (ECC) has been designed on the assumption that work may be subcontracted. There is no provision for the nomination of subcontractors within the NEC contracts. Provision for selected subcontractors may, however, be included in the Works Information (scope of work). The principle of the ECC is that the Contractor is fully responsible for every aspect of managing the work he has contracted for. Nominating subcontractors conflicts with this principle and causes many practical problems. On the other hand, the nomination of sub-contractors arises under clause 59 of OSFC conditions of contract whereby it refers to them being all the persons to
whom, by virtue of the provisions of the contract, the contractors is required sub-contract, and shall in the execution of such work or the supply of such goods, materials, plant or services, be deemed to sub-subcontractor to the contractor, and to refer to as nominated sub-contractor. The nomination process is prone to so many problems as the contractor has the right to object to a ‘nominated sub-contractor’, or to that who refuse to enter into a sub-contract which is back to back with the main contract and which identifies the contractor in respect of the nominated sub-contractor’s breaches. It is emphasised on no privacy of contract between the employer and subcontractor. In summary of this term, Unacceptable forms of subcontracts are those which contain provisions for payment procedures based on a pay-when-paid, or pay-if-paid system; a right of set-off in favour of the contractor not provided for in the law; authoritarian rights given to the prime contractor, or his agent, with no recourse to independent adjudication in the event of a dispute arising (CIDP Practice note, 2007). It can be concluded from this discussion that OSFC has failed to incorporate alternative ways of procurement such as construction management.

4. Conclusion and Further Research

The study conducted in this PhD research was instigated by construction contract and contractual process in construction industry at the Sultanate of Oman. The research intends to investigate the potential problems in using the dated standard form of construction contract and recommend solutions. This research paper outlined the proposed study, which illustrated the research justification, significance, contribution drawn from previous literature from the developed and developing countries. The report also presented an overview of the intended research methodology.

At this point of writing, the research is in progress of performing a comparative analysis between OSFC and other standard form of contracts i.e. NEC 3 and FIDIC. The initial findings reported and discussed in this paper demonstrated that there are 2 major differences between OSFC and the other two (updated) forms of contract, namely the dispute management and the sub-contractor management. The differences reflect the more contemporary needs of construction industry as accommodated by NEC 3 and FIDIC which have been updated regularly.

Further research involve finishing the archival updated study on construction law cases in Oman to identify the most common and contemporary contractual issues in its construction industry. Combining the findings from construction law cases study and general trend of construction industry in the recent time and in the future, questionnaire will be distributed as well as follow up interviews to help the researcher in formulating recommendations of necessary improvement to the OSFC in order to incorporate the contemporary and future needs and trends in the Omani construction industry. The recommendations from this research will be forwarded to the decision makers in the Sultanate of Oman to inform them in improving Omani construction industry.

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