

# ATTRIBUTES OF DOMESTIC SUBCONTRACT IN MALAYSIAN CONSTRUCTION INDUSTRY

Nor Marina Rosli<sup>1</sup>  
Nur Emma Mustaffa<sup>2</sup>  
Hamizah Liyana Tajul Ariffin<sup>3</sup>

<sup>1</sup>Faculty of Built Environment and Surveying, Universiti Teknologi Malaysia (UTM), Malaysia,  
(E-mail: marinar@utar.edu.my)

<sup>2</sup>Faculty of Built Environment and Surveying, Universiti Teknologi Malaysia (UTM), Malaysia,  
(Email: b-nuremma@utm.my)

<sup>3</sup>Faculty of Built Environment and Surveying, Universiti Teknologi Malaysia (UTM), Malaysia,  
(E-mail: hamizah@utm.my)

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**Abstract:** *A variety of standard form of main contracts and nominated subcontracts which correspond to the main contract are used in Malaysia. Nonetheless, there is no standard domestic subcontract form available to correspond to the standard main contract in the local context. More than ninety percent of registered construction companies in Malaysia are in the SME category. Even though subcontractors usually execute a significant portion of a construction project, domestic subcontracting issues are seldom acknowledged and addressed. Very little research work has been conducted, and there is little published information available on the subject, especially on the standard form of domestic subcontract. Therefore, there is a need to determine the attributes of 'good' standard forms, which may be incorporated as part of an efficient domestic subcontract form. This paper is based on an extensive review done on literature pertaining to the attributes of the domestic subcontract. Nineteen (19) selected articles from well-regarded and relevant academic journals specializing in civil engineering, construction engineering and management and project management were thoroughly reviewed. In addition to that, twenty-two (22) sample of in-house domestic subcontract forms were analysed in order to evaluate crucial conditions required for domestic subcontract. The content analysis yielded six major categories, which are clarity, consistency, language, format, parties, and risk.*

**Keywords:** *Construction, Domestic Subcontract, Attributes of Domestic Subcontract*

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## Introduction

There are two types of subcontractors in a construction project, comprises of nominated subcontractor and domestic sub-contractor. The main contractor often contracts for many works that exceed their variety or by their quantity, those of which the main contractor cannot execute alone. Consequently, the main contractor might assign all or part of them to other contractors who undertake or complete certain parts of the work, such as carpentry, plumbing, painting, or certain detached parts of the whole (Haloush, 2021). Proper contract conditions that set out a

well-balanced obligations, responsibilities, and liabilities of each contracting party are essential for projects to be successfully implemented (Ho, 2021). According to the most recent statistics published by Arcadis (2019), one of the most common causes of disputes in the construction industry, nationally and internationally, is the project parties' failure to understand their contractual obligation (Khalef et al., 2021). Based on the arguments by various authors documented in journals, a set of attributes and crucial conditions of domestic subcontract have been developed. These attributes and crucial attributes needed to be incorporated can be used as guideline during the drafting of a domestic subcontract form.

### Literature Review

There are several standard forms of main contracts in the Malaysian construction industry and a nominated subcontract form in existence, yet there has never been any published standard form of domestic subcontract. Very little research work has been conducted, and there is little published information available on the subject, especially on domestic subcontract attributes. Most subcontracts between the main contractor and the domestic subcontractor are unpublished 'in-house' contracts, ad-hoc, or 'one-off' contracts form. Domestic subcontracts are often sealed on an informal basis. Such contracts have provoked fierce criticism from trade associations representing subcontractors for their unfairness as they are only in favour of one side. This is due to the non-standard form of domestic subcontract. The parties sometimes attempt to incorporate terms by referring to other documents, such as the standard subcontract form they commonly use with or the main contract itself. This may impose an unnecessary burden on the subcontractor whose contract may not be associated with the main contract, such as the provision for liquidated damages. For example, the main contract worth RM 1,000,000.00 may have a liquidation damage clause for a delay of RM 10,000.00 per week. It would be unreasonable to expect the same level of damages from a subcontractor with a contract of RM 50,000.

The general condition of the construction contract clauses has a significant influence on the likelihood and degree of success of a project. Establishing the right contract conditions will help reduce disputes in the future. For domestic subcontract, the main contractor sometimes uses simple conditions or leaves important conditions unspecified in the subcontract used. This will lead to disputes in the future. A sample of simple conditions is gathered in Figure 1. The existing contract shown in Figure 1 only stated two conditions which are Payment and Defects Liability Period. A domestic subcontract, which could be a simple written contract or just a verbal contract, may have unspecified and unclear terms and conditions, which may lead to disputes and suspension of work (Yik and Lai 2008). Domestic subcontractors often used a non-standard form for their subcontract. The main contractor drafts the contract term, and many contractors impose their standard terms on sub-contractors. These often contain provisions that put subcontractors at loss in a disagreement.

Payment:	60 days Term after delivery.
Defects Liability Period:	Thirty (30) months commencing from the date of issuance of Certificate of Practical Completion.
Delivery Schedule:	To be advised

**Figure 1: A Sample of Simple Conditions of In-house Domestic Subcontract**

Source: Sample of Bespoke Subcontract for a Housing Project, 2017

Take one court case related to the payment clause. In the case of Brightside Mechanical & Electrical Services Group Ltd. and another v. Hyundai Engineering & Construction Co. Ltd (1988) 41 BLR 110, clause 11(b) of the subcontract provided that the contractor shall notify and pay to the subcontractor the total amount of certified value within 5 days of receipt of the total amount by the contractor included in an architect's certificate. With the payment rate less than the agreed amount, the contractor is must complete the delayed subcontractor's work. The words are clear and unambiguous. The problem arose when the main contractor refused to pay the subcontractor the amount of \$ 924, 711.00. In his defense, the main contractor stated that he did not pay the subcontractor because he had not received any payment since February 1987 due to the liquidated damages claim. The Court held that, due to this problem and referring to clause 11(b), the main contractor was not obliged to pay the sum specified in the agreement to the subcontractor until he received the payment.

The terms of the contract are the main body of the standard contract form. They clarify particular clauses that establish the rights and obligations of the parties in the contract. All the clauses are presented in a numbered format for ease of reference. The clauses include the usual performance required from each party, rules/procedures for executing the contract, handling disputes, and payment to the contractor. The drafting of a specific contract is generally the best blueprint for a particular project with specific requirements translated into certain terms and conditions. However, drafting a detailed contract can be time-consuming and expensive, requiring a specific legal team to provide legal opinions. A set of attributes and crucial conditions can be established through research and dissemination of the research findings through appropriate journal publications or conferences. One of the advantages of these attributes is that it is an antecedent for a good benchmark for the subcontract to be established.

Uff (1974) reported the difficulty of achieving an ideal contract by stating that: "In (1964), the Banwell report (H.M.S.O) recommended that a single standard form of contract for the whole construction industry was both desirable and practicable and that standardization of subcontract conditions should follow. Unfortunately, these admirable objectives have not yet been achieved." Nachatar et al. (2011) further expressed that one of the best ways to avoid or minimize frustration is to have a detailed checklist and a thorough and prepared contingency plan.

### **Methodology**

A comprehensive review and detailed content analysis of nineteen (19) selected articles from well-regarded and relevant academic journals published specializing in civil engineering, construction engineering and management and project management were made. The selection of journals was based on purposive/selective sampling (Xiong et al. 2015). Besides that, a sample of twenty-two (22) domestic subcontracts forms were collected from local construction companies have been analysed to extract out the crucial conditions from these forms.

### **Results**

Table 1 spells out the specified attributes of the domestic subcontract forms, which have been gathered from the analysis on the papers that lay out the findings of previous research which focused on the same form.

**Table 1: Attributes of domestic subcontract from various researchers**

Author	Attributes	
Agrawal <i>et al.</i> (2021)	<ul style="list-style-type: none"> <li>• Efficient</li> </ul>	<ul style="list-style-type: none"> <li>• Unambiguous</li> </ul>
Paciaroni (2013)	<ul style="list-style-type: none"> <li>• Best suited to deliver the project</li> <li>• Integrated, well-considered whole</li> <li>• Clear, concise, unambiguous language</li> <li>• Mechanically sound</li> <li>• Clearly defines the scope of work</li> </ul>	<ul style="list-style-type: none"> <li>• Anticipates a wide variety of potential problems</li> <li>• Risk allocation</li> <li>• Balanced</li> <li>• Insurance</li> <li>• Dispute resolution mechanism</li> <li>• Understood and followed at the project level</li> </ul>
Chong & Zin (2010)	<ul style="list-style-type: none"> <li>• Clarity - shortened the sentences, active voices, no repetition of words, in the complexity of phrases, avoid 'shall,' positive style of language, good explanation on procedure and process, good word formation.</li> </ul>	
Wong <i>et al.</i> (2008)	<ul style="list-style-type: none"> <li>• Clear</li> <li>• Information should be explainable to parties who may affected</li> </ul>	<ul style="list-style-type: none"> <li>• Clarification of contract terms and agreement</li> </ul>
Madon and Mohamad (2006)	<ul style="list-style-type: none"> <li>• Clarity</li> <li>• Written in simple language</li> <li>• Precise, objective, and practical</li> <li>• Prepared by qualified professional</li> <li>• Induction session before contract to be implemented</li> </ul>	<ul style="list-style-type: none"> <li>• Clearly explained on regulatory requirement</li> <li>• Minimize use of complicated legal phrase</li> <li>• General condition to be made familiar</li> </ul>
Yik <i>et al.</i> (2006)	<ul style="list-style-type: none"> <li>• Clearly define the scope of work</li> </ul>	<ul style="list-style-type: none"> <li>• Ambiguous terms and conditions</li> </ul>
Michael O'reilly (1999)	<ul style="list-style-type: none"> <li>• Clear</li> </ul>	<ul style="list-style-type: none"> <li>• Certainty</li> </ul>

Source: Author's Analysis

Based on the various ideas of an 'ideal' standard form of contract, the current six (6) attributes as shown in Figure 2 for evaluation are shortlisted and chosen for this study for a detailed analysis of the domestic subcontract. These attributes were selected after a comprehensive analysis on the literature review and samples of domestic subcontract form have been made. The attributes considered for evaluation and investigation purposes are restated here as:



**Figure 2: Summary of The Attributes**

Source: Author's Analysis

Given the number of forms drafted by the Malaysian construction industry and the problems associated with each of them, the need to establish a standard conditions contract is evidenced in the issuance of these forms. The crucial conditions of domestic subcontract form are listed in Table 2. The list of crucial conditions has been retrieved from the findings of previous research and local domestic subcontract samples of various companies.

**Table 2: Crucial Conditions of Domestic Subcontract**

<b>Clauses</b>	<b>Authors</b>
Completion dates and progress of work	Assaad et al. (2020), Uher (1991)
Payment provisions	Assaad et al. (2020) , Merwin et al. (2014), Ya-zhuo & Fan (2011), Soewendo, (2011), Podvezko et al. (2010), Fisher et al. (2005), Uher (1991)
Claims and disputes	Assaad et al. (2020), Merwin et al. (2014), Fisher et al. (2005)
Entitlements to extra time	Assaad et al. (2020), Soewendo, (2011), Fisher et al. (2005)
Contract sum	Assaad et al. (2020), Ya-zhuo & Fan (2011), Ibbs (1988)
Performance Bond	Nee et al. (2014)
Damage	Nee et al. (2014), Hartman & Snelgrove (1996)
Delay	Nee et al. (2014), Merwin et al. (2014), Soewendo, (2011), Fisher et al. (2005), Uher (1991)
Defect	Nee et al. (2014)
Variation order	Nee et al. (2014), Soewendo (2011), Hartman & Snelgrove (1996), Uher (1991), Ibbs (1988)
Payment	Nee et al. (2014)
Site conditions	Merwin et al. (2014), Fisher et al. (2005)
Change orders	Merwin et al. (2014), Hartman & Snelgrove (1996), Ibbs (1988)
Liquidated damages	Merwin et al. (2014), Ya-zhuo & Fan (2011), Yik et al. (2006), Fisher et al. (2005), Uher (1991)
Indemnification,	Merwin et al. (2014), Fisher et al. (2005)
Termination	Merwin et al. (2014), Soewendo, (2011), Podvezko et al. (2010), Fisher et al. (2005)
Warranty	Merwin et al. (2014), Podvezko et al. (2010)
Time limit of project	Ya-zhuo & Fan (2011)
Dispute settlement	Ya-zhuo & Fan (2011) , Soewendo, (2011), Yik et al. (2006), Fisher et al. (2005), Hartman & Snelgrove (1996)

Clauses	Authors
Rights and obligations	Chui & Bai (2010), Podvezko et al. (2010)
Process	Chui & Bai (2010)
Quality	Chui & Bai (2010), Ibbs (1988)
Cost	Chui & Bai (2010), Podvezko et al. (2010)
Administration	Chui & Bai (2010)
Subcontracting	Podvezko et al. (2010)
Insurance	Podvezko et al. (2010), Fisher et al. (2005)
Suspension of work	Podvezko et al. (2010)
Scope of work	Yik et al. (2006), Hartman & Snelgrove (1996), Ibbs (1988)
Project delivery systems and contractors' design responsibilities	Fisher et al. (2005), Ibbs (1988), Ibbs (1988)
Review and inspection of the work	Hartman & Snelgrove (1996), Ibbs (1988)
Security deposits and retentions	Uher (1991)

## Conclusion

Based on various authors' arguments presented above, a set of attributes needed to be incorporated in the drafting of a domestic subcontract have been established, becoming the antecedents for a benchmark of a good subcontract to be discussed further. This research provides a ground for future discussions about domestic subcontract. This on-going research may also reduce the present problems related to domestic subcontractors and may provide ways to improve domestic subcontract practice and management. The content analysis findings showed that six major categories of attributes comprise clarity, consistency, language, format, parties, and risks. These are the results of the literature review conducted in the attempt to establish a framework for domestic subcontract in the Malaysian construction industry

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