

A Methodology of Avoiding a Contractual Issue on Construction Project in Kuwait

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Abstract—This paper will investigate and critically evaluate to avoid the contractual issues on the construction project in Kuwait by improving the existing system of selected the contract forms in the construction project of Kuwait. It will fully consider the insights and opinions of engineers working on major construction projects in Kuwait. The different methods used to select the contract form in the Kuwaiti construction industry will be identified. Questionnaires, surveys and interviews will be used as a means of acquiring relevant information with regard to the country's major construction industries, This information will be analysed in order to discover the best means to improve the existing system used in Kuwaiti construction contracts for the selection of contract forms and terms of payment which could be benefit by including steps to ensure that types of project delivery system and term of payment in the future construction projects in Kuwait.

Keywords—delay, variation order, project termination, dispute resolution, construction contract, standard form

I. INTRODUCTION

A Kuwait is rich in crude oil reserves, which represent 7% of the world's reserves. Petroleum in Kuwait accounts for 95% of government income and export revenue [1]. The government, however, is seeking to diversify its domestic economic activity following a decrease in oil prices and a decline in oil revenue of 3.7%. This turndown was the result of reduced global demand for crude oil and led to a 15.5% decrease in production and a decline in the average price of exports by 33.3% per barrel. As a result of the decrease in oil revenue, as well as of the increase in non-oil revenue by 11.1% in 2009, the government has started to support non-oil activities [2]. One of the activities it has begun to support is the construction sector, and it spends large sums of money to keep this sector active. The government distributes the gross domestic product (GDP) budget based on expenditure type, and it seeks to maintain a level of ten per cent of annual expenditure on public construction projects, mainly through the Ministry of Planning [3] and Ministry of Public Works [4].

According to the International Journal of Engineering Research and Application (IJERA), delays in projects are

the main cause of problems in the construction industry. Some of the problems associated with project delays range from extended construction time to delay of start of commissioning and use of projects; and also increasing the project budget beyond the sum projected during the planning and design stages of the project. The literature on the subject confirms that project delay is a major problem that occurs all over the world but is particularly frequent in developing countries [5], assert that delays in projects have social as well as economic costs.

II. CONTRACTUAL ISSUES COMMONLY IN THE KUWAITI CONSTRUCTION INDUSTRY

While the potential of the construction industry is endless, it is a highly complex industry which is influenced by several factors that can have immense impact on the outcome of any project. There are various challenges in terms of the management of construction projects. In order to ensure the success of construction projects, one of the key aspects to success is contract management. This consists of the process of allowing parties to enter a contract which provides some obligations that they must deliver to one another [6]. There are various contractual problems that may occur within the construction industry such as financial problems, issues relating to the tender documents such as contracts and drawings, issues relating to material adaptation and specification that impact the quality of the work, political issues, administrative issues, parties who have entered the contract, overall environment of the sector, dispute resolution and arbitration, use of technology, and career ethics [7]. In the case of the construction contracts in Kuwait specifically, there are various issues that have been observed. Some of the commonly observed contractual issue in the construction industry of Kuwait include tender rules, contractual joint ventures, dispute resolution, liability, and such. In terms of tendering, the Central Tender Committee is responsible for the evaluation as well as awarding of tenders on behalf of the government [8]. However, it has been discovered that the government has been lax in terms of observing the tender rules. This issue becomes even more pronounced for the contracts which are being negotiated by the government of Kuwait. Another critical issue is the resolution of disputes between parties. The

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primary issue is the bureaucratic red-tape and corruptive practices within the government which prevent peaceful resolution of disputes. In such cases, the law in Kuwait is clear that contractual parties could agree to foreign arbitration [9]. However, the application of as well as attitudes regarding foreign arbitration is quite rigid which is why only Kuwaiti law is considered for resolution of disputes regardless of how inflexible and inefficient it may be. Reducing conflicts and resolving disputes is essential for ensuring that there are no contractual issues [10]. One of the most major issue observed in Kuwait is during the bidding and tendering process. Essentially, contractors are bidding despite not ensuring appropriate provision for the costs relating to safety. When it comes to tendering, the authorities are often pressured to make drastic decisions that can have harmful consequences in the long-term. Given the highly competitive environment and expenditure cuts, government of Kuwait is not paying great attention to the contracting and tendering process which results in additional issues such as lack of dispute resolution techniques, clear responsibilities and expectations, deadlines for the projects, relevant stakeholders, defining each partner in case of joint contracts, and various others [11]. Combined with the corruptive practices of the government, the law in Kuwait is lacking in terms of providing adequate coverage to any of the parties.

A. Issues in Contracts

Construction contracts are necessary in order to reduce the conflict which may arise during the process of construction. By creating specific terms and conditions for all parties in contracts, they become legally bound to fulfil their responsibilities and duties [12]. However, there are often times when contract disputes may occur due to disagreements between the involved parties. This can have a major impact on the construction project since the legal proceedings and other factors involved may complicate the situation even further. Such frictions can eventually result in further complications within the overall project management [13]. There are various provisions involved within contracts to protect the parties but the parties entering into the contract must be aware of the conditions involved to ensure that their interests would be protected in case any conflict arises. When there is conflict and the interests of various stakeholders or investors are not aligned, the profits of the construction project would be negatively impacted as well. However, it is not possible for the interests of stakeholders to not have conflicts since there is major disparity within their interests. According to Mitkus & Mitkus (2013) [14] construction industry is one where conflict is inherently present which makes cooperation between parties very difficult. Furthermore, the uniqueness of each project makes it impossible for there to be a standard definition of success and thus each party evaluates success differently. While contracts are supposed to protect each party, there are often some areas in which they can be lacking, particularly, when one of the parties is unaware of the appropriateness of the terms and conditions mentioned [15]. This results in various issues within

contracts which are explored comprehensively in this paper.

B. Construction Delays

Delays within construction happens to be one of the most disputable issue within construction projects. According to Almutairi (2016) [16] there are six types of delays including excusable, independent, non-excusable, critical, non-critical, and concurrent delay. According to Thorvaldsson *et al.* (1996) [17] the delays within construction projects indicate that these could be divided into three layers including issues caused by contractors' incompetence, issues relating to inadequacies or shortages within the infrastructure of the industry, and issues relating to consultants and clients. There are also various other factors which can contribute to the delays within construction such as payments and finances, interference of owners, unrealistic duration of contract that has been decided upon by the owners, and slow process of decision-making. On the side of the contractors, these delays may be caused by improper management and planning, lack of experience, mistakes, etc [18]. However, all of these factors can be tied back to contract management considering the fact that contracts are able to describe and define all of these activities. For instance, if the contracts have been established well and in accordance with the needs and requirements of the various stakeholders and parties involved, then these contracts can ensure that there are no delays within construction process. Specifically, in the context of Kuwait, research by [19] indicated that the procedures for the pre-qualification of sub-contractors as well as contractors is one of the major contributors of construction delays. Such practices of the government have allowed the contractors to lower bidding prices significantly which has resulted in unscrupulous practices from contractors such as undertaking certain measures to cut costs (reduction of materials being used, overworking and underpaying the employees, etc.). In case, there is no provision regarding Change orders within the contracts, then it would result within the inflation of contract prices for contractors or builders and could result in further delays due to financial issues, disputes, etc. Most importantly, it is essential for contracts to include Delay Provisions which would allow fair terms for all involved parties. Generally, this is drafter within a manner that would allow contractors to still be compensated regardless of the delays which provides them a lot of freedom for unilateral extension of timeline of the project.

C. Termination of Project

Contract termination in construction sector "terminates exercise of obligations as well as rights that arise from the contracted relationship" [20]. This essentially means that all legal ties are being terminated between the contractor and the principal. However, it is essential to note that not each and every obligation can be terminated, and some may continue to exist up to a certain tie such as replacing and repairing damaged property, warranty-related obligations, and others [21]. One of the major

issues associated with this is related to the amount of risk allocated to each party when the contract was first entered into [22]. There are certain conditions that are imposed and agreed upon when parties establish a contract where they list their responsibilities in case, they wish to terminate the contract; this means that certain penalties are decided upon for the defaulting party. JCT DB 2016, NEC4, and FIDIC all allow provisions for parties to terminate their contracts in case the project is to be suspended for a certain time period [23]; however, this is mostly applicable to neutral events such as COVID-19 and other force majeure. Kuwait also does not offer unilateral contract termination in certain situations. Furthermore, if right to termination has been expressed within the contract in Kuwait, a termination notice still would not be effective until the contract and its amendments' wording is appropriate and in accordance with the applicable law. Termination of contract is generally allowed in cases where contractor has no intention of performing their specific obligations, delaying or suspending their work while having no reasonable excuse, and others [24]. However, the overall process of the termination of contract poses many challenges for the party especially if the language of the contract has not been carefully read and considered before entering into it. Furthermore, given the environment of legal proceedings and law in Kuwait, being able to terminate a contract is increasingly difficult.

D. Dispute Resolution

In simple terms, dispute resolution is about resolving an issue between two parties [25]. The method of dispute resolution is decided upon by the parties involved and may have several steps prior to taking strict legal measures to resolve it [26]. Construction has increased within Kuwait in terms of both sophistication and contractors which has resulted in attention from many players on an international level. These consultants as well as contractors require appropriate remedies and steps in case any disputes occur between parties. In this case, arbitration is one of the most commonly sought out method for resolution of disputes. However, in the case of Kuwait, arbitration has often been ignored and made extremely difficult which prevents parties from bringing about peace so that the contract obligations can be fulfilled. Arbitration with intervention is essentially carried out by the court whereas arbitration without intervention is done outside of the court [27]. As mentioned previously, arbitration is one of the core issues within the contracting industry of Kuwait. Despite having local laws that support arbitration as well as having international law, the government of Kuwait has been far slower in this regard in comparison to many other nations within the Gulf. It has been common to see in Kuwait for parties to enter into arbitration agreements; however, Kuwait's state employers have repeatedly forced arbitration process into the courts. Kuwait has remained steadfast in the utilization of its local law for settling of disputes whereas other Gulf nation have already adopted

the UNCITRAL Model Law which is far improved and efficient in terms of resolving disputes through arbitration without the intervention.

Disputes are extremely common within the construction industry and can be regarding any number of issues. [28]. However, the contract determines the method of dispute resolution which needs to be implemented by the parties involved [29]. The selection of the right method is essential since arbitration with interventions would only result in delaying the project's work significantly while also increasing the financial burden on the involved parties due to the court costs.

III. IMPROVING THE EXISTING SYSTEM OF SELECT THE CONTRACT FORM TO AVOID CONTRACTUAL ISSUES ON CONSTRUCTION PROJECT IN KUWAIT

Previous studies have suggested that an independent and distinct approach to the two stages would yield better results, especially, in the long term. It is thus important, when choosing an approach to a project, to understand that different stakeholders will have different opinions and suggestions regarding the course of action. The type of client one deals with will also differ from one project to another. Additionally, the market conditions during the procurement phase (such as quality assurance, risk, complexity, accountability, costs, and time) might also differ, making it more likely for conflicts related to the budget of the project to arise [30]. The analysis of [31] established the importance of the procurement method considering the nature and the constraints of a given project. Devising an appropriate procurement method will be beneficial in terms of avoiding risks and resolving disputes related to the project. It will take into consideration characteristics that are bound to influence the choice of the procurement method, such as funding, timing, policy makers, the complexities of agency recruitment, the brief, the type of work, the site and the value of the project at each phase of the construction, [32] and will establish the factors that need to be considered when deciding on the appropriate procurement method, namely Project Size, Cost, Time, Accountability, Quality Assurance, Organization, Complexity, Risk, Market, Finance, and Design. Furthermore, these criteria for the selection of an appropriate method call for a consideration of the criteria for the selection of the appropriate type of contract.

For this paper, the focus is on understanding the core issues within the current system of contract selection within Kuwait. The literature review framework presents the various steps which are to be taken during this research in order to achieve the aim and objectives of the research. Since the aim focuses on the addressing the inadequacies within the current contract selection system within Kuwait and formulate relevant recommendations, it will be necessary to understand all the aspects involved within contract selection. This can allow for understanding about various issues in this process as the contract selection does not follow "one size fits all" philosophy. The uniqueness of each contract requires careful attention on how every situation demands a

different method of contract selection. Thus, critical analysis of each contract type is a necessity for the progress towards the achievement of the study's aim. There is also a need for shedding light on the need for good practices in terms of contract selection within the construction industry as this is one of the sectors which is faced with most problems due to contracts and can often have disastrous results for all involved parties. The requirement for focus on the needs of clients and contractors along with consultants is also necessary as they may share information that could aid in the process of developing an appropriate framework for contract selection in the case of Kuwait. (See Fig. 1).

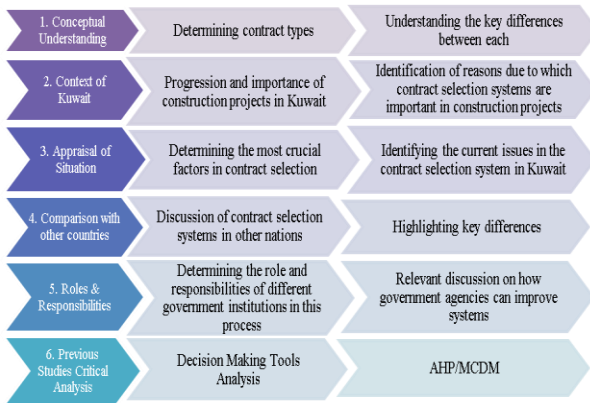


Figure 1. Literature review conceptual framework

IV. PROPOSED METHODOLOGY

This paper will propose a methodology for the establishment of a new system for the selection of contracts in the Kuwaiti construction industry to achieved that to avoid the contractual issues into construction project in Kuwait. The research methodology and design chapter of this paper outline the approach adopted in the quest to successfully answer the research question and to satisfy all the stated objectives. This chapter contains documentation of all the possible options available for this study. It also contains a narrowing down of the available options to the choices that were considered the most viable for the research question and that promised to yield the most successful results. The research design and the various processes chosen during this research are also outlined.

In order to achieve the aim of project, there will be a critical analysis of the existing systems used for the selection of contract forms for construction projects within Kuwait. There will also be evidence-based proposals for building on the strengths of the current system and for mitigating its weaknesses.

Fig. 2 below lists the research questions. It maps the research objectives and indicates five distinct phases in the form of an “onion” model. These phases will assist in clarifying the nature of the research model adopted for the research paper.



Figure 2. Research methods

The text below outlines the specific data that will be sought from specific groups of participants.

Phase I: Critical analysis of the existing system in place for selection of contract forms on construction projects in Kuwait. In order to achieve this phase, the data will Collect on systems being used for the selection of contract forms on construction projects in Kuwait where Analyse collected data in relation to best practice, based on a review of published literature then use analysis to identify strengths and weaknesses in the existing systems used for selection of contract forms on construction projects in Kuwait.

Phase II: Development of a conceptual framework on best practice for contract form selection after investigating the existing system used to select contract forms in the construction industry in Kuwait. This will be done through an interview addressing with contractors, consultants and employers whom have deep experience into the systems used to select the contract forms for the construction project in Kuwait by focusing on the contractual issues to avoid it.

Phase III: Propose and validate strategies for improving contract form selection practice in Kuwait to aiding framework selects the best chosen of contract form, project delivery system, and term of payment by multiples all of those types depending on time, size type, funding and sector.

This will be done by means of a questionnaire survey addressing major contractors, major design consultants and employers. Fig. 3 above shown that the strategies necessary for the development of the existing systems used to select the contract forms for construction project in Kuwait.

A. Research Population & Sample

- The participants amongst clients will be those individuals who had experience in the management of construction projects of varying sizes within the country and their target population will be (with 50+ employees). Consultants from firms of varying sizes in Kuwait will also be included in the sample with the target being 100 participants. Contractors from firms of varying sizes within Kuwait will be included in the sample with the target being 100 participants. The guide for the size

classification for contractor and consultants' firm include 3 sizes: small (with 10-20 employees), medium (with 20-40 employees), and large (with 50+ employees).

B. Guide for Consultant and Contractor Company Size Classification

- Small (10 to 20 employees)
- Medium (20 to 40 employees)
- Large (more than 50 employees)

Surveying includes different forms and structures of interviews and questionnaires. This is a mixed-method research study that aims to obtain qualitative data. Therefore, both questionnaires and interviews are used to gather the required information in this paper and the mixed approach is adopted. The research contains questions and tools tailored to capture both qualitative and quantitative data throughout the study.

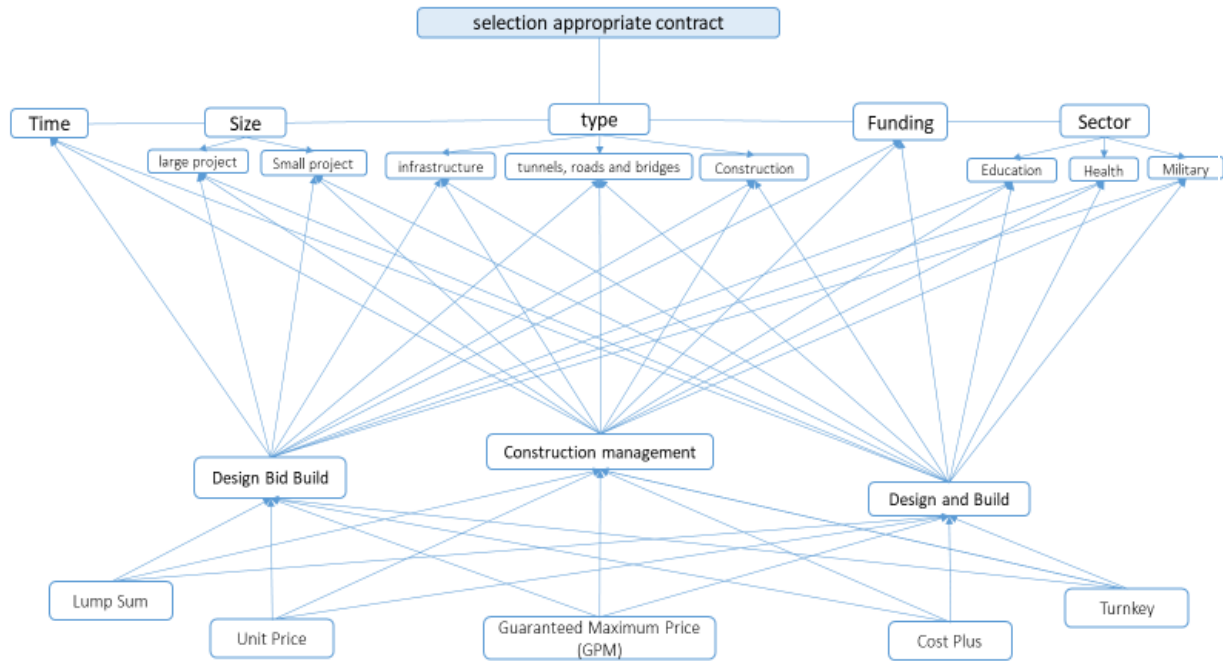


Figure 3. Strategy to develop the Kuwait system

V. CONCLUSION

It has been ascertained that the delays in projects are the main cause of problems in the construction industry. Some of the problems associated with project delays range from extended construction time to delay of start of commissioning and use of projects. There are various challenges in terms of the management of construction projects. In order to ensure the success of construction projects, one of the key aspects to success is contract management. Construction contracts are necessary in order to reduce the conflict which may arise during the process of construction. By creating specific terms and conditions for all parties in contracts, they become legally bound to fulfil their responsibilities and duties

This paper has proposed a methodology of investigating the existing system used of a select the contract forms in order to proposed a new system for selecting contracts form in the Kuwaiti construction project to achieved that improving the performance of construction industry by avoiding the contractual issues in Kuwait.

CONFLICT OF INTEREST

The authors declare no conflict of interest.

AUTHOR CONTRIBUTIONS

A. Almutairi formulated the research and reviewed the literature related to the research as well as prepared the methodology of this research to begin collecting a data for this research. Supervisory team: Nuhu & Andrew had approved the final version.

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