



2011
BEM Road Show
Paper 3: Letter of Release

**Guidelines for an engineer taking over the
work of another**

- 1. BEM Circular No. 1/1992 dated 30 Oct 1992**
- 2. BEM Circular No. 1/2004 dated 20 April 2004**
- 3. BEM Circular No. 1/2006 dated 15 April 2006**

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1. Introduction to Letter of Release (pre-1992)
2. BEM's Circular no. 1/1992
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Definition of Letter of Release

- What is a LOR with regards to the appointment of a consulting engineer for his professional services?
 1. A written document that is required to be executed by the consulting engineer
 2. To discharge his duties and obligations of his appointment which has been terminated

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Termination by Who?

1. The Client for the project which the Consulting Engineer is being appointed for
2. The Consulting Engineer himself

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Reasons for termination

1. The Client is not satisfied with the performance of the Engineer
2. The project has been sold to a new Owner who prefers his own engineer
3. The project is shelved due to economic reasons and there is no possibility of reviving it in the future
4. The Client has been influenced by another engineer who is canvassing for work
5. The Engineer is not getting the due respect and cooperation of the Client to execute his duties and responsibilities professionally. He then decides to terminate his professional services

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Post Termination: What are the issues to be resolved? (prior to BEM Circular no.1/1992)

1. The Client has to pay the Engineer for his professional services rendered up to that stage when his services is terminated
2. The Engineer has to issue a Letter of Release to the Client to enable a 2nd Engineer to take over
3. The termination should be executed within the terms of the Contract Agreement and with adherence to Regulation 31 of the Code of Professional Conduct in the Registration of Engineers Act

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Regulation 31 of the Code of Professional Conduct in the Engineers Act reads as follows:

- “31. A Professional Engineer in private practice shall not directly or indirectly –
- (a) supplant or attempt to supplant another Professional Engineer in private practice;
 - (b) intervene or attempt to intervene in or in connection with engineering works of any kind which to his knowledge has already been entrusted to another Professional Engineer in private practice;

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- (c) take over any work of that other Professional Engineer in private practice acting for the same Client unless he has –
 - (i) obtained the consent of that other Engineer; or
 - (ii) been formally notified by the Client that the services of that other Engineer have been terminated in accordance with the provisions of any **contract** entered into **between that other Engineer and the Client**

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Settlement between the two parties

- There is need to satisfy clause (c) in totality in order for the 2nd Engineer to take over
- A fair and reasonable Client will normally and amicably settle the professional fees due to the 1st Engineer before appointing a 2nd Engineer. Clause (c) (i) then applies.

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- Cases of a Client exploiting the provision of clause (c) (ii) to confirm the termination of the 1st Engineer without settling the fees did not arise or went unreported to the Board, until
- One particular incident occurred and was reported to the Board
- In this infamous case, a private Consulting Engineer appointed for a public project could not work with the Client (JKR) but yet refused to issue a Letter of Release to permit a 2nd Engineer to take over
- His unreasonable behaviour frustrated the completion of the project and obviously affected public interests
- This case caused the birth of Circular 1/1992

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BEM Circular 1/1992

- ❖ To prevent the recurrence of a similar situation, BEM issued the above circular on 30th October 1992, which allows a 2nd Engineer to take over without the necessity of a LOR from the 1st Engineer
- ❖ This Circular has three clauses:
 - **Clause 1** basically quotes the Regulations 31 of the Code of Professional Conduct
 - Sub-clause 2 defines the meaning of the words “supplant”, “intervene” and “take over” with Note 1 which mentions that the contract should have been in writing and may be in the form of an exchange of correspondence or a formalised memorandum of agreement.

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- **Clause 2** reads as follows:

THE CIRCUMSTANCES WHEN A LOR IS UNNECESSARY;

1. When the Client is no longer the registered owner of the property or project.
2. When the 1st Professional Engineer’s engagement has been terminated by the Client
3. When the 1st Professional Engineer has commenced legal proceedings for the recovery of his fees

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4. When the registration of the 1st Professional Engineer has either been suspended, cancelled or removed from the Register by the Board
5. When the 1st Professional Engineer has terminated his appointment with the Client
6. When either the Client or the 1st Professional Engineer has been declared insolvent and placed under receivership

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Clause 3

- ❖ It sets out the procedure that must be followed in meeting the requirements of the guideline and comprise the following steps as described in the following sub-clauses;
 1. The 2nd Professional Engineer must have confirmation in writing from the Client that the services of the 1st Professional Engineer have been terminated

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2. If the Client has not provided confirmation in writing that the services of the 1st Professional Engineer have been terminated, the 2nd Professional Engineer shall enquire in writing from the 1st Professional Engineer whether his services have been terminated by the Client

The 1st Professional Engineer shall respond to such an enquiry not later than 3 weeks from the date of enquiry.

In the event that the 1st Professional Engineer does not reply within 3 weeks, it shall be deemed that his services have been terminated and the 2nd Professional Engineer may proceed to take over the project.

Any enquiry made in this connection shall be sent by registered post

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General comments on Circular 1/1992

- 'Empowered' the client to engage a 2nd Engineer to replace the 1st Engineer without the need for the 1st Engineer to discharge himself
- No need to wait for the Letter of Release from the 1st Engineer
- The 2nd Engineer being appointed for the project is not deemed to have contravened Regulation 31 so long as his Client has confirmed in writing that he (the Client) has terminated the services of the 1st Engineer.

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General comments on Circular 1/1992

cont'd

- Many 'first' Engineers suffered for not being paid for their services rendered following their termination.
- Claim for fees due now suddenly rest entirely on the 'goodwill' of the Client
- Unreasonable Clients can then "drag their feet" at their own pace in the settlement of the fees.

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Problems associated with Circular 1/1992

- This circular has created a problem of a 'different wavelength' by engineers which had been reported to the Board
- Where engineers had not been paid for a long time for work, they have 2 alternatives to press for payment
- Either he stops work or he terminates his services
- If he stops work, his services will be terminated by his Client
- Whichever alternative, the Client can then engage a 2nd Engineer to take over

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- The interest of the 1st Engineer is not protected and this situation will remain as before (his termination) as far as his fees payment is concerned
 - There are others who resorted to a 3rd alternative:
 - The Engineer perseveres until the end of the project and refuses to sign Form E for the application of the CFO for the project
- PROBLEMS !!!** – Clients complain to BEM

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Circular 1/2004

The 1992 Circular allows a Client to engage a 2nd Engineer to replace the 1st Engineer without the need for the 1st Engineer to discharge himself

The 2nd Engineer, on his part, is not deemed to have contravened any law, so long as the Client confirms in writing that he (the Client) has terminated the services of the 1st Engineer

With this procedure in place, many 'first' engineers complained of not been paid for their consultancy services rendered upon their termination

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BEM received increasing nos. of complaints from clients that consulting engineers refuse to sign Form E for application of Certificate of Fitness for Occupancy.

By withholding Form E certification, these consulting engineers had chosen such action as their last resort to force clients to pay their outstanding fees, which they claimed would otherwise never be realized once they signed Form E

The BEM had consistently ruled that engineers should not hold clients (and the public) to ransom and hence must sign the Form E, and that any financial dispute should be resolved contractually

By delaying the application for CFO, the engineer is deemed to have affected the interest of the public (e.g. buyers who cannot take possession of their houses)

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In the year 2001, when cases of refusals to sign Form E began to increase, BEM agreed to industry request to revisit the issue to find a more equitable solution

The solution sought had to maintain the role of BEM in protecting the interest of the public but not at the expense the engineers

Since BEM can only regulate engineers and not members of the public (in this instance the Clients), the mechanism would be to control the 2nd Engineer who shall not be permitted to take over unless the 1st Engineer is properly discharged

With the general framework established, detail work to realize Circular No. 1/2004 then began

The whole process took over 3 years

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This new Circular was also timely to meet the government's decision to introduce self-certification by architects/engineers from CFO to CCC

Imagine the consequence under the 1992 Circular where the 1st Engineer may be coerced to sign the CCC if he wants to get paid or to be replaced and not get paid!

The consulting engineers on their part should have no excuse not to practise professionally and protect the interest of the public and environment etc.

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Circular 1/2006

Not unexpectedly, the handful of cases handled under this Circular 1/2004 revealed some loopholes which were promptly reviewed by the same BEM Working Committee

The resulting fine tuned version to plug these loopholes is now reflected in Circular 1/2006 issued by BEM on 15 April 2006

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BOARD OF ENGINEERS MALAYSIA
CIRCULAR NO. 1/2006
GUIDELINES for
AN ENGINEER TAKING OVER THE WORK OF ANOTHER

1. These guidelines replace Circular No. 1/1992 in setting out the procedure for taking over the work of one registered Engineer by another registered Engineer in concert with Regulation 31 of the Registration of Engineers Act 2002 in that:

A registered Engineer shall not directly or indirectly –

- (a) supplant or attempt to supplant another registered Engineer;
- (b) intervene or attempt to intervene in or in connection with engineering work of any kind which to his knowledge has already been entrusted to another registered Engineer; or

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- (c) take over any work of that other registered Engineer acting for the same client unless he has:-

- (i) obtained the consent of that other registered Engineer; or
- (ii) been formally notified by the client that the services of that other registered Engineer have been terminated in accordance with the provisions of any contract for professional engineering services entered into between that other registered Engineer and the client,
provided always that, in the case of dispute over non-payment of fees or quantum of any outstanding fees under the contract, the client may request the Board to be the stakeholder.

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2. For the purposes of these guidelines:

2.1 the consent of that other (or First) Engineer, in the context of Regulation 31, shall be in writing in a letter to be known as a Letter of Release to the registered (Second) Engineer who is taking over his work.

2.2 the Engineer shall include an Engineering Consultancy Practice registered with the Board.

2.3 the Contract shall mean a written agreement between the Client and the First Engineer and may be in the form of exchange of correspondence or a formalised memorandum of agreement.

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2.4 The Client shall include the “registered proprietor” or “bona-fide agent” or “contractor” for the development of the land and/or buildings. “Registered proprietor” can be individuals, group of individuals, trustees, agencies, statutory organizations, corporations, or any other legal entities whose names and/or legal identities are endorsed on the title of the land or any other instruments, which provide legal ownership to the land and/or buildings

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2.4 “Bona-fide agent” can be individuals, group of
cont'd individuals, trustees, agencies, statutory
organizations, corporations or any other legal
entities who have been empowered by the
“registered proprietor” to represent him in
relation to the development of the land and/or
buildings.

“Contractor” can be any legal entity appointed
by the “registered proprietor” or “bona-fide
agent” to carry out the development of the land
and/or buildings under a concession agreement
or a turnkey/design and build contract.

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3. In compliance with Regulation 31 and these
guidelines:

3.1 A registered Engineer in accepting any
commission shall check with the Client and Local
Authority whether there is an earlier appointed
registered Engineer whose appointment has yet to
be properly terminated.

If there is, the Second Engineer shall write to the
First Engineer for the Letter of Release for him to
take up the commission.

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3.2 If the services of the First Engineer have been properly terminated, he shall be obliged to issue a Letter of Release to enable the Second Engineer to accept the commission.

The First Engineer shall not unreasonably withhold the issuance of the Letter of Release within fourteen (14) days of being requested by the Second Engineer.

If he is unable to give the Letter of Release, he shall state the reasons.

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3.3 In the event the First Engineer claims that there are outstanding fees due to him, he shall:

- (a) present his accounts to the Client for professional services rendered within thirty (30) days of being requested for a Letter of Release.
- (b) issue the Letter of Release upon settlement of his outstanding account by his client.

3.4 In the event that the Client disputes the First Engineer's claim for fees and it remains unresolved after a period of fourteen (14) days from the date when the First Engineer first submitted his account, the dispute may be referred to the Board.

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- 3.5 The Client may submit a request for the Board to act as stakeholder.
The request shall be made on the prescribed Form SH (obtainable from the Board's office).
- 3.6 The Board shall assess a fair and reasonable sum of money to be deposited with the Board as stakeholder, reflecting the quantum in dispute and inform the Client accordingly with a copy to the First Engineer.
- 3.7 The Client shall deposit the assessed sum with the Board.

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- 3.8 On receiving the money from the Client, the Board shall instruct the First Engineer to issue the Letter of Release to the Client for him to appoint a Second Engineer.
- 3.9 The Board shall hold the disputed sum in paragraph until the dispute is settled.
The Board recommends that the dispute be settled through mediation or arbitration.
- 3.10 On being informed of the terms of settlement, the Board shall release the settlement sum or the entire sum in the stakeholder's account, whichever is the lesser to the First Engineer.
- 3.11 The balance of money left in the stakeholder account, if any, after payment is made to the First Engineer shall be returned to the Client.

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3.12 In the event a reply from the First Engineer is not received by the Second Engineer within the time limit provided in paragraphs 3.2 and 3.3 above, the matter may be referred to the Board by the Second Engineer or Client as the case may be.

If the First Engineer is found to be unreasonable in not responding to the request, the Board may direct the First Engineer to issue the Letter of Release or deem that the Letter of Release is not necessary for the Second Engineer to take up the commission for the works.

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4. The Board also does not consider Regulation 31 contravened and that the need for a Letter of Release does not arise when the First Engineer:

(a) has commenced legal proceedings for the recovery of his fees (1/2004)

(a) has commenced litigation and/or alternative dispute resolution for the recovery of his fees.

(b) and the Client have agreed to submit the dispute to arbitration

(c)(b) has either been suspended or had his name removed from the Register maintained by the Board for any reason whatsoever.

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CONDITIONS

1. The Applicant shall abide by the decision of the Board of Engineers Malaysia (BEM) on the quantum of money (the stake) to be deposited with BEM acting as stakeholder.
2. BEM shall have the right to call upon any party to assist in determining the stake.
3. The Applicant shall forward payment of the stake in the form of a crossed cheque made payable to BEM within six (6) months of being informed of the amount, failing which this application will be deemed to have lapsed.
4. On confirmation that the cheque is cleared, BEM shall instruct the First Engineer to issue the Letter of Release to the Client.

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5. BEM shall place the stake in a Stakeholder Account in fixed deposit at monthly rest with interest credited to the same account (1/2004)
5. BEM shall place the stake in a Stakeholder Account.
6. The Applicant will initiate action to settle the dispute as soon as possible (1/2004)
- 6.(i) The Applicant undertakes to initiate action within sixty (60) days of the date of the Letter of Release to settle the dispute on fees with the First Engineer in accordance with the provisions in the professional services agreement signed between the two parties, failing which the Applicant hereby agrees that BEM may release the stake to the First Engineer, unless otherwise agreed by all parties concerned.

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6 (ii) In the case where the professional services agreement is silent on the mode of settlement of dispute, the Applicant undertakes to negotiate and agree within thirty (30) days of the Letter of Release with the First Engineer on a mode of settlement of dispute over non-payment of fees or quantum of any outstanding fees under the contract. If the negotiation is not successful, the Applicant hereby agrees that he/she shall allow BEM to determine the mode of settlement and abide by BEM's decisions thereof, inclusive of the release of the stake to the First Engineer

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7. On being informed of the terms of settlement, BEM shall release the settlement sum or the entire sum in the Stakeholder's account, whichever is less to the First Engineer.
8. The balance of money, if any, in this account after disbursement to the First Engineer, shall be returned to the Client.
9. Accrued interests shall be distributed proportionately to the disputing parties.

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Has the revised Letter of Release (LOR) achieved its objective?

- By 20th April 2011, it will be 7 years since the revised LOR Circular (2004) was issued by BEM to address the gross injustice afflicting Consulting Engineers and Engineering Consultancy Practices through the BEM 1992 Circular.
- Those interested to read more about this topic may refer to ACEM's Suara Perunding publication Third Quarter 2005 under the title "Guidelines for an Engineer Taking over the Work of Another". A particularly relevant paragraph in the said article is reproduced;

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- ❖ "With this Circular in place, ACEM do not expect a flood of cases for BEM to act as stakeholder. On the contrary, it is anticipated that clients will choose to amicably settle fees due and not apply for BEM to waiver the release letter, as time will be of essence to them (now that they cannot circumvent it)".
- ✓ This prophetic statement has proven to be absolutely accurate with the Board's register showing that as of 31st January 2011, the number of LOR cases referred to BEM is 22 which includes 2 cases that were settled without the need for BEM to act as stakeholder. This averages a meager 3.5 cases a year.

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- Other interesting statistics are reproduced below to highlight the success of the revised LOR in addressing the plight of Consulting Engineers and Engineering Consultancy Practices since the 12 years preceding 2004.

Year	No. of Cases	Status
2004	2	Settled
2005	2	Settled
2006	4	Settled
2007	1	Settled
2008	3	Settled
2009	8	4 Settled, 4 Pending
2010	2	Pending
2011	0	To-date

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Stakeholder Sum (RM)	No. of Cases	Method of Settlement	No. of Cases
Nil	2		
Up to 10,000	1		
10,001 to 20,000	4	Amicable settlement (No need for arbitration)	8
20,001 to 50,000	3		
50,001 to 100,000	2	No action – Sum released by BEM to 1 st Engineer	2
100,001 to 200,000	3		
200,001 to 300,000	0		
300,001 to 400,000	3	Settlement through Arbitration	6
400,001 to 500,000	1		
500,001 to 1,000,000	1	Pending Settlement	6
Above 1,000,000	2		

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Conclusion

- The LOR Working Group currently reports to both the Board's Professional Practice Committee and Scale of Fees Committee, and continually address and fine-tune the administrative and disciplinary procedures relevant to the LOR
- Consulting Engineers are constantly reminded that whilst the LOR serves to afford a degree of protection in terms of payment of fees for services rendered, the Board will not hesitate to act against those who flout the Code of Professional Conduct
- Even with this Revised LOR, Consultants need to be conversant on how best to protect their interests when their services are terminated so that their rights under the Revised LOR are not negated; or ensure they do not terminate their services in contravention of their contractual obligations

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Thank You

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