THE HONG KONG E&M CONTRACTORS' ASSOCIATION

The Hong Kong E&M Contractors' Association Limited
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Works Branch
Development Bureau
Government Secretariat
18/F, West Wing,
Central Government Offices,
2 Tim Mei Avenue, Tamar, Hong Kong

Dear Sirs,

Implementation of the Spirit of
Security of Payment Legislation in Public Works Contracts

Overview

1. We have received the Draft Technical Circular (inclusive of annexures A to H) - Implementation of the Spirit of Security of Payment Legislation (SOPL) in Public Works Contracts and provide our comments following the sequence/heading as appeared on the draft Technical Circular.

SOP Framework

2. One Mandatory Requirement under the SOPL Framework is the claiming party/claimant may exercise his right to suspend or reduce rate of progress if admitted amount/adjudicated amount is not received. When this happens, there may be higher cost incurred to the outstanding construction works, will there be any mechanism in place to address the corresponding rise of cost when the dispute is settled or in the settlement of final account?

3. Under the SOPL, different parties including the Employer, Main Contractor, Subcontractor may appoint other independent parties to serve their respective business needs in addition to the appointed adjudicator. While it is a normal practice that the user party especially Government and public bodies will bear the corresponding cost incurred, we would suggest to stipulate clearly that every party shall bear its own cost of appointment of independent services. This may be essential when the SOPL is fully implemented.

4. Paragraph 9 of the draft Technical Circular confirms that the adjudicators decision on extensions of time is not binding. It is recommended that this is expressed in Clause 18 (Jurisdiction of adjudicator) of the SOP Provisions.

SOP Provisions for the Main Contracts

5. The SOP Provisions (Annex C of the draft Technical Circular) details a payment cycle in clauses 3 to 9. There is no mechanism for the Contractor to amend its payment response beyond the date for payment response. As a consequence any errors in the payment response and/or any significant issues which may have been uncovered between the payment response date and payable date are unable to be rectified and/or adjusted. It may be beneficial to provide for a 'notice of intention to pay less' or a 'pay less notice' in keeping with the United Kingdom's SOPL.

Specific Proposals Outside the SOP Framework

Incorporation of SOP Provisions by way of Mandatory Subcontract Conditions

6. Under the quick implementation of the spirit of SOPL in public works contract, only subcontracts under the main contracts are covered, but yet the Main Contractor is required to ensure the incorporation of SOPL Provisions in all Relevant Subcontracts at all tiers. Will this requirement exert an unbalanced burden to the Main Contractor in the context of contractual obligations and management requirements bearing in mind the Main Contractor may not be in a position to select any subcontractors at lower tier? Such SOPL Provisions may also be cascaded to subcontractor at lower tier with probable considerable administrative effort whereby the aim of quick implementation of SOPL may be contradicted.

Direct Payment for Settlement of Unpaid Adjudicated Amount

7. As noted in item 4 above similar contractual provisions are required mutatis mutandis through all lower tiers. This will become particularly complex with the proposed direct payment provisions whereby a party who has not been paid the adjudicated amount can apply to the Employer for direct payment. This adds a significant layer of complexity both in contract and in the administration of such payments.

8. In the event of a subcontractor fails to pay the lower tier subcontractors notwithstanding the subcontractor has received direct payment from the Employer, will there be any mechanism/guideline recommended to provide a rapid resolution of payment disputes at lower tier subcontractors? It is because the financial capability of the lower chain of subcontractors are normally vulnerable.

9. As the main contractor has a legal responsibility to make payments to unpaid workers should subcontractors fail in their obligation to do so, it would be prudent that prior to making direct payments for adjudicated amounts to a subcontractor the Employer obtains evidence that the subcontractor has paid its workers.

Administrative Register of Adjudicator Nominating Bodies (ANBs)

10. Adjudicator is a critical successful factor of the SOPL. While a simplified mechanism to nominate and appoint adjudicator is supported, we would suggest to establish a performance evaluation system of adjudicator to facilitate the nomination and appointment process in the long run.

Way Forward

11. We would recommend the DEVB to lay down criteria/milestones such as the completion of certain amount of design & build/build/term contracts in the course of implementation of the spirit of the SOPL in all new public works contracts with a view for the review of experience gained and subsequent introduction of the legislation to cover all construction works contracts.

12. Provide timeline for implementation of the SOP legislation.

Yours faithfully,

Gilbert Tsang
President
The Hong Kong Electrical & Mechanical Contractors' Association

cc HKCA – Eddie Lam / Thomas Tse
HKFEMC – Rocky Poon / Paul Chong

About The HKEMCA

The HKEMCA has been playing a leading role in the electrical & mechanical contracting sector to deal with all major issues with the Government and all stakeholders since 1982. Members of The HKEMCA are sizable companies which collectively undertake about 60% of the total contract value of the entire industry in Hong Kong and are the major holders of electrical & mechanical contracts outside the territory.

The HKEMCA is one of the three Association Members of the Real Estate and Construction Functional Constituency which also consists of The Real Estate Developers Association of Hong Kong and The Hong Kong Construction Association.