

MC in liquidation - No direct payment to NSC



Levett & Bailey

URGENT

FAXED

Levett & Bailey
Chartered Quantity Surveyors
利比建築工程測量師

Eastern Central Plaza 20th Floor
3 Yu Hing Road
Shaukehan
Hong Kong

Telephone : (852) 2823 1823
Facsimile : (852) 2861 1283
E-mail: surveyor@Ln8.com.hk

FACSIMILE TRANSMISSION

DATE : 18/07/2000 FAX NO : 2194 6351

TO : Housing Department - CA/3- Ms. Anissa Wong (A/39)

FROM : Timothy Lam/Andy Lee/Kenneth Tsang

C.C. : Housing Department - Mr. W. P. Chan (BSE/C40) (2761 7618)

REF. : Redevelopment of Un Chau Street Estate Phase 1 Sub-contract to Contract No.

107 of 1999 - Electrical Installation NO. OF PAGES : 3 (Incl. this page)

If there is any problem, please call : (Name) Kenneth Tsang (Tel.) 2823 3018

~~Direct Payment for Retention Money and Material On Site~~

We refer to UDL's letter ref. EG660/C3/144/CM/00 dated 10/7/2000 addressed to your office and copied to us requesting for the release of Retention Money withheld and the settlement of cost of goods and materials on site delivered by the Sub-contractor and would comment as follows:-

In accordance with GCC clause 81(4), the Employer having re-entered the Site and expelled the Contractor therefrom shall not be liable to pay to the Contractor any money on account of the Contract until the expiry of the Maintenance Period or the last of such Periods and thereafter until the cost of completion and maintenance, damages for delay in completion, if any, and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Surveyor. In which case, any money shall embrace the Retention Money. The operation of clause 81(4) will equally apply as regards the payment for Nominated Sub-contractors as well by the virtue of clause 8 of the Conditions of Sub-contract which incorporates the provisions of the Main Contract.

Pursuant to GCC clause 79(3), the release of Retention Money due to any Nominated Sub-contractor shall be through the Contractor. Although GCC clause 69(3)(c) confers the power to the Employer to effect direct payment for any Retention Money due to Nominated Sub-contractor if the Contractor fails to effect payment, GCC clause 69(3)(d) provides that the Employer is not obliged to do so. Following the liquidation of the Contractor, the payment mechanism becomes more complicated. Any payment due shall be made to the liquidator and he will in turn distribute the money to all creditors of the same class on a pari passu basis. In no way shall direct payment to Nominated Sub-contractor be entertained unless the liquidator has given his written consent of so doing. Otherwise, any such direct

payment may be held to be invalid under the general law of insolvency in Hong Kong and will not relieve the Employer of his obligation to make payment to the Contractor again with the possible result of the Employer having to make the same payment twice.

As for the claim of materials on site, pursuant to GCC clause 72 and clauses 5 and 28 of the Conditions of Sub-contract, all materials owned by the Contractor (including those of the Nominated Sub-contractor) for incorporation in the Works shall become the property of the Employer upon delivery to the Site and the Sub-contractor shall be entitled to be paid by the Contractor the value of all unfixed materials in respect of the same which ownership has been passed to the Employer under the terms of the Main Contract.

Generally speaking, the Nominated Sub-contractor is in principle legally entitled to the costs of materials on site which have not been paid by the Contractor if there is an express term for retention of titles in the Sub-contract or sale contract. Thus, the ownership of the said materials in the event of the failure of the Contractor in making payment shall not pass to the Contractor vis-a-vis the Employer unless the same have already been incorporated into the permanent works.

We would also advise that the estimated amount owing to the Employer from defaulting Contractor up to date is HK\$36.399 Million which the Contractor is liable to the Employer under GCC clause 83. Thus, the Employer shall have power to deduct from any money due to the Contractor under the Contract including Retention Money for all damages incurred by the Employer. Any claim for payment shall be made to the Contractor or the liquidator instead of the Employer as there is no privity of contract between the Employer and the Sub-contractor and nothing aforesaid shall in any way prejudice the right of the Sub-contractor against the defaulting Contractor for outstanding payments pursuant to clauses 22 and 28 of the Conditions of Sub-contract.

Please note that the above are our advice mainly based on the Building Contract. It is strongly advised that legal advice on these matters should be sought before proceeding any further.

We are pleased to enclose a draft reply letter to UDL for your reference.

Regards,

Encl.

Information
(cc) 1

Ref. 2022.4

17th May 1996

By Fax & By Post

Kingdom Land Development Ltd.
c/o Laws Real Estate Agency Ltd.
Hong Kong Spinners Industrial Building
Unit C1, 5/F., Phase 1 & 2
601-603 Tai Nan West Street
Kowloon

Attention: Mr. Raymond Law/Mr. Ambrose Chan

Dear Sirs,

Direct Payment to Sub-Con

Redevelopment of Laws Industrial Plaza
at 786 - 788 Cheung Sha Wan Road, Hong Kong
Main Contract

Direct Payment to Sub-Contractors? (MC have determined)

We refer to our previous letter dated 23/4/96 and Laws' letter dated 9/5/96 ref. L/589/96/LIP/JE regarding direct payments to Pentad's sub-contractors.

We would like to summarize our advice as follows :-

1. Domestic Sub-Contractors DSC - see other letter

Please refer to the advice stated in our previous letter dated 23/4/96 (copy attached for easy reference).

As already highlighted in the above letter, the simpler way for effecting direct payment to the respective domestic sub-contractors can be based on a supplemental agreement between the Employer and the Main Contractor to the original Main Contract with the written consent of Pentad and the written confirmation from the respective sub-contractors.

1. Domestic Sub-Contractors (Cont'd)

We understand that Pentad furnished the Architect a letter ref. ML180496.1/K.23 dated 18/4/96 confirming his agreement to the Employer's direct payment to the domestic sub-contractors for the false ceiling works (Winfield) and G/F fireman lift lobby entrance shop-front and door installation (Ming Kay). However, the Employer's attention should be further drawn to Pentad's subsequent letter ref. ML020596.1/K.23 dated 2/5/96 which had revoked their previous agreement to this arrangement. (04/5/96)

We also refer to our faxes dated 11/5/96 and 14/5/96 regarding the B.Q./assessed costs and the value of work already recommended for payment of marble finishing and suspended ceiling works under the Main Contract. As illustrated in the faxes and discussed with your office subsequently, we note that a substantial portion of the value of the said domestic sub-contract works has already been recommended for payment to Pentad under interim payment certificates issued to-date. In this connection, we would like to reiterate once more (as already expressly highlighted in our previous letter dated 23/4/96) that when considering direct payment, the amount of intended direct payment to the respective domestic sub-contractors plus the value which have already been recommended for payment and in fact have actually been paid to the Main Contractor through previous interim payments, should not be larger than the corresponding total B.Q. assessed value of the respective works under the Main Contract. Otherwise, the Employer may be exposed to the risk of having paid twice for the work done.

Future payment not??



2. Nominated Sub-Contractors

NSC before determination - Employer's discretion

In accordance with Clause 27(c) of the Main Contract Conditions, before issuing any payment certificate to the Main Contractor, the Architect may request him to furnish reasonable proof that all amounts previously due in respect of the total value of Nominated Sub-Contract works have been duly discharged. If the Main Contractor fails to comply with any such request, he shall produce in

Determination
(c) 2

2. Nominated Sub-Contractors (Cont'd)

writing stating :- (i) reasonable cause for withholding or refusing to discharge such amounts due and (ii) reasonable proof of so informing such Nominated Sub-contractor. If the Main Contractor further fails to provide such written documents, the Architect shall issue a certificate to that non-payment and the Employer may (i.e. at his own discretion) pay such outstanding amounts directly to the Nominated Sub-contractor concerned and deduct the same from any sums payable to the Main Contractor.

for the Main Contractor's work
Accordingly, any decision by the Employer for the exercise of the option of direct payment to Nominated Sub-Contractors must be preceded by the above contract procedures, in the next interim certificate

3. Winding up of the Main Contractor MC insolvency - no direct payment

In accordance with Clause 25(2) of the Main Contract Conditions, in the event of the Main Contractor becoming liquidated, the employment of the Main Contractor shall be automatically determined (except with the express agreement between the Employer and the liquidator to the contrary).

Furthermore, under Clause 25(3)(d) of the Main Contract Conditions, the Employer shall not be bound to make any further payment to the Main Contractor once the latter is liquidated. Instead, upon the completion of the remaining works by another 'completion contractor' and the finalisation of the whole account for the project, the Architect shall certify the amount due to the Main Contractor by the Employer or vice versa, having considered the direct loss/expenses incurred by the Employer arising from the determination. /

★ Accordingly, we hold the opinion that direct payments to sub-contractors (whether domestic or nominated) should not be considered under this circumstance since the Main Contractor and also all his sub-contractors in consequence have already been determined under the Contract. Moreover, it should be further noted that the rights and liabilities for payments due to or from a liquidated party shall be governed under the relevant statutes or laws which have stipulated the priority of debtors/creditors.

The above is our general comments based on the terms and conditions stated in the contract between your office and Pentad. In the light of the importance as well as the complexities of the legal issue, it may be advisable for you to consult your own legal advisor for further advice, particularly on the rights and liabilities of the contract parties under statutes regarding liquidation and the appropriate actions to be taken.

Yours faithfully,

Levett and Bailey

HKY/AH/KS/tm
c.c. Ma Leung - Mr. Simon Leung/Mr. Patrick Chiu

Direct Payment
to Domestic
Sub-contractors by
Supplemental Agreement

Ref. 2022.4

23rd April 1996

By Fax & By Post

Ma Leung & Associates
22/F., Asian House,
No. 1 Hennessy Road,
Wanchai,
Hong Kong

Attention : Mr. Patrick Chiu

Dear Sirs,

change DSC to direct contractor under SA

Redevelopment of Laws Industrial Plaza
at 786-788 Cheung Sha Wan Road, Hong Kong

Main Contract

Direct Payment to Domestic Sub-contractors

(MC may be going to
winding up)

We refer to the recent telephone discussion at several occasions with Mr. Ambrose Chan of Laws and Mr. Patrick Chiu of your office regarding direct payments to Pentad's domestic sub-contractors for the finishing works.

As requested, we would like to confirm our advice as follows :-

- 1) The Employer has no contractual obligations in whatever circumstances under the Main Contract with Pentad to pay Pentad's domestic sub-contractors directly should Pentad be default in payment since the Employer is not supposed to be involved in the internal domestic affairs between the two parties of the domestic sub-contract to which the Employer has no privity.

Employer no obligation

Payment
to
Domestic
Sub-contractors

option 1: change DSC
to DC
option 2: S.A.

- 2 -

proposal in case MC insolvency

- 2) We understand that as advised by your office, there has been hearsay evidence that Pentad may be going to winding up in the near future. If the Employer is considering, on ex gratia grounds, direct payments to Pentad's domestic sub-contractors, there can be two options to follow :-

change DSC to direct contractor with MC consent - X

- a) With the consent of Pentad and the respective domestic sub-contractor, the original domestic sub-contract is changed to a direct contract between the Employer and the latter after the assignment of the benefits by Pentad to the Employer under the domestic sub-contract agreement. The respective sub-contract works shall then be excluded from the original main contract work scope.

This arrangement requires formal documentation and execution by all parties involved and is actually a retrospective agreement since in general, the domestic respective sub-contract works were already finished and practical completion of the Main Contract works has already been endorsed by the Architect. Moreover, the Employer has to deal with each domestic sub-contractor in concern as a separate direct contractor in future.

We opine that this is not a recommendable option to pursue.
SA to direct pay DSC - V

- b) With the consent of Pentad, payment can be effected directly to the respective domestic sub-contractors as a supplemental agreement between the Employer and the Main Contractor under the original Main Contract.

This option is a simpler arrangement and requires less formal documentation. Moreover, the Main Contractor is still held liable for all the domestic sub-contract works.

Assignment of
contract
lots + no claim of
loss of profit from
the MC shall be obtained

All domestic
works completed and
P.C. endorsed by
the Architect
→ Any other
consideration?
→ Separate direct
contract
- difficult in
administration

.../3

Determination
(c.) 3

b) (Cont'd)

Undertaking
letter from
M.C. ✓

The supplemental agreement can be in the form of undertaking letter from the Main Contractor agreeing to the direct payment arrangement to the respective domestic sub-contractors. Moreover, the following should also be expressly agreed between the Main Contractor and the respective domestic sub-contractor: -

- i) the final total value of the respective sub-contract works ^{since MC mark up 1/2 in B.Q.}
- ii) the amount of outstanding payment for (i) above

Written Confirmation
from respective
domestic sub-contractors
for the acceptance
of the agreement of the
aforesaid arrangement.

The written confirmation should also be sought from the respective domestic sub-contractor for (i) and (ii) above.

We reckon that the value in (i) above shall not be larger than the corresponding contract value of the respective works under the Main Contract. Moreover, the Main Contractor should confirm that any direct payment to the respective domestic sub-contractor shall be set off from their future payment account and no additional expenses shall be claimable pursuant to this direct payment arrangement.

Yours faithfully,

Levett and Bailey

HKY/AH/KS/mun

c.c. Kingdom Land Development Ltd.
c/o Laws Real Estate Agency Ltd.
- Mr. Raymond Law/Mr. Ambrose Chan