

choices - Determination  
S-A. to carry out for Reference  
outstanding work

## Advice on Contractor's Determination or Alternative

DE 25  
FAXED

Ref. 2513.4

9th May 1998

By Fax & By Post

Wailee Design Architects Ltd.  
9/F., Chinachem Leighton Plaza  
29 Leighton Road  
Causeway Bay  
Hong Kong

Attention: Ms. Wailee Chow/Ms. Flora Lui (Dir 4067)

Dear Sirs,

New Corporate Image Renovation Works  
for Hang Seng Bank Yuen Long Branch

We refer to In-Art's fax Ref. IAC98-0451-SS-al dated 30th April 98 copied to us by your office on 2nd May 1998 and our subsequent meeting with the Employer, your office and Ferrier Chui held in HSB's office on 6th May 1998 regarding In-Art's non-performance of the captioned Contract.

In-Art has declared in the above fax that they are incapable to fulfill the agreement with HSB for the captioned Contract effective from 16th April 1998. While as discussed in the above meeting, we opine that further clarification with In-Art should be sought on their exact scope of contract liabilities unable to be fulfilled (e.g. completion of outstanding contract works, rectification of defects, effecting payment to Nominated Sub-Contractor, etc.), for your reference as requested, we would like to advise on the possible remedial actions to be taken by the Employer should In-Art fail to perform their contractual obligations.

**current status** 1. As advised by your office, we understand that the Contract Work is nearly complete, leaving behind some minor outstanding works and rectification works such as AFA panel and BM lime stones.

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**advise options**

2. In case In-Art fails to complete the outstanding and rectification works, there may be two options to follow:

a. Determination of the employment of the Main Contractor by the Employer

**determination  
- contractual ground  
- implication on  
time and cost**

Under the Main Contract Condition Clause 25(1), it is expressly stated that if the Main Contractor without reasonable cause wholly suspended the carrying out of the Works before completion, and continues such default for 14 days after receiving a warning notice issued by the Architect by registered post or recorded delivery which specifies the default, then the Employer is entitled to determine the employment of the Main Contractor within 10 days after such continuance by notice by registered post or recorded delivery, provided that the notice shall not be given unreasonably or vexatiously.

This option usually takes relative longer time to effect and also considerable lead time is required for preparation and calling tenders/quotation for the completion contract before another completion contractor can be brought in to complete the remaining works.

The Employer will incur additional expense in finishing the works by engaging the completion contractor including extra consultants' fee and any direct loss and/or damage caused to the Employer as a result of the determination. Such additional expense can be contractually recoverable from the original Main Contractor.

As highlighted above, we notice that In-Art's declaration in the above fax on their intention of wholly suspension of work is unclear. In this connection, the Main Contractor should be asked to clarify their intention before this option of determination should be adopted.

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Determination  
cc'd 1/

2. (Cont'd)

b. Employment of other contractors to execute the outstanding works on behalf of the Main Contractor

If within 7 days after receipt of a written instruction from the Architect requiring compliance with an instruction (amended Clause 2 of the Conditions of Contract refer) or if within 14 days or such period otherwise stated after receipt of Schedule of Defects or the Architect's Instructions for making good defects during defects liability period (amended Clause 15 of the Conditions of Contract refer), the Main Contractor does not comply therewith, then the Employer is entitled to employ other person(s) to complete the work. All costs incurred in connection with such employment shall be recoverable from the Main Contractor by the Employer.

Contractually, the formal issuance of the respective Architect's Instruction/Defects List and the non-performance of the Main Contractor within the prescribed period is a condition precedent to the exercise of the above stipulated right to employ other contractors to carry out the outstanding works at the Main Contractor's expenses. This procedure together with the subsequent calling of competitive quotations will inevitably incur administrative time. To overcome this time constraint, we suggest that the original Main Contractor can be approached to seek for their confirmation on their agreement to waive the prescribed waiting period, if possible, so that another contractor can be employed to carry out the outstanding works as soon as possible without undue delay.

3. The Main Contractor's original liabilities and obligations under the Contract will not be released whether Option (a) or Option (b) is chosen. Determination is time-consuming at the first instance, whereas Option (b) is relatively simpler to adopt, especially if side agreement from the Main Contractor can be sought regarding the waiver of the stipulated contract procedure for prior compliance with the Architect's Instruction as before described.

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engage others  
- contractual ground  
- practice  
- implication

The aim is to enter into a supplemental agreement with the Main Contractor (a) to get rid of the time frame requirement as specified in Contract. (b) to obtain the Main Contractor's agreement that he would not claim for any additional cost/loss of profit and the like. 3. The Main Contractor's original liabilities and obligations under the Contract will not be released whether Option (a) or Option (b) is chosen. Determination is time-consuming at the first instance, whereas Option (b) is relatively simpler to adopt, especially if side agreement from the Main Contractor can be sought regarding the waiver of the stipulated contract procedure for prior compliance with the Architect's Instruction as before described.

recommendation

Supplement agreement

to do no matter which option

(Cont'd)

4. In theory, the additional expenses in consequence, if any, can be recovered from the Main Contractor under both options. However, it usually takes a long time for settlement of the final accounts for two contracts for Option (a) i.e. the original Main Contract and the Completion Contract.

5. No matter which option is chosen, competitive tenders/quotations from a number of contractors should be sought in order to ascertain the market price for completing the outstanding works and prevent the Main Contractor from challenging the reasonableness of the additional expenses incurred by the Employer. Moreover, the items of outstanding work and rectification work to be carried out by other contractor should be of the same quality and standard as specified for the original contract works. Any changes in specifications not directly caused by the non-performance of the original Main Contractor should be treated as variation under the original Contract, therefore the additional expenses incurred, if any, in connection may not be recoverable from the original Main Contractor.

We trust the above is the contractual advice you require regarding the appropriate actions to be taken on the subject issue. Please contact us if you require further information.

Yours faithfully,

Levett and Bailey

HKYIAH/RH/mun

c.c. Hang Seng Bank  
Ferrier Chiu & Partners Ltd. - Mr. Tony Hung

option (b)  
to get claim LD by 1/10/00