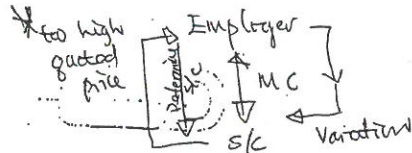


Advice on NSC Determination due to VO High Quote



Ref. 2022.4

20th September 1994

By Fax and By Hand

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

Attention : Mr. Simon Leung/Mr. Patrick Chiu

Dear Sirs,

Laws Industrial Building
at 786-788, Cheung Sha Wan Road, Kowloon
HVAC Sub-Contract

We refer to our recent teleconversation regarding the Client's request to call for alternative quotations and possible determination of the employment of the current sub-contractor for the captioned Sub-Contract.

As discussed, we would like to advise on the contractual implications of this issue as follows :

1. Background

As advised, we understand that for the subsequent revision in the design according to the plot ratio - 12 scheme, Foo Wah has submitted a quotation for the variation works involved which is considered to be excessive as highlighted in CCE's letter ref. CCE527/G-116 dated 26th August 1994.

The Employer has opined that the quoted cost is regarded to be unduly and unreasonably high and has instructed your office to call for alternative quotations from other HVAC sub-contractors in the market for the entire Sub-Contract works. Should the alternative prices quoted are lower than those of Foo Wah, the Employer will consider determining the employment of Foo Wah and renominate another sub-contractor to carry out the Sub-Contract works.

E want to determinate NSC for high quote of VO

higher price for quotation not a valid gd to detm

DE-32
Sub Contract
✓

contractual relationship
and right to determination
on MC

contract provision

2. Right for determination of the sub-contractor's employment

2.1 The status of the existing sub-contractor, Foo Wah (Int'l) Co., Ltd., is a sub-contractor nominated by the Architect under a Nominated Sub-Contract. The parties to the Sub-Contract are Pentad and Foo Wah. Their respective contractual rights and obligations are governed under the Conditions of Main Contract and Sub-Contract. In this respect, only the Main Contractor has the contractual right to determine the employment of Foo Wah under the Nominated Sub-Contract.

2.2 Under the Sub-Contract Conditions Clause 20(a), it is expressly stated that the determination of the employment of the Sub-Contract shall only be made due to the following reasons :

- The Sub-Contractor without reasonable cause wholly suspends the carrying-out of the Sub-Contract works before completion;
- He fails to proceed regularly and diligently with the Sub-Contract Works;
- He refuses or persistently neglects after notice in writing from the Main Contractor to remove defective work or improper material.

Accordingly, the reason of excessive quotation for variation works (called the 'aforesaid reason' hereinafter) is not one of the above categories.

Moreover, at present, it appears that the Sub-Contractor cannot be alleged with any of the above default.

Therefore, we opine that the employment of the Sub-Contractor cannot be validly determined under the Sub-Contract Conditions by the Main Contractor.

2.3 Before the award of this Sub-Contract to Foo Wah, we understand it is the Employer's intention that there might be a collateral agreement between the Employer and the Sub-Contractor imposing the Employer's additional requirements on the performance of this Sub-Contract.

Copies of the Employer's letter ref. L/219/LIP/LB dated 21/5/94 regarding the draft collateral agreement and our subsequent letter dated 27/5/94 listing our comments are enclosed for your reference.

Subsequently, as-of-to-date, we are not aware of and have not been informed of any such collateral agreement reached between Kingdom Land and Foo Wah.

Determination
cc: 14

2. Right for determination of the sub-contractor's employment (Cont'd)

2.4 If there is actually any such collateral agreement formed between Kingdom Land and Foo Wah, in which the Employer have explicitly stated that they have the right to determine the employment of the Sub-Contractor based on the aforesaid reason, then the Employer may exercise his right accordingly and the obligations and rights of the respective parties shall be governed under such collateral agreement.

2.5 However, should the Employer intend to exercise his right, if any, stated under Para No. 2.4 above, his attention should also be drawn to the fact that such collateral agreement has not been known by Pentad and back-to-back terms and conditions have not been agreed and stated in the Letter of Intent for the Main Contract.

We reckon that further supplemental agreement has to be made between Pentad and Foo Wah as regards the determination of the latter due to the aforesaid reason (which is not a ground under the original contract provisions) with the respective contractual liabilities and remedies clearly defined.

3. Associated time and cost implications on the Main Contract in connection with the determination of the HVAC Sub-Contract

3.1 The determination of the employment of Foo Wah and the subsequent re-nomination of a new sub-contractor will inevitably have impact on the overall programme which is subject to the further review and advice by your office. However, the Employer should consider that any delay in the target completion date of the project may incur him additional financial loss.

3.2 Pentad shall also have the right in claiming for the loss and expenses in connection with the determination and re-nomination which are all valid for reimbursement by the Employer under the Main Contract Conditions.

In addition, claims from other nominated sub-contractors due to prolongation of the contract period in consequence may also be envisaged.

4. Contractual Remedies for the Employer

4.1 There are already provisions under the Contract governing the valuation of the variation works.

Clause 10 of the Sub-Contract Conditions stipulates that value of the authorised variations shall be assessed by the surveyor (subject to the advice by the M&E Consultant in this project) in accordance with the applicable provisions under the Main Contract.

We understand that CCE is currently reviewing Foo Wah's quoted costs for the subject variation works and will render their final assessment accordingly. Should final agreement cannot be reached between CCE and Foo Wah after negotiation, the latter can refer the dispute to arbitration under Clause 22 of the Sub-Contract Conditions.

4.2 If the collateral agreement exists and the Employer intend to determine the employment of Foo Wah and renominate another sub-contractor who has apparently quoted for a lower price for the Sub-Contract works, he should also consider the associated loss incurred for other aspects of the project as already highlighted in Para No. 3.1 and 3.2 above and evaluate the overall cost implication as a whole.

4.3 If the Employer opts to determine Foo Wah under the collateral agreement between themselves, if exists, the Employer can only recover the loss and expenses under his contractual rights as stipulated in such collateral agreement.

loss not recoverable from warranty / bond

Moreover, we reckon that the Employer may not be able to recover the loss and additional expenses incurred under the Direct Warranty and Surety Bond provided by Foo Wah since the aforesaid reason is not a contractual ground under the original Sub-Contract for determination of the sub-contractor leading to non-performance of the Sub-Contractor.

We trust the above has provided the advice on the contractual aspects regarding the appropriate actions to take on the subject issue. Please contact us if you require further information.

Yours faithfully,