

NSC
C.C. 6 - NSC17 (D.P)

Final Payment
(incl. Retention Money)
to NSC

Clause 27 (e)
✓

Advice on Payment to NSC when MC insolvent

Ref.1957.2

1st September 1999

FAXED

By Fax and By Post

P&T Architects and Engineers Ltd
25/F OTB Building
160 Gloucester Road
Wanchai
Hong Kong

Attention - Mr. Joel Chan

Dear Sirs,

The Main Contract for
Lingnan University
Tuen Mun New Campus Development
Main Campus (Site A1)
Payments to NSCs

Clause 29.12(1) in New Form

As raised in your letter ref.2538 dated 19/8/1999, we are pleased to advise you on the following relating to payments to NSCs:

early FA
under
Contract

The final payment of the said Nominated Sub-Contract for lift installation had not been included in the latest payment certificate No. 29 dated 20/1/1998 to Wan Hin. According to Clause 27(e) of the Main Contract Conditions, the Architect may secure final payment (including release of retention) to any NSC through the Main Contractor before final payment is due to the Main Contractor provided that such NSC has satisfactorily indemnified the Main Contractor against any of his latent defects. So, it is contractually feasible to certify all Nominated Sub-Contracts final payment to Wan Hin for the benefit of NSCs and let the NSCs to chase Wan Hin instead of the University. Before doing that, it is prudent to have Wan Hin's agreement on (i) the final accounts of the Nominated Sub-Contracts and (ii) the said indemnity of the Nominated Sub-Contracts first.

Seek Main Contractor's agreement on
i) F/A of NSCs
ii) any sums deducted by MC from NSC

through MC

The contractual responsibilities of the Employer and Architect as regards channel of payments to NSC remain unaltered, i.e. still through the Main Contractor (in this case the Main Contractor's liquidator/receiver) even when the latter is winding up. Your attention is also drawn to Clause 25(3)(d) of the Main Contract Conditions which shall govern the settlement of final payment due to or from the Main Contractor in the event of determination of the Main Contractor's employment by the Employer.

direct
payment
under
contract

Clause 27(c) of the Main Contract Conditions confers the power to the Employer to effect direct payment to NSCs but he is not obliged to do so. We opine however that any direct payment to NSC in case of insolvency of the Main Contractor would infringe the pari passu rule – a fundamental insolvency principle of equal payment to all creditors of the same class. 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 Wan Hin again with the result of the Employer having to make the same payment twice.

infringe
insolvency
principle

We trust this letter is of assistance to you but the University is suggested to obtain his own legal advice on the above matter.

Yours faithfully,



Levett and Bailey

CHC/LCW/tss

c.c. Lingnan College, Estates Office – Mr. Stephen Ho