CPD presentation on
Development and Benefits of the HKCA Domestic Sub-contract
By Peter J Berry

A potted history of the Blue Form (2)

Its genesis lies in a dispute that arose in the mid 1980's between the AO (now Arch SD) and the E and M contractors, centring on the (then customary) proposed use of nominated sub-contracts for building services work for Eastern (Pamela Yuede) Hospital. The approved and listed E and M contractors decided as a group that they would not bid for the work on that basis and demanded that a series of separate contracts between HKG be used instead of the NSC approach.

The E and M contractors main, if not only point of complaint about NSC's was, and still is, that they did not get their payments directly from HKG (as they had done). They don't like their money passing first through the hands of the building contractor. And of course, with a major hospital, it would be big money.

The Building Services engineers were not so keen either. It meant they had to work through the Architect and they felt that they were loosing some of the necessary control over their specialist contractors whose list they controlled anyway. In these pre ICAC days, site staff worked very much closer with the contractors and helped solve the daily problems as they came up because the contactors staff was nothing like as well trained and experienced as they are today. In practice of course nothing much changed. The Architect was never going to try to unravel the mysteries of building services work.

HKG works projects have always been, and still are, based on a civil engineering form of contract, which up until late 1985, was an early form of FIDIC, amended by special conditions of contract for the lump sum style contracts used for building works and further amended for the associated E and M work, each complete with its own start and completion dates, not necessarily compatible with the building contractor's programme, and a liquidated damages clause.

No doubt you can all see the room for problems for HKG with this strategy, but fortunately, there was no such thing as a claims consultant around then. Things were further complicated by having the building contact under the supervision of the Architect and the separate building services contracts managed by the head of the building services unit. Surely a recipe for disaster, but the unit had its own highly distinctive extra contractual policy on EoT's. They were only granted once the specialist contractor had delivered a letter stating that there was no financial claim against HKG. Nobody went to arbitration. Problem solved.

This direct contracting for building services work approach had been in general use by the AO well into the 1970's but, following a series of completely predictable coordination problems on the more complicated jobs like the extension to the Kai Tak Airport building, resulting in the late completion of the work and HKG's inability to point to which contractor was to blame for the delay and impose liquidated damages, combined with an increase in disturbance to progress claims made by the main contractor and the individual services specialist contractors against HKG and against each other, NSC's were introduced for E and M work.

The primary, perhaps only benefit to HKG in using NSC's was that it resulted in HKG only one contractual entity to deal with but it resulted in the uncomfortable marrying of a civils

style main contract and a RIBA 1963 style NSC. Added to which no one really liked it, it being heavily criticised by eminent commentators like Duncan Wallace (now QC).

Because of the problems inherent in direct contracting for building services work, particularly in a project as complicated as a large hospital, AO was not prepared to accede to the E and M contractors demand and they in turn decided to embargo the tender for the hospital.

The AO‘s response was to include all the E and M work into the building contract, on a specification and drawings basis, as we were not set up to measure E and M work at that time, and tender it as a package, leaving the successful main contractor to make such arrangements with the various E and M specialists as the contractor considered appropriate and necessary.

There was also a problem with the selection of the main contractor, resulting in the tender being awarded to Fletcher from New Zealand, not at the time on HKG's Group C list. I'm not sure how this came about but I think the potential listed main contractors were equally unhappy with the proposed contract arrangements and also refused to tender.

In order to get the job done, Fletcher entered into arrangements with the E and M contractors of its own choosing, and again not from HKG's approved specialist lists, on terms that were similar to a joint venture. The AO made no objection to this approach.

The project did not go particularly smoothly, and subsequently, given the importance and value of the specialist works involved, the AO concluded, both from a professional and an accountability point of view, it should find a third way of dealing with building services specialists.

HKG already controlled the main and specialist contractor tender lists, so it was felt in the AO that, given E and M work represents between 30 and 70% of the "out of the ground" project value, that it was right, proper and, most importantly, in the overall best interests of the taxpayers that it took an appropriate level of interest in the contractual arrangements.

As Contract Adviser for what was by now the Arch SD, I discussed the problem with the Director, Joe Lei, who agreed to let me try to produce a domestic form of sub-contract. Persuading him was made a lot easier by having the 1980 edition of the RIBA suit of contracts for me to point to as they included a domestic form of sub-contract.

Works Branch (as it was) was duly informed of our intention and they strongly objected to the whole idea on the ground that HKG should not get involved in a main contractor's domestic contractual arrangements. The Director stood his ground on the basis that it was in the public interest that HKG should oversee the procurement of these vital parts of a building. It was therefore proposed that BCA (now the HKCA) and the EMCA (now the Federation of E and M Contractors) should together develop a domestic form of sub-contract, with me "chairing" their meetings.

The two parties quickly (and sensibly) identified the ICE sub-contract form as the appropriate starting point, given its language mirrored the style of wording used in HKG's contracts, with Messrs Philip Nunn and David Bateson representing the two parties' respective interests.

The development, approval and publishing of the form took about 4 years. During that time, I was moved from Arch SD to Works Branch, but continued with the project and my role in it, hence the confused thought that WB, rather than Arch SD, had some overseeing part in its development and had approved its use. This in any case was not necessary, as Arch SD was

never going to be a party to the sub-contract. To make it "fit" any other form of contract is not impossible but does require a number of carefully worded Special Conditions of Contract.

Most (but not all) of the changes made in the second edition are drafting corrections and do not change the risk allocations. Some detailed clarifications have also been made and I will review the significant ones. The following references are to the existing Clause numbers.

- The reference to design by the Sub-Contractor is moved from sub-clause 3.2 to 2.3.

- Clause 6 – 'Commencement and Completion'

- Sub-clause 1(c) now also refers to "act of prevention", as does the following proviso paragraph. There can be such acts that are not a breach of contract.
- The proviso also changes the notice period from 28 days to 21 days and "such delay becoming apparent" becomes "such delay having arisen", a some what tighter requirement that should help the Contractor in submission of delay claims under the main contract.
- Sub-clause 6 now deletes reference to both the Sub-Contractor having to "fully comply with the requirements" of the various Contractor's programmes and the "deeming" reference to the Sub-Contractor making allowance for concurrent work in progress. This is fairer on the Sub-Contractor.
- Sub-clause 7 concerning the need for the Sub-Contractor to follow updated programmes is deleted. This is also fairer on the Sub-Contractor.
- The reference in sub-clause 9 to a revised programme reducing the Sub-Contract Period for Completion is deleted. This reflects the change made to sub-clause 7.

- The proviso to Clause 8.1 – 'Authorised Variations' now makes specific reference to "after the commencement date of the Sub-Contract".

- Clause 10 – 'Notices and Claims'

- Sub-clause 2 now clarifies the need for the Sub-Contractor has to make a claim and it must refer to some entitling event.
- Sub-clause 3 now requires the Contractor to "take reasonable steps" to secure payment and the proviso is added to the end of the sub-clause.
- There is a new sub-clause 4 that protects the Contractor from "expenditure reasonably incurred and to be incurred" in taking the steps referred to in sub-clause 3.
- Sub-clause 5 requires the Sub-Contractor to provide the particulars of its claim "in a timely fashion".
- Sub-clause 6 is changed to place a 150 days time bar after the date of completion of the Works for receipt of the particulars.

- Clause 12 – 'Indemnities'

- Sub-clause1 has both the limiting provisos deleted and reworded to better clarify the limits.
- Sub-clause 4 now clarifies that indemnities are not affected by the Sub-Contractor has not been charged or convicted.

- Clause 15.5 – 'Payment'

- Now includes a proviso that the Contractor has the right to retrieve any overpayment made to the Sub-Contractor.
- Sub-clauses 6(a)(iii) and (iv) now include for “any other sum” not certified in full.
- Sub-clause 6(c) now includes a 7 day time limit within which the Contractor has to pay the Sub-Contractor.
- Sub-clause 8 changed “sooner” to “later”.

- Clause 18 - ‘Disputes’

- Sub-clause 2 now expressly refers to “domestic” arbitration. (Note: the wording may have to change when the proposed amendments to the Arb. Ord. comes into effect.) The “appointing authority” is changed to “the Secretary General of the HKIAC”.

Arch SD’s interest in the second edition is entirely appropriate, for exactly the same reasons that lead to the first edition. There are a number of outstanding issues agreed between HKCA and the Federation that involve changes to the GCC for Building Works. This would seem to be an appropriate time to remind Arch SD (and WB) about them. As they have yet to be addressed by Arch.SD, I have not included them here. They mainly concern time limits for responses.

Recently there have been two seminars on sub-contracting, by Hill and Associates and by John Battersby. I hope they won’t object if, having given credit where it is certainly due, I use their work to make mention of the key issues that affect sub-contracting.

Sub-contracting is a way of life in HK. It is debatable if the widespread use of sub-contactors (and sub-sub-etc contracting) is the most efficient and effective way of getting the basic building work done (e.g. bar bending and falsework) but it is flexible and suits the “stop/go” nature of the industry in HK. Such work is often repeat work with sub-contractors well known to the main contractor and nearly always contracted out by the main contractor on a minimal basis.

Even if this were to change to where much more of this work is done “in house”, there remains a very wide range of work that is essential to the use and comfort of the finished building and therefore demands much tighter control over how and when the work is done.

This kind of work more often than not involves design work by the specialist (e.g. curtain walling and air conditioning) for a contract where the main contractor has no such obligation. This of course is the Employer’s problem and it usually results in special conditions to overcome the break in the contractual chain.

In common with all standard forms of contract, the domestic form of sub-contract only provides the basic skeleton upon which the specific needs of the work and the terms affecting that work are to be carried out. The additional information should be set out in the detailed preambles and a particular specification which need to be, as far as possible, “back to back” with the requirements of the main contract.

It is therefore essential that any prospective tenderer for specialist work examines the main contract documents very carefully. The design liabilities which are likely to include design warrantees need particular attention.

The specialist Sub-Contractor cannot sublet the whole of the Sub-Contract Works, but can significant parts with the written consent of the Contractor (not the Architect). There is a

"Period for Completion" but no LD's. This does not mean that the Sub-Contractor can finish as and when it likes. The Sub-Contractor is open to common law set off and would have to sue for the money withheld but would almost certainly have to use the dispute clause first.

One particular difference between the Sub-Contract conditions and those of the main contract is that the former may include an insurance liability under Clause 14, which the latter does not. The other difference between the two is in Clause18 "Disputes". The Sub-Contract allows for them to be settled by adjudication (as well as mediation).

Once the work has started, it is essential the sub-contractor observes the various time limits imposed by the sub-contract. Failure to do so may result in a legitimate claim by the Contractor for time and/or money being rejected by the Employer, and possibly the Contractor claiming any financial loss, including liquidated damages, as set off against the sub-contractor.

I hope that the background to the Blue Form was of some interest to you and the fairly brief overview will be helpful to you.