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Standard Form of Contract for Decoration, Repair and Maintenance Works for Use by Laymen

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Introduction

- Hong Kong has about 17,000 buildings aged 30 years or above; ten years from now, the number will reach 28,000.
- Many buildings are in a state of disrepair and contain illegal structures and unauthorized building works, potentially endangering their occupiers and the public.
- About 150 – 250 new buildings completed each year and require certain decoration or fitting-out works before occupation or use.
- These have generated a great volume of decoration, repair and maintenance works.

Introduction

- For small-scale projects, owners may not be able to afford employing a professional consultant.
- Many projects are carried out without a formal contract.
- Even if there is a formal contract, the contractual provisions may be one-sided and fail to provide the owner with a reasonable degree of protection.
- As a layman, the owner is always in an unfavourable position, particularly when the contractor claims an extension of time and/or additional cost.
- To overcome this problem, the HKIS has published a **Standard Form of Contract for Decoration, Repair and Maintenance Works** for use by laymen.

Introduction

- It should be written in readily understandable language using plain English and should avoid using too many technical or legal terms.
- Many terms **implied by law** are included as express terms of the contract to ensure both parties clearly understand their duties, responsibilities and obligations.
- Particular consideration is given to the **protection of lay owners**.
- The main objectives of this CPD seminar are
 - to briefly compare the differences between this contract and other standard forms of building contract, and
 - to critically examine the main considerations underlying the protection of lay owners.

Use of this Contract

- This Contract is designed to be used by owners dealing directly with contractors in making improvements to their premises where the work involved is simple in character with a contract value up to HK\$400,000.
- Where the work is of a complex nature or involves building works, the owner should consider appointing a professional consultant.
- This contract is written in plain language and has kept as simple as possible. It consists of 20 clauses that take up only 4 pages plus 2 pages of guidance notes.

Documents Forming Part of the Contract

- Given no professional consultant is employed, the owner makes known his requirements to the contractors in writing or orally.
- Each contractor then produces a design in form of the drawings and specifications, together with a quotation, for the owner's consideration.
- A simple and easily administrated contractual arrangement is adopted by asking the contracting parties to tick the appropriate boxes to confirm whether there are any quotations, drawings, specifications or other documents that the parties have agreed form part of the contract.

Lump Sum Contract

- To provide greater certainty on the agreed contract sum, this contract is based on a lump sum contract in which the contractor undertakes to carry out and complete the works in accordance with the quotation, drawings, and specifications submitted and other agreed documents for an agreed price.
- To facilitate administration, both parties are simply required to fill in the agreed price in the contract.
- The original contract sum can be increased or reduced if the owner subsequently requests any changes (i.e. variations) to the works originally agreed upon.

Lump Sum Contract

- The various contract documents produced by the contractor may be unclear, ambiguous or incomplete, thus creating a loophole to make claims for additional costs and extension of the working period.
- To avoid contractual claims, this contract specifies that 'the price is deemed to include the cost of all works necessary for the timely and satisfactory completion of the works in its entirety, whether it is expressly stated in the work details or not'.
- Contractors who prepare the various contract documents but omit some obviously necessary works should be liable to do so at their peril.

Contractor's Obligations

- The contractor has an obligation to organize, carry out and complete the works **diligently** and in a **good and workmanlike** manner in accordance with the work details and contractual provisions.
- This contract also imposes on the contractor an obligation 'to complete the **design** for the works using reasonable skill and care, including the selection or specification of the materials, goods and workmanship to be used in the works so far as not stated in the work details'.
- This obligation is similar to that imposed under a **design-and-build** contract. As far as the design element is concerned, the contractor's liability is the same as that of a professional person.

Contractor's Obligations

- This contract also expressly places an obligation on the contractor to comply with all **statutory requirements** applicable to the works.
- This obligation covers not only the design aspect, but also the construction work as a whole.
- A **Deed of Mutual Covenant and Management Agreement** and **House Rules of the Premises** are often put in place to govern the working hours, air, noise, wastewater, and waste control, the delivery of materials and goods, connections to public services, etc.
- The contractor is also required to comply with any such Deed of Mutual Covenant and Management Agreement and House Rules of the Premises.

Materials, Goods and Workmanship

- To set a minimum requirement in respect of the quality of materials and goods and the standard of workmanship, this contract requires the contractor to 'supply materials and goods which are of satisfactory types, standards and quality and as set out in the work details'.
- The contract also requires the contractor to 'warrant that all materials and goods are reasonably fit for the intended purposes'.
- It further requires the contractor to 'carry out the works in a good and workmanlike manner, as set out in the work details and to the owner's satisfaction'.

Working Period and Hours, and Sufficient Working Areas

- The owner has an obligation to give the contractor access to the premises during the agreed **working hours** throughout the **working period**.
- Provision of a sufficient working area is clearly a necessary pre-condition of the contractor's performance of his obligation.
- Thus, the contract contains an express provision requiring the owner to 'keep the working areas sufficiently **clear of obstructions** to allow the contractor to carry out the works so as to enable him to complete the works on time'.
- Whether the working area is sufficient is a question of fact to be determined in light of all the circumstances.

Changes of the Works

- This contract provides a variation clause; otherwise, the owner will have no authority to order changes.
- The scope of changes includes the 'alteration of the design, quality or quantity' of the work details.
- Given that no quantity surveyor is employed, this contract requires the contractor to quote a price and the time required for the owner's agreement.
- The contractor will only proceed with the change after receiving the owner's written agreement.
- If the owner does not agree with the price and time quoted, his only option is to find another contractor to execute the varied work after the original contract has been completed.

Sub-contracting

- To protect the owner, this contract expressly states that if the contractor wishes to sub-contract any part of the works, he should first obtain the owner's consent.
- Such consent must not be unreasonably delayed or withheld.
- There is no requirement that the contractor needs to inform the owner of the names of sub-contractors.
- All that is required is consent to the fact that sub-contracting will occur.

Indemnity clause

- This contract includes an **indemnity clause** whereby the contractor is required to indemnify the owner 'against any expense, liability, loss, claim and damage which may be caused to his employees and his sub-contractor's employees of all tiers, or to the premises and its contents, the works or neighbouring properties'.
- The indemnity does not cover the consequences of a **negligent act** committed by those for whom the owner is responsible under the express terms of the contract, or by others for whom the owner is vicariously responsible in law.

Insurance clause

- The contractor is required to take out and maintain, in the joint names of the owner, himself and his sub-contractors of all tiers, three types of insurance.
- The **contractor's all risks insurance** covers the full reinstatement value of the works.
- The **third party liability insurance** covers liability to third parties in respect of bodily injury or death and damage to property with a specified minimum amount for any one occurrence or series of occurrences arising out of any one event.
- The **employees' compensation insurance** should comply with the Employees Compensation Ordinance by covering claims for any bodily injury to or the death of any workers employed in connection with the works.

Extension of Working Period

- A fair and reasonable extension of time will be granted only if the delay is due to one of two relevant events.
- The first relevant event is where the owner requests any change of the works. If the owner requests a change, the contractor is required to provide a quotation for the change and the time required.
- The second relevant event is where there arises 'any delay caused by the owner'. This simple provision covers a wide range of special but justifiable circumstances (such as acts of God), and any preventive act, breach of contract or other default by the owner or any person for whom the owner is responsible.

Payment methods

- This contract provides two simple payment methods: single payment and stage payment.
- Where the project is of short duration, the owner can choose to make a **single payment** when the contractor completes all the works.
- The contractor is not entitled to any payment until he has completed the works in its entirety.
- Where the project duration is of relatively long duration, the owner can choose to make a **stage payment** when the contractor completes each specified stage of the work.
- The owner must specify the details of each stage of the work, together with the corresponding payment amount, in the contract.

Payment Procedure

- When the work is properly completed, the contractor is required to give the owner an itemised invoice for the amount due, taking account of any price increase or decrease due to the requested changes.
- Because there is no architect to certify whether the works have been 'properly' completed, the contract states that 'the works shall be considered to be properly completed only when it is free from obvious defects'.
- If there is any obvious defect, the owner has the right to withhold payment to the contractor.
- If no obvious defect is found, the owner must pay within 7 days of receiving the contractor's invoice.
- Failure to pay is a ground entitling the contractor to terminate the contract.

Retention and Defect Liability Period

- The owner is only required to pay 90% (or other specified percentage) of the amount of the invoice. In effect, 10% of each payment is withheld from the contractor as **retention money**.
- The owner is required to pay the remaining portion of the invoice only after the contractor has made good all defects in the works that may be or become apparent at any time within 3 months (or other specified period) of its completion. In effect, there is 3-month **defect liability period**.
- The owner has the right to refuse to release the retention money unless and until the contractor has make good all defects within this defect liability period.

Occupation and Security of the Premises

- The owner must specify in the contract whether or not the premises will be occupied during the working period.
- If the premises will remain vacant, possession of the whole premises will be given to the contractor throughout the working period.
- During this period, the contractor has an obligation to take practical precautions to deter intruders from entering the premises.
- If the premises are to be occupied, the owner still has an obligation to provide sufficient working areas for the contractor to carry out the works, thereby enabling him to complete the works on time as described above.

Use of Facilities on the Premises

- While the duration of most decoration, repair and maintenance projects is relatively short, the contractor also needs time to set up various site facilities.
- This period can be significantly shortened if the owner allows the contractor to use his existing facilities.
- The owner is required to state in the contract whether he will allow the contractor to use the existing electricity, toilet, telephone and water facilities free of charge.

Health and Safety

- This contract imposes on the contractor an obligation to take all practical steps to prevent health and safety risks, and to minimize environmental pollution, nuisances, disturbances or inconvenience.
- The contractor is required to take suitable safety and precautionary measures in carrying out the works.
- The owner is entitled to terminate the contract if the contractor does not comply with his health and safety and environmental responsibilities.
- This contract also imposes on the owner an obligation to take notice of all warnings the contractor gives about any health and safety or environmental risks which he is taking measures to prevent or minimize.

Protection and Cleaning of the Works

- Because the works are to be carried out within existing premises, the contractor is required to stow away his tools, equipment and ladders at the end of each working day in an agreed storage space, and to regularly dispose of any rubbish.
- The contractor is also required to protect the finished works and the premises during the progress of the works, and to bear all costs incurred in making good any damage caused.
- Upon completion of the works, the contractor is required to remove all plant, tools and surplus materials, to make good and reinstate all damages, to clean the works and leave the premises in a clean and tidy condition to the owner's satisfaction.

Owner's Right to Terminate the Contract

- This contract sets out the following three grounds entitling the owner to determine the contract:
 - The contractor does not regularly and diligently carry out the works; or
 - The contractor does not comply with his health and safety and environmental responsibilities; or
 - The contractor is incompetent so that the works are of an unacceptable standard and not in accordance with the work details.
- If the owner intends to terminate the contract based on one of the events of default described above, he must first give the contractor a written warning notice specifying the nature of default.

Contractor's Right to Terminate the Contract

- This contract sets out the following two grounds on which the contractor may determine the contract:
 - The owner does not pay an amount properly due to the contractor without good reason; or
 - The owner prevents or obstructs the contractor from carrying out the works for a continuous period of at least 14 days.
- Adopting the same procedure as that prescribed for the owner, the contractor must serve on the owner a written notice specifying nature of the default.
- If the owner does not remedy the specified default within 7 days, the contractor may terminate the contract by giving the owner another written notice of termination that takes immediate effect.

Settlement of Disputes

- This contract provides two alternative dispute resolution methods: mediation and legal proceedings.
- If the contracting parties intend to resolve a dispute through mediation, they must agree on a person to act as the mediator.
- If, for whatever reason, the parties cannot agree a mediator within 14 days of one party requesting that the other agrees to a mediator, then either party can request that the president of the Hong Kong Institute of Surveyors appoints a mediator for them.
- This contract also allows the contracting parties to take legal proceedings to settle disputes.
- If the sum in dispute between the parties is less than HK\$50,000, the dispute can be resolved through the Small Claims Tribunal in which the parties can present their views and arguments themselves.