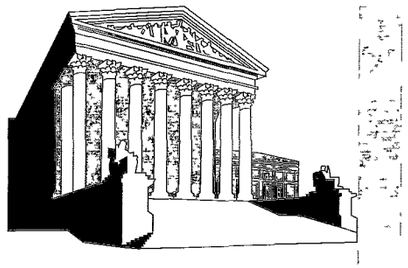

Report on Review of General Conditions of Contract

The report on the Review of the Hong Kong Government's General Conditions of Contract (GCCs) is now available. In the first of a two part series *Professor Arthur McInnis* looks at the background, the general recommendations, the government's response and offers a few comments.

Background

During the last several years those in industry and Government have become aware of an increasing number of disputes arising under public sector contracts. As a result the government commissioned a report from Jesse B Grove III. Grove is a member of New York law firm Thelen Reid & Priest and well known as a practitioner in US construction law. The brief invited a fundamental review of the GCCs; in particular regarding the identification and management of risk.

The recommendations were intended to balance risks against the interests of public finance and international best practice, to permit the government to make policy decisions on the issues, and facilitate a review of procurement procedures of the GCCs if necessary.

While the report was submitted to government some time ago, it has only recently become available. The government released the report with a full response but also a statement of its intention to implement relevant changes to the GCCs at an early date.

Structure of the Report

The report is divided into seven sections with three appendices. The sections are:

(1) Introduction;
(2) Philosophies of Risk Allocation;
(3) General Assessment of the GCCs;
(4) General Recommendations,
(5) Consideration of Specific Issues Identified in the Brief;
(6) Financial Implications; and a
(7) Conclusion.

The appendices are (1) the Standard Documents Relevant to the Study; (2) Treatment of Risks under Selected International Standard Forms of Contract; and (3) a short Bibliography.

Troubling Clauses

Grove was asked to give particular attention to a number of clauses which have become problematic including: ground conditions (cl 13); physical impossibility (cl 15); care of the works (cl 21); fees and charges and new legislation (cll 29 and 30); delay caused by public utility works (cll 50 and 63); time bars (cll 50 and 64); and payments to subcontractors (cl 69). Most of these clauses have of course featured in disputes under the GCCs Less troubling perhaps but still of special interest to the government, were clauses on valuation and disturbance of the works (cll 59-64); contractor input to the design post award and dispute settlement.

General Recommendations

The report made a number of important general recommendations that should be noted:

1. *Move away from the 'independent engineer' concept toward express reserved authority of the government.*

Comment — This would better accord with international practice and changes to other forms of contract. It should go together with fully independent and impartial dispute resolution.

2. *Move away from the remeasurement delivery system in favour of fixed price contracts with schedules of rates for variation valuation only.*

Comment — The government has rejected this recommendation and suggested no change will be made to current practice. Its rationale is to maintain as much flexibility as possible on the part of government and allow for changes in quantities. However, a number of recent cases dealing with changes in quantities, rerating and valuation may prompt some second thoughts on the government's position.

3. *Introduce breach of contract as an event to be valued and resolved under the contract terms.*

Comment — Oddly, the government has said that this recommendation should be rejected in part because no similar provision is seen in any other standard form. In fact other standard forms including the New Engineering Contract do have it and so too will the new Hong Kong private form if accepted in its current wording.

4. *Introduce the right of government to terminate for convenience.*

Comment — Accepted by the government, this seems reasonable in a limited range of circumstances and provided that a fair valuation of the Contractor's work to date is ensured.

5. *Introduce the right of the government to accelerate the works.*

Comment — This goes further than most comparable new forms which still require consent on the part of the Contractor to the acceleration.

6. *Avoid catch-all clauses (the report noted clause 50 on EOT as an example).*

Comment — From Grove's point of view these types of clauses contribute to uncertainty and occasional unexpected results. The government's present position is to not accept the recommendation though would seek to provide some guidance to overcome abuse. Part of the rationale pertains to fear of setting time at large though it is suggested here that this fear could be addressed with clear drafting.

7. *Require escrow of estimating files.*

Comment — This recommendation anticipates that the successful tenderer should escrow his full working file to show take-offs and pricing to support his tender. It would be held in escrow until such time as a dispute arose and at which point it could be opened. The intention is to reveal what was foreseen by the Contractor, how the work was priced and whether his estimates were accurate. Interestingly, the government has rejected this as not according with international practice. This is true but if one assumes an honest Contractor and only one set of files, it would be very cogent evidence indeed in settling disputes.

8. *Use liquidated damages wherever possible.*

Comment — While described as 'liquidated damages' here the concept being invoked is really closer to low performance damages as understood in the engineering context where they are common and can pertain to a wide variety of deficiencies outside delay. The government agrees with this and so do I.

Conclusion

In summary, there are some very worthwhile general recommendations that have come out of the report. Now that government has stated its position on them it is time for the industry to begin to express your views.

Next month Professor McInnis looks at some of the more specific recommendations. If there are comments you have on the report you may send them by email to the address below. AAC

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