



THE HONG KONG INSTITUTE OF
SURVEYORS

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Mr Keith Kerr
Chairman
Construction Industry Council
11/F., Murray Building
Garden Road, Central
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BY POST & FAX
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Dear Mr Kerr

**Position paper of the Hong Kong Institute of Surveyors ("HKIS")
on Security of Payment**

This letter sets out the views of the Hong Kong Institute of Surveyors (HKIS) in response to requests from some stakeholders in the construction industry for legislation for security of payment which subject has been raised in the Committee on Sub-Contracting of the Construction Industry Council ("CIC").

1. We, being a professional institute of surveyors comprising building surveyors who manage projects and take care of the quality of works, quantity surveyors who look after the costs and contracts of projects, and other surveyors who take part in different aspects of the development and construction activities, should give our stance on the topic of "Security of Payment" for the consideration of the CIC, which is now a common platform for different stakeholders in the construction industry to resolve differences and further the betterment of the construction industry.
2. In essence, we support a free market economy whereby the contract parties can freely negotiate and agree their contracts. However, due to different bargaining powers of the contract parties, the following situations have arisen:
 - (a) Long established payment practice in the standard forms of contract such as pay-when-paid arrangement cannot be easily changed.
 - (b) Equitable payment terms in standard forms of contract have been contracted out as instructed by the clients against the recommendation of their consultants.
 - (c) Equitable payment terms are not included in ad-hoc contracts.

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- (d) There are no independent certifiers (like the Architect and the QS under the standard Main Contract and Nominated Sub-Contract forms) under the domestic sub-contracts to give an independent opinion as to the proper amounts of payments.
 - (e) Agreed payment terms are not followed, in spite of payment certification by independent certifiers and valuers.
 - (f) Contra-charges are unreasonably imposed.
 - (g) The redress for breaches of agreed terms is not quick enough to resolve the cash flow problem so created.
3. It is a common scenario in the construction industry in Hong Kong, especially in the recent economic downturn climate, that Employers are having better bargaining power in their negotiations with Main Contractors. In turn, Main Contractors are having better bargaining power than Subcontractors in subletting packages of works. Hence, it is of primary importance that contracts and sub-contracts should be agreed on equitable terms supported by legislation.
 4. It is also common for Main Contractors to contra-charge Subcontractors sometimes based on subcontract terms not equitably agreed and sometimes even disregarding subcontract terms. While labour is protected by legislation, Subcontractors are not effectively protected by law which leads to the recent reported cases of Subcontractors committing suicides. Those Subcontractors were unpaid by Main Contractors on one hand, but were forced to pay labours on the other. Worse still, Subcontractors are not able to instruct their workers to continue working when they are not paid by Main Contractors and hence the subcontracts may easily be terminated by Main Contractors, with a result that Subcontractors are liable to Main Contractors for damages under the subcontracts.
 5. It follows that legislation should be the proper way to promote "Security of Payment". Intervention by legislation is therefore necessary to:
 - (a) prevent contracting out from the minimum equitable terms; and
 - (b) provide quick redress for non-compliance with the agreed terms.
 6. Any security of payment legislation should deal with not just the relationship between the Employer and the Main Contractor but should also cover the same between the Main Contractor and the Sub-Contractor because the contract values of the sub-contracts can represent more than 80% of the construction value of the industry.
 7. "Contra-charges" are the real threats to Subcontractors in Hong Kong and should be given a priority in any discussion on security of payment.



8. The Dispute Resolution Adviser ("DR Ad") system currently adopted in some Government funded projects could be extended to domestic subcontracts.
9. While the legislation could deal with the minimum equitable terms and the time of payment, a third party certifier should be employed to look into the validity and quantum of payment dispute and have a temporary ruling of the amount payable on an interim basis before it is overruled by arbitration. However, the ruling/decision of the third party certifier, whether it should be named as adjudicator or expert determination, should be supported by legislation so that Employers/Main Contractors will pay according to such ruling.
10. The legislation may compel disputed retentions or contra-charges to be deposited into a joint-account pending any temporary ruling or resolution of the disputes to create disincentive to withholding money for self gain.

Should you have any queries about our views, please feel free to contact us.

Yours sincerely

Yu Kam Hung
President

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