



Report on Review of General Conditions of Contract Part 2

The report on the Review of the Hong Kong Government's General Conditions of Contract (GCCs) is now available in limited circulation. In the second of a two-part series Professor Arthur McInnis looks at some of the detailed recommendations and offers some comments.

Detailed Recommendations

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

1. Government should accept the risk of unforeseeable physical conditions.

Comment – this is at the top of the list for good reason. It remains subject to divisions of opinion on Government's and Jesse Grove's (the consultant who authored the report) parts. It presents a clear policy choice in terms of the standard that should be employed; be it fault, management or foreseeability. This recommendation will likely remain the last of any if they were to be agreed upon.

2. Do not emasculate the proviso in clause 15 of the GCC regarding legal or physical impossibility.

Comment – recent impossibility claims indicate a fundamental difference to how the issue is being approached by government and contractors. That poses a problem and obviously raises the question of why. One suggestion is that designs have become too aggressive. Whether or not this is the case some refinement in either the GCCs or how the concept is dealt with in practice by Government should take place.

3. Government should require All Risk insurance coverage.

Comment – insurance is a useful and recognised tool for risk allocation and not only should it be made use of here but better use should be made of it in the industry as a whole.

4. Government should accept the risk of lawful third party interferences including utility undertakings.

Comment – some quick questions follow from this:

- (a) who is a utility;
 - (b) how to reconcile current GCCs; and
 - (c) whether costs should ever be given.
- If (a) can be agreed, eg utilities include government departments Water Supplies or Drainage Services for all purposes, then (b) would almost answer itself. That still leaves (c) though, and this will likely remain a fundamental issue or one of principles that might not be resolved in isolation.

5. Government should accept the risk of changes in law.

Comment – this seems justifiable on both accepted principles of risk allocation, eg it is within the government's control it is likely in the long term interest of the construction industry as a whole in that it accords with fairness as well.

6. Let market forces operate regarding subcontractor payment.

Comment – I think that more can be done here. In other jurisdictions industry goes much further to protect subcontractors, eg recent legislation in the UK, mechanics' or builders' lien legislation in North America. The market appears to not be working efficiently.

7. Failure of notice should give rise to damages not forfeiture.

Comment – In effect this would mean the removal of time bar language from the current GCCs while maintaining the government's right to recover additional costs for late notice. Once again this follows more recent contractual precedents. Such a change in emphasis could operate as an incentive and disincentive in affecting the Contractor's actions. Surely this would be a progressive development.

8. Variation valuation should be simplified and tightened.

Comment – There are a series of recommendations which go to simplifying these valuation provisions. It is a task which the Joint Contracts Committee drafting the new private form building contract for Hong Kong has taken on board. Some of the features of a simplified procedure have been outlined in the report and include:

- (a) elimination of the dichotomy between cost and priced compensation;
- (b) expression or elimination of preference for lump sum forward pricing;
- (c) elimination or fixing of a rate for home office overhead recovery;
- (d) fixing of the rate for profit mark up;
- (e) prohibiting of global claims;
- (f) eliminating overlap in some key GCCs; and
- (g) requiring sub-contractor pricing to be compliant.

A great deal of support of can be offered to these features. Valuation is subject to some anomalies which these features bring out. It can be seen first and foremost that they seek to bring greater certainty to the process of valuation. If

these or like principles can be agreed in advance it will serve to reduce disputes. Movement is in this direction in any case. Profit and overhead are increasingly recognized as part of the rates and a fair valuation eg the recent case of *Alstom Combined Cycles Ltd vs Henry Boot Construction Ltd* [2000] BLR 247 CA and thus the need to admit them is becoming increasingly obvious. Eliminating global claims could be the type of consequence that would more naturally follow if Government moved to adopt the other features outlined. Sub-contractor compliant pricing is simply attaining better back to back drafting and this should become a general objective even beyond valuation.

9. Use dispute resolution advisers widely and make no decision mediation voluntary.

Comment – There is now a reasonable degree of experience locally in forms of ADR, including mediation and the Dispute Resolution Adviser system. Government is looking at this more carefully than this recommendation would suggest and it is put forward here that the big picture be more fully taken into account before either endorsing only one route or ruling out others, eg adjudication.

10. The contractor should be able to propose variations across the board.

Comment – This follows the adoption of a like procedure in the new Government Design and Build form in clause 60(5) and the approach in other modern forms as well; particularly target cost contracts. Research shows it is a

means to improve buildability, realise cost savings and desirable. Control of course remains as it is only proposals that one is referring to here.

Conclusion

It can be seen that the report, in both the general recommendations examined last month, as well as its detailed recommendations examined here, contains some very worthwhile suggestions. It may be that the cumulative influence of new private conditions of contract, concurrent actions being taken by some quasi-government bodies, eg the Housing Authority as well as the Report itself will be enough to create some momentum so that change can take place. As they say after all, there is no time like the present.

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