

Client Alert

Construction

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Draft Technical Circular on the Implementation of the Spirit of Security of Payment Legislation in Public Works Contracts

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Since the consultation document on Proposed Security of Payment Legislation (SOPL) for the Construction Industry in June 2015 and the report of the consultation in April 2016, the SOPL Bill has yet to be put before the Legislative Council for consideration. The Government released a draft Technical Circular on the Implementation of the Spirit of Security of Payment Legislation in Public Works Contracts (Draft Circular) and a reference document in mid-March 2021. Stakeholders are given approximately 2 weeks to make comments on the Draft Circular, i.e. by end of March 2021.

SOPL aims at promoting fair payment and assist main contractors, subcontractors, consultants, sub-consultants and suppliers to receive timely payments.

Whereas the 2015 consultation document covers both public and private sector projects, the Draft Circular aims at implementing certain measures of SOPL only on public works contracts, term contracts and related subcontracts tendered after July/August 2021. The main contractor will be bound to adopt those measures through the use of special conditions and additional conditions in the main contract.

There are 4 mandatory requirements under the Security of Payment (SOP) framework:

- (1) from the date of receipt of the claiming party's payment claim, the paying party shall
 - A. respond to the claiming party within 30 days; and
 - B. make payment of the admitted amount within 60 days.
- (2) conditional payment provisions (e.g. "pay when paid") shall be ineffective and unenforceable.
- (3) the claiming party may refer a payment dispute to adjudication,
 - A. the adjudicator shall decide on the payment dispute within 55 working days from his appointment; and
 - B. the paying party shall pay the adjudicated amount within 30 days of delivery of the adjudication decision if a payment date is not specified in the adjudication decision.
- (4) if the claiming party does not receive the admitted / adjudicated amount, it is entitled to suspend or reduce the rate of progress.

On the subject of whether the scope of adjudication should cover payment disputes involving extension of time (EOT), the Government recognises that a majority of the industry stakeholders supported that an adjudicator shall have the power and jurisdiction to decide:

- (1) the time-related costs forming part of the payment dispute (which is binding and enforceable); and
- (2) a party's entitlement to EOT (which is not binding, but the party will not be subject to liquidated damages if the works have been completed within the EOT as the adjudicator so decided).

The Draft Circular only covers all construction subcontracts and sets out:

- (1) provision for direct payment for settlement of unpaid adjudicated amount; and
- (2) on-site promotion (a site notice displayed at a prominent place on site to facilitate subcontractors to notify their intention to suspend or reduce the rate of progress and to pursue direct payment of unpaid adjudicated amounts).

The Contractor's compliance with the incorporation of the SOP Provisions in all relevant subcontracts shall be reflected in the Contractor's Performance Report.

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