

Legco Planning, Lands and Works Panel - Special Meeting 15/01/2002
Proposed Charging and Penalty System for Road Opening Works

(Submission of the Hong Kong Construction Association)

Preamble

1. The Hong Kong Construction Association (HKCA) is grateful for and welcomes the opportunity to place on record before and discuss with the Hon. Members of the Panel our views on the proposed charging and penalty system.
2. HKCA is fully aware of the disruption to transport, the economic loss and the feeling of helpless frustration for drivers and passengers, brought by road openings. It is a subject that has concerned our members for years.
3. Our members are fully committed to working with the Authority to find appropriate solutions in the shortest possible time. It is in our interests to do so. We hope Hon. Members will find our arguments persuasive and will support our position and our wish to find solutions.

Background

4. Contractors who carry out road opening work of the kind that causes major disruption to road-users have to deal with the following situations that cause unplanned delays which are beyond their control:-
 - 4.1 The services found under the road surface include:-
 - Water
 - Drainage (storm and sewage)
 - Gas
 - Electricity (low and high voltage)
 - Telecommunicationswhich may all be found in close proximity;

- 4.2 Service companies / HKG departments are not required to provide accurate records of what lies beneath the road surface. The information provided is often wrong;
- 4.3 There are no “rules” as to where each service is to be placed; services may be widely spread or placed on top of each other;
- 4.4 Once the surface has been removed, the services may have to be exposed by hand to reduce the risk of damage and injury; protection of existing services can only be designed and carried out at the point;
- 4.5 There is no way of knowing which service cable etc. is still “alive” and which has been abandoned, without the direct assistance of the service provider;
- 4.6 There are no “rules” (or laws) that require the service companies / HKG departments to co-operate with the contractor or each other and respond in identifying their property or in carrying out necessary re-routing of services that obstruct the proposed new work within a reasonable time-frame that would enable accurate works programme planning;
- 4.7 Once opened up, the working space may be very congested, thereby limiting the work method options;
- 4.8 In planning any road opening, it is essential that road use and pedestrian traffic is never completely stopped; this increases the working time. In addition, the police can order work stopped at any time traffic becomes congested;
- 4.9 Only the individual service providers can touch their own installations;

4.10 The openings are subject to inclement weather conditions that cannot be accurately assessed.

5. The above uncontrolled unknowns apply equally to the Authority and to the service company / HKG department when attempting to estimate the length of time to be given for each EP. The Authority has to decide what time allowances need to be made for each category of unknown. Alternatively, the Authority may only grant the shortest possible time and then extend each EP for each category, as the inherent delay to progress is identified. Major works will need a number of EP's for each (limited) length of road to be opened at any one time, which further complicates the process.
6. In addition to the controls exerted by the EP conditions, the work is carried out under the terms of the construction contract. The difficulties in deciding the time for completion of the work are basically the same as are set out above.
7. Construction contracts will often make the contractor responsible for the co-ordination between the various services, but, as noted, there is no way of making individual service providers respond within a set or even reasonable time-limit. They will take their own time, with each service provider doing their work sequentially and not at the same time. Construction contracts also provide for the granting of extensions of time (and extra money) for a range of delays outside the control of the contractor, and for damages to be paid / allowed by the contractor should the works be completed late.
8. There is no correlation between action by the Authority and action under the construction contract.

The Implications of the New Charging and Penalty System Proposals

9. The main objectives of the proposals are stated as being:-
- To make the contractor responsible for all breaches of the EP conditions (para. 15 of the WB Consultation Paper dated 8 October 2001)
 - To create an incentive to finish the works within the approved permit duration (para. 4 of the same Paper)
 - To recover relevant costs (para. 1 of the same Paper)
10. The objectives are stated as following “the user pays” policy, and the proposed attendant costs and charges are to be calculated with this in mind. The fees, charges and fines cover:-
- The initial issue of an EP;
 - The EP extension;
 - A daily rate;
 - Additional daily charges (based on economic cost of traffic delay) which only applies where there is “unreasonable delay”;
 - Fines (and imprisonment) for breaches of the EP conditions.

These are in addition to delay damages imposed under the construction contract.

11. It is to be the duty of the Authority to assess the first issue period for each EP and to decide if the economic charge is to be applied (paras. 22 and 23 of the Consultative Paper). To carry out this critical duty properly, the Authority should complete a thorough study of the sub-surface conditions prior to project implementation.
12. The Authority needs to be clear as to the basis of the initial period in order to be able to decide whether or not delays are beyond the control of the contractor. We note that the legislation is to provide sufficient guidance as to the circumstances leading to the waiving of the additional daily charge. Presumably the causes of uncontrollable delay set out in para. 4 above will be appropriately reflected, depending upon which of the basis approaches, set out

in para. 5 above, is chosen.

13. Whilst the contractor will have included the initial fee and the initial daily rate into the price for the work, the other fees and charges cannot be calculated and included, for the same reasons as are set out in para. 4 above, and therefore will become the subject of claim under the construction contract, should the contractor be granted additional time for carrying out the work i.e. all these fees and charges will (eventually) be paid by either the consumer or the taxpayer.
14. The Consultation Paper does not recognise that the EP conditions run separately and in parallel with the terms of the construction contract. This may bring conflicts, particularly if the Authority deems delay to be unreasonable and imposes the daily economic charge, but the Engineer for the construction contract grants extensions of time. It is not clear how the inspectors will assess any breach of the EP time conditions. In these circumstances, any addition charge will be the basis for a financial claim under the construction contract. It is therefore highly desirable that the law and the contract terms are not in conflict.
15. It would seem logical that the evidence that delay is not “unreasonable” can be based on the Engineer’s granting of extension of time under of the works contract. In order for this to be of practical use to the Authority, extension of time matters will have to be decided very soon after the initial EP period expires and be continuously reviewed until the work relating to each EP is completed.
16. Given the complexities, we welcome the inclusion of the Administrative Appeal Board. Presumably the Board will be empowered to return fees and charges that should not have been paid (plus interest at Judgment Debt rate).
17. It is not clear how Works Bureau intends to make the terms of the construction contract reflect the needs of the legislation and how the legislation will cause non-Government bodies follow suit.

18. The position is also not clear what happens when the permit holder and the nominated permittee (the contractor) both infringe the EP conditions.
19. Without knowing what the EP conditions will be, it will not be possible for the contractor to allow when tendering for the construction contract for the financial risks imposed by the EP.

Conclusions

20. We do not believe that the proposals set out in the Consultation Paper can achieve the objectives, and provide a fair or logical allocation of responsibility.. Our members recognise that they must take responsibility for delays within their control, but believe that the other parties that contribute to the completion of the work must also carry responsibility for delays caused by them. It would be inequitable if these are placed on the contractor.
21. We believe the above demonstrates that the assumption that “it is the contractor who violates the EP conditions in most circumstances” (para. 13 of the Consultative Paper) is not accurate, and will not achieve the objectives referred to in para. 9 above.
22. It is time to reconsider the use of purpose built service tunnels and ducts for all new developments, which, eventually will save money and will reduce disruption to traffic.

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