

LegCo Panel on Planning, Lands and Works
Follow-up action arising from the meeting on 1 February 2002

At the meeting of the LegCo Panel on Planning, Lands and Works on 1 February 2002, under Agenda Item No. 5 – Follow-up on mediation of contractual disputes relating to the Strategic Sewage Disposal Scheme, Members requested the Administration to provide some additional information which is now provided as follows:

- (a) Updated information on claims relating to the ten ACP projects including the total amount of the final claims and the percentage of the final claims in the original project costs.

ACP Projects (including public works, New Airport and Airport Railway)

	\$ Million
Expenditure to date	131,530
Amount of claims resolved (1)	10,813
Estimated liability in respect of unresolved claims (2)	210
Estimated total amount of claims (1) + (2)	11,023
Estimated total amount of claims as a percentage of project cost	8.38%

- (b) The list of works contracts awarded to Maeda by government departments and quasi-government organizations since the forfeiture of the two SSDS tunnel contracts in November 1996

Contract title	Client office	Contractor	Contract sum	Month of award
Po Lam Station and tunnels	MTRC	Maeda	\$298M	9/99
Kowloon Tong Station Interchange	MTRC	Maeda	\$106M	6/01
Mong Kok Station Enhancements	MTRC	Maeda	\$22M	7/01
East Rail Extensions Civil Construction Contract Tai Wai Station	KCRC	Maeda	\$687M	11/00

Contract title	Client office	Contractor	Contract sum	Month of award
West Rail construction Contract Viaduct – Tin Shui Wai to Siu Hong	KCRC	Maeda and Chun Wo joint venture	\$904M	6/99
West Rail Construction Contract Viaduct – Kam Sheung Road to Tin Shui Wai	KCRC	Maeda and Chun Wo joint venture	\$1213M	6/99
Hiram's Highway Improvement Phase 3 Improvement between Nam Wai and Ho Chung and Upgrading Local Access Roads	Highways Department	Maeda	\$139M	3/99
Castle Peak Road Improvement between Sham Tseng and Ka Loon Tsuen, Tsuen Wan	Highways Department	Maeda	\$764M	10/01

- (c) Information on the criteria and procedures under the existing mechanism for determining public works contracts and how the existing mechanism could be improved

The standard criteria and procedures for determining a public works contract are given in Clause 81 of the General Conditions of Contract for Civil Engineering Works, 1999 Edition.

Internally within the Administration, there is a Works Bureau Technical Circular No. 16/99 covering the detailed contractual and financial procedures for the determination of a works contract. The internal procedures are to be reviewed regularly. One improvement measure was introduced last year, which allow the Government to recover its losses by stages from the defaulted contractor prior to the completion of the works. The relevant arrangement is covered by the Works Bureau Technical Circular No. 11/2001.

Determination of a contractor's employment is the most acute action against a contractor and all parties should take it seriously. Under the current contractual provisions, the employer is empowered to determine a contractor's employment only when the contractor is persistently in breach of contract or in irrevocable breach. Such practice is internationally widely adopted. With regard to contractor's poor

performance or progress of works, a less-than-satisfactory performance or progress does not warrant a re-entry action. It is only when the performance or the progress of works is so poor and the Engineer is satisfied that the contractor is seriously in breach of contract and the contractor is unlikely capable to perform the contract, the employer may determine the contract upon the certification of the Engineer. The Engineer must act cautiously, as the contractor may dispute with the employer against the Engineer's certification and the employer may be liable to damages if subsequently the dispute is referred to arbitration and the arbitrator rules that the Engineer's certification is improper and hence it is wrong to determine the contractor's employment.

Moreover, determination of a contractor's employment is usually the last resort of the Government as in most cases, the contractor would become bankrupt and Government would not be able to totally recover its losses. In addition, it not only affects the contract under re-entry, other on-going contracts undertaken by the same contractor may also be affected as the bankers and suppliers would likely terminate the contractor's credit facilities immediately. Members may notice from the internal guidelines that project offices are not directed to take re-entry action automatically once they are contractually entitled to do so, but are required to examine all other possible alternatives which may be in the interest of the Government. We had some successful cases in the past. In one case, we allowed the contractor to undergo a company restructuring and continue with the works, which resulted in a much lower adverse impact on the Government.

Attachment

Annex A - Clause 81 of the General Conditions of Contract for Civil Engineering Works, 1999 Edition

Annex B - Works Bureau Technical Circular No. 16/99
Contractual and Financial Procedures for Determination of the Contractor's Employment

Annex C - Works Bureau Technical Circular No. 11/2001
Interim Certification after Determination of the Contractor's Employment

Clause 81 of the General Conditions of Contract 1999 Edition

81. (1) If the Contractor shall become bankrupt or have a receiving order made against him or shall present his petition in bankruptcy or shall make an arrangement with or assignment in favour of his creditors or shall agree to carry out the Contract under a committee of inspection of his creditors or (being a corporation) shall go into liquidation (other than a voluntary liquidation for the purposes of amalgamation or reconstruction) or if the Contractor shall assign the Contract without the consent in writing of the Employer first obtained or shall have an execution levied on his goods or if the Engineer shall certify in writing to the Employer that in his opinion the Contractor:

- (a) has abandoned the Contract, or
- (b) without reasonable excuse has failed to commence the Works in accordance with Clause 47, or
- (c) has suspended the progress of the Works for 14 days after receiving from the Engineer notice in writing to proceed, or
- (d) has failed to comply with an order from the Engineer given in accordance with Clause 46, or
- (e) despite previous warning by the Engineer in writing is failing to proceed with the Works with due diligence or is persistently in breach of any of his obligations under the Contract, or
- (f) has sub-contracted the Works, or
- (g) has to the detriment of good workmanship or in defiance of the Engineer's instruction to the contrary sub-contracted any part of the Works,

then the Employer may after giving at least 7 days' notice in writing to the Contractor enter upon the Site and the Works and expel the Contractor therefrom without thereby avoiding the Contract or releasing the Contractor from any of his obligations or liabilities under the Contract or affecting the rights and powers conferred on the Employer or the Engineer by the Contract and the Employer may complete the Works or may employ any other contractor to complete the Works and the Employer or such other contractor may use for such completion so much of the Constructional Plant, temporary buildings and materials which become the property of the Employer under Clauses 71 and 72 as the Employer may think proper and the Employer may at any time sell any of the said Constructional Plant, temporary buildings and unused materials and apply the proceeds of sale in or towards the satisfaction of any sum due or which may become due to the Employer from the Contractor under the Contract.

(2) As soon as may be practicable after such entry and expulsion by the Employer, the Engineer shall ascertain and record:

- (a) the quantity of work completed up to the time of such entry and expulsion, and
- (b) the quantity of unused or partially used materials and list any Constructional Plant and temporary buildings which have become the property of the Employer under the Contract as at the time of such entry and expulsion.

The provisions of Clause 59 shall apply for the purposes of attendance by the Contractor for measurement and agreement of records and drawings.

(3) By the notice referred to in sub-clause (1) of this Clause or by further notice in writing within 28 days of the date thereof the Employer may require the Contractor to assign to the Employer and if so required the Contractor shall forthwith assign to the Employer the benefit of any agreement for the supply of any materials and/or for the execution of any work for the purposes of this Contract which the Contractor may have entered into.

(4) If the Employer shall enter and expel the Contractor in accordance with this Clause, the

Employer shall not be liable to pay to the Contractor any money on account of the Contract until the expiry of the Maintenance Period or, where there is more than one such Period, until the expiry of the latest Period and thereafter until the cost of completion and maintenance, damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer.

(5) The Contractor shall then be entitled to receive only such sum (if any) as the Engineer may certify would have been payable to the Contractor upon due completion by him less the amount certified for the purposes of sub-clause (4) of this Clause. If the amount certified in accordance with sub-clause (4) of this Clause shall exceed the sum which would have been payable to the Contractor upon due completion by him then the Contractor shall upon demand pay to the Employer the amount of such excess.

Ref. : WB(W) 250/32/07
Group : 3,5

2 June 1999

Works Bureau Technical Circular No. 16/99

**Contractual and Financial Procedures for
Determination of the Contractor's Employment**

Scope

This Circular sets out contractual and financial procedures to be followed in the determination of a contractor's employment.

2. The procedures are applicable to all types of works contracts, including design-and-build contracts. All references to Architect/Engineer or Surveyor/Engineer shall also mean references to Surveyor or Supervising Officer where the context requires. For D&B and E&M contracts, all references to "materials" shall mean "materials and Plant". In addition, the procedures are written to cater for cases where the defaulting Contractor has contracts with two or more departments and CTA(WB) is required to assume a co-ordination role in some of the financial procedures. If the defaulting Contractor has contracts with one department only, it is not necessary for CTA(WB) to take up a co-ordination role and all the financial procedures shall be dealt with by the department concerned internally.

Effective Date

3. This Circular shall take immediate effect.

Effect on Existing Circulars

4. This Circular supersedes Works Branch Technical Circulars No. 19/94, 20/94 and 20/94A which are hereby cancelled.

Authority to Re-enter

5. The circumstances under which the Employer may re-enter the Site and the Works and expel the Contractor therefrom are given in the relevant General Conditions of Contract (GCC) Clause on "Forfeiture". This Clause will now be referred to as the GCC Clause on "Determination of the Contractor's employment" as this new marginal note will be used in the next edition of GCCs (1999 edition). The Architect/Engineer and the public office acting as the Employer must be particularly careful to strictly comply with the notice requirements and other relevant obligations set out in the Contract.

Contractual Procedures

6. The contractual procedures for determination of the Contractor's employment are set out at Appendix A to this Circular which shall be considered in conjunction with departmental procedures (see paragraph 8 below) and advice received from the Legal Adviser, Works Bureau (LA/WB). It is stressed that the procedures set out in Appendix A are not exhaustive and are guidelines only. Departments should adopt a flexible approach. Advice should be sought from the LA/WB at the earliest opportunity.

Financial Procedures

7. Appendix B to this Circular sets out the guidelines on financial procedures. Any payment due to the defaulting Contractor under a re-entered contract is frozen in accordance with the GCC Clause on "Determination of the Contractor's employment". Payments due under other contracts with the defaulting Contractor may also be temporarily frozen, subject to the Employer's contractual right to set-off being established.

Departmental Procedures

8. Departments should produce and promulgate their action checklists to ensure that appropriate and timely action is taken by their staff with respect to the procedures and guidelines for re-entry and the recovery of money owed to the Employer set out in this Circular.

Final Statement/Proof of Debt

9. It is important that the department concerned quantifies the Employer's loss as soon as practicable. A Checklist for Final Statement is given at Appendix C for reference. Where the Contractor goes into receivership or liquidation, an estimate of the loss has to be made and a "Proof of Debt" has to be lodged with the receiver or liquidator as soon as possible. Delay may prejudice recovery from a defaulting Contractor. In the event that the Contractor is placed in receivership, close co-operation and liaison with the receiver or liquidator will be necessary through the LA/WB.

(W S Chan)
Deputy Secretary (Works Policy)

Contractual Procedures for Re-entry of Public Works Contracts

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1. Action before the Serving of a Notice of Re-entry

- 1.1 ***Document the circumstances.*** It is vital to carefully observe and clearly document the circumstances justifying re-entry in the terms of the GCC Clause on "Determination of the Contractor's employment". It is also vital that the steps set down in the Conditions of Contract are strictly followed. Early written warning of dissatisfaction under GCC Clause "Rate of progress" and adherence to the requirements of the "Determination of the Contractor's employment" clause are essential. It is important that advice from LA/WB is obtained at the earliest opportunity.
- 1.2 ***Other courses of action.*** Before giving the notice of re-entry, consideration should be given to other courses of action as described in the following paragraph. Re-entry usually delays completion and increases the cost of the Works. Invariably it is impossible to recover the increased cost from the defaulting Contractor. Calling in the bond (if applicable) usually compensates the Employer for only a small part of the increased cost.
- 1.3 ***Possible steps.*** Consideration should be given to the following :
- (a) Would relaxing the Contractor's liability to liquidated damages by fixing a new date for completion by way of a supplementary agreement prove less expensive in the long run in terms of cost and/or time? Before deciding, it is essential that such a step should only be introduced after full consideration of all relevant matters.
 - (b) By novation, transfer the contract to a new contractor. This means releasing the defaulting Contractor from his obligations including liquidated damages. To provide an incentive for the new contractor to carry out the work a revised time for completion and/or enhanced rates may be required.
 - (c) With the agreement of the Contractor, omit parts of work or curtail the contract, on terms agreed between the Contractor and the Employer.
 - (d) Carry out minor outstanding works by a term contractor or other contractors or with the Employer's own workmen where the Works are near completion, under the GCC Clause on "Work by person other than the Contractor". If this GCC Clause is used, any additional cost must be set-off against the Contractor's account.
 - (e) Permit assignment of financial benefits in accordance with WBTC No. 19/90, if it has the benefit of protecting the Employer's interests.

If any of these items or other extra-contractual actions are to be explored, both the Secretary for the Treasury and LA/WB must be closely involved. In most of the cases listed, only S for Tsy has the necessary authority. Any agreement involving the Contractor must be confirmed by way of a supplementary agreement made under seal. If there is any change to the terms of the Contract (e.g. by means of a supplementary agreement), the Bondsman (if applicable) must agree in advance or the bond may be invalidated.

- 1.4 ***Increase general vigilance.*** If the Contractor is not performing satisfactorily and is not responding to warnings, the Architect/Engineer and the site staff must increase their general vigilance and in particular :
- (a) Check that work is being properly done.
 - (b) Make sure that materials are being properly stored and protected before certification for payment.
 - (c) Exercise the right under the relevant GCC clauses on the vesting of Constructional Plant and materials and prohibit the removal of materials, Constructional Plant, etc.
 - (d) Enhance record-keeping (documentary and photographic) particularly of materials and Constructional Plant on the Site.
 - (e) Be more cautious and work in more detail in the valuation for any payment to the Contractor (such as re-examination of the Preliminaries and other time related items; do not include defective work).
- 1.5 ***Contractor must be formally warned.*** As soon as re-entry action is being considered, the Director, or his representative controlling the Contract must advise -

- (a) Secretary for Works (Attn. : DS(WP), CAS(PS) & CTA)
- (b) Legal Adviser, Works Bureau
- (c) all Heads of works departments
- (d) Director of Agriculture and Fisheries
- (e) Director of Housing
- (f) Director of Home Affairs
- (g) Secretary for Justice
- (h) Director of Environmental Protection

in writing under confidential cover, marked "urgent". At this time the Contractor must be formally warned by the Architect/Engineer by registered mail or recorded delivery about the impending action, even if this has already been done informally (for instance, at site meetings) or under a "Rate of progress" warning. A copy must be sent to the Bondsman (if applicable) by registered mail.

- 1.6 ***Departments to provide details of all contracts.*** Upon being advised in accordance with sub-paragraph 1.5 above that the Contract is likely to be re-entered, all other departments are to provide the department concerned, as soon as possible by FAX and copied to CTA(WB), with details of all contracts that the departments have with the defaulting Contractor for which further payment has yet to be made by the Employer under the Contract. Nil returns are required.
- 1.7 ***Liaison group.*** If the defaulting Contractor has contracts with more than one department for which further payment has yet to be made by the Employer under those contracts,

departments that have contract(s) with the defaulting Contractor shall nominate a D1 officer to be the liaison officer for the department. The nominees shall form an inter-departmental liaison group which should be chaired by a D2 officer from the department whose Contract is likely to be re-entered. If two or more departments are likely to re-enter contracts, the liaison group should be chaired by a D2 officer from the department with the greatest value of outstanding work. CTA(WB) and CAS/PS(WB) are to be invited to be members of the liaison group and CTA(WB) shall be informed as soon as possible so that he can follow up on financial matters with the relevant departments. LA/WB should also be invited to nominate an officer to be a member of the liaison group to provide legal advice. If the defaulting Contractor has contracts with only one department, setting up of an inter-departmental liaison group is not required and the concerned department shall deal with it internally, keeping close contact with CTA(WB), CAS/PS(WB) and LA/WB.

1.8 ***Duties of the liaison group*** The liaison group shall discuss, co-ordinate and arrange for a unified approach to be adopted by the relevant departments. Typical issues, which may not be exhaustive, include

- to recommend a date of re-entry;
- to review whether or not certified payments should be frozen (They should be frozen if the Contractor is likely to go into bankruptcy, receivership or liquidation within a short period);
- if set-off is to be effected, to initiate action in accordance with paragraphs 3 & 4 of Appendix B attached to this Circular.

1.9 ***Certified Payment.*** Until re-entry, the Employer is in general obliged to pay certified sums. If it is decided to freeze any certified payment, great care must be taken that the re-entry process, and not merely the serving of notice, is completed before the expiry of the time-limit that entitles the Contractor to terminate the Contract pursuant to the GCC Clause on "Default of the Employer". For the avoidance of doubt, only payments to the Contractor can be temporarily frozen, not the certification by the Engineer/Surveyor of the sums due under Contract. If negotiations on alternatives to re-entry (e.g. those in para 1.3 above) are being carried out while certified payment is being frozen, and there is the risk of the Contractor becoming entitled to invoke this Clause, the Contractor and Bondsman (where applicable) must be required to give a written undertaking to waive their rights to terminate.

1.10 ***Bankruptcy, receivership or liquidation, payments to Nominated Sub-contractors.*** If the defaulting Contractor has gone into bankruptcy, receivership or liquidation, considerable caution must be exercised before making payment direct to Nominated Sub-contractors (NSCs). The receiver or liquidator may be able to argue that such payment is a preferential payment to one creditor and in such cases the Employer would be obliged to pay the receiver or liquidator the amount paid to the NSCs. It may be possible to persuade the receiver or liquidator that direct payment is a contractual right and in the best interests of all, since it will reduce the overall cost of completing the Works and therefore the claim against the Company in liquidation or receivership by the Employer. In any case, before agreeing to pay any NSC direct, notwithstanding the re-entry of the main contract (which automatically terminates all NSCs) their agreement that they will

complete their work, subject to justifiable claims, should be obtained. The legal position is uncertain and legal advice should be obtained from LA/WB before any decision is made to pay a NSC direct. The safest course is to re-enter before this happens using one or more of the valid grounds under the GCC. In so doing, it must be absolutely clear that the Contractor is in substantial or irrevocable breach. LA/WB's advice before any action is essential.

2. Action Upon the Serving of a Notice of Re-entry

2.1 ***Decision to re-enter: condition precedent*** The decision to re-enter is that of the Employer, but if re-entry is proposed under the GCC Clause on "Determination of the Contractor's employment" items (a) to (g), the condition precedent is the independent certificate of the Architect/Engineer stating an opinion that one or more of these events have occurred. If some material time (e.g. one month) has elapsed since that certificate, the Architect/Engineer must be asked to provide further certification. The Architect/Engineer's certificate is not necessary in the case of receivership/bankruptcy/liquidation or assignment without consent.

2.2 ***Notice in writing.*** The defaulting Contractor must be given at least 7 clear days notice in writing from date of receipt of the decision to re-enter. In each case the notice must be cleared with the LA/WB. The following are to be noted:

- (a) The reason for re-entry should be stated by reference to the provision in the GCC Clause on "Determination of the Contractor's employment".
- (b) The notice of re-entry must be sent by registered post or by hand in urgent cases. The date for re-entry should be specified in the notice of re-entry, allowing at least 3 working days for delivery if delivered by post. Such allowance can be waived if the notice is delivered by hand to the Contractor by a responsible person. The responsible person may be required to swear or affirm an affidavit of service.
- (c) The notice of re-entry should be signed by the Director for and on behalf of the Employer or by an officer specifically authorised by him in writing to do so.
- (d) A copy of the notice of re-entry, suitably protected from the weather, should be posted in a prominent place on the Site.
- (e) A copy of the notice of re-entry, together with a statement confirming whether or not the contract being re-entered contains set-off provisions for recovery of monies due to the Employer, should be sent, marked "Urgent", to the following:
 - (i) Secretary for Works (Attn. : DS/WP, CTA & CAS(PS))
 - (ii) Secretary for the Treasury
 - (iii) Director of Accounting Services
 - (iv) Director of Audit
 - (v) Legal Adviser, Works Bureau
 - (vi) The Head of each works department

- (vii) Director of Agriculture & Fisheries
- (viii) Director of Housing
- (ix) Commissioner of Inland Revenue
- (x) Director of Home Affairs and
- (xi) Director of Environmental Protection

The department should copy the notice of re-entry to addressees within their own department as considered necessary, particularly any office which has a contract with the same defaulting Contractor.

- (f) A copy of the notice of re-entry must be sent by registered post to the Bondsman (if any).

2.3 ***Prohibiting the removal of Constructional Plant, temporary buildings and materials.***

At the same time as the notice of re-entry is issued the Architect/Engineer must, under the provisions of the relevant GCC Clauses on Vesting of Constructional Plant and temporary buildings and of materials, give written notice to the defaulting Contractor (even if a similar notice has been issued previously to re-confirm the Employer's position), prohibiting the removal from the Site of any Constructional Plant, temporary buildings and materials owned by the Contractor. The Engineer/Surveyor must also make a complete record of Constructional Plant, temporary buildings and materials on the Site and keep a record of any attempts to remove these. Any person attempting to remove any of these items should be advised that, under the Contract, these items are the property of the Employer and must not be removed until proof acceptable to the Employer can be provided to show that the item(s) to be removed from the Site belong to another person in which event, the details of this person and details of the item(s) removed must be recorded. Any document submitted to support a claim of ownership must be sent to the LA/WB for advice before permission is given to remove the item concerned. The police should be informed if a person physically removes items from the Site against the advice of Employer's staff. If any item is to be removed, consideration should be given to obtaining from the claimant firm or company an acknowledgement and indemnity in a form agreed with LA/WB in the event of any claim from third parties and/or the defaulting Contractor. Action for the site to be secured or watched should be taken immediately if the site has already been vacated by the defaulting Contractor before re-entry.

2.4 ***Hired and hire-purchase Constructional Plant.*** The Architect/Engineer must try to obtain details of any hired and hire-purchase Constructional Plant on the Site and any relevant agreement and advise as soon as possible whether it would be advantageous to have the benefit of the hiring or hire-purchase agreement assigned to the Employer in accordance with the provisions of the relevant GCC Clause on "Hired and hire-purchase Constructional Plant".

3. **Action Upon Re-entry**

3.1 ***Entry upon the Site.*** An officer, specifically authorised in writing by the Director to do so, shall enter upon the Site on behalf of the Employer on the notified day of re-entry. The officer should record in the site diary that he has entered upon the Site and that the

Site has been re-entered and must post a copy of notice of re-entry in a prominent position. The officer should then certify to the Director that he has entered upon the Site on the Employer's behalf and expelled the Contractor therefrom.

- 3.2 ***Notice of re-entry to other parties.*** On the same day, a copy of the notice of re-entry posted on the Site must be sent to the Bondsman by registered post advising him that the Site and the Works have been re-entered. The Bondsman must be advised that a formal claim on the Bond may be lodged once the financial position is known.

In addition, the department whose contract is re-entered shall immediately inform the following in writing :

- (a) the insurer(s) who provide(s) insurance required by the Contract,
- (b) any Nominated Sub-contractor, and
- (c) any Specialist Contractor.

- 3.3 ***Specialist Contractors on the Site.*** In the case of Specialist Contractors, every effort should be made to keep them working. However, where this is not possible, the Architect/Engineer will be obliged to order a suspension of the Works in accordance with the relevant GCC Clause. Where this is necessary, it should be borne in mind that the Specialist Contractor concerned may, in accordance with the relevant GCC Clause on "suspension lasting more than 90 days", after the Works have been suspended for a total of 118 days, treat his contract as having been abandoned by the Employer. If this possibility exists then early negotiations to avoid it are necessary.

- 3.4 ***Complete record.*** In addition to securing the Site and valuing the Constructional Plant on the Site, a complete photographic record of the Site, the Works and all items on the Site must be made as soon as possible. It should be borne in mind that upon re-entry the defaulting Contractor ceases to be responsible for the care of the Works and any Constructional Plant, temporary buildings, materials and things on the Site; the responsibility passes to the Employer who should plan for site security arrangements. Close liaison with the Police is advisable.

It is important to record the quantity and value of the works completed and also record the quantities of unused or partially used materials on the Site in accordance with the GCC Clause on "Determination of the Contractor's employment" and list any Constructional Plant and temporary buildings which have become the property of the Employer under the Contract. The Engineer/Surveyor shall invite the Contractor to attend and to assist the Engineer/Surveyor in making such measurement and record.

It is important to record all additional time spent by the Employer's staff/consultants staff and any additional costs incurred in the re-entry. Only those directly related to the winding up of the Contract and the completion of the Works are to be recorded. Time spent on administrative work should not be charged to the defaulting Contractor.

In the case of bankruptcy or liquidation the receiver or liquidator may claim ownership of the defaulting Contractor's assets. In such a case the LA/WB must be consulted.

3.5 ***Other actions.*** Action should be taken/commenced upon re-entry with respect to the following :

- (a) arrange for the Site to be secured and watched as from and including the date of re-entry, and hire additional security for the Site where necessary;
- (b) request EMSD to arrange for the Constructional Plant on the Site to be valued if necessary;
- (c) assess the monies due to or from the defaulting Contractor under the Contract at the date of re-entry;
- (d) prepare proposals for completing the Works;
- (e) arrange for continued provision of utility services;
- (f) assess the need for emergency work and arrange for it to be carried out; and
- (g) arrange for care of the permanent and Temporary Works against any physical damage or potentially dangerous deterioration.

Such steps should assist in arranging for new contracts after re-entry and reduce claims from creditors of the defaulting Contractor.

4. Action After Re-entry

4.1 ***The Works must be completed quickly.*** After re-entry it is important that the Works are completed as quickly and economically as can reasonably be done, otherwise the defaulting Contractor may have grounds for contesting some of the costs incurred by the Employer. Preparation work for completing the Works, either by tendering new contracts or utilizing existing term contracts or other means, should start as early as possible. As soon as possible after re-entry, decisions must be made as to arrangements for :

- (a) any hired and hire-purchase Constructional Plant and its assignment;
- (b) any Nominated Sub-contract; and
- (c) any other contract related to the Works.

4.2 ***Employment of Nominated Sub-contractors terminated.*** Upon re-entry of the Site and the Works in accordance with the provisions of the GCC Clause on "Determination of the Contractor's employment", the employment of Nominated Sub-contractors is terminated. It may be preferable for the original Nominated Sub-contractors to enter into new sub-contracts with the completion contractor for the completion work, and, if this is the case, they should be asked if they are willing to do so. Appropriate approval (as per single tender action) for the original Nominated Sub-contractor to enter into a new sub-contract with the completion Contractor must be obtained. An attempt should be made to arrange the new sub-contracts at the same contract prices, but if this is not possible, the cost advantages of alternative arrangements should be considered.

- 4.3 ***The Engineer's/Surveyor's duty.*** The duty of the Engineer/Surveyor is to ascertain and certify the cost of completion and maintenance, damages for delay in completion and all other expenses incurred by the Employer and the amount that would have been payable to the defaulting Contractor upon due completion by him.
- 4.4 ***If the Contractor has abandoned the Contract.*** In the event that the Contractor has abandoned the Contract and a registered letter is returned because it could not be delivered, the Secretary for Works (Attn. : SEO(PS)) and LA/WB should be alerted immediately. The department concerned should then, in liaison with SEO(PS), endeavour to locate the defaulting Contractor. If it is considered the defaulting Contractor may abscond, LA/WB must be consulted and Finance Bureau informed.
- 4.5 ***Bankruptcy, receivership or liquidation.*** To recover as much money as possible from the defaulting Contractor in case of bankruptcy, receivership or liquidation, it is necessary to quantify the amount owing to the Employer as soon as possible. All the financial information supplied by departments should be passed to CTA(WB) to consolidate for the purpose of filing a "Proof of Debt".

Financial Procedures for Re-entry of Public Works Contracts

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1. Payment to the Contractor

1.1 Any payment due to the defaulting Contractor under a re-entered Contract is withheld in accordance with the GCC Clause on "Determination of the Contractor's employment".

1.2 The defaulting Contractor shall not be entitled to receive further payment under the re-entered Contract until the completion of the Works (by a third party) and expiry of the Maintenance/Defects Liability Period and (where appropriate) subject to :

- (a) the deduction of the additional cost in the completion of the Works (by the third party), damages for delay in completion, if any, and all other expenses properly incurred by the Employer in having the Works completed have been ascertained and the amount certified by the Engineer/Surveyor; and
- (b) the deduction, made in accordance with the GCC Clause on "Recovery of money due to the Employer" or under any right of set-off.

2. Ascertainment of Financial Situation

2.1 ***Expenses and Damages Incurred by the Employer.*** Expenses arising from re-entry should be recoverable provided that they are directly and necessarily incurred by the Employer as a result of the Contractor's default. The Employer should normally be entitled to recover the following costs from the defaulting Contractor :

- (a) expenses properly incurred by the Employer;
- (b) extra cost in completion of the Works; and
- (c) damages for the delay in completion.

A checklist is given at Appendix C to this Circular to assist the project officer in preparing the statement of final account. It should be noted that the Employer's entitlement to liquidated damages will cease on the date of re-entry. Thereafter, the Employer is entitled to general damages.

2.2 ***Sources from which money may be recovered.*** In the event that any frozen payments including Retention Money under the re-entered Contract are insufficient to cover the expenses and damages, money may be recovered from any or all of the following sources in accordance with the provisions of the Contract :

- (a) the sale of the Contractor's Constructional Plant, temporary buildings and unused materials being kept on the Site which have been vested in the Employer under the Contract;
- (b) the defaulting Contractor upon demand.

If these sources fail to offset the debt, then

- (c) set-off from money due to the defaulting Contractor with respect to his other contracts with the Employer (see the GCC Clause on "Recovery of money due to the Employer"); and finally
- (d) the Bondsman (if applicable).

2.3 ***Debt to the Employer in excess.*** Money may not be recovered from the sources at 2.2 above unless it can be demonstrated by the usual accounting procedures that a debt exists, or will exist if the Contractor goes into liquidation, to the Employer in excess of the money due to the defaulting Contractor under the re-entered Contract.

2.4 ***Insurance rebate.*** An attempt should be made to get some benefit of partial refund of premium from any unexpired insurance policy required by the Contract in the joint names of the Contractor and the Employer by asking the insurance company for an insurance rebate.

2.5 ***Mitigate loss.*** There is a general duty under common law to mitigate any loss. After re-entry, for example, it is important that the Works are completed as quickly and economically as possible otherwise the defaulting Contractor may have grounds for contesting some of the expenses incurred or damages sustained by the Employer.

3. Preliminary Procedures for Recovery of Debt

3.1 ***Temporarily freeze all payments.*** The liaison group (see sections 1.7 & 1.8 in Appendix A) shall seek legal advice on whether a general right of set-off is available. If the liaison group so directs, departments are to immediately freeze all payments due to the defaulting Contractor with respect to all contracts that the defaulting Contractor has with them. Only the payments to the defaulting Contractor can be temporarily frozen, not the certification of the sums due to the defaulting Contractor by the Engineer/Surveyor.

3.2 ***Debt must be established as soon as possible.*** When payments to the defaulting Contractor are frozen without a debt having been established, the defaulting Contractor may, in accordance with the provisions of the GCC Clause on "Interim payments, Retention Money and interest", be entitled to interest on the money withheld. In addition, in accordance with the provisions of the GCC Clause on "Default of the Employer", the defaulting Contractor may terminate all other contracts if payment under those contracts are not made as certified. Consequently it is important that the debt must be established as soon as possible and in any event before the defaulting Contractor becomes entitled to terminate other contracts not the subject of a re-entry notice. If the Contractor is declared bankrupt or in receivership or liquidation, then all money must be withheld until legal advice is obtained on the Employer's right of retention.

3.3 ***Release of frozen payment.*** If a debt cannot be established or if the Contractor has given a notice to the Employer pursuant to the GCC clause on "Default of the Employer" urging for payment of the sum due and the Contract cannot be re-entered within the 14 days notice period, payment must be made within the contractual time limit, otherwise the Contractor may terminate the Contract.

4. Recovery of Debt by Set-Off

4.1 ***Liaison group meeting.*** As soon as the details of the payments temporarily frozen and the initial assessment of the debt are available, the chairman of the liaison group will arrange a meeting of the group to determine from which contract(s) the debt will be recovered by set-off. [Note that the Employer cannot set-off debts against payments due under contracts entered into by independent Authorities e.g. Hospital, Housing, MTRC, Airport].

4.2 ***Deposit account.*** Once it has been determined by the liaison group that set-off is required, CTA(WB) will open a deposit account for the defaulting Contractor. All money withheld or subsequently collected will be transferred into this account. The department will also advise the other departments involved and the Inland Revenue Department of the details of the deposit account, i.e. title, type, code number, etc.

4.3 ***Departments should advise the defaulting Contractor of money withheld.*** Each department that is withholding money due to the defaulting Contractor will raise a transfer voucher, copied to CTA(WB) and the chairman of the liaison group, together with certified documents such as interim payment certificates, retention money certificates, etc., in support of the money due which is being withheld as set-off. The purpose of this transfer voucher is for crediting the deposit account already opened. The transfer voucher together with the certified documents should be forwarded to the Treasury for processing. Payment vouchers **must not** be raised in these cases. At the same time the departments should advise, by registered mail, the defaulting Contractor (and Receiver or Liquidator if applicable) of the money being withheld and the reason for withholding the money.

4.4 ***Monitor the recovery of the debt.*** The liaison group must carefully monitor the recovery of the debt by set-off. When the debt can be accurately ascertained, the chairman of the liaison group shall call a meeting of the group to agree further set-off if further recovery is needed. In the event that the original estimate of debt exceeds the final figure and an over-recovery has occurred, the amount of the over-recovery should be released to the defaulting Contractor (with interest if the Contract so requires) after CTA(WB) has cleared the issue with the Inland Revenue Department to confirm that tax payments due are not in arrears. The arrangements for the release of this amount of over-recovery are to be agreed by the liaison group.

4.5 ***Deposit account closure.*** Upon final determination of the sum due from the

defaulting Contractor and recovery of the required amount by set-off, the deposit account will be closed by credit to the project vote of the re-entered contract (the precise closure entries will depend on the particular circumstances of each case). The chairman of the liaison group is to advise CTA(WB) who will advise the Treasury to close the account. The defaulting Contractor (and the receiver or liquidator, if applicable) and the Bondsman (if applicable) should be kept fully informed of and up to date with the financial situation.

5. Settlement of Final Account

- 5.1 ***Statement of Account.*** On expiry of the Maintenance Period and after the cost of completion and maintenance, damages for the delay in completion, if any, and all other expenses incurred by the Employer have been ascertained and the amount certified by the Surveyor/Engineer, a Statement of Account and Demand Note for the balance should be served on the defaulting Contractor (or receiver or liquidator, if applicable) and copied to CTA(WB), the chairman of the liaison group and the Bondsman (if applicable), by the department whose contract has been re-entered.
- 5.2 ***Written enquiry.*** If the defaulting Contractor (or receiver or liquidator, if applicable) does not pay the money due per the Statement of Account, a registered enquiry should be made (giving 14 days for reply) as to why payment has not been made. The response, or no response at all, will serve as evidence that the defaulting Contractor is unwilling or unable to pay the debt. This evidence can be used for the purposes of recovering the debt by other means.
- 5.3 ***Legal steps.*** When all money that is recoverable (including calling in the Bond if applicable) have been received and there is still an outstanding debt, the chairman of the liaison group shall liaise with CTA(WB) and arrange for the appropriate steps for debt recovery. This may require CTA(WB) to seek legal advice. When the defaulting Contractor becomes bankrupt or goes into liquidation, the advice of the LA/WB must be sought immediately to ensure that the proper legal steps are taken. If it is thought that a defaulting Contractor may abscond, CTA(WB) shall immediately consult LA/WB.

6. Recovery of Debt by Claim on Surety Bondsman (if applicable)

- 6.1 ***Call in the Bond.*** Once it is established that the defaulting Contractor has caused the Employer to sustain expenses and/or damages which cannot be recovered by set-off and the defaulting contractor has not honoured a Statement of Account and Demand Note issued under paragraph 5.1, the department concerned should inform CTA(WB) to call in the Bond. LA/WB must be kept informed of the calling in of the Bond and their advice should be sought before any action is taken. Where the debt to the Employer is less than the value of the bond, a sum equal to the debt shall be called in.
- 6.2 ***Detailed evidence.*** If evidence exists that the debt to the Employer is clearly considerably more than the value of the Bond and cannot be recovered by set-off

or direct from the defaulting Contractor, then the account to the Bondsman need only be in sufficient detail as to establish the debt and it will not be necessary to await the completion of the Works before formally lodging a claim against the Bondsman. However the closer the debt is to the value of the Bond, the more detailed the evidence will have to be and it may be necessary to await the completion of the Works before formally lodging a claim against the Bondsman.

6.3 ***Legal action concerning the Bond.*** Legal action concerning the Bond must be commenced within twelve years of the occurrence of the cause of action i.e. date of the default of the Contractor as listed in the opening statement of the GCC Clause on "Determination of Contractor's employment".

6.4 ***Bond not always incorporated.*** Note that not every contract requires a Bond. (WBTC No. 10/97 refers).

7. Write-off or Irrecoverable Debts Owed by the Defaulting Contractor

7.1 It may be necessary to write-off any debt due from a defaulting Contractor if all efforts to recover the debt have failed. Works Bureau will co-ordinate with the relevant departments to substantiate the write-off application.

8. Bankruptcy, Receivership or Liquidation

8.1 ***Bankruptcy, receivership or liquidation.*** To recover as much money as possible from the defaulting Contractor in case of bankruptcy or liquidation, it is necessary to quantify the amount owing to the Employer as soon as possible. All the financial information supplied by departments should be passed to CTA(WB) to consolidate for the purpose of filing a "Proof of Debt".

Check List for Final Statement

The check-list has been prepared to assist the Project Architect/Engineer and Quantity Surveyor in the action to be taken in the completion of the Works after the date of determination and the preparation of the accounts and final statement.

The check list is not definitive. It is not for the Architect/Engineer/Surveyor to decide the legal rights and wrongs. It is only for the Architect/Engineer/Surveyor to make as comprehensive a list as possible to ensure the Employer's rights are safeguarded.

DETERMINATION OF CONTRACTOR'S EMPLOYMENT IN ACCORDANCE WITH THE CONTRACT

	AMOUNT	
	<u>DEDUCT</u>	<u>ADD</u>
Amount of original contract (with the Contractor in default)	\$	\$
Omission of the Contingency Sum	\$	\$
Net Omission/Addition on Measured Variation and Daywork Items	\$	\$
Net Omission/Addition on Provisional Sums and Prime Cost Items	\$	\$
Fluctuations	\$	\$
Total	<u>\$</u>	<u>\$</u>
TOTAL OF NOTIONAL FINAL CONTRACT SUM	<u>\$</u>	...(1)
(i.e. the total amount that would have been payable on due completion in accordance with the re-entered Contract)		

DEDUCTION

1. MONIES ALREADY PAID TO THE CONTRACTOR (IN DEFAULT) BEFORE THE DATE OF DETERMINATION

Monies paid by the Employer to(note a)		
Certificate Nos. 1 to	\$	
Less Certificate No. (not honoured)	\$()	
Total	<u>\$</u>	...(2)

2. ADDITIONAL EXPENSES PROPERLY INCURRED BY THE EMPLOYER

2.1 Expenses arising from the re-entry

2.1.1	protective measures	\$
2.1.2	Watching, lighting and guarding site	\$
2.1.3	Tidy up and restoration of the Site.....(note b)	\$
2.1.4	Photographs of the Site and the Works	\$
2.1.5	Government staff costs	\$
2.1.6	Consultant fees	\$
2.1.7	Legal costs	\$
2.1.8	EMSD's valuation fee	\$
2.1.9	Insurance	\$

2.2 Monies paid to Nominated Sub-Contractors (i.e. to the Contractor in default) in respect of non payment out of Certificate No. datedin accordance with Clause 69 and as follows.....(note c)

.....	\$
.....	\$
.....	\$

2.3 Monies paid to Nominated Sub-Contractors (i.e. to the Contractor in default) in respect of release of retention on work executed before the date of determination in accordance with Clause 69 and as follows.....(note c)

.....	\$
.....	\$
.....	\$

2.4 Monies paid to suppliers on behalf of the Contractor for materials delivered before the date of determination as follows.....(note c)

.....	\$
.....	\$
.....	\$

	Total	\$...(3)
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3 COST OF COMPLETION

Monies paid by the Employer to the completion contractor(s)

.....(notes d & e)	\$
.....(notes d & e)	\$

	Total	\$...(4)
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4 DAMAGES FOR DELAY IN COMPLETION

4.1 In respect of the period between the (extended) date for completion in the Contract and the date of determination.

4.1.1 Liquidated Damages days at \$ per day \$

4.2 General damages for delay in completion in respect of the period from the (extended) date for completion in the Contract or the date of determination whichever is the later and the certified date of completion of the Works (adjusted for any delay caused by the Employer, its agent and the completion contractor).

4.2.1	Loss of income or recovery on capital invested	\$	
4.2.2	Claims in respect of the delay by		
	Consultants	\$	
	Nominated sub-contractors	\$	
	Specialist contractors	\$	
	Others.....(note f)		
4.2.3	Overhead costs		
	accommodation	\$	
	services and utility charges	\$	
	Office and site staff costs	\$	
	Insurance and Maintenance of the works	\$	
	Other running costs.....(note g)	\$	
	Total	\$...(5)

ADDITION

5 SALE OF PLANT AND MATERIALS

	Sale of Plant	\$	
	Sale of surplus materials	\$	
	Insurance rebate	\$	
	Less Expenses	()	
	Total	\$...(6)

6 SET-OFF FROM MONIES HELD BY THE EMPLOYER

6.1	From Contract No. (note h)	\$	
6.2	Retention money	\$	
	Total	\$...(7)

FINAL STATEMENT

	<u>AMOUNT</u>
TOTAL OF NOTIONAL FINAL CONTRACT SUM	\$... (1)
DEDUCT	
MONIES ALREADY PAID TO THE CONTRACTOR (IN DEFAULT) BEFORE THE DATE OF DETERMINATION	\$... (2)
EXPENSES PROPERLY INCURRED BY THE EMPLOYER	\$... (3)
COST OF COMPLETION	\$... (4)
DAMAGES FOR DELAY IN COMPLETION	\$... (5)
ADD	
SALE OF PLANT AND MATERIALS	\$... (6)
SET-OFF FROM MONIES HELD BY THE EMPLOYER	\$... (7)
AMOUNT NOW DUE TO THE CONTRACTOR	<u>\$</u>
or DEBT PAYABLE BY THE CONTRACTOR	<u><u>\$</u></u>

Notes:

- (a) Name of Contractor (in default).
- (b) e.g. Tidying up site, moving materials or goods into stores/compounds; removal of defective materials from site; correcting/adjusting defective works prior to contract for completion; repairing damage to works.
- (c) To be released only if there is a balance sufficient to make the necessary payment(s).
- (d) Name(s) of Contractor(s) for Completion.
- (e) Adjustment may be required if the total amount includes contractual claims which would not be attributable to the Contractor (in default).
- (f) e.g. Payment of accommodation charges for tenant unable to take up residence and solicitors fees thereon. Payments to staff who are "under employed".
- (g) ther preliminaries e.g. transportation,
- (h) List the contracts.

Ref. : WB(W) 209/32/110
Group : 3, 5

25 May 2001

Works Bureau Technical Circular No. 11/2001

**Interim Certification after Determination
of the Contractor's Employment**

Scope

This circular promulgates an amendment to Clause 81 of General Conditions of Contract, 1999 Edition (GCC 1999) which specifically empowers the Engineer/Surveyor/Supervising Officer to issue interim certificate after determination of the Contractor's employment in accordance with Clause 81 of GCC 1999.

Effective Date

2. This circular takes immediate effect.

Effect on Existing Circulars

3. This circular has no effect on existing technical circulars.

Background

4. Sub-clauses (4) and (5) of Clause 81 of GCC 1999 currently provide that no payments are due from either party after determination until the expiry of the Maintenance Period and all the Employer's expenses have been ascertained and the amount certified by the Engineer/Surveyor. As the certification may not be available until years after the determination, these provisions delay the Employer's right to recovery of sums due unnecessarily.

Policy

5. All new contract documents shall adopt an appropriate SCC from the Appendix to allow the Engineer/Surveyor/Supervising Officer to issue interim certificate after determination.

(W S Chan)
Deputy Secretary (Works Policy)

**SCC for Interim Certification after Determination
(for use with the non – D&B GCC)**

SCC No. []

General Conditions of Contract Clause 81 is amended by replacing sub-clauses (4) and (5) with the following:

- “(4) (a) If the Employer enters and expels the Contractor in accordance with this Clause, the Employer shall not be liable to pay the Contractor any money under the Contract (whether in respect of amounts certified by the Engineer/Surveyor or otherwise) unless and until the Engineer/Surveyor certifies that an amount is due to the Contractor under sub-clause (4)(b) of this Clause.
- (b) The Engineer/Surveyor shall certify the difference between :
- (i) such sum as would have been due to the Contractor if he had duly completed the Works together with any proceeds of sale under sub-clause (1) of this Clause; and
 - (ii) the costs of completing the Works (whether or not the Works are completed under a separate contract), damages for delay (if any) and all other expenses properly incurred by the Employer.
- (c) Such difference as is certified by the Engineer/Surveyor under sub-clause (4)(b) of this Clause, subject to adjustment by the Engineer/Surveyor to take account of the amount (if any) certified by the Engineer/Surveyor under sub-clause (5) of this Clause, shall be a debt due to the Employer or the Contractor as the case may be and shall be paid by or to the Contractor as the case may be within 21 days of the date of certification by the Engineer/Surveyor.
- (5) If the Engineer/Surveyor is satisfied at any time prior to the completion of the Works that the whole or part of the costs, damages and other expenses referred to in sub-clause (4)(b)(ii) of this Clause exceeds such sum as calculated under sub-clause (4)(b)(i) of this Clause, he may issue an interim certificate to that effect and the amount of such excess as is certified by the Engineer/Surveyor in the interim certificate shall be considered as a debt due from the Contractor to the Employer and shall be paid by the Contractor within 21 days of the date of interim certification by the Engineer/Surveyor.”

**SCC for Interim Certification after Determination
(for use with D&B GCC)**

SCC No. []

General Conditions of Contract Clause 81 is amended by replacing sub-clauses (5) and (6) with the following:

- “(5) (a) If the Employer enters and expels the Contractor in accordance with this Clause, the Employer shall not be liable to pay the Contractor any money under the Contract (whether in respect of amounts certified by the Supervising Officer or otherwise) unless and until the Supervising Officer certifies that an amount is due to the Contractor under sub-clause (5)(b) of this Clause.
- (b) The Supervising Officer shall certify the difference between :
- (i) such sum as would have been due to the Contractor if he had duly completed the Works together with any proceeds of sale under sub-clause (1) of this Clause; and
- (ii) the costs of completing the Works (whether or not the Works are completed under a separate contract), damages for delay (if any) and all other expenses properly incurred by the Employer.
- (c) Such difference as is certified by the Supervising Officer under sub-clause (5)(b) of this Clause, subject to adjustment by the Supervising Officer to take account of the amount (if any) certified by the Supervising Officer under sub-clause (6) of this Clause, shall be a debt due to the Employer or the Contractor as the case may be and shall be paid by or to the Contractor as the case may be within 21 days of the date of certification by the Supervising Officer.
- (6) If the Supervising Officer is satisfied at any time prior to the completion of the Works that the whole or part of the costs, damages and other expenses referred to in sub-clause (5)(b)(ii) of this Clause exceeds such sum as calculated under sub-clause (5)(b)(i) of this Clause, he may issue an interim certificate to that effect and the amount of such excess as is certified by the Supervising Officer in the interim certificate shall be considered as a debt due from the Contractor to the Employer and shall be paid by the Contractor within 21 days of the date of interim certification by the Supervising Officer.”

