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**WORKS BRANCH
GOVERNMENT SECRETARIAT
MURRAY BUILDING
GARDEN ROAD
HONG KONG**

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Works Branch Technical Circular No. 28/92

Damage to Crops and Property on Agricultural Lands

This Circular deals with the procedure to be followed when damage to crops or other property has occurred on agricultural lands as a result of construction works. Public Works Departmental Technical Circular No. 8/80 is cancelled and replaced by this Circular.

Purpose

The procedures set out in Appendix A are intended primarily to avoid delay in payment of small claims for compensation where crops or property on agricultural land are damaged as a direct consequence of execution of the works under the contract.

Introduction

2. In the wet season, especially during typhoon and heavy rainstorm conditions, flooding may occur and silt may wash down from work sites or borrow areas on to agricultural land, causing damage to crops and/or property. Damage may also result from other aspects of construction work. The Architect's/Engineer's Representative should ensure that the work proceeds in such a way as to obviate the risk of this as far as possible and after damage has been suffered, consider additional improvement work to eliminate the likelihood of recurrence.

Special Condition of Contract

3. In order to expedite the payment of compensation to owners and/or occupiers of agricultural land and to facilitate recovery of compensation from contractors where appropriate, the Special Condition of Contract (SCC) attached at Annex A is to be included in all contracts where the possibility of damage to agricultural crops and/or property on agricultural lands might arise.

4. The procedure for implementing the SCC in the event of damage has been agreed with Agriculture & Fisheries Department (AFD) and Attorney General's Chambers (AGC) and is set out hereunder. It is to be followed as a general rule, but specific circumstances may arise that need some flexibility.

**(H B Phillipson)
Deputy Secretary (Works Policy)**

DAMAGE TO CROPS AND PROPERTY ON AGRICULTURAL LANDS

Procedures

On receiving a report from the appropriate District Office (DO), District Lands Office (DLO), or the claimant, that damage has occurred, the Architect's/Engineer's Representative shall arrange an early joint inspection of the affected area with representatives of the Contractor, the claimant, the DO, DLO, AFD, and the relevant project office if the contract works are being supervised by consultants, to ascertain whether the damage has originated from the contract works. A written assessment should be sent to AGC by the Architect/Engineer, or via the project office when consultants are involved, for advice if there are any doubts as to the Contractor's liability.

2. Where the inspection reveals that damage could have originated from the contract works the Architect's/Engineer's Representative shall as soon as possible after the damage has occurred arrange for -

- (a) the damage to be photographed;
- (b) the boundary of the damaged area or the extent of the damage to be defined and recorded during the inspection;
- (c) DLO or District Survey Office staff to record lot numbers, details of the damage, and measure and prepare a plan of the land area involved;
- (d) AFD staff, with the assistance of the Architect's/Engineer's Representative if required, to provide technical advice, record the damage, determine the total value of damage and/or loss of the crops suffered, assess the cost of removing silt (if any) and of restoring the soil to a state suitable for production of crops (if applicable);
- (e) measurements of quantities for compensation assessment by DLO or AFD to be agreed with the Contractor and the claimant through the Architect's/Engineer's Representative and recorded in the usual way for contract measurements; and
- (f) apportionment of the damage to be assessed where part only of the damage has been caused by the contract works. This apportionment may include other contract works.

3. If any change of circumstance arises which causes the compensation to be re-assessed, the department/office/party having knowledge of such change of circumstance shall notify the Architect's/Engineer's Representative, who shall arrange another site inspection following the procedures set out in paragraphs 1 and 2. The re-assessment made should be copied to AGC if advice on the Contractor's liability has been sought and the basis of re-assessment differs from the previous assessment.

4. If the Architect/Engineer considers that the flooding or any material which caused the damage had originated from the contract works, he shall write to the Contractor -

- (a) notifying the Contractor of impending claims for compensation and that details (AFD Damage and/or Crop Compensation Schedules) will be forwarded when obtained from the DLO;
- (b) drawing the Contractor's attention to the appropriate clause in the Conditions of Contract requiring him to indemnify the Employer against claims;
- (c) enquiring whether, in the event of the land owner and/or occupier agreeing, the Contractor wishes to remove silt and boulders and/or to repair any damage by his own labour, (It must be borne in mind that where damage has caused loss of crops the Contractor will be liable both for the cost of repairing the damage and for paying compensation for loss of crops.);
- (d) requesting the Contractor to pay the compensation direct to the DLO within 14 days of being given notice of the amount payable and/or repair the damage or bear the cost of doing so; and
- (e) informing the Contractor that in the event of his not paying the DLO, it is intended to pay compensation to the claimant without prejudice to the Employer's position under the indemnification clause and to recover the cost from the Contractor in accordance with the SCC relating to claims by a third party in respect of damage (Annex A).

5. The Architect/Engineer shall attempt to obtain the Contractor's acceptance of liability quickly, but provided that the Architect/Engineer is satisfied that the damage has been caused by the execution of the contract works, funds will be provided from the project vote if the Contractor has failed to pay within the 14 days and/or has failed to commence any repair work which he has undertaken to do. The amount paid in compensation shall be recovered by deductions from money due to the Contractor.

6. The assessed costs shall be paid by banker's cheque through the DLO to the claimant.

7. Should the amount of compensation exceed the amount of money due or likely to become due to the Contractor under the contract, setting-off procedure against monies due under any other contract with the Contractor shall be followed. (GCC Clause 83 refers)

8. If it cannot be agreed on whether the damage was caused by the execution of the contract works, or to what extent it was caused, the Architect's/Engineer's Representative in consultation with the relevant DO will present a case as soon as possible to the Architect/Engineer so that a decision can be made on whether to accept a commitment against the project vote in the event that it may not be possible legally to recover any or some of the compensation from the Contractor.

9. A flow chart showing procedures to be followed is attached at Annex B.
10. The following points relating to the SCC at Annex A should also be noted:-
 - (a) the Government is entitled under the SCC to exercise the right to deduct the amount paid by way of set-off, from any monies due or which may become due to the Contractor under the contract in question or any other contract, provided that the claim is in respect of matters for which the Contractor is required under the contract to indemnify the Government and the Government is satisfied that the Contractor or his insurers are delaying settlement of the claim.
 - (b) it should be appreciated that there is no obligation on the part of the Government to make direct payment to a claimant even if the SCC applies, there is merely a discretion to do so if it is thought appropriate in the circumstances.
 - (c) in any case it is possible that the Contractor or his insurers could mount an action against the Government if it could be proved that the terms of settlement with the claimant were too generous. This is a risk inherent in the SCC which can only be minimized by careful examination and assessment of the claims but can never be eliminated completely.
 - (d) If the SCC at Annex A is used together with the SCC on 'Third Party Insurance' in a particular contract, the procedure sub-clause (2) of the SCC at Annex A should be invoked only in relation to settlement of small claims. Claims substantially above the stated excess in the insurance policy should be left to the care of the insurers.
11. In any contract not including the SCC and where damage is caused by the execution of the Works GCC Clause 22(1) and GCC Clause 83 shall apply and the procedures set out above shall be used as appropriate.
12. When deducting money in accordance with this circular always refer to the SCC or GCC Clause 22(1) as appropriate. Any dispute over the right to deduct or the valuation shall be settled under GCC "Settlement of Disputes" Clause 86.
13. In the event that the claimant does not agree with AFD's valuation then in the first instance DO/DLO will act as mediator to see if the dispute can be settled satisfactorily between the claimant and the contractor. If the dispute cannot be settled it shall be referred to the Attorney General's Chambers.

Special Condition of Contract

Marginal Notes Guidelines

- (1) Any claim received by the Employer or the Architect/Engineer* in respect of matters for which the Contractor is required under the Contract to indemnify the Employer will be passed to the Contractor who shall likewise inform the Employer and the Architect/Engineer* of any such claim which is submitted directly to him by a claimant. The Contractor shall keep the Employer and the Architect/Engineer* informed as to the progress made towards settlement.
- (2) When a claim involves alleged damage to crops or property on agricultural lands the District Lands Officer shall be informed by the Architect's/Engineer's** Representative and representative or representatives of the District Lands Office will be present at the negotiations and any payment in settlement of the claim shall be made through the District Lands Officer to the claimant. The Contractor shall do everything necessary including notifying his insurers, if any, of the claim received, to ensure that the claim is settled without delay. If in the opinion of the Employer the Contractor or his insurers, if any, are delaying settlement the Employer may make direct payment to the claimant in settlement of all outstanding amounts which in the opinion of the Employer are due to him and shall without prejudice to any other method of recovery have the right to deduct by way of set-off, in accordance with General Conditions of Contract Clause 83 the sums so paid.

Third party claims in respect of damage on and to agricultural lands.

* Delete "Architect" or "Engineer" as appropriate

** Delete "Architect's" or "Engineer's" as appropriate

