

Legislative Council Panel on Housing

Project Management and Rehousing Issues Arising from the Housing Authority's Re-entry Upon Three Construction Sites

Purpose

This paper outlines the Housing Department (HD)'s response to the following issues arising from forfeiture of three building contracts between the Housing Authority (HA) and Dickson Construction Co. Ltd. (DCCL) :

- (a) project management and site supervision;
- (b) construction programmes of the three public housing estates affected;
- (c) rehousing arrangements for Wong Chuk Hang Estate tenants affected by redevelopment; and
- (d) overdue wages for construction workers.

2. The three building contracts are : Construction of Redevelopment of Shek Pai Wan Estate Phase 2, Construction of Fanling Area 36 Phase 1 and Construction of Fanling Area 36 Phase 2.

Background

3. DCCL was awarded the above contracts in 2003 and 2004 for the construction of a total of 7 163 flats. Shek Pai Wan Estate Phase 2 is the reception estate for tenants affected by the Wong Chuk Hang Estate Redevelopment Project. Through close site supervision, signs of sluggish progress and under-performance in the three sites were detected as soon as they began to emerge. HD issued warnings to DCCL repeatedly under the contracts requiring prompt rectification. When it became apparent that DCCL was unable to fulfil its contractual obligations to proceed with the works with due diligence, HA, having regard to the public interest, re-entered upon the sites in accordance with the contractual provisions on 17 February 2006. As a result, completion of the three projects will be deferred.

Project Management and Site Supervision

4. Strengthening project management and site supervision is one of the major improvement measures under HA's Quality Housing Initiatives Reform launched in 2000. All building works are supervised by professional architects and engineers at each stage from commencement to completion and during the maintenance period. There are also resident HD staff at the construction sites to closely monitor the day-to-day site activities, thus enabling the HD to identify promptly any problems arising during construction, as well as ensuring that the construction works are progressing on schedule and meet the quality requirements and specifications stipulated in the contracts. The entire supervision mechanism covers both the contractual and list management levels, and is summarized as follows :

- (a) Upon commencement of works, HD's Contract Managers will require contractors to prepare contract quality assurance plans to set out the objectives, major work flow and sequence of works.

Apart from conducting site inspections from time to time, HD's professional architects, engineers and resident site staff hold regular meetings with contractors to check works progress, and submit detailed monthly reports to Contract Managers. In case of slippage, HD staff will take appropriate actions including strengthening site inspection, monitoring daily labour strength and attendance, or issuing warning letters to contractors so as to bring the project back on track.

- (b) Meanwhile, HD also conducts objective assessment on works progress of each building contract under the Performance Assessment Scoring System (PASS). Contractors' performance including works progress is rated monthly. The Contractors Performance Review Committee (CPRC) reviews and rates the performance of the contractors at quarterly meetings. The ratings by CPRC and performance scores under PASS will affect the contractors' eligibility for tendering.

- (c) If there are signs of under-performance, CPRC will thoroughly review the contractor's performance. In the case of poor performance, HD will issue advisory letter or warning letter to the contractor concerned depending on the seriousness of the problem identified. The contractor's senior executives will be interviewed and asked to come up with effective rectification plans. The performance reports will be submitted to the List Management Committee (LMC) for consideration. Contractors with unacceptable performance will be deprived of tendering opportunities.

5. The above mechanism has worked well in monitoring the three contracts undertaken by DCCL. Upon early signs of DCCL's under-performance, Contract Managers immediately interviewed the management of DCCL, and issued advisory letters and warning letters urging prompt rectification. Material supply, number of workers, attendance records and works progress were then kept under close daily monitoring. CPRC and LMC interviewed the management of DCCL several times since July 2005. Despite HD's attempts to help DCCL to improve and bring the projects back on track, DCCL was unable to proceed with the works according to contract requirements. In September 2005, DCCL was prohibited from tendering for HA's contracts. When these efforts failed to bring about the necessary improvements, HA had no alternatives but to resort to forfeiture of contracts and re-entry upon the sites.

6. In this incident, HA's rigorous project management and site monitoring regimes have facilitated prompt identification of the site problems and enabled HD to tackle these problems in accordance with contract provisions and list management practices at the earliest possible opportunity.

Construction Programmes

7. The revised completion dates for the three building contracts after re-entry are as follows :

	Shek Pai Wan Estate Phase 2	Fanling Area 36 Phase 1	Fanling Area 36 Phase 2
Anticipated completion date after re-tendering ^{Note}	February 2007	September 2008	January 2008
Anticipated slippage	13 months	18 months	11 months

^{Note} Possible extension of time due to inclement weather is not taken into account.

Nevertheless, the overall housing production in the five-year Public Housing Construction Programme will remain unchanged. There will not be any significant impact on the average waiting time for public rental housing.

8. To minimize delay, we will adopt special procurement arrangements to expedite the process in re-tendering the remaining works. We will also shorten the construction period for Shek Pai Wan Estate Phase 2 and Fanling Area 36 Phase 2 to nine and 20 months respectively. With such arrangements, the construction of Shek Pai Wan Estate Phase 2 and Fanling Area 36 Phase 2 can be completed within the original financial year.

Impact on Wong Chuk Hang Estate Tenants

9. Due to slippage in the construction of Shek Pai Wan Estate Phase 2, a total of 1 460 tenants of Wong Chuk Hang Estate who will be rehoused to that estate are affected. On the day of re-entry, we posted a notice at the office of the Wong Chuk Hang Estate Redevelopment Section informing residents of the latest demolition and rehousing arrangements. We have also individually notified the affected tenants of the deferred completion of Shek Pai Wan Estate Phase 2 and the arrangements for Wong Chuk Hang Estate to ensure that they understand the situation clearly. HD has also invited them to consider alternative rehousing arrangements if they do not wish to wait for Shek Pai Wan Estate Phase 2. Possible options include some 270 uncommitted flats in Shek Pai Wan Estate Phase 1 and vacant flats in other existing public housing estates. Up to now, about 160 households have opted for Shek Pai Wan Estate Phase 1. Flat allocation is in progress. For tenants who wish to stay put, we have expedited the re-tendering process so that the remaining works in Shek Pai Wan

Estate 2 can be completed as soon as possible for early rehousing. At the same time, HD will ensure good hygiene and security in Wong Chuk Hang Estate so as to maintain a satisfactory living environment until all tenants are rehoused.

Overdue Wages for Construction Workers

10. The recovery of the outstanding wages from DCCL and its domestic sub-contractors is basically a labour dispute. The interests of Hong Kong workers are protected by the Employment Ordinance. Workers can seek assistance from the Labour Department (LD) if they are not paid by their employers. They can also take legal action against their employers and may seek the assistance of the Legal Aid Department.

11. Indications of DCCL being unable to pay its workers and to pay the contractors' fees to its sub-contractors (who in turn did not pay their workers) first appeared in July 2005. The Contract Managers immediately demanded DCCL to make good but to no avail. The workers staged a petition in October 2005. LD, HD and representatives of trade unions and workers then held conciliation meetings with DCCL to press DCCL for payment. Although DCCL had been ordered by the Labour Tribunal and the Minor Employment Claims Adjudication Board to pay the workers, it had only honoured some of the payments after intervention by HD and LD. Through conciliation meetings, LD has, up to the end of February 2006, assisted 166 workers to recover outstanding wages amounting to about \$2.3 million, and another 163 workers to recover outstanding wages amounting to \$2.2 million as awarded by the Labour Tribunal.

12. The Retention Money for HA's contracts with DCCL amounts to about \$35 million. In line with usual industry practice, the Retention Money came from the contract payments to DCCL to provide HA with a safeguard against defective performance or non-performance. There is no provision under the contract enabling HA to use the Retention Money to pay workers' overdue wages. There is no legal or contractual basis for HA to use the Retention Money for other purposes, including payment of overdue wages, and to recover such payments afterwards.

13. Under normal circumstances, the Retention Money will be paid to the contractor after certification by the Contract Manager upon expiry of the maintenance period. After forfeiture of the three contracts, all payments that HA is liable on account of the contracts are rendered not liable until the expiry of the maintenance period provided for in such contracts and thereafter until the cost of completion and all other expenses incurred by HA have been ascertained, and that such payments shall be reduced by the costs in completing the remaining contract works, damages for delay and other associated expenses, by virtue of the General Conditions of Contract. The loss suffered by HA due to DCCL's non-performance is far greater than the amount of Retention Money and outstanding contract payments. After deducting these payments, HA will still have to recover the balance from DCCL. If HA pays the overdue wages out of the Retention Money but cannot recover the same afterwards, the result is that the expenses can only be met from public resources, which is unacceptable.

14. Clause 40(4) of the General Conditions of Contract empowers HA to make direct payment of outstanding wages to workers of DCCL through the Commissioner for Labour under the following circumstances :

- (a) the contractor is in default in the payment of wages of workers employed by the contractor (not by a sub-contractor) for carrying out the works of the contracts;
- (b) such workers have filed claims for overdue wages with the Commissioner for Labour; and
- (c) the Commissioner for Labour is satisfied with proof that the contractor is in default of payment in respect of such workers.

However, the situation is at present complicated by existing petitions for the winding up of DCCL. HA's power to invoke Clause 40(4) is restrained by insolvency law. Case law on insolvency cases suggests that payments made by a party on behalf of another party pursuant to a contractual provision are void when the other party is in liquidation. As the winding up of a company commences from the date of presentation of a petition for its winding up, it would mean any payment by HA to the direct workers of DCCL under Clause 40(4) since the petition will be void.

15. It is evident from the above that HA has no valid ground to pay the workers directly and then recover the payment from the contractor. Any attempt to do so will be outside the established contractual and legal framework and the payment will have to be shouldered by HA in its entirety.

16. A more practical way is for HD to work in collaboration with LD to assist the workers to recover their overdue wages through established contractual and legal channels as follows :

(a) For the employees directly employed by DCCL

- (i) They should first seek payment from DCCL.
- (ii) If DCCL is insolvent and owe them wages and is being petitioned for winding up or bankruptcy, they may apply for ex-gratia payment from the Protection of Wages on Insolvency Fund (the Fund). Currently two creditors have petitioned for winding up DCCL. Even if DCCL can strike out the petitions, LD can refer these employees to the Legal Aid Department to apply for legal assistance to present further winding up petition in order to trigger the use of the Fund.

(b) For workers of sub-contractors

- (i) They should first seek payment from their direct employers.
- (ii) They may claim against the principal contractor (DCCL) and superior sub-contractors (if any) for the first two months' wages in arrears provided proper notices have been served on DCCL within the statutory time limit.
- (iii) They may apply for ex-gratia payment from the Fund if their direct employers are insolvent and owe them wages and are being petitioned for winding up or bankruptcy. LD can refer these employees to the Legal Aid Department to apply for legal assistance to present petition in order to trigger payment from the Fund. (The discretionary power by the

Commissioner for Labour to waive the requirement for petition, even if the legal conditions for invoking can be fulfilled, is applicable only to a total of 18 workers employed by three sub-contractors, each employing less than 20 workers).

17. LD has expedited the processing of applications from employees of DCCL for ex-gratia payments under the Fund. As for the workers employed by DCCL's sub-contractors, they may claim wage payment against the principal contractor and sub-contractors for the first two months of wages in arrears under the Employment Ordinance. LD has been assisting the employees of DCCL's sub-contractors to recover their wages through enforcement of labour legislation or the Fund depending on actual circumstances. These workers are also concerned about their employment opportunities. For this, HA has also made some special arrangements so that the contractor undertaking the completion contracts will employ the majority of DCCL's domestic sub-contractors who were working on the sites at the time of re-entry, who would in turn employ those workers. These arrangements may help relieve the labour dispute problems precipitated by the breach of contract by DCCL.

Long-term Measures to Solve the Problem of Wages in Arrears of Construction Workers

18. Non-payment or deferred payment of workers' wages in the construction industry has been largely attributed to the multi-layered sub-contracting system, and inadequacies in sub-contracting documentation and workers' employment contracts. Very often, this is the result of poor project management on the part of the contractors and sub-contractors involved. The problem of non-payment of wages in the industry may be solved by enhancing the contract management system throughout the supply chain, coupled with effective sub-contractor and worker registration systems.

19. In this connection, in order to enhance the monitoring and the security of payments to sub-contractors and workers, HA introduced in 2005 a workers' hotline publicized on construction sites where wages abuses are reported. From May 2006 onwards, HA will tighten the control measures in building contracts for new projects, including the payment of wages through a designated autopay account system and monitoring of sub-contract layering, and

appointment of Labour Relations Officer(s) to work on sites to check and verify the records of workers in employment, attendance, payment of wages and acknowledgement of receipt of wages so as to ensure timely wage payment to workers and to eradicate the problem of overdue wages in HA's construction contracts.

Housing, Planning and Lands Bureau
March 2006