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8 June 2018

Clerk to the Public Accounts Committee
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
(Attn.: Mr Anthony CHU)

By Email
(ahychu@legco.gov.hk)

Dear Mr CHU,

Public Accounts Committee

Consideration of Chapter 8 of the Director of Audit's Report No. 70

Sha Tin Section of Route 8

Thank you for your letter dated 31 May 2018 requesting response / information to facilitate the Public Accounts Committee's consideration of the above chapter. Please find our reply below:

- (a) The organization chart of the Legal Advisory Division (Works) ("LAD"), including the rank of counsels and their duties;

During the period of offering legal advice for Contract A in 2012, there were 15 Government Counsel grade officers in the Legal Advisory Division (Works) ("LAD(W)"), comprising one Principal Government Counsel ("PGC"), two Deputy Principal Government Counsel ("DPGC"), one Assistant Principal Government Counsel ("APGC"), ten Senior Government Counsel ("SGC") and one Government Counsel ("GC").

The SGC and GC were divided into two teams. Team 1 (comprising 5 SGC and 1 GC) mainly handled the legal aspects of contentious construction cases. It also gave legal advice on other claim-related construction issues. Team 2 (comprising 5 SGC) mainly handled non-contentious matters such as the drafting and vetting of Government

construction contracts and related documents (e.g. tenders). It also gave legal advice on matters relating to construction and other matters falling within the works policy purview of the Works Branch of the Development Bureau.

A copy of the organisational chart of the LAD(W) as at 2012 is attached.

- (b) According to Note 13 of paragraph 2.21 of the Audit Report, the Highways Department (“HyD”) amended the Structures Design Manual for Highways and Railways in August 2006 setting out guidelines for carrying out appropriate level of independent checking on the design of different categories of new highway structures and the associated modification of existing highway structures by consultants or contractors employed by the Government. Whether such independent checking would be extended to all major public works;

Under the current mechanism, independent checking of the design at an appropriate level is normally required for major structures of different public works projects according to their nature, complexity and importance. With the relevant works departments, we will conduct a review to align and/or update the levels of such independent design checks to take into account the latest development in construction technology.

- (c) Measures taken/to be taken to better protect the Administration’s interests in contracting with consultants/contractors for major public works contracts in future;

Construction contracting is never an easy task. One of the difficult areas is the careful apportioning of risks between the contracting parties to deal with unforeseen circumstances that may happen during the execution of the contract. If we simply put all the risks on the consultants/contractors, it would end up with a very high contract price as the consultants/contractors will likely make a conservative assumption in formulating their pricing strategies. To strike a balance, we have to allow the consultants/contractors to submit claims to compensate their losses in the event that certain unforeseen circumstances are encountered.

Shifting from the traditional form of engineering contracts, in recent years, the Development Bureau has been advocating “collaborative partnership” in the implementation of public works projects, including the adoption of the “New Engineering Contract” (NEC) form to enhance management efficiency and cost effectiveness.

The NEC is a suite of contracts developed by the Institution of Civil Engineers in the United Kingdom. It encompasses contract provisions

to encourage contracting parties to adopt a partnering approach to take forward construction works, thereby avoiding or minimising disputes. This contract form attaches great importance to risk mitigation and management and embraces a collaborative risk management mechanism, which helps further reduce project risks. Under the NEC form of contracts, contracting parties are required to give early warnings on any risks that could increase project costs and/or cause any delay as soon as the risks arise. The parties should then work together to address such risks in a collaborative manner through attending meetings to determine the appropriate measures to deal with and mitigate the risks. In this way, the NEC form can help improve the performance of construction contracts in terms of cost and time control.

The NEC form includes, among other things, target cost options which are more suitable for relatively large-scale and complex projects. A pain/gain share mechanism is built into such options to deal with any budget overrun/cost saving as compared with the final target cost, thereby setting a common objective between the contracting parties to enhance project management and tighten cost control. With this mechanism, contractors have the incentive to proactively propose more innovative and cost-effective construction proposals so as to lower the cost and/or complete the works earlier.

Thus, the adoption of NEC form in public works projects will help protect the Government's interest in the contracts with consultants/contractors.

- (d) For projects which were completed within the original Approved Project Estimates yet substantial amount was paid out by the Administration as claims to contractors for additional/varied works or for any other reasons, whether the Administration would consider setting up a reporting mechanism to the Legislative Council on details of these cases.

Details of claims for additional/varied works submitted by contractors under public works contracts normally contain commercially sensitive information, the public disclosure of which might harm the competitive or financial positions of the contractors and can result in the Government's breach of its obligation not to divulge information as provided in the contracts. Such disclosure might also prejudice the Government's position in defending against other similar claims in possible future legal proceedings. The reporting of claims in public works contracts to the Legislative Council (LegCo) would potentially give rise to the above concerns.

Currently, there is a check-and-balance mechanism in place for vetting and approving contract variations as well as certifying contract claims. Works departments are required to follow and comply with relevant

provisions of works contracts and other prevailing Government guidelines/requirements, including the Stores and Procurement Regulations, and seek approval from the relevant internal delegated authorities in issuing contract variations and certifying claims even if the Approved Project Estimates of the projects are not exceeded. Furthermore, approved contract variations and certified claims will be copied to the Audit Commission for information. If the situation warrants, the Audit Commission will conduct audits and where necessary report the cases to the Public Accounts Committee of the LegCo. We consider that the present mechanism of reporting contract variations and claim settlements to the Audit Commission has been working well. That said, we will continue to closely monitor the situation and where necessary carry out review to explore any room for further tightening the control on issuing of contract variations.

Yours sincerely,



(Francis L K LEUNG)
for Secretary for Development

c.c. Secretary for Transport and Housing
Secretary for Financial Services & the Treasury
Director of Highways
Director of Civil Engineering and Development
Commissioner for Transport
Director of Architectural Services
Director of Electrical and Mechanical Services

Legal Advisory Division (Works)

