

Construction Industry Council

Committee on Procurement and Subcontracting

Meeting No. 001/15 of the Committee on Procurement and Subcontracting was held on Thursday, 26 March 2015 at 2:30pm at Meeting Room No.1, CIC Headquarters, 15/F, Allied Kajima Building, 138 Gloucester Road, Wanchai, Hong Kong.

Present : Tai-chong CHEW (TCC) Chairman
Allan CHAN (SKC)
Paul CHONG (PC)
Luen-kiu CHOW (LKC)
Lawrence NG (LN)
Melissa Kaye PANG (MKP)
Mike WONG (MW)
Irene CHENG (ICG) for Permanent Secretary for
Transport and Housing (Housing)
(*on behalf of Ada FUNG*)
Jennie AU YEUNG (JAY) Independent Commission Against
Corruption
Ling-so CHUNG (LsC) Construction Site Workers General
Union
Thomas Kwok-kwan (KnH) Chairperson of Special Group on
HO On-Demand Bonds
Steve GRIFFIN (SGN) Chairperson of Task Force on
Employer-Procured Insurance
Policies in Construction Contracts
Andrew SIMPSON (ASN) Chairperson of Task Force on
Competition Law
Ki-cheung TANG (KCT) Chairperson of Task Force on
Standard Contract Provisions for
Domestic Subcontracts
Chun-yuen TSE (CYT) Chairperson of Task Force on
Enhancements to Subcontractor
Registration Scheme
Sing-mo HO (SMH) Chairperson of Task Force on NEC3
Collaborative Contracts
Alfred Wai-ho (ADL) Hong Kong Institution of Engineers
LEUNG
Francis LEUNG (FLG) Development Bureau
Sing-lam WONG (SLW) Contractor's Authorized Signatory
Association

In Attendance :	Christopher TO	(CT)	Executive Director
	Miranda YEAP	(MYP)	Senior Manager – Council Services
	Carmen LIU	(LKM)	Manager – Council Services
	Belle HO	(CYH)	Manager – Council Services
	Chi-wai LAI	(CWL)	Manager – Registration Services
	Amy FUNG	(AyF)	Assistant Manager – Council Services
	Christine LAU	(CGL)	Assistant Manager – Council Services
	Joshua COLE	(JCo)	King & Wood Mallesons
	James WILKINSON	(JWi)	King & Wood Mallesons
	Apologies :	Hau-wai CHEUNG	(HWC)
Stephen LAI		(SLI)	
Wilfred WU		(WSCW)	
Tat-tong CHEUNG		(TTC)	Chairperson of Working Group on the Review of the Implementation of the Dispute Resolution Mechanism
Kevin POOLE		(KP)	Chairperson of Task Force on the Selection of Consultants and Contractors
Hing-fung LEUNG		(HfL)	Hong Kong International Arbitration Center
Franklin YU		(FIY)	Hong Kong Institute of Architects
Ada FUNG		(AF)	For Permanent Secretary for Transport and Housing (Housing)

PROGRESS REPORT

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1.0 Welcome Note from the Chairman

The Chairman welcomed Members for joining Meeting No. 001/15 of the Committee on Procurement and Subcontracting (Com-PNS).

The Chairman also proposed a vote of thanks to the retired Member, Ir. Dr. Derrick PANG for his contributions.

1.1 Confirmation of the Progress Report of Meeting No. 003/14 of the Committee on Procurement and Subcontracting

Members took note of the Paper CIC/PNS/R/003/14 and confirmed the Progress Report of Meeting No. 003/14 of the

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Com-PNS held on Monday, 15 December 2014.

1.2 Matters Arising from the Previous Meeting of the Committee on Procurement and Subcontracting

(a) Item 3.6 – Visit to the Competition Commission by Com-PNS

MYP reported that a visit to the Competition Commission (the “Commission”) was held on 20 January 2015. The item would be reported under agenda item 1.3.

(b) Item 3.9(e) – Work Plan of Com-PNS 2015/16

MYP briefed Members that Task Force/Special Group Chairmen were tasked to review the Work Plan and budget of Com-PNS for 2015/16. MYP reported that Chairman of the Special Group on On-Demand Bonds, Sr Thomas Kwok Kwai Ho (KnH), suggested to revise the budget for the production of a “Standard Form of On-Demand Bonds with conditions”. Details were reported under agenda item 1.6(d) at this meeting.

1.3 Report of the Task Force on Competition Law

ASN, Chairman of the Task Force on Competition Law, briefed Members on the latest progress of the Task Force as follows:

(a) Visit to the Competition Commission

ASN mentioned that a visit to the Commission was held on 20 January 2015 for Members of the Com-PNS to exchange views with the Commission.

(b) Progress of the IPBA - CIC Construction Conference

Members took note that the date of the IPBA – CIC Construction Conference would be confirmed subject to availability of venue and speakers.

[LN and SKC joined the meeting at 2:48pm.]

(c) Drafting progress of the three sets of draft “Reference Materials on Competition Law for the Construction Industry”

ASN reported that at the last Task Force meeting on 12 March 2015, Members reviewed and discussed the three sets of draft “Reference Materials on Competition Law for the Construction Industry” prepared by the consultant, King & Wood Mallesons, as stated in the Paper CIC/PNS/P/001/15. He added that an additional fact sheet prepared by Mr.

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Stephen Crosswell and himself to explain how to avoid bid-rigging behaviour was tabled but not yet discussed at the meeting. The fact sheet would be further reviewed in due course.

He remarked that Task Force Members were generally satisfied with the draft Reference Materials and had endorsed in principle the draft Case Analyses subject to adding an explanation note to state that cases used were from jurisdictions other than Hong Kong and the competition laws in those jurisdictions might differ from the Hong Kong Competition Ordinance (“the Ordinance”).

For “Reference Materials on Frequently Asked Questions on Competition Law” (FAQs), it was suggested that the language be modified to reduce the use of technical language and examples be further reviewed to ensure compliance with the Ordinance and the Commission’s draft Guidelines.

ASN further remarked that regarding the draft Code of Conduct, Members had divergent views and the Task Force had considered two possible options:

- Option 1 : The draft Code of Conduct be renamed and classified as a Reference Material.
- Option 2: The draft Code of Conduct be shortened to form a Code comprising a couple of pages featuring general expectations and a separate new Reference Material (such as FAQs or fact sheet) comprising most of the existing detailed paragraphs from the current draft Code.

[PC joined the meeting at 3:00pm.]

The Chairman advised that despite that there would likely be a grace period for stakeholders to comply with the Ordinance, it was important for the CIC to alert stakeholders, especially SMEs on the requirement of the Ordinance. He added that sizeable organisations would probably have access to their own legal advice.

[LKC joined the meeting at 3:03pm.]

MYP added that HKCA and HKIS had reservations on naming the Reference Materials as Code of Conduct. It was agreed that the relevant organisations would be given about 6 to 8 weeks

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to further consider the documents before finalisation. She also mentioned that King & Wood Mallesons was willing to further improve or simply the Reference Materials to cater to the needs of lower tier industry participants.

[JCo and JWi joined the meeting at 3:05pm]

MKP was also of the view that the term “Code of Conduct” would impose an extra consequence as in case of infringement, disciplinary action should be taken. As such, she had reservation to term the reference materials as “Code of Conduct”.

JAY was of the view that it would be better to have a guideline to provide more details to elaborate on the requirements of the Ordinance. She remarked that “Code of Conduct” would usually be internal in nature and was of the view that classification as “Reference Materials” would be more appropriate. She elaborated that if someone breached the Ordinance, the “Code of Conduct” might not give the defendant sufficient defence excuse.

FLG remarked that DEVB would have no objection to the suggestion to rename the Code of Conduct as Reference Material.

The Chairman reiterated the need to alert the stakeholders the Ordinance and to give them an indication of good practice. In response to KCT’s and KnH’s request for the Commission to endorse the Code of Conduct, the Chairman said that whilst the Commission would unlikely entertain such request, he suggested adding a clause to ask readers to seek legal advice should there be any doubt regarding a particular conduct. After much deliberation, the Chairman concluded that the Code of Conduct be renamed as Reference Materials so that it could be put forward to the Council in mid 2015 and asked the Task Force/Secretariat to follow up with the minor amendments. He also suggested that Reference Materials might be further reviewed or switched to Code of Conduct in due course in 3 to 4 years when the industry stakeholders become more familiar with the Ordinance.

MYP supplemented that the main purpose of the Reference

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Materials would be:

- (i) to raise the industry's awareness regarding the possible impact of the new Ordinance;
- (ii) to education stakeholders with respect to scenarios which might constitute infringement of the law; and
- (iii) to facilitate industry stakeholders' compliance with the Ordinance.

MYP supported the Chairman's suggestion and commented that it would facilitate the above purposes.

The Chairman invited JCo to brief Members of the Annexes to the Paper CIC/PNS/P/001/15.

KCT quoted examples in Annex A of the Paper which might be setting a stricter standard than the current practice of the industry. He commented that though it would be safe to follow the recommendation of the Code, it might hinder normal operations of the industry.

Members took note that the First Conduct Rule would not apply where the entities involved in the agreement have a combined annual global turnover below HK\$200 Million.

[MW left the meeting at 3:35pm.]

CYT and LKC expressed concerns that trade associations might unintentionally infringe the law when committing certain behaviours, such as exchange of information on the latest situations in construction sites, wages of construction workers etc. They mentioned that the industry stakeholders would like to have definite advice on whether certain behaviours would infringe the Ordinance.

SKC agreed that most trade associations would like to know whether they would breach the law by committing certain behaviours. He was of the view that the FAQs would be useful for the industry and suggested the FAQs be updated on periodical basis and the Chairman supported.

The Chairman commented that he found the FAQs very useful.

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He asked the Task Force to refine the FAQs to address the degree of duplication and ensure there would be no potential contradiction. MYP supplemented that the three documents were produced as standalone documents to allow readers to read them as individual documents as there was no obligation on readers to go through all three in one go and it was always difficult to prepare an all embracing document. The Secretariat would do some fine-tuning on all the documents.

With respect to the Case Analyses, JCo advised that cases were mainly from European jurisdictions with Competition Law similar to that of Hong Kong. Members noted that quarterly updates would be produced for a period of 3 years with more local examples as well as cases from industries other than construction. In response to ADL's comment, MYP stated that a disclaimer has been added to explain that laws of jurisdictions other than Hong Kong were used.

MYP informed Members that the Secretariat was in the process of liaising with a contractor to produce an animation video on bid-rigging with an aim to act as a lively education channel for stakeholders.

ASN suggested to provide more support to SMEs, who lacked knowledge and resources, such as preparing specific fact sheets and organising specific sessions of workshops target on them to address their difficulty in relation to the Ordinance.

LN and ASN shared the view that SMEs lacked knowledge and resources and suggested the CIC to explore with the Competition Commission to organise different forms and sessions of seminars to enable stakeholders from different sectors, such as professionals or SMEs to address different issues relating to various stakeholders regarding the subject matter of Competition Ordinance.

PC shared with Members his concerns on the stringency of enforcement at the initial stage of the implementation of the Ordinance. He pointed out that since there were no precedent cases so far, strict enforcement may lead to precedent cases that might be detrimental to industry.

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1.4 Report of the Task Force on NEC3 Collaborative Contracts

(a) Reference Materials on Frequently Asked Questions on NEC3 Collaborative Contracts

Members took note of the Paper CIC/PNS/P/002/15 regarding updates on NEC3 Collaborative Contracts.

SMH, Chairman of the Task Force on NEC3 Collaborative Contracts, briefed Members on the latest progress of the Task Force and the drafting progress of “Reference Materials on Frequently Asked Questions on NEC Collaborative Contracts” (FAQ Document). Members noted that legal vetting has been completed. Changes were mainly editorial in nature. SMH mentioned that both the English and bilingual version of the FAQ document would be further reviewed by the Task Force before submission to the Com-PNS and the Council for approval to publish, targeted at its June/August meeting.

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SMH pointed out that some terms of the NEC were only defined in the English version. As such, it was proposed that a “Disclaimer” would be included in the English and Chinese version to encourage readers to seek appropriate independent advice from their professional advisers where possible

In response to KnH’s request, SMH agreed to make available the amended version following legal vetting with highlights on the changes for Members’ easy reference.

SMH also reported that further to Members’ suggestion at the last Com-PNS meeting, a feedback form was also incorporated into the FAQ Document to collect feedback from industry stakeholders.

The Chairman emphasised that CIC was not advocating NEC as the only collaborative contractual arrangement. CIC was in fact supportive of all forms of collaborative contracts but given the latest government announcement on capital works contract, Members should be alerted on the progressive adoption of NEC.

(b) Way forward and the possible Stage 2 deliverables

Members took note that the Task Force deliberated on the way forward and the possible stage 2 deliverables. As an initial

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proposal, it was suggested that a series of Case Books on NEC Projects in Hong Kong, including the Improvement of Fuk Man Road Nullah Project of the Drainage Services Department and CLP's first completed NEC Project might be produced.

SMH further remarked that a seminar/forum or workshop for the practitioners might be conducted in late 2015 or early 2016.

SMH further reported that the Task Force was considering another new initiative to trigger a study on completed and ongoing NEC projects. The detailed scope has not been defined but it was proposed that a consistent set of matrix to compare the performance between NEC and non-NEC could be performed.

(c) NEC ECC Project Manager Accreditation Programme

SMH reported that the CIC has worked with the NEC UK to launch the first NEC ECC Project Manager Accreditation Programme in Hong Kong from 9 to 13 February 2015, which was taught by two experts from the UK, Mr. Robert Gerrard and Mr. Tim Robinson, and was attended by over 25 participants.

MYP added that the Programme was not a basic training course. Participants were required to complete an online assessment before enrolling, as well as to conduct another assessment after completion of the 5-day programme. SMH expressed that while the assessment was vigorous, it reinforced the capability of local practitioners in NEC, which was crucial to the success of implementation of NEC in Hong Kong.

In response to KnH's enquiry, MYP mentioned that a mix of participants from different sectors, such as the Government, consultant, contractors etc. attended the Programme.

1.5 Update on Subcontractor Registration Scheme (SRS) Operations

Members took note of the Paper CIC/PNS/P/003/15 regarding updates on SRS operations.

CWL reported that the updated statistics in terms of number of regulatory actions taken on (i) MPF related; (ii) Wages related; and (iii) Safety related were 24, 26 and 15 respectively. He briefed

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Members that the total no. of regulatory actions taken was 65 instead of 60 following the hearing of regulatory actions on 20 March 2015.

Members took note of the Paper CIC/PNS/P/004/15 on the appointment of Members of the Management Committee of the SRS for its new term of office and endorsed the proposed membership of the Management Committee of the SRS for its new term of office from 16 July 2015 to 15 July 2018 (both dates inclusive).

1.6 Any Other Business

(a) Progress Update of the Task Force on Standard Contracts Provisions for Domestic Subcontracts

KCT, Chairman of the Task Force on Standard Contract Provisions for Domestic Subcontracts, reported that following the Council's decision on 12 December 2014 to go ahead with the legal vetting of the latest draft Standard Form of Domestic Sub-Contract, Minter Ellison has been appointed and has submitted their marked up version of the Standard Form in mid March 2015. The marked up version has been circulated to Task Force Members for consideration. Further meetings would be convened as necessary to conclude the draft.

(b) Progress Update of the Working Group on the Review of the Implementation of the Dispute Resolution Mechanism

On behalf of TTC, Chairman of Working Group on the Review of the Implementation of the Dispute Resolution Mechanism, MYP briefed Members on the latest updates of the Working Group.

MYP reported that comments were received from the Housing Authority regarding Amendment to Annex E - Independent Expert Certifier Review Rules and Amendment to Annex F - Expert Determination Rules. No further comments were received from other members after incorporating their comments at the last working group meeting.

MYP further reported that on Hong Kong Construction Arbitration Centre (HKCAC)'s proposed alternative model, HKCAC's request was to include them as one of the appointing

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authority on par with Hong Kong International Arbitration Centre (HKIAC) and the 3 professional institutions, namely Hong Kong Institute of Architects, (HKIA), Hong Kong Institution of Engineers (HKIE) and Hong Kong Institute of Surveyors (HKIS). MYP mentioned that Dr. Simon Chee, Member of the Working Group on the Review of the Implementation of the Dispute Resolution Mechanism and President of HKCAC, was in the process of liaising with the above professional bodies to seek their comments. So far, the Secretariat has not received any updates from his side but would advise Com-PNS the progress in due course.

(c) Progress Update of the Task Force on Enhancements to Subcontractor Registration Scheme

CYT, Chairman of the Task Force on Enhancements to Subcontractor Registration Scheme briefed Members on the latest progress of the Task Force.

Members noted that the proposed mandatory registration scheme would be further discussed at the next meeting of the Task Force tentatively scheduled for mid-April. A consultant might be engaged to consider the issue in detail.

(d) Progress Update of the Special Group on On-Demand Bonds

KnH, the Chairman of Special Group of On-Demand Bonds, reported that the Special Group has further reviewed the budget for the production of a “Standard Form of On-Demand Bonds with Conditions” and the subsequent seminar for promotional purpose. KnH suggested revising the budget from HK\$1,500,000 to \$1,000,000.

Members also took note that the Special Group intended to recruit a consultant to draft the Standard Form and was in the process of defining the scope of the consultancy and preparing an assignment brief for consultant engagement, targeted to be issued in the third quarter of 2015.

[LKC left the meeting at 4:10pm.]

(e) Progress Update of the Task Force on the Selection of Consultants and Contractors

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MYP, on behalf of KP, Chairman of the Task Force on the Selection of Consultants and Contractors, reported the latest progress of the Task Force. Further to the suggestion at the last Com-PNS meeting, a half day seminar/briefing session was proposed to be scheduled for early August or November 2015 to further promulgate the published Reference Materials on the Selection of Consultants. The Task Force would liaise with SGN and KnH, Chairman of Task Force on Employer-Procured Insurance Policies in Construction Contracts and Chairman of Special Group on On-Demand Bonds respectively regarding the seminar/briefing session to explore if they would co-organise the event to further promulgate their published Fact Sheets and Alerts.

(f) Progress Update of the Task Force on Employed-Procured Insurance Policies in Construction Contracts

The Chairman of the Task Force on Employed-Procured Insurance Policies in Construction Contracts, SGN, briefed Members on the progress of the Task Force.

Members took note that SGN has indicated an interest in co-organising the seminar/briefing session under 1.6 (e) above.

(g) Development of Appropriate Procurement and Subcontracting Processes

The Chairman invited Members to contribute comments or ideas to enhance the processes of the industry to enable members to excel against a changing environment. He also suggested that Members might invite relevant experts to join CIC's meetings where appropriate to contribute to the discussion.

FLG drew Members' attention to the enactment of the Contract (Rights of Third Parties) Ordinance in late 2014. He pointed out that though this Ordinance would not come into force until one year later, it might cause concerns amongst the industry. FLG briefly explained the essence of the Ordinance for a third party to claim damages arising as a result of the contracting parties, versus the traditional doctrine of Privity of Contract.

FLG informed Members that DEVB has already sought legal advice in this regard and would take necessary action where

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appropriate. He suggested that the industry's stakeholders, such as Hong Kong Construction Association (HKCA), might prefer to express their views at an earlier stage.

1.7 Date of Next Meeting

Members took note that the next meeting tentatively scheduled for early June 2015 would be postponed to mid June 2015. The Secretariat would inform with Members the re-scheduled meeting date as soon as possible. **All to note**

[Post-Meeting Note: The next meeting of the Com-PNS was re-scheduled to Thursday, 18 June 2015 at 2:30pm at Meeting Room No. 1, CIC Headquarters, 15/F, Allied Kajima Building, 138 Gloucester Road, Wanchai, Hong Kong.]

There being no further business, the meeting adjourned at 4:40pm.

CIC Secretariat
March 2015