



Hong Kong Housing Authority

**ARTICLES OF AGREEMENT
AND
GENERAL CONDITIONS OF
NOMINATED SUB-CONTRACT
TO BUILDING WORKS CONTRACTS**

2013 EDITION

(version 1.1)

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**To be used in conjunction with the “Hong Kong Housing Authority General Conditions of Contract for
Building Works (2013 Edition)”**

Parties

This SUB-CONTRACT is made the
day of 20
between
of (or, whose registered office is situated at)
.....
(hereinafter referred to as "the Contractor") of the one part and
.....
of (or, whose registered office is situated at)
.....
(hereinafter referred to as "the Sub-contractor") of the other part;

Sub-contract supplemental to Main Contract

WHEREAS the Contractor has entered into a Contract (hereinafter referred to as “the Main Contract”) numbered and dated and made between the Hong Kong Housing Authority (hereinafter referred to as “the Employer”) of the one part and the Contractor of the other part;

AND WHEREAS the Contractor desires to have executed the works of which particulars are set out in Part 1 of the Appendix to the General Conditions of Sub-contract (hereinafter referred to as “the Sub-contract Works”) and which form part of the works (hereinafter referred to as “the Main Works”) comprised in and to be executed in accordance with the Main Contract;

AND WHEREAS the Sub-contractor has had reasonable opportunity of inspecting the Main Contract or a copy thereof except the detailed prices of the Contractor included in Bills of Quantities or schedules of rates, and has agreed to execute the Sub-contract Works upon the terms hereinafter appearing:

NOW IT IS HEREBY AGREED AS FOLLOWS:-

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

- (1) In the Sub-contract the following words and expressions shall have the meanings hereby assigned to them except where the context otherwise requires:-
 - “Cost” means expenditure reasonably incurred including overheads whether on or off the Site and depreciation in value of Constructional Plant owned by the Sub-contractor but excluding profit.
 - “Conditions of Sub-contract” means the General Conditions of Sub-contract and the Special Conditions of Sub-contract.
 - “DARA” means the dispute avoidance and resolution advisor appointed under Clause 17.1 of the General Conditions of Main Contract, or Clause 12.1(4) of the General Conditions of Sub-contract, as the case may be.
 - “Enhancement Works” means any work ordered by the Contract Manager under Clause 8.7.

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“Final Sub-contract Sum” means the final sum determined or ascertained to be payable to the Sub-contractor in accordance with the Sub-contract and for the avoidance of doubt, the sum shall exclude any amount that may be deducted by the Contractor under Clause 11.4.

“Form of Tender” means the form of tender as completed and submitted by the Sub-contractor with the Tender.

“General Conditions of Main Contract” means the General Conditions of Contract of the Main Contract.

“General Conditions of Sub-contract” means the general conditions of Sub-contract set forth as such in the Sub-contract.

“Letter of Acceptance” means the letter issued by the Contractor for the acceptance of the Tender including such documents as may be attached to or expressly stated in the letter to form part of the Sub-contract.

“Main Contract” means the Main Contract referred to in the Sub-contract Articles of Agreement.

“Main Contract Conditions” means the General Conditions of Contract and the Special Conditions of Contract of the Main Contract.

“Main Works” means the Works as defined in the Main Contract.

“Notice of Dispute” means the notice of dispute served in writing under Clause 12.1.

“Special Conditions of Sub-contract” means the conditions of Sub-contract which amend or revise any General Conditions of Sub-contract by way of addition, deletion and substitution.

“Specification” means the specifications referred to in the Sub-contract and any modification thereof or addition thereto as may from time to time be furnished or approved in writing by the Contract Manager.

“Sub-contract” means the Sub-contract Articles of Agreement, the Tender, the Letter of Acceptance, the Drawings, the General Conditions of Sub-contract and the Special Conditions of Sub-contract, the Specification and the Sub-contract Bills of Quantities and/or schedule of rates for the Sub-contract Works; and is being provided for as “Nominated Sub-contract” in the Main Contract Conditions.

“Sub-contract Articles of Agreement” means the articles of agreement to be executed by the Contractor and the Sub-contractor.

“Sub-contract Bills of Quantities” means the bills of quantities of the Sub-contract.

“Sub-contract Sum” means the sum specified in Part II of the Appendix to the General Conditions of Sub-contract.

“Sub-contract Works” means the work described in Part I of the Appendix to the General Conditions of Sub-contract to be executed by the Sub-Contractor; and is being provided for as “Nominated Sub-contract Works” in the Main Contract Conditions.

“Sub-contractor” means the person, firm or company whose Tender for the Sub-contract Works has been accepted by the Contractor and includes the Sub-contractor’s personal representatives, successors and permitted assigns.

“Sub-contractor’s Maintenance Works” means any works which are required to be carried out by the Sub-contractor within such time and in such manner as specified in the Sub-contract for the fulfilment of the Sub-contractor’s obligations as set out in Clause 7.1 which may include but without limitation any work of repair or rectification (whether such work is necessitated by any default or neglect of the Sub-contractor under the Sub-contract or otherwise) or any work of making good of any defect, imperfection, shrinkage, settlement or other fault as identified within the Maintenance Period.

“Tender” means the Sub-contractor’s tender for the Sub-contract.

“Variation” means any change to the Sub-contract works as defined in Clause 8.1(1).

- (2) Words or phrases not defined in Clause 1.1(1) shall have the meanings respectively assigned to them in the Main Contract Conditions unless the context in which they appear requires otherwise.

1.2 Nomination of Sub-contractor

The Sub-contractor shall be nominated by the Employer and shall be employed by the Contractor as a “Nominated Sub-contractor” as provided for by the Main Contract Conditions.

2 SUB-CONTRACTING

2.1 Sub-contracting of the Sub-contract Works

- (1) The Sub-contractor shall not sub-contract the Sub-contract Works or any part of the same without the written consent of both the Contractor and the Employer, provided that in the case of any difference of opinion between the Contractor and the Employer the opinion of the Employer shall prevail.
- (2) Notwithstanding the written consent under Clause 2.1(1) the Contract Manager shall have the power to order the removal of any sub-contractor employed by the Sub-contractor from the Site and/or the Sub-contract Works, which power shall not be exercised unreasonably.
- (3) The sub-contracting of any part of the Sub-contract Works shall not relieve the Sub-contractor from any of his liabilities or obligations under the Sub-contract. The Sub-contractor shall be responsible for the acts, defaults and neglects of any of his sub-contractors or the agents, employees or workers of such sub-contractors as fully as if they were the acts, defaults or neglects of the Sub-contractor.
- (4) The Sub-contractor shall furnish the Contractor with particulars, as specified in the Sub-contract, of any sub-contractor employed or to be employed on the Sub-contract Works. The Sub-contractor shall submit particulars of the sub-contractors within 7 days from the date of commencement of the Sub-contract Works and shall notify the Contractor in writing of any sub-contractors of any subsequent sub-contracting, changes or proposed changes, as the case may be, in his submission of particulars of the sub-contractors in the course of the Sub-contract Works within the time as specified in the Specification.
- (5) The Sub-contractor shall observe, perform and comply with Clause 3.2(7) of the General Conditions of Main Contract regarding the submission and updating of the Sub-contractors Management Plan. The Sub-contractor shall also take any necessary measures as required by the Contractor to enable the Contractor to fully comply with Clause 3.2(7) of the General Conditions of Main Contract.
- (6)
 - (a) Unless expressly provided to the contrary in the Sub-contract, the Sub-contractor shall ensure that his sub-contractors shall not sub-contract the whole of the works sub-contracted to them.
 - (b) The Sub-contractor shall employ his own staff to manage and supervise his sub-contractors.
- (7) For the purposes of this Clause 2.1, “sub-contractor” means sub-contractors irrespective of tiers.

3 SUB-CONTRACT DOCUMENTS

3.1 Agreement

The Sub-contractor shall enter into an Agreement with the Contractor for the execution of the Sub-contract Works.

3.2 Main Contract documents

The Sub-contractor may inspect, at the office of the Surveyor, the documents which comprise the Main Contract except the rates in the Bills of Quantities and schedule of rates.

4 GENERAL OBLIGATIONS

4.1 Sub-contractor's liability under incorporated provisions of the Main Contract

- (1) The Sub-contractor shall observe, perform and comply with all the provisions of the Main Contract on the part of the Contractor to be observed, performed and complied with in so far as they relate and apply to the Sub-contract Works and are not inconsistent with the express provisions of the Sub-contract as if all the same were severally set out herein and shall indemnify and save harmless the Contractor against and from:-
 - (a) any breach, non-observance or non-performance by the Sub-contractor, his employees or agents of the said provisions of the Main Contract; and
 - (b) any act or omission of the Sub-contractor, his employees or agents which involves the Contractor in any liability to the Employer under the Main Contract; and
 - (c) any claim, damage, loss or expense due to or resulting from any negligence or breach of duty on the part of the Sub-contractor, his employees or agents, and
 - (d) any loss, damages or compensation payable at law under any statute in force for the time being in respect or in consequence of any accident or injury to any worker or other person in the employment of the Sub-contractor arising out of or in the course of his employment.
- (2) The Sub-contractor's liability to indemnify or recompense the Contractor in accordance with Clause 4.1(1) shall be reduced proportionally to the extent that the act or neglect of the Contractor, his other sub-contractors or their respective employees or agents may have contributed to the damage, loss or injury.

Provided that nothing contained in the Sub-contract shall impose any liability on the Sub-contractor in respect of any negligence or breach of duty on the part of the Employer, the Contractor, his other sub-contractors or their respective employees or agents nor create any privity of contract between the Sub-contractor and the Employer or any other sub-contractor.

4.2 Surety or Security

The Sub-contractor shall procure a bond in the form as provided in the appendix to the Conditions of Sub-contract from an insurance company or bank, in either case to be approved in writing in advance by the Employer, in favour of the Employer in the sum stated in the Sub-contract. The Sub-contractor shall submit the bond duly executed by the insurance company or bank to the Employer within 21 days of the date of the Letter of Acceptance.

4.3 Sufficiency of Tender

The Sub-contractor shall be deemed to have satisfied himself before submitting the Tender as to the correctness and sufficiency of the Tender for the Sub-contract Works and of all the Sub-contract rates and all such rates shall, except in so far as it is otherwise provided in the Sub-contract, cover all the Sub-contractor's risks, liabilities and obligations set out in or implied from the Sub-contract and all matters and things necessary for the proper execution of the Sub-contract Works.

4.4 Execution of the Sub-contract Works

Save in so far as it is legally or physically impossible, the Sub-contractor shall execute the Sub-Contract Works in accordance with the Sub-contract to the satisfaction of the Contractor and the Contract Manager.

4.5 Programme

The Sub-contractor shall execute his work in accordance with a programme to be provided and prepared by the Contractor (which is subject to revisions by the Contractor from time to time) and in accordance with the progress of the Main Works.

4.6 Sub-contractor's superintendence

- (1) The Sub-contractor shall give or provide all necessary superintendence during the execution of the Sub-contract Works and as long thereafter as the Contract Manager may consider necessary for the proper fulfilment of the Sub-contractor's obligations under the Sub-contract.

- (2) Without prejudice to the Sub-contractor's obligations under Clause 4.6(1), the Sub-contractor shall provide and maintain a management team of sufficient number of members to manage and supervise the Sub-contract throughout the execution of the Sub-contract Works. All members of the management team shall have the qualifications and experience as specified in the Sub-contract and shall be under the direct employment of the Sub-contractor.
- (3) All members of the management team shall be constantly on the Site on a full time basis and are prohibited from taking up or being awarded a sub-contract for any part of the Sub-contract Works or from having a vested interest in any sub-contract or sub-contractor of any tier under the Sub-contract.
- (4) The Sub-contractor shall submit for approval of the Contract Manager and the Contractor the names, qualifications, experience and documentary proof of the employment status of any members of his management team as provided in the Sub-contract.
- (5) The Sub-contractor shall inform the Contract Manager and the Contractor forthwith of any changes made to the management team.

4.7 Safety and environmental management of the Sub-contract Works

- (1) Without prejudice to the generality of the Sub-contractor's responsibilities under the Sub-contract or any statutory regulation with respect to safety, health and environmental management, the Sub-contractor shall comply with the respective obligations set out in the Safety Plan and Environmental Management Plan throughout the currency of the Sub-contract Works.
- (2) The Sub-contractor shall submit the safety plan in respect of the Sub-contract Works and the environmental management, waste management and site hygiene statement in respect of the Sub-contract Works and their subsequent revisions or updates to the Contractor for the Contractor's agreement and incorporation into the Safety Plan and the Environmental Management Plan in accordance with the requirements as specified in the Sub-contract.
- (3) The Sub-contractor shall ensure that his safety supervisor, all personnel who are responsible for environmental management, waste management and site hygiene and all personnel who are in a position of authority among his sub-contractors have access to the Safety Plan and Environmental Management Plan and are made aware of their obligations to comply with the Safety Plan and the Environmental Management Plan.

4.8 Care of the Sub-contract Works

- (1) The Sub-contractor shall (up to and including the day 28 days after the date of completion of the Main Works certified by the Contract Manager under Clause 8.7 of the General Conditions of the Main Contract but in the event of the Employer taking possession of the Main Works earlier, then up to and including the day 28 days after such date of possession) be responsible for the care of the Sub-contract Works and shall bear the cost of the restoration of any damage or loss to the Sub-contract Works and of any Constructional Plant, temporary buildings and materials and things whatsoever on the Site or delivered to or placed on the Site in connection with or for the purpose of the Sub-contract Works (hereinafter referred to as "the Restoration") except to the extent that the damage or loss is due to:-
 - (a) any of the "excepted risks" prescribed in the Main Contract Conditions;
 - (b) a breach of contract or other default by the Contractor or the Employer or any person for whom the Contractor or the Employer is responsible.
- (2) In the event that any damage or loss referred to in Clause 4.8(1) is caused by an event covered by the insurance of the Main Works taken out in compliance with the Main Contract Conditions (hereinafter referred to as "Main Works Insurance"), the Contractor shall, upon receipt of a reasonable request from the Sub-contractor, submit a claim in respect of the Restoration to the insurer. The Sub-contractor shall assist the Contractor to satisfy all the requirements in the policy of the Main Works Insurance in preparing the insurance claim.
- (3) Notwithstanding Clause 4.8(1), and provided that any damage or loss referred to in Clause 4.8(1) is covered by the Main Works Insurance, the Contractor shall bear a sum equivalent to a percentage, which is prescribed in the Main Contract, of the excess or deductible to be borne by the insured of the Main Works Insurance (hereinafter referred to as the "Excess Borne By Contractor"). The Contractor shall pay to the Sub-contractor:-

- (a) the Sub-contractor's share of the proceeds from the Main Works Insurance for the Restoration; plus
 - (b) the Excess Borne By Contractor.
- (4) The Sub-contractor shall not be entitled to any payment in respect of the Restoration other than the sum payable under Clause 4.8(3).

4.9 Instructions and decisions

The Sub-contractor shall comply with all instructions given to him by the Contractor and with decisions, instructions and orders given to the Contractor by the Contract Manager or the Contract Manager's Representative which are confirmed to the Sub-contractor by the Contractor.

4.10 Right of access of the Contractor

The Contractor and all persons duly authorized by him shall at all reasonable times have access to any work which is being prepared for the Sub-contract Works by the Sub-contractor, his employees or agents.

4.11 Provision of services for the Sub-contract Works

- (1) The Sub-contractor shall supply all necessary water, lighting, power, watching and attendance for the purposes of the Sub-contract Works unless the Main Contract provides otherwise.
- (2) Where any part of the Sub-contract Works is carried out in darkness, the Contractor shall provide adequate lighting with all necessary lighting facilities to or in those parts of the Site where any such Sub-contract Works are being carried out so as to ensure the safety of all persons on or in the vicinity of the Site or such Sub-contract Works.
- (3) Save as otherwise provided in the Main Contract, the Sub-contractor shall provide and erect all necessary workshops, sheds or other buildings for his employees, sub-contractors and agents at such places on the Site as the Contractor shall designate and the Contractor shall give all reasonable facilities to the Sub-contractor for such erection.

5 LABOUR

5.1 Fair wages

The Sub-contractor shall observe, perform and comply with all of his obligations with regard to fair wages as set out in Clause 6.2 of the General Conditions of Main Contract. Where the Employer has made payment of wages due to any person employed by the Sub-contractor including those employed by his sub-contractors of any tiers and recovers the sums so paid from the Contractor pursuant to Clause 6.2 of the General Conditions of Main Contract, the Contractor may recover such sums so paid by the Contractor to the Employer as a debt from the Sub-contractor.

6 COMMENCEMENT, COMPLETION AND DELAYS

6.1 Commencement, completion, extensions of time and damages

- (1) The Sub-contractor shall commence the Sub-contract Works on the date for commencement notified in writing under the Sub-contract by the Contractor and shall proceed with the same with due diligence and without delay except as may be expressly sanctioned or ordered by the Contract Manager or be wholly beyond the control of the Sub-contractor.
- (2) The Sub-contract Works shall be carried out at such times and in such manner to suit the progress of the Main Works and to enable the Contractor to complete the Main Works or any Section within the time or times (or extended time or times) as provided in the Main Contract. The details of the completion period or periods of the Main Works or respective Sections are reproduced in Part III of the Appendix to the General Conditions of Sub-contract.
- (3) If the completion of the Sub-contract Works or any part thereof be delayed and such delay shall be caused by:-
 - (a) any act or omission of the Contractor, his sub-contractors (other than the Sub-contractor), his or their respective employees or agents; or
 - (b) any cause for which the Contractor could obtain an extension of the time for completion of the Main Works or a Section under the Main Contract;

then the Sub-contractor shall serve a notice in writing on the Contractor for re-scheduling of the date or dates for completion of the Sub-contract Works or any part thereof together with particulars of the cause of the delay and the probable effect and extent of the delay to the progress of the Sub-contract Works or any part thereof within 21 days of the cause of such delay becoming apparent.

- (4) Within 60 days after the receipt of the Sub-contractor's notice served pursuant to Clause 6.1(3), the Contractor shall decide a fair and reasonable re-scheduling of the date or dates for completion of the Sub-contract Works or any part thereof as the case may require and shall notify the Sub-contractor of such re-scheduled date or dates in writing accordingly.

Provided that no re-scheduling of the date or dates for completion of the Sub-contract Works or any part thereof shall be made where the delay is caused by the failure of the Sub-contractor to commence or carry out the Sub-contract Works or any part thereof in due time.

Provided further that the Contractor and the Sub-contractor may by mutual agreement in writing extend the time for the Contractor to decide and notify in writing to the Sub-contractor his decision on the re-scheduling of the date or dates for completion of the Sub-contract Works or any part thereof under this Clause 6.1.

- (5) If in the opinion of the Contractor the cause of the delay envisaged by the Sub-contractor's notice served pursuant to Clause 6.1(3) has a continuing effect, the Contractor may, but shall not be obliged to, make an interim re-scheduling of the date or dates for the completion of the Sub-contract Works or any part thereof as he thinks fit at any time before he finally decides on re-scheduling of the date or dates for completion of the Sub-contract Works or any part thereof pursuant to Clause 6.1(4).
- (6) For the purposes of deciding whether or to what extent the Sub-contractor may be entitled to a re-scheduling of the date or dates for completion under this Clause 6.1, the Contractor may, within 14 days after the receipt of the Sub-contractor's notice served pursuant to Clause 6.1(3), require the Sub-contractor to submit further particulars of the cause and extent of the delay to the progress of the Sub-contract Works. Where such further particulars are required by the Contractor, they shall be submitted in writing by the Sub-contractor to the Contractor within 14 days after the receipt of the Contractor's request.
- (7) (a) If the Sub-contractor fails to comply with the notice requirements of Clause 6.1(3) in respect of a claim for re-scheduling of the date or dates for completion of the Sub-contract Works or any part thereof, such claim shall not be considered and shall be deemed to have been waived by the Sub-contractor under the Sub-contract and at common law.

- (b) If the Sub-contractor fails to comply with the provisions of Clause 6.1(6) but nevertheless has served a notice pursuant to Clause 6.1(3), the Contractor shall consider granting a re-scheduling of the date or dates for completion of the Sub-contract Works or any part thereof only to the extent that the Contractor is able to on the information available.
- (8) If the Sub-contractor fails to observe or comply with the requirements provided in Clause 6.1(2), the Sub-contractor shall pay to the Contractor any loss or damage suffered or incurred by the Contractor and caused by such failure, of which loss or damage the Contractor shall at the earliest opportunity give reasonable notice in writing to the Sub-contractor that the same is being or has been suffered or incurred.

7 MAINTENANCE AND DEFECTS

7.1 Maintenance

Upon completion of the Sub-contract Works, or any part thereof, the Sub-contractor shall, on behalf of the Contractor and without extra payment, maintain the Sub-contract Works until the completion of the Main Works or of the relevant Section or part thereof as certified by the Contract Manager under the Main Contract Conditions and thereafter maintain the Sub-contract Works for the same period and upon the same terms as the Contractor is liable to do under the Main Contract.

7.2 Maintenance Works

- (1) All Sub-contractor's Maintenance Works which the Contractor, whether at his own cost or not, shall be liable to repair, rectify or make good under the Main Contract, shall be repaired, rectified or made good by the Sub-contractor after the receipt by him from the Contractor of the Contract Manager's instructions relating to the same.

Provided that where the Contractor is liable to execute such Sub-contractor's Maintenance Works but not at his own cost, then the Contractor shall secure a similar benefit to the Sub-contractor and shall account to the Sub-contractor for any money received by the Contractor in respect of the same.

- (2) If the Contractor or any sub-contractor (other than the Sub-contractor) shall execute any work, whether permanent or temporary, to the Main Works or to any part thereof required by the Contract Manager or rendered necessary by reason of the defect, imperfection, shrinkage, settlement or other fault in the Sub-contract Works due to materials or workmanship not being in accordance with the Sub-contract, then the Sub-contractor shall pay to the Contractor the cost of the execution of such work.

Provided that if the Contractor shall pay or allow to the Employer the value of or other agreed sum in respect of such work instead and in satisfaction of executing the same, then the Sub-contractor shall pay to the Contractor such value or other agreed sum as aforesaid.

Provided further that the value or agreed sum shall not exceed the cost of executing such work.

- (3) If the Sub-contractor shall execute any work to or in connection with the Sub-contract Works, whether permanent or temporary, required by the Contract Manager or rendered necessary by reason of any defect, imperfection, shrinkage, settlement or other fault in the Main Works other than the Sub-contract Works due to materials or workmanship not being in accordance with the Main Contract, then the Contractor shall pay to the Sub-contractor the cost of the execution of such work.

Provided that if instead of the Sub-contractor executing such work and in satisfaction of the same the Contractor shall pay or allow to the Employer the value of or other agreed sum, not exceeding such cost as aforesaid, in respect of such work, then the Contractor shall indemnify the Sub-contractor against any claim, damage or loss in respect of failure to execute such work.

8 VARIATION, VALUATIONS AND CLAIMS

8.1 Variation

- (1) The Contract Manager shall order any change to any part of the Sub-contract Works that may in his opinion be necessary for the completion of the Sub-contract Works and shall have the power to order any change that for any other reason shall in his opinion be desirable for or to achieve the satisfactory completion and functioning of the Sub-contract Works. Any such change (referred to in the Sub-contract as “Variation”) may include:-
 - (a) addition, omission, substitution, alteration, change in quality, form, character, kind, position, dimension, level or line, and
 - (b) change to any sequence, method or timing of construction specified in the Sub-contract, and
 - (c) change to the Site or entrance to and/or exit from the Site.

Provided that the Contract Manager shall not be under any obligation to order a Variation that is necessary for the completion of the Sub-contract Works or any part of the Sub-contract Works the design of which is the Sub-contractor’s responsibility.

- (2) The Contract Manager may order any Variation to any part of the outstanding work referred to in Clause 8.7 of the General Conditions of Main Contract during the Maintenance Period if such Variation shall in the opinion of the Contract Manager be desirable for or to achieve the satisfactory completion and functioning of the Sub-contract Works.
- (3) No change to the Sub-contract Works shall be made by the Sub-contractor without an order in writing by the Contract Manager confirmed by the Contractor. No Variation shall in any way vitiate or invalidate the Sub-contract but the value of all such Variations shall be taken into account in calculating the Final Sub-contract Sum.

8.2 Valuing Variation

The Surveyor shall determine the sum which in his opinion shall be added to or deducted from the Sub-contract Sum as a result of a Variation in accordance with the following principles:-

- (a) Any item of work omitted from the Sub-contract Works shall be valued at the rate set out in the Sub-contract for such work.
- (b) Any work carried out which is the same as or similar in character to and executed under the same or similar conditions and circumstances to any item or work priced in the Sub-contract shall be valued at the rate set out in the Sub-contract for such item of work.
- (c) Any work carried out which is not the same as or similar in character to or is not executed under the same or similar conditions or circumstances to any item of work priced in the Sub-contract shall be valued at a rate based on the rates in the Sub-contract so far as may be reasonable, failing which, at a rate determined by the Surveyor.

Provided that if the nature or extent of any Variation relative to the nature or extent of the whole of the Sub-contract Works or any part thereof shall be such that in the opinion of the Surveyor any rate contained in the Sub-contract for any item of work is by reason of such Variation rendered unreasonable or inapplicable then a suitable new rate shall be determined by the Surveyor for that item, using the Sub-contract rates as the basis for determination. This proviso shall not apply to the valuation of any omission resulting from an instruction issued under Clause 9.1 of the General Conditions of Main Contract.

Provided always that any Cost which has been or is likely to be incurred by reason of the progress of the Sub-contract Works or any part thereof having been materially affected by any Variation shall be notified by the Sub-contractor to the Contractor and ascertained by the Surveyor or the Contractor, as the case may be, within such time and in such manner as provided in Clauses 8.3 and 8.4. Such Cost shall be ascertained exclusively pursuant to Clause 8.4 and not as part of the Surveyor’s determination made pursuant to this Clause 8.2.

8.3 Notice of Claims

- (1) Unless otherwise provided in the Sub-contract, the Sub-contractor shall have the same obligations as the Contractor with regard to notice and submission of claims as set out in the Main Contract Conditions.
- (2)
 - (a) If the Sub-contractor has incurred or is likely to incur expenditure for which the Sub-contractor would not be reimbursed by a payment made under any other provision in the Sub-contract by reason of the progress of the Sub-contract Works or any part thereof having been materially affected by any of the matters set out in Clause 11.5(1)(a) of the General Conditions of Main Contract and if the Sub-contractor intends to claim such expenditure, he shall, within 21 days of the event set out in Clauses 11.5(1)(a)(i) to 11.5(1)(a)(vi) of the General Conditions of Main Contract upon which the claim is based becoming apparent, serve a notice of intention to claim in writing on the Contractor with a copy thereof to the Surveyor.
 - (b) Upon receipt of the notice of intention to claim under Clause 8.3(2)(a), the Contractor shall decide:-
 - (i) that the Sub-contractor has incurred or is likely to incur expenditure by reason of the progress of the Sub-contract Works or any part thereof having been materially affected and the Contractor shall, within 21 days from the date of serving of such notice of intention to claim, require the Surveyor to ascertain the expenditure incurred or likely to be incurred by the Sub-contractor for which the Sub-contractor would not be reimbursed by a payment made under any other provision in the Sub-contract, or
 - (ii) that the Sub-contractor has not incurred or is unlikely to incur expenditure for which the Sub-contractor has submitted a notice of intention to claim under Clause 8.3(2)(a) and the Contractor shall notify the Sub-contractor of his decision in writing with a copy thereof to the Surveyor within 21 days from the date of serving of such notice of intention to claim.
- (3) If the Sub-contractor intends to claim additional payment under any provision of the Conditions of Sub-contract other than Clause 8.3(2)(a), the Sub-contractor shall within 21 days of an event which may give rise to a claim becoming apparent serve a notice of intention to claim in writing on the Contractor and state the contractual provision upon which the claim is based.
- (4) It shall be a condition precedent to the Sub-contractor's entitlement to any expenditure or additional payment referred to in this Clause 8.3 that the Sub-contractor shall comply with the notice requirements of Clause 8.3(2)(a) or 8.3(3). If the Sub-contractor fails to comply with the said notice requirements in respect of any claim, such claim shall not be considered and shall be deemed to have been waived by the Sub-contractor under the Sub-contract and at common law.

8.4 Ascertainment of claims

- (1) Upon serving of a notice of intention to claim under Clause 8.3(2)(a) or 8.3(3), the Sub-contractor shall keep such contemporary records as may reasonably be necessary to support any claim and shall submit to the Contractor details of the records being kept in respect thereof. Without necessarily admitting the Contractor's liability, the Contractor may require the Sub-contractor to keep any additional contemporary records as are reasonable and may in the opinion of the Contractor be material to the claim. The Sub-contractor shall permit the Contractor to inspect all records kept pursuant to this Clause 8.4 and shall supply copies thereof as and when the Contractor may so require.
- (2) The Sub-contractor shall, after the submission of a notice of intention to claim expenditure or additional payment under Clause 8.3(2)(a) or 8.3(3), submit to the Contractor the claim including an account giving particulars of the circumstances giving rise to the claim, the sum claimed and the methodology and calculation of such sum within the following time:-
 - (a) within 60 days from the date of serving of the notice of intention to claim under Clause 8.3(2)(a) or 8.3(3) unless Clause 8.4(2)(b) shall apply;
 - (b) (where the event giving rise to the claim relates to a decision by the Contractor as to a re-scheduling of the date or dates for completion of the Sub-contract Works or any part thereof for a delay caused by or due to any of the causes stipulated in Clause 6.1(3)) within 21 days after the receipt of the Contractor's notice of the relevant re-scheduling.

- (3) The Contractor may within 14 days after the receipt of the submission from the Sub-contractor under Clause 8.4(2), require the Sub-contractor to submit any further information which the Contractor may reasonably require for the purpose of his ascertainment of the Cost or additional payment. The Sub-contractor shall submit the requisite information to the Contractor within 14 days from the receipt of the Contractor's requirement.
- (4) The Contractor shall ascertain the Cost or additional payment (if any) according to the respective provisions of the Sub-contract within 60 days after the receipt of the information submitted by the Sub-contractor pursuant to Clause 8.4(2) or 8.4(3) as the case may be.

Provided that in respect of claims for which the Contractor is entitled to recover from the Employer under the Main Contract, the Contractor is not obliged to provide his ascertainment of the claim to the Sub-contractor but the Contractor shall notify the Sub-contractor of any Surveyor's ascertainment in relation to such claim leading to an adjustment to the Sub-contract Sum within 14 days after the receipt of such ascertainment.

- (5) It shall be a condition precedent to the Sub-contractor's entitlement to any Cost or additional payment to be ascertained under Clause 8.4(4) that the Sub-contractor shall comply with the claim submission requirements of Clause 8.4(2). If the Sub-contractor fails to comply with the said claim submission requirements in respect of any claim, such claim shall not be considered and shall be deemed to have been waived by the Sub-contractor under the Sub-contract and at common law. If the Sub-contractor fails to comply with the provisions of Clause 8.4(3) in respect of any claim, the Contractor shall consider such claim only to the extent that the Contractor is able to on the information available.

8.5 Surveyor's determination and ascertainment

- (1) The Surveyor shall issue his assessment and determination under the Sub-contract in such time and in such manner as provided for in Clause 11.7(2) of the General Conditions of Main Contract.
- (2) Notwithstanding any other provisions in the Sub-contract, the Surveyor shall be allowed to make corrections of arithmetical errors in his determination or ascertainment issued under the conditions of Sub-contract.

8.6 Requested Variation

The Sub-contractor shall, with the consent of the Contractor, such consent not to be unreasonably withheld, be allowed to submit proposal as provided for under Clause 11.8(1) of the General Conditions of Main Contract. Such proposal shall be submitted through the Contractor to the Contract Manager.

8.7 Enhancement Works

- (1) The Contract Manager may order any Enhancement Works to the Sub-contract Works or any part thereof that has been certified complete by the Contract Manager under Clause 8.7 of the General Conditions of Main Contract that are desirable for or to achieve better functioning of the Sub-contract Works or the Main Works, during the period of 180 days following the date of completion of the Main Works or the relevant part thereof or the relevant Section, as the case may be, stated in the certificate of completion issued under Clause 8.7 of the General Conditions of Main Contract. The Contract Manager shall state the time for completion of the Enhancement Works in his written instruction.

Provided that no Enhancement Works with a date for completion beyond the Maintenance Period shall be ordered by the Contract Manager. The Enhancement Works may include addition, substitution and alteration of the Sub-contract Works.

- (2) The Sub-contractor shall comply with the Contract Manager's instruction issued under Clause 8.7(1) and shall carry out and complete the Enhancement Works with due diligence and to the satisfaction of the Contract Manager.
- (3) The Surveyor shall determine by way of fair valuation the sum which in his opinion shall be added to the Sub-contract Sum as a result of an order for Enhancement Works issued by the Contract Manager under Clause 8.7(1).
- (4) No Enhancement Works shall in any way vitiate or invalidate the Sub-contract but the value of all Enhancement Works shall be taken into account in calculating the Final Sub-contract Sum.

9 CONSTRUCTIONAL PLANT

9.1 Constructional Plant

The provisions of Clauses 13.1 to 13.7 inclusive of the General Conditions of Main Contract shall equally apply to Constructional Plant, temporary buildings and materials brought onto the Site by the Sub-contractor.

10 PAYMENTS

10.1 Application for payment

- (1) The Sub-contractor shall deliver to the Contractor on dates to be agreed with the Contractor statements in quadruplicate in a form approved by the Contractor showing:-
 - (a) the estimated value of the Sub-contract Works executed in accordance with the Sub-contract up to the end of such periods with adjustments for Variations listed separately; and
 - (b) a priced list of materials delivered to the Site for use in the permanent Sub-contract Works; and
 - (c) all other estimated sums which the Sub-contractor considers to be due to him in accordance with the Sub-contract;so that the Contractor may submit such claims for consideration and certification by the Surveyor.
- (2) The Surveyor shall certify payment for the Sub-contract Works using the same principles as stated in the Main Contract Conditions for certification of the value of the Main Works.
- (3) Notwithstanding the period of interim certificates stated in the appendix to the Form of Tender of the Main Contract, the period of valuation of an item in the schedule of rates for site safety, environmental management and site hygiene shall be that stipulated in the schedule of rates for site safety, environmental management and site hygiene.
- (4) In respect of each item in the schedule of rates for site safety, environmental management and site hygiene, the Sub-contractor shall deliver to the Contractor and make a copy to the Contract Manager no later than 3 days after the end of the applicable period of valuation stipulated in the schedule of rates for site safety, environmental management and site hygiene a statement showing:-
 - (a) the cumulative value of work done by the Sub-contractor; and
 - (b) the information required to be submitted by the Sub-contractor as stated in the schedule of rates for site safety, environmental management and site hygiene.

10.2 Payment to the Sub-contractor and Retention Money

- (1) Within 28 days of the Surveyor certifying in accordance with Clause 14.2(1) of the General Conditions of Main Contract, the Contractor shall notify and pay to the Sub-contractor the sum certified as due in respect of the Sub-contract Works.
- (2) Within 28 days of the Surveyor certifying the release of a portion of the Retention Money Held in respect of the Nominated Sub-contractor in accordance with Clause 14.2(5)(a) of the General Conditions of Main Contract, the Contractor shall notify and pay to the Sub-contractor the sum certified as due in respect of the Sub-contract Works.
- (3) In the event of failure by the Contractor to make payment to the Sub-contractor in compliance with the provisions of this Clause 10.2, the Contractor shall pay to the Sub-contractor simple interest on a daily basis and at a rate equivalent to 1% per annum above the average of the best lending rates of the three Hong Kong note-issuing banks prescribed from time to time upon any overdue payment from the day following the date on which the same shall have been made.

11 REMEDIES AND POWERS

11.1 Termination of the Sub-contract by the Contractor

- (1) If the Sub-contractor defaults in any of the following respects:-
 - (a) abandons the Sub-contract; or
 - (b) without reasonable excuse fails to commence the Sub-contract Works in accordance with Clause 6.1; or
 - (c) suspends the progress of the Sub-contract Works for 7 days after receiving from the Contractor a notice in writing to proceed; or
 - (d) fails to remove materials from the Site or to remove and properly re-execute work for 7 days after receiving from the Contractor a notice in writing that the said materials or work have been condemned and rejected by the Contract Manager; or
 - (e) fails to proceed with the Sub-contract Works with due diligence or is persistently in breach of any of his obligations under the Sub-contract; or
 - (f) fails to submit a bond as required under Clause 4.2;

then, if such default shall continue for 7 days after a notice by registered post specifying the default has been sent to the Sub-contractor by the Contractor and copied to the Contract Manager, the Contractor may without prejudice to any other rights or remedies thereupon by a further notice by registered post terminate the employment of the Sub-contractor under the Sub-contract.

Provided that the Contractor shall not terminate the employment of the Sub-contractor on the ground of the Sub-contractor's failure to submit an on-demand bond as required under clause 4.2 without the prior written consent of the Employer, and such consent shall not be unreasonably withheld.

- (2) If the Sub-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 Sub-contract under a committee of inspection of his creditors or, being a company, shall go into liquidation other than a voluntary liquidation for the purposes of amalgamation or reconstruction or if the Sub-contractor shall assign the Sub-contract without consent being previously obtained or if he shall have an execution levied upon his goods, then the Contractor may without prejudice to any other rights and remedies by written notice forthwith terminate the employment of the Sub-contractor under the Sub-contract.
- (3) In case of the employment of the Sub-contractor under the Sub-contract being terminated as hereinbefore provided, then the Sub-contractor shall be deemed to be in breach of the Sub-contract and the Contractor shall only be liable for the value of any work actually and properly executed and not paid for at the date of such termination and for the value of any unfixed materials delivered upon the Site for use in the Sub-contract Works the ownership of which has passed to the Employer under the terms of the Main Contract and for no other sum whatsoever. No further payment shall be made to the Sub-contractor until after the Sub-contract Works have been completed and the Surveyor has certified the sum due, if any. The Contractor shall have the right to recover, or to deduct from or set off against any sum due to the Sub-contractor the value of damage suffered and/or expense incurred by him by reason of the termination of the employment of the Sub-contractor under the Sub-contract.

11.2 Termination of the Main Contract

If for any reason the Contractor's employment under the Main Contract is terminated whether by the Contractor or by the Employer and whether due to any default of the Contractor or otherwise or if the Contractor is expelled from the Site of the Main Works in accordance with the provisions of Clause 15.1 of the General Conditions of Main Contract, then the employment of the Sub-contractor under the Sub-contract shall thereupon also terminate and the Sub-contractor shall be entitled to be paid by the Contractor, less any previous payments on account:-

- (a) the value of the Sub-contract Works completed at the date of such termination;
- (b) the value of Sub-contract work begun but not completed at the date of such termination;
- (c) the value of all unfixed materials delivered upon the Site for use in the Sub-contract Works the ownership of which has passed to the Employer under the terms of the Main Contract;

- (d) the cost of materials properly ordered for the Sub-contract Works for which the Sub-contractor shall have paid or of which he is legally bound to accept delivery;
- (e) the reasonable cost of removal from the Site of the Sub-contractor's Constructional Plant, temporary buildings and other property.

11.3 Remedy on the Sub-contractor's failure to carry out work required

- (1) If the Sub-contractor fails to execute the Sub-contractor's Maintenance Works in accordance with the Sub-contract, the Contractor may, after giving reasonable notice in writing to the Sub-contractor, do such work by his own or other workers as he may consider necessary.
- (2) If the work so done by the Contractor under Clause 11.3(1) is work which the Sub-contractor was liable to do at his own expense under the Sub-contract, all costs and charges properly incurred by the Contractor in so doing shall be paid by the Sub-contractor to the Contractor.

11.4 Contractor's right to deduction or set off

The Contractor shall, notwithstanding any other provisions in the Sub-contract, be entitled to deduct from or set off against any money due from him to the Sub-contractor or any retention money due to be released to the Sub-contractor, any sum which the Sub-contractor is liable to pay to the Contractor under the Sub-contract after giving reasonable notice in writing to the Sub-contractor before such deduction or set off.

12 AVOIDANCE AND RESOLUTION OF DISPUTES

12.1 Avoidance and resolution of disputes

Objectives

- (1) In order to foster co-operation between the Contractor and the Sub-contractor, to minimize the volume of claims, disputes and disruptions to the Sub-contract Works, and to ensure the cost-effective and expeditious resolution of disputes that do arise, the dispute avoidance and resolution procedures as set forth in this Clause 12.1 shall be implemented.
- (2) The Contractor and the Sub-contractor shall participate fully in the dispute avoidance and resolution procedures set forth herein to resolve any claims the Sub-contractor has against the Contractor or vice versa which arise out of a difference or dispute between the Contractor and the Sub-contractor by the process required in this Clause 12.1 and to resolve any claims between the Contractor and the Employer over the Sub-contract Works by the process pursuant to Clause 17.1 of the General Conditions of Main Contract and shall be bound by the results of the processes.

Appointment of DARA

- (3) By entering into the Sub-contract, the Sub-contractor agrees that the DARA shall be the same personnel appointed pursuant to Clause 17.1(3)(a) of the General Conditions of Main Contract. The Contractor shall enter into and execute the DARA agreement for and on behalf of the Sub-contractor and by such execution, the Sub-contractor shall be bound by the terms and conditions of the DARA agreement.
- (4) Where the Sub-contractor has an actual or potential conflict of interest with the DARA appointed pursuant to Clause 17.1(3)(a) of the General Conditions of Main Contract, the Sub-contractor shall serve a written notice on the Contractor. In such event:
 - (a) the Contractor may request the appointment of another DARA to serve as the DARA for the Sub-contract whose tenure shall be identical to the DARA appointed pursuant to Clause 17.1(3)(b) of the General Conditions of Main Contract. The Contractor and the Sub-contractor shall jointly select this other DARA for appointment by the Employer and the Contractor within 28 days from the receipt of the Contractor's written request by the Sub-contractor. The Contractor shall enter into and execute the DARA agreement for and on behalf of the Sub-contractor and by such execution, the Sub-contractor shall be bound by the terms and conditions of the DARA agreement. Should the Contractor and the Sub-contractor fail to agree on a suitable DARA, then this other DARA shall, upon the written application of either the Contractor or the Sub-contractor, be nominated by the Hong Kong International Arbitration Centre, or
 - (b) the Contractor and the Sub-contractor may agree to adopt an alternative dispute avoidance and resolution mechanism to resolve any disputes that arise out of the Sub-contract Works.

Until this other DARA has been appointed or the alternative dispute avoidance and resolution mechanism has been agreed by the Contractor and the Sub-contractor, the DARA's service and the dispute avoidance and resolution procedures stipulated in this Clause 12.1 shall continue to apply to this Sub-contract.

- (5) The Employer and the Contractor shall equally share and pay the DARA's fees and expenses in respect of the dispute avoidance and resolution services provided by the DARA irrespective of whether the DARA is appointed pursuant to Clause 17.1(3)(a) of the General Conditions of Main Contract or pursuant to Clause 12.1(4)(a).

***Cost of DARA
service***

(a) Provided that if such services provided by the DARA are required in respect of a difference or dispute between the Contractor and the Sub-contractor, the Contractor and the Sub-contractor shall equally share and pay the DARA's fees and expenses for the services so provided.

(b) Provided further that if such services provided by the DARA are required in respect of a difference or dispute raised by the Contractor to the Employer at the request of the Sub-contractor or as a result of the resolution of a dispute raised by the Sub-contractor pursuant to the Sub-contract, then the DARA's fees and expenses in respect of such difference or dispute shall be shared equally by the Employer, the Contractor and the Sub-contractor.

(c) If the Contractor or the Sub-contractor fails to pay his share of the DARA's fees and expenses as required under Clause 12.1(5)(a) or 12.1(5)(b) within 7 days after the due date for payment as reasonably demanded by the DARA, the Employer may pay such amount and recover the same as a debt from the Contractor. If the Employer makes such a payment as a result of the Sub-contractor's default, the Contractor shall be entitled to recover and deduct the same amount from any money due from the Contractor to the Sub-contractor under Clause 10.2.

- (6) (a) The Contractor, the Sub-contractor, the Employer, the Contract Manager and the Surveyor shall perform their obligations or duties under the Sub-contract with due expedition. They together with the DARA shall adopt a proactive and cooperative working attitude with an aim to reduce conflicts and disputes and to resolve any difference or dispute that may arise from or in relation to the Sub-contract.

***General
Obligations for
dispute
avoidance***

(b) Upon request in writing by the Contractor and/or the Sub-contractor, the DARA shall as soon as practicable meet the Contractor and the Sub-contractor either separately or together as requested to attempt to resolve any differences that arise before they become disputes under the Sub-contract.

- (7) If a difference of any kind whatsoever arises between the Contractor and the Sub-contractor in connection with or arising out of the Sub-contract or the carrying out of the Sub-contract Works whether during the progress of the Sub-contract Works or after completion and whether before or after termination, abandonment or breach of the Sub-contract, the Contractor and the Sub-contractor shall follow the dispute avoidance and resolution procedures stipulated herein. The Sub-contractor shall proceed with the Sub-contract Works with due diligence unless the Sub-contract has been abandoned or terminated.

***Difference and
Dispute***

Provided that the Contractor and the Sub-contractor shall not raise a difference over or in connection with any decision, certificate, determination or ascertainment of the Contract Manager or the Surveyor as the case may be unless and until the same has been issued or notified in writing to the Contractor and/or the Sub-contractor in accordance with the Sub-contract.

- (8) (a) If a difference between the Contractor and the Sub-contractor arises out of or in connection with the Sub-contract over the following:-

(i) a Contractor's decision on the re-scheduling of the date or dates for completion of the Sub-contract Works or any part thereof pursuant to Clause 6.1(4), or

(ii) a Contractor's ascertainment of Cost or additional payment pursuant to Clause 8.4(4), or

(iii) the Contractor's decision issued pursuant to Clause 8.3(2)(b), or

(iv) any difference relating to matters other than those referred to in Clauses 12.1(8)(a)(i) to 12.1(8)(a)(iii) above to which either the Contractor or the Sub-contractor has raised the matter in writing to the other stating the difference between them over the matter and requesting a resolution,

the site level representatives of the Contractor and the Sub-contractor shall attempt in good faith to resolve the difference within 28 days from the date of such Contractor's decision referred to in Clauses 12.1(8)(a)(i) and 12.1(8)(a)(iii), such Contractor's ascertainment of Cost or additional payment referred to in Clause 12.1(8)(a)(ii) or such Contractor's or Sub-contractor's request in writing for resolution of a difference referred to in Clause 12.1(8)(a)(iv) as the case may be.

- (b) In the event that the site level representatives of the Contractor and the Sub-contractor have failed to resolve the difference and if either the Contractor or the Sub-contractor wishes to pursue the resolution of the difference, he shall before the expiry of the 28 day period stated in Clause 12.1(8)(a) serve on the other a Notice of Dispute and copy the same to the DARA.

Provided that if no Notice of Dispute is served by either the Contractor or the Sub-contractor within the said 28 day period, the difference is deemed to have been resolved and settled. Provided further that any notice of dispute in respect of such difference (whether named or purported to be a Notice of Dispute) served by the Contractor or the Sub-contractor on the other after the said 28 day period shall be invalid and of no effect.

- (c) Notwithstanding any other provisions in the Sub-contract, any:-
- (i) Contractor's decision on the re-scheduling of the date or dates for completion of the Sub-contract Works or any part thereof pursuant to Clause 6.1(4), or
 - (ii) Contractor's ascertainment of Cost or additional payment pursuant to Clause 8.4(4), or
 - (iii) Contractor's decision issued pursuant to Clause 8.3(2)(b),

for which the Sub-contractor has not served a Notice of Dispute within 28 days from the date of issue of the same shall become final and binding between and upon the Contractor and the Sub-contractor.

- (9) For the purpose of this Clause 12.1, a Notice of Dispute shall be a notice in writing served on the Contractor to the Sub-contractor or from the Sub-contractor to the Contractor, as the case may be, stating the matter in dispute. A dispute shall be deemed to arise when such Notice of Dispute has been served.
- (10) If the Sub-contractor feels aggrieved by any action or inaction of the Employer, the Contract Manager or the Surveyor pertaining to the Sub-contract Works under the provisions of the Main Contract and/or the Sub-contract, the Sub-contractor may request the Contractor to raise the matter or difference with the Employer and resolve the same by the process pursuant to Clause 17.1 of the General Conditions of Main Contract. For the avoidance of doubt, the Sub-contractor shall observe, perform and comply with all the dispute avoidance and resolution provisions in Clause 17.1 of the General Conditions of Main Contract in relation to the matter or difference that he has against the Contractor which arises out of a difference or dispute between the Contractor and the Employer over the Sub-contract Works. Upon receipt of such a request reasonably submitted by the Sub-contractor, the Contractor shall raise the matter or difference pertaining to the Sub-contract Works with the Employer accordingly and both the Contractor and Sub-contractor shall be bound by the results of the dispute avoidance and resolution process pursuant to Clause 17.1 of the General Conditions of Main Contract.

**Reference to
DARA**

- (11) Upon receipt of a copy of a Notice of Dispute issued pursuant to Clause 12.1(8), the DARA shall forthwith meet the site level representatives of the Contractor and the Sub-contractor to help resolve the dispute stated in the Notice of Dispute. If the dispute is not resolved within 14 days of the date of service of the Notice of Dispute, the DARA shall provide his views on the dispute by submitting a DARA report in writing to the senior management of the Contractor and the Sub-contractor within 7 days after the date that the efforts of resolution by the site level representatives have been terminated or within 21 days of the date of the service of the Notice of Dispute, whichever is the earlier. The DARA shall be allowed access to records or documents that are relevant to the dispute.

**DARA
report**

- (12) (a) The DARA shall set out the key issues of the dispute and identify the obstacles to settlement in the DARA report. Upon request in writing by both the Contractor and the Sub-contractor, the DARA shall provide in the DARA report a non-binding recommendation for settlement or as the case may be a non-binding evaluation of the merits of the subject matter of the dispute.

- (b) The DARA report and any views given by the DARA (whether in the DARA report or otherwise) shall not be admissible in any subsequent dispute resolution process or legal proceedings in connection with the Sub-contract.
 - (c) Any statement or settlement offer made by either the Contractor and the Sub-contractor in any meeting convened for the purposes of dispute resolution facilitated by the DARA or otherwise made in confidence to the DARA shall not be admissible in any subsequent dispute resolution process or legal proceedings in connection with the Sub-contract.
 - (d) The DARA shall not be called upon as a witness in any subsequent dispute resolution process or legal proceedings in connection with the Sub-contract.
- (13) Upon receipt of the DARA report, the senior management of the Contractor and the Sub-contractor shall meet and attempt to settle the dispute. The DARA shall only attend such meetings if requested by both the Contractor and the Sub-contractor. If the dispute is not settled within 14 days of the date of issue of the DARA report, the DARA may, within 7 days after the date that senior management settlement efforts have been terminated or within 21 days of the date of issue of the DARA report, whichever is the earlier, propose to the Contractor and the Sub-contractor a form of dispute resolution alternative to any form of arbitration, but the Contractor and the Sub-contractor shall not be obliged to accept such proposal.
- (14) (a) If either the Contractor or the Sub-contractor refuses to accept the DARA's proposal as referred to in Clause 12.1(13), then the dispute resolution procedures set out in Clause 12.1(15) shall be followed, but in the event that the Contractor and the Sub-contractor agree to accept the DARA's proposal, the Contractor and the Sub-contractor shall, with the assistance of the DARA (if required by the Contractor and the Sub-contractor), agree on the conduct of such alternative dispute resolution process (which may include but not limited to the time for appointment of the expert or other person, for exchange of submissions or documents and for commencement of the dispute resolution process) within 21 days after the date of the senior management settlement efforts have been terminated or within 35 days of the date of issue of the DARA report, whichever is the earlier.
- (b) If the Contractor and the Sub-contractor fail to agree on the time for appointment of the expert or other person, for exchange of submissions or documents or for commencement of the alternative dispute resolution process within the time as provided in Clause 12.1(14)(a), then either the Contractor or the Sub-contractor may notify the DARA in writing of the disagreement and copy the same to the other, and the DARA shall decide such time for the alternative dispute resolution process.
 - (c) If the Contractor and the Sub-contractor fail to agree on the appointment of the expert or other person for conducting the alternative dispute resolution process under this Clause 12.1(14), the alternative dispute resolution process under this Clause 12.1(14) shall be deemed to have been abandoned by both of them.
- (15) When any of the following events occurs:-
- (a) in the absence of a DARA's proposal referred to in Clause 12.1(13) and the Contractor and the Sub-contractor fail to reach agreement to adopt any alternative dispute resolution process, or
 - (b) either the Contractor or the Sub-contractor refuses to accept the DARA's proposal referred to in Clause 12.1(13), or
 - (c) the Contractor and Sub-contractor fail to reach an agreement on the conduct of such alternative dispute resolution process within the time stated in Clause 12.1(14), or
 - (d) such alternative dispute resolution process adopted in accordance with Clause 12.1(14) is abandoned or terminated by either the Contractor or the Sub-contractor, or
 - (e) no settlement of the dispute is reached in such alternative dispute resolution process adopted in accordance with Clause 12.1(14),

*Alternative
form of
dispute
resolution*

*Reference to
short form
arbitration*

then the Contractor and the Sub-contractor shall resolve the dispute by way of short form arbitration in accordance with the “Short Form Arbitration Rules” as provided in the appendix to the Conditions of Sub-contract unless either the Contractor or the Sub-contractor refuses to do so in writing within 14 days after the date that any of the events referred to in Clauses 12.1(15)(a) to 12.1(15)(d) occurs, in which case, the dispute resolution procedures stated in Clause 12.1(16) shall be followed.

Reference to arbitration

- (16) If either the Contractor or the Sub-contractor refuses in writing to resolve the dispute by short form arbitration, the Contractor or the Sub-contractor may refer the dispute to arbitration in accordance with and subject to the provisions of the Arbitration Ordinance (Cap. 609) or any statutory modification thereof for the time being in force and any such reference shall be deemed to be a submission to arbitration within the meaning of such Ordinance. Any reference to such arbitration shall be made within 28 days of the written refusal to resolve the dispute by way of short form arbitration by either the Contractor or the Sub-contractor.
- (17) If a dispute of any kind whatsoever arises between the Contractor and the Sub-contractor in connection with or arising out of the Sub-contract or the carrying out of the Sub-contract Works of which a Notice of Dispute is given pursuant to the provisions of the Sub-contract after the expiry of the Period of Final Measurement or after the termination or abandonment of the Sub-contract, the dispute shall be resolved by way of mediation or arbitration as hereinafter provided. Either the Contractor or the Sub-contractor may within 28 days of the service of the Notice of Dispute refer the dispute to mediation in accordance with and subject to the “Government of Hong Kong Special Administrative Region Construction Mediation Rules” or any modification thereof being in force at the date of such request. If the Contractor and the Sub-contractor fail to resolve the dispute by mediation or if either the Contractor or the Sub-contractor has no intention to refer the dispute to mediation, then either the Contractor or the Sub-contractor may refer the dispute to arbitration in accordance with and subject to the provisions of the Arbitration Ordinance (Cap. 609) or any statutory modification thereof for the time being in force and any reference shall be deemed to be a submission to arbitration within the meaning of such Ordinance. Any such reference to arbitration shall be made within 90 days of :-
- (a) the refusal to mediate, or
 - (b) the abandonment or termination of the mediation, or
 - (c) the failure of the Contractor and the Sub-contractor to reach a settlement in the mediation.
- (18) The reference to arbitration under Clause 12.1(16) or 12.1(17) shall be in accordance with and subject to the following:-
- (a) All the provisions in Schedule 2 to the Arbitration Ordinance (Cap. 609) shall apply to any arbitration instituted in accordance with Clause 12.1(16) or 12.1(17).
 - (b) Subject to Clause 12.1(18)(c), the Domestic Arbitration Rules (2012) of the Hong Kong International Arbitration Centre (the “Arbitration Rules”) or any modification thereof for the time being in force shall apply to any arbitration instituted in accordance with Clause 12.1(16) or 12.1(17).
 - (c) Notwithstanding any provisions of the Arbitration Rules, the place of meetings and hearings in the arbitration shall be Hong Kong unless the parties otherwise agree.
- (19) The arbitrator appointed in a short form arbitration instituted under Clause 12.1(15) or an arbitration instituted under Clause 12.1(16) or 12.1(17) shall have full power to open up, review and revise any decision (other than a decision under Clause 7.5(3) of the General Conditions of Main Contract not to vary the Main Works), opinion, instruction, order, direction, determination or certificate of the Contract Manager any measurement, valuation, determination, ascertainment or certificate of the Surveyor or any decision or ascertainment of the Contractor.

Arbitrator’s powers

Provided that:-

- (a) any Contractor’s decision or ascertainment which has become final and binding between and upon the Contractor and the Sub-contractor by virtue of Clause 12.1(8)(c), and
- (b) any settlement, deemed settlement or resolution of difference or dispute pursuant to the provisions of this Clause 12.1

shall not be opened up, reviewed or revised by the arbitrator in the arbitration.

13 CHANGE IN LAW AND FLUCTUATIONS

13.1 Adjustment of Sub-contract Sum due to Change in Law

- (1) Subject to the Sub-contractor's compliance with the provisions under Clauses 8.3(3) and 8.4, if the Surveyor is of the opinion that the Sub-contractor has incurred additional expenditure due to a Change in Law for which the Sub-contractor would not be reimbursed by a payment made under any other provisions in the Sub-contract, the Surveyor shall in compliance with Clauses 11.6(3), 11.6(4) and 11.6(5) of the General Conditions of Main Contract in so far as they relate and apply to the Sub-contract Works ascertain the increase in Cost and shall take this into account in the calculation of the Final Sub-contract Sum.
- (2) If the Surveyor is of the opinion that the Sub-contractor has been or is likely to be involved in decrease in expenditure to the Sub-contractor in execution of the Sub-contract due to a Change in Law, the Surveyor shall determine such decrease which shall be deducted from the Sub-contract Sum and be taken into account in the calculation of the Final Sub-contract Sum.

13.2 Price Fluctuations

Notwithstanding any right or power contained in the Main Contract Conditions relating to adjustment to the Contract Sum of the Main Works for price fluctuations, the Sub-contract Sum shall not be subject to such adjustment unless the Sub-contract expressly includes such right or power.

APPENDIX

Part I

First Recital Particulars of the works (being a part of the Main Works comprised in the Main Contract) in the Sub-contract referred to as “The Sub-contract Works” viz:-

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Part II

Clause 1.1 Sub-contract Sum:-

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Part III

Clause 6.1(2) Details of the completion period or periods of the Main Works or respective Sections.

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.....
.....

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[For selecting the correct option, please see the Notes on the page 24]

- (a) SIGNED, SEALED and DELIVERED by
#.....
trading as the Contractor in the presence of:

.....
Name: #.....
Occupation:
Address:
.....
.....

OR

- (b) SIGNED, SEALED and DELIVERED by
#.....
being the partners of the Contractor in the presence of:

.....
Name: #.....
Occupation:
Address:
.....
.....

OR

- (c) EXECUTED and DELIVERED as a DEED and the
COMMON SEAL of the Contractor was affixed in the
presence of:
[(i) #.....
.....
its director(s), or
(ii) #,
its director and
#.....,
its company secretary, or
(iii) #.....
.....,
person(s) authorized to sign the Sub-contract by its
board of directors, or
(iv)]*
in the presence of :

.....
Name: #.....
Occupation:
Address:
.....
.....

OR

(d) EXECUTED and DELIVERED as a DEED by
the Contractor acting through
[(i) #.....,
its sole director, or
(ii) #.....,
.....,
its directors, or
(iii) #.....,
its director and #.....,
its company secretary]^
in the presence of :
.....
Name: #.....
Occupation:
Address:
.....
.....

OR

(e) SIGNED, SEALED and DELIVERED by the Contractor by
#.....
its attorney under power of attorney
dated
in the presence of :
.....
Name: #.....
Occupation:
Address:
.....
.....

(a) SIGNED, SEALED and DELIVERED by
#.....
trading as the Sub-contractor in the presence of:
.....
Name: #.....
Occupation:
Address:
.....
.....

OR

(b) SIGNED, SEALED and DELIVERED by
#.....
.....
being the partners of the Sub-contractor in the presence of:
.....
Name: #.....
Occupation:
Address:
.....
.....

OR

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(c) EXECUTED and DELIVERED as a DEED and the COMMON SEAL of the Sub-contractor was affixed in the presence of:

- [(i) #.....
.....,
its director(s), or
- (ii) #.....,
its director and
#.....,
its company secretary, or
- (iii) #.....
.....
person(s) authorized to sign the Sub-contract by its
board of directors, or

(iv)]*
in the presence of:

.....
Name: #.....
Occupation:
Address:
.....
.....

OR

(d) EXECUTED and DELIVERED as a DEED by the Sub-contractor acting through

- [(i) #....., its sole director,
or
- (ii) #.....
.....
its directors, or
- (iii) #.....,
its director and
#.....,
its company secretary]^

in the presence of:

.....
Name: #.....
Occupation:
Address:
.....
.....

OR

(e) SIGNED, SEALED and DELIVERED by the Sub-contractor by #.....
its attorney under power of attorney
dated
in the presence of:

.....
Name: #.....
Occupation:
Address:
.....
.....

Notes :

- (a) For use where the Contractor/Sub-contractor is a sole proprietor.
 - (b) For use where the Contractor/Sub-contractor is a partnership. The deed shall be executed by all the partners with their names inserted.
 - (c) For use where the Contractor/Sub-contractor is a company incorporated in Hong Kong and executes the deed with a Common Seal:
 - * Select the correct option and insert the name(s) in accordance with the provision of the Contractor's/Sub-contractor's Articles of Association. If none is applicable, insert an appropriate expression in the blank.
 - (d) For use where the Contractor/Sub-contractor is a company incorporated in Hong Kong and executes the deed without a Common Seal:
 - ^ Select the correct option and insert the name(s) accordingly.
 - (e) For use where the Contractor/Sub-contractor executes the deed under a power of attorney.
- # Name(s) to be inserted in Block Capitals.

Hong Kong Housing Authority
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to Building Works Contracts 2013 Edition
(version 1.1)

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