

Insights

SECURITY OF PAYMENT CIRCULAR ISSUED BY THE DEVELOPMENT BUREAU OF HONG KONG – TO TAKE EFFECT FROM 31 DECEMBER 2021

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SUMMARY

On 5 October 2021, the Development Bureau (**DevB**) published the **Technical Circular (Works) No.6/2021** for the implementation of security of payment provisions in public work contracts (**Circular**).

The Circular promulgates a contractual regime to implement “the spirit of the Security of Payment Legislation” in public works construction contracts and sub-contracts (**the SOP regime**). For affected contracts, the Circular (i) regulates payment application and certification processes, and (ii) enshrines adjudication as an interim dispute resolution mechanism.

THE SOP REGIME

The SOP regime will take effect in two stages. For Group B or Group C contractors listed in DevB’s “List of Approved Contractors for Public Works”, the SOP regime will apply to tender invitations issued on or after 31 December 2021. For tenders invited from listed contractors which fall outside of Groups B or C, the SOP regime will apply to tender invitations issued on or after 1 April 2022. 1 April 2022 will also be the date from which the SOP regime applies to suppliers and contractors listed in DevB’s “List of Approved Suppliers of Materials and Specialist Contractors for Public Works”.

Key elements of the regime include:

1. The prohibition of “pay when paid” provisions.
2. Payment claims are to be submitted by a contractor or sub-contractor at times specified in the relevant contract or sub-contract.

3. Payment responses are to be issued by the employer (or the higher tier contractor or sub-contractor, as relevant) within 30 days (or any agreed shorter period) of the contractor's payment claim.
4. The net admitted amount required to be paid within 60 days of the payment claim being served.
5. The contractor (or sub-contractor, as relevant) is entitled commence adjudication within 28 days if no payment response is issued when due, if it is dissatisfied with the payment response, or if the net admitted amount is not paid when due.
6. Once the adjudication is commenced, the adjudicator must issue their determination within 55 days of his appointment, unless both parties agree otherwise.

The contractual SOP regime is intended to be a pre-cursor to a later statutory regime and has been designed to allow Government and industry participants to acclimatise to operating in an SOP environment, and to identify potential issues before legislation is introduced.

COMPARISON WITH THE DRAFT CIRCULAR

In our article titled "[Security of Payment in Hong Kong - pilot programme for public works contracts](#)", we looked at an earlier draft of the Circular and discussed important features of the SOP regime.

DevB's Circular as issued includes changes and clarifications to that earlier draft. Some of the key changes and clarifications cover:

- **Incorporation of the SOP regime into affected contracts:** The Circular now makes it clear that the Security of Payment Provisions set out in Annex C to the Circular are to be incorporated into the affected main contract as an appendix by way of new additional or special conditions of contract set out in Annex B.
- **Direct payment process:** Where a sub-contractor makes an application for direct payment of an adjudicated amount, Government now has the discretion to make direct payment of any amount it considers reasonable based on the information provided. Relatedly, a certification process is introduced to allow the main contractor to certify and submit documentary proof of (a) the insolvency of a subcontractor at any higher tier to the claimant, or (b) the inability of the main contractor or a higher tier subcontractor to recover the amount of direct payment through deductions to other payments due. These are in addition to the grounds included in the earlier draft circular (and which have been retained in the Circular as issued) that (c) the claimed adjudicated amount has been settled in full, or (d) the relevant adjudication is no longer binding.
- **Relationship between the claim handling procedure and the EOT claims:** The draft Circular stated that before a claim for additional payment could be referred to adjudication, all claim

handling procedures stipulated in the relevant contract must have been gone through. The Circular as issued clarifies that this requirement extends to EOTs and time-related payment claims. Critically, the Security of Payment Provisions provide that where additional payment is claimed in connection with a specified compensable event, a payment dispute does not arise unless and until the contract administrator has notified his rejection or assessment of that claim, or has failed to do so within the applicable timescale or, if no timescale is specified, a reasonable time. This means that, in practice, the contract administrator will have first decided on an EOT claim before the matter may be submitted to adjudication.

- **Effect of an adjudicator's determination on time-related costs and EOT:** As discussed in our earlier [article](#), the adjudicator is empowered to make binding determinations as to time-related costs forming part of a payment dispute and, if necessary for making such a determination, non-binding determinations as to the extension of time due for relevant delays. The Circular now appears to clarify the intended effects of an adjudication decision on EOT. The new drafting suggests that the date of completion of a contract will be revised to reflect the EOT entitlement determined by the adjudicator. It also appears that an adjudicator's determination that an EOT applies in respect of a delaying event will suspend any right to terminate on the grounds of any delay covered by that EOT.

PREPARING FOR THE IMPLEMENTATION OF THE SOP REGIME

The issue of the Circular intensifies the need to prepare for the implementation of the SOP regime. It is therefore worth taking a deeper look at the issues and challenges the SOP regime presents, some of which we will discuss in our [next article](#).

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