

Regional News for August 2012

Construction News

Eric Tse / Denny Mak / Andrew Keung

Construction Levy Rate – The Legco has passed a pair of resolutions just before the end of its term. The levy rate under the **Construction Industry Council Ordinance** will be raised from 0.4% to 0.5% of the value of the construction operations concerned. Legco also passed a resolution to lower the levy rate under the **Pneumoconiosis & Mesothelioma (Compensation) Ordinance** imposed on operations and quarry products, from 0.25% to 0.15%. The two resolutions have come to effect on 20 August. Construction operations that have commenced or for which a tender has been submitted before this date will not be affected.

Kai Tak works gazetted – The Stage Four Kai Tak North Apron Area Infrastructure Works were gazetted on July 6, 2012 to tie in with proposed residential developments in the North Apron Area of the former Kai Tak Airport. The works include construction of roads and associated footpaths and pedestrian crossings; conversion of existing carriageways and reconstruction and widening of Sung Wong Toi and To Kwa Wan Roads. The works will start in mid-2013 for completion in 2016.

Kwun Tong Heritage Park – The Government plans to transform the Tsun Yip Street playground into the Kwun Tong Industrial Heritage Park. Development Bureau spokesman said the playground lies in the heart of the Kwun Tong Business Area. According to the Draft Kwun Tong (South) Outline Zoning Plan, the playground is zoned as 'Open Space' and is an invaluable "city lung". The park will be a testament to the transformation of Kowloon East from an old industrial area into a new business centre, and a link for the past, present and future. According to the Conceptual Master Plan of Kowloon East 2.0, it includes exploring the possibility to develop the vacant lot of about 10,000 square metres under the Kwun Tong Bypass into a public space for staging arts and cultural performances. It will integrate arts and cultural activities into city life and create a unique atmosphere to set the scene for the transformation of Kowloon East.

RICS Members and Fellows can join ICES using the new RICS Accelerated Route – This new route simplifies the application process for RICS members considerably, removing the need to complete the ICES competencies, produce an experience report or undergo a review interview. ICES expect RICS members and Fellows to be able to demonstrate significant experience in the civil engineering or geospatial environment. For more details, please refer to ICES website.

Reaching out in China

Eric Tse / Miranda Lui

ICES and CHINCA Workshop in August 2012

Due to overwhelming response in the last workshop held in this April, another joint ICES-CHINCA workshop on “International and PRC Contract and Commercial Management” was held in Beijing from 22nd to 24th of August. 30 delegates from major Chinese construction companies attended this second workshop. Some senior members of ICES also attended the workshop and took the opportunity to promote the Institution and shared their experience with the delegates.

Visit China Civil Engineering Construction Corporation, Beijing

Andrew Keung and Miranda Lui paid a visit to China Civil Engineering Construction Corporation and introduced ICES and the ICES Approved Development Scheme to their senior management. We have had good discussion with Mr Sun Yong, Vice President together with Mr Wang Kai, the Director of Bidding and Cost Management Department and a number of his deputies. Mr Yao Hengbin, Deputy Director of Human Resource also joined in the discussion on the needs of training for their staff.

Joint Agreement with HKIS

Eric Tse / Michael Wong

Followed the Reciprocity Agreement (RA) between the Commercial Management Discipline of ICES and Quantity Surveying Division of HKIS in April 2010, we have signed another agreement with HKIS for our Geospatial Engineering Discipline on 3 August 2012.



Left: Sr Serena Lau, HKIS President exchanged the Reciprocity Agreement with Andrew Keung, the ICES President’s Chief Representative. Right: Sr Michael Wong and Sr TM Koo witnessed the signing ceremony.



Group photograph of HKIS and ICES members and guests taken after the signing ceremony.

Under the RA, a corporate member of the HKIS in good standing who is also a member of the Land Surveying Division (LSD) may be elected a Member of the ICES (Geospatial Engineering Stream); while a Member or Fellow of the ICES in good standing who is in the Geospatial Engineering stream and elected to ICES membership via its Graduate Route may also be elected a Member of the HKIS LSD. The RA is also applicable to Associate Members of the HKIS's LSD and Technical members of the ICES's GE Stream who are in good standing.



**RECIPROCITY AGREEMENT
between
THE HONG KONG INSTITUTE OF SURVEYORS
and
CHARTERED INSTITUTION OF CIVIL ENGINEERING SURVEYORS**



Whereas The Hong Kong Institute of Surveyors (HKIS) and the Chartered Institution of Civil Engineering Surveyors (ICES) see benefits to members of both professional bodies in establishing Reciprocity Agreement, the HKIS and the ICES agree the following:

1. A Corporate Member (Member or Fellow) of the HKIS in good standing, who is a member of the Land Surveying Division, may be elected as a Member of the ICES (Geospatial Engineering stream) subject to:
 - a. One year's post qualification professional practice relevant to ICES (Geospatial Engineering stream) and in circumstances which will enable a Member or Fellow of ICES (Geospatial Engineering stream) to confirm the professional activities undertaken. Applicants will be required to submit a detailed record of their experience for examination, followed by:
 - b. A professional competence interview conducted by the ICES to assess the applicant's suitability for admission to ICES.
2. A Member or Fellow of the ICES in good standing, who is in the Geospatial Engineering stream and elected to ICES membership via the Graduate Route of ICES, may be elected as a Member of the HKIS Land Surveying Division subject to:
 - a. One year's post qualification professional practice in Hong Kong in circumstances which will enable a Corporate Member of HKIS Land Surveying Division to confirm the professional activities undertaken. Applicants will be required to submit a detailed record of their experience for examination, followed by:
 - b. A professional competence interview conducted by the HKIS Land Surveying Division to assess the applicant's suitability for admission to HKIS Land Surveying Division.
3. An Associate Member of the HKIS in good standing, who is a member of the Land Surveying Division, may be elected as a Technical Member of the ICES (Geospatial Engineering stream) subject to:
 - a. One year's post qualification professional practice relevant to ICES (Geospatial Engineering stream) and in circumstances which will enable a Member or Fellow of ICES (Geospatial Engineering stream) to confirm the professional activities undertaken. Applicants will be required to submit a detailed record of their experience for examination, followed by:
 - b. A professional competence interview conducted by the ICES to assess the applicant's suitability for admission to ICES.
4. A Technical Member of the ICES in good standing, who is in the Geospatial Engineering stream, may be elected as an Associate Member of the HKIS Land Surveying Division subject to:
 - a. One year's post qualification professional practice in Hong Kong in circumstances which will enable an Associate Member of HKIS Land Surveying Division to confirm the professional activities undertaken. Applicants will be required to submit a detailed record of their experience for examination, followed by:
 - b. A professional competence interview conducted by the HKIS Land Surveying Division to assess the applicant's suitability for admission to HKIS Land Surveying Division.
5. Irrespective of the above, each professional body reserves the right to deny membership, or extend the practice period for any applicant under this agreement when in the opinion of that body, the applicant does not satisfy all its educational or membership criteria.
6. This agreement does not apply to any member of the HKIS or ICES who has been elected to membership of either body through a reciprocity agreement with other professional bodies.
7. Each professional body will notify the other of any proposed major constitutional or educational changes, and of any proposal to enter into merger or reciprocity agreements with other professional bodies.
8. The HKIS and ICES agree to exchange professional research and knowledge and to co-operate in any topics of mutual interest or liaison on matters of mutual concern.
9. This agreement shall be reviewed three years after the date of signing or on an earlier date as mutually agreed between the two professional bodies.

Signed on behalf of
The Hong Kong Institute of Surveyors

Signed on behalf of
Chartered Institution of Civil Engineering
Surveyors






President
On this 3rd day of August 2012

President's Chief Representative - Greater China
On this 3rd day of August 2012

Legal Corner

Is proceeding with work 'regularly and diligently' an implied term?

In the recent English decision *Leander Construction Limited v Mulalley and Company Limited*, the Technology and Construction Court considered whether the obligation on the sub-contractor to proceed with the works '**regularly and diligently**' should be implied into a construction sub-contract. Although a sub-contractor's failure to proceed with the works 'regularly and diligently' would give the main contractor the express right to terminate under the sub-contract, Mr Justice Coulson considered it unnecessary to imply such a term to give the sub-contract business efficacy. Furthermore, where the sub-contract **already expressly stipulates a final completion date, no such obligation could be implied.**

The facts

Mulalley, the main contractor, hired Leander, the subcontractor, to carry out groundworks at a site in Lewisham, South London. The sub-contract in question provided for the commencement date, the sub-contract period and the final completion date, along with an Activity Schedule that set out the activities and the relevant deadlines within which they were to be completed. The parties agreed that the sectional completion dates or periods as set out in the Activity Schedule were not contractually binding.

The termination provisions in the sub-contract were:

'12.1 If the Sub-Contractor shall make default in any of the following respects: ...

.3 ...fails to proceed with the Sub-Contract Works regularly and diligently, ...

then the main Contractor may issue a notice to the Sub-Contractor defining the defaults and giving it 48 hours to comply. If in the opinion of the Main Contractor the Sub-Contractor does not remedy the default(s) then it will be deemed that a breach of the Order has occurred. This breach will expressly allow the Main Contractor the right to terminate the employment of the Sub-Contractor under the Order and the following rules

shall apply...'

In addition to the termination clause, Mulalley maintained that Leander still had an implied obligation to proceed 'regularly and diligently'. Mulalley issued two withholding notices on the basis that Leander had not fulfilled its implied obligation to carry out the sub-contract in a 'regular and diligent' manner by failing to adhere to the Activity Schedule as set out in the sub-contract. Leander rebutted that there was no such implied obligation and therefore they were not liable to pay damages to Mulalley for the delay.

The implied term test

The test in *BP Refinery (Westernport) Pty Limited v Shire of Hastings* formulates that in order to imply a term into a contract, it must:

- be **reasonable and equitable**
- be necessary to give **business efficacy** to the contract
- be so **obvious** that it goes without saying (such as a specific custom or practice or implied by law)
- be **capable of clear expression**, and
- **not contradict any express term** of the contract.

Decision

The court held that Mulalley failed to show that the implied obligation was necessary to give the contract business efficacy. To imply such an obligation would be contrary to the proper construction and express terms of the sub-contract. The court's refusal to imply the obligation into the sub-contract in this case is consistent with its usual reluctance to imply terms where arrangements have already been made in the contract in the event of delay and/or extension of time (where necessary). The termination clause in this sub-contract made it plain that the parties expressly considered the action to be taken if Leander did not progress 'regularly and diligently' with the works – that is by serving a 'hurry-up'

notice. Consequently it could not be said that Leander had a positive obligation to proceed 'regularly and diligently' with the works. As such, Mulalley only had a right to terminate the sub-contract, not a right to claim non-liquidated damages in the event of a breach.

Implications

The court continues to uphold the general

position that express terms are favoured. If terms relating to interim progress are to constitute part of the contract, they have to be expressed as a positive obligation in the form of contractually binding sectional completion dates. Otherwise, the contractor is entitled to work according to its own pace as long as it completes the works by the specified completion date.

Past Events

Eric Tse / Denny Mak

18 August : 20 members attended the technical site visit to the TKO-Biodiesel Plant. The Project Manager of the Plant briefed us the background and status of the project and the Chief Technology Officer of ASB Biodiesel explained to us the technical details of the plant. This plant is first of its kind in Hong Kong and has a capacity of producing 100,000 tonnes of diesel fuel using cooking oil and grease trapped waste collected from local community.

Election for Council of Management

Members should have received the ballot form for the election for Council of Management. As an alternative to postage ballot, members who find it difficult to use the postal service may scan the ballot form, you must include the serial number for your vote to be valid. Please email it to mike.bension@murraysmith.com

Coming Events

4 September : “ **MTR Approach to Dispute Avoidance**”, an evening CPD Talk presented by Mr Martin Dunn, FCInstCES, General Manager-Procurement & Contracts, MTR Corporation at Duke of Windsor Social Service Building in Wanchai.

15 September : **HKIS Annual Conference 2012** on "Development, Supply, and Utilization of Land in Hong Kong" will be held at Conrad Hong Kong. Hon. Anthony BL Cheung, Secretary for Transport and Housing will deliver an opening keynote speech at the conference.

17 September : A full day Conference on “**Collaboration and Cooperation in Contracts for Hong Kong’s Expanding Infrastructure**” organized by the Lighthouse Club and supported by ICES will take place at Hong Kong Convention and Exhibition Centre and keynote address will be given by Ir Wai Chi Sing, JP.

October : “ **From 1D to 6D, BIM application for Engineers and Surveyors**”, an evening CPD Talk presented by Mr Elvis Li, CEO of isBIM Ltd. Mr Li would share his views and practical experience on the latest industry hot topic - how BIM could value-add to Quantity Surveyors’ current practices with the readily available BIM quantity data to accelerate the entire cost estimation cycle.