

**Fifty-first Meeting of  
the Business Facilitation Advisory Committee**

***Agenda Item 2 : Business Impact Assessment on  
Proposed Construction Industry  
Security of Payment Legislation***

**Purpose**

This paper briefs members on the study findings of the Business Impact Assessment (BIA) of the proposed Construction Industry Security of Payment Legislation (SOPL).

**Background**

2. The Development Bureau (DEVB) and the Construction Industry Council conducted an industry wide survey on payment practice in the local construction industry in 2011. The survey revealed significant payment problems experienced by main contractors, sub-contractors, consultants and suppliers, in particular the use of ‘pay when paid’ clauses and payments being delayed by disputes. Situations were more severe in the private sector, hence the problems faced by the entire industry cannot be resolved solely by administrative and contractual arrangements on public works contracts. DEVB therefore considers it necessary to introduce a new legislation to address the issues.

3. In September 2012, DEVB appointed a consultant to study and advise on the models of SOPL adopted in overseas jurisdictions and on the options and issues involved for introducing similar legislation in Hong Kong.

4. In October 2012, DEVB set up a Working Group on Security of Payment Legislation for the Construction Industry (Working Group) to solicit trades’ views and comments on the essential elements and framework of the legislative proposal. The Working Group comprised representatives from key industry bodies in Hong Kong with membership listed at **Annex 1**. The Working Group discussed the options and issues for the proposed legislation identified by the consultant under the following broad areas –

- scope of coverage;
- payment;
- prohibition of ‘pay when paid’ and conditional payment;
- suspension for non-payment; and
- adjudication and enforcement.

5. In June 2015, DEVB launched a 3-month public consultation on a “Proposed Model” for the SOPL, which was based on the consensus reached by the Working Group. In October of the same year, DEVB engaged a consultant to conduct a BIA on the “Proposed Model” as in the public consultation document to support the legislative proposal, which was then completed in March 2017. Subsequently, DEVB and the Department of Justice commenced the drafting of the Construction Industry Security of Payment Bill. Resolution of the divergent views were carried out in parallel.

6. Due to the divergent views among major stakeholders on the proposed scope of adjudication and coverage of Repair, Maintenance, Alteration and Addition (RMAA) works, DEVB refined the “Proposed Model” and formulated an “Adjusted Model” in March 2023. In May 2023, support from the majority of key stakeholders were eventually secured.

7. In October 2022, DEVB engaged the same consultant to update the BIA study for the “Adjusted Model” for SOPL.

8. According to the “Adjusted Model”, the proposed legislative framework of SOPL is briefly described below.

## **Legislative framework of SOPL**

### ***Scope of coverage***

9. The SOPL for the construction industry aims to help main contractors, sub-contractors, consultants, sub-consultants and suppliers in receiving payment on time for work done and services provided. The legislative framework of the SOPL includes the introduction of an adjudication mechanism, prohibition of conditional payment provisions, etc., that aim to improve payment practices and provide a rapid and interim binding solution for handling payment disputes.

10. The SOPL will apply to the construction works, consultancy services, plant and materials supplied for works in Hong Kong. When drawing up the scope of SOPL for the private sector, we particularly note that individual

owners and incorporated owners of “strata-titled” property may not have the experience and knowledge in managing construction contracts and may not have ample knowledge to assess the necessity and reasonableness of the cost of the works. Therefore, in order to avoid inappropriately imposing legal liabilities onto individual owners and incorporated owners, the coverage will be different from works procured by the Government or specified bodies.

11. The SOPL will be applicable to all construction activities and RMAA works under all construction contracts, consultancy appointments, plant and materials supply contracts procured by the Government and specified bodies and the associated sub-contracts regardless of value. The proposed list of specified bodies is at **Annex 2**.

12. For the relevant contracts not procured by the Government or specified bodies (i.e. the private sector and other public/quasi-public bodies not frequently taking forward construction contracts), the SOPL will only be applicable to the construction works for “new building” as defined by the Building Ordinance (Cap. 123) where the main works contract has an original value in excess of HK\$5 million or where the original contract value of main consultancy appointments and plant and materials supply contracts is in excess of HK\$0.5 million, and it will not be applicable to RMAA works.

13. Where a main contract is subject to SOPL, all the associated lower tier sub-contracts will also be subject to SOPL.

14. Since smaller contractors and sub-contractors, who are most in need of the protection of the SOPL, are the parties most likely to be working under oral or partly oral agreements, it is proposed that SOPL will apply to both written and oral contracts.

### ***Framework of SOPL***

15. Under the SOPL, the contract parties will remain free to agree in their contracts with respect to payment intervals. However, the contract parties are required to observe the following four mandatory requirements under the SOPL –

- (a) paying party may serve payment response within 30 days and shall make payment of admitted amount within 60 days to the claiming party from the date of payment claim served by the claiming party;
- (b) conditional payment provisions (such as ‘pay when paid’ clause, etc.) shall be rendered ineffective and unenforceable;

- (c) claimant may refer a payment dispute to adjudication through which the adjudicator shall decide on the payment dispute within 55 working days from the date of his appointment, and the respondent shall pay the adjudicated amount as decided by the adjudicator; and
- (d) unpaid party may exercise his right to suspend or reduce rate of progress if admitted amount/adjudicated amount is not received.

16. The scope of adjudication under SOPL does not cover disputes solely related to extension of time for works. Once the SOPL is effected, time-related payment disputes of contracts entered into by the Government or specified bodies can be referred to adjudication. The adjudicator's determination on both payment and extension of time is binding upon all the contracting parties. Non-time-related payment disputes of contracts entered by the private sector can also be referred to adjudication. The legislation will empower the Secretary for Development to announce a date after which time-related payment disputes of construction contracts entered by the private sector could also be referred to adjudication. Similarly, the adjudicator's determination on both payment and extension of time is binding upon all the contracting parties.

### **The BIA Study**

17. The key objectives of the BIA study are to –
- (a) assess the business environment of the construction sector and relevant segments of the real estate sector and the professional services sector in order to better understand how the different segments might be impacted by the SOPL;
  - (b) consult and record how companies within different segments anticipate the SOPL is likely to impact their business including expected benefits, compliance difficulties, particular concerns, unintended consequences, as well as financial impacts including costs of compliance and anticipated financial gains; and
  - (c) recommend any enhancements to the SOPL that will address particular concerns and mitigate potential negative impact.

18. The BIA study was conducted in 2016-17 and 2022-23 by the consultant engaged by the DEVB. The consultant held face-to-face interviews with individual companies from different segments to establish a comprehensive assessment of the anticipated impact of SOPL to relevant trade. The study finding showed that there would be over 11 000 companies directly impacted by the SOPL, many of which are the sub-contractors from small and medium enterprise (SME) sector.

19. The consultant interviewed around 60 companies from the main contractor and sub-contractor segments including 12 SMEs in total. For suppliers, there were 15 interviews – including suppliers of core construction materials and eight SMEs. For developers, a total of seven interviews were conducted including four in the Government and specified bodies and three in the private sector. For consultants, there were 15 interviews, covering disciplines of civil engineers, architects, quantity surveyors and mechanical, electrical and plumbing engineers, among which three were SMEs.

### *Findings of the BIA Study*

20. Through extensive communications with the stakeholders, the study ascertained strong support for introducing the SOPL for the construction industry in Hong Kong. With private sector developers and specified bodies making timely payment to their contractors, sub-contractors, suppliers and consultants, SOPL is expected to improve payment practices and provide a cost-effective mechanism for recovering delayed payment.

21. The study showed that the implementation of the SOPL will have minimal impact on the business compliance costs to the construction sector. However, claimants and respondents will face the cost of preparation work for adjudication as well as the fees for Adjudicator Nominating Body (ANB) and adjudicators. The study also found that as compared to the current payment practices, timely payment to the construction sector may come at the expense of those employing it – the Government, specified bodies and developers. They will also bear the brunt of the ANB and adjudicators' fees if their main contractors or main consultants raise adjudications against them.

22. Furthermore, the study highlighted the possible unintended consequences, such as main contractors' payment problem with Nominated Sub-contractors, once the SOPL is enacted. According to the current practices, payments to the main contractor in respect of the Nominated Sub-contractor's works will be largely determined by the developer's quantity surveyor. Some main contractors opined that this might lead to the main contractor funding the Nominated Sub-contractor's works or bear the risk of an adjudication action,

should the payments certification lag behind the works completed or the value of completed works were underestimated for other reasons. During the process, in case the Nominated Sub-contractor initiates an adjudication to the main contractor, the developer may also be subject to adjudication by the main contractor. Therefore, it is anticipated that once the SOPL is enacted, the overall payment practices would be improved and this unintended consequence may not be as significant as anticipated. In addition, sub-contractors raised concerns regarding their obligation to notify the site owner before the former can exercise their rights for suspension of work. Based on feedback from the interviews, it is anticipated that sub-contractors would only contemplate suspending their work as a last resort, typically when there is a significant breakdown of trust. Since the sub-contractors can obtain the contact information of the site owners by different means such as from the signboard erected at the site, land searches, etc., it is believed that the sub-contractors would be able to serve the notification to the site owner if they would like to exercise their rights for suspension of work.

23. The construction sector noted that the payment problems for RMAA works in the private sector would fall outside the scope of the SOPL. These works in ballpark account for about 15% of Hong Kong's construction expenditure. Inclusion of RMAA works in the private sector in the SOPL would involve individual owners and incorporated owners and property management agencies of "strata-titled" properties in Hong Kong, and should only be prudently considered after the SOPL has been enacted for some time.

## **Conclusion**

24. Overall, the BIA study concluded that the SOPL would improve payment practices and provide a cost-effective mechanism for recovering delayed payments, benefitting main contractors, sub-contractors, SME suppliers and consultants, and thus the Hong Kong construction industry.

25. The SOPL will bring about significant benefits for all parties involved in the construction industry in Hong Kong. For main contractors, sub-contractors, consultants, sub-consultants and suppliers, the legislation will provide greater certainty of payment and improve cash flow. This will, in turn, improve the financial status of businesses in the construction industry and enable them to invest in new projects and technologies. For the Government, specified bodies and developers, the SOPL will provide assurance of quality and timely delivery of projects, as it facilitates timely resolution of disputes, ensuring the continuity of works.

26. The SOPL will contribute to the overall development of the construction industry in Hong Kong. By improving payment practices, it will attract new businesses and investment to the industry, as well as encourage existing businesses to expand their operations. This will, in turn, create job opportunities and promote economic growth.

### **Advice Sought**

27. Members are invited to note the content of the paper and offer comments, if any.

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**Membership of the Working Group  
on Security of Payment Legislation**

1. The Association of Architectural Practices
2. The Association of Consulting Engineers of Hong Kong
3. Construction Industry Council
4. Chartered Institution of Civil Engineering Surveyors (Hong Kong Region)
5. Development Bureau
6. The Hong Kong Construction Association, Limited
7. Hong Kong Construction Sub-Contractors Association
8. The Hong Kong Federation of Electrical and Mechanical Contractors Limited
9. Hong Kong Housing Authority
10. The Hong Kong Institute of Architects
11. The Hong Kong Institute of Surveyors
12. The Hong Kong Institution of Engineers
13. Hong Kong International Arbitration Centre
14. MTR Corporation Limited
15. The Real Estate Developers Association of Hong Kong



**List of Specified Bodies under Security of Payment Legislation**

1. Airport Authority Hong Kong
2. The Chinese University of Hong Kong
3. City University of Hong Kong
4. CLP Power Hong Kong Limited
5. Construction Industry Council
6. The Education University of Hong Kong
7. The Hong Kong Academy for Performing Arts
8. The Hong Kong and China Gas Company Limited
9. Hong Kong Baptist University
10. Hong Kong Cyberport Development Holdings Limited
11. The Hongkong Electric Company, Limited (HK Electric Investments)
12. The Hong Kong Housing Authority
13. Hong Kong Housing Society
14. Hongkong International Theme Parks Limited
15. The Hong Kong Polytechnic University
16. Hong Kong Science and Technology Parks Corporation
17. Hong Kong Sports Institute Limited
18. Hong Kong Trade Development Council
19. The Hong Kong University of Science and Technology
20. Hospital Authority
21. Kowloon-Canton Railway Corporation
22. Lingnan University
23. MTR Corporation Limited
24. Ocean Park Corporation
25. The University of Hong Kong
26. Urban Renewal Authority
27. Vocational Training Council
28. West Kowloon Cultural District Authority