Standard form of contract for decoration, repair and maintenance works for laymen use

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Abstract:
In Hong Kong, there are a vast number of new and old buildings which need regular decorations, repairs and maintenances. For large-scale projects, the owner normally appoints a professional consultant to help them plan, design and administrate the works. However, for small-scale projects, some owners may directly appoint a contractor to carry out the works. Unfortunately, most owners, as lay customers of construction services, do not have knowledge in building construction and contract. Even a contract is signed, it may not be detailed enough or one-sided in favour of the contractor. As a result, owners are often in disadvantageous position in the event of disputes with contractors. In order to give owners a reasonable protection, a ‘Standard Form of Contract for Decoration, Repair and Maintenance Works’ was published for laymen use. This paper explains the major clauses of this contract, and compares the differences between this contract and other standard form of building contracts administered by building professionals. This paper also critically examines the underlying considerations on the protection of lay owners under this contract.

Keywords:
Standard form of building contract; decoration, repair and maintenance works

1 Introduction

In Hong Kong, there are currently about 17,000 buildings aged 30 years or above and, in ten years, the number will reach 28,000. Many of these buildings are in disrepair conditions and also contain illegal structures and unauthorised building works, which may potentially endanger the occupiers and the public. According to the Development Bureau (2010a), from the years 2001 to 2009, 379,510 unauthorised building works were removed by the Government; 5,339 illegal rooftop structures were cleared; 20,345 abandoned signboards installed on external walls were removed; 273,946 repair orders, 10,330 repair orders and 35,213 warning notices were issued. Recently, following the tragic collapse of one old building in January 2010, the Government immediately inspected 4,011 buildings aged 50 or above. The results of the inspection show that the conditions of 2 building (i.e. 0.05%) would require emergency remedial works; 1,030 building (i.e. 25.7%) were found to exhibit different extents of defects which warrant the issue of a statutory repair/investigation order; 1,270 building (i.e.
31.7%) were found with minor defects; and the remaining 1,709 buildings (i.e. 42.6%) were found with no apparent defect (Development Bureau, 2010b). To a certain extent, these statistics indicate the massive need for repair and maintenance works. Recognizing the importance of building maintenance and public safety, the Government in recent years has actively promoted proper building maintenance, has assisted owners in carrying out maintenance works, and has enforced the relevant legislation against unauthorized building works. In particular, the Government has launched in May 2009 the HK$2.5 billion Operation Building Bright to provide subsidies to help owners of old and dilapidated buildings to carry out repair and maintenance works. Besides, the Government has also established the HK$1 billion Building Maintenance Grant Scheme for Elderly Owner to enhance financial assistance to elderly owner-occupiers to repair and maintain their self-occupied properties. In addition to existing buildings, there are about 150 – 250 new buildings completed each year which also need certain decoration or fitting-out works before its occupation or use. Therefore, these, all together, have created a great amount of decoration, repair and maintenance works.

Some of these decoration, repair and maintenance projects are large in scale and may include, for instance, re-laying of the whole roofing system, re-titling of external walls, re-decoration of lobbies, staircases and other common areas, replacement of fires services, electrical and lift installations, etc. On the other hand, there are also many small projects involving, for instance, repair of spalled concrete, fixing of water pipes, repair of windows, replacement of fire doors, decoration of individual apartments, etc. For large-scale projects, the appropriate professional consultant (such as the architect, engineer and surveyor) should be employed to implement the works. Basically, they should be responsible for the preparation of the design and contract documents. For small-scale projects, owners may not be affordable or justifiable to employ a professional consultant in view of the small contract sum. Under such circumstances, they may directly appoint a contractor to carry out the works without signing a proper contract.

Owners generally do not have adequate knowledge about construction and law. For many small projects, there may be no formal or comprehensive contract signed between the owner and contractor. Even if there is a formal contract, the contract provisions may be one-sided without reasonable protection to owners. As such, owners, as laymen, are always in an unfavourable position, particularly when there are claims for an extension of time and/or additional cost by contractors. In order to overcome this problem, the Hong Kong Institute of Surveyors published a ‘Standard Form of Contract for Decoration, Repair and Maintenance Works’ for use by lay owners. The author, as the Chairman of the Quantity Surveying Division of the Institute at that time, was the principal drafter of this contract.

The consideration for drafting each provision of a contract for use by laymen is entirely different from a contract for use by building professionals. For instance, since the contract is administered by lay owners, it should be easily understood by using plain English and without many technical or legal jargons such as the employer, site, contract documents, contract sum, contract period, variation, and extension of time, which are replaced by such commonly used words as the owner, premises, work details, price, change, working period, an extension of working period, respectively. In addition, while some fundamental duties, responsibilities and obligations of the contracting
parties are well established in common law, it cannot assume that they have knowledge about building law. Thus, many implied terms in law are written as express terms in this contract in order to let both parties clearly understand their duties, responsibilities and obligations. Furthermore, particular consideration is also given to the protection of lay owners as customers of construction services rendered by experienced contractors. The main purposes of this paper are to compare the differences between the main provisions of this contract and other standard forms of building contract, and to critically examine the underlying consideration of main clauses of this contract on the protection of lay owners.

2 Main Provisions of the Contract

This contract is designed for use where the owner deals directly with a contractor making improvements to his premises such as decorations, repairs, maintenance or minor alterations, and the works involved is simple in character with a contract value up to HK$400,000 (at 2008 prices). Where the works are of a complex nature or involve building works defined under Buildings Ordinance, the owner should consider appointing a professional consultant who will act for them, including choosing the appropriate contract.

While a good contract can provide certain protection to the owner, it is more important to find a good contractor. Thus, the owner should choose reputable contractors for the works. The owners must decide exactly the work details before asking the contractors to quote for the works. This will avoid misunderstandings and disputes later on. The owner should normally get quotations from more than one contractor in order to obtain a competitive price for the works. Three quotations are quite usual. Before signing the contract, both parties must agree all contract details, including the work details, price, working period and hours, etc. The owners must make sure that all the appropriate parts of the contract have been filled in.

As mentioned above, this contract is written in plain language (in both Chinese and English) and is kept as simple as possible. It only consists of 20 clauses in 4 pages plus 2 pages guidance notes which do not form part of the contract. The following paragraphs describe each of these clauses in detail.

2.1 Documents forming parts of the Contract

Modern building contracts typically comprise the articles of agreement, the form of tender, the employer’s letter of acceptance of the contractor’s tender and any correspondence between the parties expressed to form part of the contract, the special conditions (if any), the conditions, the contract drawings, the specification and the contract bills. Although each of these contract documents is prepared by professional consultants, disputes always arise whether a particular document has been incorporated into, or forms part of, the contract. Disputes also arise from ambiguity or discrepancy in or divergence between the various contract documents. While the counts normally give more weight to documents such as the contract bill which has been specifically prepared for the particular contract, the have also reversed the orinary rule in the case of English Industrial Estates Corporation v. George Wimpey & Co. Ltd. (1972) that written words prevail over printed words in standard form contracts. Not
infrequently, the contract bills may be found inconsistent with the contract drawings and/or the specification. Under such a circumstance, whether the contract bills will take precedence over the contract drawings and/or the specification will depend on the express contract provision, if any, governing the order of precedence of the various contract documents.

As no professional consultant is employed to produce the drawings and specification, the owner usually makes known his requirements in writing or orally to the tendering contractors. The contractor then produces the design of the drawings and specification together with a quotation for the owner’s consideration. It should be aware that if the owner’s requirements are very brief, he will have little control over the end product. On the other hand, if the owner’s requirements consist of a set of drawings and specification, the contractor will need to do little but to carry out the works and the owner will know exactly what is to be provided. In any event, the owner must crystallise his requirements before executing the contract. To facilitate the formation of a legally binding contract, a simple and easily administrated contractual arrangement is adopted by asking the contracting parties to tick the appropriate boxes provided to confirm whether there are any quotations, drawings, specification or other documents (such as the owner’s requirements) which have been agreed to form part of the contract. These are collectively called the “work details” in this contract. Since an offer may be accepted by conduct in law, guidance note is thus provided to remind both parties that they must sign all agreed documents, and that the owner must keep the original documents.

2.2 Lump Sum Contract

There are three main types of building contract: lump sum, measure and value, and cost plus percentage. In order to give a greater certainty on the agreed contract sum, this contract is based on the lump sum contract in which the contractor undertakes to carry out and complete the works in accordance with the submitted quotation, drawings, specification and other agreed documents (i.e. the work details) for an agreed price. Administratively, both parties are simply required to fill in the agreed price in the contract. As a lump sum contract, the contractor is entitled to nothing until the works has been wholly completed: Cutter v. Powell (1795). This lump sum can be increased or decreased if the building owner has subsequently requested any changes (i.e. variations) to the originally agreed works.

The traditional lump sum building contract works well on the situation that the works itself can be precisely defined in form of either the drawings and specification or the drawings and bills of quantities. As noted above, the various contract documents (i.e. the quotation, drawings and specification) are primarily produced by the contractor. These documents may be unclear, ambiguous or incomplete, frequently leading to the dispute whether a particular work should be included in the original contract. For instance, whether the door is fixed by two or three hinges and its material quality may not be clearly shown in the drawings and/or specification. The incomplete or ambiguous quotation, drawings and specification may create a loophole for the contractor to make claims for both additional cost and extension of working period. For the avoidance of misunderstandings and contractual claims, guidance note is provided to warn the owner that he should decide the work details in sufficient detail to
enable them to be defined and priced by the contractor. More importantly, the contract specifies that ‘the price is deemed to include the cost of all works necessary for the timely and satisfactory completion of the works in its entirety, whether it is expressly stated in the work details or not’. One may argue that this clause is not fair to the contractor. However, Wallace (1994) argues that no description will descend to every detail of building processes so that it is a cardinal principle of construction that, in the absence of an expressed contrary intention (for instance, the bills of quantities should be prepared in accordance with the specified standard method of measurement), an obligation to do the described works imports an obligation to do all the necessary ancillary work or processes, whether described or not, which are needed to produce the described works. The contractor who prepares the various contract documents but misses out some obviously necessary works will be responsible to do so at his peril.

2.3 Contractor’s Obligations

Same as the traditional standard forms of building contract, this contract imposes on the contractor an obligation to organize, carry out and complete the works diligently and in a good and workmanlike manner in accordance with the work details and the provisions of this contract. This is the most fundamental obligation of the contractor. As an entire contract, the contractor must complete the works in its entirety. If he fails to complete the works, he will be in breach of the contract unless the contract has come to an end for some reason. Within this fundamental obligation, there are two distinct parts which need further considerations. First, this contract contains an express provision which requires the contractor to work diligently. As a matter of business efficacy, it is an implied term that the contractor will proceed with reasonable diligence and maintain reasonable progress. If the contractor does not ‘regularly and diligently’ carry out the works, the owner is entitled to terminate this contract. Whether this standard is achieved is probably to be judged according to the usage of the industry: Hounslow Borough Council v. Twickenham Garden Development Ltd. (1970). Thus, this contract provides a control on the contractor’s progress and completion. Second, this contract also contains an express provision which requires the contractor to complete the works in ‘a good and workmanlike manner’. According to Hancock v. B.W. Brazier (Anerley) Ltd. (1966), it is an implied term of all building contracts that the contractor will do his work in a good and workmanlike manner. If the contractor is incompetent so that the works are of an unacceptable standard and not in accordance with the work details, the owner is again entitled to terminate this contract.

In the classic standard form of building contract, the owner and his professional consultants assume responsibility for the design of the whole works, whereas the contractor agrees to carry out and complete the works according to the design and thus, does not undertake liability for the design: Cable (1956) Ltd. v. Hutcherson Brothers Pty. Ltd. (1969). As mentioned above, since no professional consultant is employed for minor decoration, repair and maintenance works, the owner has to rely on the contractor’s skill and judgment in design. Thus, in addition to the fundamental obligation described above, the contractor imposes on the contractor an obligation ‘to complete the design for the works using reasonable skill and care, including the selection or specification of the materials and goods and workmanship to be used in the works so far as not stated in the work details’. This is similar to the design-and-build
contract. However, as far as the design element is concerned, the contractor’s liability is the same as a professional person.

This contract also expressly places an obligation on the contractor to comply with all statutory requirements applicable to the works. It includes obtaining all approvals and consents from Buildings Department and other authorities, and paying all fees and charges. His obligation covers not only the design, but also the whole of the construction. Based on the case of Ano. v. Sibbabridge Ltd. and Ano. (1980), it is an implied term of all building contracts that the contractor would comply with all statutory obligations, including of course the Building Regulations. This obligation overrides the contractor’s obligation under the contract to comply with the work details and the owner’s requirements. If there is such a conflict, then the implied term must prevail. It is the contractor who commits a criminal offence if the statutory regulations are breached.

For proper management of a building with multi-owners, there are often a Deed of Mutual Covenant and Management Agreement and House Rules of the Premises in respect of the working hours, control of air, noise, wastewater and waste, delivery of materials and goods, connection to public services, etc. This contract also expressly places an obligation on the contractor to comply with any of such Deed of Mutual Covenant and Management Agreement and House Rules of the Premises. These restrictions should be made known to the contractor during the tendering stage.

2.4 Materials, Goods and Workmanship

As noted above, the owner may rely on the drawings and specification produced by the contractor. Sometimes, there is no specification at all. The contractor may argue that the work provided complied with the agreed work details (including, for instance, a faulty material), the express obligation has been complied with. In order to set a minimum requirement in respect of the quality of materials and goods and standard of workmanship, this contract requires the contractor to ‘supply materials and goods which are of satisfactory types, standards and quality and as set out in the work details’. In addition, this contract also requires the contractor to ‘warrant that all materials and goods are reasonably fit for the intended purposes’. Moreover, this contract further requires the contractor to ‘carry out the works in a good and workmanlike manner and with care and skill’.

If an express term of the contract deliberately or unintentionally sets a lower liability standard for the contractor, it will be subject to the requirement of ‘reasonableness’ under the various statutory regulations.

2.5 Working Period and Hours, and Sufficient Working Areas

The contracting parties must clearly state the agreed commencement and completion dates (i.e. the working period) in the contract. As the works are carried out in existing
premises, they must also clearly state the working hours in the contract. Thus, the owner has an obligation to give the contractor access to the premises during the agreed ‘working hours’ throughout the ‘working period’.

It is an implied term of all building contracts that the owner will give possession of the site to the contractor in sufficient time for him to complete his works by the specified completion date: Freemen & Sun v. Hensler (1900). While exclusive possession of the site may not be applicable to the decoration, repair and maintenance projects, a sufficient working area is clearly a necessary pre-condition of the contractor’s performance of his obligation: The Queen in Right of Canada v. Watler Cabott Construction Ltd. (1975). Thus, the contract contains an express provision which requires the owner to ‘keep the working areas sufficiently clear of obstructions to allow the contractor to carry out the works so as to enable him to complete the works on time’. Whether the working area is sufficient is a question of fact to be determined in light of all the circumstances: London Borough of Hounslow v. Twickenham Garden Developments Ltd. (1970). If he prevents or obstructs the contractor from carrying out the works for a continuous period of more than 14 days, the contractor is entitled to terminate the contract.

2.6 Changes of the Works

Most standard forms of building contracts empower the owner’s architect to issue an instruction to change the original work. Otherwise, if the contractor has not done the originally contracted work, he may not be able to recover the contract price and may even be liable in damages for breach of contract (Wallace, 1994). This contract also provides a variation clause; otherwise, the owner will have no authority to order changes of the original works. The scope of changes may include the ‘alteration of the design, quality or quantity’ of the work details, which should be wider enough to cover the possible changes needed in ordinary decoration, repair and maintenance works. However, there are certain limitations on the power to order changes. The owner cannot take away part of the contract works from the contractor and give to others: Commissioner for Main Roads v. Reed & Stuart Pty Ltd. (1974). In addition, he has also no power to impose restrictions regarding access to the premises, limitation of working space or working hour, or the sequence of carrying out the works. Moreover, he cannot fundamentally change the scope or nature of the works.

The variation clause of most building contracts also contains valuation rules for variations. As long as the instruction is empowered under the contract, the contractor must carry out the variation order as soon as practicable, and the variation will be measured and evaluated by the quantity surveyor in accordance with the valuation rules. Given that no quantity surveyor or other consultant is employed, this contract does not contain such valuation rules. In order to realize the cost and time implications, this contract requires the contractor to quote a price for the change and the time involved for the owner’s agreement. The contractor will only proceed with the change after receiving the owner’s written agreement. If the owner does not agree with the price and time quoted by the contractor, he can only find another contractor to execute the varied work after the completion of the original works.
2.7 Sub-contracting

Sub-contracting is a common practice in the building industry. In order to protect the owner, this contract expressly states that if the contractor wishes to sub-contract any part of the works, he should firstly obtain the owner’s consent. Such consent must not be unreasonably delayed or withheld. There is no requirement that the contractor must inform the owner of the names of sub-contractors. It is merely consent to the fact of sub-contracting which is required.

2.8 Injury, Damage and Insurance

All building works involve a certain degree of risk. An accident may result in personal injuries by workmen, occupier or neighbours, or damage to the works itself, existing property and its contents or adjoining owners’ properties. Similar to classic standard forms of building contract, this contract provides an indemnity by the contractor to the owner ‘against any expense, liability, loss, claim and damage which may be caused to his employees and his sub-contractor’s employees of all tiers, or to the premises and its contents, the works or neighbouring properties’. This indemnity clause is wider enough to cover most (if not all) possible injuries or damages to persons and properties arising from the carrying out of the works. However, there is one important qualification. It is well established that if a person obtains an indemnity against the consequences of certain acts, the indemnity is not to be construed so as to include the consequences of his own negligence unless those consequences are covered either expressly or by necessary implication: Walters v. Whesseo Ltd. And Shell Refining Co. Ltd. (1960).

Thus, the indemnity does not cover the consequences of a negligent act committed by those for whom the owner is responsible under the express terms of the contract, and others for whom the owner is in law vicariously responsible (Parris, 1985).

Given the short contract duration and small contract sum for minor decoration, repair and maintenance projects, it is not uncommon that the contractor procures no or inadequate insurance to cover the potential risks. Thus, the contractor is expressly required to take out and maintain, in the joint names of the owner, himself and his sub-contractors of all tiers, three types of insurances; Contractor’s All Risks insurance, Third Party Liability insurance and Employees’ Compensation insurance. The Contractor’s All Risks insurance covers the full reinstatement value of the works; the Third Party Liability insurance covers the liability to the third party in respect of bodily injury or death and damage to properties with a specified minimum amount for any one occurrence or series of occurrences arising out of any one event, and the Employes’ Compensation insurance should comply with the Employees Compensation Ordinance to cover claims for bodily injury to or the death of any workers employed in connection with the works. The indemnity clause is subject to the opening words of ‘without prejudice to his obligation to indemnify the owner’, which indicates that the indemnity is to stand independently of the insurance and that the contractor cannot claim to have fulfilled his obligation under the indemnity clause in respect of any injury to persons or property by effecting insurance policies: Gold v. Patman & Fotheringham Ltd. (1958).

If the contractor has failed to take out or maintain the cover or if he has procured an inadequate cover, he will still be liable for the additional loss and damage under the indemnity clause. For the additional security of the owner, the contractor must insure in the joint names of the owner, himself and his sub-contractors of all tiers.
2.9 Extension of Working Period

As a matter of principle, the extension of time (or working period) clause aims to protect the owner rather than the contractor. If there is no contract provision allowing the owner to grant an extension of time for any delay caused by him, time will be at large. The contractor’s obligation is to complete the works within a reasonable time: *Wells v. Army & Navy Co-operative Society Ltd. (1902)*. If the owner wishes to recover any loss and/or damage arising from the contractor’s delay, he has to prove that the contractor has not failed to complete the works within a reasonable time. Nevertheless, the extension of time clause in most building contracts is administrated by a professional consultant in view of the complicated nature of construction processes. However, given the situation that no professional consultant is employed, this contract adopts a simple mechanism to enable the owner to administrate the extension of time clause. Thus, a fair and reasonable extension of time will be granted only if the delay is due to two relevant events. The first relevant event is due to any change requested by the owner. As mentioned above, if there is a change requested by the owner, the contractor is required to provide a quotation for the change and the time involved. If the proposed price and extra time is found to be acceptable, the owner can grant the extension of time accordingly. If not accepted, he must find another contractor to carry out the varied work later. The second relevant event is due to ‘any delay caused by the owner’. This simple provision may widely cover any special but justifiable circumstances (such as an act of God), and an act of prevention, a breach of contract or other default by the owner or any person for whom the owner is responsible. In minor decoration, repair and maintenance projects, the second specified event is not expected to be happened frequently.

In modern building practice, the principal function of the extension of time clause is to enable a date to be fixed for the calculation of liquidated damages for delay. Thus, most building contracts also contain a liquidated damages clause, in which the owner’s right to deduct liquidated damages from the contractor is dependent upon the issue by the architect of a certificate of non-completion to confirm that the contractor has failed to complete the works by the original or extended completion date. This is a condition precedent, without which the owner has no right to make any deduction or recover any liquidated damages: *Algrey Contractors Ltd. V. Tenth Moat Housing Society Ltd. (1972)*. However, the building owner will not be able to administrate this complicated provision. Thus, this contract does not contain a liquidated damages clause. Nevertheless, it does not mean that there is no protection to the owner in the event of delay caused by the contractor. As mentioned above, if the contractor does not regularly and diligently carry out the works, the building owner is entitled to terminate the contract.

2.10 Payment

Since payment is the lifeblood of the contractor, most standard forms of building contract provide interim payments to the contractor on the basis of the payment evaluation and certificate by the quantity surveyor and architect, respectively. Given that there is neither quantity surveyor nor architect, this contract provides two simple payment methods: single payment and stage payment. Where the project duration is short (for instance, less than about one month), the owner can choose to make a ‘single payment’ when the works are all completed by the contractor. The contractor is
not entitled to any payment until he has completed the whole works. Thus, this simple payment method gives a greater protection to the owner. On the other hand, where the project duration is relatively long, the owner can choose to make a ‘stage payment’ when each of the specified stages of the work is completed by the contractor. Under such a method, the owner must insert the details of each work stage, together with the corresponding amount of payment, in the contract.

When all of the works are properly completed or when each stage of the work is properly completed, the contractor is required to give the owner an itemised invoice for the amount due, taking account of any price increase or decrease due to changes. The itemised invoice is to facilitate the owner to check the actual works done. Since there is no architect to certify whether the works have been ‘properly’ completed in accordance with the work details, the contract expressly states that ‘the works shall be considered as being properly completed only when they are free from obvious defects’. If there is any obvious defect, the owner has the right to withhold payment to the contractor. On the other hand, if no obvious defect is found, the owner must pay within 7 days after receiving the contractor’s invoice unless a greater sum has already been paid (i.e. overpayment in the previous stage payment). Failure to pay is a ground entitling the contractor to terminate the contract.

The payment clause in most building contracts also contains provisions governing the retention and defect liability period which are to protect the owner. This contract also provides a simple retention clause, in which the owner is only required to pay 90% (or other specified percentage) of the amount of the invoice. In effect, 10% retention money is withheld from each payment to the contractor. While no defect liability period clause is provided, this contract contains an express provision, whereby the owner is only required to pay the remaining portion of the invoices after the contractor has made good all defects in the works which may be or become apparent at any time within 3 months (or other specified period) after its completion. In effect, there are 3 months (or other specified period) defect liability period. The owner has the right not to release the retention money unless and until the contractor has made good all defects within this defect liability period.

2.11 Occupation and Security of the Premises

The owner must specify in the contract whether or not the premises will be occupied during the working period. If the premises are indicated to be vacant, the implication is that possession of the whole premises will be given to the contractor throughout the working period, including any extension of time granted. During this period of time, the contractor has an obligation to take practical precautions to deter intruders entering into the premises.

If the premises are indicated to be occupied, the building owner still has an obligation to provide sufficient working areas for the contractor to carry out the works so as to enable him to complete the works on time as described above.

2.12 Use of Facilities on the Premises

While the duration of most decoration, repair and maintenance projects is relatively short, the contractor also takes time to set up the various site facilities such as the
temporary electricity, toilet, telephone and water before starting the construction works. This period can be significantly shortened if the owner allows the contractor to use his existing facilities. Thus, the owner is required to state in the contract whether he will allow the contractor to use the electricity, toilet, telephone and water free of charge.

2.13 Health and Safety

Health and safety are an important issue, particularly when the works are carried out within existing premises. This contract imposes on the contractor an obligation to take all practical steps to prevent health and safety risks to the building owner and other people occupying or visiting the premises, and minimize environmental pollution, nuisance, disturbance or inconvenience to the existing and neighbouring occupants. The contractor is required to provide suitable safety and precautionary measures for carrying out the works, particularly on external walls of the premises. In view of the importance of this issue, the owner is entitled to terminate this contract if the contractor does not comply with his health and safety and environmental responsibilities.

On the other hand, this contract also imposes on the owner an obligation to take notice of all warnings the contractor gives about any health and safety or environmental risks which he is taking measures to prevent or minimize.

2.14 Protection and Cleaning of the Works

Since the works are carried out within existing premises, the contractor is required to stow away his tools, equipment and ladders at the end of each working day in a place agreed to be used for such storage, and regularly dispose of any rubbish from the premises. The contractor is also required to protect the finished works and the premises during the progress of the works, and bear all costs incurred in making good any damage caused. Upon completion of the works, the contractor is required to remove all plant, tools and surplus materials, make good and reinstate all damages, clean the works and leave the premises in a clean and tidy condition to the building owner’s satisfaction. These are typical preliminaries clauses in the bills of quantities or specification of most building contracts.

2.15 Owner’s Right to Terminate the Contract

Most building contracts usually contain clauses entitling one party to bring the contract to an end in certain circumstances. This contract sets out the following three grounds entitling the owner to determine the contract:

- The contractor does not regularly and diligently carry out the works; or
- The contractor does not comply with his health and safety and environmental responsibilities; or
- The contractor is incompetent so that the works are of an unacceptable standard and not in accordance with the work details.

If the owner intends to terminate the contract based on one of the defaults described above, he must firstly give the contractor a written warning notice which must specify the default. It is necessary that the contractor has no doubt about the default alleged, and the owner must give sufficient detail to identify the incident if there is any danger of confusion. If the contractor continues the default for 7 days after he receives such
notice, the owner may terminate this contract by serving the contractor another written notice of termination, which is to take immediate effect.

Upon termination of this contract, the owner will not be bound to make any further payment to the contractor until after completion of the works by another contractor. The owner is entitled to recover from the contractor any direct loss and/or damage caused to him by the termination of the contract, including his loss of liquidated damages, making good defects, employing a new contractor at a higher price and such consequential losses which are reasonably foreseeable as arising out of what is to be treated as equivalent to the contractor’s breach of contract: Wraight Ltd. V. P.H. & T. (Holdings) Ltd. (1968). There can rarely be a sum due to be paid to the terminated contractor.

2.16 Contractor’s Right to Terminate the Contract

This contract sets out the following two grounds on which the contractor may determine the contract:

- The owner does not pay an amount properly due to the contractor without having good reason; or
- The owner prevents or obstructs the contractor from carrying out the works for a continuous period of at least 14 days.

Adopting the same procedure prescribed for the owner, the contractor must serve a written notice specifying the default. If the owner does not remedy the specified default within 7 days, the contractor may terminate this contract by giving the owner another written notice of termination, which is to take immediate effect.

Upon termination of this contract, the owner must pay the contractor within 14 days for the value of work properly executed and unfixed materials and goods ordered for the works.

2.17 Settlement of Disputes

Standard forms of building contracts typically contain express provisions on dispute resolution methods, which may include negotiation, adjudication and arbitration. In view of the small amount of contract sum in decoration, repair and maintenance projects, the dispute resolution methods must be simple, fast and cost effective. This contract provides two alternative methods of dispute resolution: mediation and legal proceedings. If the contracting parties intend to resolve a dispute through mediation, they should agree a person to act as the mediator. If, for whatever reason, the parties cannot agree a mediator within 14 days of one party requesting the other to agree on a mediator, then either party can request the President of the Hong Kong Institute of Surveyors to appoint a mediator for them.

In addition to mediation, this contract also allows the contracting parties to take legal proceedings to settle their disputes. If the sum in dispute between the parties is less than HK$50,000, the dispute can be resolved through the Small Claims Tribunal, whereby the parties can present their views and arguments themselves.
3 Conclusion

Historical development in building contract indicates that when the architect, engineer and surveyor face any claims or loopholes in a contract, they will amend the original condition or to add a special condition so as to avoid the same to be happened in the future. With this continued improvement, the relevant parties can have a better understanding of their duties, responsibilities and obligations under the contract. However, the contract has become more and more complicated. Apparently, this approach is not applicable to the building contract solely used by lay owners.

For a standard form of building contract used by lay owners, we have to consider the contractual provisions in an entirely different manner; for instance, how the parties incorporate the relevant documents to create a valid contract, how the traditional lump sum contract includes those works not expressed stated in the work details, how the owner relies on the contractor’s skill and judgment in design, how the cost of a change can be agreed without valuation rules, how an extension of time is assessed and granted, how payment is evaluated and certified, what grounds the parties can terminate the contract, and how the parties resolve the dispute in a cost-effective manner, etc. All of these issues have been satisfactorily resolved in this contract. Finally, while this contract is written for use in Hong Kong, the various legal principles and underlying considerations are also applicable to other countries.

4 References


