

Insights

HK SECURITY OF PAYMENT BILL: GOVERNMENT RESPONDS TO SUBMISSIONS FROM THE PUBLIC

Oct 07, 2024

SUMMARY

The Hong Kong Government received 37 submissions from the public in July 2024 regarding the Construction Industry Security of Payment Bill (“Bill”) and held discussions with deputations from different stakeholders at a LegCo meeting on 16 July 2024.

On 2 October 2024, in a [letter to the LegCo](#), the Government summarised some of the key points that had been made in the submissions from the public and gave its response to the submissions.

While there is no indication from this letter that the Government would make any amendments to the wording of the Bill in relation to the submissions from the public, the letter raises some important points regarding the Bill and some follow-up actions that the Government said that it will undertake to deal with concerns raised by various stakeholders.

SOME KEY POINTS IN THE GOVERNMENT’S RESPONSE

Some of the key points in the Government’s letter of 2 October 2024 are set out below.

CONDITIONAL PAYMENT PROVISIONS

As mentioned in our previous Insight “[HK Security of Payment Bill: an insolvency exception to ban against “pay when paid” clauses?](#)”, some stakeholders suggested that cases of non-payment caused by insolvency of contractual parties at upper tiers in the supply chain should be an exception to the ban against “pay when paid” clauses.

The Government responded that if such an exception is introduced, all the sub-contractors down the supply chain will not receive payment. This goes against the fundamental principle of the Bill, which is to ensure stakeholders throughout the supply chain receive payments to which they are entitled.

The Government also added that higher-tier contractors generally are in a better financial position than the lower-tier contractors to deal with insolvency of paying parties higher up in the supply chain. (In other words, the Government did not wish insolvency risks to be passed down the supply chain, especially to lower-tier contractors with weaker financial position.)

However, the Government stated that it will explore ways outside the Bill to deal with this issue, including the ways to assist receiving parties, who are being owed monies by insolvent paying parties, to receive their outstanding payments under the insolvency mechanism as soon as possible (after the receiving parties have obtained a determination pursuant to the adjudication mechanism under the Bill).

CONSOLIDATION OF ADJUDICATIONS

Some submissions suggested that the Bill should allow consolidation of adjudications involving different contracts in the same supply chain where the underlying disputes arise out of the same facts.

The Government responded that the Bill does not forbid the consolidation of adjudications.

Drawing the experience from arbitration, the Government stated that consolidation of adjudications should be allowed only where certain criteria are fulfilled, e.g. the disputes arose out of the same facts, same supply chain and same time, and all relevant parties agree to consolidate.

The Government also was aware of the short timeframe of adjudication, and queried whether adjudicators would have sufficient time to handle additional papers and workload arising out of consolidation of adjudications.

The Government stated that it will explore this issue with the nominating bodies to prepare the relevant details, as needed. It remains to be seen whether the Government will require the nominating bodies to expressly provide for rules for consolidation in their respective sets of adjudication rules.

NOMINATING BODIES

Some of the submissions raised concerns regarding the fees of the adjudicators.

The Government stressed that the Secretary for Development has powers under the Bill to “*regulate the fees of a nominating body or adjudicator*”^[1].

The Government stated that it will publish non-binding guidelines regarding the fees of the nominating bodies and adjudicators, and will set a cap on the fees of the nominating bodies and adjudicators.

RIGHT TO DELAY WORK

Some of the submissions suggested to limit the right to delay work only to first-tier contractors, but not sub-contractors in the second tier and below, in order to avoid this right from being “abused” by lower-tier sub-contractors.

The Government rejected this suggestion, stressing the importance of the right to delay work to the effectiveness of the adjudication mechanism in ensuring that lower-tier sub-contractors receive outstanding payment.

Again, the Government pointed to the weaker financial position of lower-tier sub-contractors and stated that it would be unfair to these sub-contractors if they do not have this right.

COMMENCEMENT DATE

Under the Bill, most of its provisions will come into operation eight months after the statute is gazetted^[2].

Some submissions recommended that the Bill should give the Secretary for Development the power to lengthen this eight-month period if required.

The Government recognised the wish of industry stakeholders that the Bill should be effective as soon as possible. While admitting that there still is further preparation work to do, the Government stated that having eight months is sufficient and practicable.

CONCLUSION

This letter by the Government shows that the Government is determined to implement the Bill through LegCo with its current wording intact and have the legislation in operation eight months after it is gazetted.

However, the Government is paying due regard to the real and legitimate concerns raised by stakeholders. The Government’s latest letter demonstrates that the Government is open to dealing with various of these concerns by means other than amending the Bill.

[1] Clause 61(2)(c) of the Bill.

[2] Clause 1(2) of the Bill.

RELATED PRACTICE AREAS

- Commercial Construction & Engineering
- Construction Disputes

MEET THE TEAM



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