

香港特別行政區政府
The Government of the Hong Kong Special Administrative Region

政府總部
環境運輸及工務局
香港花園道美利大廈



Environment, Transport
and Works Bureau
Government Secretariat
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(經辦人：衛碧瑤女士)

衛女士：

政府帳目委員會審議
審計署署長第37號報告書
兩座橋樑的建造工程

本年一月二日來信收悉。

現應你們的要求，隨信付上環境運輸及工務局技術通告(工務)第 29/2003 號一份(只提供英文版)。至於政府在何種情況下才可向帳目委員會披露有關的機密資料，則請參閱上述通告第 9 段和第 10 段，該兩段已清楚說明有關之情況。為方便各議員，我們已將該兩段載於附件。

環境運輸及工務局局長

(卜國明 卜國明 代行)

副本送：審計署署長

二零零四年一月十三日

香港特別行政區政府

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21 October 2003

Environment, Transport and Works Bureau
Technical Circular (Works) No. 29/2003

Confidentiality clauses in works contracts
and consultancy agreements

Scope

This circular makes provisions in all construction contracts and consultancy agreements to allow Government to disclose confidential information, under certain conditions, to the Public Accounts Committee of the Legislative Council concerning matters relating to mediation settlements, arbitration awards and settlement agreements via any other means of dispute resolution process.

Effective Date

2. This circular takes immediate effect.

Effect on Existing Circular

3. This circular is to be read in conjunction with WBTC No. 4/99, Construction Mediation Rules (1999 Edition) and Administrative Guidelines. The library of Standard Special Conditions of Contract promulgated under WBTC No. 18/2000, when updated, shall include the Special Conditions of Contract promulgated under this circular. WBTC No. 29/99, Place of Arbitration, is hereby cancelled.

Application

4. The special provisions given in the Appendix hereto apply to all construction contracts including term contracts and Design and Build Contracts and to all consultancy agreements.

The Policy Background

5. The Public Accounts Committee (PAC) considers reports of the Director of Audit on the accounts and the results of value-for-money audits of the Government and other organizations which are within the purview of public audit. It may invite Government officials and senior staff of public organizations to attend public hearings to give explanation, evidence or information to the PAC, or it may invite any other person to assist it in relation to such explanation, evidence or information if deemed necessary.

6. The PAC is accountable to the public. Accountability can only be meaningful if adequate information is available for consideration and evaluation. Government recognizes that any claims of commercial confidentiality in relation to its dealing with a private contracting party may have the effect of diminishing the effectiveness of accountability to the public for the expenditure of the public funds. There is no intention whatsoever to allow the issue of confidentiality erode the capability of PAC to be accountable to the public.

7. However, Government also recognises that disclosing information indiscriminately would undermine the fundamentals of the dispute resolution mechanisms in our standard forms of contracts, namely mediation and arbitration, and would destroy the confidence parties had enjoyed over the years in adopting these mechanisms to reach amicable settlement of disputes.

8. There is therefore a need to strike a delicate balance between public interest and contractual confidentiality. The maintenance of confidentiality in relation to business dealings including commercial settlements is an important issue for private companies and more generally for Hong Kong's reputation as an international business centre. To maintain the creditability of the Government and to protect its image by observing every provision of a commercial contract signed by the Government is in itself also an important consideration of public interest.

9. In view of the competing interests, and following consultation with the construction industry, it has been decided that in relation to mediation settlements and arbitration awards, Government will introduce a sanitization period whereby the contractor/consultants will have the opportunity to withhold consent to the release of commercially sensitive information. The sanitization period is set at 6 months following settlement of the dispute or arbitration award, as the case may be. After the sanitization period, the contractor/consultants will be deemed to have given consent, but they will be informed before any disclosures to the PAC and they may then request commercially sensitive information to be disclosed on a confidential basis. If the request is considered legitimate, it will be referred to PAC for its consideration.

10. Disclosure of information should be confined to the "outline" of the dispute and the terms of the settlement (i.e. summary of the essential facts and issues). All such disclosures to the PAC should have the endorsement of the Controlling Officer.



(W S Chan)

**Deputy Secretary for the Environment,
Transport and Works (Works) 2**

(I) Standard General Conditions of Contract

Special Condition of Contract

General Conditions of Contract Clause 8 is amended by adding the following as sub-clause (3):

“(3) Notwithstanding sub-clause (2) of this Clause, but subject to the following provisions, the Employer may disclose the outline of any dispute and the terms of settlement for which a settlement agreement has been reached with the Contractor or the outcome of the arbitration or any other means of resolution of dispute to the Public Accounts Committee of the Legislative Council upon its request. Before disclosures are made to the said Committee, the Employer shall inform the Contractor. Disclosures shall not be made to the said Committee before expiry of the first 6 months from the date of the settlement agreement, arbitration award or, as the case may be, outcome of other means of resolution of dispute without the written consent of the Contractor but such consent shall not be unreasonably withheld. The Contractor shall be deemed to have given his consent to disclosures on the expiry of the first 6 months from the date of the settlement agreement, arbitration award or, as the case may be, outcome of other means of resolution of dispute. The Contractor may, if he considers necessary to protect the sensitive nature of certain information relating to him, request the Employer to disclose such specified information to the said Committee strictly on a confidential basis. If the Employer considers that there are legitimate grounds to accede to the Contractor’s request, the Employer shall convey the request to the said Committee for its consideration.”

(II) HKSARG Construction Mediation Rules

Rule 12 shall be amended as follows—

“12.1 Mediation is a private and confidential process and every aspect of communication for the purpose of or related to the mediation process shall be without prejudice. Confidentiality also extends to the settlement agreement except where disclosures –

- (a) are necessary for implementation or enforcement;
- (b) are required by the parties' auditors or for some other legitimate business reason;
- (c) are required by any order of the courts of Hong Kong or other judicial tribunal;
- (d) which are necessary for the making of claims against any third party or to defend a claim brought by any third party.

12.2 Notwithstanding Rule 12.1 and subject to the following provisions, the party comprising the Government of the Hong Kong Special Administrative Region (the Government party) may disclose the outline of any dispute with the the other party and the terms of the settlement agreement to the Public Accounts Committee of the Legislative Council upon its request. Before disclosures are made to the said Committee, the Government party shall inform the other party. Disclosures shall not be made to the said Committee before expiry of the first 6 months from the date of the settlement agreement without the written consent of the other party but such consent shall not be unreasonably withheld. The other party shall be deemed to have given his consent to disclosures on the expiry of the first 6 months from the date of the settlement agreement. The other party may, if he considers necessary to protect the sensitive nature of certain information relating to him, request the Government party to disclose such specified information to the said Committee strictly on a confidential basis. If the Government party considers that there are legitimate grounds to accede to the other party's request, the Government party shall convey the request to the said Committee for its consideration.'

12.3 The parties shall not rely on or introduce as evidence in any subsequent arbitral or judicial proceedings:

- (a) any oral or written exchanges within the mediation between either party and the mediator or between either party;
- (b) any views expressed or suggestions made within the mediation either by the mediator or either party in respect of a possible settlement of the dispute;
- (c) any admission made by a party within the mediation;
- (d) the fact that either party had or had not indicated a willingness to accept any suggestion or proposal for settlement by the mediator or by the other party; and

- (e) any documents brought into existence for the purpose of the mediation including any notes or records made in connection with the mediation by the mediator or either party.”

(III) HKIAC Domestic Arbitration Rules

Special Condition of Contract

Sub-clause (5) of General Conditions of Contract Clause 86 shall be replaced by the following:

“(5) (a) Subject to paragraphs (b) and (c) of this sub-clause, the Hong Kong International Arbitration Centre Domestic Arbitration Rules (the Arbitration Rules) shall apply to any arbitration instituted in accordance with this Clause.

(b) Notwithstanding Article 8.2 and Article 13 of the Arbitration Rules, the place of meetings and hearings in the arbitration shall be Hong Kong unless the parties otherwise agree.

(c) Article 26 of the Arbitration Rules shall be deleted and replaced by:

‘26.1 The arbitration proceedings are private and confidential between the parties and the arbitrator. No information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration. Disclosures are permissible where disclosures –

- (a) are necessary for implementation or enforcement;
- (b) are required by the parties’ auditors or for some other legitimate business reason;
- (c) are required by any order of the courts of Hong Kong or other judicial tribunal;
- (d) which are necessary for the making of claims against any third party or to defend a claim brought by any third party.

26.2 Notwithstanding Article 26.1 and subject to the following provisions, the party comprising the Government of the Hong Kong Special Administrative Region (the Government party) may disclose the outline of any dispute with the other party

and the outcome of the arbitration to the Public Accounts Committee of the Legislative Council upon its request. Before disclosures are made to the said Committee, the Government party shall inform the other party. Disclosures shall not be made to the said Committee before expiry of the first 6 months from the date of the outcome of the arbitration without the written consent of the other party but such consent shall not be unreasonably withheld. The other party shall be deemed to have given his consent to disclosures on the expiry of the first 6 months from the date of the outcome of the arbitration. The other party may, if he considers necessary to protect the sensitive nature of certain information relating to him, request the Government party to disclose such specified information to the said Committee strictly on a confidential basis. If the Government party considers that there are legitimate grounds to accede to the other party's request, the Government party shall convey the request to the said Committee for its consideration.' ”

(IV) Consultancy Agreement - Engineering and Architectural Consultancy

Special Conditions of Employment

SCE XX

Sub-clause (D) of General Conditions of Employment Clause 9 is deleted and replaced by the following:

“(D) If the Consultants have provided the Employer with documents and information which they have declared in writing to be confidential and stamped accordingly whether in relation to their practice or special circumstances or for other good causes, unless the Director within two months of receipt of such information by notice in writing disagrees, then that information will be treated as confidential. In relation to disputes between the Employer and the Consultants, the Employer may subject to the following provisions disclose the outline of any dispute and the terms of settlement for which a settlement agreement has been reached with the Consultants or the outcome of the arbitration or any other means of resolution of dispute to the Public Accounts Committee of the Legislative Council upon its request. Before disclosures are made to the said Committee, the Employer shall inform the Consultants. Disclosures shall not be made to the said Committee before expiry of the first 6 months from the date of the settlement agreement, arbitration award or, as the

case may be, outcome of other means of resolution of dispute without the written consent of the Consultants but such consent shall not be unreasonably withheld. The Consultants shall be deemed to have given their consent to disclosures on the expiry of the first 6 months from the date of the settlement agreement, arbitration award or, as the case may be, outcome of other means of resolution of dispute. The Consultants may, if they consider necessary to protect the sensitive nature of certain information relating to them, request the Employer to disclose such specified information to the said Committee strictly on a confidential basis. If the Employer considers that there are legitimate grounds to accede to the Consultants' request, the Employer shall convey the request to the said Committee for its consideration."

SCE YY

Sub-clause (D) of General Conditions of Employment Clause 44 shall be replaced by the following:

"(D) (i) Subject to paragraphs (ii) and (iii) of this sub-clause, the Hong Kong International Arbitration Centre Domestic Arbitration Rules (the Arbitration Rules) shall apply to any arbitration instituted in accordance with this Clause.

(ii) Notwithstanding Article 8.2 and Article 13 of the Arbitration Rules, the place of meetings and hearings in the arbitration shall be Hong Kong unless the parties otherwise agree.

(iii) Article 26 of the Arbitration Rules shall be deleted and replaced by:

'26.1 The arbitration proceedings are private and confidential between the parties and the arbitrator. No information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration. Disclosures are permissible where disclosures –

- (a) are necessary for implementation or enforcement;
- (b) are required by the parties' auditors or for some other legitimate business reason;
- (c) are required by any order of the courts of Hong Kong or other judicial tribunal;

(d) which are necessary for the making of claims against any third party or to defend a claim brought by any third party.

26.2 Notwithstanding Article 26.1 and subject to the following provisions, the party comprising the Government of the Hong Kong Special Administrative Region (the Government party) may disclose the outline of any dispute with the other party and the outcome of the arbitration to the Public Accounts Committee of the Legislative Council upon its request. Before disclosures are made to the said Committee, the Government party shall inform the other party. Disclosures shall not be made to the said Committee before expiry of the first 6 months from the date of the outcome of the arbitration without the written consent of the other party but such consent shall not be unreasonably withheld. The other party shall be deemed to have given his consent to disclosures on the expiry of the first 6 months from the date of the outcome of the arbitration. The other party may, if he considers necessary to protect the sensitive nature of certain information relating to him, request the Government party to disclose such specified information to the said Committee strictly on a confidential basis. If the Government party considers that there are legitimate grounds to accede to the other party's request, the Government party shall convey the request to the said Committee for its consideration.' "

環境運輸及工務局技術通告第29/2003號摘錄

“9.，而經諮詢建造業界後，政府遂決定設立一段期限，在這段期限內，讓承建商／顧問公司有機會不容許政府披露有關商業敏感的資料。此期限由達成和解或作出仲裁後起計，為期6個月。期滿後，承建商／顧問公司將會被定為同意披露資料，但當每次向政府帳目委員會披露資料之前，政府仍會首先通知承建商／顧問公司，而承建商／顧問公司可以要求其商業敏感資料必須以保密形式提交。如政府認為要求合理，便會轉告帳目委員會考慮。

10. 政府所披露的資料必須限於工程爭議的“概要”以及和解的條款(即基本事實與事件的撮要)，而將資料轉交帳目委員會之前，必須得到管制人員批准。”