

Ref. : WB(W) 250/32/25

Group : 3, 5

13 April 2000

Works Bureau Technical Circular No. 13/2000

Deed of Assignment of Contractor's Financial Benefits

Scope

This Circular promulgates guidance in dealing with requests from Contractors for approval under Clause 3 of the General Conditions of Contract to assign financial benefits, and provides an updated standard form of the Deed of Assignment of Contractor's Financial Benefits.

Effective Date

2. This Circular takes immediate effect.

Effect on Existing Circulars

3. This Circular supersedes WBTC No. 19/90.

Approval of Assignment

4. Heads of Departments are vested with the authority to approve applications made by Contractors for assignment of the Contract at their discretion.
5. The Contractor shall be required to give his reasons for making the application for an assignment of his financial benefit and to provide details of the proposal in order that it can be ascertained that such an application is justified.

6. A contractor's application for an assignment of his financial benefit should normally be approved regardless of his financial situation. However should the circumstances of the case warrant, the Head of Department may exercise his discretion in order to safeguard Government's interests. For example, if re-entry is already contemplated and, judging from the Contractor's performance, it is considered that the assignment is unlikely to result in a substantial improvement but simply defer the date of re-entry, then approval should not be given.

7. If the assignee asks for confirmation that written consent to assign has been given, the following paragraph should be included in the reply:

"This consent is given on the basis that no reliance has been placed on any information from the Employer nor have any representations or warranties been given by the Employer on the Assignor's financial status."

Standard Form of Deed of Assignment

8. The Works Policy Division and the Legal Advisory Division of Works Bureau have worked in conjunction with the Hong Kong Association of Banks and produced an updated standard form of the Deed of Assignment of Contractor's Financial Benefits attached at Appendix A.

9. Where approval to assign is given, the Contractor shall be required to use this standard form in its entirety. Should a contractor propose any amendment to the standard form, departments shall seek advice from the Legal Advisory Division, Works Bureau.

Payment of Sum due to the Contractor after Assignment

10. Project officer's attention is drawn to clause 7.1 of the standard form of the Deed of Assignment of Contractor's Financial Benefits which stipulates that all monies payable by the Employer to the Assignor pursuant to the Contract shall, during the subsistence of this Deed of Assignment be paid by the Employer direct to the Assignee. Should a contractor propose any method of payment other than that specifies in clause 7.1, departments shall seek advice from the Legal Advisory Division, Works Bureau.

(W S Chan)
Deputy Secretary (Works Policy)

This Deed made this day of 20

Between ("the Assignor")

And ("the Assignee")

Facts

- (A) By Agreement dated day of 20..... and referred to as Contract No. ("the Contract") the Assignor agreed with the Government of the Hong Kong Special Administrative Region ("the Employer") to execute and complete certain Works ("the Works").
- (B) To finance inter alia the execution and completion of the Works the Assignee has agreed to make available to the Assignor a general banking facility in an aggregate amount not exceeding HK\$ or such greater amount as may be agreed from time to time ("the Facility").
- (C) The Facility is to be secured inter alia by this Deed of Assignment.
- (D) The Assignee has agreed with the Assignor subject to the Assignor complying with the terms of the Facility and the execution of this Deed, to keep the Facility open for the duration of the Contract.

The Parties Agree as Follows :

1. The Assignor ASSIGNS to the Assignee all monies payable or which may become payable by the Employer to the Assignor under the Contract.

2. The Assignor shall provide the Assignee all reasonable assistance to recover any monies due under the Contract.
3. The Assignor shall hold all monies paid to it under the Contract on trust for the Assignee and shall account to the Assignee for such monies as the Assignee may direct.
4. Upon repayment of all monies due to the Assignee under the Facility, the Assignee shall REASSIGN to the Assignor all rights and interests granted under this Deed of Assignment.
5. THE ASSIGNOR COVENANTS WITH THE ASSIGNEE as follows -
 - 5.1 The Contract is valid and subsisting and fully enforceable and in no way void or voidable and the whole benefit of the Contract is now vested in the Assignor free from all liens, charges, mortgages options, third party interests or other encumbrances.
 - 5.2 All obligations to be performed and complied with by the Assignor pursuant to the Contract have been performed and complied with up to the date of execution of this Deed of Assignment.
 - 5.3 The Assignor will in strict compliance with the Contract as to time, quality of the work and materials and otherwise in every respect execute and complete the Works and do all other things and observe all conditions necessary to be done or observed in order to entitle it to the Contract Sum referred to in the Contract and will not permit or suffer any act, omission or thing which may in any way preclude or hinder it from demanding the same free from all deductions, abatements or withholding whatsoever.
 - 5.4 The Assignor will expend all sums to be advanced to it pursuant to the Facility in the execution and completion of the Works and other works referred to in the Facility and pay all outgoings in connection with the Works and any extra or additional works including penalties and other payments provided for by the Contract.
 - 5.5 So long as any monies remain due to the Assignee under the Facility the Assignor will as and when it receives any monies payable to it under the Contract immediately payover the same to the Assignee.
 - 5.6 (a) The Assignor will not :

- (i) commit any act such that a petition for bankruptcy may be presented against it or present a petition for its own bankruptcy; or
- (ii) commit any act or be in a state such that application for winding up may be presented against it or such that it may be wound up voluntarily; or
- (iii) fail to satisfy any judgment against it before the expiry of seven (7) days following the date of such judgment.

(b) For the purposes of this Clause 5.6, "act" includes "omission".

5.7 The Assignor will not during the subsistence of this Deed of Assignment without the written consent of the Assignee and the Employer first obtained assign, mortgage, charge or otherwise dispose of the whole or any substantial part of the undertaking and assets of the Assignor's business.

5.8 The Assignor will carry on and conduct its said business in a proper and efficient manner and will not make any substantial alteration to the nature of its business.

5.9 The Assignor will give the Assignee such information relating to its affairs, business and assets as the Assignee may from time to time require.

5.10 **Further Assurance**

The Assignor shall execute and do all such assurances, acts and things as the Assignee may reasonably require for perfecting or protecting the security created by this Deed of Assignment or for facilitating the recovery of any monies due under the Contract and the exercise of all powers, authorities and discretions vested in the Assignee and shall in particular execute all transfers, assignments and assurances of the security whether to the Assignee or to its nominees and give all notices, orders and directions which the Assignee may consider expedient.

5.11 **Power of Attorney**

- (a) The Assignor hereby irrevocably appoints by way of security the Assignee or its nominees as the attorney of the Assignor and in the name and on behalf of the Assignor as its act and deed or otherwise to sign, seal, deliver and otherwise perfect any such legal or other assignments or any deed, assurance, instrument or act which may be required or may be deemed proper or expedient for the purpose of exercising fully and effectively all or any of the powers hereby

conferred on the Assignee whether under Clause 5.10 or otherwise under this Deed of Assignment and also for the purpose of enforcement and realisation of the security hereby created; the appointment shall operate as a general power of attorney made under the Powers of Attorney Ordinance (Cap. 31).

- (b) The Assignor hereby undertakes to ratify and confirm all deeds, instruments and documents lawfully executed by virtue of the authority and powers hereby conferred.

5.12 Additional/Continuing Security

- (a) The security created by this Deed of Assignment is a continuing security and shall secure the balance of the liabilities outstanding from time to time notwithstanding the bankruptcy, insolvency, liquidation, winding-up or incapacity or any change in the constitution of the Assignor or any other person or any settlement of account or other matter whatsoever until the balance of the liabilities outstanding from time to time has been paid and discharged in full.
- (b) The security created by this Deed of Assignment shall be in addition to and shall not in any way prejudice or be prejudiced by any other security, remedy and lien which the Assignee may now or at any time hereafter hold for all or any part of the moneys and liabilities covenanted to be paid or discharged under this Deed of Assignment.

5.13 Indulgence

This Deed of Assignment and the rights of the Assignee under it shall not be discharged or in any way affected by -

- (a) any time, indulgence, waiver or consent at any time given to the Assignor or any other person;
- (b) any amendment to this Deed of Assignment or to any other security or any guarantee or indemnity;
- (c) the making or the absence of any demand on the Assignor or any other person for payment;

- (d) the enforcement or absence of enforcement of or release of this Deed of Assignment or of any other security, guarantee or indemnity;
- (e) the dissolution, amalgamation, reconstruction or reorganisation of the Assignor or any other person; and
- (f) the illegality, invalidity or unenforceability of or any defect in any provision of this Deed of Assignment or any of the obligations of the Assignor or any other person under any such provision.

5.14 Indemnity

Without prejudice to the right to indemnity by law given to agents and trustees (and subject to the provisions of any applicable ordinance), the Assignor shall indemnify the Assignee or its nominees or its attorney out of the secured payments and the income thereof in respect of all liabilities and expenses certified in reasonable detail as properly incurred by them or any of them in the execution of the terms and conditions of this Deed of Assignment and against all actions, proceedings, claims and demands in respect of any matter or thing done or omitted in any way relating to the security.

- 6. The Assignee covenants with the Assignor that so long as the Assignor complies with the terms of the Facility, then the Assignee shall not withdraw the Facility or reduce the Facility except if expressly provided for in the terms agreed in the Facility set at the date of this Deed of Assignment.
- 7. It is Agreed by the Parties as follows -
 - 7.1 All monies payable by the Employer to the Assignor pursuant to the Contract shall, during the subsistence of this Deed of Assignment be paid by the Employer direct to the Assignee.
 - 7.2 The Assignee shall not be under any obligation to take any steps or institute any proceedings to recover any monies payable or to become payable by the Employer under the Contract nor shall the Assignee be answerable for any loss arising from its having neglected to take any such steps or institute any such proceedings.
 - 7.3 The Assignee shall be entitled on behalf of the Assignor to settle all accounts in relation to the Contract and if the Assignor fails to perform any of its obligations under the Contract the Assignee may enter into any agreement with the Employer to deal with that failure to perform and any such settlement or arrangement shall be binding on the

Assignor.

- 7.4 Nothing contained or implied herein shall in any way whatsoever affect, alter or amend terms of the Contract between the Employer and the Assignor, and in particular and without derogating from the generality of this clause, the right of the Employer to make payment other than to the Assignee and to exercise the right of set off pursuant to the terms of the Contract.
- 7.5 Neither the consent of the Employer to this Deed, the settling of an account by the Assignee with the Employer nor the entering into of any agreement by the Assignee with the Employer pursuant to Clause 7.3 or otherwise shall give rise to any contractual relationship between the Employer and the Assignee other than the obligation of the Employer to make payments to the Assignee pursuant to this Deed. The Assignor shall remain liable to perform all the obligations assumed by it under the Contract and neither the Assignee nor any agent or employee of the Assignee shall be under any obligation of any kind under the Contract or be under any liability whatsoever in the event of any failure by the Assignor to perform its obligations thereunder.

This Deed is executed the Year and Day above mentioned.

Sealed with the Common Seal of)
[Assignor])
and Signed by)
)
)
)
in the presence of :)

Sealed with the Common Seal of)
[Assignee])
and Signed by)
)
)
in the presence of :)
)

The Government of the Hong Kong Special Administrative Region as the Employer acting by and through on the day of 20..... consents to the assignment of the Contract on the above terms and conditions.

Signed for and on behalf of the)
Government of the)
Hong Kong Special Administrative Region by)
)
in the presence of :)
)

Subsumed