

HKIS QSD PQSL Series 2015
Walkthrough the Standard Form of Building Contract Clause by Clause - Session 6
 by
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<p>【SFBCwQ.2005】 †SFBCnQ.2006‡</p>	<p>SFBCwQ.1986(2ndAmend.July1999)</p>
<p>Agreement & Schedule of Conditions of Building Contract for use in the Hong Kong Special Administrative Region, Private Edition – 【With Quantities, 2005 Edition】 †Without Quantities, 2006 Edition‡</p>	<p>Agreement and Schedule of Conditions of Building Contract for use in Hong Kong, First RICS (HK Branch) Edition 1986 (with quantities) incorporating up to Second amendments published in July, 1999</p>
<p>【】 = text in “With Quantities” only † ‡ = text in “Without Quantities” only {} = Essential amendments for Special Conditions <> = Alternative changes for Special Conditions <> = Desirable but not essential changes ## = note to pay attention to text to pay attention to</p>	
<p>19 Assignment and sub-letting</p>	<p>17 Assignment or Sub-letting</p>
<p><i>Assignment</i></p> <p>19.1 (1) Except where provided otherwise in clause 19.1, neither party shall, without the written consent of the other, assign or transfer any of his rights or obligations under the Contract.</p> <p>(2) The Contractor must fulfil his organization, management, planning, supervision and co-ordination obligations through the site management and supervisory team referred to in clause 10 and he shall neither assign nor make arrangements for the vicarious performance of those functions.</p> <p># “vicarious performance” means performing through a third party. #</p> <p># Sub-letting is common, but the Contractor’s organization is also an important consideration when he is awarded the Contract. This provision provides some bottom line to the scope of sub-letting. Refer also to clause 19.2(a) to complement the principle. #</p> <p>(3) The Employer may assign or transfer the whole or any part of the benefit of the Contract after Substantial Completion of the Works, a Section or a Relevant Part without the Contractor’s consent. Any assignment shall be notified promptly to the Contractor.</p> <p># This is useful in cases where the Works are to be transferred to future owners. This does not cover assignment for the purposes of obtaining by the Employer of financing. If such assignment is required, the Contractor’s consent would be required. #</p>	<p>17(1) (a) The Employer shall not without the written consent of the Main Contractor assign this Contract.</p> <p>(b) The Main Contractor shall not without the written consent of the Employer assign this Contract.</p>

【SFBCwQ.2005】 [SFBCnQ.2006]	SFBCwQ.1986(2ndAmend.July1999)
<p>(4) Subject to giving prior notice to the Employer, the Contractor may assign the whole or any part of the benefit of the Contract for the purpose of obtaining financing for the carrying out of the Works provided that the assignment does not adversely affect the Contractor's fulfilment of his obligations under the Contract.</p>	
<p><i>Sub-letting</i></p> <p>19.2 The Contractor shall be permitted, unless prohibited by the Contract, to sub-let parts of the Works provided that:</p> <p>(a) he does not sub-let the whole of the Works or incrementally sub-let parts of the Works to the same person to indirectly attain sub-letting of the whole, or substantially the whole, of the Works and retains his management role as described in clause 19.1(2) at all times;</p> <p>(b) the terms of the agreement to sub-let are, so far as is reasonable, consistent with the terms of the Contract, and contain a condition that the employment of the sub-contractor under the sub-contract shall determine immediately upon the determination (for any reason) of the Contractor's employment under this Contract;</p> <p># The suggested addition is to go in line with the provisions in respect of Nominated Sub-Contracts. #</p> <p>(c) he submits a plan of his sub-contracting arrangement giving the names of his key sub-contractors with their scope of works and such other particulars as may be required by the Architect;</p> <p># It is not likely that the Contractors on the average would submit such a plan with definite names before awarding the sub-contracts to seek the Architect's approval. It would be better to specify in the Tender Documents the key trades for which a proposed list of specialist sub-contractors is to be submitted with the Tender. #</p> <p>(d) he does not sub-let any part of the Works to a sub-contractor against whom the Architect has made an objection giving his reasons;</p> <p># The reasons must be reasonable and strong. Except when a proposed list of sub-contractors is submitted for approval or information well in advance, the objection would likely be after the award of the sub-contracts and would have serious consequence. #</p> <p>(e) he removes from the Works any sub-contractor he is instructed by the Architect to remove; and</p> <p>(f) the sub-letting of a part of the Works to a Domestic Sub-Contractor does not relieve the Contractor from any liability or obligation under the Contract and he remains responsible for carrying out and completing the Works in all respects in accordance with the Contract and for the acts, defaults, omissions and neglect of a Domestic Sub-Contractor as fully as if they were his own acts, defaults, omissions or neglect.</p> <p># This re-iterates the principle that the Contractor is ultimately responsible irrespective of sub-contracting. #</p>	<p>17(2) (a) The Main Contractor shall be permitted unless expressly prohibited by the Architect to sub-let the whole or any portion of the Works either on the basis of the provision by the sub-contractor of labour and materials or by the provision of labour only on a piece-work basis. Notwithstanding that where the Architect has not prohibited sub-letting the Architect shall be entitled to prohibit any sub-contractor and shall have full powers to remove any sub-contractor from the Works.</p> <p>(b) The sub-letting of the whole or any portion of the Works shall not relieve the Main Contractor from any liability or obligation under the Contract, and he shall be responsible for the acts, defaults and neglects of any sub-contractor, his servants or agents, as fully as if they were the acts, defaults or neglects of the Main Contractor, his servants or agents.</p> <p>(c) It shall be the duty of the Main Contractor, if so required by the Architect, to furnish to the Architect all particulars required as to any sub-contractor employed or to be employed on the Works.</p> <p>Provided that it shall be a condition in any sub-letting which may occur that the employment of the sub-contractor under the sub-contract shall determine immediately upon the determination (for any reason) of the Main Contractor's employment under this Contract.</p>

【SFBCwQ.2005】 [SFBCnQ.2006]	SFBCwQ.1986(2ndAmend.July1999)
<p>20 Injury to persons and property and indemnity to Employer</p> <p># This is what one calls the “liability clause” which specifies the basic liability whether insurances are taken out or not. #</p>	<p>18 Injury to Persons and Property and Employer's Indemnity</p>
<p><i>Contractor to indemnify Employer</i></p> <p>The Contractor shall be liable for and shall indemnify the Employer against any damage, expense, liability or loss in respect of any claim or proceedings for:</p> <p># This can be read as “... liable for any damage caused to himself ... and ... indemnify against any damage caused to the Employer ... #</p> <p>(a) bodily injury to, disease contracted by or the death of any person arising out of, or in the course of, or by reason of the carrying out of the Works and whether arising on or off the Site, except to the extent that the injury, disease or death of that person is due to any act or neglect of the Employer or any person for whom the Employer is responsible; and</p> <p># The default is full liability, unless due to the Employer. #</p> <p># The Old Forms use “unless due to” for “except to the extent”. #</p> <p># “people” includes workmen as well. #</p> <p>(b) injury or damage to real or personal property arising out of, or in the course of, or by reason of the carrying out of the Works and whether arising on or off the Site, to the extent that the injury or damage is due to a breach of contract or other default of the Contractor or any person for whom the Contractor is responsible {, but the extent is without prejudice to the Contractor's obligations under clause 2.1(1)(h) during the time periods specified therein}.</p> <p># The default is no liability, unless due to the Contractor. #</p> <p># The Old Forms use “provided always that the same is due to” for “to the extent that ... is due to”. #</p> <p># “property” includes the Works and third party properties as well. #</p> <p># Paragraph (a) uses “act or neglect”. Paragraph (b) uses “breach of contract or other default”. They can have different meanings. An act or a neglect may not by itself be a breach of contract. “default” is a failure to do something, which should basically mean something under the Contract but may cover something under the law. “default” is different from “fault”. The Old Forms use “act or neglect” and “negligence, omission or default” respectively. #</p>	<p>18(1) The Main Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the carrying out of the Works, unless due to any act or neglect of the Employer or of any person for whom the Employer is responsible.</p> <p>18(2) Except for such loss or damage as is at the risk of the Employer under clause 20[B] of these Conditions (if applicable) the Main Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal in so far as such injury or damage arises out of or in the course of or by reason of the carrying out of the Works, and provided always that the same is due to any negligence, omission or default of the Main Contractor, his servants or agents or of any sub-contractor, his servants or agents.</p>

<p style="text-align: center;">【SFBCwQ.2005】 【SFBCnQ.2006】</p>	<p style="text-align: center;">SFBCwQ.1986(2ndAmend.July1999)</p>
<p>21 Insurance against injury to persons or property</p> <p># This is what one calls the “insurance clause”, which does not affect the liability clause. #</p>	<p>19 Insurance against Injury to Persons and Property</p>
<p><i>Employees’ Compensation Insurance</i></p> <p># Note that “ ’ ” should follow after “s” to be proper. #</p> <p>21.1 (1) The Contractor shall effect and maintain employees’ compensation insurance in compliance with the provisions of the Employees Compensation Ordinance in the joint names of the Contractor, his {domestic} sub-contractors and their respective sub-contractors of all tiers {and the Employer as the principal} against all liabilities arising in respect of bodily injury to, disease contracted by or death of the 【Contractor’s or any {tier’s domestic} sub-contractor’s {of all tiers} employees】 【employees of {the} Contractor or of sub-contractors of all tiers】 arising out of and in the course of their employment on the Works or in connection with the Contract. {The Contractor shall cause each Nominated Sub-Contractor to effect and maintain (and produce evidence of) employees’ compensation insurance in compliance with the provisions of the Employees Compensation Ordinance in the joint names of the Sub-Contractor, his sub-contractors of all tiers and the Employer and the Contractor as the principals against all liabilities arising in respect of bodily injury to, disease contracted by or death of the Sub-Contractor’s or any tier’s sub-contractor’s employees arising out of and in the course of their employment on the Sub-Contract Works or in connection with the Sub-Contract. The amount of the insurance cover shall be not less than \$200,000,000 per event if the number of employees is more than 200 or not less than \$100,000,000 per event if the number of employees is not more than 200 for liability under the Ordinance or at common law.}</p> <p># “take out an insurance” as used in the Old Forms means “effect an insurance”. #</p> <p># SFBCwQ.2005 uses “the Contractor’s or any sub-contractor’s of all tiers employees” while SFBCnQ.2006 has already corrected it to “the employees of (the) Contractor or of sub-contractors of all tiers”. The above suggested changes make the minimum changes to either version but result in different wording. #</p> <p># The original clause requiring the Contractor to effect and maintain the insurance to cover all of his sub-contractors of all tiers is probably in line with the requirements of the Employees’ Compensation Ordinance that the principal contractor shall compensate employees of his sub-contractors as if the employees were employed directly by the principal contractor. However, in cases where Nominated Sub-Contractors are appointed before the appointment of the Contractor, no insurance would be available based on this original clause. Therefore, the suggested changes up to the first sentence added above is to require the Nominated Sub-Contractors to take out their insurance whether or not they are appointed before or after the appointment of the Contractor. #</p> <p># The last sentence added above is to accommodate contractors or sub-contractor having less number of employees. This numbers and amounts are based on the Employees’ Compensation Ordinance. #</p> <p># Sub-clause (1) after changes has admittedly become too long. #</p>	

<p style="text-align: center;">【SFBCwQ.2005】 [SFBCnQ.2006]</p>	<p style="text-align: center;">SFBCwQ.1986(2ndAmend.July1999)</p>
<p>(2) The insurance cover shall be against the liabilities referred to in clause 21.1(1) sustained during the period from the Commencement Date commencement of any part of the Works whether on site or off-site until the Defects Rectification Certificate for the whole of the Works has been issued and the Contractor has finally left the Site.</p> <p># See the comments under the definition of “Commencement Date” in clause 1 for the reason for the change. This would be important if the official Commencement Date is after the Date of Possession due to absence of Government consent. #</p> <p>(3) As soon as the Contractor becomes aware of any workman or other person employed on the Works or in connection with the Contract suffering any bodily injury, contracting a disease or dying, he shall notify the Commissioner for Labour, with a copy of the notice to the Architect and the insurers.</p>	
<p><i>Third party liability insurance</i></p> <p>21.2 (1) The party responsible for effecting Contractors’ All Risks Insurance of the Works under either clause 22A, 22B or 22C shall, unless otherwise stated in the Contract, effect insurances in the joint names of the Employer, the Contractor, his sub-contractors and their respective sub-contractors of all tiers against all liabilities of the insured under the Contract or otherwise in respect of:</p> <p># There may be cases where the Contractor will be required to effect a third party liability insurance without at the same time a Contractors’ All Risks Insurance, e.g. in the case of demolition works. However, demolition works nowadays include expensive covered walkways, scaffolding and props, it would be unwise not to effect a Contractors’ All Risks Insurance for such demolition works. #</p> <p># “the insureds” is sometimes used to mean more than one insured party. Similarly, “the joint-insureds”.</p> <p>(a) bodily injury to, disease contracted by or the death of any person arising out of or in the course of or by reason of the carrying out of the Works and whether arising on or off the Site; and</p> <p># The scope here is wider than the liability clause 20(a) with intention to cover an act or neglect of the Employer as well. It is therefore important that the Employer is one of the insureds. #</p> <p>(b) injury or damage to real or personal property other than the Works insofar as the injury or damage arises out of, or in the course of, or by reason of the carrying out of the Works and whether arising on or off the Site, including injury or damage caused by any act or neglect of the Employer or any person for whom the Employer is responsible or by collapse, subsidence, heave, vibration, weakening or removal of support or lowering of ground water due to any cause other than:</p> <p># The scope here is wider than the liability clause 20(b), except that this is restricted to third party properties only. #</p> <p>(i) ionizing radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;</p> <p># This is one of the “Excepted Risks”. #</p>	<p>19(1) (a) Without prejudice to his liability to indemnify the Employer under clause 18 of these Conditions, the Main Contractor shall maintain and shall cause any sub-contractor to maintain:</p> <p>(i) Such insurances as are necessary to cover the liability of the Main Contractor or, as the case may be, of such sub-contractor, in respect of personal injuries or deaths arising out of or in the course of or caused by the carrying out of the Works; and</p> <p>(ii) Such insurances as may be specifically required by the Contract Bills in respect of injury or damage to property real or personal arising out of or in the course of or by reason of the carrying out of the Works and caused by any negligence, omission or default of the Main Contractor, his servants or agents or, as the case may be, of such sub-contractor, his servants or agents.</p>

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<p>(ii) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; and}</p> <p># This is also one of the “Excepted Risks”. #</p> <p>(iii) non-negotiable exclusions imposed by the insurance market.</p> <p>(2) The insurance cover shall be against the liabilities referred to in clause 21.2(1) sustained during the period from the {Commencement Date commencement of any part of the Works whether on or off-site} until the Defects Rectification Certificate for the whole of the Works has been issued and the Contractor has finally left the Site.</p> <p>(3) The insurances shall include:</p> <p>(a) a cross liability clause to the effect that the insurances shall cover the Employer, the Contractor, his sub-contractors and their sub-contractors of all tiers as separate insured, and</p> <p># If one of the insureds causes personal injury or death or property loss or damage to another of the insureds, since both of them are jointly insured, the other one would not be treated as a third party, and the one liable would not be covered by the insurance. To remedy this situation, a cross liability clause is required to deem that a separate insurance is issued to every one of the insureds, and all other insureds are treated as third party. #</p> <p># Note that the standard policy wording may already have the purpose of the cross liability clause embodied. The so called “cross liability clause” endorsement may in fact put limitations to the standard policy wording. #</p> <p>(b) a waiver of any right of subrogation which the insurers may have against any of the insured.</p> <p># It is important that the waiver goes hand in hand with the cross liability clause. #</p> <p>【(4)】 【(c)】 The third party liability insurances against injury or death to any person and injury or damage to real or personal property under clause 21.2(1) shall each be effected with the limit of indemnity stated in the Appendix for any one occurrence or series of occurrences arising out of one event but unlimited in the aggregate amount for the period of the insurance.</p> <p># There should also be an endorsement to cover the Employer’s properties (Principal’s properties) such as the existing buildings and foundations which are not insured as part of the Works. It would have a different limit of indemnity and level of excess. #</p> <p>{ 【(5)】 【(4)】 If the Contractor considers the amounts of insurance specified are inadequate to cover his obligations, he shall be at liberty to increase the amounts insured at his own expense. }</p>	<p>19(2) (a) The Main Contractor shall maintain in the joint names of the Employer and the Main Contractor insurances for such amounts of indemnity as may be specified by way of provisional sum items in the Contract Bills in respect of any expense, liability, loss, claim or proceedings which the Employer may incur or sustain by reason of damage to any property other than the Works caused by collapse, subsidence, vibration, weakening or removal of support or lowering of ground water arising out of or in the course of or by reason of the carrying out of the Works excepting damage:</p> <p>(i) caused by the negligence, omission or default of the Main Contractor, his servants or agents or of any sub contractor, his servants or agents;</p> <p>(ii) attributable to errors or omissions in the designing of the Works;</p> <p>(iii) which can reasonably be foreseen to be inevitable having regard to the nature of the work to be executed or the manner of its execution;</p> <p>(iv) which is at the risk of the Employer under clause 20[B] of these Conditions (if applicable);</p> <p>(v) arising from a nuclear risk or war risk;</p>
<p><i>Insurers and terms to be approved</i></p> <p>21.3 (1) The insurances under clause 21 shall be placed with insurers acceptable to both parties and approved in writing by the party not responsible for effecting the insurances.</p> <p>(2) The cover shall be in terms approved by the Architect but in any case cannot be beyond the best terms currently available.</p>	<p>19(2)...(b) Any such insurance as is referred to in the immediately preceding paragraph shall be placed with insurers to be approved by the Architect, and the Main Contractor shall deposit with him the policy</p>

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	<p style="text-align: center;">or policies and the receipts in respect of premiums paid.</p>
<p><i>Policies to be produced</i></p> <p>21.4 The party responsible for effecting the insurances under clause 21.2 shall provide evidence of cover to the other party prior to the {Commencement Date commencement of any part of the Works whether on or off-site} and shall produce the policies of insurance and the premium receipts for inspection and approval by the other party as soon as practicable afterwards.</p>	<p>19(1)...(b) As and when he is reasonably required so to do by the Architect the Main Contractor shall produce and shall cause any sub-contractor to produce for inspection by the Employer documentary evidence that the insurances required by this sub-clause are properly maintained, but on any occasion the Employer may (but not unreasonably or vexatiously) require to have produced for his inspection the policy or policies and receipts in question.</p>
<p><i>Event of failure to insure</i></p> <p>21.5 If either party defaults in effecting or in maintaining the insurance cover required by clause 21, the other party may effect and maintain this insurance and the premium shall be recoverable from the defaulting party as a debt. {If a Nominated Sub-Contractor defaults in effecting or in maintaining the insurance cover required by clause 21.1, the Contractor shall effect and maintain this insurance, otherwise the Employer may effect and maintain this insurance, and the premium shall in either case be recoverable from the defaulting party as a debt.}</p> <p># There is no mention of administrative charge. #</p>	<p>19(1)...(c) Should the Main Contractor or any sub-contractor make default in insuring or in continuing or in causing to insure as provided in this sub-clause the Employer may himself insure against any risk with respect to which the default shall have occurred and may deduct a sum or sums equivalent to the amount paid or payable in respect of premiums from any monies due or to become due to the Main Contractor.</p> <p>19(2)...(c) Should the Main Contractor make default in insuring or in continuing to insure as provided in this sub-clause the Employer may himself insure against any risk with respect to which the default shall have occurred and the amounts paid or payable by the Employer in respect of premiums shall not be set against the relevant provisional sum in the settlement of accounts under clause 30(5)(c) of these Conditions.</p>

<p style="text-align: center;">【SFBCwQ.2005】 [SFBCnQ.2006]</p>	<p style="text-align: center;">SFBCwQ.1986(2ndAmend.July1999)</p>
<p style="text-align: center;"><i>No prejudice to Contractor's indemnity</i></p> <p>21.6 The effecting and maintaining of insurances by either the Employer or the Contractor {(or his Nominated Sub-Contractors)} under clause 21 is without prejudice to the Contractor's obligation to indemnify the Employer under clause 20.</p> <p># This reinforces the principle that the insurance clause does not affect the liability clause. #</p>	
<p>{ <i>Deductibles and exclusions</i></p> <p>21.7 Any deductible or excess or exclusion included in the insurances under clause 21.2 shall be borne by the parties who would have been liable in the absence of the insurances in proportion to their contributing liabilities.}</p> <p># This suggested additional clause is to clarify the misconception that whoever lodges the insurance claim should bear the deductible or excess or exclusion. #</p>	