



Newsletter

September 2022

ON-DEMAND PERFORMANCE BONDS

The provision of Performance Bonds on construction projects is common place.

A Performance Bond ("Bond") is a financial instrument that is provided by a third party as a guarantee of the performance of the contractual obligations of one party to another, typically with a validity for the duration of the project or longer.

In construction projects, this typically involves the main contractor providing a Bond to the Employer, or sub-contractors providing Bond(s) to the main contractor. The Bond itself is typically provided by a financial institution ("Bond provider"), which is usually a bank, but can also be an insurance company.

Making a demand on a Bond does not occur often, as it is normally seen as a last resort on a contract, in that it signifies that the other party has failed to perform its obligations.

In TCGL's experience, many Contracts provide a template for the Bond wording and in a vast majority of cases the Contractor and/or the Bond provider will comply with that wording, with only limited amendments. Typically, the Bond to be provided is 'On Demand', as opposed to 'On Default', which simply requires that a written demand be made to the Bond provider, stating that the main contractor (or sub-contractor) is in default under the contract as well as the amount of loss and or damages sustained by the Employer (or the main contractor) as a result of that default, in which case, the Bond provider has to pay up to the amount stated in the Bond.

It seems that there can be exceptions to this principle, and the recent Hong Kong case involving the West Kowloon Cultural District Authority [West Kowloon Cultural District Authority v AIG Insurance Hong Kong Limited [2022] HKCA 975] has put the spotlight firmly on the importance of the wording in both the Bond and any demands made against the Bond.

The matter had been through the courts and the Court of First Instance held that the Employer's demand on the

Bond was valid. However, the matter went to the Hong Kong Court of Appeal where the issue was raised with the specific wording of the Bond. On that matter, the Court of Appeal concluded that based on the language of the Bond, notwithstanding that it was an 'On Demand' Bond, the written demand made on the Bond was invalid as it made reference to not only existing loss and damage, but also future loss and damage that the Employer would continue to suffer and sustain, which the Bond itself did not contemplate.

Unusually, it was the Bond provider, rather than the main contractor who was required to provide the Bond in favour of the Employer, who took issue with the demand and took the matter to court, as in this particular case the main contractor was in liquidation, which meant that the Bond provider had little chance of recovering the amount of the Bond.

Making a demand on a Bond is a serious step and the drafting of the demand itself, is clearly not quite as simple as people may envisage. The format of the Demand and to whom, where and when may all be a prerequisite, but importantly any Demand should also carefully consider any specific requirements stated in the Bond, such as any requirement to particularize amounts or the nature of the default and/or the amount of damages sustained by reason of the default.

As with all contractual documents, the importance of the wording cannot be underestimated and in this case it would seem that an expensive lesson has been learned that sometimes 'less is more'.

NEC OPTION X29

NEC introduced a new secondary Option X29 on Climate Change together with guidance notes for all NEC4 main contract and subcontract forms on 26 July 2022. The Option together with the guidance notes can be downloaded from NEC website.

<http://www.neccontract.com/news/final-version-of-x29-released>

HONG KONG CONSTRUCTION PROJECT NEWS

Census & Statistics Department's construction output statistics for the second quarter of 2022 (Q2) show:

The gross value of construction works performed by main contractors in Q2 of 2022 increased by 8.0% from a year earlier to HK\$59.5 billion. In real terms there was a 3.8% increase for Q2 of 2022 after removing the effect of price changes.

Private sector sites were up 10.2% for Q2 of 2022 to HK\$15.2 billion from a year earlier.

Public sector sites increased by 33.9% for Q2 of 2022 to HK\$22.8 billion over a year.

Gross value of construction works at locations other than construction sites (maintenance, decoration, repair, electrical installations, etc.) was down 11.5% for Q2 of 2022 at HK\$21.5 billion.

Residential Building projects accounted for the largest share in gross value for Q2 of 2022 at HK\$11.7 billion (up 4.1%) with transport projects being the largest in Structures & Facilities category and third overall at HK\$6.8 billion, down 24.0% from Q2 of 2021.

PROJECT NEWS

A HK\$3.64 billion contract has been awarded to Gammon Construction Limited to design and build the Kwun Tong Composite Development (KTCD) for Architectural Services Department.

The project includes a 25-storey High Block containing the Civil Service College and other training and medical facilities, as well as a 9-storey Low Block that will house a range of community and welfare amenities. The scope of works also includes basement car parks, elevated walkways, in-situ re-provisioning of the existing public transport interchange, building services installation, roads and external works, as well as other ancillary facilities.

The project commenced in 2022 and completion is expected to be in phases beginning from the end of 2026.

STAFF NEWS

We are pleased to welcome Alice Lo, Ivan Chan, Edgar Lui, Ian Cheung, Venus Ng and Ryan Kwun to our team.

Alice, Edgar and Venus have all joined us as Project Quantity Surveyors, Ian as a Quantity Surveyor, Ivan as an Assistant Quantity Surveyor and Ryan as a specialist E&M Quantity Surveyor.

All are currently assigned to provide contracts administration services on the 3RS project at Hong Kong International Airport, and bring with them a diverse range of experience from various disciplines and sectors of construction.

We welcome them all to our growing team!



通訊

2022年9月

見索即付履約保函

在建設項目中提供履約保函是很常見的事情。

履約保函（「保函」）是一種金融工具，由第三方提供擔保，保證合約的一方會履行其在合約的責任，通常有效期是項目建設時間或更長的時間。

在建設項目，通常是由承建商向發包方提交保函，或由分包商向承建商提交。履約保函一般由金融機構（「保函提供者」）提供，這些金融機構通常是銀行，但亦可以是保險公司。

要求兌現履約保函的情況其實並不常見，因為它通常被視為最後的手段，它意味着另一方未能履行其合約的責任。

根據TCGL過往的經驗，大部分合約都附有保函的範本，並且在絕大多數的情況下，承建商和/或保函提供者都採用該範本，或只作出少量的修改。一般情況下，保函都是「見索即付」保函而不是需要證明違約的保函。它只要求以書面向保函提供者提出，說明承建商（或分包商）違約及導致發包方（承建商）承受損失或損害的金額，至止，保函提供者便需要支付至保函規定的金額。

但是這個原則看來亦有例外。香港近期的一個案例涉及西九龍文化管理局 [West Kowloon Cultural District Authority v AIG Insurance Hong Kong Limited [2022] HKCA 975]，正正聚焦在保函用的文字及索賠函件用詞的重要性。

該案件先由原訟法庭裁定發包方對保函的索償是有效的。然而，當此案轉交到香港上訴法庭時，就出現保函內相關文字的爭議。在這個問題上，上訴法庭的結論是，雖然它是一個見索即付的履約保函，但是所提出的書面索償無效，因為該索償不僅提及已出現的損失和損害，而且還包括發包方在未來將繼續遭受的損失和損害，這是保函本身沒有設想到的。

不尋常的是，提出索償及進行訴訟的是保函提供者，而不是承建商，因為這件案件的情況特殊，承建商已經破產，意味著保函提供者幾乎沒有機會收回保證的金額。

就保函提出索賠是重要的一步，而且顯而易見草擬索賠的函件並不是大家想像的那麼簡單。索賠函件的格式以及對誰、在何時及何地提出都可能是先決條件，但更重要的是，任何的索賠都需要仔細考慮保函中的具體規定，例如任何要求詳列金額或具體說明違約性質和/或因違約而蒙受的損害的金額。

與所有合約文件一樣，不能低估用詞的重要性。在此案上，似乎得了一個昂貴的教訓，有時「少即是多」。

新工程合約 X29 選項

新工程合約於2022年7月26日推出了一套適用於新工程合約第四版的總包及分包合約的第二類選項，關於氣候變化的 X29 條款及指引說明。條款連同指引說明可以在以下新工程合約網站下載。

<http://www.neccontract.com/news/final-version-of-x29-released>

香港建築業統計

政府統計處2022年第二季(Q2)的建築業產量統計顯示：

2022年第二季度總承建商的建築工程總價值相比去年同期上升8.0%至595億港元。扣除價格變動的影響後，2022年第二季度的實際價值則上升3.8%。

2022年第二季度私人地盤相比去年同期上升10.2%，達到152億港元。

同期，公營地盤增加33.9%，至228億港元。

同期非地盤建造工程總值（保養、裝修、維修、電力裝置等）下降11.5%，至215億港元。

住宅建築項目在2022年第二季度的總價值中所佔份額最大，為117億港元（上升4.1%），運輸項目在其他建築物及設施類別中是最大及所有細類中的第三位，為68億港元，相比2021年第二季度下降24%。

項目信息

金門建築有限公司獲得建築署批出總值港幣36.4億元的「觀塘綜合發展項目」(KTCD)設計及建造合約。

項目包括一個樓高25層的公務員學院和其他培訓及醫療設施用途的高座，以及一個樓高9層容納一系列社區及福利設施的低座。工程內容還包括地庫停車場、高架行人道、原址重置現有公共運輸交匯處、屋宇設備裝置、道路及室外工程，和其他附屬設施。

工程已於2022年展開，預期於2026年底開始分階段竣工。

員工信息

The Contracts Group很高興歡迎 Alice Lo 小姐、Ivan Chan 先生、Edgar Lui 先生、Ian Cheung 先生、Venus Ng 小姐和 Ryan Kwun 先生加入我們的團隊。

Alice、Edgar 和 Venus 是項目工料測量師，Ian 是工料測量師，Ivan 是助理工料測量師，Ryan 是機電工料測量師。

他們全部都參予香港國際機場的3RS工程的合約管理，並各自帶來在建築界不同領域的工作經驗。

我們歡迎他們加入我們不斷壯大的團隊！

如果您的同事希望收到我們的通訊，請致電2529 1696或發送電子郵件至 info@contractsgroupltd.com