



PROCURE. MANAGE. DELIVER

# NEC4 ECC and ECC Hong Kong Edition compared – key differences

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## AGENDA

- Welcome and introductions
- Overview
- Core clauses
- Resolving and Avoiding Disputes
- Secondary Options
- Schedule of Cost Components
- Contract Data

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- Over **20 years** of experience in drafting, procuring and managing NEC contracts
- Tutor and examiner for NEC accreditations
- Key member of the NEC4 drafting team which included leading the drafting of all user guides (24 no. books) and drafting key elements of the ECC (upon which other NEC4 contracts were based) - 2017 & 2020 editions
- Drafted user guides for the Alliance Contract (2018) and NEC4 Facilities Management Contract (2021)
- Drafted Hong Kong public sector NEC ECC and TSC versions



## OVERVIEW – WHY ECC HONG KONG EDITION (ECC(HK))?

- Produced to
  - Better suit local legislation, procurement practices and dispute resolution regime
  - Take full advantage of the NEC features including plain language and the Scope
  - Improve document flow and cross-referencing
  - Improve readability, making it more accessible to non-government clients including that of subvented projects

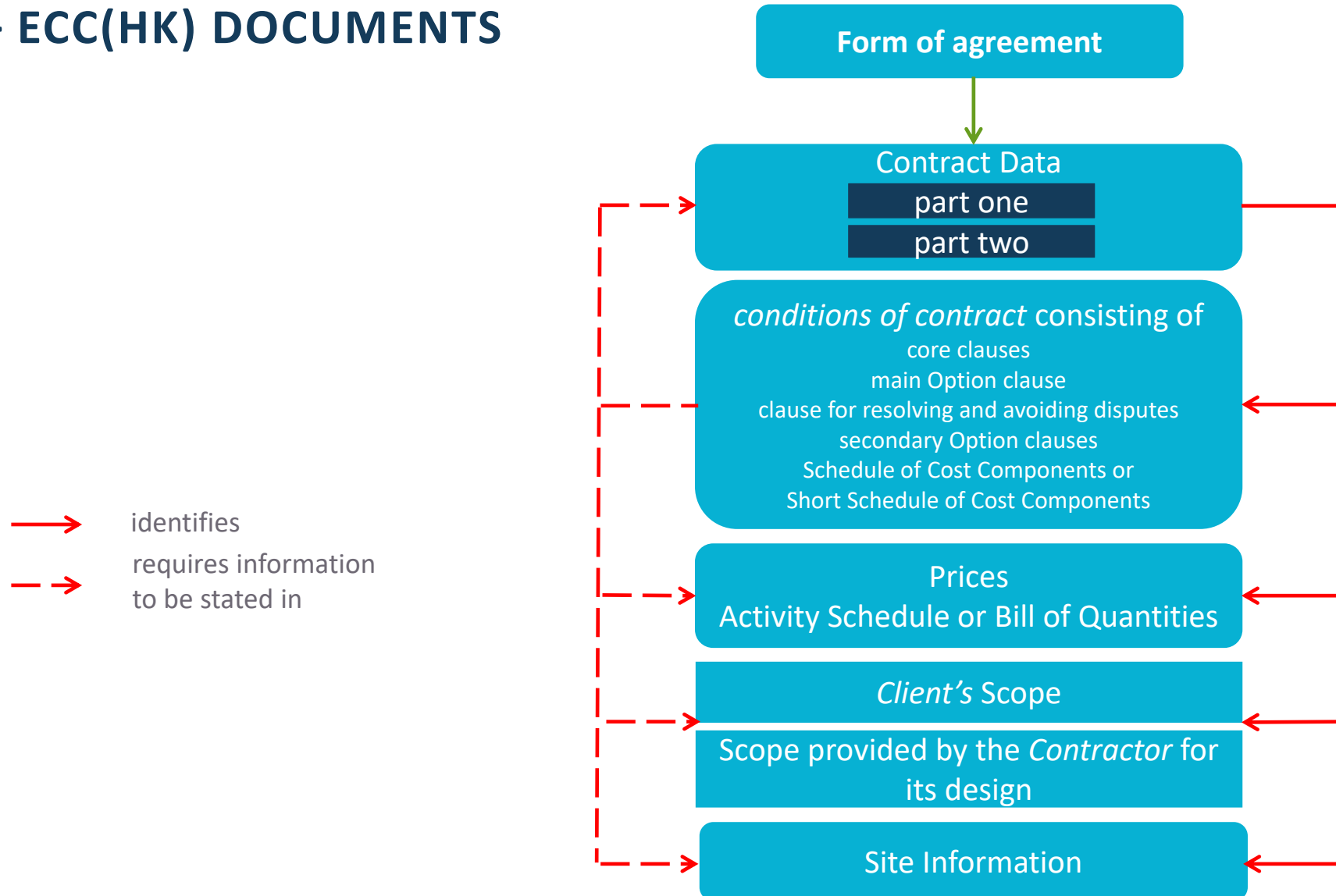
## OVERVIEW – ADDITIONAL CONDITIONS OF CONTRACT (ACC)

- A key part of developing the ECC(HK) was reviewing the existing ACC and standard amendments. Clauses have been
  - Incorporated into the ECC(HK)
  - Moved to DevB's generic Scope
  - Deleted as provided for elsewhere
  - Retained as ACC (Option Z clauses)

## OVERVIEW – PRINCIPLES

- NEC is a family of standard contracts, each of which has these characteristics
  - Provide greater stimulus to good management
  - Can be used in wide variety of commercial situations, for wide variety of types of work and in any location
  - Use language and structure which are straightforward and easily understood
  - Standardised between contracts
  - Flexible including allocation of risk and choice of secondary Options

## OVERVIEW – ECC(HK) DOCUMENTS



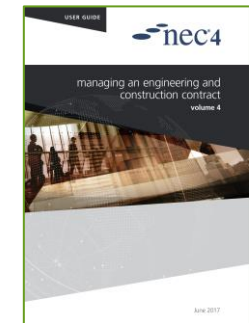
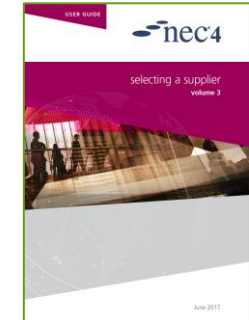
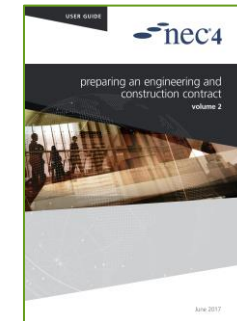
## OVERVIEW – ECC(HK) DOCUMENTS

- Contract Data
  - contains project specific information which is necessary to operate the contract including identifying the *conditions of contract*, Scope, Site Information and, if required, the Prices
  - identifies other information (that is not Scope, Site Information or Prices)
- Scope
  - specifies and describes the *works* and states any constraints on how the *Contractor Provides the Works* (cl 11.2(19))
- Site Information
  - describes the past and present conditions of the Site and its surroundings (cl 11.2(21))
- Prices (Activity Schedule or Bill of Quantities)
  - records the Prices and how they are adjusted in accordance with the contract



## OVERVIEW – ECC(HK) USER GUIDES

- Hong Kong Editions
  - For all contracts
    - Vol 1 Establishing a procurement and contract strategy
    - Vol 3 Selecting a supplier (applies to all NEC versions)
  - For the ECC Hong Kong Edition
    - Vol 2 Preparing an engineering and construction contract
    - Vol 4 Managing an engineering and construction contract



## OVERVIEW – ECC(HK) CONDITIONS OF CONTRACT

- Core clauses
  - 1 General
  - 2 The *Contractor's* main responsibilities
  - 3 Time
  - 4 Quality Management
  - 5 Payment
  - 6 Compensation events
  - 7 Title
  - 8 Liabilities and insurance
  - 9 Termination
- Main Options
  - A Priced contract with activity schedule
  - B Priced contract with bill of quantities
  - C Target contract with activity schedule
  - D Target contract with bill of quantities
  - E Cost reimbursable contract
  - F Management contract

## OVERVIEW – ECC(HK) CONDITIONS OF CONTRACT

- Resolving and Avoiding Disputes
  - Option W4 - used when adjudication, mediation and arbitration are the methods of dispute resolution (**new**)
- Secondary Options
  - X1 Price adjustment for inflation (used only with Options A, B, C and D)
  - X2 Changes in law
  - X3 Multiple currencies (used only with Options A and B)
  - X4 Ultimate holding company guarantee
  - X5 Sectional Completion
  - X6 Bonus for early Completion
  - X7 Delay damages
  - X8 Undertakings to the *Client* and Others

## OVERVIEW – ECC(HK) CONDITIONS OF CONTRACT

- Secondary Options (cont'd)
  - X9 Transfer of rights
  - X10 Information modelling
  - X11 Termination by the *Client*
  - X12 Multiparty collaboration (not used with Option X20)
  - X13 Performance bond
  - X14 Advanced payment to the *Contractor*
  - X15 The *Contractor's* design
  - X16 Retention (not used with Option F)
  - X17 Low performance damages
  - X18 Limitation of liability
  - X20 Key Performance Indicators (not used with Option X12)

## OVERVIEW – ECC(HK) CONDITIONS OF CONTRACT

- Secondary Options (cont'd)
  - X21 Whole life cost
  - X22 Early *Contractor* involvement (used only with Options C and E)
  - X29 Climate Change
  - X30 Innovation and Technology (**new**)
- Z *Additional conditions of contract*

## OVERVIEW – SUMMARY OF CHANGES COMPARED TO ECC4

Clause		Description	New s/c	Amended s/c	Replaced s/c
1	11	Identified and defined terms	4 no.	1 no.	1 no.
	12	Interpretation and the law	1 no.		
	18	Corrupt Acts	1 no.	3 no.	
	19	Prevention		1 no.	
2	22	Using the <i>Contractor's</i> design			1 no. (deleted)
	26	Subcontracting		2 no.	
	27	Other responsibilities		1 no.	
	28	Assignment		1 no.	
	29	Disclosure	1 no.	2 no.	
3	30	Starting, Completion and Key Dates		1 no.	
	35	Take over		1 no.	

## OVERVIEW – SUMMARY OF CHANGES COMPARED TO ECC4

Clause		Description	New s/c	Amended s/c	Replaced s/c
5	50	Assessing the amount due		3 no.	
	51	Payment		3 no.	
	53	Final assessment	1 no.	1 no.	2 no. (deleted)
6	60	Compensation events	1 no.	2 no.	1 no.
8	80	<i>Client</i> liabilities		1 no.	
	81	<i>Contractor's</i> liabilities		1 no.	
	82	Recovery of costs	1 no.		
	83	Insurance cover		2 no.	
9	90	Termination	1 no.		
	91	Reasons for termination		2 no.	
A, B	11	Identified and defined terms			1 no. (deleted)

## OVERVIEW – SUMMARY OF CHANGES COMPARED TO ECC4

Clause		Description	New s/c	Amended s/c	Replaced s/c
A, B	63	Assessing compensation events			1 no. (deleted)
B, D	60	Compensation events		1 no.	
C, D, E, F	11	Identified and defined terms		2 no.	
W1, 2 & 3		Resolving and avoiding disputes			44 no. (deleted)
W4	4.1 – 4.6	Resolving and avoiding disputes	23 no.		
X1	1.1, 1.2, 1.5	Price adjustments for inflation		5 no.	
X2	2.1, 2.2	Change in Law	2 no.	1 no.	
X7	7.1, 7.3, 7.4	Delay damages	1 no.	2 no.	
X14	14.1, 14.2	Advanced payment to the <i>Contractor</i>			2 no.
X16	16.1	Retention		1 no.	1 no. (deleted)
X30	30.1 – 30.5	Innovation and Technology	8 no.		



## OVERVIEW – SUMMARY OF CHANGES COMPARED TO ECC4

Clause		Description	New s/c	Amended s/c	Replaced s/c
SCC	13(i), 13(j)	People		2 no.	
SCC	24	Equipment			1 no. deleted
SCC / SSCC	5, 52, 55	Charges	1 no.	2 no.	
SCC / SSCC	61	Manufacture and fabrication			1 no.
SCC / SSCC	71	Design			1 no.
SCC / SSCC	9	Insurance premium	1 no.		
SSCC	11	People			1 no.
SSCC	21, 22, 26	Equipment		3 no.	4 no. deleted
Totals			47 no.	47 no.	7 no. replaced 55 no. deleted

## CORE CLAUSES - 1 GENERAL

- Defined terms - new
  - Code on Access to Information (new 11.2(2))
  - Independent Commission Against Corruption (ICAC) (new 11.2(12))
  - Public Accounts Committee (new 11.2(18))
  - Tier Subcontractor – covers first, second and third tiers of subcontracting (new 11.2(23))
- Defined terms - amended
  - Others – changed to align with Option W4 (11.2(14))
  - Disallowed Cost – changed to align with Option W4 and “acceptance or procurement procedure stated in the Scope” changed to “...stated in the contract” (C, D, E11.2(30) and F11.2(31))

## CORE CLAUSES - 1 GENERAL

- Interpretation and the law (new 12.5)
  - A third party cannot enforce a term of the contract under the Contracts (Rights of Third Parties) Ordinance (Cap. 623)
- Corrupt Acts (18)
  - Corrupt Act – definition changed to align with Prevention of Bribery Ordinance (Cap. 201) (11.2(6))
  - Tier Subcontractor expressly referenced
  - Obligation to notify the *Client* and ICAC as soon as they become aware (new 18.2)
- Prevention (19.1)
  - *Contractor* and *Project Manager* to discuss ways of dealing with event

## CORE CLAUSES – 2 THE CONTRACTOR'S MAIN RESPONSIBILITIES

- Subcontracting
  - Tier Subcontractor expressly referenced (26.1)
  - Reference to use of an NEC subcontract removed (26.3)
- Assignment
  - *Contractor* to obtain the *Client's* agreement before transferring the benefit (28.1)
- Disclosure
  - Tier Subcontractor expressly referenced (29.1 and 29.3)
  - Circumstances when *Client* can disclose information expressly stated (new 29.2)

## CORE CLAUSES – 3 TIME

- Completion
  - Default period (of one week) for certifying can be changed in Contract Data (30.2)
- Take over
  - Default period (of three weeks) for taking over the works after Completion can be changed in Contract Data (35.1)

## CORE CLAUSES – 5 PAYMENT

- Assessing the amount due
  - *Contractor* submits an application for payment two weeks before the assessment date (50)
  - Price of Work Done to Date – now forecast of what will have been paid one week after the next assessment date (11.2(34))
- Payment
  - *Project Manager* certifies the payment within two weeks of the assessment date (51.1)
  - Payment is subject to the *Client's* right of set off (51.1)
  - Interest is calculated on a simple interest basis (51.4)

## CORE CLAUSES – 5 PAYMENT

- Final assessment
  - *Contractor* submits a final application for payment within
    - four weeks of the *Supervisor* issuing the Defects Certificate
    - thirteen weeks of the *Project Manager* issuing a termination certificate or
    - a longer period to which the *Project Manager* has agreed (53.1)
  - The *Project Manager* makes an assessment and certifies a final payment within four weeks of the *Contractor's* application or when it should have been submitted (new 53.2)
  - Final payment is made within three weeks of the assessment or a different period stated in Contract Data (new 53.2)

## CORE CLAUSES – 6 COMPENSATION EVENTS

- Compensation events - new
  - One of the following weather conditions or its consequences affecting the Site
    - the hoisting of a tropical cyclone warning signal number 8 or above,
    - a Black, Red or Amber Rainstorm Warning or
    - an *additional weather condition* (60.1(13))
  - A shortage of labour which would have been unreasonable for an experienced contractor to have allowed for at the *tender closing date* (new 60.1(21))
- Compensation events - amended
  - Reference to Contract Date changed to *tender closing date* (60.1(12) & (19))
  - Default threshold (0.5% of the total of the Prices at the Contract Date) for an event can be increased in Contract Data (*compensation amount*) (B, D60.4)



## CORE CLAUSES – 6 COMPENSATION EVENTS

- People Rates (A, B11.2(28))
  - People Rates no longer form part of Defined Cost (i.e. Short Schedule of Cost Components (SSCC))
  - Clauses 11.2(28) and 63.16 (establishing new rates) removed and SSCC item 11 amended
  - Costs of people under Option A and B as per other main Options – i.e. “actual” costs subject to it being demonstrated they represent open market or competitively tendered prices

## CORE CLAUSES – 8 LIABILITIES AND INSURANCE

- *Client* liabilities
  - Strikes removed, so default is it's a *Contractor* liability (80.1, 5<sup>th</sup> bullet)
- *Contractor* liabilities
  - Additional *Contractor* liabilities can be stated in Contract Data (81.1)
- Recovery of cost
  - *Client* may recover sums for which the *Contractor* is liable to the *Client* under any other contracts with the *Client* (new 82.4)

## CORE CLAUSES – 8 LIABILITIES AND INSURANCE

- *Insurance table*
  - Table moved to Contract Data to provide greater flexibility as to which insurances are provided, who provides the insurance and the minimum amount of cover (83.2)
  - Tier Subcontractor expressly referenced

## CORE CLAUSES – 9 TERMINATION

- Termination
  - Without prejudice to any other rights and remedies of the Parties (new 90.5)
  - Reference to Contract Date changed to *tender closing date* (R21, 91.7)
  - Tier Subcontractor expressly referenced (R22, 91.8)

## RESOLVING AND AVOIDING DISPUTES

- Option W4 (new)

Issue	Dispute	Payment Dispute
Scope	Is any dispute between the Parties arising under or in connection with the contract and includes a Payment Dispute (W4.1(2))	Is a payment dispute as defined in the <i>security of payment provisions</i> (W4.1(4))
Notifying and referring a dispute	Is referred to the <i>Project Manager</i> by either Party. A Payment Dispute is not referred to the Project Manager if it has already been determined by the <i>adjudicator</i> (W4.2(1)&(2))	Is referred to the <i>adjudicator</i> by the <i>Contractor</i> in accordance with the <i>security of payment provisions</i> (W4.3(1))
Decision	The <i>Project Manager</i> notifies its decision within 4 weeks (W4.2(3))	The <i>adjudicator</i> notifies in accordance with the <i>security of payment provisions</i> (W4.3(2))

## RESOLVING AND AVOIDING DISPUTES

### • Option W4 (new)

Issue	Dispute	Payment Dispute
<b>Referral to Mediation</b>	The dissatisfied Party may refer the matter to Mediation in accordance with the <i>mediation rules</i> within 4 weeks (or longer period if both Parties agree) (W4.4(1))	The dissatisfied Party may refer the matter to Mediation in accordance with the <i>mediation rules</i> within 4 weeks (W4.4(2))
<b>Referral to arbitration</b>	A matter is referred in accordance with the Arbitration Ordinance within 13 weeks of the <ul style="list-style-type: none"> <li>• referral to Mediation,</li> <li>• refusal to mediate or termination of Mediation</li> <li>• period for referral to Mediation expires and neither Party has made a referral or</li> <li>• failure to reach a settlement through Mediation (W4.5(2))</li> </ul>	
<b>Decision</b>	The <i>arbitrator</i> conducts the arbitration in accordance with the <i>arbitration rules</i> and gives a decision (W4.5(4)&(5))	

## SECONDARY OPTIONS

- X1 Price adjustment for inflation
  - Index replaced with *index figure*
  - *Index figure* is the one applicable to the date 42 days before the date of assessment of the amount due (X1.1(2))
  - The table of proportions in Contract Data part 1 is replaced by the *schedule of proportions* provided by the *Contractor* (Contract Data part 2) (X1.1(3))
  - If the *index figure* changes after it has been used it is corrected in the next assessment (X1.2)

## SECONDARY OPTIONS

- X2 Change in Law
  - New defined terms
    - Change in Law is limit to those identified in the *list of enactments* (new X2.1(2))
    - Reference Date is ten days before the *tender closing date* (new X2.1(1))
  - A Change in Law is a compensation event if made
    - on or after the Reference Date or
    - before the Reference Date and
      - the commencement date is not known on the Reference Date and
      - the contract does not include an obligation to comply with the Change in Law on its commencement (X2.1(2) & X2.2)



## SECONDARY OPTIONS

- X7 Delay damages
  - If the rate of delay damages is reduced on partial take over, it is not reduced below the minimum rate stated in Contract Data (new X7.4)
- X14 Advanced payment to the *Contractor*
  - *Contractor* submits an Advanced Payment Statement which includes the amount and a declaration. The *Project Manager* certifies within one week and payment is made within three weeks. (new X14.1 & 14.2)
  - Requirement for bond removed

## SECONDARY OPTIONS

- X16 Retention
  - Amount retained does not exceed the *limit of amount retained* (X16.1)
  - Requirement for bond removed

## SECONDARY OPTIONS

- X30 Innovation and Technology (new)
  - Procedure is similar to early warnings
  - *Contractor or Project Manager* can propose changes to the Scope that enhances safety, supervision efficiency or decarbonisation (X30.1(1))
  - *Project Manager* records proposals in the I&T Register and issues within two weeks of first notification (X30.2 & 30.3(1))
  - First innovation and technology meeting held within one week of issuing the I&T Register. Later meetings held when either party instructs the other to attend (X30.3(1)&(2))
  - Those attending co-operate in considering proposals, deciding actions, reviewing and perhaps removing matters from I&T Register (X30.4)
  - If a proposal that is being adopted requires the Scope to change, the *Project Manager* instructs accordingly (this may trigger a compensation event) (X30.5)

## SCHEDULE OF COST COMPONENTS

- People
  - Pension costs excluded including the Mandatory Provident Fund Scheme Ordinance (Cap. 485) and Occupational Retirement Schemes Ordinance (Cap. 426) (SCC 13 & SSCC 11)
  - People Rates removed so costs of people under Option A and B as per other main Options – i.e. “actual” costs subject to it being demonstrated they represent open market or competitively tendered prices (SSCC 11)

## SCHEDULE OF COST COMPONENTS

- Equipment
  - Only tendered rates for purchased Equipment now included (SCC 23)
  - All other tendered rates removed including
    - for special Equipment (SSC)
    - published list (SSCC)
    - other Equipment that is not in the published list (SSCC)
  - Consequently “actual” costs to be used subject to it being demonstrated they represent open market or competitively tendered prices

## SCHEDULE OF COST COMPONENTS

- Charges
  - Payments to public authorities exclude those related to
    - Pneumoconiosis Compensation Fund Board under the Pneumoconiosis and Mesothelioma (Compensation) Ordinance (Cap. 360)
    - Construction Industry Council under the Construction Workers Registration Ordinance (Cap. 583) and Construction Industry Council Ordinance (Cap. 587). (SCC & SSCC 52)
  - Now includes the cost of providing accommodation for the *Project Manager* and *Supervisor* (new SCC & SSCC 55)

## SCHEDULE OF COST COMPONENTS

- Manufacturing and fabrication (SCC & SSCC 61)
  - Tendered rates removed
  - Consequently “actual” costs to be used subject to it being demonstrated they represent open market or competitively tendered prices
- Design (SCC & SSCC 71)
  - Tendered rates removed
  - Consequently “actual” costs to be used subject to it being demonstrated they represent open market or competitively tendered prices
- Insurance premiums (new SCC & SSCC 91)
  - Cost of premiums for insurances stated in insurance table now included

## CONTRACT DATA

- Various changes to reflect the changes to the *conditions of contract* including
  - 13 no. new identified terms
  - Other new entries include
    - Alternate period within which the date of Completion is certified
    - Alternate period within which the *Client* takes over the works
    - Additional *Contractor's* liabilities
    - Minimum rate of delay damages