

SAMPLE SPECIAL CONDITIONS OF CONTRACT
FOR
NOISE BARRIERS WITH TRANSPARENT PANELS

- SCC Y
- (1) Further to General Conditions of Contract Clause 4(4) the sub-contracting of the Noise Barrier Works (as defined in the Particular Specification) shall not relieve the Contractor from any liability or obligation under the Contract and he shall be responsible for the acts, defaults and neglects of the Noise Barrier Works Sub-Contractor (as defined in the Particular Specification)("NBWSC") or the agents, employees or workers of the NBWSC as fully as if they were the acts, defaults or neglects of the Contractor.
 - (2) The Noise Barrier Works shall remain in a condition conforming to the requirements set out in the Particular Specification for a period of 10 calendar years commencing from the date of completion stated in the certificate of completion with respect to the Works (except Landscape Softworks and Establishment Works) issued pursuant to General Conditions of Contract Clause 53.
 - (3) For the purposes of this Clause, in the event of different certificates of completion having been issued for different Sections or parts of the Works (except Landscape Softworks and Establishment Works) pursuant to General Conditions of Contract Clause 53, the expression "certificate of completion" shall mean the last of such certificates issued.
 - (4) The Contractor undertakes that in the event that the Noise Barrier Works fail to remain in the condition conforming to the requirements set out in the Particular Specification for a period of 10 calendar years commencing from the date of completion stated in the certificate of completion with respect to the Works (except Landscape Sofeworks and Establishment Works) issued pursuant to General Conditions of Contract Clause 53 as stated in sub-clause (2) above, it shall as soon as reasonably practicable after receipt of notification by the Employer, carry out at its own cost all repair or replacement work including emergency and Temporary Works which are necessary in the opinion of the Employer to ensure that the Noise Barrier Works conform to the requirements set out in the Particular Specification. All repair or replacement work including emergency and Temporary Works shall be carried out by the Contractor at times as specified by the Employer so as not to interfere with the proper use and functioning of the completed Works. In the event that such repair or replacement work is not carried out by the Contractor in accordance with this sub-clause, the Employer may, without prejudice to any other remedy, proceed to carry out such work by its own workers or by other contractors and the cost properly incurred by the Employer in having such work carried out shall be a debt due to the Employer from the Contractor and shall be paid to the Employer by the Contractor immediately on demand.
 - (5) The Contractor shall enter into a sub-contract with the NBWSC in the Standard Form of Domestic Subcontract published by the Hong Kong Construction Association and shall within 21 days of so doing give to the Employer a copy of the said executed sub-contract with only such amendments as may previously have been approved by the Employer in writing.
 - (6) The Contractor shall be responsible for submitting to the Employer within 21 days of the appointment of the NBWSC a Deed of Warranty duly

executed by the NBWSC in favour of the Employer in the form appearing at Appendix [] with only such amendments as may previously have been approved by the Employer in writing.

- (7) Notwithstanding the provisions of the General Conditions of Contract Clause 53, the submission of the Deed of Warranty referred to in sub-clause (6) above is a condition precedent to the issue of the certificate of completion.
- (8)
 - (a) Except in respect of those intellectual property rights referred to in sub-clause (c), the Contractor hereby undertakes and warrants to the Employer that it is the sole legal and beneficial owner of all intellectual property rights subsisting in the design of the Noise Barrier Works.
 - (b) Upon the issue of the certificate of completion of the Works (except Landscape Softworks and Establishment Works) or after termination, abandonment or breach of Contract, the Contractor shall be deemed to have granted to the Employer and the subsequent owners or occupiers of the Works free of all fee a transferable, non-exclusive and irrevocable licence (carrying the right to grant sub-licences) to utilize the design of the Noise Barrier Works in connection with the execution of the Works and/or the subsequent alteration, extension and maintenance thereof and for no other purpose whatsoever without the prior written agreement of the Contractor.
 - (c) To the extent that beneficial ownership of any intellectual property rights in the Contractor's Design is vested in anyone other than the Contractor or the Employer, the Contractor shall procure that the relevant beneficial owner shall grant a licence together with an indemnity to the Employer and the subsequent owners or occupiers of the works upon the same terms mutatis mutandis as those set out in sub-clauses (b) and (f) respectively.
 - (d) For the avoidance of doubt, any licence and indemnity granted pursuant to this Clause shall not be determined if the Contractor shall for any reason cease to be employed in connection with the Works.
 - (e) The Contractor shall at the request of the Employer, do such acts and execute all such deeds and documents (or procure that the same be done or executed) as the Employer or the subsequent owners or occupiers of the Works may require for vesting in the Employer and the subsequent owners or occupiers of the Works all or any of the rights referred to in this Clause. The Contractor shall bear its own costs and expenses in relation thereto.
 - (f) The Contractor hereby indemnifies the Employer against all claims, proceedings, actions, damages and losses incurred or sustained by the Employer arising from the use of the design of the Noise Barrier Works (irrespective of whether the intellectual property rights therein are owned by the Contractor or other parties) by the Employer for purposes referred to in sub-clause (b). The Contractor shall at its own cost grant a like indemnity to the subsequent owners or occupiers of the Works upon request of the Employer.

Form of Sub-contractor's Warranty for Noise Barrier

THIS DEED OF AGREEMENT

is made the [] day of [] []

BETWEEN

(1) [] [whose registered office is at] / [of]
[] (the Sub-contractor); and

(2) The Government of the Hong Kong Special Administrative Region (the Employer).

WHEREAS

- (A) By a contract no. (the Contract) made between the Employer and (the Contractor) and dated the [] day of [] [] the Contractor agreed to execute and complete certain works as more particularly described in the Contract relating to _____ (the Works) upon the terms and conditions contained in the Contract.
- (B) The Sub-contractor has had an opportunity of reading and noting the provisions of the Contract (save for those parts of confidential commercial nature).
- (C) By a contract dated [] (the Sub-contract) made between the Contractor and the Sub-contractor, the Sub-contractor agreed to *design, manufacture, supply and *construct and *supervise the Noise Barrier Works forming part of the Works. The Noise Barrier Works are defined in the Particular Specification.
- (D) Pursuant to the terms of the Contract, the Contractor agreed to procure the provision of a Warranty on the terms and conditions now set out and executed by the Sub-contractor.
- (E) At the request of the Contractor, the Sub-contractor agreed to provide this Warranty.

NOW IT IS HEREBY AGREED AS FOLLOWS :

1. The Sub-contractor hereby warrants and undertakes to the Employer that :
- (a) it has executed and completed and will execute and complete the [] [depends on services provided in respect of the Noise Barrier Works] of the Noise Barrier Works, and it has carried out and will carry out each and all of the obligations, duties and undertakings of the Sub-contractor under the Sub-contract when and if such obligations, duties and undertakings, shall become due and performable, in accordance with the terms of the Sub-contract (as the same may from time to time be varied or amended with the consent of the Employer); and
- (b) it will supply the Employer with all information as the Employer may reasonably require from time to time in relation to the progress of the [] [depends on services provided in respect of the Noise Barrier Works] construction of the Noise Barrier Works.

2. Without limiting the Sub-contractor's obligations and liabilities under Clause 4 hereof, the Sub-contractor undertakes to indemnify the Employer against each and every liability which the Employer may have to any person whatsoever and against any claims, demands, proceedings, loss, damages, costs and expenses sustained, incurred or payable by the Employer provided that the Sub-contractor shall have no greater liability to the Employer by virtue of its undertaking under this Clause 2 than the liability of the Contractor to the Employer under the Contract in so far as and to the extent that the same has arisen by reason of any breach by the Sub-contractor of its obligations, duties and undertakings under the Sub-contract.
3. Without prejudice to the generality of Clauses 1 and 2 hereof, the Sub-contractor further warrants :-
 - (a) that the [] [depends on services provided in respect of the Noise Barrier Works] shall be suitable for use as part of the Works;
 - (b) that the [] [depends on services provided in respect of the Noise Barrier Works] shall conform to the performance requirements set out in the Particular Specification for a period of ten years from the date of completion stated in the certificate of completion with respect to the Works (except Landscape Softworks and Establishment Works) issued pursuant to the General Conditions of Contract Clause 53;
 - (c) that the materials, goods and workmanship supplied by the Sub-contractor in connection with the Noise Barrier Works shall be and remain of good quality and be fit for the purposes for which they are intended; and
 - (d) that all reasonable skill, care and diligence has been and will be exercised in connection with the design of the Noise Barrier Works (if the design is carried out by the Sub-contractor).
4.
 - (a) The Sub-contractor undertakes that in the event of a failure or defect in the Noise Barrier Works discovered at any time during the period referred to in Clause 3(b), it shall as soon as reasonably practicable after receipt of notification by the Employer, carry out at its own cost all repair or replacement work including emergency and Temporary Works which is necessary in the opinion of the Employer to ensure that the Noise Barrier Works conforms to the warranties set out in Clause 3 hereof. All repair or replacement work including emergency and Temporary Works shall be carried out by the Sub-contractor at times as specified by the Employer so as not to interfere with the proper use and functioning of the completed Works. In the event that such repair or replacement work is not carried out by the Sub-contractor in accordance with this Clause 4(a), the Employer may, without prejudice to any other remedy, proceed to carry out such work by its own workers or by other contractors and the cost properly incurred by the Employer in having such work carried out shall be a debt due to the Employer from the Sub-contractor and shall be paid to the Employer by the Sub-contractor immediately on demand.
 - (b) The Sub-contractor undertakes to indemnify the Employer against all losses and claims for injury or damage to any person or property whatsoever which may be caused by any failure or defect in the Noise Barrier Works to conform to the warranties set out in Clause 3 hereof and against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto.
 - (c) The Sub-contractor undertakes to make good or, at the option of the Employer, pay to the Employer the cost of making good any damage, loss or injury which may occur to any property of the Employer and undertakes to recompense the Employer in respect of any damage, loss or injury which may occur to any employee of the Employer caused by and

failure or defect in the Noise Barrier Works to conform to the warranties set out in Clause 3 hereof in the Noise Barrier Works.

(d) Provided that nothing in Clauses 4(b) and (c) shall be deemed to render the Sub-contractor liable for or in respect of or to indemnify the Employer against any compensation or damages for or with respect to :

(i) failure or defect in the Noise Barrier Works caused by work which was not constructed by the Sub-contractor, or

(ii) failure or defect in the Noise Barrier Works caused by repair, maintenance or alteration to the Noise Barrier Works (other than the repair or replacement work carried out by the Employer's own workers or other contractors in accordance with Clause 4(a) hereof) done after the date of completion stated in the certificate of completion with respect to the Works (except Landscape Softworks and Establishment Works) issued pursuant to the provisions of the Contract by persons other than the Sub-contractor or its servants or agents.

or for or in respect of all claims, demands, proceedings, damages, costs, charges and expenses in respect thereof or in relation thereto.

5. In the event of different certificates of completion having been issued for different Sections or parts of the Works (except Landscape Softworks and Establishment Works) pursuant to General Condition of Contract Clause 53, the expression "certificate of completion" shall, for the purpose of Clause 3(b), Clause 4(d)(ii) and Clause 9(b), means the last of such certificates issued.

6. No allowance of time by the Employer hereunder or by the Contractor under the Sub-contract nor any forbearance or forgiveness in or in respect of any matter or thing concerning this Agreement or the Sub-contract on the part of the Employer or the Contractor, nor anything that the Employer or the Contractor may do or omit or neglect to do, shall in any way release the Sub-contractor from any liability under this Agreement.

7. The Sub-contractor agrees that it will not without first giving the Employer not less than twenty-one (21) days' prior notice in writing exercise any right it may have to terminate the Sub-contract or treat the same as having been repudiated by the Contractor or withhold performance of its obligations, duties and undertakings under the Sub-contract.

8. (a) In the event that the Contract or the employment of the Contractor under the Contract is terminated for any reason whatsoever and if so requested by the Employer in writing within twenty-one (21) days of such termination, the Sub-contractor shall carry out and complete its obligations under this Agreement and shall enter into a novation agreement with the Employer and the Contractor in which the Sub-contractor will undertake inter alia to perform the Sub-contract and be bound by its terms and conditions as if the Employer had originally been named as a contracting party in place of the Contractor. The said novation agreement will be in such form as the Employer may reasonably require.

(b) In the event that the Employer does not require the Sub-contractor to enter into a novation agreement as required by sub-clause (a) of this Clause, the Sub-contractor shall have no claim whatsoever against the Employer for any damage, loss or expense howsoever arising out of or in connection with this Agreement.

9. (a) Except in respect of those intellectual property rights referred to in sub-clause (c), the Sub-contractor hereby undertakes and warrants to the Employer that it is the sole legal and beneficial owner of all intellectual property rights subsisting in the design of the Noise Barrier Works.
 - (b) Upon the issue of the certificate of completion of the Works (except Landscape Softworks and Establishment Works) or after termination, abandonment or breach of Contract, the Sub-contractor shall be deemed to have granted to the Employer and the subsequent owners or occupiers of the Works free of all fee a transferable, non-exclusive and irrevocable licence (carrying the right to grant sub-licences) to utilize the design of the Noise Barrier Works in connection with the execution of the Works and/or the subsequent alteration, extension and maintenance thereof and for no other purpose whatsoever without the prior written agreement of the Sub-contractor.
 - (c) To the extent that beneficial ownership of any intellectual property rights in the design of the Noise Barrier Works is vested in anyone other than the Sub-contractor, the Sub-contractor shall procure that the relevant beneficial owner shall grant a licence together with an indemnity to the Employer and the subsequent owners or occupiers of the Works upon the same terms mutatis mutandis as those set out in sub-clauses (b) and (f) respectively.
 - (d) For the avoidance of doubt, any licence and indemnity granted pursuant to this Clause shall not be determined if the Sub-contractor shall for any reason cease to be employed in connection with the Works.
 - (e) The Sub-contractor shall at the request of the Employer, do such acts and execute all such deeds and documents (or procure that the same be done or executed) as the Employer or the subsequent owners or occupiers of the Works may require for vesting in the Employer and the subsequent owners or occupiers of the Works all or any of the rights referred to in this Clause. The Sub-contractor shall bear its own costs and expenses in relation thereto.
 - (f) The Sub-contractor hereby indemnifies the Employer against all claims, proceedings, actions, damages and losses incurred or sustained by the Employed arising from the use of the design of the Noise Barrier Works (irrespective of whether the intellectual property rights therein are owned by the Sub-contractor or other parties) by the Employer for purposes referred to in sub-clause (b). The Sub-contractor shall at its own cost grant a like indemnity to the subsequent owners or occupiers of the Works upon request of the Employer.
10. In the event of any ambiguity or conflict between the terms of the Sub-contract and this Agreement, the terms of this Agreement shall prevail.
 11. The provisions of this Agreement shall be without prejudice to and shall not be deemed or construed so as to limit or exclude any rights or remedies which the Employer may have against the Sub-contractor whether in tort or otherwise.
 12. The Employer shall be entitled to assign the benefit of this Agreement at any time without the consent of the Sub-contractor being required.
 13. All documents arising out of or in connection with this Agreement shall be served :-
 - (1) upon the Employer at [] marked for the
attention of [] and

(2) upon the Sub-contractor, at [] Hong Kong

14. The Employer and the Sub-contractor may change their respective nominated addresses for service of documents to another address in Hong Kong but only by prior written notice to each other. All demands and notices must be in writing.

15. This Agreement shall be governed by and construed in all respects according to the laws for the time being in force in the Hong Kong Special Administrative Region.

16. (a) Any dispute or difference of any kind whatsoever between the Employer and the Sub-contractor arising under out of or in connection with this Agreement shall be referred to arbitration in accordance with the provisions of the Arbitration Ordinance or any statutory modification thereof for the time being in force and any such reference shall be deemed to be a submission to arbitration within the meaning of such Ordinance. The reference shall be a domestic arbitration for the purpose of Part II of the Arbitration Ordinance (Cap. 341). The Hong Kong International Arbitration Centre Domestic Arbitration Rules (the Arbitration Rules) shall apply to any arbitration instituted in accordance with this Clause 16 unless the parties agree to the contrary. Notwithstanding Article 8.2 and Article 13 of the Arbitration Rules, the place of meetings and hearings in the arbitration shall be the Hong Kong Special Administrative Region unless the parties otherwise agree.

(b) 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.

- (c) In the event that the Employer is of the opinion that the issues in such a dispute or difference will or may touch upon or concern a dispute or difference arising under or in connection with the Contract (the Contract Dispute) then provided that an arbitrator has not already been appointed pursuant to Clause 16(a), the Employer may by notice in writing to the Sub-contractor require and the Sub-contractor shall be deemed to have consented to the referral of such dispute or difference to the arbitrator to whom the Contract Dispute has been or will be referred.
- (d) Save as expressly otherwise provided, the arbitrator shall have full power to open up, review and revise any decision, opinion, instruction, notice, order, direction, withholding of approval or consent, determination, certificate, statement of objection, assessment or valuation of the Engineer or the Contractor relating to the dispute or difference.

* - Delete if not applicable.

IN WITNESS whereof this Agreement has been executed as a deed on the date first above written.

(a) SEALED with the COMMON SEAL of)
[name of the Sub-contractor] and SIGNED by)
[] its [director(s) or director and secretary or)
person(s) authorized to sign the contract by its board of)
directors]* in the presence of :)
.....)
.....)
[Name])
[Occupation])
[Address])

OR

(b) SIGNED, SEALED AND DELIVERED)
by [the Sub-contractor] by [])
his/her/its* attorney under power of attorney dated)
[] in the presence of :)
.....)
.....)
[Name])
[Occupation])
[Address])

OR

(c) SIGNED, SEALED AND DELIVERED)
by [name of sole proprietor])
trading as [name of the firm] in the presence of :)
.....)
.....)
[Name])
[Occupation])
[Address])

SIGNED, SEALED AND DELIVERED)
by the Employer by)
[name and appointment of officer])
in the presence of :)
.....)
.....)
[Name])
[Occupation])
[Address])

Note :

- (a) For use where a sub-contractor which is an incorporated company executes under its common seal.
- (b) For use where a sub-contractor, whether a firm or an incorporated company, executes through an attorney.
- (c) For use where an individual sub-contractor is a sole proprietor or where all partners of a firm execute.

* Select the correct expression for use. If none is applicable, insert an appropriate expression.