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Works Bureau Technical Circular No. 4/99

**Construction Mediation Rules (1999 Edition) and
Administrative Guidelines**

Scope

This Circular promulgates "The Government of the Hong Kong Special Administrative Region Construction Mediation Rules (1999 Edition)", which have been prepared in the light of experience gained in using mediation in the resolution of disputes; and replaces the Hong Kong Government Mediation Rules (1989)". The Circular also includes updated Administrative Guidelines for mediation.

Effective Date

2. This Circular takes immediate effect.

Effect on Existing Circulars

3. This Circular supersedes WBTC No. 11/91 and WBTC No. 24/92.

Policy

4. The Government of the Hong Kong Special Administrative Region Construction Mediation Rules (1999 Edition) (the Rules) shall be those given at Appendix A to this Circular. The Administrative Guidelines at Appendix B shall be followed as far as practicable. Reference should also be made to the Works Bureau publication "Guidelines for Claims Management and Conduct of Negotiations" (December 1997) for guidance on the preparation for and conduct of negotiation within the mediation process.

5. For existing contracts which specify the use of mediation rules other than the Rules, departments should attempt to agree with the contractor to adopt the Rules at Appendix A to this Circular by means of a supplemental agreement to the contract.

6. In existing contracts where there is no provision for mediation, departments are nevertheless encouraged to consider mediation as a means for resolving disputes. If the department and the contractor agree, mediation using the Rules should be adopted by means of a supplemental agreement to the contract. The Legal Advisory Division of Works Bureau (LAD/WB) should be consulted in all cases on the procedures.

(W S Chan)
Deputy Secretary (Works Policy)

**The Government of the Hong Kong Special Administrative Region
Construction Mediation Rules (1999 Edition)**

Rule 1. Definition of mediation

Mediation under these Rules is a confidential, voluntary and non-binding dispute resolution process in which a neutral person, "the mediator", helps the parties to reach a negotiated settlement.

Rule 2. Application of the Rules

These Rules apply to the mediation of present or future disputes where the parties seek amicable settlement of such disputes and where, either by stipulation in their contract or by agreement, they have agreed that these Rules shall apply. The parties may agree to vary these Rules at any time.

Rule 3. Initiation of the mediation process

If either party is dissatisfied with a decision of the Architect/Engineer, or if the Architect/Engineer fails to give a decision in the time required under the contract, either party may initiate the mediation process by a written request to the other party with a copy to the Architect/Engineer. Such request shall contain a brief self-explanatory statement of the nature of the dispute, the amount claimed or remedy sought and the name of a person or persons nominated to act as mediator.

Rule 4. Response to request for mediation

The party which receives a request for mediation shall notify the other party, within 28 days after receipt of the request, whether or not it agrees to participate in the mediation and if so whether the person or persons nominated to act as mediator are acceptable. If the person or persons nominated are not acceptable, the parties shall attempt to agree a suitable mediator within 14 days of acceptance of the request for mediation. The absence of any reply within the time specified shall be treated as a refusal to mediate.

Rule 5. Appointment of the mediator

Where the parties agree on a mediator and that person agrees to act as mediator, the mediation shall then proceed in accordance with these Rules. If the parties fail to agree within the time stipulated in Rule 4 either party may request the Hong Kong International Arbitration Centre (HKIAC) to appoint a suitable mediator.

Rule 6. Disqualification of the mediator

No person shall act as mediator where that person has any financial or personal interest in the outcome of the mediation, except with consent of the parties. Before accepting appointment the proposed mediator shall disclose to the parties and to the HKIAC (if the appointment has been made by the HKIAC under Rule 5), any circumstances likely to create a presumption of bias or prevent a prompt resolution of the dispute. In the case of a proposed mediator to be appointed by the HKIAC, the HKIAC shall immediately advise the parties. If either party objects to the proposed mediator within 7 days of the receipt of the proposed appointment by the HKIAC he shall not be appointed. In such case the HKIAC shall appoint another suitable mediator.

Rule 7. The mediation process

The mediator shall commence the mediation as soon as possible after his appointment and shall endeavour to conclude the mediation within 42 days. The mediator's appointment shall not extend beyond a period of three months without the consent of both parties.

Rule 8. Role of the mediator

The mediator may conduct the mediation in such manner as he considers appropriate, taking into account the circumstances of the case, the wishes of the parties and the need for a speedy settlement of the dispute. The mediator may communicate with the parties together or with each party separately.

Rule 9. Role of the parties

Each party shall co-operate in good faith with the mediator. Either party may request a private meeting with the mediator at any time.

Rule 10. Representation

The parties may be represented or assisted by persons of their choice. Each party shall notify in advance the names and the role of such persons to the mediator and the other party.

Rule 11. Termination of the mediation

The mediation process shall come to an end:

- (a) upon the signing of a settlement agreement by the parties; or
- (b) upon the written advice of the mediator after consultation with the parties that in his opinion further attempts at mediation are no longer justified; or
- (c) upon written notification by either party at any time to the mediator and the other party that the mediation is terminated.

Rule 12. Confidentiality

Mediation is a private and confidential process and every aspect of communication for the purpose of or related to the mediation process shall be without prejudice. Confidentiality also extends to the settlement agreement except where its disclosure is necessary for implementation or enforcement.

The parties shall not rely on or introduce as evidence in any subsequent arbitral or judicial proceedings:

- (a) any oral or written exchanges within the mediation between either party and the mediator or between either party;
- (b) any views expressed or suggestions made within the mediation either by the mediator or either party in respect of a possible settlement of the dispute;
- (c) any admission made by a party within the mediation;
- (d) the fact that either party had or had not indicated a willingness to accept any suggestion or proposal for settlement by the mediator or by the other party; and
- (e) any documents brought into existence for the purpose of the mediation including any notes or records made in connection with the mediation by the mediator or either party.

Rule 13. Costs

Unless otherwise agreed, each party shall bear its own costs regardless of the outcome of the mediation or of any subsequent arbitral or judicial proceedings. All other costs and expenses shall be borne equally by the parties and the parties shall be jointly and severally liable to pay to the mediator such costs, including:

- (a) the mediator's fees and expenses;
- (b) expenses for any witnesses or expert advice or opinion requested by the mediator with the consent of the parties; and
- (c) any administrative costs in support of the mediation.

Before the commencement of the mediation, the mediator may require the parties to deposit such portion of the anticipated costs and expenses as he thinks appropriate. He may at any time during the mediation require the parties to make further deposits to cover any additional anticipated fees and expenses. Any surplus funds deposited shall be returned to the parties at the conclusion of

the mediation.

Rule 14. Mediator's role in subsequent proceedings

The parties undertake that the mediator shall not be appointed as arbitrator or representative or counsel of either party in any subsequent arbitration or judicial proceedings whether arising out of the mediation or any other dispute in connection with the same contract. Neither party shall be entitled to call the mediator as a witness in any subsequent arbitration or judicial proceedings arising out of the same contract.

Rule 15. Exclusion of liability

The parties jointly and severally release, discharge and indemnify the mediator and the HKIAC in respect of all liability whatsoever, whether involving negligence or not, from any act or omission in connection with or arising out of or relating in any way to any mediation conducted under these Rules, save for the consequences of fraud or dishonesty.

**Administrative Guidelines for
Mediation in Construction Disputes**

When to Mediate

1. Following the referral of a contractual dispute to the Architect/Engineer, and if either party is dissatisfied with the decision of the Architect/Engineer, or if the Architect/Engineer fails to give a decision as required under the “Settlement of disputes” Clause, then either party may request that the dispute be referred to mediation. Whether or not to seek mediation or agree to the Contractor’s request to mediate rests with the Director of the works department administering the contract (the Director).

Policy

2. There may be instances where mediation is not considered appropriate, or where the claim appears to be without substance. However, in all cases the merits of the dispute should be given careful consideration before deciding whether to agree to or to refuse mediation. The policy is to implement mediation wherever it is possible that a dispute may be resolved speedily and at less cost to government should the dispute escalate to formal arbitration or litigation. In an ongoing contract this should also avoid unnecessary escalation of the dispute or festering of the relationship. In a contract where a dispute has already been referred to arbitration or litigation, mediation may still provide a cheaper, speedier and more acceptable solution.

Initiation by Government

3. Any request for mediation initiated by government should be submitted to the Director after first obtaining Legal Advisory Division of Works Bureau (LAD/WB) advice. The Director may then initiate mediation in accordance with Rule 3 of the Rules. The formal mediation request should be copied to S for Tsy, S for W (Attn : PGC/LAD and PAS(WP&S)) and the Architect/Engineer.

Initiation by the Contractor

4. On receiving a request for mediation from the Contractor, the Director or an officer at D2 rank or above delegated by him shall, in accordance with Rule 4 of the Rules, advise the Contractor within 28 days after receipt of the mediation request whether he is willing to participate in the mediation. The Director or the officer delegated by him shall notify

LAD/WB promptly of any such request. A copy of his response to the Contractor must be copied to S for Tsy, S for W (Attn : PGC/LAD and PAS(WP&S)) and the Architect/Engineer.

Defining a Request for Mediation

5. With reference to Rule 3 of the Rules, a request for mediation shall be formally recognised as such only if submitted in writing by the Contractor to the Director or an officer delegated by him, or by the Director or an officer delegated appointed by him to the Contractor. Any request for mediation received by the project officer must be referred immediately to the Director.

Consultation

6. The department shall liaise with LAD/WB on the extent to which LAD/WB assistance is required and shall assess government's potential liability having regard to the assessment of the Architect/Engineer, the Contractor's arguments, the merits of the claims and the legal advice on government's potential for success in arbitration or litigation. If it is considered beneficial to settle the matter in dispute by extra-contractual settlement which will incur financial implications to government, he shall first seek the agreement of S for Tsy on a ceiling figure up to which he may negotiate with authority. If the information is insufficient for making an assessment at the outset of the mediation, the department may nevertheless proceed with the mediation and make a proposal on the settlement ceiling during the course of the mediation, when government's potential liability, and the contractor's arguments, become clearer. The department shall keep LAD/WB and S for Tsy informed at appropriate stages of the mediation.

Appointment of the Mediator

7. The mediator shall be appointed in accordance with the Rules.

Representation at the Mediation

8. The Director or an officer appointed by him shall be responsible for selecting the personnel to represent him at the mediation and, whilst he has full discretion in the selection process, the representatives should normally be officers at senior professional rank or above and led by an officer at D2 rank or above. It is essential that those selected as representatives should be available for the duration of the mediation. In accordance with Rule 10 of the Rules, the department shall notify the mediator and the other party in advance, the names and the role of his representatives in the mediation.

9. The Director or officer appointed by him may request LAD/WB to attend, to advise or participate in some or all stages of the mediation process. This may be particularly desirable where a point of law is in dispute or if a commercial settlement is being considered.
10. The number of government representatives attending should not normally be more than four. It is important for those selected as representatives in the mediation to bear in mind that they are not presenting their facts to a Court of Law and that mediation is an informal process. To simplify and expedite the mediation, every attempt should be made to agree in advance with the Contractor on the issues, facts and law and establish any common ground. This will focus the parties' attention on the real problems and save time in the mediation.

Mediation Process

11. The mediation process usually consists of several stages, beginning with a preliminary meeting called by the mediator. The purpose of a preliminary meeting is to introduce the mediator to the parties, establish a cooperative atmosphere, establish a timetable for the exchange of documents, and to decide on procedural issues, a suitable venue and a time schedule for the mediation. Ideally, all those who would attend the mediation should attend the preliminary meeting.
12. At the mediation hearing, the mediator will normally make an opening statement in order to clarify his role, emphasise his neutrality, explain the procedures, the goal of the mediation, the confidential nature of the process and legal aspects.
13. After the opening statement the mediator would usually invite each party to present its case in turn, following which he should clarify the issues in dispute and which need to be resolved in the mediation. At the next stage the mediator will try to control the flow communication between the parties in joint meetings or private meetings. His goal is firstly to focus on the underlying needs and interests of the parties, to narrow differences, encourage the parties to explore options, and possibly to test the validity of any suggestions for settlement. The process also requires the parties pro-active involvement to look for options, search for any potential joint gains and if necessary to re-assess their respective positions.
14. At the mediation, the government representatives should initially present their case according to their understanding of the terms of the contract, and seek a settlement on that basis. However, if it appears following the exchange of information and evidence,

that there may be grounds, or good commercial reasons, for exploring a compromise settlement, then the government representatives may negotiate up to the ceiling figure previously agreed by the S for Tsy (see paragraph 6). Beyond that ceiling figure, the government representatives shall immediately seek the further approval or advice of the S for Tsy.

15. If the parties agree on how to resolve the matters in dispute, the mediator should facilitate a written agreement on the terms of settlement for signature of the parties before concluding the mediation.

Use of other Alternative Dispute Resolution Processes

16. Whilst government wishes to promote the use of mediation, other amicable forms of dispute resolution may in some cases offer a speedier and cheaper solution. If any other method is considered, LAD/WB shall be consulted at the earliest opportunity.

Reporting Mediation Requests for Record Purposes

17. All requests for mediation of construction disputes, whether requested by government or the Contractor, shall be notified for record purposes by the Director or an officer delegated by him to the S for W (Attn: PGC/LAD and PAS(WP&S)) in the form of the attached Appendix C immediately after the rejection of the mediation request or after the mediator is appointed where the mediation has been accepted.
18. In the case of mediations requested by government, a copy of the formal request for mediation shall be attached to Appendix C.
19. At the conclusion of the mediation, relevant details shall be notified to the S for W (Attn: PGC/LAD and PAS(WP&S)) in the form of the attached Appendix D, together with a copy of the Appendix C previously submitted.
20. All notifications to S for W shall be marked 'CONFIDENTIAL'.

Mediation Details

Contract No. _____

1. Mediation Rules used 1991 (see WBTC 11/91)
 1999
 others (specify) _____

2. Were the Mediation Rules strictly followed?
 Yes (go to Item 4) No
3. Was any other method of dispute resolution used, e.g. negotiation, mini-trial?
 No Yes (specify) _____
4. Was settlement reached before or during mediation hearing?
 Yes (go to Item 6) No
5. Was settlement reached after mediation hearing?
 No, and dispute was abandoned
 referred to arbitration
 referred to litigation
(go to item 7)
- Yes, settlement reached by negotiation on _____ (date)
- Yes, settlement reached on _____ (date) based on mediator's proposed terms of settlement which were
 accepted in whole accepted in part.
6. Brief outline of agreement
7. Which of the following were notified/consulted during and/or after the mediation?
- | | Notified | Consulted |
|--------------------|--------------------------|--------------------------|
| LAD/WB | <input type="checkbox"/> | <input type="checkbox"/> |
| PAS(WP&S)/WB | <input type="checkbox"/> | <input type="checkbox"/> |
| S for Tsy | <input type="checkbox"/> | <input type="checkbox"/> |
| Engineer/Architect | <input type="checkbox"/> | <input type="checkbox"/> |
| Others (specify) | <input type="checkbox"/> | <input type="checkbox"/> |
| | <input type="checkbox"/> | <input type="checkbox"/> |
| | <input type="checkbox"/> | <input type="checkbox"/> |
| | <input type="checkbox"/> | <input type="checkbox"/> |
8. Remarks:

Signed: _____
for Director

Date: