

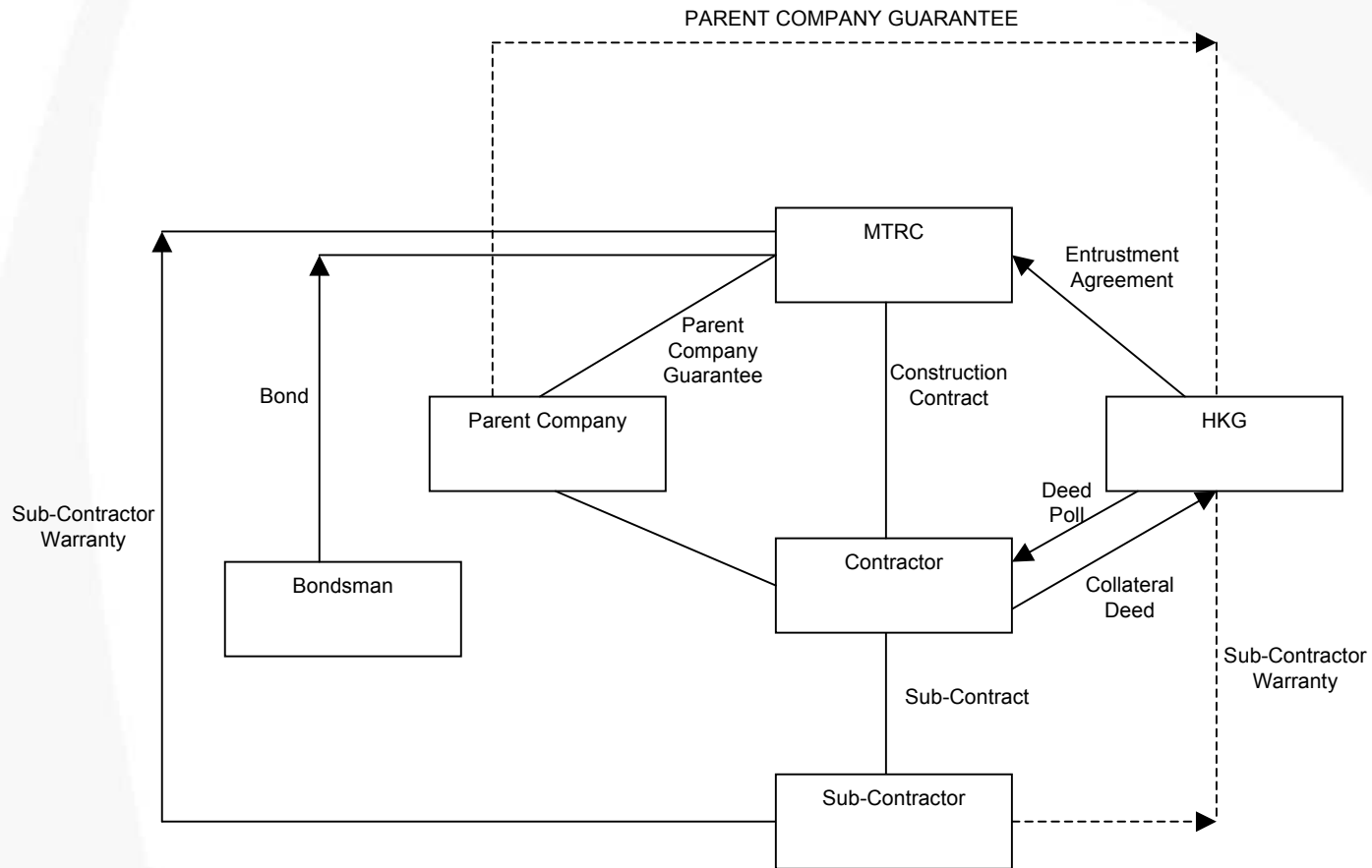
# **MTRC CONDITIONS OF CONTRACT FOR CIVIL ENGINEERING AND BUILDING WORKS CONSTRUCTION ENTRUSTMENT AGREEMENTS 2009**

Seminar to HKCA  
27 November 2009

# INTRODUCTION

- Overview of entrustment arrangements
- Risk areas of entrustment documents
- Major areas under Conditions of Contract

# OVERVIEW



# BACKGROUND

- September 2008 Consultation on Entrustment Documents
- Advice to HKCA 13 October 2008
- Meeting with MTRC's Lawyers to discuss suggested revisions
- Proposed consultation on Conditions of Contract
- No consultation
- Tenders invited

# NORMAL DOCUMENTS

- Construction Contract
- Sub-Contract
- Sub-Contractor Warranty to MTRC
- Parent Company Guarantee to MTRC
- Bond

# ADDITIONAL DOCUMENTS AND REQUIREMENTS

- DOCUMENTS
  - Entrustment Agreement
  - Deed Poll
  - Collateral Deed
- REQUIREMENTS
  - Parent Company Guarantee to HKG
  - Sub-Contractor Warranty to HKG
  - Supplement to Sub-Contract

# ENTRUSTMENT AGREEMENT

- Entrustment of SCL and XRL Projects to MTRC
- Document seen in draft only
- Concession fees

# DEED POLL

- **Certification under Conditions of Contract**
- SM stated:

*“The Corporation expects that the Government will not accept any explicit fetter on its powers (notwithstanding that the proposed amendment would be effective only in respect of the Government's powers as a contracting party, rather than its statutory powers). The Entrustment Agreements create a mechanistic arrangement in relation to the certification process and allow no scope for Government to interfere directly in the Corporation's issue of Certificates. Therefore the risk to contractors of the Government doing so must be considered to be limited. However, the Corporation is prepared to add wording into the conditions of contract that will be used in connection with the XRL and SCL projects to the effect that the Corporation will resist any Government interference in the issue of Certificates that have been approved in accordance with the Corporation's procedures.”*

# DEED POLL (Cont'd)

- GCC 90.4

*“Unless otherwise agreed between the Parties, any decision on the part of the Employer with regard to the issue and/or content of Certificates shall only be made in accordance with the terms of this Contract, the Entrustment Agreement, the deed poll issued by Government in connection with the Entrustment Agreement and any internal policies and procedures of the Employer which may be applicable from time to time.”*

# DEED POLL (Cont'd)

- MTRC Management Systems
- SM stated:

*“The management systems and procedures that will apply to the construction and consultancy contracts entered into in connection with the Shatin to Central Link and Express Rail Link entrustment agreements will be the MTR standard systems and procedures, amended only as is necessary to reflect the provisions of the entrustment agreements (including the right for Government to comment on any amendments MTR proposes to make to specified systems and procedures) and the specific nature of the projects themselves.*

*In terms of fetters on the ability of the Corporation to issue Certificates, the issuance of certificates will, of course, be subject to the Corporation's management systems and procedures. However these will not include a right for Government to "veto" the issuance of a Certificate.”*

# DEED POLL (Cont'd)

- GCC 105.1

*“In the event of Government:*

*(b) interfering with or obstructing the issue of any payment certificate,”*

# DEED POLL (Cont'd)

- **Enforcement of Payment Obligations**
- **Set off**
- SM stated

*“The intention is that the certification process contained in the Entrustment Agreements will be wholly "mechanical" and that Government will "automatically" pay against production of the certificates....Appendix E (at paragraph 1.5) provides that Government shall not be entitled to delay or refuse to make any payment specified in any Certificate. The "fall-back" to the above is that if Government fails to pay any Certified Amount "in accordance with a Certificate" (e.g. if Government were to attempt to set-off any sum against the Certified Amount), Appendix E (at paragraph 1.6) provides for default-interest being payable to the relevant payee.*

*However, the Corporation is prepared to try to incorporate wording into the Collateral Deed to the effect that Government will be prevented from setting-off any amounts claimed under the Collateral Deed against any amounts payable under Certificates.”*

# DEED POLL (Cont'd)

- No prohibition of set off in Collateral Deed or Deed Poll
- Prohibition of Contractor set off
- Specific rights of HKG Set off in Conditions of Contract

# DEED POLL (Cont'd)

- **Arbitration**
- SM stated:

*“The Corporation .. considers that, in practice, the mechanistic nature of the certification process means that any delay in enforcing the terms of the Deed Poll due to arbitration would be limited (because there would be no grounds for Government to object to making any payments against production of Certificates). On this basis, the Corporation is not prepared to seek deletion of this clause from the Deed Polls. However, in the interests of consistency, the Corporation is prepared to try to incorporate a similar arbitration clause into the Collateral Deed.”*

# DEED POLL (Cont'd)

- Disputes over set off
- No arbitration agreement in Collateral Deed
- GCC 103.17 introduces Mediation requirement

# DEED POLL (Cont'd)

- ***Uncertain payment obligations***
- Various specific HKG payment obligations in GCC
- Various specific MTRC payment obligations in GCC
- Arbitration awards

SM stated:

*“The Corporation is prepared to add wording into the conditions of contract .. to the effect that the Corporation will, upon any award or order in favour of a contractor by an arbitrator or a court , promptly issue a Certificate equal to the amount of such award or order.”*

GCC 105.5 introduced but not a cure

# COLLATERAL DEED

- Culpable delay
- Latent defects

# COLLATERAL DEED

- Double jeopardy

*“The Corporation would like to stress that the intention behind the Collateral Deed is to ensure that the level of recovery against a contractor .. is the same as it would be if the structure was such that (i) the Corporation employed and paid the contractors directly and (ii) the Corporation were both the ultimate owner of the completed project and the operator thereof. On this basis the Corporation is prepared to try to incorporate terms into the Collateral Deed which would give contractors comfort that there would be no "double recovery" as a result of both the Corporation and the Government claiming for the same loss and that the liability of the contractors as a result of entry into the Collateral Deed would be no greater than it would have been had the Corporation been (i) responsible for paying the contractors directly and (ii) the owner and operator of the completed project. ”*

# COLLATERAL DEED (Cont'd)

- Clause 6

*“..the Contractor shall have no greater liability to the Government by virtue of this deed than it would have owed to the Government had the Government and the Employer jointly been named as the employer under the Contract.”*

# COLLATERAL DEED (Cont'd)

- No arbitration agreement
- Confusion:
- Arbitration agreement – entrustment agreement, construction contract, deed poll, sub-contract
- No arbitration agreement – collateral deed, sub-contractor warranty to MTRC

# CLAIMS CRITERIA

- Delay? Cost could not have been reasonably foreseen at the date of the Letter of Clarification
- Not unusual
- Key argument – what could have been foreseen?
- Document assumptions made at the time to assist in showing what was foreseeable –double edged sword?

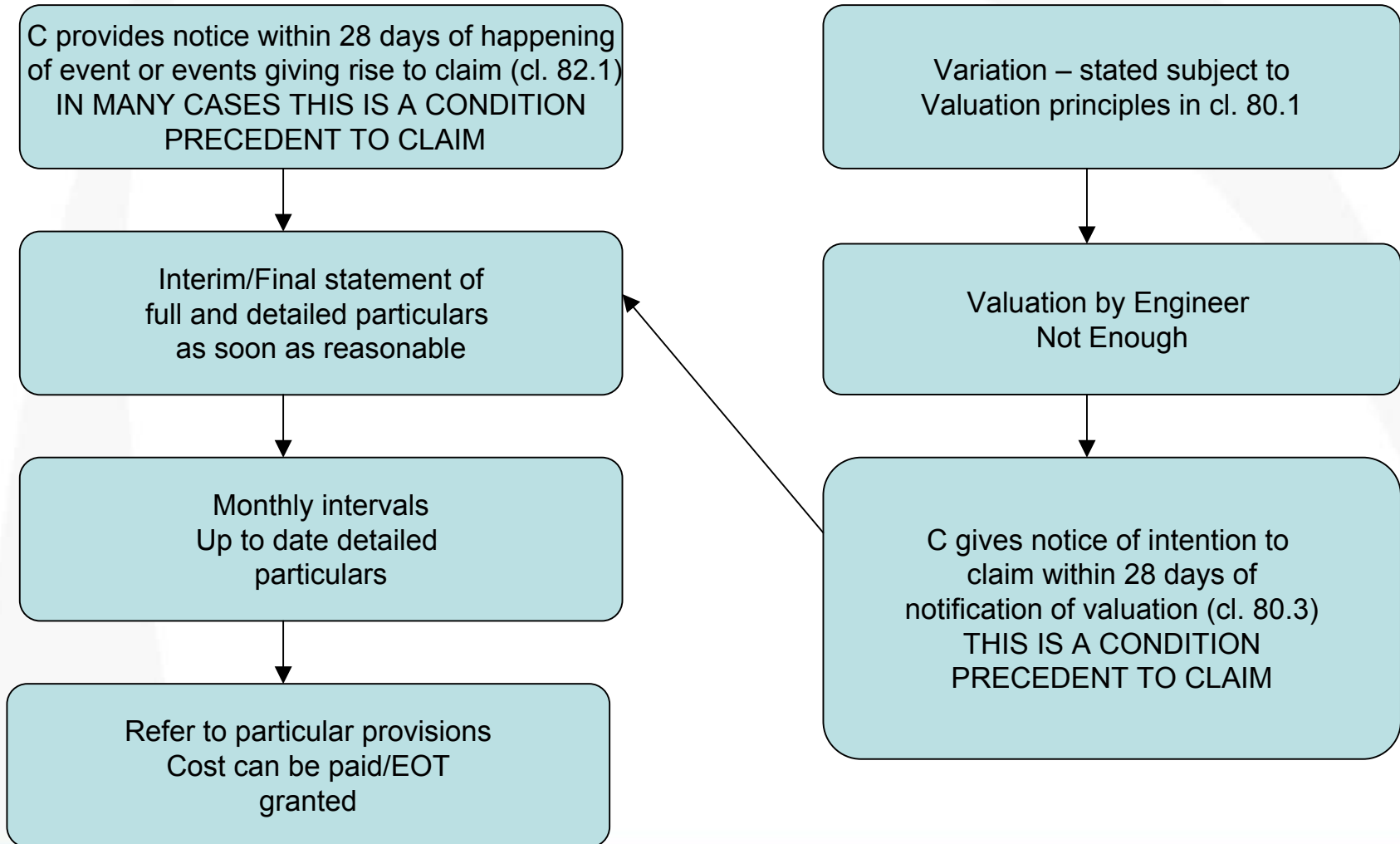
# CLAIMS NOTIFICATION

- **Claims**
- “If such Cost is greater than that which the Contractor could reasonably have foreseen at the date of the Letter of Clarification, the Contractor shall, subject to his complying with the requirements of Clause 82, be paid such sum in respect of such Cost..”
- Condition precedent

# CLAIMS NOTIFICATION (Cont'd)

- **Variations**
- GCC 80.3 *“If the Contractor intends to claim a higher rate or price than the rate or price notified to him by the Engineer pursuant to Clause 80.1 or Clause 80.2 the Contractor shall within 28 Days after such notification give notice in writing of his intention to claim, failing which the Contractor shall be deemed to have accepted the rate or price notified to him.”*
- Condition precedent after rate or price notified

# CONTACTOR CLAIMS - NOTIFICATION



# LIST OF CONTRACTOR CLAIM EVENTS

Clause	Description	EOT	Cost	Notice Pre-condition?
6.2	Ambiguities/Discrepancies between Contract documents	√	√	√
7.4	Delay in Information	√	√	√
9.7	Delay in Approval of Design Data	√	√	√
16.4	Late consent to work methods	√	√	√
16.5	Changing method of construction or installation to which consent been given	√	√	√
19.2	Correction of Errors (from incorrect Data) in Setting Out	√	√	√
22.5-6	Excepted Risks	√	√	X
37.2	Other's use of Contractor's Equipment and Labour	√	√	√
38.1-4	Physical Conditions	√	√	√

# LIST OF CONTRACTOR CLAIM EVENTS (Cont'd)

43.1	Fossils	X (unless also a physical condition)	√	X
46.7	Disruption by Designated/Interfacing Contractors	√	√	√
46.8	Disruption by Utility Companies	√	√	√
57.12	Tests not provided for in the Contract	√	√	√
60.3	Uncovering Works found to be compliant with Contract	√	√	X
65.2	Employer Delay in giving Possession of the Site	√	√	√
69.9	Delay Recovery Measures	X	√	X
72.2	Suspension of Works	√	√	√
72.6	Suspension of Works where Funding Suspension Notice	√	√	√

# LIST OF CONTRACTOR CLAIM EVENTS (Cont'd)

74.6	Steps taken to enable Employer use of the Works before completion	√	√	√
75.2	Employer caused repair works during DLP	X	√	X
77.1	Searching for Defects	√	√	√
79.4-9	Changes	X	X	X
80.1-3	Variations	√	√	√
99.1	Delay to Nomination of NSC	√	√	√

# CONTRACTOR CLAIMS – CLAIM EVENTS SCHEDULE

Key Date Affected

Claim Ref	Description of the Works	Project Area	Claim Type	Date Notified	Summary of event	Key Date Affected				Relevant Time and Cost Clauses	Effect of Events	Reasons	Likely consequences of the event on progress of the Works and an estimate of the likelihood or probable extent of the delay	Relevant comments	Mitigation Measures	Current amount of the claim
						1	2	3	#							
										Total Value of Claims						

# PHYSICAL CONDITIONS

- 38.1 - compensation for physical/artificial obstructions encountered (which could not have been foreseen – but note clause 14.1) C entitled to EOT and/or Cost
- 14.1 – C deemed to have inspected the Site (widely defined) and obtained info. on all matters

# PHYSICAL CONDITIONS - NOTIFICATION

- Subject to C complying with clause 82, Engineer may:
  - Require C to provide estimate of cost of proposed measures and Approve such measures
  - Give instructions
  - Order a Suspension
  - Instruct a Variation

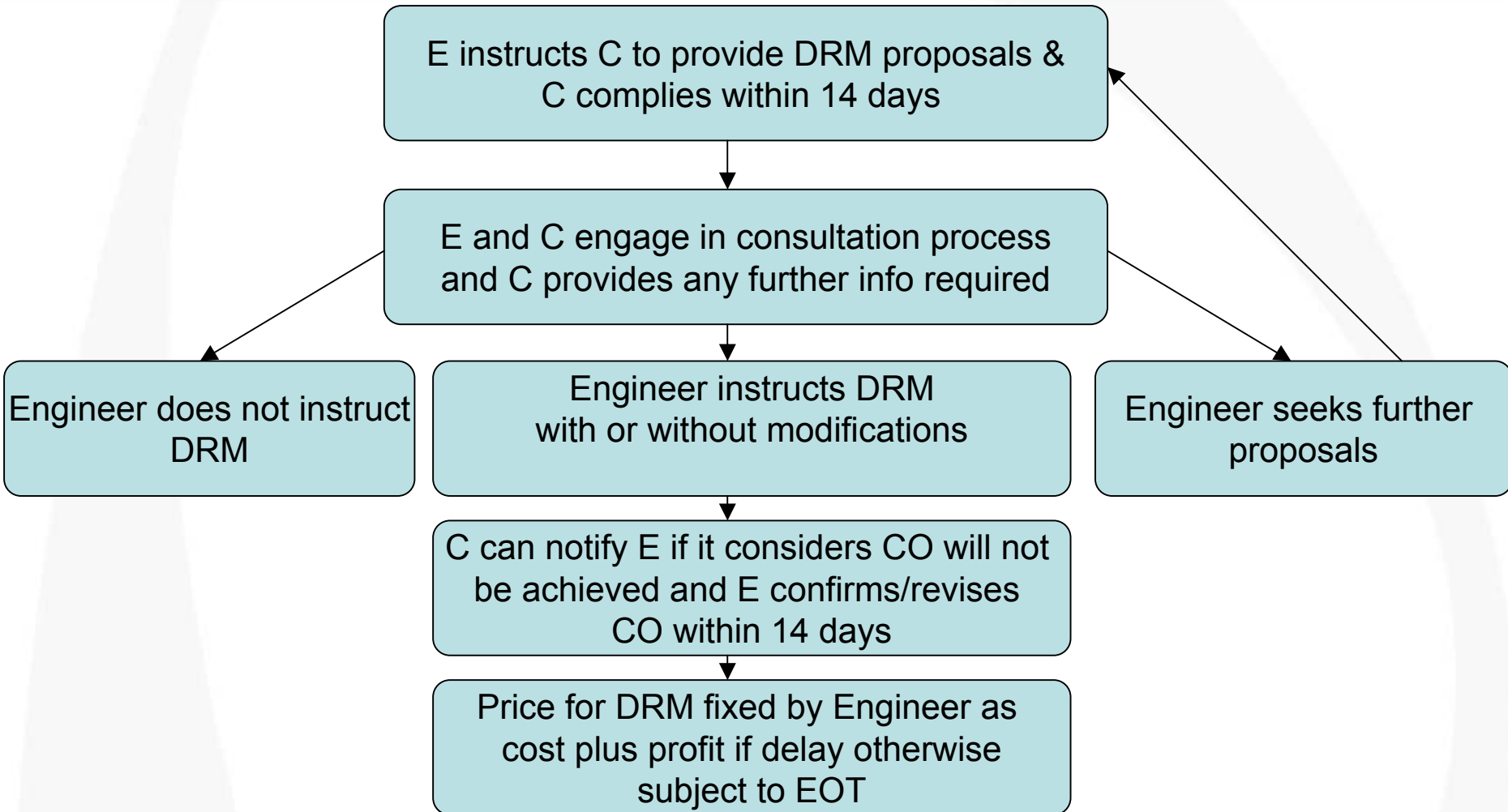
# VARIATIONS AND CHANGES

- Distinguish between “Variation” and “Change”
- Variation (clause 79.1) – can be ordered by Engineer at any time but not expressly during DLP
- Change (clause 79.4) – ordered by Engineer where he considers C will fail to meet his contractual obligations
- Variation will result in additional payment, Change will not

# VARIATIONS – NOTIFICATION AND VALUATION

- 79.3 – C must notify Engineer if considers any **proposed** Variation will give rise to additional payment/EOT/programme change or impact Contractor's warranties within 14 days
- 80.1 – where work is of similar character and executed under similar conditions as to that priced in the Pricing Document, those rates will apply.
- Re-rating provision where a rate rendered unreasonable or inapplicable by a Variation
- If not of similar character/conditions Pricing Document rates used as far as reasonable, failing which fair valuation shall be made.
- If C considers different rates (not Pricing Doc rates) should be used – must notify Engineer before carrying out V work
- 80.3 - If C disagrees with Engineer's valuation – must notify within 28 days of being notified of rate otherwise deemed acceptance

# DELAY RECOVERY MEASURES



# LIQUIDATED DAMAGES

- Rates to be specified in Appendix to Form of Tender
- Cumulative damages can be applied
- General damages payable if no LDs stated (MTRC and HKG) – *pro-tem* bona fide estimate
- 70.11 - Cap on LDs/GDs in Appendix to Form of Tender
- Omission of “reduction of liquidated damages” provision – 70.8 enables E to claim full LDs/general damages for the section in circumstances where part of the section has been completed in time under the Contract

# DEFECTS LIABILITY AND LIMITATION PERIOD

- Defect Liability Certificate not issued until all Defects Liability Periods have expired (clause 75)
- Repair work undertaken during a DLP will re-start DLP
- Recurring defect could extend DLP indefinitely
- Limitation Period in respect of obligation to carry out repair work will not start until end of relevant DLP – if rolling DLPs, LP will not start until end of DLP
- Note also clause 24.1 – wide indemnity – limitation period runs from date when loss indemnified against is incurred which may operate to extend LP indefinitely

# CONTRACTOR DESIGN OBLIGATIONS

- Not design and build – Specification details extent of Contractor design.
- C has responsibility for errors regardless of Approval (clause 9.4)
- Design obligations – 3 types:
  - Skill and Care
  - Absolute obligations
  - Fitness for Purpose

# CONTRACTOR DESIGN OBLIGATIONS

- Skill and care:
  - Clause 11.1(a) – skill and care of qualified and competent designer experienced in similar works
  - Clause 11.1(c) – “highest standards” available
- Absolute obligations
  - Design Data must be prepared by C in compliance with specification and Drawings (clause 9.1)
  - Clause 10.3 – C responsible for mistakes and errors in design proposals incorp. in Design Data (but not suitability/accuracy of design reqs in Spec/Drawings)
- Fitness for any specified Purpose/performance criteria
  - Clause 11.1(b) – Works to comply with Contract and Design Data

# SUBCONTRACTORS AND SUBCONTRACTS

- 5.1 – C requires Approval for subcontracting and retains liability for all subcontractors
- 5.3 – full particulars of parts of Works to be subcontracted inc. price and T&C to be disclosed to Engineer
- Note 78.1 – C required to assign benefit of any guarantees or warranties of suppliers and/or subcontractors but C retains liability

# EXTENSION OF TIME

- Simple provision
- Wide grounds
- Test of “delay in achieving Completion Obligation”
- Prospective or retrospective
- Time can be reduced for Variation or Change
- No tricky anti-concurrent delay provisions
- Notifications required but not condition precedent

# DISPUTE RESOLUTION MECHANISM

- Sole means of resolving disputes under the Contract
- First referred to Engineer – gives notice of decision within 30 days
- Can then refer to Arbitration – but can only appoint an arbitrator, can not proceed with arbitration until mediation completed
- Mediation pursuant to MTRCL Mediation Rules (App G) – request can only be served after completion/termination of Contract
- Then can proceed with Arbitration

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