

在工務工程合約實施付款保障條款 Security of Payment (SOP) Provisions in new Public Works Contracts

Briefing Session for HKRCA

7 September 2021

發展局
Development Bureau



Topics

1. 推行建造業付款保障的進展
Progress of taking forward SOP for Construction Industry
 2. 建造業付款保障框架
SOP Framework
 3. 在工務工程合約下實施
Implementation in new Public Works Contracts
 4. 主要措施
Key features for the implementation
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推行建造業付款保障的進展
**Progress of taking forward SOP
for Construction Industry**

推行建造業付款保障的進展

Progress of taking forward SOP for Construction Industry

- 2015年進行公眾諮詢 – 獲普遍支持
Public consultation (2015) – Largely supported
- 2016年成立專責小組 – 制訂付款保障條例的立法框架
SOPL Task Force (2016) – Formulated SOP Legislative Framework
- 2017年向律政司發出法例草擬委託書 (現正修改條例草案草稿)
Drafting Instructions (2017) – Issued to DoJ (draft bill being finalised)

推行建造業付款保障的進展

Progress of taking forward SOP for Construction Industry

- 建議在工務工程合約下實施
Proposed implementation in new public works contracts
 - ☑ 2020年4月成立工作小組
Formed a dedicated Working Group (April 2020)
 - ☑ 2020年9月至12月期間，諮詢業界持份者
Conducted prior consultation with stakeholders (Sep – Dec 2020)
 - ☑ 2021年3月至4月期間，就技術通告草稿徵詢業界持份者的意見
Circulation of draft TC for comment (Mar – Apr 2021)
 - ☑ 2021年4月至6月期間，舉辦簡介會
Briefing sessions for stakeholders (Apr – Jun 2021)

推行建造業付款保障的進展

Progress of taking forward SOP for Construction Industry

Parallel actions:

草擬條例草案

Draft
SOP Bill

條例草案的最終定稿

Finalise the Draft SOP Bill

適時向立法會提交條例草案

Tabling of SOP Bill to
LegCo at suitable time

歸納經驗完善條例草案

Implementation experience

help refine the Draft SOP Bill

修改合約條款

Revise
conditions of
contract

擬備技術通告

Prepare Technical Circular

目標於2021年12月(暫定)或以後招標
的新工務工程合約實施

Target implementation in all new public
works contracts tendered in or after
December 2021 (tentative)

建造業付款保障框架 SOP Framework

訂立付款保障的目的 Purpose of SOP



改善付款慣例以及合約雙方的現金流
Improve **payment practices** and **cash flow**
of contract parties

就付款爭議進行審裁

Adjudication of payment dispute

- ✓ 快捷程序 Rapid
- ✓ 中途具約束力的解決方案 Interim binding



建造業付款保障框架 SOP Framework

締約雙方可自由訂立合約，但受制於4項強制性要求：
Party autonomy, subject to 4 mandatory requirements:



「付款期」以60天為上限



提請審裁的權利

PROHIBITED



禁止「先收款、後付款」等條款



SUSPENDED

SLOW DOWN

暫停工程或減慢工程進度的權利

涵蓋範圍 Scope of Application

- SOPL: 所有政府的建造工程合約

Technical Circular ✓

All main 'construction contracts' entered into by the **Government**

- SOPL: 所有指定法定及/或公共機構及企業的建造工程合約

All main 'construction contracts' entered into by the specified statutory / public bodies and corporations

- SOPL: 私營界別的建造工程合約

All main 'construction contracts' entered into by private sector

For new specified structures / works OR for repair, maintenance, A&A works, with original contract value:

- 500萬港元以上的新建造工程合約
exceeding \$5 million (for carrying out construction work)
- 50萬港元以上，相關的服務合約或物料、設備或機械供應合約
exceeding \$0.5 million (for supplying related goods and services)

涵蓋範圍 **Scope of Application**

- SOPL: 涵蓋所有相關的工程分判合約
Construction subcontracts at all tiers under the above main construction contracts
Technical Circular ✓
- SOPL: 涵蓋書面合約 **Written contracts**
Technical Circular ✓
- SOPL: 涵蓋口頭合約 **Oral contracts**
- SOPL: 涵蓋相關的專業服務和物料、設備或機械供應合約
Professional services, supply of materials and plant

建造業付款保障框架 SOP Framework

(1) 付款 *Payment*:

- **SOPL**: 申索方有權提出「付款申索」
Claiming party's entitlement to serve **payment claim** Technical Circular ✓

- **SOPL**: 締約雙方可自由議定「進度付款」的期數、
申索付款的時間和到期應付款額的計算方法
Parties free to agree when progress payments can be claimed and the basis of valuation Technical Circular ✓

If absence of express provisions,

- progress payments can be claimed monthly on the last day of each month
- amount calculated based on value of works / goods / services

建造業付款保障框架 SOP Framework

(1) 付款 *Payment*:

- **SOPL**: 付款方有權在合約指定的時間內(不遲於「付款申索」送達後30天) 送達「付款回應」

Technical Circular ✓

Payment response made by the paying party shall be served within the time specified in contract (no later than 30 days of the service of payment claim)

If absence of express provisions on the time to serve payment response

- 30 days of the service of payment claim

建造業付款保障框架 SOP Framework

(1) 付款 *Payment*:

- **SOPL**: 若付款方沒有於限期前送達「付款回應」，付款方會被視為對有關申索款額有爭議，但在有關審裁中將不能提出在到期應付款額中作出任何抵銷

Technical Circular ✓

Paying party's **failure to serve payment response** is regarded as disputing in full the claimed amount, but will not be able to raise set off in related adjudication

建造業付款保障框架 SOP Framework

(1) 付款 *Payment*:

- SOPL: 付款方須於合約指定的時間內(不遲於「付款申索」送達後60天)付款

Technical Circular ✓

Paying party to *make payment* within the time specified in contract (no later than 60 days of the service of payment claim)

If absence of express provisions on the time to make payment

- 60 days of the service of payment claim

建造業付款保障框架 SOP Framework

(2) 禁止「先收款、後付款」等條款

Prohibit 'Conditional Payment Provisions':

□ **SOPL**: 「先收款、後付款」同效的條款無效

Technical Circular ✓

Such provisions are rendered ineffective and unenforceable

- “pay-if-paid”
- “pay-when-paid”
- otherwise provisions which makes liability or due date for payment conditional / contingent on the operation of any other contract or agreement (e.g. “pay-when-certified”)

建造業付款保障框架 SOP Framework

(2) 禁止「先收款、後付款」等條款

Prohibit 'Conditional Payment Provisions':

- 「先收款、後付款」的條款無效，包括適用於指定分包商的合約
No exception to nominated sub-contract (NSC)

Technical Circular ✓

- 「先收款、後付款」的條款無效，即使不付款的原因是由於合約鏈上游有合約一方破產
No exception to insolvency higher up the chain

Technical Circular ✓

建造業付款保障框架 SOP Framework

(3) 暫時停工或減慢工作進度的權利

Right to suspend / reduce rate of progress:

- **SOPL**: 不獲付款一方有權暫時停工或減慢工作進度

Technical Circular ✓

Unpaid party has **right to suspend / reduce rate of progress** if admitted / adjudicated amount is not received

- **SOPL**: 於通知付款方和業主的5個工作天後，不獲付款一方可行駛暫時停工或減慢工作進度的權利

Technical Circular ✓

Unpaid party **may exercise the right** if the amount is not received within 5 working days after service of notification to both the paying party and the site owner

建造業付款保障框架 SOP Framework

(3) 暫時停工或減慢工作進度的權利

Right to suspend / reduce rate of progress:

- **SOPL:** 不獲付款一方可就暫時停工或減慢工作進度造成的延誤和干擾，享有額外工期以完成其合約，以及獲付合理的費用和開支；行駛此權利不是違約

Technical Circular ✓

Party exercising the right is entitled to compensation for time and costs and is not in breach of contract

- **SOPL:** 須於收到整筆欠款後7個工作天內復工

Technical Circular ✓

Party exercising the right should resume progress within 7 working days after receiving the amount in full

建造業付款保障框架 SOP Framework

(4) 審裁 *Adjudication*:

- SOPL: 有權於付款爭議出現的28天內提請審裁

Technical Circular ✓

Parties' right to refer payment dispute to adjudication within 28 days after the dispute arise

- ✓ Dispute on payment under contract only
 - 1) 對「付款申索」有爭議
Payment claim is wholly disputed
 - 2) 承認為到期應付的款額少於申索的款額
Admitted Amount less than the Claimed Amount
 - 3) 對申索的款額提出抵銷或扣減
Set-off or withholding is raised against the Claimed Amount

建造業付款保障框架 SOP Framework

(4) 審裁 *Adjudication*:

✓ Dispute on payment under contract only

Technical Circular ✓

4) 不支付已承認為到期應付的款額
Admitted Amount is not paid within time

5) 付款一方沒有在規定限期內送達「付款回應」
No payment response is served within time

✗ 不能就只涉及工期的爭議提請審裁

‘Claim for EOT only’ falls outside the ambit of adjudication under SOPL

Technical Circular ✓

建造業付款保障框架 SOP Framework

(4) 審裁 Adjudication:

□ SOPL: Selection of ANB through...

Technical Circular ✓

- ✓ 在合約協定審裁員提名團體 或
specifying in contract or
- ✓ 在合約期間或付款爭議產生後，經雙方協定 或
「申索方提議、答辯方選擇」的程序指定審裁員提名團體
post-contract agreement (via mutual agreement of the parties or the
'claimant-propose respondent-select' procedure)

□ SOPL: 由發展局成立審裁員提名團體名單

Technical Circular ✓

DEVB to establish and maintain a **Register of ANBs**

建造業付款保障框架 SOP Framework

(4) 審裁 *Adjudication*:

- SOPL: 審裁員提名團體須於5個工作天內完成提名及委任審裁員
Parties' agreed ANB to **nominate and appoint adjudicator**
within 5 working days

Technical Circular ✓

- SOPL: 申索方須於委任審裁員後1個工作天內送達申述書
Claimant to serve **adjudication submission** within 1
working day from the date of appointment of adjudicator

Technical Circular ✓

- SOPL: 答辯方在其後的20個工作天內送達抗辯書
Respondent to serve **adjudication response** within 20
working days from the date of receipt of the claimant's
adjudication submission

Technical Circular ✓

建造業付款保障框架 SOP Framework

(4) 審裁 Adjudication:

- SOPL: 審裁員於獲委任後55個工作天內 或 雙方同意的延長限期內作出裁決以及公布其裁決

Technical Circular ✓

Adjudicator to **decide the dispute** and deliver the adjudication decision **within 55 working days** from the date of appointment or any longer period as agreed by the parties

- SOPL: 雙方須遵從審裁裁決，除非雙方其後簽訂和解協議、獲得仲裁裁決 或 法庭判決

Technical Circular ✓

Parties are **bound by adjudication decision** unless otherwise agreed by the parties in writing, decided in arbitration award or by the Court

建造業付款保障框架 SOP Framework

(4) 審裁 *Adjudication*:

- SOPL: 雙方共同承擔審裁員的費用和開支，審裁員可裁定雙方須承擔的攤分比例

Technical Circular ✓

Parties jointly and severally liable to pay **adjudicator's fees and expenses** in the proportion as decided by the adjudicator

- SOPL: 雙方須各自承擔進行審裁的訟費

Technical Circular ✓

Parties not liable to pay any **costs or expenses incurred by the other party**

建造業付款保障框架 SOP Framework

(4) 審裁 Adjudication:

- SOPL: 雙方可向法庭申請，按法庭判決的方式強制執行審裁裁決
Parties may apply to the Court for **enforcement** of the adjudication decision
- SOPL: 雙方可向法庭申請撤銷審裁裁決
Parties may apply to the Court for **setting aside** the adjudication decision

在工務工程合約下實施
Implementation in new Public Works Contracts

在工務工程合約下實施

Implementation in new Public Works Contracts

發展局技術通告 *DEVB Technical Circular*

根據立法框架制定

Based on legislative framework of the SOPL



在合約條款中加入付款保障條款

SOP Provisions (forms part of conditions of contract)

&

並提出主要措施作支援

Key features (to support the implementation)

在工務工程合約下實施

Implementation in new Public Works Contracts

發展局技術通告 *DEVB Technical Circular*

□ 涵蓋範圍 **Application**

工程合約 *Contracts for Construction Works*

- ✓ 所有新工務工程合約
All new public works contracts
 - 基本工程合約 和 定期保養合約
Capital works contracts & Maintenance term contracts
- ✓ 所有上述工務工程合約下的工程分判合約
All construction subcontracts under above main contracts

在工務工程合約下實施

Implementation in new Public Works Contracts

發展局技術通告 *DEVB Technical Circular*

□ 涵蓋範圍 **Application**

不包括以下相關合約

But not covering the following contracts and subcontracts

- ✘ 物料、設備或機械供應合約
Contracts solely for supply of goods / plants

- ✘ 顧問服務或其他服務合約
Contracts solely for consultancy services or other services

在工務工程合約下實施

Implementation in new Public Works Contracts

發展局技術通告 *DEVB Technical Circular*

基本工程合約 和 定期合約 Capital Works and Term Contracts

合約條款

Conditions of Contract
(**Annex B** to the TC(W))

付款保障條款

SOP Provisions for main contracts
(**Annex C** to the TC(W))

解決爭議條款

Revised Dispute Resolution Clause
(**Annex E** to the TC(W))

工程分判合約

Construction Subcontracts

分判合約條款

Mandatory Subcontract Conditions
(**Annex D** to the TC(W))

付款保障條款

SOP Provisions for Subcontracts
(**Annex D** to the TC(W))

主要措施

Key Features for the Implementation

主要措施 Key Features for the Implementation

(1) 在所有工程分判合約實施

Apply to construction subcontracts (all tiers)

- 強制要求在工程分判合約中加入付款保障條款
“**SOP Provisions**” as mandatory conditions of subcontracts
 - 透過現有分判管理機制
Make use of existing SMP and subcontracting mechanisms
 - ✓ 由總承建商提交文件證明合乎要求
Main Contractor to provide documentary proof of compliance
 - ✓ 確認所有工程分判合約 以及 申報沒有隱瞞工程分判合約
Identify in SMP all subcontracting & declare no hidden subcontract
 - ✓ 業主抽查上述機制
Employer’s check for compliance

主要措施 Key Features for the Implementation

(2) 工地推廣 *On-site Promotion*

- 於適當位置張貼工地告示
**Posting of “Site Notice” (Annex H to the TC(W))
at prominent place of the Site**
- 防止隱瞞工程分判合約
prevent ‘**hidden**’ subcontract
- 使分判商能夠通知業主有關其行駛暫時停工或減慢工作進度權利的意向
enable subcontractors to serve notice of his intention to **exercise rights
to suspend/reduce rate of progress**
- 使分判商能夠向業主申請“直接支付”其被拖欠的審裁款額
enable subcontractors to request for **direct payment** of unpaid
adjudicated amount

主要措施 Key Features for the Implementation

(2) 工地推廣 *On-site Promotion*

- 工程分判合約列表 **List of construction subcontracts**

Contract Title / Number ◊	Name of Paying Party ◊	Name of Sub-contractor ◊ (undertaking works) ◊
◊	<i>e.g. Main Contractor ◊</i>	<i>e.g. ABC Sub-contractor ◊</i>
◊	<i>e.g. Main Contractor ◊</i>	<i>e.g. DEF Sub-contractor ◊</i>
◊	<i>e.g. DEF Sub-contractor ◊</i>	<i>e.g. XYZ Sub-contractor ◊</i>

- 聯絡資料 **Contact information**

Employer ◊ (and his agent) ◊	<i>[-relevant-project-officer-] ◊</i>	<i>[-address-/-email-/-phone-] ◊</i>
	<i>[-Project-Manager-/-Engineer-/- Surveyor-/-Supervising-Officer- for-the-main-contract-] ◊</i>	<i>[-address-/-email-/-phone-] ◊</i>
Main Contractor ◊	<i>[-Project-Director-/-Site-Agent-] ◊</i>	<i>[-address-/-email-/-phone-] ◊</i>

主要措施 Key Features for the Implementation

(3) 直接支付被拖欠的審裁款額

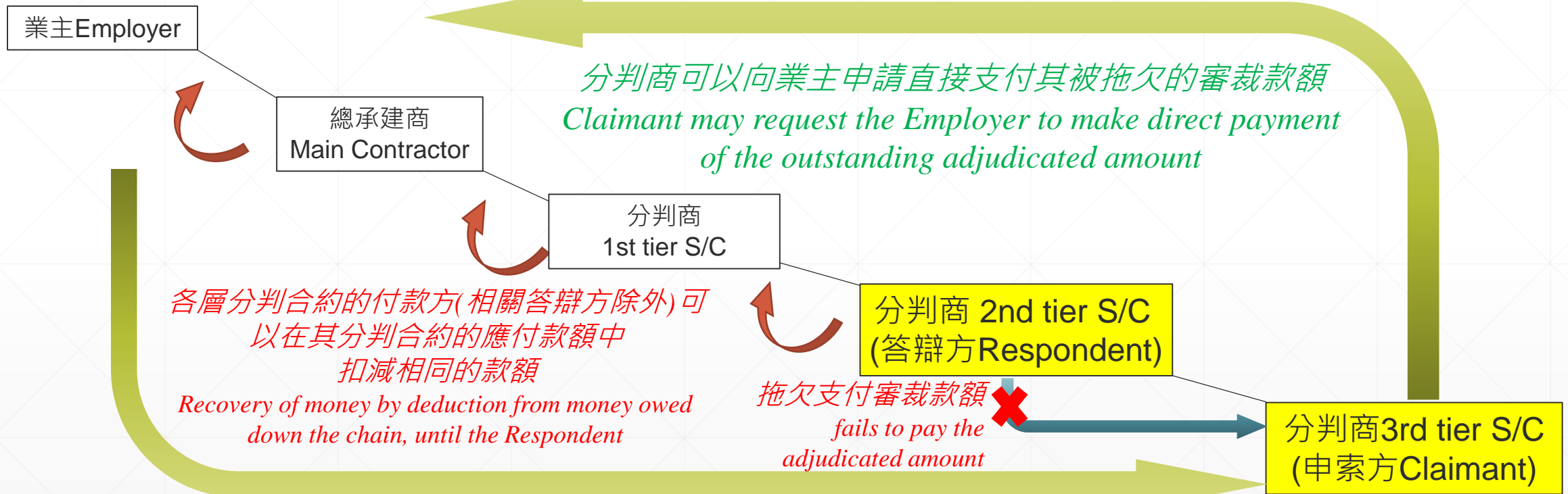
Direct payment of unpaid adjudicated amount

- 分判商可以向業主申請**直接支付**其被拖欠的審裁款額
Subcontractor claimant may request for **direct payment from the Employer to settle unpaid adjudicated amount**
- ✓ 這項措施是“法庭執行”審裁裁決的替代方案
Such right is provided in lieu of ‘Court enforcement’ under SOPL
- ✓ 業主可以就有關申請直接支付分判商
Employer may make direct payment to the claimant
- ✓ 各層分判合約的付款方(相關答辯方除外)可以在其分判合約的應付款額中扣減相同的款額
Each paying party along the chain are entitled to deduct the same amount from each next tier (*until the respondent*)

主要措施 Key Features for the Implementation

(3) 直接支付被拖欠的審裁款額

Direct payment of unpaid adjudicated amount



如總承建商未有於28天內提交文件證明指定的情況，業主可以就有關申請直接支付分判商

Employer may make direct payment (full or part), if the Main Contractor fails to provide documentary proof within 28 days.

主要措施 Key Features for the Implementation

(3) 直接支付被拖欠的審裁款額

Direct payment of unpaid adjudicated amount

□ 分判商就有關申請須要提交的文件：

Submission required from the subcontractor claimant:

✓ 審裁裁決的認證副本

Certified true copy of the **adjudication decision**

✓ 確認相關工務工程中，與審裁款額有關的**已完成工作**

Identify the **work done** to which the adjudicated amount relates

✓ **簽署聲明**未曾收到審裁款額

Written declaration that the adjudicated amount has not been received

主要措施 Key Features for the Implementation

(3) 直接支付被拖欠的審裁款額

Direct payment of unpaid adjudicated amount

- 如總承建商於28天內提交文件證明以下指定的情況，
業主不會作出直接支付：

Direct payment shall not be made if the Contractor provides documentary proof of either the following **within 28 days:**

- 答辯方已支付有關審裁款額
Adjudicated amount has been **fully paid** by the respondent
- 申索方已接受任何支付款額作為清繳有關審裁款額
Claimant has been satisfied with **any payment as full settlement** of the adjudicated amount

主要措施 Key Features for the Implementation

(3) 直接支付被拖欠的審裁款額

Direct payment of unpaid adjudicated amount

- 如總承建商於28天內提交文件證明以下指定的情況，
業主不會作出直接支付：

Direct payment shall not be made if the Contractor provides documentary proof of either the following **within 28 days:**

- 有關審裁裁決已沒有約束力
Adjudication decision is **no longer binding** on the respondent
- 各層分判合約中，任何一位付款方(包括有關答辯方)已破產或清盤
a party along the chain of subcontracting (down to the subcontractor respondent) is **bankrupt / in liquidation**

主要措施 Key Features for the Implementation

(3) 直接支付被拖欠的審裁款額

Direct payment of unpaid adjudicated amount

- 為確保各層分判合約的付款方可以在其分判合約的應付款額中扣減相同的款額，業主可能只會直接支付部份被拖欠的審裁款額

To ensure recover of money by deduction, the Employer may direct pay part of the outstanding amount

主要措施 Key Features for the Implementation

(4) 承建商表現評核報告 *Report on Contractor's Performance*



1) 強制於工程分判合約中加入
付款保障條款

Incorporate mandatory
subcontract conditions

2) 支付分判商

Payment to sub-contractors
at the first tier

→ Poor rating in items related to
subcontracting in Section 6 (*proposed*)

→ Poor rating in items related to
subcontract payment (*proposed*)

→ Poor rating in items related to progress

主要措施 Key Features for the Implementation

(5) 簡化協定審裁員提名團體的程序

Simplified Mechanism on Selection of ANB

- 發展局會用行政方式成立審裁員提名團體名單
DEVB shall establish the Administrative Register of ANBs
- 簡化指定審裁員提名團體的程序：
Selection of ANB is simplified by agreement through:
 - ✓ 在合約中協定審裁員提名團體
Specify the agreed ANB in contract
 - ✓ 「申索方提議、答辯方選擇」的程序只限於工程分判合約中沒有明訂審裁員提名團體的情況下採用
For subcontracts, default provision for “claimant-propose respondent-select” procedures in case the subcontract does not specify an ANB

謝謝!
Thank you!