

來函檔號 Your Ref. :
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私人密件
PRIVATE & CONFIDENTIAL

Lantau Island
N.T.


Dear Mr

Complaint against Civil Engineering and Development Department

Further to our letter of 11 May 2004, this Office has now completed the investigation into your complaint. I enclose herewith a copy of the Investigation Report approved by The Ombudsman for your information.

Please note that your complaint is **partially substantiated**.

Yours sincerely,


(Frederick TONG)
for The Ombudsman

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1

Investigation Report

Complaint against Civil Engineering and Development Department

By Mr

The Complaint

Mr [redacted] ("the complainant") lodged a complaint against the Civil Engineering Department (recently renamed Civil Engineering and Development Department, "CEDD") for derogation of duty over their actions in the sourcing of natural river boulders from the Tung Chung Stream ("the Stream") for use in the project of Infrastructure for Penny's Bay Development ("the Project"). Specifically, he alleged that CEDD has -

- (a) failed to prudently and properly ascertain the legality of source of the boulders;
- (b) conveyed, by its inappropriate actions, tacit approval to the removal of a substantial quantity of river boulders;
- (c) failed to supervise its consultant, Maunsell Consultants Asia Ltd. (MCAL, the Engineer for the Project) and its contractor, China State Construction Engineering (Hong Kong) Limited (CSCE, the Contractor for the Project) in the sourcing of a legal supply of boulders; and
- (d) allowed an illegal excavation of the Stream, which lies on Government land and is ecologically valuable, to continue to the extent that some 330 metres thereof have been destroyed.

Background Information from Complainant

2. Based on media reports about the illegal removal of boulders from the Stream, the complainant initially lodged a complaint with this Office on 4 December 2003. The complainant has since been communicating with CEDD and copying the correspondence to this Office.

3. The correspondence revealed that MCAL and CSCE had inspected the

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stockpile on 18 September 2003 while CEDD had attended the inspections of the boulders *in situ* at the Stream on 9 and 17 October 2003. However, CEDD claimed that they did not know the source to be illegal and that MCAL had considered it contractually difficult to stop the delivery of 400 tonnes of boulders to the Penny's Bay site for mock-up between 28 October and 4 November 2003. When the Stream was found to be on Government land, CSCE was instructed on 5 November 2003 to stop taking further materials from the stockpile. All the boulders were subsequently returned to the stockpile and the Stream was to be reinstated.

4. The complainant alleged that, by attending the inspections in October, CEDD had conveyed tacit approval to the illegal removal of the boulders and that there was a startling lapse in project supervision and a failure to exercise professional duty of care by CEDD.

5. Concerned over the despoliation of the Stream and dissatisfied with CEDD's supervision of the Project, the complainant requested The Ombudsman to investigate the matter.

Investigation

6. After due consideration, The Ombudsman decided to conduct a full investigation into the complaint on 23 February 2004. In response to our request, CEDD provided information and comments on 15 March, 25 May and 14 July 2004.

CEDD's Comments

7. Significant events are highlighted in chronological sequence in the **Annex**.

8. Construction of an artificial lake in Penny's Bay is part of the Project, for which CSCE is the Contractor for the works and MCAL the Engineer for supervision and management. CEDD, representing Government as the Employer, is responsible for the management of MCAL under a consultancy agreement.

9. The construction of the lake requires about 8,000 tonnes of natural boulders for its edge. CSCE is required to source the boulders, submit samples and provide mock-up for MCAL's approval prior to ordering and installation of the material.

CSCE engaged Artscapes (Far East) Ltd ("Artscapes") as the specialist sub-contractor for construction of the edge of the lake. On 15 September 2003, Artscapes proposed to CSCE a source of boulders that would come from a project to clean up the Tung Chung River, being carried out by a construction company allegedly authorized by the Tung Chung Rural Committee.

10. As the river training works at the Stream were not a public project and the construction company purportedly engaged by the Rural Committee was not the Department's contractor, CEDD and MCAL were not in a position to approve or stop the works. Such works had not been submitted for Government approval.

11. On the visit of 9 October 2003, CEDD requested MCAL to check the legal status of the source when its staff first observed that the boulders came from works at a stream. Subsequently, there were repeated reminders (Items 5-7 and 10-12 of the Annex) requesting MCAL to take urgent action on this amongst other issues. By 29 October 2003, as MCAL had not yet acquired proof of the legality of the boulders, CEDD liaised with the Lands Department ("Lands D") and provided the land status plan to MCAL on 4 November 2003 for further investigation.

12. CEDD observed that MCAL had also been skeptical about the source of the materials and repeatedly reminded CSCE to submit proof of the legality of the source.

13. As regards CSCE's delivery of boulders from 28 October to 4 November 2003, CEDD was not informed by MCAL and did not give consent to the delivery. CEDD only learnt of details of the delivery afterwards and first noted on 4 December 2003 the letter purportedly from the Rural Committee authorizing the construction company to clean up the Stream.

14. As MCAL was responsible for supervision and management of the Project, CEDD's approval for delivery of construction materials into the site was not necessary. MCAL had the sole discretion to approve or disapprove the materials for use in accordance with the relevant contract. MCAL had the duty to ensure that the materials comply with the contract specifications.

15. CSCE has produced a letter dated 26 June 2003, purportedly issued by the Rural Committee, claiming that the boulders came from projects then underway at the Stream for flood protection. In this context, insofar as the materials complied

with contract requirements in terms of quality and size and MCAL did not have evidence of the source being obviously illegal, MCAL considered it contractually difficult to stop CSCE from transporting such materials to the site from 28 October to 4 November 2003 when the land status had yet to be clarified. After the land was confirmed to be Government, MCAL stopped the delivery of the boulders on 5 November 2003.

16. The consultancy agreement required MCAL to exercise all reasonable professional skill, care and diligence in the supervision and management of the Project. MCAL was well aware of this requirement and had not given any approval for the source in the absence of adequate proof of its legality.

Our Comments

17. We see from para. 8.1.1 of Engineering and Associated Consultant Selection Board Handbook ("the Handbook"), compiled by CEDD, that "management of consultants is to ensure the timely completion of the Project taking proper account of the need for adequate liaison with Government and for compliance with the appropriate Government policies and regulations". Para 8.1.2 stipulates, as one of the principles of consultants management, that CEDD is to play "an active role requiring input from Government side as well as receiving output from the consultants". Para 8.2.7(b)(ii) expects the managing office to "monitor closely the consultants' performance on contract management to see that they act properly and effectively and that Government procedures and regulations are followed".

18. We consider the above provisions in the Handbook relevant in making our observations and drawing conclusions on the case.

Complaint point (a)

19. We note that MCAL was required to check, and CSCE to prove, the legality of the source of the boulders. CEDD had no direct duty to ascertain the legality but it had repeatedly issued reminders on this to MCAL. However, having inspected the boulders on 9 October 2003, CEDD did not check the land status until 29 October 2003. We consider CEDD to have been insufficiently alert and proactive, in failing to check the land status earlier for prompt and adequate

Government input to help ascertain the legality of the source.

20. In this light, this point is partially substantiated.

Complaint points (b) and (d)

21. CEDD was not aware of the removal of the boulders from the Stream by the construction company before its first inspection on 9 October 2003. In this context, CEDD was ignorant of the land status and thus in no position, direct or indirect, to approve or disapprove the removal of boulders.

22. Having scrutinised all relevant information, we can find no evidence to suggest that CEDD or MCAL approved the use of the boulders from the Stream. We consider that CEDD had neither approved nor condoned the illegal excavation of the Stream.

23. These two points are, therefore, unsubstantiated.

Complaint point (c)

24. CSCE was monitored by MCAL and CEDD was to manage the latter under a consultancy agreement. CEDD has no role in supervising CSCE direct. However, it had a duty to monitor the performance of MCAL closely.

25. In this light, we consider CEDD to have ultimate responsibility for the Project and should have been more proactive in providing land status information to MCAL as soon as it raised queries on the legality of the source of the boulders at the site inspection on 9 October 2003. Had CEDD been more alert and meticulous, the transportation of boulders into the site could have been stopped.

26. This point is, therefore, partially substantiated.

Conclusion

27. Overall, The Ombudsman considers this complaint to be **partially substantiated**.

Recommendations

28. To avoid recurrence, The Ombudsman recommends that CEDD strengthens communications with its consultants for projects under its supervision, CEDD should take a more positive and active role in matters requiring input from Government or possible impacting adversely on the environment.

CEDD's Comments on Draft Investigation Report

29. CEDD gave detailed comments on paras. 19, 20, and 24 to 26 in the Draft Investigation Report regarding complaint points (a) and (c). In essence, CEDD contended that:

- (a) MCAL is directly responsible for checking and approving the source and has the sole discretion to approve or disapprove the materials for use in the works in accordance with the Project. CEDD is responsible for the management of MCAI and does not have any direct duty to ascertain the legality of the source. In the process of supervising MCAL, CEDD has already exercised its duty diligently as CEDD had repeatedly reminded MCAL on the need to check the legality of the source since CEDD's first visit on 9 October 2003. Since then, CEDD has kept close monitoring on the development and was skeptical about the legality of the source;
- (b) CEDD expected MCAL to exercise all reasonable professional skill, care and diligence in the supervision and management of the Project. All along, MCAL was requesting CSCE to produce documentary evidence. Even the provisional approval issued by MCAL on 22 October 2003 contained such condition. CEDD would, therefore, not expect CSCE to import the boulders at its own risk bearing contractual and legal consequences without producing the documentary evidence. When CEDD learnt that MCAL had provisionally approved the source but not taken any proactive measures to ascertain the legality, CEDD as the Employer in the project contract

eventually stepped in at its own initiative to approach Lands D on 29 October 2003. This was an additional step taken by CEDD, which is not normally expected from the Employer. Furthermore, CEDD did not take such step soon after the inspection on 9 October 2003 because the suitability of the boulders was still being considered by MCAL at that time;

- (c) CEDD, as the Employer, is not responsible for digging out evidence to prove the legality or non-legality of the source. Such evidence should be provided by CSCE and vetted by MCAL. CEDD would not need to engage consultants if it took over the contractual administration and supervision duties of MCAL as the Engineer for the Project; and
- (d) CEDD has exercised its duty diligently and taken reasonable action in supervising the consultant.

In view of the above, CEDD contended that complaint points (a) and (c) should not be substantiated and thus the whole complaint should be unsubstantiated.

The Ombudsman's Final Remarks

30. The Ombudsman considers that CEDD should not limit its role merely to the narrow perspective of the Employer in the contract. It has a duty as a government department to protect the environment where works under its supervision are concerned. As noted above, the Handbook imposes on CEDD, as the managing office "an active role" in providing Government input. Common sense dictates that such input should be prompt and adequate. In this case, it should include furnishing land status information to MCAL as early as possible.

31. Even if one could accept that, after the site visit on 9 October 2003, CEDD had discharged its duty by reminding MCAL of the need to check the legality of the source, CEDD could - and in our view should - have taken earlier steps to ascertaining the legality of the source when MCAL issued provisional approval on 22 October 2003 to CSCE for removal of the boulders from the Stream subject to proof of legality of source. CEDD did fail to take steps between 22 and 29

October 2003 to disallow such removal, even if it did not give approval. This is far from Government expectation of contract monitoring.

32. All points considered, The Ombudsman has decided that the conclusion and recommendations in paragraphs 27 and 28 should stand.

Office of The Ombudsman

Ref : OMB 2003/3617

September 2004

Annex (Paras.7&11)

Sequence of Significant Events on Sourcing of Boulders in Tung Chung

Item	Date	Event
1.	15/09/03	MCAL approved CSCF's application to engage Artscapes as the specialist subcontractor for the construction of the edge of an artificial lake in Penny's Bay. Artscapes proposed to CSCE a source in Tung Chung for the supply of boulders in the construction of the lake edge.
2.	16/09/03	MCAL received proposal from CSCE on source of boulders.
3.	18/09/03	MCAL, CSCE and Artscapes visited the stockpiles near Hau Wong Temple to inspect the quality of materials. CSCE claimed that the materials belonged to a construction company working on a stream protection job in the vicinity. Subsequently, MCAL, CSCE and Artscapes visited the Stream and met the owner of the construction company working on the Stream, who claimed to be authorized for the works by the Tung Chung Rural Committee. The construction company had removed boulders from the Stream and stockpiled the materials near Hau Wong Temple away from the Stream. MCAL and CSCE requested documentary proof.
4.	26/09/03	Artscapes produced for CSCE a letter dated 26 June 2003 which bears the name of the Chairman and the seal of the Rural Committee authorizing the construction company to clean up the Stream bed, including removal and disposal of pebbles and boulders. CSCE showed the letter to MCAL. MCAL requested CSCE to submit further evidence to support the legality of the source of the boulders.
5.	09/10/03	Representatives from CEDD, MCAL, the theme park operator, CSCE and Artscapes jointly inspected the materials at the Stream, the original source. CSCE advised that the removal of boulders from the Stream was flood protection works, which had been carried out in the past years. CEDD requested MCAL to check, and CSCE to prove, the legal status of the source. Subsequent to the visit, CEDD repeatedly made verbal enquiries with MCAL about the status of lake edge works submission, including proof of the legality of the source of materials.

Item	Date	Event
6.	17/10/03	Representatives from CEDD, MCAL, the theme park operator, CSCE and Artsclapes jointly visited the original source of the boulders to establish the standard of materials for use. The materials were considered to be suitable in term of colour, shape and size. CEDD reminded MCAL to obtain and check documentary proof regarding the legality of the source from CSCE.
7.	20/10/03	During CSCE's presentation to CEDD and MCAL at MCAL's site office about the works of the artificial lake, CEDD reminded MCAL to check the legality of the source as the courses of most streams in Hong Kong lie on Government land.
8.	22/10/03	MCAL issued formal reply to CSCE's proposal (Item 2 in this Annex), requesting CSCE to confirm with documentary proof that the proposed source was legal.
9.	28/10 – 04/11/03	<p>CSCE transported 400 tonnes of boulders to Penny's Bay for preparing mock-up samples, pending, amongst others, adequate proof of the source and MCAL's final approval.</p> <p>MCAL considered it contractually difficult to stop CSCE from delivering the materials, in view of the letter dated 26 June 2003 purportedly issued by the Rural Committee.</p>
10.	29/10/03	CEDD asked MCAL to check the legal status of the source at a meeting with MCAL at MCAL's site office and sent an email to MCAL requesting urgent follow-up action, including proof of the legality of the source. CEDD also approached Lands D to verify the land status.
11.	01/11/03	CEDD sent a reminder to MCAL requesting the outcome of their investigation into the legal status of the source.
12.	04/11/03	Email reminder was sent to MCAL requesting urgent action to chase CSCE for submission, which should cover proof of the legality of the source, as that should have been submitted by 25 October 2003 as promised. CEDD learnt from the land status plan of Lands D that the Stream and some of the adjacent areas are mainly on Government land. CEDD passed the plan to MCAL, requesting them to check the legal status of the source of the

Item	Date	Event
		boulders.
13.	05/11/03	MCAL stopped CSCE from delivering boulders to Penny's Bay.
14.	15/11/03	CEDD and MCAL had a discussion about the delivery and a decision was made to return the boulders. MCAL stopped further production of mock-ups and instructed CSCE to return the materials to the supplier.
15.	04/12/03	MCAL reported the sequence of the incident to CEDD, together with relevant documents including the letter purportedly issued by the Rural Committee.
16.	06/12/03	All pebbles and boulders were sent back to the stockpile, including those which had been used for mock-ups.