

**Commission of Inquiry into the Construction Works at and near the Hung Hom Station
Extension under the Shatin to Central Link Project**

THIRD WITNESS STATEMENT OF JONATHAN KITCHING

I, **JONATHAN KITCHING** of 39/F Sun Hung Kai Centre, 30 Harbour Road, Hong Kong, say as follows:

1. I refer to my first and second witness statements dated 23 May 2019 and 30 May 2019 respectively. Unless otherwise stated or the context otherwise requires, any abbreviations shall bear the same meaning as in those statements.
2. I make this third statement in reply to the witness statement of Cheung Yick Ming dated 10 May 2019 (“**Cheung’s Statement**”) [EE1/59-92]. I was not personally involved in the procurement of Wing & Kwong. The matters stated below are based on my review of relevant records held by Leighton and discussions with Leighton staff.
3. Any allegations or matters raised in the statement mentioned in paragraph 2 above (or any other statements) which are not addressed in, or are inconsistent with, my witness statement are denied. If I do not address any allegations or matters raised in other witness statements, it should not be construed as an admission on my part.
4. Unless otherwise stated, the facts stated herein are within my personal knowledge and are true. Where the facts and matters stated herein are not within my own knowledge, they are based on the stated sources and are true to the best of my knowledge.

Leighton’s Subcontract with Wing & Kwong

5. In response to paragraph 10 of Cheung’s Statement:
 - (a) In or around April/May 2015, Leighton entered into a sub-contract with Wing & Kwong for the rebar fixing works for the HHS and other associated structures, including the NAT (the “**W&K Subcontract**”). Wing & Kwong signed but did not date the W&K Subcontract and returned it to Leighton, and Leighton then scanned it into its system. A copy of the W&K Subcontract is exhibited hereto and

marked “**JK-2**”. The PDF metadata for the scanned copy of the W&K Subcontract indicates that the signed W&K Subcontract was scanned and saved to Leighton’s system on 22 May 2015 (this is the date the document was created and last modified). The relevant metadata of the PDF copy of the W&K Subcontract is exhibited hereto and marked “**JK-3**”.

- (b) The scope of works to be carried out by Wing & Kwong under the W&K Subcontract is set out in Appendix 1 (at page 69 of 80). Relevantly, Appendix 1 includes rebar fixing works for the NAT. Specifically, the Introduction part has a total of 23 items (which includes items for the NAT) and states:

“The reinforcement bar cutting, bending and fixing works include but are not limited to the following locations:

1. Stabling Sidings and associated structures

2. Stabling Sidings substructures and pile caps (provisional)

....

21. NSL of North Approach Tunnel (provisional)

22. EWL of North Approach Tunnel (provisional)

23. Associated Works to North Approach Tunnel (provisional)”

[emphasis added]

- (c) The pricing basis for the subcontract works are set out in the Sub-Contract Particulars (page 40) and Appendix 2, Pricing Schedule (page 126) of the W&K Subcontract. The Pricing Schedule shows that Wing & Kwong was to be paid at a fixed rate multiplied by the quantity of materials.
- (d) The document exhibited at CYM-2 of Cheung’s Statement [EE1/99-178], which Cheung refers to as “the Original Sub-Contract”, only has 13 items in its Scope of Work section [EE1/139], and is therefore not the subcontract entered into between Leighton and Wing & Kwong which Wing & Kwong signed back in or around April/May 2015. As explained below, extra items for scope of work beyond the 13 items in the “Original Sub-Contract” were added in at Tender Addendum No. 2 dated 20 October 2014 which reinforces the fact that the copy of subcontract

disclosed by Wing & Kwong could not have been the finalized one signed in 2015. That document disclosed by Wing & Kwong would appear to be a previous draft version of the W&K Subcontract.

6. In response to paragraphs 11 to 14 of Cheung's Statement:

- (a) Wing & Kwong went through an open tender process for the sub-contract works.
- (b) Leighton notified Wing & Kwong that they were awarded the sub-contract by letter of intent dated 28 November 2014 ("**Letter of Intent**"). A copy of the Letter of Intent is exhibited hereto and marked "**JK-4**".
- (c) The Letter of Intent refers to Wing & Kwong's quotation with reference "**WK-6532-03(F)-Addendum No.2**" dated 21 October 2014. Leighton cannot locate a copy of this quotation. However, Wing & Kwong provided the quotation in response to Leighton's Tender Addendum No.2 dated 20 October 2014, which is exhibited hereto and marked "**JK-5**".
- (d) The scope of works in Leighton's Tender Addendum No.2 includes works for the NAT which were carried across from Tender Addendum No.1 made on 18 October 2014. Specifically, it states the following which mirror the items under the Scope of Work in the W&K Subcontract quoted in paragraph 5(b) above:

"The reinforcement bar cutting, bending and fixing works include but are not limited to the following locations:

1. Stabling Sidings and associated structures

2. Stabling Sidings substructures and pile caps (provisional)

....

26. NSL North Approach Tunnel (provisional)

27. EWL North Approach Tunnel (provisional)

28. Associated Works to NAT (provisional)"

[emphasis added]

- (e) The 28 item scope in Tender Addendum No. 2 included also works for the SAT. However, items 21 to 25 in Tender Addendum No. 2 were eventually removed and given to Fang Sheung. As such, these works were not included in the W&K Subcontract.
7. Thus, contrary to paragraphs 15 to 18 of Cheung's Statement, the W&K Subcontract included works for the NAT as well as the HHS.
8. In response to paragraphs 19 to 27 of Cheung's Statement:
- (a) Leighton cannot locate the physical copy of the W&K Subcontract signed by both Wing & Kwong and Leighton. It appears that the W&K Subcontract was misplaced after it was signed and returned to Leighton by Wing & Kwong in 2015. Leighton had only kept a scanned copy of the W&K Subcontract signed by Wing & Kwong in Leighton's computer system.
- (b) For this reason, Leighton asked Wing & Kwong to sign a copy of the W&K Subcontract again in April 2017, which Cheung refers to as the "Second Contract Document". That document is the same as the W&K Subcontract signed by Wing & Kwong and returned to Leighton in 2015, save for the following minor amendments/updates:
- (i) The name of Wing & Kwong on the cover, recital and signature page was changed;
- (ii) The date originally appearing on the signature page was moved to the first page of the body;
- (iii) In the Table of Contents (under Appendices), the one signed in 2017 has "(Not Used)" next to those appendices that were not in use; and
- (iv) On Page 71, under "General Programme of Works", the one signed in 2015 states "Refer to attached Tentative Construction Programme (Rev.1)" while the one signed in 2017 states "The Sub-Contractor shall arrange his works to meet the Leighton programmed works which will be issued to the Sub-Contractor from time to time for the Sub-Contract works". The change appeared to have been made because the Tentative Construction

Programme was drafted in 2014 and by 2017 it would have been outdated. However, the Tentative Construction Programme (Rev.1) is still attached to the 2017 version (as with the 2015 version).

- (c) A copy of the W&K Subcontract signed by Wing & Kwong and Leighton in April 2017 is annexed hereto and marked “**JK-6**” which is the same as the W&K Subcontract disclosed by MTRCL at [BB3/2044-2236]. The W&K Subcontract previously disclosed by Leighton at [CC2/870-1062] is also the same document save that that copy was not yet dated and signed by Leighton.

9. In response to paragraph 28 to 29 of Cheung’s Statement:

- (a) As explained above, the works for the NAT were already covered by the W&K Subcontract agreed between Leighton and Wing & Kwong in April/May 2015.
- (b) SCI 2710 and SCI 2711 relate to ‘Extra Over’ for overtime work as part of the Delay Recovery Measures (DRM).¹ In simple terms, under these two SCI, Wing & Kwong were instructed and paid extra to speed up the work process. A copy of SCI 2710 and SCI 2711 are exhibited hereto and marked “**JK-7**” and “**JK-8**” respectively. They were *not* instructions issued by Leighton to Wing & Kwong specifically to carry out the NAT works (as paragraph 28 of Cheung’s Statement alleged), since the NAT works were already covered in the W&K Subcontract agreed in 2015 and re-signed in 2017.
- (c) SCI 2806 was issued to Wing & Kwong to increase the numbers of couplers that Wing & Kwong was responsible for in the North Fan Area. It is not relevant to the NAT works. A copy of SCI 2806 is exhibited hereto and marked “**JK-9**”.

10. In response to paragraph 30 of Cheung’s Statement:

¹ This is derived from the Main Contract under Clause 69.3 of the Conditions of Contract as follows: “If in the opinion of the Engineer a delay to the achievement of a Completion Obligation caused by a matter described in Clause 68.1(a)-(j) might be overcome by the Contractor taking certain measures (hereinafter referred to as “delay recovery measures”) then the Engineer may instruct the Contractor to provide proposals for delay recovery measures specifying that the Completion Obligations shall be achieved either on the date fixed in accordance with the Contract disregarding the entirety of the said delay or on some later date. The Contractor’s proposals shall specify: (a) the nature of the delay recovery measures which the Contractor would propose to adopt; and (b) the Contractor’s estimate for those measures.”

- (a) As explained above, the pricing basis for the subcontract works for both the HHS and NAT are set out in Sub-Contract Particulars (page 40) and Pricing Schedule (page 126) of the W&K Subcontract.
- (b) In March 2017, Leighton and Wing & Kwong agreed to a final account involving a milestone payment schedule with an agreed total final account sum of \$62,500,000. It was agreed on this basis as a commercial settlement between Leighton and Wing & Kwong including all Subcontract and instructed works.
11. Finally, I wish to point out that under Clause 2.6 of the W&K Subcontract [CC2/876], Wing & Kwong shall not assign any part of the subcontract without Leighton's prior written consent. I have not seen and understand that there is no documentation from Wing & Kwong notifying Leighton that in fact the rebar fixing work under the W&K Subcontract had been sub-contracted to Loyal Ease.

My First Witness Statement

12. I refer to paragraph 16 of my first witness statement dated 23 May 2019 [CC10/6489]. Whilst there were subcontractor instructions issued to Wing & Kwong (e.g. SCI 2710, 2711 and 2806 referred to above), upon my review they were not issued in respect of the NAT Stitch Joints or the SNJ. For this reason, the more accurate way to describe the position in the second sentence of that paragraph should be as follows:

"There were no written instructions issued to W&K, nor any other contemporaneous correspondence or record, which referred to a mismatch between the couplers and the rebar or indicated that there was any issue with the rebar fixing."

Dated the 1 day of June 2019.

Signed:

Jonathan Kitching