

**THE GOVERNMENT OF  
THE HONG KONG SPECIAL ADMINISTRATIVE REGION**

**TENDER FOR THE PROVISION OF SERVICES**

**STANDARD TERMS AND CONDITIONS  
Reference No. BD-TERMS-2**

**FOREWORD**

This document Ref. No. BD-TERMS-2 issued by the Government Logistics Department of the Government of the Hong Kong Special Administrative Region of the People's Republic of China contains the standard terms and conditions that are applicable by express incorporation or reference to invitations to tender for the provision of services issued by the procuring bureau/department (Procuring Department) on behalf of the Government. The Procuring Department may issue addenda to these terms and conditions whenever necessary.

These terms and conditions will not be provided in each tender invitation issued by the Procuring Department on behalf of the Government. However, tenderers who respond to any such invitation to which these terms and conditions are applicable are required to confirm compliance with these terms and conditions, and those issued under any addenda, in addition to the other terms and conditions of that invitation.

The Chinese translation of this document is for reference only. In the event of any conflict or inconsistency between the English text and the Chinese translation of this document, the English text shall prevail.

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## INTERPRETATION

In the documents issued by the Government in connection with this Invitation to Tender (including these Standard Terms and Conditions (Reference No. BD-TERMS-2 (December 2014)) and the Contract that is made pursuant to this Invitation to Tender), unless otherwise defined or the context otherwise requires:

1.1 the following expressions shall bear the same meanings as set out below:

- “Appendix” means an appendix attached to the Tender Form;
- “Companies Registry” means the Companies Registry of the Government;
- “Contract” means the agreement made between the Government and the Contractor pursuant to the Invitation to Tender, and reference to the terms thereof shall include:
- (a) the terms set out in the Tender Document, completed, modified or expanded as necessary or appropriate to include the terms accepted by the Government and the Contractor; and
  - (b) all other documents attached to the Tender Form as a Schedule or other attachment by whatever name called, completed and stamped with a chop of the Procuring Department;
- “Contract Deposit” has the meaning given to it in Clause 11 of the General Conditions of Contract;
- “Contract Period” means, subject to early termination or extension provided for in the Contract:
- (a) the period specified in the Special Conditions of Contract as the contract period; or
  - (b) if no such period is specified in the Special Conditions of Contract, the period from the date on which the Contract is constituted in accordance with Paragraph 26.1 of the Terms of Tender to the date on which the Contractor has fully discharged all its obligations under the Contract (both dates inclusive);

“Contract Price” means the amount calculated in accordance with paragraph (b) under Part A – Contract Price of the Price Schedule, which is payable by the Government to the Contractor under the Contract for the full and proper performance by the Contractor of its obligations under the Contract;

“Contractor” means the Tenderer whose Tender is accepted by the Government;

“Estimated Contract Price” means the amount specified at the end of paragraph (a) under Part A – Contract Price of the Price Schedule under the heading “Estimated Contract Price”;

“Force Majeure Event” means:

- (a) any supervening outbreak of war affecting Hong Kong and/or any other parts of the PRC, hostilities (whether war be declared or not), invasion, acts of foreign enemies, rebellion, revolution, military or usurped power, overthrow (whether by external or internal means) of the Government and/or the government of the PRC, civil war, riot, civil disturbances, fire if not caused or contributed to by the Contractor, its related persons (as defined in Paragraphs 23.6 and 23.7 of the Terms of Tender) or any employee or agent or ex-employee or ex-agent thereof, civil commotion and acts of God;
- (b) any supervening catastrophic event which is similar to the foregoing if not caused or contributed to by the Contractor, its related persons (as defined in Paragraphs 23.6 and 23.7 of the Terms of Tender) or any employee or agent or ex-employee or ex-agent thereof; or
- (c) any supervening epidemic outbreak in Hong Kong;

and which, in any case of (a), (b) and (c) above, prevents the performance of the duties and obligations of any party hereunder;

“General Conditions of Contract”	means the General Conditions of Contract set out in Part 2 of these Standard Terms and Conditions (Reference No. BD-TERMS-2 (December 2014));
“general holiday” or “public holiday”	means every Sunday and any other day which is a general holiday by virtue of the General Holidays Ordinance (Chapter 149 of the Laws of Hong Kong);
“Good Industry Practice”	means the standards, practices, methods and procedures conforming to law and the degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person or body engaged in a similar type of undertaking under the same or similar circumstances;
“Government”	means the Government of the Hong Kong Special Administrative Region of the People’s Republic of China;
“Government Representative”	means: <ul style="list-style-type: none"> <li>(a) the Head of the Procuring Department;</li> <li>(b) any officer of the Government specified by the Head of the Procuring Department for the purposes of the Contract; and</li> <li>(c) any other officer authorised by the officer referred to in (b) for the purpose of the Contract;</li> </ul>
“Hong Kong”	means the Hong Kong Special Administrative Region of the People’s Republic of China;
“Inland Revenue Department”	means the Inland Revenue Department of the Government;
“Inspecting Officer”	means the officer appointed by the Government Representative for the purpose of inspecting the Services performed in pursuance of the Contract;

“Intellectual Property Rights”	means patents, trade marks, service marks, trade names, design rights, copyright, domain names, database rights, rights in know-how, new inventions, designs, processes, and other intellectual property rights of whatever nature and wheresoever arising, whether now known or created in the future, in each case whether registered or unregistered, and include applications for the grant of any such rights;
“Interpretation”	means this Interpretation section;
“Invitation to Tender”	means this invitation to tender for the provision of the Services to the Government on the terms and conditions set out in the Tender Document;
“Materials”	means any and all works and materials (including their drafts and uncompleted versions) developed, written or prepared by the Contractor, its employees, agents or sub-contractors in relation to the Services (whether individually or collectively or jointly with the Government) including without limitation, any reports, summaries, models, questionnaires, analyses, papers, documents, records, plans, drawings, formula, tables, charts, data or information collected, compiled, produced or created by the Contractor in relation to the Services recorded or stored by whatever means;
“Notes for Tenderers”	means the notes for tenderers (if any) attached to the Tender Form;
“PRC”	means the People’s Republic of China;
“Price Schedule”	means the price schedule attached to the Tender Form containing details of the Contract Price and the payment timetable;
“Procuring Department”	means the bureau or department of the Government specified as such in the Appendix;
“Schedule”	means a schedule attached to the Tender Form;
“Services”	means the services to be provided by the Contractor to the Government as specified in the Service Specifications;

- “Service Specifications” means the specifications referred to in [PART 3A] of, and attached to, the Tender Form;
- “Special Conditions of Contract” means the special conditions of contract attached to the Tender Form;
- “Tender” means an offer to provide the Services as submitted by a Tenderer in response to the Invitation to Tender;
- “Tender Acceptance” has the meaning given to it in Paragraph 26 of the Terms of Tender;
- “Tender Closing Time” means the time on the date specified in the “LODGING OF TENDER” section of the Tender Form as the latest date and time before which Tenders must be deposited with the Government, and as such date and time as may be extended in accordance with Paragraph 3.7(b) of the Terms of Tender;
- “Tender Document” means the documents issued by the Government for the purpose of the Invitation to Tender, and reference to the terms thereof shall include the terms set out in:
- (a) the Tender Form;
  - (b) this Interpretation section;
  - (c) the Notes for Tenderers (if any);
  - (d) the Terms of Tender;
  - (e) the Terms of Tender (Supplement) (if any);
  - (f) the General Conditions of Contract;
  - (g) the Special Conditions of Contract (if any);
  - (h) the Service Specifications (if any);
  - (i) the Price Schedule;
  - (j) the Information Schedule; and



- (k) all other documents attached to the Tender Form whether as a Schedule or other attachment by whatever name called;
- “Tender Form” means the Tender Form G.F. 231 issued for the Invitation to Tender;
- “Tender Submission Date” means the date of the Offer to be Bound;
- “Tenderer” means the person whose particulars are set out in the “Offer to be Bound” section of the Tender Form;
- “Terms of Tender” means the Terms of Tender set out in Part 1 of these Standard Terms and Conditions (Reference No. BD-TERMS-2 (December 2014)) and the Terms of Tender (Supplement) (if any) attached to the Tender Form;
- “Terms of Tender (Supplement)” means the terms of tender (supplement) (if any) attached to the Tender Form;
- “working day” means Monday to Friday other than a public holiday or a day on which Tropical Cyclone Warning Signal no. 8 or above is hoisted or a Black Rainstorm Warning Signal is in force for any duration between 0900 and 1200 hours in Hong Kong; and
- “WTO GPA” means the World Trade Organization Agreement on Government Procurement.

1.2 the following rules of interpretation shall apply:

- (a) references to statutes or statutory provisions shall be construed as references to those statutes or statutory provisions as replaced, amended, modified or re-enacted from time to time; and shall include all subordinate legislation made under those statutes;
- (b) words importing the singular shall include the plural and vice versa; words importing a gender shall include all other genders; references to any person shall include any individual, firm, body corporate or unincorporate (wherever established or incorporated);
- (c) headings are inserted for ease of reference only and shall not affect the construction of the Tender Document or the Contract;

- (d) references to a document shall:
  - (i) include all schedules, appendices, annexures and other materials attached to such document; and
  - (ii) mean the same as from time to time amended or supplemented in accordance with the terms of the Tender Document or the Contract;
- (e) references to “Tenderer” or “Contractor” shall include its permitted assigns, successors, or any persons deriving title under them;
- (f) references to “Government” shall include its assigns, successors-in-title and persons deriving title under them, regardless of whether or not any of these persons are mentioned separately in the relevant provisions;
- (g) references to a “Paragraph” in the Terms of Tender are to a paragraph in the Terms of Tender; references to a Clause, Sub-clause, Section or Paragraph in or a Schedule, Appendix or any other attachment to a document are to a clause, sub-clause, section or paragraph in or a schedule, appendix or attachment to that document;
- (h) references to “law” and “regulation” shall include any constitutional provisions, treaties, conventions, ordinances, subsidiary legislation, orders, rules and regulations having the force of law and rules of civil and common law and equity;
- (i) any word or expression to which a specific meaning has been attached in any part of the Tender Document shall bear such meaning whenever it appears in the same and other parts of the Tender Document;
- (j) a time of a day shall be construed as a reference to Hong Kong time;
- (k) references to “normal business hours” mean 0900 to 1800 hours;
- (l) references to a day mean a calendar day;
- (m) references to a month or a monthly period mean a calendar month;
- (n) any negative obligation imposed on any party shall be construed as if it were also an obligation not to permit or suffer the act or thing in question, and any positive obligation imposed on any party shall be construed as if it were also an obligation to procure that the act or thing in question be done;

- (o) any act, default, neglect or omission of any employee, licensee, agent or sub-contractor of the Contractor shall be deemed to be the act, default, neglect or omission of the Contractor;
  - (p) words importing the whole shall be treated as including a reference to any part of the whole;
  - (q) the expressions “include” and “including” shall be construed without limitation to the words following;
  - (r) words and expressions extend to their grammatical variations and cognate expressions where those words and expressions are defined in the Tender Document or by reference to any other definition;
  - (s) references to “writing” include typewriting, printing, lithography, photography, facsimile and the printed out version of a communication by electronic mail and other modes of representing and reproducing words in a legible form; and
  - (t) where a general obligation in the Tender Document or the Contract is followed by more specific obligations, the general obligation shall not be construed restrictively by reference to the specific obligations or deemed to be fully performed by reason only that the specific obligations have been performed.
- 1.3 Nothing in the Contract shall be taken to restrict, derogate from or otherwise interfere with any power or duty, or the exercise or performance of any power or duty conferred or imposed by or under any law upon the Government or any person in the service of the Government.
- 1.4 All rights and powers of the Government under the Contract may be exercised by the Government Representative. If any provision of the Contract provides for a determination of any matter by the Government or the Government Representative, the determination made by the Government or the Government Representative (as the case may be) shall, in the absence of manifest error, be final and conclusive.
- 1.5 Unless otherwise provided for in the Tender Document, all quotations and payments shall be made in Hong Kong Dollars.

**PART 1**  
**TERMS OF TENDER**

**1. Invitation to Tender**

- 1.1 Unless otherwise specified in the Tender Form, Tenders are invited for the provision of all of the Services subject to and in accordance with the Tender Document.
- 1.2 The Standard Terms and Conditions (Reference No. BD-TERMS-2 (December 2014)) comprising the Interpretation section, the Terms of Tender and the General Conditions of Contract may be downloaded from the website at <http://www.gldetb.gov.hk>.
- 1.3 A Tenderer should read the Tender Document carefully prior to submitting a Tender and ensure that it understands all requirements of the Tender Document.
- 1.4 A Tenderer should obtain such independent advice from its own advisers as it considers appropriate.
- 1.5 A Tenderer should check the numbers of pages of the Tender Document. If it finds any missing or indistinct pages, it should inform the Government Representative immediately so that the same can be rectified.
- 1.6 A Tenderer will be regarded to be thoroughly conversant with all aspects of the Tender Document (including the Contract) and in general to have obtained all necessary information of any circumstances which may influence or affect its Tender or its performance of the Contract. The Government does not assume any liability in respect of any errors or mistakes made by a Tenderer or any neglect or failure of the Tenderer to obtain any information or clarification relating to the provision of the Services to the Government in accordance with the Contract.
- 1.7 No error, mistake, neglect or failure by a Tenderer shall affect any provision of the Tender Document (including the Contract) or relieve the Tenderer from any of its obligations or liabilities under the Tender Document (including the Contract). For the avoidance of doubt, a successful Tenderer shall not be entitled to any additional payment, compensation or allowance by reason of any such error, mistake, neglect or failure. If a Tenderer is awarded the Contract, it shall not be excused from any liability under the Contract as a consequence of any misinterpretation by it of any matter or fact relating to the Tender Document or the Contract.

- 1.8 Information, statistics and forecasts set out in the Tender Document are provided for a Tenderer's reference only. The Government does not warrant or represent that the information, statistics and forecasts are complete, true or accurate. The Government does not bind itself to adhere to such information, statistics and forecasts.
- 1.9 Without prejudice to Paragraph 1.8, the estimated requirement of the Services specified in the Price Schedule or Service Specifications (if any) is/are estimate(s) of the Services that may be required by the Government. They are given for a Tenderer's reference only and are not figures to which the Government binds itself to adhere. The Government's actual requirements may vary depending on the actual need of the Procuring Department and the successful Tenderer must accept any increase or decrease of the stated estimates.
- 1.10 By submitting a Tender, a Tenderer will be regarded to have agreed to all terms and conditions set out in the Tender Document.

## **2. Supplementary Information/Tender Addenda**

All supplementary information or tender addenda to the Invitation to Tender will be provided in writing by the Government and forwarded to all prospective Tenderers who have registered with the Government when obtaining a copy of the Tender Document.

## **3. Tender Preparation and Submission**

- 3.1 Save in accordance with the terms of the Tender Document, a Tenderer must not alter any provision of the Tender Document.
- 3.2 A Tender must be completed in either English or Chinese and in accordance with other requirements of the Tender Document. The Government will not consider a Tender that is completed in any other language.
- 3.3 A Tenderer shall submit, in the following manner, its completed Tender together with all information and documents required under the Tender Document or relevant to its Tender in accordance with the terms of the Tender Document. A Tender not so submitted (for example, a Tender submitted by e-mail or facsimile) will not be considered.

### Tender Submission:

The Tender (including the Tender Form) shall be completed in ink or typescript and submitted in triplicate in accordance with the Lodging of Tender section of the Tender Form.

3.4 The Government may not consider a Tender if:

- (a) false, inaccurate or incorrect information is given in the Tender;
- (b) complete information (including descriptive literature, catalogues and any other document required under any provision of the Tender Document) is not given with the Tender; and
- (c) any particulars or data requested for in the Tender Document is not furnished in full in the Tender.

3.5 When completing the Tender Document (including the Offer to be Bound section of the Tender Form), a Tenderer shall ensure that the name of the Tenderer is the same as the name shown in:

- (a) if the Tenderer is a company incorporated in Hong Kong:
  - (i) the Certificate of Incorporation of the Tenderer; or
  - (ii) if there is a change of name of the Tenderer since the date of its Certificate of Incorporation, the latest Certificate of Change of Name of the Tenderer;
- (b) if the Tenderer is a sole proprietorship or a partnership, the latest business registration certificate of the Tenderer; or
- (c) if the Tenderer is formed, established or incorporated outside Hong Kong, a document equivalent to Paragraph 3.5 (a)(i), (a)(ii) or (b) above (as the case may be) issued by a governmental or competent authority of the place where the Tenderer is formed, established or incorporated.

3.6 Execution and Submission of Tenders

- (a) Part 4 “Offer to be Bound” of the Tender Form shall be duly signed by:
  - (i) if the Tenderer is a sole proprietorship, the Tenderer;
  - (ii) if the Tenderer is a partnership, a partner of the Tenderer;  
or

- (iii) if the Tenderer is a body corporate, one or more persons who are duly authorised by the Tenderer to sign and submit the Tender for and on behalf of the Tenderer.
- (b) a Tender will not be further considered if Part 4 “Offer to be Bound” of the Tender Form is not completed and signed in the manner described in Paragraph 3.6(a) above or submitted with the Tender before the Tender Closing Time.

### 3.7 Tender Closing Time

- (a) A Tender must be deposited in the tender box as specified in the Tender Form before the Tender Closing Time. A Tender deposited in the tender box specified at or after the Tender Closing Time will not be considered;
- (b) In case Tropical Cyclone Warning Signal No. 8 or above is hoisted or a Black Rainstorm Warning Signal is in force for any duration between 0900 and 1200 hours on the date and time specified in the “LODGING OF TENDER” section of the Tender Form, the latest date and time before which Tenders are to be deposited at the tender box referred to in Paragraph 3.7(a) will be extended to 1200 hours on the following working day.

3.8 All documents to be submitted by a Tenderer shall either be originals or certified true copies of the documents. If a Tenderer fails to comply with this requirement, its Tender may not be further considered.

## 4. Tenders to Remain Open

- 4.1 A Tender once submitted by a Tenderer will be binding on the Tenderer.
- 4.2 It is an essential requirement of this Invitation to Tender that a Tender shall remain valid and open for acceptance for the longest of the following periods:
  - (a) a period of not less than ninety (90) days after the Tender Closing Time;
  - (b) a period specified in the Terms of Tender (Supplement) for which Tenders are to remain valid and open for acceptance, if any; and

(c) a period offered in the Tender for which it is to remain valid and open for acceptance,

("Tender Validity Period").

4.3 If a Tenderer does not state in its Tender the period for which the Tender is to remain valid and open for acceptance, the Tender Validity Period of that Tender shall be the longer of the periods in Paragraphs 4.2(a) and (b).

4.4 If a Tenderer offers in its Tender a period that is shorter than any of the periods referred to in Paragraphs 4.2(a) and (b), or if it rejects the Tender Validity Period prescribed in Paragraph 4.2, its Tender will not be further considered.

## **5. Prices**

5.1 Unless otherwise provided for in the Tender Document, a Tenderer shall quote all the prices requested for in the Tender Document in Hong Kong Dollars. Such prices shall be net prices allowing for all trade and cash discounts. The prices shall cover all expenses incidental to the due and proper performance of the Contract by the Contractor.

5.2 Prices quoted by a Tenderer shall only be shown in the Price Schedule.

5.3 A Tenderer must quote fixed prices. A Tender with any price variation clause, including one based on foreign exchange market fluctuation, will not be considered further.

5.4 A Tenderer should make sure that all prices quoted in its Tender are accurate before it submits the Tender. The Tenderer shall be bound by the Tender prices quoted in its Tender if the Tender is accepted by the Government. Under no circumstances will the Government be obliged to accept any request for price adjustment on any ground (including any mistake made in prices quoted).

5.5 Without prejudice to the generality of the Terms of Tender, the Government may require a Tenderer who in the opinion of the Government has submitted an unreasonably low price to justify and demonstrate that such a Tenderer is capable of carrying out and completing the Contract. The Government may reject the Tender if the Tenderer fails to so justify and demonstrate to the Government's satisfaction.



## **6. Checklist of Compliance**

A Tenderer should ensure that its Tender complies with all the essential requirements stipulated in the Tender Document. The Tenderer should complete the Checklist of Compliance, if any, and submit it with its Tender.

## **7. Company/Business Organisation Status**

7.1 A Tenderer shall provide the following details relating to itself in the Schedules:

- (a) name and address of the company/business organisation;
- (b) length of business experience;
- (c) shareholders/partners/proprietor of the company/business organisation and their percentage of ownership;
- (d) names and correspondence addresses of the following:
  - (i) managing director/partners;
  - (ii) other directors; and
  - (iii) sole proprietor;
- (e) a copy of a valid Business Registration Certificate and copies of other documents evidencing its business status;
- (f) if the Tenderer is a company or body corporate, its Memorandum (if any) and Articles of Association, a copy of the agreement made between its shareholders (if any), Certificate of Incorporation, Certificate of Change of Name (if any), and other corporate documents;
- (g) if the Tenderer, being an incorporated entity, is a company incorporated in Hong Kong or has a principal place of business in Hong Kong, a copy of the latest annual return filed with the Companies Registry;
- (h) place and date of its incorporation or formation;
- (i) company profile information of the Tenderer including the number and location of full time/contract employees, core business strategies and strength, and industry expertise;

- (j) a copy of the relevant document (e.g. board resolutions of the Tenderer if it is a company) showing that the authorised person(s) who sign(s) the Offer to be Bound has/have the authority to sign it for and on behalf of the Tenderer; and
- (k) names and addresses of banks which are prepared to provide references or other relevant financial data which indicate the financial viability of the Tenderer.

7.2 If a Tenderer is incorporated, formed or established outside Hong Kong, a legal opinion in form and substance satisfactory to the Government and issued by a lawyer duly qualified to practise the laws of the place of incorporation, formation or establishment (as the case may be) of the Tenderer and acceptable to the Government shall be provided upon request by the Government on the following issues and any other issues as may be required by the Government:

- (a) the Tenderer is duly incorporated, formed or established and validly existing under the laws of the place of the Tenderer's incorporation, formation or establishment and that the Tenderer has full power, capacity and authority to carry on the business as it is now conducting and to provide the Services to the Government on the terms and conditions of the proposed Contract;
- (b) the Tenderer has the full power, authority and legal capacity to:
  - (i) execute and submit its Tender and to incur the liabilities and perform the obligations under the Tender Document; and
  - (ii) enter into and execute the Contract and to incur the liabilities and perform the obligations thereunder;
- (c) the proposed Contract with the Government will, upon its formation pursuant to Paragraph 26.1, constitute the legal, valid and binding obligations of the Tenderer in the place of its incorporation, formation or establishment and is enforceable against the Tenderer in accordance with its terms;
- (d) the execution, delivery and performance of its Tender and the proposed mode of execution, delivery and performance of the Contract (if awarded to the Tenderer) have been duly authorised by all necessary corporate action of the Tenderer, and does not violate any provision of any applicable law, regulation or decree of the Tenderer's place of incorporation, formation or

establishment, or the Memorandum and Articles of Association or similar constitutional documents of the Tenderer;

- (e) no authorisations, consents, approvals are required from any governmental authorities or agencies or other official bodies in the place of incorporation, formation or establishment in connection with the execution and delivery of the Tenderer's Tender, or the performance by the Tenderer of its obligations under the Tender Document and the Contract;
- (f) the Tenderer's Tender and the Contract (if awarded to the Tenderer) need not be registered or filed in the place of incorporation, formation or establishment in order to secure their validity and/or priority;
- (g) there is no restriction under the laws of the place of the Tenderer's incorporation, formation or establishment affecting the Tenderer's obligations under the Tender Document and the Contract;
- (h) the choice of the laws of Hong Kong to govern the Tender Document and the Contract is a valid choice of laws and would be recognised and given effect to by the courts of the place of incorporation, formation or establishment of the Tenderer; and
- (i) it is not necessary under the laws of the place of incorporation, formation or establishment of the Tenderer that the Government be licensed, qualified or otherwise registered in such place of incorporation, formation or establishment in order to enable it to enforce its rights under the Tender Document and the Contract.

7.3 The Government may require a Tenderer to provide, at its own expense, additional legal opinion satisfactory to the Government in all respects issued by a lawyer duly qualified to practise the laws of the place of incorporation, formation or establishment of the Tenderer and acceptable to the Government on any other matters arising from its Tender.

7.4 If a Tenderer proposes to engage any sub-contractor to perform the Contract, subject to the other provisions in the Tender Document relating to such engagement, the Tenderer shall submit with its Tender, information and documents relating to each of such proposed sub-contractor on the matters referred to in Paragraph 7.1, and if the proposed sub-contractor is incorporated outside Hong Kong, the legal opinion referred to in Paragraphs 7.2 and 7.3 above.

## **8. Cancellation of Tender**

Without prejudice to the Government's right to cancel the tender at its absolute discretion or for public interest reasons, where there are changes of requirement after the Tender Closing Time for operational or whatever reasons, the Government is not bound to accept any conforming tender and reserves the right to cancel the tender.

## **9. Counter-Proposals**

9.1 A Tenderer must not submit any proposal that has the effect of varying or modifying any essential requirements specified in the Tender Document.

9.2 If a Tenderer fails to comply with Paragraph 9.1, its Tender will be disqualified and will not be further considered by the Government.

9.3 Subject to Paragraph 9.1, if a Tenderer still wishes to submit a counter-proposal ("Counter-Proposal"), the Counter-Proposal must be submitted in the following manner:

- (a) the Counter-Proposal shall be attached to the Offer to be Bound;
- (b) the original provision which the Counter-Proposal relates to should be fully recited before the proposed alteration or deletion;
- (c) the proposed alteration to the original provision should be underlined and should bear the corresponding clause number of the original provision unless it is an addition;
- (d) if it is an addition, the additional provision should be underlined;
- (e) words to be deleted should be crossed out by a single line only;  
and
- (f) an explanation should be given below the alteration or deletion and put in square brackets "[ ]".

9.4 Any Counter-Proposal that is not submitted in accordance with Paragraph 9.3 will not be considered by the Government and will not be regarded to form part of the Tender submitted by a Tenderer. In such event, the Tenderer shall be deemed to have agreed to the original term to which the Counter-Proposal relates and the Government will continue to consider the Tenderer's Tender on this basis.

- 9.5 Notwithstanding and without prejudice to the aforesaid, the Government may negotiate with the Tenderer any Counter-Proposal but is not obliged to do so. The Government may at its absolute discretion reject any Counter-Proposal. If negotiation is conducted but fails, the Government may reject or exclude the Counter-Proposal and assess the Tender as it is without the Counter-Proposal.

## **10. Authenticity of Documents Submitted**

All documents submitted by a Tenderer to the Government in relation to its Tender shall be original documents or certified true copies of the original documents. If a Tenderer fails to comply with this requirement or fails to provide such verification as the Government may require to prove the authenticity of a document submitted to the Government, the Government may not further consider the Tender.

## **11. Personal Data Provided**

- 11.1 All personal data provided in a Tender will be used by the Government for the purposes of the Invitation to Tender and all other purposes arising from or incidental to it (including for the purposes of tender evaluation, the award of the Contract and resolution of any dispute arising from the Invitation to Tender).
- 11.2 By submitting a Tender, a Tenderer is regarded to have agreed to, and to have obtained from each individual whose personal data is provided in the Tender, his consent for the disclosure, use and further disclosure by the Government of the personal data for the purposes set out in Paragraph 11.1.
- 11.3 An individual to whom personal data belongs and a person authorised by him in writing has the right of access and correction with respect to the individual's personal data as provided for in sections 18 and 22 and Principle 6 of Schedule 1 to the Personal Data (Privacy) Ordinance (Chapter 486 of the Laws of Hong Kong). The right of access includes the right to obtain a copy of the individual's personal data provided in the Tender.
- 11.4 Enquiries concerning the personal data collected by means of the Invitation to Tender, including the making of access and corrections, should be addressed to the Personal Data Privacy Officer of the Procuring Department.

## **12. Warranty against Collusion**

- 12.1 By submitting a Tender, a Tenderer is regarded to have represented and warranted to the Government that in relation to the Invitation to Tender:
- (a) save with the prior written consent of the Government, it has not communicated and will not communicate to any person other than the Government the amount of any price submitted in its Tender;
  - (b) it has not fixed and will not fix the amount of any price submitted in its Tender by arrangement with any person;
  - (c) it has not made and will not make any arrangement with any person as to whether it or that other person will or will not submit a Tender; and
  - (d) it has not otherwise colluded and will not otherwise collude with any person in any manner whatsoever in the tendering process.
- 12.2 In the event that a Tenderer is in breach of any of the representations and/or warranties in Paragraph 12.1, the Government shall be entitled to, without compensation to any person or liability on the part of the Government:
- (a) reject the Tenderer's Tender;
  - (b) if the Government has accepted the Tender, withdraw its acceptance of the Tender; and
  - (c) if the Government has entered into the Contract with the Tenderer, terminate the Contract.
- 12.3 By submitting a Tender, a Tenderer is regarded to have undertaken to indemnify and keep indemnified the Government against all losses, damages, costs or expenses arising out of or in relation to any breach of any of the representations and/or warranties in Paragraph 12.1.
- 12.4 A breach by a Tenderer of any of the representations and/or warranties in Paragraph 12.1 may prejudice its future standing as a Government contractor or service provider.
- 12.5 Paragraph 12.1 shall have no application to a Tenderer's communications in strict confidence with its own insurers or brokers to obtain an insurance quotation for computation of the prices quoted in its Tender, or with its professional advisers, consultants or sub-contractors to solicit their assistance in preparation of its Tender.

12.6 The rights of the Government under Paragraphs 12.2 to 12.4 are in addition to and without prejudice to any other rights or remedies available to it against the Tenderer.

### **13. Warning against Bribery**

13.1 The offer of an advantage to any Government officer with a view to influencing the award of the Contract is an offence under the Prevention of Bribery Ordinance (Chapter 201 of the Laws of Hong Kong). Any such offence committed by a Tenderer or any of its officers (including directors), employees or agents will render its Tender null and void.

13.2 The successful Tenderer shall inform its officers, employees (whether permanent or temporary), agents and sub-contractors who are connected with the provision of the Services that the soliciting or accepting of advantages, as defined in the Prevention of Bribery Ordinance (Chapter 201 of the Laws of Hong Kong) is not permitted. The successful Tenderer shall also caution its officers (including directors), employees and agents and sub-contractors against soliciting or accepting any excessive hospitality, entertainment or inducement which may impair their impartiality in relation to the selection of its sub-contractors, if any, or the supervision of the work of the sub-contractors once selected.

### **14. Environmental Protection**

14.1 Tenderers are requested to minimise the impact of their activities on the environment

14.2 The following environment-friendly measures are recommended to be adopted in the preparation of documents relating to a Tender and the future performance of the Contract:

(a) all documents should be printed on both sides and on recycled paper. Paper that exceeds 80 gsm should not be used for the text;

(b) use of plastic laminates, glossy covers or double covers should be avoided as far as possible. If art board paper has to be used as document covers, recyclable non-glossy paper should be used; and

(c) single line spacing should be used and excessive space in the margins and in between paragraphs should be avoided.

## **15. Tenderer's Commitment**

- 15.1 All Tenders, information and responses from a Tenderer must be submitted in writing. Each of them is the representation of the Tenderer and will, if accepted by the Government, be incorporated into and made part of the Contract in such manner as the Government considers appropriate.
- 15.2 The Government reserves the right not to consider a Tender that directly or indirectly attempts to preclude or limit the effect of the requirement stated in Paragraph 15.1 above.

## **16. New Information**

A Tenderer should inform the Government in writing immediately of any factor which might affect its ability to meet any requirements of the Tender Document. The Government reserves the right not to consider a Tenderer's Tender further if the Tenderer's continued ability to meet such requirements is in doubt.

## **17. Contractors' Performance Monitoring**

If a Tenderer is awarded the Contract, its subsequent performance will be monitored and may be taken into account when its future offers for other tenders / quotations exercises are evaluated.

## **18. Cost of Tender**

A Tenderer shall submit its Tender at its own cost and expense. The Government shall not be liable for any costs and expenses whatsoever incurred by a Tenderer in connection with the preparation or submission of its Tender, including all costs and expenses relating to (a) communication or negotiations with or providing presentation or demonstration to the Government, (b) site visits or surveys made by the Tenderer, and (c) presenting the Tenderer's reference sites and equipment to the Government Representative during the site visits, whether before or after the Tender Closing Time.

## **19. Request for Information**

- 19.1 In the event that the Government determines that:
- (a) clarification in relation to any Tender is necessary; or



- (b) a document or a piece of information, other than the document or information set out in Paragraph 19.2, is missing from any Tender,

it may, but is not obliged to, request the Tenderer concerned to make the necessary clarification, or submit the required document or information. Each Tenderer shall thereafter within five (5) working days or such other period as specified in the request submit such clarification, information or document in the form required by the Government. A Tender will not be considered further if complete information or document is not provided as required by the deadline as specified in the request, or in the case of clarification, such clarification is not provided by such deadline or is not acceptable to the Government. As an alternative to seeking clarification or further information or document, the Government may not consider the Tender further or may proceed to evaluate the Tender on an “as is” basis.

19.2 The document and information not covered by Paragraph 19.1 are:

- (a) price information or quotes required in the Tender Document;
- (b) a signed Offer to be Bound; and
- (c) any other document or information in respect of which it is specified in the Tender Document that a failure to provide to the Government in a Tender at the time of submission of the Tender or by the Tender Closing Time will result in the Tender not being considered.

19.3 Tenderers should also note that the Government will not consider any clarification or information submitted by a Tenderer after the Tender Closing Time irrespective of whether or not the clarification or information is submitted at the invitation of the Government if the Government considers that such clarification or information would alter the Tenderer’s Tender in substance or give the Tenderer an advantage over the other Tenderers.

## **20. Tenderer’s Enquiries**

20.1 Any enquiries from the Tenderer concerning the Tender Document up to the date of lodging its Tender with the Government shall be in writing and shall be submitted to the Government specified in the Notes for Tenderers.

- 20.2 After lodging a Tender with the Government, the Tenderer shall not attempt to initiate any further contact, whether direct or indirect, with the Government on its Tender or the Tender Document. The Government shall have the sole right to initiate any such further contact and all such contacts and any replies of the Tenderer thereto shall be in writing or formally documented in writing.
- 20.3 Unless otherwise expressly stated by the Government in writing, a statement made by the Government (whether oral or written) in response to any enquiry made by a prospective Tenderer shall be for information only. No such statement shall constitute a representation or warranty by the Government of any nature whatsoever (whether express or implied), and no invitation is made by the Government to any Tenderer or prospective Tenderer to rely on such statement. No such statement shall form part of the Tender Document or alter, negate or constitute a waiver of any provision of the Tender Document.

## **21. Communication with the Government**

- 21.1 All communications given or made by the Government or a Tenderer in relation to the Invitation to Tender shall be in writing and sent or delivered to the other party in the manner provided in Clause 28 of the General Conditions of Contract, save that the Government may, by prior notice to a Tenderer, require the Tenderer to send or deliver a written communication by post or facsimile only. A Tenderer shall complete the Appendix and should note that the Government will not accept the use of a postal box as the Tenderer's correspondence address for any purpose whether before or after the award of the Contract.
- 21.2 All communications in relation to the Invitation to Tender shall be conducted directly between the Government and the Tenderer irrespective of the number of sub-contractors involved.

## **22. Negotiations**

- 22.1 The Government reserves the right to negotiate with any Tenderer the terms of the Tenderer's Tender and conditions of the Contract.
- 22.2 Negotiations will normally be conducted only with the Tenderer whose Tender complies with all the essential requirements and is in the sole opinion of the Government the most advantageous to the Government. Where there is no Tender (despite having complied with all the essential requirements) is so considered by the Government or where the most advantageous Tender cannot be determined until after any

Counter-Proposals have been resolved or withdrawn, the Government reserves the right to hold negotiations also with the other Tenderers.

## **23. Government Discretion**

23.1 Notwithstanding anything to the contrary in this Tender Document, the Government reserves the right to disqualify a Tenderer on grounds including any one of the following:

- (a) a petition is presented or a proceeding is commenced which has not been withdrawn as at the Tender Closing Time or an order is made or a resolution is passed for the winding up or bankruptcy of the Tenderer;
- (b) the Tenderer has made or submitted a false, inaccurate or incomplete statement or representation or a forged document in the Tender or in any subsequent submission by the Tenderer or communication between the Government and the Tenderer since submission of that Tender;
- (c) in the event of a claim alleging or the Government having grounds to believe that any thing(s), service(s) or material(s) to be supplied or recommended by the Tenderer in its Tender infringe or will infringe any Intellectual Property Rights of any person;
- (d) the Tenderer has made significant or persistent breaches or deficiencies in performance of any substantive requirement or obligation under any Government or other contracts;
- (e) the Tenderer has been convicted by the final judgement in respect of serious crimes or other serious offences;
- (f) in the event of the professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the Tenderer;
- (g) any failure of the Tenderer to pay taxes to the Government; or
- (h) the Tenderer has made any restrictions or limitations which seek to limit or avoid the responsibility of the Tenderer in contract, tort or otherwise for failing to exercise the skill and care required by the Contract, or reasonably expected of the Tenderer/Contractor under the Contract in the Tender or in any subsequent submission by the Tenderer or communication

between the Government and the Tenderer since submission of the Tender.

The grounds specified in Paragraphs 23.1(a) to 23.1(h) are separate and independent, and shall not be limited by reference to or inference from the other of them.

23.2 For the purposes of Paragraph 23.1, each Tenderer shall provide at the time of submission of its Tender (and thereafter up to the time of award in relation to any event occurring between the time of submission and the time of award) all information at least in relation to itself that is reasonably relevant to facilitate the Government's determination as to whether to exercise its right of disqualification, including but not limited to the following:

- (a) details of any petition or proceeding mentioned in Paragraph 23.1(a);
- (b) details of conviction of the Tenderer in Hong Kong or any overseas jurisdictions in respect of (i) serious offences; and (ii) other offences involving bribery, false accounting, corruption, dishonesty or employment handed down any time during a period of five (5) years preceding the Tender Closing Time and thereafter up to the time of award;
- (c) details of all infringement claims as mentioned in Paragraph 23.1(c); and
- (d) details of all breaches or performance deficiencies of the Tenderer or a related person as mentioned in Paragraph 23.1(d).

If none of the events as mentioned in Paragraphs 23.2(a) to 23.2(d) above has ever occurred within the applicable period as mentioned above, the Tenderer shall provide a statement to that effect by completing the relevant part of the Information Schedule at the time of submission of its Tender. If found missing, the Government reserves the right to seek clarification pursuant to Paragraph 23.3 below.

23.3 In addition to the information mentioned in Paragraph 23.2, the Government reserves the right to request from a Tenderer and take into account all information about:

- (a) the Tenderer itself;
- (b) any of the directors or management staff of the Tenderer who conduct similar business as the Tenderer or whose businesses any of which is similar to the business of the Tenderer; and

- (c) any of the related persons of the Tenderer and of any directors and management staff of the related persons who conduct similar business as the Tenderer or whose businesses any of which is similar to the business of the Tenderer,

and such information is reasonably relevant to facilitate the Government's determination as to whether to exercise its right of disqualification under Paragraph 23.1.

Such information relating to any of the aforesaid persons may include, without limitation, details of any conviction in respect of offences referred to in Paragraph 23.2(b) or details of any breaches or performance deficiencies referred to in Paragraph 23.1(d), details of any serious crimes or serious offences referred to in Paragraph 23.1(e), of any professional misconduct, acts or omissions referred to in Paragraph 23.1(f) and of any failure to pay taxes to the Government referred to in Paragraph 23.1(g) above.

- 23.4 If the Tenderer fails to comply with the request made by the Government pursuant to Paragraph 23.3 above within such time as required by the Government or has otherwise submitted false, inaccurate or incomplete information, the Government may disqualify the Tenderer pursuant to Paragraph 23.1(b) above.
- 23.5 In providing the information required under Paragraphs 23.2 and 23.3 above, the Tenderer may show cause to satisfy the Government that the petition, proceedings, conviction record, infringement claim, breach or performance deficiency, or professional misconduct, as the case may be, does not cast doubt on the fitness, propriety or capability of the Tenderer to perform the Contract to be awarded in this Invitation to Tender.
- 23.6 If the Tenderer is a company, the expression "related person" of the Tenderer includes any one of the following:
  - (a) a shareholder (corporate or individual) which directly or indirectly beneficially owns fifty (50) percent or more of the issued share capital of the Tenderer ("majority shareholder");
  - (b) a holding company or a subsidiary of the Tenderer;
  - (c) a holding company or a subsidiary of a majority shareholder of the Tenderer;

- (d) a company in which a majority shareholder (being an individual) of the Tenderer directly or indirectly beneficially owns fifty (50) percent or more of its issued share capital or controls the composition of its board of directors.

The expressions “holding company” and “subsidiary” have the meanings given to them in the Companies Ordinance (Chapter 622 of the Laws of Hong Kong).

23.7 If the Tenderer is a sole proprietor or partnership, the expression “related person” includes any one of the following:

- (a) any partner of the Tenderer (if it is a partnership);
- (b) the spouse, parent, child, brother or sister of the Tenderer, and, in deducing such a relationship, an adopted child shall be deemed to be a child both of the natural parents and the adopting parent, and a step child to be a child of both the natural parent and of any step parent;
- (c) a company in which the Tenderer or any partner of the Tenderer beneficially directly or indirectly owns fifty (50) percent or more of its issued share capital or controls the composition of its board of directors.

23.8 References to related persons, directors and management staff of the Tenderer or of a related person include persons who were in such capacity at such time of the incident referred to in Paragraphs 23.1(d), 23.1(e), 23.1(f), 23.1(g) or Paragraph 23.2(b).

## **24. Financial Vetting**

24.1 If the Estimated Contract Price of a Tender exceeds HK\$5 million, the Tenderer has to demonstrate its financial capability before it can be considered for the award of the Contract. For this purpose, the Tenderer is required to submit the following documents for financial vetting:

- (a) Originals (or copies certified by its auditors) of the audited accounts of the Tenderer, and the audited consolidated accounts of the group if the Tenderer is a subsidiary of another company for the three (3) financial years prior to the Tender Submission Date. The audited accounts must comply with the following requirements:

- (i) The audited accounts must be prepared on the same basis for each year in accordance with accounting principles generally accepted in Hong Kong and the disclosure requirements of the Companies Ordinance (Chapter 622 of the Laws of Hong Kong).
- (ii) The latest audited accounts must be for the period ending no more than eighteen (18) months before the Tender Submission Date.
- (iii) The audited accounts must contain the Director's Report, Auditor's Report, Balance Sheet, Income Statement (or commonly referred to as Profit & Loss Account), Statement of Changes in Equity, Cash Flow Statement and Notes to the Accounts.
- (iv) All such accounts must have been audited by certified public accountants (practising) or for a non-Hong Kong company, by auditors recognised by its local law.
- (v) If any such accounts are in a language other than Chinese or English, translations, certified as accurate by the respective consulate or a notary public registered in Hong Kong, must be provided.
- (vi) If the Tenderer is a joint venture or partnership, audited accounts for each of the members/participants of the joint venture or partnership must be submitted if the members/participants are incorporated bodies.

Remarks: Unaudited accounts are acceptable only if the Tenderer is an unincorporated business where audited accounts are not mandatorily required, or the Tenderer is a newly established company where the first accounts are not yet available. For unincorporated businesses, tax records such as profits tax assessment issued by the Inland Revenue Department for the past three (3) financial years (if available) should be provided. The unaudited accounts and tax records must be certified by the sole proprietor, partners or directors of the Tenderer, certified public accountants or other accountants acceptable to the Government.

- (b) Management accounts with a period ending not more than three (3) months before the Tender Submission Date if this has not been covered by the latest audited accounts. The accounts shall be prepared on the same basis in accordance with accounting principles generally accepted in Hong Kong. They must be certified by (i) the sole proprietor, partners or directors of the

- Tenderer, or (ii) certified public accountants or other accountants acceptable to the Government;
- (c) Projected profit and loss accounts and cash flow statements of the Contract for each contract year and the pre-operating period (if applicable) and, if possible, those of the company during the Contract Period, setting out the revenue, details of operating expenses, capital expenditure including the initial investments and the sources of finance, and other particulars showing how the Tenderer will deal with the Contract. The projected accounts and statements must comply with the following requirements:
- (i) They should be certified by the company's chief executive. For a joint venture or partnership, separate certification from the chief executive of each of the members/participants of the joint venture or partnership is required.
  - (ii) The assumptions used in preparing the projections should be reasonable and must be clearly stated. All the supporting schedules and detailed calculations should also be provided.
  - (iii) The assumptions by the Government included in the Tender Document must be reflected in the Tenderer's projections.
- (d) Copy of the latest annual return filed with the Companies Registry if the Tenderer is a corporate entity or similar statutory filings showing the authorised and issued share capital, name of shareholders and directors if the Tenderer is an overseas company;
- (e) The latest three (3) to six (6) months' bank statements (originals or certified true copies) confirming balances of its major bank accounts;
- (f) Original letters from bankers, where applicable, confirming lines of credit facilities available to the Tenderer and the current undrawn/unutilised balances of such credit facilities on or after a specified date (shortly before the Tender Submission Date or a date fixed by the Government) and stipulating the expiry date of the facilities;
- (g) Copies (certified by the sole proprietor, partners, directors or company secretary of the Tenderer) of letters of undertaking, minutes of board meetings or returns of allotment of shares to support injection of capital, where applicable;



- (h) Description and amount of all existing contracts (both public and private) on hand; and
  - (i) Description and amount of all tenders that have been submitted to the Government.
- 24.2 Tenderers shall upon the request in writing by the Government provide the documents mentioned in Paragraph 24.1 and any other financial and corporate information as required by the Government for assessment of the financial capability of the Tenderer to undertake the Contract within the time stipulated in the written request by the Government.
- 24.3 If the successful Tenderer has passed the financial assessment, it shall submit to the Government a Contract Deposit either in cash or in the form of a banker's guarantee in Hong Kong Dollars in an amount equivalent to two percent (2%) of the Estimated Contract Price in accordance with Paragraph 27.3 below.
- 24.4 If the successful Tenderer fails in the financial assessment, or it is a newly established company, or it is unable to submit adequate information for conducting a meaningful financial assessment, the Tenderer shall submit to the Government a Contract Deposit either in cash or in the form of a banker's guarantee in Hong Kong Dollars in an amount equivalent to five percent (5%) of the Estimated Contract Price in accordance with Paragraph 27.3 below.

## **25. Award of Contract**

- 25.1 Subject to the other provisions of the Tender Document, the Government will normally award the Contract to the Tenderer which the Government has determined to be capable of fulfilling the terms of the Contract and whose Tender:
- (a) conforms with all the essential requirements stipulated in the Tender Document and has the lowest tender price among all the Tenders where the Invitation to Tender is not subject to a marking scheme on the technical and price aspects; or
  - (b) conforms with all the essential requirements stipulated in the Tender Document and has the highest combined technical and price score where the Invitation to Tender is subject to a marking scheme on the technical and price aspects.
- 25.2 Each Tenderer acknowledges that the Government may elect at its sole option to accept all or any part of the Tenderer's Tender.

25.3 The Government is not bound to accept the Tender with the lowest price offer or the Tender with the highest combined technical and price score or any Tender and reserves the right to accept all or any part of any Tender at any time within the Tender Validity Period.

## **26. Acceptance**

26.1 A Tender shall not be regarded to have been accepted by the Government unless the Government issues to the successful Tenderer an acceptance in writing (“Tender Acceptance”) and send it by either post or facsimile transmission to the successful Tenderer’s address or facsimile number (as the case may be) specified in the Appendix. A binding Contract between the Government and the successful Tenderer is only constituted:

- (a) if the Tender Acceptance is sent by post, at the time of posting;  
or
- (b) if the Tender Acceptance is transmitted by facsimile, at the time when a transmission report is generated by the Government’s facsimile machine, confirming that the Tender Acceptance has been transmitted to the aforementioned facsimile number.

26.2 A duplicate hard copy of the Contract, including the “Memorandum of Acceptance” duly completed by the Government, will subsequently be delivered to the successful Tenderer evidencing the earlier acceptance by post or facsimile transmission, as the case may be.

26.3 Tenderers who do not receive any notification within the Tender Validity Period should assume that their Tenders have not been accepted.

## **27. Contract Deposit**

27.1 Based on the rate/unit price quoted by a Tenderer in paragraph (a) under Part A of the Price Schedule, an Estimated Contract Price that may be payable by the Government under the Contract during the Contract Period pursuant to the Tenderer’s Tender will be determined by the Government.

- 27.2 If the Estimated Contract Price payable by the Government to the successful Tenderer exceeds HK\$1.43 million but is less than or equals to HK\$5 million, as security for the due and faithful performance of the Contract by the successful Tenderer, the successful Tenderer shall deposit with the Government via the Head of the Procuring Department, within twenty-one (21) days from the date of the Tender Acceptance, an amount equivalent to two percent (2%) of the Estimated Contract Price (“Contract Deposit”).
- 27.3 If the Estimated Contract Price payable by the Government to the successful Tenderer exceeds HK\$5 million, as security for the due and faithful performance of the Contract by the successful Tenderer, the successful Tenderer shall deposit with the Government via the Head of the Procuring Department, within twenty-one (21) days from the date of the Tender Acceptance, an amount equivalent to two percent (2%) (if it passes the financial vetting) or five percent (5%) (if it fails the financial vetting or in cases where the financial information available is inadequate for a meaningful assessment of the Tenderer’s financial capability to fulfill the Contract requirements to be conducted) as the case may be of the Estimated Contract Price.
- 27.4 The successful Tenderer shall pay the Contract Deposit either in cash or in the form of a banker’s guarantee. Each Tenderer should state clearly in Part I of the Annex the method of providing the Contract Deposit. If the successful Tenderer fails to do so, it will be regarded to have undertaken to pay the Contract Deposit to the Government in cash.
- 27.5 If the successful Tenderer elects to pay the Contract Deposit by way of a banker’s guarantee, the banker’s guarantee must comply with the following:
- (a) it must be issued by a bank that holds a valid banking licence granted under the Banking Ordinance (Chapter 155 of the Laws of Hong Kong) and acceptable to the Government;
  - (b) unless otherwise agreed by the Government, it must be on the terms set out at Part II of the Annex; and
  - (c) the banker’s guarantee shall come into effect on the date of commencement of the Contract Period unless another date is specified in the Tender Acceptance as the date on which the banker’s guarantee is to take effect. In the event that another date is so specified, the banker’s guarantee shall take effect no later than such date.

27.6 The Contract Deposit, whether paid by way of cash or banker's guarantee shall be returned to the Contractor or released in accordance with the Contract.

## **28. Complaints about Tendering Process or Contract Award**

28.1 The tendering process is subject to internal monitoring to ensure that the relevant contract is awarded properly and fairly. Any Tenderer who feels that its Tender has not been fairly evaluated may write to the Head of the Procuring Department who will personally examine the complaint and refer it to the approving authority/relevant tender boards for consideration if the complaint relates to the tendering system or procedures followed. The Tenderer should lodge the complaint within three (3) months after the award of Contract.

28.2 A Review Body on Bid Challenges under the WTO GPA has been set up by the Government to deal with challenges made against alleged breaches of the WTO GPA. The relevant procedures for handling bid challenges are set out in the Rules of Operation of the Review Body which are available for inspection at the Secretariat of the Review Body located at the Trade and Industry Department. They may also be sent to the interested parties upon request to the Secretariat of the Review Body. Where the Invitation to Tender is subject to WTO GPA, and that a Tenderer believes that a breach of the WTO GPA has occurred, the Tenderer may, within ten (10) working days after it knew or reasonably should have known the basis of the challenge, lodge a challenge to the Review Body on the alleged breaches of the WTO GPA. Nevertheless the Tenderer is encouraged to seek resolution of its complaint in consultation with the Procuring Department before lodging a complaint to the Review Body. In such instances, the Procuring Department shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures through the Review Body. The Review Body may receive and consider a late challenge but a challenge will not be considered if it is filed later than thirty (30) working days after the basis of the challenge is known or reasonably should have been known to the Tenderer.

## **29. Documents of Unsuccessful Tenderers**

29.1 The Government may destroy all documents submitted by unsuccessful Tenderers three (3) months after the Contract has been constituted under Paragraph 26.1.

29.2 Where the Invitation to Tender is subject to WTO GPA, the Government may destroy all documents submitted by unsuccessful Tenderers three (3) years after the Contract has been constituted under Paragraph 26.1.

### **30. Consent to Disclosure**

30.1 The Government may disclose, whenever it considers appropriate, to the public or upon request by any member of the public (which may have been a Tenderer) without any further reference to or consent from the successful Tenderer or any other Tenderer, particulars of the Services to be provided by the successful Tenderer, the date of the award, the name and address of the successful Tenderer and the Estimated Contract Price.

30.2 Nothing in Paragraph 30.1 shall prejudice the Government's power to disclose whenever it considers appropriate information of any nature whatsoever (whether or not specified in Paragraph 30.1) if the disclosure is made under any one of the following circumstances:

- (a) the disclosure of any information to any public officer or public body, as defined in the Interpretation and General Clauses Ordinance (Chapter 1 of the Laws of Hong Kong) or any other person employed, used or engaged by the Government (including agents, advisers, contractors and consultants);
- (b) the disclosure of any information already known to the recipient;
- (c) the disclosure of any information which is public knowledge;
- (d) the disclosure of any information in circumstances where such disclosure is required pursuant to any law of Hong Kong, a request made by the Review Body mentioned in Paragraph 28, or an order of a court of Hong Kong or a court or tribunal with competent jurisdiction; or
- (e) without prejudice to the power of the Government under Paragraph 30.1, to the extent the information relates to a Tenderer, with the prior written consent of that Tenderer.

## APPENDIX

Contact details of:

(1) the Government Representative:

Procuring Department:

Address:

Attn:

Facsimile Number:

Email Address:

(2) the Tenderer:

Address:

Attn:

Facsimile Number:

Email Address:

(3) Process Agent (for a Tenderer incorporated, formed or established outside Hong Kong):

Address:

Attn:

Facsimile Number:

Email Address:

**Part I**

**Method of providing the Contract Deposit**

If the Contract is awarded to us, we shall pay the Government the Contract Deposit \*in cash/by way of a banker's guarantee in accordance with Paragraph 27 of the Terms of Tender.

\* Delete as appropriate.

**Part II**

**Form of  
Banker's Guarantee for  
the Performance of a Contract**

THIS GUARANTEE is made on the ..... day of .....  
BETWEEN .....  
of ....., a bank within the meaning of the Banking Ordinance  
(Chapter 155 of the Laws of Hong Kong) (hereinafter called the "Guarantor") of the one part and  
the Government of the Hong Kong Special Administrative Region (hereinafter called the  
"Government") of the other part.

**WHEREAS**

(A) By a contract (hereinafter called the "Contract") dated the [day] of [month year]  
made between «SERVICE\_PROVIDER\_NAME» of «SERVICE\_PROVIDER\_ADDRESS»  
(hereinafter called the "Contractor") of the one part and the Government of the other part  
(designated as <<name of the Procuring Department>> Contract No. «CONTRACT\_NUMBER»),  
the Contractor agreed and undertook to provide \_\_\_\_\_ upon the terms and  
conditions of the Contract.

(B) The Guarantor has agreed to guarantee in the manner and on the terms and conditions  
hereinafter appearing, the due and faithful performance of the Contract by the Contractor.

Now the Guarantor HEREBY AGREES with the Government as follows:

(1) Where applicable, words and expressions used in this Guarantee shall have the  
meaning assigned to them under the Contract.

(2) In consideration of the Government entering into the Contract with the Contractor:

- (a) The Guarantor hereby irrevocably and unconditionally guarantees the due and  
punctual performance and discharge by the Contractor of all of his, her and  
their obligations and liabilities under the Contract and the Guarantor shall pay  
to the Government on demand and without cavil or argument all monies and  
discharge all liabilities which are now or at any time hereafter shall become  
due or owing by the Contractor to or in favour of the Government under or in  
connection with the Contract together with all costs, charges and expenses on  
a full indemnity basis which may be incurred by the Government by reason or  
in consequence of any default on the part of the Contractor in performing or  
observing any of the obligations terms conditions stipulations or provisions of  
the Contract.



- (b) The Guarantor, as a primary obligor and as a separate and independent obligation and liability from its obligations and liabilities under sub-clause (a) above, irrevocably and unconditionally agrees to indemnify and keep indemnified the Government against and shall pay to the Government on demand and without cavil or argument all losses, damages, costs, charges and expenses on a full indemnity basis suffered or incurred by the Government arising from or in connection with the failure of the Contractor to perform fully or promptly any of his, her or their obligations terms conditions stipulations or provisions of the Contract.
- (c) The Guarantor further agrees that all dividends, compositions and payments which the Government may at any time receive from the Contractor or from his, her or their estate or estates, whether in liquidation, bankruptcy or otherwise, in respect of all such losses, damages, costs, charges and expenses shall be taken and applied by the Government as payments in gross, and that this Guarantee shall stand good in respect of the balance to the full amount of \_\_\_\_\_.

(3) This Guarantee shall not be affected by any change of name or status in the company, firm or individual described as "the Contractor" or where "the Contractor" is a partnership, any change in the partners or in its constitution.

(4) The Guarantor shall not be discharged or released from this Guarantee by any arrangement made between the Government and the Contractor or by any alteration in the obligations imposed upon the Contractor by the Contract or by any waiver or forbearance granted by the Government to the Contractor as to payment, time, performance or otherwise whether or not such arrangement, alteration, waiver or forbearance may have been or is made or granted with or without knowledge or assent of the Guarantor.

(5) Without prejudice to Clause 4 above, the obligations of the Guarantor under this Guarantee shall remain in full force and effect and shall not be affected or discharged in any way by, and the Guarantor hereby waives notice of or assents to:

- (a) any suspension, termination, amendment, variation, novation or supplement of or to the Contract from time to time (including without limitation extension of time for performance);
- (b) any provision of the Contract being or becoming illegal, invalid, void, voidable or unenforceable;
- (c) the termination of the Contract or of the engagement of the Contractor under the Contract for any reason;
- (d) any forbearance, variation, extension, discharge, compromise, dealing with exchange, waiver or renewal in respect of any right of action or remedy that the Government may have, now or after the day of this Guarantee, against the Contractor and/or the negligence, failure, omission, indulgence or delay by the Government in enforcing any right, power, privilege to or remedy available to the Government in relation to the obligations of the Contractor set out in the Contract;

- (e) the voluntary or involuntary liquidation, bankruptcy, dissolution, sale of assets, receivership, general assignment for benefit of creditors, insolvency, reorganisation arrangement, composition, or other proceedings of or affecting the Contractor or its assets, or any change in the constitution of the Contractor;
- (f) any assignment, novation or sub-contracting by the Contractor of any or all of its obligations set out in the Contract;
- (g) without prejudice to the generality of the foregoing, any fact or event (whether similar to any of the foregoing or not) which in the absence of this provision would or might constitute or afford a legal or equitable discharge or release of or defence to the Guarantor, other than the express release of its obligations.

(6) This Guarantee shall extend to any variation, novation of or amendment to the Contract and to any agreement supplemental thereto agreed between the Government and the Contractor and for the avoidance of doubt, the Guarantor hereby authorises the Government and the Contractor to make any such amendment, variation, novation or supplemental agreement without its notice or assent.

(7) This Guarantee shall have immediate effect upon execution and is a continuing security. This Guarantee shall cover all of the obligations and liabilities of the Contractor under the Contract and shall remain in full force and effect and irrevocable until:

- (a) the date falling three (3) months after the expiry of the Contract; or
- (b) the date on which all the obligations and liabilities of the Contractor under the Contract have been duly carried out, completed and discharged in accordance with the Contract,

whichever is the later.

(8) This Guarantee is in addition to and shall not merge with or otherwise prejudice or affect any contractual or other right or remedy or any guarantee, indemnity, lien, pledge, bill, note, charge or any other security which the Government may at any time hold (collectively "Other Security") and this Guarantee may be enforced by the Government without first having recourse to any of the Other Security or taking any steps or proceedings against the Contractor, and notwithstanding any release, waiver or invalidity of the Other Security.

(9) Any demand, notification or certificate given by the Government specifying amounts due and payable under or in connection with any of the provisions of this Guarantee shall be conclusive and binding on the Guarantor.

(10) The obligations expressed to be undertaken by the Guarantor under this Guarantee are those of primary obligor and not as a surety.

(11) This Guarantee shall be governed by and construed according to the laws for the time being in force in the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong") and the Guarantor agrees to submit to the exclusive jurisdiction of the courts of Hong Kong.

(12) All documents arising out of or in connection with this Guarantee shall be served :

(a) upon the Government, at the <<Name of Procuring Department>> of <<Address of the Procuring Department>> marked for the attention of \_\_\_\_\_, facsimile number \_\_\_\_\_;

(b) upon the Guarantor, at \_\_\_\_\_, Hong Kong, marked for the attention of \_\_\_\_\_, facsimile number \_\_\_\_\_.

(13) Documents to be served under this Guarantee shall be deemed to have been duly served by one party if sent by letter or fax addressed to the other party at the address stated above or to the facsimile number set out above. The documents so served shall be effective (a) on the date of delivery if hand-delivered; (b) on the date of transmission if sent by facsimile; and (c) if despatched by mail (whether registered or not), on the day on which they are tendered for delivery by the postal authority in Hong Kong.

(14) The aggregate amount of the Guarantor's liability under this Guarantee shall not exceed\_\_\_\_\_.

(15) The Guarantor hereby acknowledges that

(a) the Guarantor should read and fully understand, with the benefit of independent legal advice if necessary, the terms and conditions of this Guarantee before entering into this Guarantee.; and

(b) no Government officer is authorised to advise on, make representations regarding or amend (other than by a written instrument signed by both the Guarantor and the Government) the terms and conditions of this Guarantee.

IN WITNESS whereof the said Guarantor ..... has caused its Common Seal/Seal to be hereunto affixed the day and year first above written.

※ The [Common Seal/Seal\*] of the said )  
Guarantor was hereunto affixed and )  
signed by ..... )  
..... )  
[Name & Title] )  
duly authorised by its board of )  
directors..... )  
.....

@ Signed Sealed and Delivered )  
for and on behalf of and as )  
lawful attorney of the Guarantor )  
under power of attorney dated )  
..... and deed of delegation )  
dated ..... )  
by ..... )  
[Name & Title] )  
and in the presence of ..... )  
..... )  
[Name & Title]

\* Please delete as appropriate

@ See Powers of Attorney Ordinance (Chapter 31 of the Laws of Hong Kong)

Note : When banker's guarantees are executed under power of attorney, a photocopy of the power of attorney, certified on each page by a Hong Kong solicitor that it is a true and complete copy of the original must be submitted.

**PART 2**  
**GENERAL CONDITIONS OF CONTRACT**

**1. Total Services and Variation**

- 1.1 The Services to be performed under the Contract shall be as laid down in the Service Specifications, Special Conditions of Contract and Schedule (if any) and shall be carried out, as and when required, to the satisfaction of the Inspecting Officer. All orders placed under the Contract shall be issued in writing and the Government will not be responsible for Services performed on oral instructions issued by any person whomsoever.
- 1.2 The Contractor shall not extend the Services beyond the requirements specified in the Service Specifications, Special Conditions of Contract and Schedule (if any) except as directed in writing by the Government Representative; but the Government Representative may, subject to the proviso hereinafter contained, at any time during the Contract Period by notice in writing direct the Contractor to alter, amend, omit, add to, or otherwise vary any of the Services and/or the Contract Period, and the Contractor shall carry out such variations, and be bound by the same conditions, so far as are applicable, as though the said variations were stated in the Service Specifications, Special Conditions of Contract and Schedule (if any).
- 1.3 Where a variation has been made to the Contract the amount to be added to or deducted from the Contract Price in accordance with that variation shall be determined in accordance with the rates specified in the Price Schedule so far as the same may be applicable and where rates are not contained in the Price Schedule, or are not applicable, such amount shall be such sum as is reasonable in the circumstances.

**2. Contractor's Acknowledgement, Obligations and Contract Performance**

- 2.1 The Contractor acknowledges and agrees that it has been supplied with sufficient information to enable it to provide to the Government the Services, which shall comply fully with the requirements set out in the Service Specifications and other provisions of the Contract. The Contractor shall not be entitled to any additional payment nor be excused from any liability under the Contract as a consequence of any misinterpretation by the Contractor of any matter or fact relating to the Service Specifications or any other provisions of the Contract.
- 2.2 The Contractor further acknowledges that the Government relies on the skill and judgment of the Contractor in the provision of the Services and the performance of its obligations under the Contract.

- 2.3 The Contractor shall perform its obligations under the Contract:
- (a) with appropriately experienced, qualified and trained personnel and with all due care, skill and diligence; and
  - (b) in accordance with Good Industry Practice.
- 2.4 The Contractor shall comply with all applicable laws and regulations. In particular, the Contractor shall:
- (a) comply with the Employment Ordinance (Chapter 57 of the Laws of Hong Kong) and the Immigration Ordinance (Chapter 115 of the Laws of Hong Kong). The Contractor shall not employ any persons who are forbidden by the laws of Hong Kong or are not entitled for whatever reasons to undertake any employment in Hong Kong;
  - (b) make its own arrangements to provide Mandatory Provident Fund Schemes to its employees in accordance with the provisions of the Mandatory Provident Fund Schemes Ordinance (Chapter 485 of the Laws of Hong Kong); and
  - (c) comply with the requirements of the Occupational Safety and Health Ordinance (Chapter 509 of the Laws of Hong Kong) and any other legal provisions pertaining to the health and safety of the personnel, Government staff and others who may be affected by its performance of Services.
- 2.5 The Contractor shall secure, obtain and maintain throughout the Contract Period all and any governmental authorisations, approvals, permits or licences which may be required or necessary in connection with the performance of the Contract and to bear all costs, charges and expenses that may be incurred in obtaining and maintaining the permits and licences.
- 2.6 The Contractor shall pay all taxes, duties, fees, charges, assessments of any nature levied by relevant governmental authorities and to pay the fines and penalties imposed for any offence or infringement by the Contractor under any laws or regulations in connection with the performance of the Contract.
- 2.7 The Contractor shall be responsible for the accuracy of all drawings, documents and information supplied by the Contractor to the Government in connection with the Services. Without prejudice to any other provisions of the Contract, the Contractor shall indemnify the Government against all losses and damages arising from, and costs and expenses incurred in connection with, any discrepancies, errors or omissions therein.

- 2.8 Any drawings and specifications reasonably required for the Contractor's guidance in the execution of the Contract shall be provided by the Government free of charge but shall be returned to the Government on completion of the Contract.
- 2.9 If at the request of the Contractor assistance of any Government staff is provided after normal business hours, the Contractor will be responsible for the overtime remuneration, subsistence allowances and travelling expenses of such Government staff directly engaged in such assistance.

### **3. Warranties and Representations**

- 3.1 The Contractor warrants, represents and undertakes that:
- (a) the Contractor and its sub-contractors, their employees and agents shall have the necessary training, skill, experience, qualifications and expertise to provide the Services on the terms and conditions set out in the Contract;
  - (b) the Contractor shall carry out the Services with all due diligence and in a timely, safe, proper, skilful and workmanlike manner;
  - (c) the Services shall conform in all respects to the Service Specifications and conditions under the Contract;
  - (d) it shall not employ any illegal workers to carry out its obligations under the Contract;
  - (e) the Contractor has full power, capacity and authority to enter into the Contract and to perform its obligations under the Contract;
  - (f) the Contract constitutes valid, legally binding obligations of the Contractor enforceable in accordance with its terms;
  - (g) all authorisations, approvals, consents, licences, exemptions and other requirements of any governmental, administrative or other authority or body in any relevant jurisdiction which are required to authorise the Contractor to execute, deliver and perform the Contractor's obligations under the Contract (including where its procedures so require, the consent of its parent company) have been duly and unconditionally obtained and are in full force and effect and the use of the Services by the Government will not contravene any applicable laws;

- (h) all information supplied, and statements and representations made by or on behalf of the Contractor in or in relation to its Tender and the Contract are true, accurate and complete;
- (i) no claim is being made and no litigation, arbitration or administrative proceeding is presently in progress, or to the best of the Contractor's knowledge and belief, pending or threatened against it or any of its assets which will or might have a material adverse effect on its ability to perform its obligations under the Contract;
- (j) it is not subject to any contractual obligation, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under the Contract;
- (k) no proceedings or other steps have been taken and not discharged (nor to the best of its knowledge, are threatened) for the winding up or bankruptcy of the Contractor or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, manager, administrator or similar office in relation to any of the Contractor's assets or revenue;
- (l) it owns, has obtained and is able to obtain, valid licences for all Intellectual Property Rights that are necessary for the performance of its obligations under the Contract; and
- (m) it has not done or omitted to do anything which could have a material adverse effect on its assets, financial condition or position as an ongoing business concern or on its ability to fulfil its obligations under the Contract.

3.2 The warranties, representations and undertakings, expressed or implied, contained in Clause 3.1 and other provisions of the Contract (collectively, "Warranties" and each, a "Warranty") shall be true without limitation in time, save that in case of any Warranty expressed to be effective during the Contract Period, it shall be true on each day of the Contract Period as if it is repeated on each such day.

3.3 Each of the Warranties shall be separate and independent and without prejudice to any other Warranty, and shall not be limited by reference to or inference from any other Warranty or any other provision of the Contract.



- 3.4 Unless otherwise expressly excluded from or provided to the contrary in the Contract, the rights, duties and liabilities imposed on a service provider and the rights conferred on the party contracting with the service provider under the Supply of Services (Implied Terms) Ordinance (Chapter 457 of the Laws of Hong Kong) apply to bind the Contractor and the Government respectively.

#### **4. Costs and Expenses**

Save as otherwise expressly provided for in the Contract, the Contractor shall comply with all provisions of the Contract and its obligations under the Contract at its own costs and expenses.

#### **5. Order and Provision of Services**

5.1 Whenever required by the Government by a written order signed by the Government Representative (“Order”) specifying:

- (a) the Services to be provided to the Government;
- (b) the date and time for provision of the Services referred to in (a); and
- (c) the conditions, if any, applicable to the provision of the Services referred to in (a),

the Contractor shall provide to the Government the Services so specified in the Order in accordance with the Order and the provisions of the Contract.

5.2 If no date and time for provision of the Services is specified in an Order, the Contractor shall provide the Services specified in the Order within fourteen (14) working days from the date of the Order.

5.3 Time shall be of the essence as regards each provision of the Services specified in an Order.

5.4 Notwithstanding any provision of the Contract, due provision of any Services to the Government shall not be regarded to have taken place unless and until such Services are accepted by the Government.

## **6. Inspection**

- 6.1 The Services performed shall be subject to inspection and certification by the Inspecting Officer and/or the Government Representative. Upon breach of any term or condition of the Contract by the Contractor, including but not limited to failure to comply with the performance requirements in accordance with the Service Specifications, the Government shall be entitled to reject unsatisfactory performance of the Services and withhold payment of the Contract Price until the deficiencies or defects have been rectified by the Contractor.
- 6.2 In the event that the Contractor, its sub-contractors or any of the Services performed shall fail to comply with any of the requirements of the Contract, or in the event that there is a breach of or non-compliance with any warranty, undertaking or obligation on the part of the Contractor to observe and perform which is capable of remedy, the Government may by notice in writing to the Contractor at any time require the Contractor to make good the defect, deficiency or remedy the breach at its sole costs and expenses within such time as may be stipulated by the Government in the notice.

## **7. Non-exclusive Contract**

Nothing in the Contract shall preclude the Government from procuring any Services from any other person.

## **8. Government Property**

When Government property is issued to the Contractor under the Contract, the Contractor shall be responsible for the due return of all such property. Should any such property be lost or damaged from any cause whatsoever while in the possession or control of the Contractor or his servants, workmen or agents, the Contractor shall pay for the same at total original cost plus twenty percent (20%). A count of the articles or material in the possession of the Contractor may be made at any time by the Government Representative and the Contractor shall render such assistance as is necessary for this purpose.

## **9. Government Premises/Contractor's Premises**

- 9.1 The Contractor, shall ensure that all persons engaged by him in carrying out the Contract keep to such parts of Government premises as are necessary for the due discharge of the Contractor's obligations under the Contract.

- 9.2 Where the Services are carried out on the Contractor's premises, such premises shall be open to inspection by the Government Representative or Inspecting Officer at all reasonable times.
- 9.3 The safety of any craft, vessel and vehicle used by the Contractor and brought alongside or onto Government premises, piers or wharves, as the case may be, shall be the responsibility of the Contractor, who shall indemnify the Government in respect of any loss or damage to such Government premises, piers or wharves.

## **10. Payment of the Contract Price**

- 10.1 In consideration of the Contractor's due and proper performance of all its obligations in accordance with the Contract, the Government shall pay the Contractor the Contract Price in accordance with the payment timetable set out in the Price Schedule.
- 10.2 Notwithstanding any provision in the Contract, unless otherwise agreed in writing by the Government, in respect of any Services provided to the Government, the Government shall not have any obligation to pay the Contractor any Contract Price for such Services unless and until the Services have been accepted by the Government. The Government shall pay the Contractor the Contract Price within thirty (30) days after the date of acceptance of the Services.
- 10.3 The Contract Price is inclusive of all charges for provision of Services. Subject to Clause 1 and save as otherwise expressly provided for in the Contract, the Contractor shall not be entitled to any adjustment in the Contract Price for any reason (including foreign exchange fluctuations).
- 10.4 In the event that the Contractor has made a standing offer to provide the Services to the Government if and when demanded during the Contract Period, the Contractor and the Government hereby acknowledge and agree that the consideration for the standing offer shall be One Hong Kong Dollar, payable by the Government to the Contractor, if demanded, and that the Contractor irrevocably undertakes to keep the standing offer open throughout the Contract Period.
- 10.5 The Contractor shall invoice the Government for any payment of the Contract Price. In respect of each provision of the Services, the Contractor shall deliver to the Government an invoice setting out the particulars of the Services provided (including the unit rate), the Order number (if any), the amount of Contract Price payable for the Services and such other

information as the Government Representative may require from time to time.

- 10.6 Notwithstanding any provision of the Contract, the Government is entitled to withhold payment of all or any part of the Contract Price and any other sum payable by the Government to the Contractor under the Contract if:
- (a) the Contractor fails to observe or perform any provision of the Contract;
  - (b) the Government disputes on any reasonable ground its obligation to pay the amount in question;
  - (c) the Government has reasonable grounds to believe that the Contractor is or will be liable to the Government under any provision of the Contract for the loss or damage suffered by the Government; or
  - (d) withholding of payment is required by any applicable law.
- 10.7 No payment made by the Government under the Contract shall prejudice or carry any implication whatsoever on any rights or cause of action which has accrued or may accrue, or any remedy available, to the Government in respect of any breach of the Contract by the Contractor.

## **11. Contract Deposit**

- 11.1 If the Estimated Contract Price exceeds HK\$1.43 million, as security for the due and faithful performance of the Contract by the Contractor, the Contractor shall deposit with the Government via the Head of the Procuring Department within twenty-one (21) days from the date of Tender Acceptance, an amount specified in Paragraph 27.2 or 27.3 of the Terms of Tender (“Contract Deposit”).
- 11.2 If the Contractor fails to comply with Clause 11.1, the Government may terminate the Contract immediately.
- 11.3 Without prejudice to Clause 11.2, if the Contractor fails to comply with Clause 11.1, the Government may withhold from any sum due or payable by the Government to the Contractor from time to time, such amount which in aggregate does not exceed the amount of Contract Deposit payable to the Government under Clause 11.1. The Government may apply the amount so withheld to satisfy the Contractor’s obligation under Clause 11.1 in full or in part, and to the extent that the amount is so applied, the latter amount shall be treated as Contract Deposit paid in cash pursuant to Clause 11.1.

- 11.4 If:
- (a) the Contractor fails to comply with any provision of the Contract, the Government may deduct from the Contract Deposit paid in cash, or call on the banker's guarantee, to recover the amount of costs, losses, damages or expenses suffered or incurred by the Government arising from or relating to such failure; or
  - (b) any amount is due or payable by the Contractor to the Government under the Contract, the Government may deduct from the Contract Deposit paid in cash, or call on the banker's guarantee, to recover the amount due or payable, in each case irrespective of whether or not a demand for payment has been made against the Contractor.
- 11.5 The Contract Deposit (whether paid in cash or in the form of the banker's guarantee) may be deducted or called on by the Government without the Government first having recourse to any other security or rights or taking any other steps or proceedings against the Contractor or any other person, and may be enforced for any balance due after resorting to any one or more of other means of obtaining payment or discharge of the monies, obligations and liabilities owing by the Contractor to the Government.
- 11.6 If any deduction is made by the Government from the Contract Deposit or a call is made on the banker's guarantee any time prior to the expiry or termination of the Contract, the Contractor shall, within twenty-one (21) days after the date of the written demand by the Government, deposit a further sum or provide a further banker's guarantee, in a sum equal to the amount so deducted or so called, which further sum shall be added to the residue and form part of the Contract Deposit. If the Contractor is required to provide a further banker's guarantee under this Clause, the further banker's guarantee must comply with the requirements in Paragraphs 27.5(a) and (b) of the Terms of Tender and shall come into operation on the date of its execution.
- 11.7 If based on the Orders issued by the Government under Clause 5.1, the Government determines that the total Contract Price payable by it for such Orders is likely to exceed the Estimated Contract Price, the Government may, by written notice to the Contractor, require the Contractor to submit to the Government such additional amount as further Contract Deposit such that the Contract Deposit shall at all times during the Contract Period be an amount equivalent to two percent (2%) (or five percent (5%) if the Contractor failed in the financial assessment under Paragraph 24 of the Terms of Tender in the tender evaluation stage) of the Estimated Contract Price specified by the Government in the notice.

- 11.8 If a notice is issued by the Government under Clause 11.7, the Contractor shall within twenty-one (21) days deliver to the Government the additional amount of further Contract Deposit required in the notice in the form of either cash or a further banker's guarantee. The further banker's guarantee must comply with the requirements in Paragraphs 27.5(a) and (b) of the Terms of Tender and shall come into operation on the date of its execution. A further Contract Deposit paid by the Contractor to the Government shall form part of the Contract Deposit.
- 11.9 If the Contractor fails to comply with Clause 11.6, 11.7 or 11.8, the Government may terminate the Contract immediately.
- 11.10 Upon the expiry or termination of the Contract:
- (a) if the Contract Deposit is paid in cash, the Government shall, after deducting the sums due from the Contractor to the Government, return the balance of the Contract Deposit in cash and without interest to the Contractor three (3) months after completion of all the obligations under the Contract by the Contractor to the Government's satisfaction, or the expiry or termination of the Contract, whichever is the later;
  - (b) if the Contract Deposit is paid by way of a banker's guarantee, the banker's guarantee shall be discharged and released in accordance with its terms.

## **12. Variations**

Subject to the provisions of the Contract, no waiver, cancellation, alteration or amendment of or to the provisions of the Contract shall be valid unless made by an instrument in writing and duly signed by the Contractor and the Government.

## **13. Liability and Indemnities**

- 13.1 Neither the Government nor any of its employees or agents shall be under any liability whatsoever for or in respect of:
- (a) any loss of or damage to any of the Contractor's property or that of its employees or agents however caused (whether by any Negligence of the Government or any of its employees or agents or otherwise);  
or

- (b) any injury to or death of the Contractor (in the case where the Contractor is a natural person) or any of its employees or agents, save and except any such injury or death caused by the Negligence of the Government or any of its employees or agents.

13.2 Without prejudice to any other provision of the Contract, the Contractor shall indemnify each of the Government and its employees and agents (each an “Indemnified Person”) against:

- (a) any and all claims (whether or not successful, compromised, settled, withdrawn or discontinued, in whole or in part), actions, investigations, demands, proceedings or judgments, joint or several, threatened, brought or established against an Indemnified Person (“Claims”); and
- (b) any and all liabilities, losses, damages, costs, charges or expenses (including (i) all legal fees and other awards, costs, payments, charges and expenses and (ii) any loss or damage sustained by or any injury to or death of any person in consequence of any Negligence of the Contractor or any of its employees, sub-contractors or agents) which an Indemnified Person may pay or incur as a result of or in relation to any Claims,

which in any case arise directly or indirectly in connection with, out of or in relation to:

- (i) the performance or breach of any provisions of the Contract by the Contractor, its employees, agents or sub-contractors;
- (ii) the negligence, recklessness, tortious acts or wilful omission of the Contractor, its employees, agents or sub-contractors;
- (iii) any default, unauthorised act or wilful misconduct of the Contractor, its employees, agents or sub-contractor(s);
- (iv) any claim that the use or possession of the Materials infringes the Intellectual Property Rights of any person; or
- (v) the non-compliance by the Contractor, its employees, agents or sub-contractor(s) with any applicable law, or regulation, order or requirement of any government agency or authority.

13.3 The indemnity under Clause 13.2 shall not apply to any injury or death caused by the Negligence of an Indemnified Person.

- 13.4 In the event of any person suffering any injury or death in the course of or arising out of the Contract and whether there be a claim for compensation or not, the Contractor shall verbally inform the Government Representative as early as practicable and deliver to the Government a written report within seven (7) working days after the occurrence of the injury or death, or on an earlier date specified by the Government Representative.
- 13.5 For the purposes of this Clause, “Negligence” shall have the same meaning as that assigned to it in section 2(1) of the Control of Exemption Clauses Ordinance (Chapter 71 of the Laws of Hong Kong).
- 13.6 The indemnities, payment and compensation given in pursuance of the Contract by the Contractor shall not be affected or reduced by reason of any failure or omission of the Government in enforcing any of the terms and conditions of the Contract.

## **14. Termination**

### **14.1 If:**

- (a) the Contractor fails to provide to the Government any Services specified in an Order within the time as specified in the Order or in accordance with Clause 5.2;
- (b) any Services are rejected pursuant to the Contract;
- (c) the Contractor fails to provide to the Government rectified Services by the date specified by the Government Representative pursuant to Clause 6.2;
- (d) the Contractor commits a fundamental breach of any term of the Contract;
- (e) the Contractor is in breach of any other provision of the Contract which in the opinion of the Government is not capable of remedy;
- (f) the Contractor commits a breach of any other provision of the Contract which is capable of remedy and fails to remedy the same within seven (7) days of service of notice by the Government (or such longer period as specified in the notice) requiring such remedy;
- (g) the Contractor is in breach of any of its warranties and undertakings under the Contract;



- (h) the Contractor has made a material misrepresentation (including submission of false statement or inaccurate information) during the tendering process of the Contract;
- (i) the Contractor, any officer (including director), employee, agent or sub-contractor of the Contractor commits an offence under the Prevention of Bribery Ordinance (Chapter 201 of the Laws of Hong Kong) or any law of a similar nature in relation to the Contract or any other contract made by the Contractor with the Government; or
- (j) the Government is given the right to terminate the Contract under any other provision of the Contract,

the Government may by written notice to the Contractor terminate the Contract immediately.

14.2 The Government may also by written notice to the Contractor terminate the Contract immediately upon the occurrence of any of the following events:

- (a) a proposal is made for a voluntary arrangement or any other composition, scheme or arrangement with, or assignment for the benefit of, the Contractor's creditors;
- (b) if the Contractor is an incorporated body, a shareholders or members meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding-up is passed (other than voluntarily for the purpose of bona fide reconstruction or solvent amalgamation);
- (c) a petition is presented for the winding-up or bankruptcy of the Contractor, which is not dismissed within fourteen (14) days after the petition is presented;
- (d) the Contractor is or becomes insolvent, or any order is made for the Contractor's bankruptcy;
- (e) an administrator, administrative receiver, receiver or similar officer is appointed over the whole or any part of the Contractor's business or assets;
- (f) the Contractor suspends or ceases, or threatens to suspend or cease, to carry on all or a substantial part of its business;
- (g) the Government reasonably apprehends that any of the events mentioned above is about to occur; or

- (h) a Force Majeure Event occurs in such manner entitling the Government to terminate the Contract under Clause 26.7.
- 14.3 The Government may at any time suspend or terminate the Contract by giving the Contractor thirty (30) working days prior written notice.
- 14.4 On termination of the Contract for any reason, the Government is under no further obligation to the Contractor under the Contract without thereby releasing the Contractor from any of its liabilities under the Contract, or affecting any rights and powers conferred upon the Government by the Contract.
- 14.5 The expiry or termination of the Contract shall not affect any accrued rights or liabilities of either party nor shall it affect the coming into force or the continuance in force of any provision of the Contract which is expressly or by implication intended to come into or continue in force on or after such expiry or termination.
- 14.6 If the Contract is terminated under Clause 14.1 and the Government makes other arrangements for the provision of any Services from any other source, the Government may recover from the Contractor: (a) any amount in excess of the Contract Price incurred by the Government in engaging another contractor to complete the uncompleted Services and all costs and expenses incurred in making the arrangements for the same including conducting tender for the uncompleted Services; and (b) any additional expenditure incurred by the Government in connection with a default by the Contractor referred to in Clause 14.1. If the Contract is so terminated, until the Government has established the final cost of making other arrangements contemplated under this Clause, no further payments shall be payable by the Government to the Contractor for the Services provided by the Contractor prior to termination and in accordance with the Contract for which payment has yet to be made by the Government.
- 14.7 On the expiry or termination of the Contract for any reason, the Contractor shall:
  - (a) immediately return to the Government all documents containing confidential information, personal data and such other information, property and materials in the possession or under the control of the Contractor or any of its sub-contractors and agents, which was obtained or produced in the course of providing the Services;
  - (b) assist and co-operate with the Government to ensure an orderly transition of the provision of the Services to such person specified by the Government Representative and/or the completion of any work-in-progress;

- (c) within twenty-eight (28) days of the date of termination compile and submit to the Government a report of all relevant information, facts, data, findings and conclusions in respect of the Services which have been provided up to the effective date of termination; and
  - (d) promptly provide all information concerning the provision of the Services which may reasonably be requested by the Government for the purposes of adequately understanding the manner in which the Services have been provided or the purpose of allowing the Government or a replacement contractor to conduct due diligence.
- 14.8 Save as otherwise expressly provided for in the Contract, no compensation whatsoever (including compensation for any loss or expense arising from any consequential loss or damage, or loss of opportunity, suffered or incurred by the Contractor) shall be payable by the Government to the Contractor as a result of any suspension or early termination of the Contract by the Government.

## **15. Intellectual Property Rights**

- 15.1 The Government shall be the exclusive owner of the Materials. All the Intellectual Property Rights in the Materials shall vest in the Government at the time they are created. Subject to Clause 15.3, the Contractor warrants that such Materials are original works developed by or on behalf of the Contractor.
- 15.2 The Contractor shall not use or allow to be used directly or indirectly the Materials except for the performance of its obligations under the Contract or except with the prior written approval of the Government. "Use" includes any acts restricted by copyright (including reproduction) set out in sections 22 to 29 of the Copyright Ordinance (Chapter 528 of the Laws of Hong Kong).
- 15.3 If materials from other copyright works or Intellectual Property Rights from other sources (except those originating from the Government) are included in the Materials or any software and materials are supplied or used by the Contractor in the performance of the Contract and the Intellectual Property Rights are vested in a third party, the Contractor shall identify such materials to the Government and keep the Government informed in writing of such third party materials.

- 15.4 The Contractor warrants that:
- (a) it has or shall have a valid and continuing licence under which it is entitled to use or sub-license such third party materials and the third party Intellectual Property Rights for itself and for the Government and its authorised users to use such third party materials;
  - (b) prior to the use and incorporation of such third party materials, the Contractor shall have obtained the grant of all necessary clearances for itself and for the Government and its authorised users authorising the use of such third party materials for the purposes contemplated under the Contract;
  - (c) the provision of the Services by the Contractor and the use or possession by the Government and its authorised users of the Materials including the third party materials for any of the purposes contemplated by the Contract does not and will not infringe any Intellectual Property Rights of any person; and
  - (d) the exercise of any of the rights granted under the Contract by the Government and its authorised users will not infringe any Intellectual Property Rights of any person.
- 15.5 The Contractor hereby waives and will procure its officers, employees, agents, sub-contractors and all authors concerned to waive all moral rights (whether past, present or future) in respect of the Materials to which they may now or at any time in the future be entitled under the Copyright Ordinance and under any similar law in force from time to time anywhere in the world. Such waiver shall operate in favour of the Government, its authorised users and licensees and shall take effect upon delivery of the relevant Materials.
- 15.6 The Contractor shall at its own costs execute or procure the execution of any further assignments, deeds, licence, documents and instruments and do or procure the doing of any further things as may be necessary to give full effect to this Clause.
- 15.7 The provisions of this Clause shall survive the expiry or termination of the Contract and shall continue in full force and effect notwithstanding such expiry or termination.

## **16. Conflict of Interest**

- 16.1 The Contractor shall during the Contract Period and for three (3) months thereafter:

- (a) ensure that it (including each and every employee of the Contractor) and each of its sub-contractors and each of their respective employees, officers and agents engaged in the discharge of the obligations hereunder, and each of their respective associates and associated persons, shall not undertake any service, task, or job or do anything whatsoever for or on behalf of any third party (other than in the proper performance of the Contract) which conflicts or which may be seen to conflict with the Contractor's duties or obligations under the Contract without the prior written approval of the Government (which approval shall not be unreasonably refused or delayed); and
- (b) forthwith notify the Government in writing of all or any facts which may reasonably be considered to give rise to a situation where the financial, professional, commercial, personal or other interests of the Contractor or any of the Contractor's sub-contractors or any of their respective employees, officers and agents deployed for the performance of the Contractor's obligations hereunder or their respective associates or associated persons, conflict or compete, or may be seen to conflict or compete, with the Contractor's duties or obligations under the Contract.

16.2 The Contractor shall ensure that each of its associate and associated person, each of its sub-contractors and each of their respective employees, officers and agents deployed in the performance of the Contractor's obligations hereunder and their respective associates and associated persons shall keep themselves informed and inform the Contractor and keep it informed regularly of all facts which may reasonably be considered to give rise to a situation in which the financial, professional, commercial, personal or other interests of such persons, conflict or compete, or may be seen to conflict or compete, with the Contractor's obligations under this Contract.

16.3 In the Contract:

- (a) "associate" in relation to any person means:
  - (i) a relative or partner of that person; or
  - (ii) a company one or more of whose directors is in common with one or more of the directors of that person;
- (b) "associated person" in relation to another person means:
  - (i) any person who has control, directly or indirectly, over the other;

- (ii) any person who is controlled, directly or indirectly, by the other; or
  - (iii) any person who is controlled by, or has control over, a person at (i) or (ii) above;
- (c) “control” in relation to another person means the power of a person to secure:
- (i) by means of the holding of shares or interests or the possession of voting power in or in relation to that or any other person;
  - (ii) by virtue of powers conferred by any constitution, memorandum or articles of association, partnership, agreement or arrangement (whether legally enforceable or not) affecting that or any other person; or
  - (iii) by virtue of holding office as a director in that or any other person;
- that the affairs of the first-mentioned person are conducted in accordance with the wishes of that other person;
- (d) “director” means any person occupying the position of a director by whatever name called and includes a de facto or shadow director;
  - (e) “relative” means the spouse, parent, child, brother or sister of the relevant person, and, in deducing such a relationship, an adopted child shall be deemed to be a child both of the natural parents and the adopting parent and a step child to be a child of both the natural parents and the step parent.

## **17. Confidentiality**

17.1 The Contractor shall treat as proprietary and confidential all information, documents, materials and data (including any personal particulars records and personal data (as defined in the Personal Data (Privacy) Ordinance (Chapter 486 of the Laws of Hong Kong)), in whatever form or media, which the Government has for the purposes of or in the course of performing the Contract, supplied, made available or communicated to the Contractor or which may come to the Contractor’s knowledge or be accessible by the Contractor in the course of carrying out the Services and all advices, recommendations, documents, materials and data given by the

Contractor to the Government under the Contract (“Confidential Information”). The Contractor’s obligations under this Clause 17 shall not extend to any information which was rightfully in the possession of the Contractor prior to the commencement of the negotiations leading to the Contract or which is already in the public knowledge or becomes so at a future date (otherwise than as a result of a breach of this Clause).

- 17.2 Without prejudice to any other provision of the Contract, the Contractor shall indemnify and keep the Government and its authorised users fully and effectively indemnified against any and all actions, damages, costs, claims, demands, expenses (including the fees and disbursements of lawyers, agents and expert witnesses) and any awards and costs which may be agreed to be paid in settlement of any proceedings and liabilities of any nature arising from or incurred by reason of:
- (a) a breach of confidence (whether under the Contract or general law) by the Contractor or any of its employees, agents or sub-contractors;
  - (b) any actions or claims made in respect of information subject to the Personal Data (Privacy) Ordinance, which action and/or claim would not have arisen but for the act, negligence or omission of the Contractor or any of its employees, agents or sub-contractors in connection with the performance of the Contract; and
  - (c) any act done or omission in the performance of the Contract that contravenes the Unsolicited Electronic Messages Ordinance (Chapter 593 of the Laws of Hong Kong).
- 17.3 The Contractor shall use the Confidential Information solely for the purposes of the Contract. The Contractor shall not, at any time whether during the Contract Period or after the expiry or termination (howsoever occasioned) of the Contract, use (or allow to be used) the Confidential Information for any other purposes without the Government’s prior written consent.
- 17.4 The Contractor shall not disclose the Confidential Information to any third parties except in confidence to such of the Contractor’s employees, agents or sub-contractors who need to know the same for the purposes of the Contract.
- 17.5 The Contractor undertakes to take all necessary measures for the protection of the Confidential Information and to prevent any unauthorised disclosure or leakage of the Confidential Information.

- 17.6 The Contractor shall comply with any disclosure restrictions and conditions of use of the Confidential Information as may be stipulated by the Government from time to time.
- 17.7 The Contractor shall ensure that each of its employees, agents, sub-contractors, and any other persons involved in the performance of the Contract are aware of and comply with the provisions of this Clause 17 and the Official Secrets Ordinance (Chapter 521 of the Laws of Hong Kong).
- 17.8 The Contractor undertakes, if so requested by the Government, to deliver to the Government on such date as specified by the Government, separate confidentiality agreements duly executed by the Contractor and/or each person to whom any Confidential Information is to be disclosed by the Contractor in accordance with the Contract. The Contractor shall not be regarded to have complied with this Clause unless each confidentiality agreement is executed on terms prescribed by the Government.
- 17.9 The Contractor further agrees that it will not at any time whether by itself or through any subsidiary or agent use, sell, license, sub-license, create, develop or deal with any Confidential Information otherwise than in accordance with the Contract.
- 17.10 If the Contractor becomes aware of any breach of confidence by any of its employees, agents or sub-contractors, it shall promptly notify the Government and give the Government all reasonable assistance in connection with any action or proceedings which the Government may take or institute against any such persons.
- 17.11 The Government may request the Contractor in writing at any time that any Confidential Information disclosed pursuant to the terms of this Clause and any copies, analyses, compilations and extracts thereof whether in hard copies, electronic format or other media be returned, destroyed and/or deleted with a written statement to the effect that upon such return, destruction and/or deletion it has not retained in its possession or under its control, either directly or indirectly, any Confidential Information in whatever form. The Contractor shall comply with any such request from the Government within seven (7) days of receipt of such request.
- 17.12 The provisions of this Clause 17 shall survive the expiry or termination of the Contract and shall continue in full force and effect notwithstanding such expiry or termination.



## **18. Probity**

18.1 The Contractor acknowledges it has been reminded that:

- (a) dishonesty, theft and corruption on its part or that of its employees, agents or sub-contractors are criminal offences and may lead to prosecution under section 9 of the Prevention of Bribery Ordinance (Chapter 201 of the Laws of Hong Kong), sections 17, 18D and 19 of the Theft Ordinance (Chapter 210 of the Laws of Hong Kong) and section 161 of the Crimes Ordinance (Chapter 200 of the Laws of Hong Kong);
- (b) the soliciting or accepting of advantages, as defined in the Prevention of Bribery Ordinance is not permitted.

18.2 The Contractor shall inform its officers, employees (whether permanent or temporary), agents and sub-contractors that the soliciting or accepting of advantages (as defined in the Prevention of Bribery Ordinance) is not permitted. The Contractor shall also caution its officers, employees and agents and sub-contractors against soliciting or accepting any excessive hospitality, entertainment or inducement which may impair their impartiality in relation to the selection of its sub-contractors, if any, or the supervision of the work of the sub-contractors.

18.3 The Government may terminate the Contract immediately if the Contractor or any of its employees, agents and sub-contractors is convicted of an offence under the Prevention of Bribery Ordinance, the Theft Ordinance or the Crimes Ordinance.

18.4 The Contractor shall within two (2) weeks after the commencement of the Contract draw up and submit a staff code of conduct to the Government Representative including, among other probity issues, a statement explicitly prohibiting its sub-contractor (if any), or any person employed by it to provide the Services from soliciting or accepting any form of advantages in discharging his duties under the Contract. It shall ensure that its sub-contractor (if any), or any person employed by it to provide the Services is well aware of the prohibited acts explicitly stated in Clause 18.2 and of the staff code of conduct. The code of conduct should form part of the employment contract to ensure acknowledgement and compliance by the employees.

## **19. Insurance**

- 19.1 The Contractor shall effect and maintain throughout the Contract Period a policy or policies of insurance providing an adequate level of cover in respect of all risks which may be incurred by the Contractor in connection with the performance or attempted performance of its obligations under the Contract, including death, personal injury, loss of or damage to property or any other loss. Such insurances shall include cover in respect of any financial loss arising from any advice given or omitted to be given by the Contractor. The insurance company or companies shall be authorised under the Insurance Companies Ordinance (Chapter 41 of the Laws of Hong Kong).
- 19.2 Without prejudice to Clause 19.1, the Contractor shall effect and maintain employer's liability insurance in respect of all its employees and other staff in accordance with all applicable legal requirements.
- 19.3 If required by the Government, the Contractor shall deliver to the Government copies of all insurance policies referred to in the Contract together with receipts or other evidence of payment of the latest premium due under the policies.
- 19.4 The Contractor shall be responsible for lodging claims with the insurance company and shall notify the insurance company within the time period specified in the policy of the occurrence of any event liable to give rise to a claim.
- 19.5 If the Contractor fails to give effect to or maintain any insurance required under the Contract, the Government may make such alternative arrangements as it considers appropriate to protect its interests and may recover from the Contractor the costs of putting such in place and maintaining such arrangements.
- 19.6 No provision in any insurance and no amount of insurance covered shall relieve the Contractor of any liability under the Contract. It is the responsibility of the Contractor to determine the amount of insurance cover that will be adequate to enable the Contractor to satisfy any liability under the Contract.

## **20. Process Agent**

If the Contractor is not a Hong Kong resident, the Contractor irrevocably appoints the person whose name and address are set out in the Appendix as its process agent to receive on its behalf service of process of any legal action or proceedings arising out of or in connection with the Contract in Hong Kong. Service upon the

process agent shall be good service upon the Contractor whether or not it is forwarded to and received by the Contractor. If, for any reason, the process agent ceases to be or ceases to be able to act as process agent, or no longer has an address in Hong Kong, the Contractor hereby agrees to appoint a substitute process agent with an address in Hong Kong acceptable to the Government and to deliver to the Government a copy of the substitute process agent's acceptance of that appointment within thirty (30) days. In the event that the Contractor fails to appoint a substitute process agent, or fails to notify the Government of the name and address for service of that substitute process agent, it shall be effective service for the Government to serve the process upon the last known address in Hong Kong of the last known process agent for the Contractor notified to the Government notwithstanding that such process agent is no longer found at such address or has ceased to act or has ceased to be able to act.

## **21. Relationship of the Parties**

The Contractor enters into the Contract with the Government as an independent contractor only and nothing in the Contract shall create a contract of employment, a relationship of agency or partnership, or a joint venture between the Government and the Contractor. Unless otherwise expressly provided for in the Contract, neither party is authorised to act in the name of, or on behalf of, or otherwise bind the other party.

## **22. Assignment and Sub-contracting**

22.1 Unless otherwise provided for in the Contract, the Contractor shall not, without the prior written consent of the Government, assign, transfer, sub-contract or otherwise dispose of any of its interests, rights, benefits or obligations under the Contract. The performance of the Contract by the Contractor shall be personal to it.

22.2 The Contractor shall submit the proposed sub-contract to the Government for approval. The Government reserves the right to grant permission for sub-contracting and determine the terms and conditions of the sub-contract. A certified copy of the sub-contract shall be deposited with the Government within seven (7) days after the effective date of the sub-contract.

22.3 The Contractor shall remain fully liable and shall not be relieved from any of its obligations hereunder by entering into any sub-contract for the performance of any part of the Contract and the Contractor shall be responsible for the acts, defaults or neglect of any sub-contractor, its employees and agents.

## **23. Disclosure of Information**

The Contractor hereby irrevocably authorises, consents and agrees that the Government may, whenever it considers appropriate or upon request by any person (written or otherwise) and without any further reference to the Contractor, disclose to any person in such form and manner as the Government considers fit:

- (a) the Services provided or to be provided by the Contractor;
- (b) the Estimated Contract Price and any other fees, cost and expense payable to the Contractor pursuant to the Contract;
- (c) the price proposal submitted prior to the date of the Contract by the Contractor to the Government in relation to the Services; and
- (d) the engagement by the Government of the Contractor under the Contract and the name and address of the Contractor and persons appointed or engaged by the Contractor to assist in the performance of the Contract.

## **24. Publicity**

24.1 Whether before, during or after the expiry or termination of the Contract Period, the Contractor shall not use the Government's name in any document, publication, advertisement or publicity material without the prior written consent of the Government.

24.2 Subject to Clause 24.1, the Contractor shall submit to the Government Representative for approval all the proposed advertising or other publicity material relating to the Contract, the Services or other services provided or other work done in connection with the Contract wherein the Government's name is mentioned or language used from which a connection with the Government can reasonably be inferred or implied.

24.3 Notwithstanding any consent or approval given under Clause 24.1 or 24.2, whenever required by the Government, the Contractor shall remove all advertisement and publicity material relating to the Contract wherein the Government is mentioned or language used from which a connection with the Government can reasonably be inferred or implied and the Contractor must comply with such request.

## **25. Vicarious Liability**

Any act, default, neglect or omission of any officers, employees, agents or sub-contractors of the Contractor shall be deemed to be the act, default, neglect or omission of the Contractor.

## **26. Force Majeure**

26.1 If the Contractor becomes aware of any matter likely to constitute a Force Majeure Event, the Contractor shall forthwith notify the Government in writing of that matter and all relevant particulars.

26.2 Within three (3) days after the occurrence of a Force Majeure Event, the Contractor shall notify the Government in writing of the full particulars of the Force Majeure Event including its nature, extent and likely duration of its effect on the Contractor's ability to perform its obligation under the Contract. In the event of an occurrence of a Force Majeure Event, the Government may on its own issue a notice to the Contractor noting the occurrence of the Force Majeure Event and requiring the Contractor to suspend all or any of the obligations under the Contract. A notice issued by the Contractor or the Government pursuant to this Clause is hereinafter referred to as the "Suspension Notice".

26.3 Following the issue of a Suspension Notice by the Contractor or the Government, the Contractor shall keep the Government informed at reasonable intervals, and upon the request of the Government, of:

- (a) the likely duration of the relevant Force Majeure Event and of its effect on the Contractor's ability to perform its obligations under the Contract;
- (b) the actions taken or proposed to be taken by the Contractor to mitigate or minimise the effects of that Force Majeure Event; and
- (c) any other matters relevant to that Force Majeure Event or the Contractor's performance affected by that Force Majeure Event.

26.4 To the extent that the performance of obligations by the Contractor under the Contract is prevented by a Force Majeure Event, the Contractor's performance of such obligations will, subject to Clause 26.5, be suspended to that extent from the date the Contractor or the Government gives a Suspension Notice in respect of that Force Majeure Event until the Contractor ceases to be so prevented ("Cessation Date"). Notwithstanding anything in the Contract to the contrary, as soon as the Government issues a Suspension Notice to the Contractor, the Contractor shall forthwith

suspend the performance of the obligations to the extent specified in the Suspension Notice.

26.5 During the suspension of any obligations under Clause 26.4:

- (a) the Contractor shall use its best endeavours (including incurring any reasonable expenses and re-deploying its manpower and resources) to remove or mitigate the effect of each Force Majeure Event on the Contractor's performance of the obligations under the Contract;
- (b) the Government may make alternative arrangements for the performance of any suspended obligations, whether by another person or otherwise; and
- (c) the Contractor shall not be entitled to any cost, fee or charge or such pro rata portion thereof in respect of the suspended obligations for the suspended period.

26.6 As soon as the relevant Force Majeure Event has ended, the Contractor shall forthwith notify the Government of the Cessation Date, or the Government may on its own, after consultation with the Contractor, by notice in writing to the Contractor, determine the appropriate Cessation Date. The Contractor shall immediately after the Cessation Date resume performance of the suspended obligations in accordance with the terms and conditions of the Contract. In the event of any disagreement between the Government and the Contractor on the appropriate Cessation Date, the Government's decision shall be final in the absence of manifest error.

26.7 Should suspension of the performance by the Contractor of its obligations under the Contract persist or be likely to persist as a result of a Force Majeure Event, the Government shall be entitled to terminate the Contract pursuant to Clause 14.2.

26.8 The Contractor shall ensure that provisions similar to this Clause 26 are incorporated in all its contracts with sub-contractors made pursuant to this Contract.

## **27. Retention of Records**

The Contractor shall keep and maintain until six (6) years after the expiry of the Contract, or such longer period as may be agreed by the parties, full and accurate records of the Contract including the Services provided under it, all expenditure reimbursed by the Government, and all payments made by the Government. If requested by the Government, the Contractor shall afford the Government or its representative access to the records as may be requested by the Government.

## **28. Notices**

- 28.1 Each notice, demand, invoice, correspondence or other communication given or made under the Contract by a party shall be in writing and delivered or sent to the other party at its postal address, facsimile number or email address set out in the Appendix (or such other postal address, facsimile number or email address as the addressee has by not less than seven (7) working days' prior written notice specified to the other party).
- 28.2 Such notices, demands, invoices, correspondence or other communications shall be addressed as provided in Clause 28.1 and, if so addressed, shall be deemed to have been duly given or made as follows:
- (a) if sent by personal delivery during normal business hours on a working day, upon delivery at the address of the relevant party;
  - (b) if sent by post, four (4) days (for any place in Hong Kong) and seven (7) days (for any place outside Hong Kong) after the date of posting;
  - (c) if sent by facsimile during normal business hours on a working day, when despatched with confirmed receipt as evidenced by the transmission report generated at the end of the transmission of such facsimile by the facsimile machine used for such transmission;
  - (d) if sent by email, when actually received in a form readable by an individual.

## **29. Entire Agreement**

- 29.1 The Contract constitutes the whole agreement between the parties thereto and supersedes any previous agreements or arrangements between them relating to the subject matter hereof. The Contractor acknowledges that in entering into the Contract, it has not relied on any statements, warranties or representations given or made by the Government.
- 29.2 All of the provisions of the Contract shall remain in full force and effect notwithstanding the completion of the Services (except insofar as those obligations which have been fully performed).

### **30. Governing Law**

The Contract shall be governed by and construed in accordance with the laws of Hong Kong and the parties hereby agree to submit to the exclusive jurisdiction of the courts of Hong Kong in relation to any matters arising out of the Contract.

### **31. Severability**

If any provision of the Contract is found by any authority or court of competent jurisdiction to be illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect the other provisions of the Contract, all of which shall remain in full force and effect.

### **32. Waiver**

32.1 No failure, delay, forbearance or indulgence by any party to the Contract to exercise any right, power or remedy available to it under the Contract or at law or in equity shall operate as a waiver thereof; nor shall any single or partial exercise of the same preclude any other or further exercise thereof or the exercise of any other right, power or remedy. A right or a remedy of each party under the Contract shall be cumulative and not exclusive of any other rights, power or remedies provided by the Contract, at law or in equity. Without limiting the foregoing, no waiver by any party of any breach by the other party of any provision hereof shall be deemed to be a waiver of any subsequent breach of that or any other provision hereof.

32.2 Without prejudice to the generality of Clause 32.1, any right of termination of the Contract or any other right, power or remedy of whatsoever nature conferred upon the Government under the Contract shall be exercisable by it in addition to and without prejudice to any other rights and remedies available to it under the Contract or at law (and, without prejudice to the generality of the foregoing, shall not extinguish any right to damages to which the Government may be entitled in respect of the breach of the Contract) and no exercise or failure to exercise a right of termination shall constitute a waiver by the Government of any other right, power or remedy.

### **33. Recovery of Sums Due**

Where the Contractor has incurred any liability to the Government, whether at law or in equity and whether such liability is liquidated or unliquidated, the Government may set off, whether by way of equitable set off or at common law the amount of such liquidated liability and a reasonable estimate of the amount of any unliquidated liability, against any sum then due or which at any time



thereafter may become due from the Government to the Contractor under the Contract or any other contract made between the Government and the Contractor.

#### **34. Assistance in Legal Proceedings**

34.1 If and whenever requested to do so by the Government Representative, the Contractor shall provide to the Government all relevant information, documents (including documentation and statements from staff) and other assistance in connection with any inquiry, investigation, arbitration, tribunal hearings or court proceedings in which the Government may become involved or any internal disciplinary hearing of the Government that arises out of or in connection with the Contract or the Contractor's presence at the Government's premises. If requested by the Government, the Contractor shall arrange for relevant staff to give evidence at such inquiries, investigations, arbitrations, hearings or proceedings.

34.2 Where the Contractor or any employees, agents or contractors of the Contractor become aware of an incident, accident or other matter which may give rise to a claim or legal proceedings by a third party against the Government or the Contractor or in respect of the Contract, it shall notify the Government Representative immediately in writing giving full details of such incident, accident or matter as the Government Representative may require.

#### **35 Order of Precedence**

In the event of, and only to the extent of, any conflict or inconsistency between the Clauses of the Contract, any document referred to in those Clauses and the Schedules, the following order of precedence shall be applied, but only in so far as is necessary to resolve that conflict or inconsistency:

- (a) Special Conditions of Contract;
- (b) Service Specifications;
- (c) Schedules;
- (d) General Conditions of Contract; and
- (e) any other materials which were submitted by the Contractor as part of its Tender and attached to the Contract.

## SAMPLE PRICE SCHEDULE

### Part A – Contract Price

(a) The rate/unit price

Item No.	Description	Estimated Quantity (A)	Rate/Unit Price (HK\$) (B)	Estimated Contract Price (i.e. A x B) (HK\$)

**Estimated Contract Price** \_\_\_\_\_

(b) Calculation of Contract Price

Contract Price = Sum of [{Actual quantity of the Services for respective item(s) accepted by the Government} x {Rate/Unit Price quoted for respective items(s) quoted in paragraph (a) above}].

## Part B – Payment Timetable

### *[For lump sum payment:*

Subject to the other provisions of the Contract, the Contract Price shall be paid to the Contractor in one lump sum within thirty (30) days after the date of acceptance of the Services as stipulated in Clause 10.2 of the General Conditions of Contract.]

### *[For milestone payment and payment by instalments:*

Subject to the other provisions of the Contract, the Contract Price shall be paid to the Contractor by instalments in accordance with the following schedule:

<b>Milestones / Number of instalments</b>	<b>Payment Date</b>	<b>Amount of Contract Price (HK\$)</b>

]

## Part C– Payment Discount

1. Tenderers are requested to indicate in the spaces provided below what discounts they would allow on the tendered prices if payment is made in full within –
  - (a) 7 working days from the date of receipt of an invoice or from the date of acceptance of the relevant Services, whichever is the later:  
\_\_\_\_\_ % discount;
  - (b) 8 to 14 working days from the date of receipt of an invoice or from the date of acceptance of the relevant Services, whichever is the later:  
\_\_\_\_\_ % discount.
2. Tenderers are requested to insert the word “Nil” in the spaces provided above if they do not offer any payment discount.
3. Tenderers are requested to ensure that no more than two digits after the decimal places are quoted for the above discount.
4. The 7 or 14 working days’ period for payment discount shall be calculated from the date of the Government receipt of an invoice or the date of the Government’s acceptance of the relevant Services (excluding the general holidays), whichever is the later.

Name of Tenderer: \_\_\_\_\_ Signature of Person Authorised to Sign Tender: \_\_\_\_\_

Date: \_\_\_\_\_ Name in Block Letters: \_\_\_\_\_

Company Chop: \_\_\_\_\_

## SAMPLE INFORMATION SCHEDULE

(To be completed and returned together with the tender submission)

**1. Information required under Paragraph 23.2 (Government Discretion) of the Terms of Tender**

- \* (a) I / We confirm that none of the events as mentioned in Paragraphs 23.2(a) to 23.2(d) of the Terms of Tender has ever occurred.
  
- \* (b) I / We confirm that the following event(s) as mentioned in Paragraphs 23.2(a) to 23.2(d) of the Terms of Tender has occurred:

Date	Details of the Event

Note: \* Please delete whichever is not applicable.

Name of Tenderer: \_\_\_\_\_ Signature of Person Authorised to Sign Tender: \_\_\_\_\_

Date: \_\_\_\_\_ Name in Block Letters: \_\_\_\_\_

Company Chop: \_\_\_\_\_