

**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 (GLD) 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 procuring bureaux/departments (Procuring Department) on behalf of the Government. The Procuring Department may issue addenda to these terms and conditions whenever necessary.

The hardcopy of these terms and conditions will not be provided in each tender invitation issued by the Procuring Department on behalf of the Government. Softcopy is available for download from the e-Tender Box web address: <https://pcms2.gld.gov.hk>.

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 (July 2022)) 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:

- |                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|----------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| “Accepted Innovative Suggestions”            | means those innovative suggestions proposed by the Tenderer and accepted by the Government in the version attached to the Memorandum of Acceptance of identification purposes;                                                                                                                                                                                                                                                                                                                                                                                                                       |
| “Alternative Authentication Method” or “AAM” | means the use of an Identification Code for the submission of a Tender via the e-Tender Box in lieu of the use of a digital certificate;                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| “Appendix”                                   | means an appendix attached to the Tender Form;                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| “billing period”                             | means one or more period(s) within the Contract Period during which one or more Item(s) of Services are provided and are payable for each such period;                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| “Companies Registry”                         | means the Companies Registry of the Government;                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| “Contract”                                   | means the contract between the Government and the Contractor comprising the following parts of the Tender Documents and other items as specified below: <ul style="list-style-type: none"><li>(a) BD-TERMS-2 (July 2022) comprising: the “Tender Form” (G.F. 231) (or the equivalent Tender Form in the case of Electronic Tendering), the “Interpretation”, the “Terms of Tender”; the “General Conditions of Contract”; the “Appendix”; and “Annex A” and “Annex B” to the Terms of Tender;</li><li>(b) the “Offer to be Bound” in the Tender Form;</li><li>(c) the “Tender Acceptance”;</li></ul> |

- (d) the “Interpretation (Supplement)”;
- (e) the “Terms of Tender (Supplement)”;
- (f) the Schedules in the form as appearing in the Tender Documents and those which were submitted by the Contractor as part of its Tender for the Contract, and accepted by the Government;
- (g) the “Special Conditions of Contract”;
- (h) the “Service Specifications”; and
- (i) all other schedules, plans, drawings and other documents which form part of the Contractor’s Tender or are incorporated by reference in any of the above documents,

in each case subject to such further changes as the Government may stipulate in exercise of its powers under the Terms of Tender or the Terms of Tender (Supplement), and/or otherwise subject to such further changes as the Government and the Contractor may agree. All of these documents shall be attached to the Memorandum of Acceptance to be issued under Paragraph 18.2 of the Terms of Tender for identification purposes.

Each of the above documents shall be referred to throughout the Tender Documents and the Contract by their respective titles as appearing in quotation marks above.

References to “the Contract” or “this Contract” shall mean the same Contract as defined above;

“Contract Deposit” has the meaning given to it in Clause 12 of the General Conditions of Contract;

“Contract Period” has the meaning given to it in Clause 1.1 of the General Conditions of Contract;

- “Contract Price” means in relation to the Services comprising one or more Item(s), and in respect of a billing period during which such Item(s) of Services are provided, the amount payable for such Service(s) over that billing period on and subject to the terms and conditions of the Contract and is to be calculated based on the Unit Price(s) per such billing period for such Item(s) as specified in the Price Schedule and if expressly stated as applicable in the Price Schedule, the quantity of such Item(s) (which is not measured in billing periods) under the Services performed in that billing period;
- “Contractor” means the Tenderer whose Tender is accepted by the Government through the issue of the Tender Acceptance;
- “Date of Tender Acceptance” or “Tender Acceptance Date” means the date of the Tender Acceptance and this date shall, unless otherwise specified in the Interpretation (Supplement), be taken as the date of the Contract;
- “Electronic Record” has the meaning given to it under the ETO;
- “Electronic Tendering” means the making and submission of a Tender through the e-Tender Box whether through the use of a digital certificate or through the use of an Identification Code;
- “essential requirement” means a requirement specified in the Tender Documents which is identified as an essential requirement or a requirement in relation to which it is stated in the Tender Documents that the non-compliance by a Tender or a Tenderer as at the Tender Closing Time will lead to that Tender or Tenderer not being considered further (or the Tender or Tenderer being disqualified);
- “Estimated Service Price for an Item” means in relation to an Item, the Unit Price for that Item per billing period as specified in the Price Schedule multiplied by number of billing periods within the Contract Period and if stated to be applicable in the Price Schedule, further multiplied

by the estimated quantity (which is not measured in billing periods) of such Item as specified in the Price Schedule;

“e-Tender Box” or “ETB” means the electronic tendering platform of the information technology system known as “Procurement and Contract Management System” or “PCMS” of the GLD for ETB Users to view tender notices and tender documents, and prepare and submit tenders electronically whether through the use of a digital certificate or an Identification Code;

“ETB User” means a person who has registered with the PCMS whether as a GLD supplier, or a GLD subscriber, or a person who is for the time being just an applicant to become a GLD supplier up to the time of the notification of the result of its application;

“ETO” means the Electronic Transactions Ordinance (Chapter 553 of the Laws of Hong Kong);

“Force Majeure Event” means:

- (a) any outbreak of war, hostilities (whether war be declared or not), invasion, acts of foreign enemies, rebellion, revolution affecting Hong Kong, overthrow (whether by external or internal means) of the Government; or
- (b) any event which is not caused or contributed to by, and is beyond the control of, the Contractor, its related persons (as defined in Paragraphs 16.6 and 16.7 of the Terms of Tender) or any employee or agent or ex-employee or ex-agent of the Contractor and none of them can prevent the consequences of such event from happening;

and which, in any case of (a) or (b) above, materially prevents the performance of the duties and obligations of any Party hereunder; for the avoidance of doubt, any change of law and regulation of whichever jurisdiction shall not be treated as a Force Majeure Event;



“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 (July 2022));
“general holiday” or “public holiday”	means a 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 all laws and regulations, 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 Data” or “Government Property”	means all property, equipment, data, documents, information, text, drawings, pictures, diagrams, images, sound or music, and any other materials of whatsoever nature (tangible or intangible) stored, presented or embodied in any medium, and which are provided or to be provided by the Government to the Contractor under or for the purposes of or in relation to the Contract or otherwise the Contractor has access;
“Government Logistics Department” or “GLD”	means the Government Logistics Department of the Government;
“Government Representative”	means: <ul style="list-style-type: none"> <li>(a) the head of the Procuring Department;</li> <li>(b) any public officer of the Government authorised by (a) for the purposes of the Contract; and</li> </ul>

- (c) any other public officer authorised by the public officer referred to in (b) for the purposes of the Contract.

The Government may change the Government Representative and/or his post title from time to time as it thinks fit without prior notice to the Contractor;

“Hong Kong” means the Hong Kong Special Administrative Region of the People’s Republic of China;

“Hong Kong dollars” means the lawful currency of Hong Kong;

“Identification Code” means a unique 8-character code generated by the ETB and sent to the email account registered by the ETB User with the PCMS (viz., “registered email account”) upon the request of the ETB User for the submission of a Tender through the use of such code;

“Independent Accredited Laboratory” means a laboratory which:

- (a) is accredited for the required scope as specified in the Tender Documents under the Hong Kong Laboratory Accreditation Scheme (HOKLAS) operated by Hong Kong Accreditation Service or under other accreditation scheme operated by any one of the laboratory accreditation bodies with which HOKLAS has concluded mutual recognition agreements/arrangements or such other accreditation as may be specified in the Interpretation (Supplement);
- (b) must not be the same entity as the Tenderer or the Contractor; and
- (c) must not be an associate or associated person (as defined in Clause 18.3 of the General Conditions of Contract) of the Tenderer or the Contractor;

“Information Schedule”	means a schedule attached to the Tender Form for completion of the Tenderer’s information;
“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” or “IPR”	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 whether now known or created in future (of whatever nature and wherever arising) and in each case whether registered or unregistered and including applications for the grant of any such rights;
“Interpretation”	means this Interpretation;
“Interpretation (Supplement)”	means the interpretation (supplement) referred to in Part 3C of, and in the form attached to, the Tender Form;
“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 Documents;
“Items”	means the services specified in the column of the table with heading “Description” in Part A of the Price Schedule with a unique item number and where applicable letter assigned to them in the first column of that same table in that Schedule, and shall be inclusive of all related services and subject matters specified in the Contract;
“Marking Scheme”	means where the Technical Proposal and the Price Proposal of a Tender are to be evaluated separately, a scheme which collectively contain those procedures requirements and criteria for the evaluation of such Proposals separately;
“Materials”	means any and all works and materials of whatsoever nature (including their drafts and uncompleted

versions) developed, written, prepared, produced, created, collected, compiled or provided by or on behalf of or for the Contractor, in relation to the Services or for the purposes of the Contract including without limitation, any reports, summaries, models, questionnaires, analyses, papers, advice, recommendations, documents, records, plans, designs, drawings, pictures, diagrams, images, sound, music, formula, tables, charts, databases, computer source codes, compilation of data or information, data or information collected, compiled, produced or created by the Contractor, its employees, agents or sub-contractors in relation to the Services or for the purposes of the Contract, recorded or stored by whatever means;

- “Non-collusive Tendering Certificate” means a document known as such and in the form attached to the Tender Form for completion and submission by the Tenderer as part of its Tender under Paragraph 29.2 of the Terms of Tender;
- “Order” has the meaning given to it in Clause 7.1 of the General Conditions of Contract;
- “Order Period” means the period specified in Clause 1.2 of the General Conditions of Contract as the “Order Period” unless the Special Conditions of Contract stipulate a different period as to the Order Period in which case that different period shall be the Order Period. This is the period during which an Order may be placed by the Government for the Services;
- “Original Tender Closing Date” means the date specified in the “Lodging of Tender” section of the Tender Form as the latest date before which Tenders must be deposited with the Government, regardless of whether the date has been extended subsequently;
- “Paper-based Tendering” means the making and submission of a Tender in paper form in accordance with the “Lodging of Tender” section of the Tender Form;
- “Parties” (in upper or lower case) means the Government and the Contractor; and “Party” (in upper or lower case) means any one of them;

“Permissible Currency”	means US dollars or any other permissible currency in which the Unit Prices may be quoted as specified in the Terms of Tender (Supplement) (if any);
“PRC”	means the People’s Republic of China;
“Price Proposal”	means the Price Schedule to be completed by the Tenderer;
“Price Schedule”	means the price schedule attached to the Tender Form for completion of the Unit Price quotation(s) of the Services offered and also containing the payment timetable for the Contract Price (if applicable);
“Procuring Department”	means the bureau or department of the Government specified as such in the Appendix;
“Schedules”	means the Completeness Check Schedule, the Price Schedule, the Information Schedule, the Non-collusive Tendering Certificate and any other schedule(s), referred to in Part 3B of, and in the respective forms attached to, the Tender Form; they may be assigned a consecutive number and/or letter for identification purposes;
“Services”	means all or any of the Items;
“Service Specifications”	means the specifications referred to in PART 3A of, and in the form attached to, the Tender Form; references to Service Specifications include those specifications offered by the Tenderer and accepted by the Government (if any);
“Special Conditions of Contract”	means the special conditions of contract referred to in Part 3 of, and in the form attached to, the Tender Form;
“Specified Tender Box”	means the tender box specified in the “Lodging of Tender” section of the Tender Form or, where applicable, other places assigned by a Government officer for depositing bulky tenders;
“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 18 of the Terms of Tender;
- “Tender Closing Date” means the date specified as such in the Tender Form as the same may be extended by the Government from time to time whether in accordance with Paragraph 3.11(b) or (c) of the Terms of Tender or otherwise;
- “Tender Closing Time” means the time on the Tender Closing Date before which Tenders must be deposited with the Government in the manner stipulated in the Tender Form as the same may be extended from time to time whether in accordance with Paragraph 3.11(b) or (c) of the Terms of Tender or otherwise;
- “Tender Documents” means the documents issued by the Government for the purpose of the Invitation to Tender the full list of which shall be as set out in the Tender Form for the Invitation to Tender and shall include all documents forming part of the Standard Terms and Conditions (Reference No. BD-TERMS-2 (July 2022)) (viz., the Tender Form, the Interpretation, the Terms of Tender and their Annexes and Appendix and the General Conditions of Contract) and if so stated in the Tender Form, all or any of the documents specified below:
- (a) the Interpretation (Supplement);
  - (b) the Terms of Tender (Supplement);
  - (c) the Special Conditions of Contract;
  - (d) the Service Specifications;
  - (e) the Price Schedule;
  - (f) the Completeness Check Schedule;
  - (g) the Information Schedule;
  - (h) the Non-collusive Tendering Certificate; and

- (i) all other documents attached to the Tender Form or any of the aforesaid documents whether as a Schedule or Annex or other attachment by whatever name called;

“Tender Form” means:

- (a) in the case of a Tender submitted in paper form, the Tender Form G.F. 231 issued for the Invitation to Tender; and
- (b) in the case of a Tender submitted electronically, the tender form available on the e-Tender Box for completion electronically;

“Tender Submission Date” means the date of the Offer to be Bound;

“Tender Validity Period” has the meaning given to it in Paragraph 4.2 of the Terms of Tender;

“Tenderer” means a person which or who has capacity to contract and has submitted a Tender in response to this Invitation to Tender;

“terms and conditions of use of the PCMS and the e-Tender Box” means all those terms and conditions for the use of the PCMS and the e-Tender Box from time to time published on the website of the e-Tender Box including the “Terms and Conditions of Use of the PCMS and the e-Tender Box” and the “e-Tender Box System and File Attachment Requirements” in the version prevailing immediately prior to the Tender Closing Date;

“Terms of Tender” means the Terms of Tender set out in Part 1 of these Standard Terms and Conditions (Reference No. BD-TERMS-2 (July 2022));

“Terms of Tender (Supplement)” means the terms of tender (supplement) referred to in Part 3C of, and in the form attached to, the Tender Form;

“Technical Proposal” means if the two-envelope system is adopted for the submission of the Tender, all proposals, information

and documents required to be submitted as part of the Tender apart from the Price Schedule;

- “Total Estimated Service Price” means an amount equal to the summation of the Estimated Service Prices for all such Item(s) which have been awarded to the Contractor;
- “Unit Price” (in upper or lower case) means the rate/unit price for an Item set out in the Price Schedule per billing period;
- “Virus” means a subversive computer programme or piece of code that may corrupt or erase computer data files and/or change the normal behaviour of a computer;
- “website of the e-Tender Box” means the website of the following address:  
<https://pcms2.gld.gov.hk>;
- “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 Black Rainstorm Warning Signal or “extreme conditions after super typhoons” announced by the Government is/are in force, for any time during the normal business hours; and
- “WTO GPA” means the Agreement on Government Procurement of the World Trade Organization.

1.2 Unless otherwise expressly stated to the contrary, 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 Documents 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;
- (e) references to “Tenderer” or “Contractor” shall include its permitted assigns, successors-in-title, 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 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 “laws” and “regulations” 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, regardless of the jurisdiction;
- (i) any word or expression to which a specific meaning has been attached in any part of the Tender Documents shall bear such meaning whenever it appears in the same and other parts of the Tender Documents;
- (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 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 Documents or by reference to any other definition;
- (s) references to “in writing” include manuscript, typewriting, printing, lithography, photography, facsimile, electronic mail, information which can be viewed on the e-Tender Box, and any other modes of representing and reproducing words in a legible form;
- (t) reference to “original signature” includes a digital image of a hand-written signature (viz., a scanned signature);
- (u) where a general obligation in the Tender Documents 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;
- (v) where this Invitation to Tender allows partial tenders for some but not all of the Items, and evaluation will be conducted on an Item to Item basis, references to “Tender will not be considered further” will have the further meaning as elaborated in Paragraph 17.5 of the Terms of Tender; and
- (w) the expressions “public body” and “public officer” have the meanings given to them in the Interpretation and General Clauses Ordinance (Chapter 1 of the Laws of Hong Kong). The expression “officer” has the meaning given to it in the Companies Ordinance (Chapter 622 of the Laws of Hong Kong).

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 All and any provisions set out in the Standard Terms and Conditions (Reference No. BD-TERMS-2 (July 2022)) (viz., the Tender Form, the Interpretation, the Terms of Tender and their Annexes and Appendix and the General Conditions of Contract) may be further amended or deleted in the supplements to these documents to be issued as part of the same set of the Tender Documents for an Invitation to Tender, regardless of whether or not this is stated to be the case in the individual provisions. The Schedules in the form as found in the Standard Terms and Conditions (Reference No. BD-TERMS-2 (July 2022)) are templates only and only the actual version attached to the Tender Form shall be deemed to form part of the Tender Documents but not those templates.
- 1.6 Where there is any provision in the Standard Terms and Conditions (Reference No. BD-TERMS-2 (July 2022)) which provides that an alternative or additional requirement may be set out in the Interpretation (Supplement), or the Terms of Tender (Supplement), or the Special Conditions of Contract, or any of the Schedules, or the applicability of certain requirement may be confirmed in any of the aforesaid documents, but in the Tender Documents published, there is no mention of any such alternative or additional requirement in any of the aforesaid documents, or no confirmation that the requirement should apply, it shall be deemed that there is no such alternative or additional requirement, or that the relevant requirement does not apply (as the case may be).
- 1.7 Unless otherwise expressly stated, all provisions of the Tender Documents shall apply regardless of whether Paper-based Tendering or Electronic Tendering is used for the submission of the Tender or formation of the Contract.

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

**1. Invitation to Tender**

- 1.1 Tenders are invited for the provision of the Items summarised in the Terms of Tender (Supplement) subject to and in accordance with the Tender Documents.
- 1.2 The Standard Terms and Conditions (Reference No. BD-TERMS-2 (July 2022)) comprising the Interpretation, the Terms of Tender and the General Conditions of Contract may be downloaded from the website of the e-Tender Box at <https://pcms2.gld.gov.hk>. In addition to the aforesaid Tender Documents comprised in the Standard Terms and Conditions, there are other Tender Documents in the respective forms as attached to the Tender Form to form the full set of the Tender Documents for this Invitation to Tender. A full list of these Tender Documents is set out in the Tender Form and a full set of the Tender Documents may be collected from the Procuring Department at the address as specified in the Terms of Tender (Supplement).
- 1.3 Each Tenderer should read the Tender Documents carefully prior to submitting a Tender and ensure that it understands all requirements of the Tender Documents.
- 1.4 Each Tenderer should obtain such independent advice from its own advisers as it considers appropriate.
- 1.5 Each Tenderer should check the numbers of pages of the Tender Documents. If it finds any missing or indistinct pages, it should inform the Government Representative immediately so that the same can be rectified.
- 1.6 Each Tenderer will be regarded to be thoroughly conversant with all aspects of the Tender Documents (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 a 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 Documents (including the Contract) or relieve

the Tenderer from any of its obligations or liabilities under the Tender Documents (including the Contract). For the avoidance of doubt, a successful Tenderer shall not be entitled to any additional payment, compensation, exemption from compliance or observance, 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 obligation or liability under the Contract as a consequence of any misinterpretation by it of any provision in the Tender Documents or the Contract.

- 1.8 Information, statistics and forecasts set out in the Tender Documents 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 above, the estimated requirement of the Services specified in the Price Schedule or Service Specifications (if any) is/are estimate(s) of the quantity 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.

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

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

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

- 3.1 Unless otherwise specified in the Terms of Tender (Supplement), the Tenderer must bid for all Items specified in the Price Schedule by submitting the Unit Price for each such Item. Where a Tenderer fails to do so, its Tender will not be considered further.
- 3.2 A complete list of all proposals, documents and information which are required to be submitted is set out in the Completeness Check Schedule. These proposals, documents and information to be submitted by the Tenderer shall include the signed Offer to be Bound in Part 4 of the Tender Form (in case of Paper-based Tendering), the Price Schedule, the

Information Schedule, the Completeness Check Schedule, the Non-collusive Tendering Certificate, and such other proposals, documents and information as specified in the Terms of Tender (Supplement). Where the two-envelope system is adopted (as specified in the Terms of Tender (Supplement)), the Technical Proposal shall be submitted to include all of foregoing apart from the Price Schedule, and the Price Proposal shall be submitted to include the Price Schedule.

3.3 The Tenderer must submit all of the following in its Tender before the Tender Closing Time, otherwise its Tender will not be considered further:

- (a) (i) (for Paper-based Tendering) a duly signed Part 4 “Offer to be Bound” of the Tender Form in English or Chinese containing an original signature by or on behalf of the Tenderer. The Offer to be Bound to be submitted (other than the signature on the Offer to be Bound which must be original) shall be Part 4 of the Tender Form or a printed copy from a softcopy of Part 4 of the Tender Form or a photocopy or a scanned copy of such hardcopy or printed copy. Any manner of reproduction of Part 4 of the Tender Form (including copy-typing) to be submitted as the Offer to be Bound shall not be acceptable and the Tender with the non-conforming Offer to be Bound will not be considered further; or
- (ii) (for Electronic Tendering) the box signifying the Tenderer’s agreement with Part 4 “Offer to be Bound” of the Tender Form must have been checked;
- (b) the Unit Price quotations for all Items in the Price Schedule (or in the case partial tender is allowed as stated in the Terms of Tender (Supplement), the Unit Price quotations for those Items (or where applicable, group(s) of Items) which the Tenderer is bidding in the Price Schedule); and
- (c) such other items and documents as specified in the Terms of Tender (Supplement) whereby it is provided that failure to submit any of them before the Tender Closing Time will immediately lead to the Tender not being considered further.

3.4 In these Terms of Tender, and, where applicable, in the Terms of Tender (Supplement), there are also requirements for the submission of documents and/or information, whereby it is provided that if not supplied by the Tender Closing Time, or upon subsequent request of the

Government after the Tender Closing Time, the Tender will not be considered further. Even so, for this type of documents and/or information, the Government is not obliged to make any request for resubmission after the Tender Closing Time. If the Government chooses not to do so, or even if the Government chooses to do so but the Tenderer fails to supply the missing document or information, the Tender will also not be considered further.

- 3.5 For all other proposals, documents and information which do not fall within Paragraph 3.3 or 3.4 above, the Government reserves the right to seek submission under Paragraph 12.1 of the Terms of Tender or evaluate the Tender on an “as is” basis.
- 3.6 The Tenderer shall complete and submit all Schedules in either English or Chinese and in accordance with other requirements of the Tender Documents. Where a supporting document in its original form is in a language other than English or Chinese, the Tenderer shall provide translation of that supporting document from the language into English.
- 3.7 Where it is stated in the Terms of Tender (Supplement) that the two-envelope system shall be adopted, the Tenderer shall submit its Tender in two (2) separate proposals, one as the Technical Proposal and another as the Price Proposal. A Tenderer shall submit, in one of the following manners, its completed Tender. A Tender submitted through a method other than Paper-based Tendering or Electronic Tendering will not be considered.

Tender Submission:

(a) Paper-based Tendering

The Tender (and where the two-envelope system is applicable, comprising the Technical and Price Proposals) shall be completed in writing on hardcopy (and if so expressly requested in the Terms of Tender (Supplement) also on softcopy) and shall be submitted in triplicate in accordance with the “Lodging of Tender” section of the Tender Form.

(b) Electronic Tendering

The Tender (and where the two-envelope system is applicable, comprising the Technical and Price Proposals) shall be submitted:

- (i) in accordance with the terms and conditions of use of the PCMS and the e-Tender Box; and

- (ii) through the e-Tender Box through the use of any one type of digital certificates recognised by and uploaded to the e-Tender Box or through an Identification Code.

3.8 The Government may not consider a Tender (or will not consider a Tender where it is expressly so stated) if:

- (a) false, inaccurate or incorrect information is given in the Tender; or
- (b) any proposal, document or information requested in the Tender Documents is not furnished in full in the Tender.

3.9 When completing the Tender Documents (including the Offer to be Bound section of the Tender Form), each 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; or
  - (iii) its business name as shown in the current business registration certificate of the Tenderer;
- (b) if the Tenderer is a sole proprietorship or a partnership, the current business registration certificate of the Tenderer issued under the Business Registration Ordinance (Chapter 310 of the Laws of Hong Kong); or
- (c) if the Tenderer is incorporated, formed or established outside Hong Kong, a document equivalent to that described in Paragraph 3.9(a)(i), (a)(ii), (a)(iii) or (b) above (as the case may be) issued by a governmental or competent authority of the place where the Tenderer is incorporated, formed or established.

3.10 Execution and Submission of Tenders

- (a) Paper-based Tendering
  - (i) A Tender submitted through Paper-based Tendering will be regarded to have been submitted by a Tenderer or



authorised to have been submitted by a Tenderer (as the case may be) if the submitted Part 4 “Offer to be Bound” of the Tender Form is signed in the following applicable manner:

- (1) if the Tenderer is a sole proprietorship, the Tenderer signing the Tender in the name of the Tenderer (or of the sole proprietorship), or a person authorised by the Tenderer signing the Tender for and on behalf of the Tenderer;
- (2) if the Tenderer is a partnership, one or more partner(s) of the Tenderer signing in the name of the partnership (and in the case of limited partnership, that partner must be a general partner); or a person authorised by the partnership, signing the Tender for and on behalf of the Tenderer; or
- (3) if the Tenderer is a company, a director of the Tenderer or one or more persons who are duly authorised by the Tenderer signing the Tender for and on behalf of the Tenderer.

(b) Electronic Tendering

- (i) A Tender submitted through Electronic Tendering will be regarded to have been submitted by a Tenderer or authorised to have been submitted by a Tenderer (as the case may be) if it is submitted in any one of the following ways:
  - (1) submission of the Tender via the e-Tender Box through the use of an Identification Code; or
  - (2) submission of the Tender via the e-Tender Box through the use of such type of digital certificate recognised by the ETB, and uploaded by the Tenderer to the ETB. Save in the case where the Tenderer is a partnership, a Tenderer shall use a digital certificate which is issued in its name as appearing in the applicable document mentioned in Paragraph 3.9(a) or (b) or (c) above; otherwise the Tender will not be considered further. In the case that the Tenderer is a partnership, the Tenderer may use a digital certificate issued in the name of one of

its partners (or a general partner in the case of a limited partnership), or a digital certificate issued in the name of the partnership; otherwise the Tender will not be considered further.

(ii) If any attachment to a Tender submitted by a Tenderer via the e-Tender Box:

- (1) does not comply with the terms and conditions of use of the PCMS and the e-Tender Box;
- (2) is found to be contaminated with Virus; or
- (3) is corrupted or otherwise not readable or printable into readable text by the Government,

and such non-compliance of file format, Virus contamination, or file corruption has resulted in failure to submit the relevant proposal, document or information as described in Paragraph 3.3(a)(ii), (b) or (c) above by the Tender Closing Time, the Tender will not be considered further and its Tenderer will be notified of such.

(iii) In the case where the Tenderer uses a digital certificate for the submission of Tender via the e-Tender Box, the Government will verify the validity of a Tenderer's digital certificate with the relevant certification authority which has issued such digital certificate. If the directory service or revocation list service of that certification authority or its contractor is/are not available for any reason, the Government may postpone the verification process until such time when the directory service or revocation list service (as the case may be) of the certification authority or its contractor is/are resumed or when the Tender is opened, whichever is the later. If the verification process is postponed, the Tenderer will be informed of this through an on-screen message and an on-line acknowledgement of the Tender.

(iv) A Tender will not be considered further if the digital certificate used by a Tenderer for submission of Tender via the e-Tender Box is found invalid (i.e. expired, revoked, or it is not a digital certificate recognised in the e-Tender Box for submission of Tenders) upon verification.

### 3.11 Tender Closing Time

(a) (i) Paper-based Tendering

A Tender must be deposited in the Specified Tender Box before the Tender Closing Time. A Tender deposited in the Specified Tender Box at or after the Tender Closing Time, or a Tender not deposited in the Specified Tender Box, will not be considered.

(ii) Electronic Tendering

Transmission of a Tender through the e-Tender Box shall be successfully completed in accordance with the requirements of the e-Tender Box before the Tender Closing Time. Save as otherwise provided for in the Tender Documents, a Tender will not be considered if the relevant proposal, document or information as described in Paragraph 3.3(a)(ii), (b) or (c) above is not successfully and completely transmitted through the e-Tender Box before the Tender Closing Time.

(b) In case Tropical Cyclone Warning Signal No. 8 or above is hoisted, or Black Rainstorm Warning Signal or “extreme conditions after super typhoons” announced by the Government is/are in force, for any duration between 0900 and 1200 hours on the date specified in the “Lodging of Tender” section of the Tender Form, the latest date and time before which Tenders are to be deposited in the Specified Tender Box and at the e-Tender Box will be extended to 1200 hours on the next working day.

(c) In case of blockage of the public access to the location of the Specified Tender Box at any time between 0900 and 1200 hours on the Tender Closing Date, the Government will announce extension of the Tender Closing Time until further notice. Following removal of the blockage, the Government will announce the extended tender closing time as soon as practicable. The above announcements will be made via press releases on the website of Information Services Department (<http://www.info.gov.hk/gia/general/today.htm>).

3.12 The Government shall not have or accept any liability, obligation or responsibility whatsoever for any loss of, destruction of or damage to the Tender submission submitted and/or deposited by Tenderers in the Specified Tender Box if such loss, destruction or damage shall be caused

by or directly or indirectly due to any outbreak of war, hostilities (whether war be declared or not), invasion, acts of foreign enemies, riot, civil commotion, rebellion, storm or other cause whatsoever beyond the reasonable control of the Government. Following any event which results in such loss, destruction or damage, the Government will announce any arrangements concerning Tender submission as soon as practicable. The above announcements will be made via press releases on the website of Information Services Department (<http://www.info.gov.hk/gia/general/today.htm>).

3.13 If a Tenderer submits a Tender by Electronic Tendering, the Tenderer shall, in addition to compliance with the Tender Documents, observe and comply with all terms and conditions of use of the PCMS and the e-Tender Box as set out in or referred to in the e-Tender Box.

#### 3.14 Modification of Tender

(a) Before the Tender Closing Time, a Tenderer who has lodged a Tender may modify its Tender as considered necessary.

(b) Paper-based Tendering

Any modification to the submitted Tender considered necessary by the Tenderer shall be the subject of a separate letter accompanying the Tender. Figures and words shall not be altered or erased; any modification shall be effected by striking the incorrect figure or word and inserting the correct figure or word in manuscript above the original figure or word. All such amendments shall be initialled by the Tenderer in manuscript.

(c) Electronic Tendering

In case of modification to the submitted Tender, the Tenderer shall submit either a complete set of the revised Tender superseding the original Tender, or just the revisions to the original Tender. Either way, this shall be stated clearly in the submission.

3.15 Apart from Part 4 “Offer to be Bound” of the Tender Form (which, in the case of Paper-based Tendering, must be originally signed by or on behalf of the Tenderer as required under Paragraph 3.3(a)(i) above), wherever there is any provision in the Tender Documents requiring that the original of any document or the document as mentioned in Paragraph 3.15.1(b) below to be submitted as part of the Tender,

- 3.15.1 in the case of Paper-based Tendering, (a) the Tenderer may submit a photocopy certified to be true and complete by the person(s) specified in Paragraph 3.10(a)(i) above; (b) in the case of any certificate which is required to be issued by a specified body (for example an Independent Accredited Laboratory or a recognised certification body (if applicable)), the photocopy certificate must be certified as true and complete by that specified body or a lawyer duly qualified to practise in Hong Kong or the laws of the place of incorporation, formation or establishment of the Tenderer; and (c) if only a photocopy without any certification has been submitted, the Government reserves the right to request a certified true copy as required in (a) or (b) above (whichever is applicable) (“certified true copy”) after the Tender Closing Date. The Tender may not be considered further if the certified true copy is not provided; and
- 3.15.2 in the case of Electronic Tendering, the Tenderer shall first submit the certified true copy as described in Paragraph 3.15.1(a) or (b) above (whichever is applicable) in electronic format as part of its Tender via the e-Tender Box. Subsequently, the Government reserves the right to request a certified true copy (hardcopy) after the Tender Closing Date. If only a photocopy without any certification has been submitted in electronic format as part of its Tender via the e-Tender Box, the Government reserves the right to request a certified true copy (hardcopy) after the Tender Closing Date. The Tender may not be considered further if the certified true copy (hardcopy) is not provided.

#### **4. Tenders to Remain Open**

- 4.1 A Tender once submitted by a Tenderer will be binding on the Tenderer. By submitting a Tender, the Tenderer shall be deemed to have represented to the Government that it has done so as the principal but not as an agent of any other person. If the Tenderer submits a Tender as an agent on behalf of another person, full disclosure must be made in the Tender.
- 4.2 It is an essential requirement of this Invitation to Tender that a Tender shall remain valid and open for a period of ninety (90) days after the Tender Closing Date (or such other period as specified in the relevant provisions of the Terms of Tender (Supplement) which supplement this Paragraph 4.2) (“Tender Validity Period”).
- 4.3 If a Tenderer offers in its Tender a period that is shorter than the applicable Tender Validity Period specified in Paragraph 4.2 above, or if it rejects the Tender Validity Period prescribed in Paragraph 4.2 above, its Tender will not be further considered.

## 5. Prices

- 5.1 Unless otherwise provided for in the Tender Documents, the Tenderer shall quote the Unit Price for each Item in the Price Schedule in Hong Kong dollars or the Permissible Currency. The Unit Price quoted by the Tenderer for an Item shall be all-inclusive of all amounts chargeable for the performance by the Tenderer of all obligations as stated in the Contract for or concerning or in relation to such Item. Under no circumstances will the Government compensate the Contractor for any loss incurred in the fluctuation of the currency in which the Unit Prices are quoted.
- 5.2 Prices quoted by a Tenderer shall only be shown in the Price Schedule.
- 5.3 A Tenderer must quote fixed Unit Prices for all Items and the same Unit Price for the same Item regardless of the quantity (or those Items (or where applicable, group(s) of Items) which it intends to bid in the case partial tender is allowed). A Tender with any price variation clause, including one based on foreign exchange market fluctuation, will not be considered further.
- 5.4 Each Tenderer shall make sure that all prices and other proposals offered in its Tender are accurate and complete before it submits the Tender. The Tenderer shall be bound by all prices and other proposals offered in its Tender if the Tender is accepted by the Government. The Tenderer may not initiate any request for amendment of its Tender after the Tender Closing Time on any ground (including any mistake made in the Tender). On the other hand, in the event of any apparent arithmetical or typo mistake or inconsistency in a Tender, pursuant to Paragraph 12 of the Terms of Tender, the Government may, but is not obliged to, ask the Tenderer to clarify, or to confirm another figure to replace the original figure. Where the Tenderer's clarification is not provided or not satisfactory, or the Tenderer refuses to confirm such other figure, or where the Government does not elect to seek clarification or confirmation from the Tenderer, the Government reserves the power to proceed to evaluate the Tender on an as is basis (i.e., in the form as originally submitted prior to the Tender Closing Time) or disqualify the Tenderer on ground that it has provided erratic or inconsistent proposals or quotations for proper evaluation.
- 5.5 Payment to the successful Tenderer shall be made in accordance with the payment timetable in Part B of the Price Schedule.
- 5.6 The Tenderer is requested to indicate in the space provided in Part C of the Price Schedule the prompt payment discount it will allow on any

payment under the Contract if made in full within the period of time as specified therein.

- 5.7 Payment to a successful Tenderer from a place outside Hong Kong will be made by telegraphic transfer. A Tenderer from a place outside Hong Kong is therefore required to provide the banking details in Part D of the Price Schedule.
- 5.8 If the unit prices are quoted in US dollars or another Permissible Currency (where applicable), unless otherwise specified by the Tenderer and agreed by the head of the Procuring Department, payment to the successful Tenderer will be made either in Hong Kong dollars or in such Permissible Currency, depending on the stipulation in the Terms of Tender (Supplement). In the case of the former, the conversion rate applicable for determining the amount of Hong Kong dollars payable shall be as stated in the Terms of Tender (Supplement).
- 5.9 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. Compliance with Essential Requirements**

A Tenderer shall comply with all the essential requirements (if any) stipulated in the Tender Documents. If a Tenderer fails to do so, its Tender will not be considered further.

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

- 7.1 The Tenderer shall provide the following details relating to itself in the Information Schedule:
- (a) name and principal place of business of the Tenderer;
  - (b) length of business experience;
  - (c) shareholders/partners/proprietor of the Tenderer and their percentage of ownership;

- (d) names of the following:
  - (i) managing director and other directors;
  - (ii) partners; or
  - (iii) sole proprietor;
- (e) a copy of a valid Business Registration Certificate issued under the Business Registration Ordinance (Chapter 310 of the Laws of Hong Kong) or documentary evidence showing that the Tenderer is exempted from business registration under the Business Registration Ordinance (Chapter 310 of the Laws of Hong Kong); or if the Tenderer does not carry on business in Hong Kong, the equivalent document issued by the authority of the place of business of the Tenderer;
- (f) if the Tenderer is a company, its Memorandum (if any) and Articles of Association, Certificate of Incorporation, Certificate of Change of Name (if any); or the equivalent documents issued by the authority of the place of incorporation of the Tenderer if the Tenderer was not incorporated under the Companies Ordinance (Chapter 622 of the Laws of Hong Kong) (or its predecessor Ordinance);
- (g) if the Tenderer is a company incorporated in Hong Kong or is a registered non-Hong Kong company under the Companies Ordinance (Chapter 622 of the Laws of Hong Kong), a copy of the latest annual return filed with the Companies Registry and all subsequent filings since the latest annual return; or the equivalent documents issued by the authority of the place of incorporation of the Tenderer if the Tenderer was not incorporated or registered under the Companies Ordinance (Chapter 622 of the Laws of Hong Kong) (or its predecessor Ordinance);
- (h) place and date of its incorporation or formation;
- (i) business profile information of the Tenderer including the number and location of full time/contract employees, core business strategies and strength, and industry expertise;
- (j) notwithstanding the deeming provision specified in Paragraphs 3.10(a)(i) and 3.10(b)(i) of the Terms of Tender, a Tenderer shall provide a certified extract of board resolution or other documentary evidence acceptable to the Government demonstrating authorisation and approval for the submission of its Tender. This requirement shall always be applicable to a Tenderer which is a company regardless of the mode of



submission of Tender. In the case that a Tenderer is a sole proprietorship or a partnership, documentary evidence acceptable to the Government demonstrating authorisation and approval for the submission of its Tender shall also be required if (a) (in the case of Paper-based Tendering), the signatory of the Offer to be Bound, or (b) in the case of Electronic Tendering using an Identification Code, the person submitting the Tender, is not the sole proprietor or a partner (or a general partner in the case of a limited partnership) (as the case may be);

- (k) where a Tenderer is not a company, a partnership, or a sole proprietorship, some of the information mentioned in the foregoing Sub-paragraphs of this Paragraph 7.1 may not apply and may not be available. Regardless of the mode of submission of its Tender, the Government reserves the right to request such relevant information and documents in relation to the Tenderer to ascertain the identity of the Tenderer as well as to ensure that the submission of the Tender has been duly authorised and approved; and
- (l) 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 may be requested by the Government. The legal opinion, if required, should be made available upon request during the Tender Validity Period. Upon such request, the Tenderer shall provide such legal opinion covering 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 and in good standing 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. By "validly existing and in good standing", it is meant that no event mentioned in any of the Clauses 15.2(a) to (e) of the General Conditions of Contract or any event which has an equivalent effect to any such event has occurred in relation to the Tenderer;

- (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 Documents; 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 18 of the Terms of Tender, 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; without prejudice to the generality of the foregoing, where an Electronic Record is used in the formation of the Contract (whether with or without any electronic or digital signature), the Contract shall not be denied legality, validity or enforceability on the sole ground that an Electronic Record was used for that purpose;
- (d) the submission of its Tender and the 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 (if any) 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 Documents 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 Documents and the Contract;

- (h) the choice of the laws of Hong Kong to govern the Tender Documents and the Contract is a valid choice of laws;
- (i) the judgment handed by the courts of Hong Kong after the adjudication of any dispute arising from the Contract will be recognised and given effect to by the courts of the place of incorporation, formation or establishment of the Tenderer; and
- (j) 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 Documents 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. Where the opinion on the question specified in Paragraph 7.2(i) above is negative or otherwise subject to qualifications not satisfactory to the Government, the additional legal opinion shall opine that any ruling made by the arbitrator under the arbitration provision set out in Paragraph 7.4 below will be recognised and given effect to by the courts of the place of incorporation, formation or establishment of the Tenderer ("additional opinion on arbitration"). Together with the additional opinion on arbitration to be provided, the Tenderer shall also be required to provide a confirmation in writing that in consideration of the award of the Contract, it agrees that Clause 39.2 of the General Conditions of Contract shall be replaced by the arbitration clause in Paragraph 7.4 below.

7.4 Where the opinion on the question specified in Paragraph 7.2(i) above is negative or otherwise subject to qualifications not satisfactory to the Government, subject to the obtaining of the additional opinion on arbitration as mentioned in Paragraph 7.3 above, Clause 39.2 of the General Conditions of Contract shall be deemed deleted and replaced by the following: "Any dispute arising from the Contract shall not be adjudicated by the courts of Hong Kong but shall be adjudicated by arbitration to be held in accordance with the Hong Kong International Arbitration Centre Domestic Arbitration Rules prevailing at the time when a notice of arbitration is issued by a Party ("Arbitration Rules")

except that regardless of whether the Arbitration Rules providing anything to the contrary, unless the Parties otherwise agree in writing: (a) the arbitration hearing must be held in Hong Kong and that the Arbitration Ordinance (Chapter 609 of the Laws of Hong Kong) shall apply to the arbitration (including the whole of Schedule 2); and (b) without prejudice to section 18(2) of the Arbitration Ordinance, the Government may on its own disclose any information relating to (i) the arbitral proceedings under the arbitration agreement; and (ii) an award made in those arbitral proceedings, under any of the circumstances mentioned in Paragraph 26.2 of the Terms of Tender”.

## **8. Sub-contractors**

- 8.1 If any obligations of the Contractor are proposed to be performed by a sub-contractor, the Tenderer shall submit in the Information Schedule information of the sub-contractor. Details of the obligations to be performed by the proposed sub-contractor shall be submitted.
- 8.2 The information required in the Information Schedule for each proposed sub-contractor shall cover the information as required in Paragraph 7.1(a) of the Terms of Tender as if references to Tenderer shall mean the proposed sub-contractor.
- 8.3 The Government reserves the power to request the Tenderer to withdraw any sub-contracting proposal in the Information Schedule whereupon should the Tenderer refuse to do so, its Tender may not be considered further.
- 8.4 Where it is so specified in the Terms of Tender (Supplement) as being applicable, a legally binding sub-contractor’s undertaking will be required to be submitted. If a sub-contractor’s undertaking is required, and that the proposed sub-contractor was established or incorporated outside Hong Kong, and if requested by the Government, the legal opinion referred to in Paragraphs 7.2 and 7.3 of the Terms of Tender shall also be provided in relation to the proposed sub-contractor.

## **9. Cancellation of the Invitation to Tender Exercise**

Without prejudice to the Government’s right to cancel this Invitation to Tender exercise 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 Invitation to Tender.

## **10. Tenderer's Commitment**

All Tenders, information and responses from a Tenderer must be submitted in writing. Each of them is the offer, commitment and 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.

## **11. Counter-Proposals**

11.1 The Tenderer must not submit any proposal that has the effect of varying or modifying (a) any essential requirements specified in the Tender Documents; (b) all provisions in the Tender Documents concerning the preparation, submission and evaluation of Tenders and award of Contract; and (c) those additional provisions which are not permitted to be subject to any counter-proposal as identified in the Terms of Tender (Supplement) (if any).

11.2 The Tenderer must not directly or indirectly attempt to preclude or limit the effect of any requirements or instructions set out in the Tender Form, these Terms of Tender or the Terms of Tender (Supplement) or the Schedules.

11.3 If a Tenderer fails to comply with Paragraph 11.1 or 11.2 above, subject to any clarification which the Government may, but is not obliged to, seek from the Tenderer, its Tender will not be further considered.

11.4 Counter-proposal to other provisions of the Tender Documents not specified in Paragraph 11.1 or 11.2 above, whilst not strictly disallowed, is not encouraged. If the Tenderer wishes to submit one or more counter-proposals to any provision in the Tender Documents not of the types specified in Paragraph 11.1 or 11.2 above ("Counter-Proposals"), the Counter-Proposals shall be submitted in the following manner:

- (a) (i) for Paper-based Tendering, the Counter-Proposals shall be attached to Part 4 "Offer to be Bound" of the Tender Form; or
- (ii) for Electronic Tendering, the Counter-Proposals shall be attached as a separate attachment and identified as such;
- (b) the original provisions which the Counter-Proposals relate to shall be fully recited before the proposed alteration or deletion;

- (c) the proposed alteration to the original provisions shall be underlined and shall bear the corresponding clause number of the original provisions unless it is an addition;
- (d) if it is an addition, the additional provisions shall be underlined;
- (e) words to be deleted shall be crossed out by a single line only; and
- (f) an explanation shall be given below the alteration or deletion and put in square brackets “[ ]”.

11.5 Unless the Government otherwise agrees, Counter-Proposals that are not submitted in accordance with Paragraph 11.4 above 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 provisions to which the Counter-Proposals relate and the Government will continue to consider the Tenderer’s Tender on this basis.

11.6 Notwithstanding and without prejudice to the aforesaid, the Government may, but is not obliged to, negotiate with the Tenderer any Counter-Proposal. The Government may at its absolute discretion reject any Counter-Proposal. If the Government does elect to negotiate with a Tenderer concerning a Counter-Proposal, and if after such negotiation, the Tenderer is unwilling to withdraw such Counter-Proposal, or otherwise revise it on terms acceptable to the Government, its Tender may not be considered further. Any accepted Counter-Proposal following from a successful negotiation shall be deemed as part of the Tenderer’s Tender and forms part of the Contract and shall be binding on the Tenderer if the Contract is eventually awarded to it.

## **12. Request for Information**

12.1 In the event that the Government determines that:

- (a) clarification in relation to any part of the Tender is necessary; or
- (b) a document or a piece of information, other than those specified in Paragraph 3.3 of the Terms of Tender, 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. The Tenderer shall within five (5) working days from the date of the

request or within such other period as specified in the request submit the clarification, information or document. If the clarification or information or document is not provided by the aforesaid deadline, the Tender may not be considered further (or will not be considered further where the missing information or document is of the type specified in Paragraph 3.4 of the Terms of Tender).

- 12.2 Any excess proposal or information supplied by a Tenderer which goes beyond what has been requested by the Government pursuant to Paragraph 12.1 above will be ignored for the purposes of the tender evaluation or will entitle (but not oblige) the Government not to consider the Tender further.

### **13. Tenderer's Enquiries**

- 13.1 Any enquiries from the Tenderer concerning the Tender Documents up to the date of lodging its Tender with the Government shall be in writing and shall be submitted to the Government no later than three (3) working days before the Tender Closing Date. The request shall be submitted in the manner specified in Paragraph 14.1 of the Terms of Tender.
- 13.2 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 Documents. 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.
- 13.3 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 potential 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 potential Tenderer to rely on such statement. No such statement shall form part of the Tender Documents or alter, negate or constitute a waiver of any provision of the Tender Documents.

### **14. Communication with the Government**

- 14.1 Without prejudice to the requirements set out in Paragraph 18 of the Terms of Tender concerning notification of acceptance of Tender, 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 29 of the General Conditions of Contract at the address, facsimile number or email address specified in the Appendix, save that in the case of lodging any enquiries under Paragraph 13.1 of the Terms of Tender, the Tenderer shall lodge such enquiries by facsimile or by email only. The Tenderer shall complete its postal address, facsimile number and email address in the Appendix to the Terms of Tender 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.

- 14.2 All communications in relation to the Invitation to Tender shall be conducted directly between the Government and the Tenderer unless the Government elects to contact any proposed sub-contractor or customer or client of the Tenderer directly.

## **15. Negotiations**

The Government reserves the right to negotiate with any Tenderer in relation to the Tenderer's Tender and/or the Contract.

## **16. Government Discretion**

- 16.1 Notwithstanding anything to the contrary in this Tender Documents, 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 any time prior to the Contract award or an order is made or a resolution is passed for the winding up or bankruptcy of the Tenderer or a related person 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 (i) a claim or an allegation by any person, or a ruling or judgment by a court, or decision by a competent tribunal or arbitration body that any thing(s), service(s) or material(s) to



be supplied or recommended by the Tenderer in its Tender infringes any Intellectual Property Rights or any other rights of any person (“IPR infringement”) (and in the case of any claim or allegation, it was made any time during a period of seven (7) years preceding the Tender Closing Date and up to the time of Contract award); or (ii) the Government having grounds to believe there is or will be such IPR infringement; or (iii) an agreement has been entered into whether by the Tenderer or any other person to settle or compromise any claim or allegation about IPR Infringement (regardless of whether on an admission basis or non-admission basis) which agreement is still valid and subsisting at any time during a period of seven (7) years preceding the Tender Closing Date and up to the time of Contract award;

- (d) any time during the thirty-six (36) months prior to the Tender Closing Date or between the Tender Closing Date and the award of the Contract, the Tenderer or a related person of the Tenderer (as defined in Paragraphs 16.6 and 16.7 below and including those who were in such capacity any time within the same period, i.e., thirty-six (36) months prior to the Tender Closing Date or between the Tender Closing Date and the award of the Contract) has committed significant or persistent default(s) or deficienc(ies) in the performance of any requirement or obligation under any other Government contract regardless of the procurement department of such other Government contract, regardless of whether the default(s) or deficienc(ies) led to the actual termination of the relevant Government contract and regardless of whether such default(s) or deficienc(ies) occurs before or after the termination or expiry of the relevant Government contract, and in the case of the latter, provided that the default(s) or deficienc(ies) relates to any provisions which survive such termination or expiry, and regardless of whether such default(s) or deficienc(ies) has been remedied (“Contract Default(s)”); and the Government Representative in its sole judgment is satisfied that such Contract Default(s) casts a reasonable doubt on the capability of the Tenderer to perform the Contract to be awarded in this Invitation to Tender;
- (e) (i) the Tenderer; or (ii) a related person of the Tenderer; or (iii) a director or management staff of the Tenderer or those of the related person of the Tenderer, has been convicted by the final judgment (i.e. judgment not subject to any appeal to a higher court prior to the Contract award) in respect of one or more serious offences including conviction of offences involving bribery, false accounting, corruption, dishonesty or employment

handed down any time during a period of five (5) years preceding the Tender Closing Date and thereafter up to the time of Contract award;

- (f) in the event of the professional misconduct or acts or omissions having been committed during a period of five (5) years preceding the Tender Closing Date and up to the time of Contract award that adversely reflect on the commercial integrity of the Tenderer or a related person of the Tenderer or a director or management staff of the Tenderer or those of the related person of the Tenderer; professional misconduct includes any breach of the Good Industry Practice; or
- (g) any failure of the Tenderer to pay taxes to the Government during a period of five (5) years preceding the Tender Closing Date and up to the time of Contract award.

The grounds specified in Paragraphs 16.1(a) to 16.1(g) above are separate and independent, and shall not be limited by reference to or inference from the other of them.

16.2 For the purposes of Paragraph 16.1 above, 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 and those information in relation to its related person or its director or management staff (which it has knowledge and 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 16.1(a) above;
- (b) details of all infringement claims, allegations, rulings, judgments, decisions or settlement agreements as mentioned in Paragraph 16.1(c) above;
- (c) details of all Contract Defaults as mentioned in Paragraph 16.1(d) above;
- (d) details of conviction as mentioned in Paragraph 16.1(e) above in Hong Kong or any overseas jurisdiction;
- (e) details of any professional misconduct or act or omission as mentioned in Paragraph 16.1(f) above; and

- (f) details of any failure to pay taxes as mentioned in Paragraph 16.1(g) above.

If none of the events as mentioned in Paragraphs 16.1(a) to 16.1(g) 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 16.3 below. The information provided by the Tenderer is not conclusive. The Government may independently verify the veracity and completeness of any information provided. In the case of Contract Default, the Government will form an assessment as to whether or not such Contract Default has occurred.

- 16.3 In addition to the information mentioned in Paragraph 16.2 above, the Government reserves the right (but not obligation) to request from a Tenderer or a related person of the Tenderer or director or management staff of the Tenderer or those of the related person of the Tenderer or other independent sources, such other information that is reasonably relevant to facilitate the Government's determination as to whether to exercise its right of disqualification under Paragraph 16.1 above.
- 16.4 If the Tenderer fails to comply with the request made by the Government pursuant to Paragraph 16.3 above within such time as required by the Government, the Government may disqualify the Tenderer pursuant to Paragraph 12 of the Terms of Tender. If the Tenderer has submitted false, inaccurate or incomplete information, the Government may disqualify the Tenderer pursuant to Paragraph 16.1(b) above.
- 16.5 In providing the information required under Paragraphs 16.2 and 16.3 above, the Tenderer may show cause to satisfy the Government that in relation to any of the events as mentioned in Paragraph 16.1 above, even if it has occurred, it 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.
- 16.6 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 (being a company) of the Tenderer; or
- (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).

16.7 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; or
- (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.

16.8 References to related persons of the Tenderer, directors and management staff of the Tenderer or those of a related person in any of the applicable Sub-paragraph of Paragraph 16.1 above include persons who were in such capacity at such time of the event referred to in that Sub-paragraph.

## **17. Award of Contract**

17.1 Subject to the other provisions of the Tender Documents, 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 complies with the following evaluation criteria:

- (a) where the Tender Documents do not contain any Marking Scheme, (i) the Tenderer has passed the completeness check, (ii) the Tenderer and its Tender conform with all the essential requirements stipulated in the Tender Documents, (iii) the

Tenderer has not been disqualified (or having its Tender not being considered further) for failing to comply with any other requirements set out in the Tender Documents, and (iv) amongst all the Tenders which fulfil the evaluation criteria as specified in (i) to (iii) above, the Tenderer has submitted the lowest tender price (i.e., either (1) the lowest amount which is equal to the summation of all Estimated Service Prices for all Item(s) to which the price evaluation relates, or (2) such tender price which is to be derived by another calculation as may be specified in the Terms of Tender (Supplement) (if any)); or

- (b) where the Tender Documents contain a Marking Scheme (viz., an evaluation which includes separate technical evaluation stage and price evaluation stage for the evaluation of the Technical Proposal or any part thereof and the Price Proposal submitted by the Tenderer separately), (i) the Tenderer's Technical Proposal and Price Proposal have respectively passed the completeness check under the Marking Scheme (if any), (ii) the Tenderer and its Technical Proposal conform with all the essential requirements stipulated in the Tender Documents (if any); and any passing mark in the technical evaluation stage (if any), (iii) the Tenderer has not been disqualified (or having its Tender not being considered further) for failing to comply with any other requirements set out in the Tender Documents, and (iv) the Tenderer's Price and Technical Proposals have attained the highest combined score amongst all the Tenders which fulfil the evaluation criteria as specified in (i) to (iii) above based on the Marking Scheme. The foregoing evaluation criteria (i) to (iv) (as further elaborated in the remaining paragraphs of this Paragraph 17) shall be deemed to be incorporated into the Marking Scheme and in the event of any inconsistency, the foregoing shall prevail.

- 17.2 The term "completeness check" referred to in Paragraph 17.1(a) or (b) above (whichever is applicable) shall mean the checking of (a) whether or not all proposals, documents and information which are, as per provisions in the Tender Documents, required to be submitted before the Tender Closing Time (and failing which the Tender will not be considered further), have been so submitted; and (b) whether or not those which are, as per the provisions in the Tender Documents, required to be submitted before the Tender Closing Time or upon subsequent request (and failing which the Tender will not be considered further), have been so submitted before the Tender Closing Time, or upon such request if a subsequent request has indeed been made by the Government.

- 17.3 For determining the lowest tender price under Paragraph 17.1(a) above or the price score under Paragraph 17.1(b) above,
- (a) any prompt payment discount offered by the Tenderer in the Price Schedule will not be taken into consideration in the tender price assessment; and
  - (b) tender price quoted in the Permissible Currency other than Hong Kong dollars will be converted to Hong Kong dollars based on the official opening selling rate of that Permissible Currency quoted by the Hong Kong Association of Banks on the Tender Closing Date.
- 17.4 Unless otherwise expressly permitted in the Terms of Tender (Supplement), a partial tender for some but not all of the Items is not permitted. Where it is not permitted, the Tenderer must submit an offer for all quantities of all Item(s). All Tenders will be evaluated on an overall basis by taking into account all offered Item(s) based on the quantit(ies) specified in the Price Schedule in accordance with Paragraph 17.1 above. Where partial tender is allowed, the Tenders will be evaluated on an Item by Item basis (or group of Items by group of Items basis (each a “Group”), depending on the specification in the Terms of Tender (Supplement)) in accordance with Paragraph 17.1 above and separate Contracts may be awarded in respect of each Item (or each Group, as the case may be). Under such scenario, all Tenders for each Item (or Group) will be evaluated by taking into account the quantit(ies) for such Item (or Group) specified in the Price Schedule in accordance with Paragraph 17.1 above. Where a Tenderer is the successful Tenderer for more than one Item (or Group), only one Contract will be awarded to that Tenderer covering all such Items (or Groups, as the case may be).
- 17.5 Where it is provided in the Terms of Tender (Supplement) that the Tenders for each Item (or Group) will be evaluated separately, and where in respect of an Item (or Group) offered by the Tenderer, the Tenderer or its Tender fails to fulfil any of the evaluation criteria as specified in Paragraph 17.1(a) or (b) above (whichever is applicable) (“a non-conforming Tender”), the Tenderer’s Tender for that Item (or Group) will not be considered further, but without affecting the validity of the Tenderer’s Tender for other Item(s) (or Group(s)) if its Tender for those Item(s) (or Group(s)) are not non-conforming. Throughout the Tender Documents, references to “Tender will not be considered further” (or other similar expressions) shall be construed to mean the non-conforming Tender for the relevant Item (or Group) only. For the avoidance of doubt, in the case of Paper-based Tendering, regardless of

the Item(s) (or Group(s)) the Tenderer is bidding, if the Tenderer fails to submit the Offer to be Bound as mentioned in Paragraph 3.3(a)(i) of the Terms of Tender, its entire Tender will not be considered further.

- 17.6 Regardless of the applicable requirement as mentioned in Paragraph 17.4 above, each Tenderer acknowledges and agrees that the Government may elect at its sole option to accept all or any part of the Tenderer's Tender.
- 17.7 Notwithstanding anything herein to the contrary, the Government is not bound to accept the Tender with the lowest price offer or the Tender with the highest combined 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.

## **18. Acceptance**

- 18.1 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 either by post or facsimile transmission to the successful Tenderer's address or facsimile number (as the case may be) specified in the Appendix to the Terms of Tender. 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.
- 18.2 A duplicate hardcopy of each of the documents comprised in 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.
- 18.3 Tenderers who do not receive any notification within the Tender Validity Period should assume that their Tenders have not been accepted.
- 18.4 Where an Electronic Record is used in the formation of the Contract (whether with or without any electronic or digital signature), the

Contract shall not be denied validity or enforceability on the sole ground that an Electronic Record was used for that purpose.

## **19. Financial Vetting**

19.1 If the Estimated Service Price for all Items of a Tender exceeds HK\$15 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 directors' report, auditors' report, statement of financial position (also referred to as balance sheet), statement of profit or loss and other comprehensive income (also referred to as income statement), statement of changes in equity, statement of cash flows 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 the local law of the place of the company's establishment.
  - (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 member of the joint venture or partnership must be submitted if the members 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 business 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) shall 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 a director of the Tenderer, or (ii) certified public accountants or other accountants acceptable to the Government as mentioned in Paragraph 19.1(a)(iv) above;
- (c) Projected statement of profit or loss and other comprehensive income and statements of cash flows of the Contract for each contract year and the pre-operating period (if applicable) and, if possible, those of the Tenderer 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 perform the Contract. The projected accounts and statements must comply with the following requirements:
  - (i) For a company, they should be certified by a director or company secretary. For a joint venture or partnership, separate certification from each member of the joint venture or partnership is required.
  - (ii) The assumptions used in preparing the projections shall be reasonable and shall be clearly stated. All the supporting schedules and detailed calculations shall also be provided.
  - (iii) The assumptions by the Government included in the Tender Documents shall be reflected in the Tenderer's projections.

- (d) 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;
  - (e) 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; and
  - (f) Written confirmation from a guarantor that it is willing to provide financial support or guarantee to the Tenderer, where applicable.
- 19.2 Tenderers shall upon the request in writing by the Government provide the documents mentioned in Paragraph 19.1 above 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.
- 19.3 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 Total Estimated Service Price in accordance with Paragraph 20.2(a) of the Terms of Tender.
- 19.4 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%) or the percentage specified in the Terms of Tender (Supplement), if any, whichever is the higher, of the Total Estimated Service Price in accordance with Paragraph 20.2(b) of the Terms of Tender.

## **20. Contract Deposit**

- 20.1 If the Total Estimated Service Price payable by the Government to the successful Tenderer exceeds HK\$1.4 million, but is less than or equals to HK\$15 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 Total Estimated Service Price.

- 20.2 If the Total Estimated Service Price payable by the Government to the successful Tenderer exceeds HK\$15 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:
- (a) two percent (2%) of the Total Estimated Service Price (if it passes the financial vetting); or
  - (b) five percent (5%) or the percentage specified in the Terms of Tender (Supplement), if any, whichever is the higher, of the Total Estimated Service Price (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 fulfil the Contract requirements to be conducted).
- 20.3 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 Annex A to the Terms of Tender 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.
- 20.4 If the successful Tenderer elects to pay the Contract Deposit by way of a banker's guarantee, the proposed guarantor and the form and substance of the banker's guarantee must be subject to the acceptance of the Government. Without prejudice to the generality of the foregoing, the banker's guarantee must comply with the following:
- (a) it must be issued by a bank that holds a valid banking licence issued 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 Annex A to the Terms of Tender; and any authorisation used by the bank for the execution of the banker's guarantee shall be acceptable to the Government; and

- (c) the banker's guarantee shall come into effect on the Date of the Tender Acceptance.

20.5 The Contract Deposit, whether paid by way of cash (if any is remaining) or banker's guarantee, shall be returned to the Contractor or released in accordance with Clause 12.10 of the General Conditions of Contract.

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

21.1 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 or 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.

21.2 Where the Invitation to Tender is covered by the WTO GPA, 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 Tenderers upon request to the Secretariat of the Review Body. In the event 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 approach the Procuring Department for resolution of its complaint before lodging a challenge to the Review Body. In such instances, the Procuring Department shall accord impartial and timely consideration to any such complaint, and deal with it in a manner that will not be prejudicial to the corrective measures that may be obtained by the Tenderer 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.

## **22. Documents of Unsuccessful Tenderers**

If this Invitation to Tender is covered by the WTO GPA, the Government may destroy all documents submitted by unsuccessful Tenderers three (3) years after the Contract has been constituted under Paragraph 18.1 of the Terms of Tender. Where it is not covered by the WTO GPA, the Government may destroy these documents three (3) months after the Contract has been constituted in the aforesaid manner.

## **23. 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 Documents. 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.

## **24. 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 or quotation exercises are evaluated.

## **25. Cost of Tender**

Each 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 and the doing of all acts required for the purpose of this Invitation to 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, (c) presenting the Tenderer's reference sites and equipment to the Government Representative during the site visits, and (d) provision of tender samples, whether before or after the Tender Closing Time.

## **26. Consent to Disclosure**

26.1 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,

- (a) a brief description of the Services provided or to be provided by the successful Tenderer;
- (b) the Total Estimated Service Price and any other fees, cost and expense payable to the successful Tenderer pursuant to the Contract;
- (c) the engagement by the Government of the successful Tenderer under the Contract and the name and address of the successful Tenderer; and
- (d) the date of award of the Contract.

26.2 Nothing in Paragraph 26.1 above shall prejudice the Government's power to disclose whenever it considers appropriate information of any nature whatsoever in relation to or concerning any Tenderer (successful or unsuccessful) or its tender (whether or not the information is specified in Paragraph 26.1 above and including information recorded in whatever media) if the disclosure is made under any one of the following circumstances (even if disclosure may also mean the information will at the same time, or subsequently, become public information):

- (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 (including because of any disclosure under Paragraph 26.2(a) above);
- (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 21.2 of the Terms of Tender, or an order of a court of Hong Kong or a court or tribunal with competent jurisdiction;

- (e) the disclosure of any information regarding anti-competitive collusive conduct to the Competition Commission of Hong Kong (and other authorities as relevant); or
- (f) without prejudice to the power of the Government under Paragraph 26.1 above, to the extent the information relates to or concerns a Tenderer, with the prior written consent of that Tenderer.

## **27. Personal Data Provided**

- 27.1 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, resolution of any dispute arising from the Invitation to Tender, and the disclosure pursuant to Paragraph 26 of the Terms of Tender).
- 27.2 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 27.1 above, or the disclosure pursuant to Paragraph 26 of the Terms of Tender.
- 27.3 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.
- 27.4 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.

## **28. Licence to use the materials submitted by Tenderers**

A Tender once submitted will become the property of the Government. Tenders of unsuccessful Tenderer may be destroyed in accordance with Paragraph 22 of the Terms of Tender. In consideration of the Government considering its

Tender, without prejudice to all other rights and powers of the Government under the Tender Documents (including in particular its right to disclose information in the Tenders) and under the Contract, each Tenderer hereby grants and shall upon the demand of the Government at the Tenderer's cost procure that the lawful owner or authorised person of the relevant Intellectual Property Rights will grant, to the Government, its assigns, successors-in-title and authorised users, a royalty-free, non-exclusive, irrevocable, sub-licensable, transferable, world-wide, unrestricted right and licence to use or exercise all or any Intellectual Property Rights subsisting in its Tender for the purposes of tender evaluation and for all other purposes incidental thereto or in connection therewith (including resolution of any dispute arising from the Invitation to Tender). Such right and licence shall continue to subsist so long as all or any Intellectual Property Rights subsist in the Tender (or any part thereof) under any applicable law, including the laws of Hong Kong. Where there is any presentation or demonstration, the aforesaid right and licence shall extend to such presentation and/or demonstration to be conducted by the Tenderer.

## **29. Warranty against Collusion**

- 29.1 The Tenderer must ensure that the Tender is prepared without any agreement, arrangement, communication, understanding, promise or undertaking with any other person (except as provided in paragraph 3 of the Non-collusive Tendering Certificate referred to in Paragraph 29.2 below), regarding, amongst other things, price, tender submission procedure or any terms of the Tender. Bid-rigging is inherently anti-competitive and is considered serious anti-competitive conduct under the Competition Ordinance (Chapter 619 of the Laws of Hong Kong). Tenderers who engage in bid-rigging conduct may be liable for the imposition of pecuniary penalties and other sanctions under the Competition Ordinance.
- 29.2 The Tenderer shall complete and submit to the Government a Non-collusive Tendering Certificate (in the form set out in one of the Schedules titled as such) as part of its Tender.
- 29.3 In the event that a Tenderer is in breach of any of the representations, warranties and/or undertakings in Paragraph 29.1 above or in Non-collusive Tendering Certificate submitted by it under Paragraph 29.2 above, 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 Tenderer's Tender; and
  - (c) if the Government has entered into the Contract with the Tenderer, terminate the Contract under Clause 15.1 of the General Conditions of Contract.
- 29.4 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, warranties and/or undertakings in Paragraph 29.1 above or in Non-collusive Tendering Certificate submitted by it under Paragraph 29.2 above.
- 29.5 A breach by a Tenderer of any of the representations, warranties and/or undertakings in Paragraph 29.1 above or in Non-collusive Tendering Certificate submitted by it under Paragraph 29.2 above may prejudice its future standing as a Government contractor or service provider.
- 29.6 The rights of the Government under Paragraphs 29.3 to 29.5 above are in addition to and without prejudice to any other rights or remedies available to it against the Tenderer.

### **30. Warning against Bribery**

- 30.1 The offer of an advantage to any public 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.
- 30.2 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 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.

### **31. Environmental Protection**

- 31.1 Tenderers are encouraged to minimise the impact of their activities on the environment and to observe the general guidelines in Guidance Note GN-1 (Environmental Protection) at Annex B to the Terms of Tender.
- 31.2 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.

## **APPENDIX TO THE TERMS OF TENDER – Contact Details**

Contact details of:

All correspondence with the Government or Government Representative relating to matters concerning the Contract from a potential Tenderer or the Tenderer or the Contractor shall be addressed to contact at (1) provided that

- (a) all enquiries concerning the Service Specifications or other technical aspects of the Services to be lodged by a potential Tenderer; and
- (b) all correspondence and notices concerning the Order and inspection of the Services from the Contractor.

(1) the Government (Procuring Department):

Address:

Attn:

Facsimile Number:

Email Address:

(2) the Tenderer/Contractor:

Address:

Attn:

Telephone Number:

Facsimile Number:

Email Address:

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

Address:

Attn:

Telephone Number:

Facsimile Number:

Email Address:

Name of Tenderer: \_\_\_\_\_

Date: \_\_\_\_\_

**Part I**

**Method of providing the Contract Deposit**

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

\* Delete as appropriate.

N.B.: If a Tenderer does not complete this Part, it will be regarded to have undertaken to pay the Contract Deposit to the Government in cash.

**Part II**

**Form of  
Banker's Guarantee**

THIS GUARANTEE is made on the ..... day of .....  
By.....  
of ....., a bank within the meaning of the Banking Ordinance (Chapter 155 of the Laws of Hong Kong) (hereinafter called the "Guarantor")

In favour of

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 this Guarantee executed as a deed witnesses 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's acceptance of the bank named herein as the Guarantor under this Guarantee:

- (a) The Guarantor hereby irrevocably and unconditionally guarantees, as a continuing obligation, 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, notwithstanding any dispute between the Contractor and the Government or any other person.
- (b) The Guarantor, as a primary obligor and as a separate, continuing 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 Government may place and keep any monies received by virtue of this Guarantee (whether before or after the insolvency or liquidation of the Guarantor or the Contractor) to the credit of a suspense account for so long as the Government may think fit in order to preserve the rights of the Government to sue or prove for the whole amount of its claims against the Guarantor, the Contractor or any other person.

(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 or where "the Contractor" is a company, any change of its member or shareholder or its officers or 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 amended or 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 on the same date as the Contract 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 end of three (3) months from the date of early termination or expiry of the Contract Period; or



(b) if at the time of expiry or early termination of the Contract Period, there is any outstanding right or claim of the Government, or any outstanding obligation or liability of the Contractor, whether under or arising from or in relation to the Contract, the date on which all such rights and obligations, and claims and liabilities have actually been carried out, completed and discharged (as confirmed by the Government in writing),

whichever is the applicable.

(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 the 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) This Guarantee may only be amended by an instrument in writing signed by the Guarantor and the Government as represented by the Government Representative.

IN WITNESS whereof this Guarantee was executed as a deed and 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 in the presence of )

Name of witness:  
Title of witness:  
Signature of witness:

@ 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 of witness:  
Title of witness:  
Signature of witness:

\* 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.

**Guidance Note GN-1  
(Environmental Protection)**

Contractors are encouraged to minimise the impact of their activities on the environment and to observe the following requirements in particular:

- Comply with all applicable legal and other requirements on environmental protection.
- Control the use of materials and resources (e.g. electricity, fuel, chemicals, paper, etc.) to minimise their consumption and unnecessary wastage. Use environment-friendly alternatives where possible during your daily operations.
- Store properly all materials/chemicals to prevent any spillage and leakage.
- Minimise the production of solid waste and chemical waste.
- Ensure all solid waste is properly handled, stored and disposed of in an efficient and sensitive manner to avoid any spillage and leakage. In particular, all chemical waste should be handled, stored and disposed of in accordance with the applicable legal requirements.
- Ensure proper and regular maintenance of all vehicles used for the purpose of conducting business, including controlling their noise and emissions.
- Minimise all air emissions and noise generation where practicable.
- Ensure all waste water is discharged in accordance with the applicable legal requirements.
- Reuse and recycle waste wherever possible.

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

**1. Contract Period**

- 1.1 Subject to the provisions in the Contract for earlier termination, and without prejudice to Clause 16.1(a) of the General Conditions of Contract, this Contract shall have a duration specified as the Contract Period in the Special Conditions of Contract. Where the Special Conditions of Contract do not specify any period as the Contract Period, the Contract Period shall be the period commencing from the Date of Tender Acceptance and ending on the date when the Contractor has discharged all its obligations in relation to the Services.
- 1.2 Unless otherwise expressly specified in the Special Conditions of Contract, an Order for the Services may be placed by the Government any time during the Contract Period up to the last date of the Contract Period.

**2. Total Services and Variation**

- 2.1 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 in accordance with the timetable as set out in the Contract; or for those Services which are to be performed on demand, as and when required, to the satisfaction of the Inspecting Officer. For those Services to be performed on demand, 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.
- 2.2 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).

- 2.3 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 Unit Prices specified in the Price Schedule so far as the same may be applicable and where the Unit Price is not contained in the Price Schedule, or is not applicable, such amount shall be such sum as is reasonable in the circumstances.

### **3. Contractor's Acknowledgement, Obligations and Contract Performance**

- 3.1 The Contractor acknowledges and agrees that when entering into the Contract, 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.
- 3.2 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. Save to the extent expressly set out in the Contract, the Contractor does not expect, and the Contractor agrees that it is unnecessary for, the Government to do anything to facilitate or assist the Contractor's provision of the Services and the performance of its obligations under the Contract.
- 3.3 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.
- 3.4 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.

3.5 The Contractor shall:

- (a) duly and unconditionally secure, obtain and maintain throughout the Contract Period all and any authorisations, approvals, consents, licences, permits, exemptions and other requirements of any governmental, administrative or other authority or body in any relevant jurisdiction which are or may be required or necessary to authorise the Contractor to execute, deliver and perform the Contractor's obligations under the Contract (including where the Contractor's procedures so require, the consent of its parent company) ("Consents");
- (b) ensure that the Consents are in full force and effect, and the use of the Services by the Government will not contravene any applicable laws, throughout the Contract Period; and
- (c) bear all costs, charges and expenses that may be incurred in obtaining and maintaining the Consents throughout the Contract Period.

3.6 The Contractor shall, through the Government Representative, keep the Government informed of all matters related to the Contract within the actual or constructive knowledge of the Contractor and shall answer all enquiries received from the Government Representative.

3.7 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.

3.8 To the extent that the Government considers it reasonably necessary and that the information (in whatever media) is in the possession of the Government and is not subject to any confidentiality restriction, the Government may at the request initiated by the Contractor (but not otherwise required in the Contract), provide all such information for the Contractor's guidance in the execution of the Contract free of charge provided such request from the Contractor is made in a timely manner to avoid any delay on the part of the Contractor to perform the Contract. If required by the Government, the Contractor shall return all such

information (in whatever media) to the Government upon the expiry or early termination of the Contract or at the time specified in the Special Conditions of Contract.

- 3.9 The Contractor shall be responsible for the completeness and 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 in accordance with Clause 14.2 of the General Conditions of Contract in connection with, any discrepancies, errors or omissions therein.
- 3.10 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.
- 3.11 The Contractor acknowledges that it does not have the right to provide the Services to the Government on an exclusive basis and nothing in this Contract confers any such exclusive right. Nothing in the Contract shall preclude the Government from procuring any Services from any other person.

#### **4. Warranties and Representations**

- 4.1 The Contractor warrants, represents and undertakes that:
  - (a) the Contractor and any permitted sub-contractors of the Contractor, their respective 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 all its obligations under the Contract including without limitation the vesting of the Intellectual Property Rights in the Government, and the granting and/or procuring the

grant of the licences to the Government, its authorised users, assigns and successors-in-title in accordance with Clause 17 of the General Conditions of Contract;

- (f) the Contract constitutes valid, legally binding obligations of the Contractor enforceable in accordance with its terms;
- (g) all information and documents supplied, and statements and representations from time to time made by or on behalf of the Contractor in or in relation to its Tender and the Contract are genuine, true, accurate and complete;
- (h) throughout the Contract Period, 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;
- (i) throughout the Contract Period, it is not subject to any contractual obligation, or court judgment or ruling order or arbitration decision, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under the Contract;
- (j) throughout the Contract Period, 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; and
- (k) throughout the Contract Period, 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.

4.2 The warranties, representations and undertakings, expressed or implied, contained in Clause 4.1 above and in Clause 17.1 of the General Conditions of Contract and in other provisions of the Contract (including without limitation the Special Conditions of Contract and Paragraph 29.1 of the Terms of Tender), and those made by the Contractor in its Tender for the Contract including all Schedules, during the evaluation of the Tender, and those from time to time made in the course of performance of the Contract, are collectively referred to as "Warranties", and each, a "Warranty".



- 4.3 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.
- 4.4 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.

## **5. 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.

## **6. Price Variation**

All unit prices quoted for the Services in the Price Schedule shall remain valid throughout the Contract Period and only subject to adjustment in accordance with the provisions set out in the Special Conditions of Contract (if any).

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

7.1 Subject to the ordering and arrangement of provision of Services specified in the Special Conditions of Contract for the Services, for any Services which are stated to be provided upon demand, whenever required by the Government by a written order signed by the Government Representative and issued to the Contractor during the Order Period specifying:

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

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.

- 7.2 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.
- 7.3 Where all or any scope of the Services is to be performed by default throughout the Contract Period (or any part thereof) and/or in accordance with such timetable as specified in the Terms of Tender (Supplement) and/or the Special Conditions of Contract and/or other part of the Contract (as the case may be), Clauses 7.1 and 7.2 above shall not apply to such scope of the Services. The Contractor shall be required to perform the Services in accordance with the time requirements as aforesaid. For the avoidance of doubt, all scope of the Services shall be deemed to fall within this Clause unless it is expressly stated that any Services are to be performed on demand.
- 7.4 Time shall be of the essence of the Contract as regards the provision of such scope of the Services as specified in an Order or otherwise such scope of the Services in accordance with the time mentioned in Clause 7.3 above.
- 7.5 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 in writing.

## **8. Inspection**

- 8.1 The Services performed shall be subject to inspection and certification by the Inspecting Officer, and/or the Government Representative, and/or by an Independent Accredited Laboratory (whereupon the passing of any such tests shall be evidenced by a test certificate or laboratory test report certified by the Independent Accredited Laboratory) as specified in the Special Conditions of Contract.
- 8.2 All costs incurred by the Contractor in complying with this Clause 8 (including those for the appointment of the Independent Accredited Laboratory where applicable) shall be borne by the Contractor and shall not be chargeable to the Government unless and to the extent otherwise expressly specified in the Price Schedule. 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.

8.3 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.

## **9. 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 an amount equal to its replacement costs plus all administrative costs incurred by the Government for replacing such lost or damaged property. 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.

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

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

10.2 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.

10.3 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.

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

11.1 In consideration of the Contractor's due and proper performance of all its obligations in accordance with all terms and conditions of the Contract and subject always to all and any set-off, deductions or withholding, the

Government shall pay the Contractor the Contract Price in accordance with the payment timetable set out in the Price Schedule.

- 11.2 Where the payment timetable stated in the Price Schedule provides that the Contract Price for any Item(s) of Services shall be payable whether in one lump sum or by instalment, unless otherwise agreed in writing by the Government, in respect of any Services covered by that lump sum or instalment as stated in the payment timetable, the Government shall not have any obligation to pay the Contractor the Contract Price for such Services unless and until such Services have been accepted by the Government in writing. The Government shall pay the Contractor the Contract Price for such Services within thirty (30) days after the date of receipt of the invoice or written acceptance of such Services, whichever is later.
- 11.3 Where it is stated in the Special Conditions of Contract or other part of the Contract that the Services shall be payable successive billing periods, the Government shall pay the Contract Price for the Services performed in each billing period:
- (a) within thirty (30) days after the end of that billing period; or
  - (b) within thirty (30) days after the receipt of the invoice from the Contractor for that billing period (which has included all necessary deductions, set-off and withholding),
- whichever is the later and after the receipt of an advance payment bond of the equivalent amount as required in the Special Conditions of Contract, if any.
- 11.4 Unless specifically stated in the Contract, apart from the Contract Price, no other money shall be payable by the Government to the Contractor or any other person under the Contract. Save as otherwise expressly provided for in the Contract, the Contractor shall perform, comply with and observe all provisions of the Contract and its obligations under the Contract at its own costs and expenses.
- 11.5 Without prejudice to Clause 11.4 above, the Contract Price is inclusive of all charges for provision of the Services (including all costs and charges for the Consents). 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).
- 11.6 Where and to the extent this Contract constitutes a standing offer to provide the Services to the Government if and when demanded during the Order

Period, the Contractor and the Government hereby acknowledge and agree that the consideration for the standing offer shall be one (1) Hong Kong dollar, payable by the Government to the Contractor, if and when demanded, and that the Contractor irrevocably undertakes to keep the standing offer open throughout the Order Period.

- 11.7 The Contractor shall invoice the Government for any payment of the Contract Price. In respect of the provision of the Services which has been accepted and that the Contract Price is payable in the manner specified in Clause 11.2 above, the Contractor shall deliver to the Government an invoice setting out the particulars of the Services provided (including the Unit Price), (if applicable) the Order number (where an Order has been issued), the amount of Contract Price payable for the Services after taking into account all applicable deductions, set-off and withholding, and such other information as the Government Representative may require from time to time.
- 11.8 In the case where the Contract Price is payable in instalment in the manner specified in Clause 11.2 above, an invoice for an instalment of the Contract Price shall not be issued unless (a) the scope of the Services as specified in the payment timetable in the Price Schedule for that instalment has been performed and accepted by the Government as confirmed by it in writing; and (b) the invoice must have taken into account all applicable deductions, set-off and withholding.
- 11.9 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 or regulation for tax or otherwise.
- 11.10 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.

- 11.11 The Government shall not be held responsible or liable for any delay in payment and no interest or other surcharge or any other payment howsoever described shall be charged to the Government due to (a) invoices not having been issued in accordance with this Clause 11, or (b) the amount billed in the invoices not having been duly calculated in accordance with the provisions of the Contract (including without limitation not having taken into account all applicable deductions, set-off or withholding), or (c) the Contractor disputing any deductions or set-off or withholding made by the Government pursuant to the Contract, or (d) any invoice or correspondence being improperly addressed contrary to the requirements stipulated in the Contract. Each invoice shall include all deductions, set-off and withholding which may be made pursuant to the terms of the Contract and shall show the net amount payable. If the Contractor does not render an invoice charging a correctly stated net amount due to its failure to take into account all appropriate deductions, set-off or withholding or otherwise, the Government may, but is not obliged to, pay the net amount which duly takes into account all appropriate deductions, set-off and withholding.
- 11.12 In the event that the Contractor fails to pay any sum of money on the date it falls due or upon demand by the Government under the Contract, it shall pay interest on such sum to accrue from the due date up to the date of actual payment in full at the rate of 1% above the rate per annum which shall be a simple average of the rates per annum announced by the note-issuing banks of Hong Kong from time to time to be its prime lending rate for Hong Kong dollars. Such interest shall accrue on a daily basis and shall be computed on the basis of a 365-day year (“default interest rate”). For the applicable interest rate when a court judgment or an award from the arbitrator is obtained (if any), the interest rate to accrue on such judgment sum or awarded sum shall be the aforesaid default interest rate, or such rate as may be determined from time to time by the Chief Justice of Hong Kong by order for judgment debt interest (whichever rate is the higher rate).
- 11.13 Where the Contractor is outside Hong Kong, payment will be made by telegraphic transfer to the Contractor’s bank account as specified in Part D of the Price Schedule. All charges imposed by the banks outside Hong Kong shall be borne by the Contractor. In addition, any charges imposed by the banks in Hong Kong for carrying out any special request(s) by the Contractor shall be borne by the Contractor, or the Contractor shall reimburse the Government for the same if the Government has settled such charges with the bank.

## 12. Contract Deposit

- 12.1 The Contractor shall pay the Contract Deposit in accordance with Paragraph 20 of the Terms of Tender (and/or where applicable in accordance with the relevant Paragraph of the Terms of Tender (Supplement) which supplements or replaces such Paragraph 20 (in whole or in part)).
- 12.2 If the Contractor fails to comply with Clause 12.1 above, the Government shall have the right to terminate the entire Contract pursuant to Clause 15.1 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 15.4 of the General Conditions of Contract.
- 12.3 Without prejudice to Clause 12.2 above, if the Contractor fails to comply with Clause 12.1 above, the Government may deduct from any sum due or payable by the Government to the Contractor from time to time, an amount equal to the Contract Deposit to serve as the Contract Deposit.
- 12.4 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 of Sub-clause (a) or (b) above, irrespective of whether or not a demand for payment has been made against the Contractor.
- 12.5 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.
- 12.6 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 12.6, the further banker's guarantee must comply with the requirements in Paragraphs 20.4(a) to (c) of the Terms of Tender.

- 12.7 Where the total Contract Price payable for all Services to be procured under the Contract for the whole of the Contract Period is likely to exceed the original Total Estimated Service 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%) or the percentage specified in the Terms of Tender (Supplement), if any, whichever is the higher, if the Contractor failed in the financial assessment under Paragraph 19 of the Terms of Tender in the tender evaluation stage) of the revised Total Estimated Service Price specified by the Government in the notice.
- 12.8 If a notice is issued by the Government under Clause 12.7 above, 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 20.4(a) to (c) of the Terms of Tender. A further Contract Deposit paid by the Contractor to the Government shall form part of the Contract Deposit.
- 12.9 If the Contractor fails to comply with Clause 12.6, 12.7 or 12.8 above, the Government shall have the right to terminate the entire Contract pursuant to Clause 15.1 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 15.4 of the General Conditions of Contract, depending on the election of the Government.
- 12.10 Upon the expiry or termination of the Contract Period:
- (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 (if any) in cash and without interest to the Contractor by the date specified in (i) or (ii) below, whichever is applicable:
    - (i) the end of three (3) months counting from the date of early termination or expiry of the Contract Period; or



- (ii) in the case if at the time of expiry or early termination of the Contract Period, there is any outstanding right or claim of the Government, or any outstanding obligation or liability of the Contractor, whether under or arising from or in relation to the Contract, the date on which all such rights and obligations, and claims and liabilities have actually been carried out, completed and discharged (as confirmed by the Government in writing).
- (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 the guarantee period as stated therein.

(the applicable period specified in Sub-clause (a) or (b) above is referred to as the "Guarantee Period".)

12.11 Where upon expiry of the Guarantee Period, any claim of the Government or any liability of the Contractor, whether under or arising from or in relation to the Contract cannot yet be quantified or finalised, the Government may, without prejudice to its other rights and remedies, pay the entire Contract Deposit or any part thereof (whether in cash or in banker's guarantee) into a suspense account, for so long as it considers necessary, and pending the quantification or finalisation of the amount of the claim or liability. Upon quantification or finalisation of the amount of all or any claims or liabilities, the Government shall apply the amount in the suspense account in or towards satisfaction of the quantified amount. Where there is any remaining amount in the suspense account after such application, the Government will return the remaining amount to the Contractor without interest. Where the amount in the suspense account is insufficient to cover all or any claims or liabilities, the Government reserves all rights and remedies against the Contractor in respect of such claims and liabilities.

12.12 Where the Contract Period is more than three (3) years, the Government may conduct periodic financial vetting of the Contractor with a view to ensuring that the Contractor remains financially healthy for the performance of the Contract and depending on the results, take necessary actions as the Government considers appropriate. Periodic financial vetting may be conducted at an interval of every three (3) years of the Contract Period. Upon request of the Government, the Contractor shall within seven (7) days provide all such information to the Government for such periodic financial vetting which may include information as specified in Annex A to the General Conditions of Contract.

### **13. 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.

### **14. Liability and Indemnities**

14.1 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 (in the course of employment).

14.2 Without prejudice to any other provision of the Contract, the Contractor shall indemnify each of the Government, its assigns, successors-in-title, and authorised users (including the employees and agents of the Government) (each an "Indemnified Party") from and against:

- (a) all and any liabilities and indebtedness (including liabilities to pay damages or compensation), losses, damage, costs, charges and expenses incurred or suffered by an Indemnified Party of whatsoever nature (including all legal and expert costs, charges and expenses on a full indemnity basis); and
- (b) all and any demands, claims, actions, arbitrations, proceedings, threatened, brought or instituted by any person against an Indemnified Party or by an Indemnified Party against any person (regardless of whether or not they have been settled or compromised) (collectively, "Claims" and each a "Claim") and everything stated in Sub-clause (a) above incurred or suffered by an Indemnified Party in all and any such Claims,

which arise directly or indirectly as a result of or in connection with, or which relate in any way to, all or any of the following:

- (i) the breach of any provisions of the Contract by the Contractor;
- (ii) the negligence, recklessness, tortious acts or wilful act or omission of the Contractor, its employees, agents or sub-contractors;
- (iii) any Warranty which is incorrect, inaccurate, incomplete or misleading;
- (iv) any claim or allegation that the use or possession of the Materials or Third Party Materials infringes the Intellectual Property Rights or any other 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;
- (vi) any act or omission of the Contractor, or its employees, agents or sub-contractors, in the performance of the Contract notwithstanding that the Contractor is authorised or obliged to do or commit any such act or omission under this Contract;
- (vii) any loss, damage, injury or death referred to in Clause 14.1 above save and except injury or death caused by the Negligence of the Government or any of its employees (in the course of employment); or
- (viii) any injury or death of any third party, or any loss or damage to property sustained by any third party, in consequence of any act, omission, default, or negligence of the Contractor or any of its employees, agents and sub-contractors.

Each of the above is separate and shall be construed independently and shall not prejudice or be limited by reference to or inference from the other of them or other provisions of this Contract.

- 14.3 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.

- 14.4 For the purposes of this Clause 14, “Negligence” (appearing in upper case) 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).
- 14.5 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.

## **15. Termination**

15.1 In the event that:

- (a) the Contractor fails to perform any Services in accordance with Clause 7.3 of the General Conditions of Contract or any Services requested in an Order within the time as specified in that Order or otherwise in accordance with Clause 7.2 of the General Conditions of Contract;
- (b) any Services are rejected pursuant to the Contract;
- (c) the Contractor is in breach of any provision of the Contract which in the opinion of the Government is not capable of remedy;
- (d) the Contractor commits a breach of any provision of the Contract which is capable of remedy and fails to remedy the same within fourteen (14) days from the date of service of notice by the Government (or such longer period as specified in the notice) requiring such remedy;
- (e) any Warranty is incorrect, inaccurate, incomplete or misleading;
- (f) the Contractor has made a material misrepresentation (including submission of false statement or inaccurate information) during the tendering process of the Contract;
- (g) 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;

- (h) the Contractor abandons the Contract in whole or in part;
- (i) the Contractor assigns or transfers or purports to assign or transfer all or any part of the Contract or all or any of its rights or obligations thereunder without the prior written consent of the Government; or
- (j) any event or circumstance occurs which enables the Government to terminate the Contract under any one of the following provision of the General Conditions of Contract:
  - (i) Clause 12.2 or 12.9 (Contract Deposit);
  - (ii) Clause 20.3 (Probity);
  - (iii) Clause 27.3 (Force Majeure);
  - (iv) Clause 28 (Illegal Workers);
  - (v) Clause 35.4 (Admission of Contractor Personnel to Government Premises); or
  - (vi) Paragraph 29.3(c) of the Terms of Tender (Warranty against Collusion),

the Government may by seven (7) days' written notice to the Contractor terminate the Contract immediately.

15.2 The Government may immediately terminate the Contract 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' resolution has been passed that it be wound up or dissolved (other than voluntarily for the purpose of bona fide reconstruction or solvent amalgamation the terms of which have been approved by the Government in advance);
- (c) a petition is presented for the winding up or dissolution 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 or winding up or dissolution;

- (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; or
  - (g) the Government reasonably believes that any of the events mentioned above is about to occur.
- 15.3 Separate from the event mentioned in Clause 15.1(j)(iii) above and Clause 27.3 of the General Conditions of Contract, where there is a Force Majeure Event, the Government may terminate the Contract in part or in whole pursuant to Clause 27.7 of the General Conditions of Contract.
- 15.4 Instead of terminating the Contract in relation to all Services pursuant to Clause 15.1, 15.2 or 15.3 above, the Government may elect, but is not obliged, to terminate the Contract in relation to any part or parts of the Services only ("Partial Termination"). The part(s) of the Services to which the Partial Termination relates are referred to as "Terminated Services". The Terminated Services may cover all or any part(s) of the Services which have not been accepted up to the time of termination.
- 15.5 Each of the grounds entitling the Government to terminate the Contract as specified in Clauses 15.1 to 15.3 above and in each Sub-clause of Clauses 15.1 and 15.2 shall be construed independently and shall not be limited or restricted by reference to or inference from any other ground or any other provision of this Contract.

## **16. Termination Consequences**

- 16.1 Upon expiry or early termination of the Contract (howsoever occasioned) ("Termination"):
- (a) the Contract shall be of no further force and effect, but without prejudice to:
    - (i) the Government's rights and claims under the Contract or otherwise at law against the Contractor arising from antecedent breaches of the Contract by the Contractor (including any breach(es) which entitle the Government to terminate the Contract);

- (ii) the rights and claims which have accrued to a Party prior to the Termination; and
  - (iii) the continued existence and validity of those provisions which are expressed to or which in their context by implication survive the Termination (however occasioned) (including Clauses 3, 4, 11.9 to 11.12, 12 to 41 of the General Conditions of Contract, the Interpretation, the Interpretation (Supplement) and such other provisions as specified in the Special Conditions of Contract);
- (b) the Government shall not be responsible for any claim, legal proceeding, liability, loss (including any direct or indirect loss, any loss of revenue, profit, business, contract or anticipated saving), damages (including any direct, special, indirect or consequential damages of whatsoever nature) or any cost or expense, suffered or incurred by the Contractor arising out of or in relation to the Termination;
- (c) without prejudice to the other rights and claims of the Government including the right to seek indemnity under Clause 14.2 of the General Conditions of Contract, in the event of the Termination under Clause 15.1 or 15.2 of the General Conditions of Contract, the Contractor shall be liable for all losses, damage, costs and expenses incurred by the Government arising from the Termination including without limitation (i) any amount in excess of the Total Estimated Service 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 (ii) any additional expenditure incurred by the Government in connection with a default by the Contractor referred to in Clause 15.1 of the General Conditions of Contract. 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;
- (d) the Contractor shall immediately return to the Government all Government Property which is supplied or in respect of which access is granted to the Contractor by the Government for the purposes of or in relation to the Contract;

- (e) the Contractor shall provide all such assistance as the Government may request from time to time after the Termination to ensure an orderly and effective transition of the provision of the Services to the Government or another contractor to be appointed by the Government Representative and/or completion of any work-in-progress;
- (f) the Contractor shall 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
- (g) at the request of the Government, the Contractor shall enter into and perform all deeds of assignment, transfer or novation in favour of the Government or in favour of any person whom the Government may designate, for the assignment, transfer or novation of any contract, arrangement or other subject matter whatsoever (including without limitation licences in relation to any Intellectual Property Rights) on such terms and conditions as the Government may stipulate; and procure any other third party whom the Government considers necessary for effecting or perfecting such assignment, transfer or novation to enter into and perform any such deeds of assignment, transfer or novation.

Further, upon request by the Government and/or in the event of the expiry or termination (howsoever occurred) of the Contract, the Contractor shall at its sole costs and expenses promptly deliver to the Government the Materials (including any drafts and copies thereof) then in the Contractor's custody, control or possession, whether in their completed forms or not.

16.2 Upon a Partial Termination pursuant to Clause 15.4 of the General Conditions of Contract:

- (a) the provisions in the Contract to the extent they apply or concern or relate to the Terminated Services shall be of no further force and effect, but without prejudice to:
  - (i) the Government's rights and claims under the Contract or otherwise at law against the Contractor arising from antecedent breaches of the Contract by the Contractor;
  - (ii) the rights and claims which have accrued to a Party prior to the Partial Termination; and



- (iii) the continued existence and validity of all remaining provisions of the Contract; and
- (b) all of the consequences specified in Clause 16.1 above (apart from Clause 16.1(a) above, and in the case of Partial Termination under the circumstances mentioned in Clause 15.4 of the General Conditions of Contract, also apart from Clause 16.1(c) above) shall apply save that references to “Termination” shall mean “Partial Termination”; references to “Services” shall mean the “Terminated Services”.

## **17. Intellectual Property Rights**

- 17.1 The Government shall be the exclusive owner of the Materials. Except for the Third Party Materials, all the Intellectual Property Rights in the Materials shall vest in the Government immediately upon creation. Subject to Clause 17.3 below, the Contractor warrants that such Materials shall be original works created, developed or made by or on behalf of the Contractor.
- 17.2 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).
- 17.3 If any materials of which the Intellectual Property Rights are owned by third parties and incorporated into the Materials or supplied or used by the Contractor in the performance of the Contract (“Third Party Materials”), the Contractor shall identify the Third Party Materials to the Government and keep the Government informed in writing of such Third Party Materials. The Contractor hereby grants or in case it is not empowered to do so, shall at its own costs and expenses procure that there will be granted, in favour of the Government, its authorised users, assigns and successors-in-title a royalty-free, non-exclusive, irrevocable, perpetual, worldwide and sub-licensable licence, for all purposes contemplated by the Contract, to use (including doing any of the acts restricted by copyright set out in sections 22 to 29 of the Copyright Ordinance (Chapter 528 of the Laws of Hong Kong)) the Third Party Materials.

17.4 The Contractor warrants that:

- (a) prior to the use and incorporation of the Third Party Materials into the Materials or in providing the Services, the Contractor shall have obtained from the third party Intellectual Property Rights owners the grant of all necessary clearances and licences for itself and its authorised users and for the Government, its authorised users, assigns and successors-in-title to use the Third Party Materials in the manner and for any of the purposes contemplated by the Contract. The costs of the above clearances and licences shall be borne by the Contractor;
- (b) the provision of the Materials, Services and Third Party Materials by the Contractor and the use or possession by the Government, its authorised users, assigns and successors-in-title of the Materials and the Third Party Materials for any of the purposes contemplated by the Contract does not and will not infringe any Intellectual Property Rights or any other rights of any person; and
- (c) the exercise of any of the rights granted under the Contract by the Government, its authorised users, assigns and successors-in-title will not infringe any Intellectual Property Rights or any other rights of any person.

17.5 The Contractor hereby irrevocably waives and undertakes to procure, at its own costs and expenses, its officers, employees, agents, sub-contractors and all authors concerned to irrevocably waive all moral rights (whether past, present or future) in respect of the Materials and Third Party Materials. Such waiver shall operate in favour of the Government, its authorised users, assigns and successors-in-title and shall take effect upon creation of the Materials or upon the grant of the licence to the Government, its authorised users, assigns and successors-in-title or upon the delivery of the Third Party Materials to the Government (as the case may be).

17.6 The Contractor shall at its own costs execute or procure the execution of any further assignments, deeds, licences, documents and instruments and do or procure the doing of any further things as may be required by the Government to give full effect to Clauses 14.2, 17 and 19 of the General of Conditions of Contract, and shall provide all such assignments, deeds, licences, documents and instruments to the Government within fourteen (14) days from the date of the Government's written request or such longer period as may be agreed by the Government in writing.

17.7 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. Conflict of Interest**

18.1 The Contractor shall during the Contract Period and for six (6) months thereafter:

- (a) ensure that it (including each and every officer, employee and agent 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 (collectively “Restricted Group”) shall not undertake any business, activity, service, task, or job or do anything whatsoever for its own account (whether on its own or in conjunction with another person(s) in a joint venture or partnership or other business entity) or for or on behalf of another person (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; 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 interests (of whatsoever nature) of the Contractor or any other member of the Restricted Group, conflict or compete, or may be seen to conflict or compete, with the Contractor’s duties or obligations under the Contract.

18.2 The Contractor shall ensure that itself and each other member of the Restricted Group shall keep themselves informed and that each other member of the Restricted Group shall inform the Contractor and keep it informed regularly of all facts which may reasonably be considered to give rise to a situation in which its and/or their interests conflict or compete, or may be seen to conflict or compete, with the Contractor’s obligations under this Contract.

18.3 In the Contract:

- (a) “associate” of a 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” of a person means:
  - (i) any person who has control, directly or indirectly, over the second-mentioned person;
  - (ii) any person who is controlled, directly or indirectly, by the second-mentioned person; or
  - (iii) any person who is controlled by, or has control over, the person mentioned in (i) or (ii) above;
- (c) “control” over another person (“person under control”) 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 person under control 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 person under control or any other person; or
  - (iii) by virtue of holding office as a director in that person under control or any other person;

that the affairs of the person under control are conducted in accordance with the wishes of that person exercising control;
- (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; and
- (f) “Restricted Group” has the meaning given to it in Clause 18.1 above.

## 19. Confidentiality

19.1 The Contractor shall not disclose and shall treat as proprietary to the Government and confidential all Government Data, any other information, report, document, plan, record, 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)), database, code or particulars (a) furnished or disclosed by or on behalf of the Government or by any other person to the Contractor; or (b) otherwise is accessible by or available to the Contractor in the course of performing the Contract; or (c) any Materials, advice, recommendations, reports or any other materials containing information belonging to the Government or specifically relating to or relevant to the Services provided to the Government (collectively “Confidential Information”) in whatever form or media. The restrictions on disclosure contained in this Clause 19.1 shall not apply to the disclosure of any Confidential Information if:

- (a) such disclosure to any person employed, used or engaged by the Contractor in performing the Contract is made in circumstances where such disclosure is necessary in the reasonable opinion of the Contractor for the performance of the Contractor’s duties and obligations under the Contract, provided that the Contractor has imposed on the said person employed, used or engaged an absolute and legally binding obligation to the Contractor to refrain from disclosing the Confidential Information to a third party;
- (b) such Confidential Information is already known to the recipient other than as a result of disclosure by the Contractor or any other member of the Restricted Group; or
- (c) such Confidential Information is or becomes public knowledge other than as a result of disclosure by the Contractor or any other member of the Restricted Group;
- (d) such disclosure is made in circumstances where such disclosure is required pursuant to any laws of Hong Kong or an order of a court of Hong Kong; or
- (e) with the prior consent in writing of the Government.

19.2 Without prejudice to any other provision of the Contract, the Contractor shall indemnify and keep indemnified each of the Government, its assigns successors-in-title and authorised users from and against everything stated in Clauses 14.2(a) and 14.2(b) of the General Conditions of Contract which the Government (or any of its assigns or successors-in-title or authorised

users) may suffer or incur directly or indirectly as a result of or arising from or in connection with or in relation to:

- (a) a breach of confidence (whether under the Contract or general law) by the Contractor or any other member of the Restricted Group;
- (b) any actions or claims made in respect of information subject to the Personal Data (Privacy) Ordinance (Chapter 486 of the Laws of Hong Kong), 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).

19.3 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, disclose, publish or reproduce, and shall procure and ensure each person who may be imparted with any Confidential Information in accordance with Clause 19.1 above shall not use, disclose, publish or reproduce, the Confidential Information for any other purposes without the Government's prior written consent.

19.4 When requested by the Government, the Contractor shall forthwith require any of its officers or employees or agents or sub-contractors as the Government may stipulate, and such other persons to whom disclosure is made pursuant to Clause 19.1 above, to execute a written undertaking in favour of the Contractor and the Government in a form to be determined by the Government agreeing to the restrictions attached to the Confidential Information set out in this Clause 19 and the Contractor agrees to provide certified true copies of any such undertakings to the Government within fourteen (14) days from the date of request by the Government. The Contractor further agrees that, if so required by the Government, it will, at its own cost and expense, take such actions and steps as are lawful and necessary to enforce such undertaking in the event of any breach thereof by anyone who has executed such undertaking.

19.5 The Contractor shall establish and maintain all necessary security measures and procedures for the safe custody of the Confidential Information in the Contractor's possession or under its control and to prevent unauthorised access thereto or use thereof.

- 19.6 The Contractor shall not, and shall ensure that no other member of the Restricted Group will, save to the extent necessary for performing the Contract, peruse, retain possession or control of, or duplicate, any Confidential Information or any copy thereof (in whatsoever media or format).
- 19.7 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 19 and the Official Secrets Ordinance (Chapter 521 of the Laws of Hong Kong).
- 19.8 The Contractor shall promptly notify the Government of, and give the Government all reasonable assistance in connection with, any proceedings which the Government may institute against any person pursuant to any of the provisions in this Clause 19.
- 19.9 The Contractor acknowledges that any unauthorised disclosure or use of the Confidential Information can cause irreparable harm and significant injury to the Government, the degree of which may be difficult to ascertain or that damages may not be an adequate remedy. Accordingly, the Contractor agrees that the Government shall have the right to obtain and be immediately granted an injunction prohibiting any breach of this Clause 19 and/or specific performance ensuring the compliance of this Clause 19 in light of any threatened or actual breach of this Clause 19, without prejudice to its other rights and claims including those available under the Contract or at law arising from such breach.
- 19.10 Without prejudice to the generality of the foregoing provisions, the Contractor further undertakes that it will not at any time itself or through any associate or associated person or employee, sub-contractor or agent use, sell, license, sub-license, create, develop or otherwise deal in any Confidential Information.
- 19.11 The Government may request the Contractor in writing at any time that any Confidential Information disclosed pursuant to the terms of this Clause 19 and any copies, analyses, compilations and extracts thereof whether in hardcopies, 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 and medium. The Contractor shall comply with any such request from the Government within seven (7) days of receipt of such request.

## 20. Probity

20.1 The Contractor acknowledges it has been reminded that:

- (a) dishonesty, theft and corruption on its part or that of its officers, 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); and
- (b) the soliciting or accepting of advantages, as defined in the Prevention of Bribery Ordinance is not permitted.

20.2 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 (Chapter 201 of the Laws of Hong Kong)) is not permitted. The Contractor shall also caution its officers (including directors), employees and agents and sub-contractors against soliciting or accepting any 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.

20.3 The Government shall have the right to terminate the entire Contract pursuant to Clause 15.1 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 15.4 of the General Conditions of Contract in the event that the Contractor or any of its officers, employees, agents and sub-contractors is convicted of an offence under the Prevention of Bribery Ordinance (Chapter 201 of the Laws of Hong Kong), the Theft Ordinance (Chapter 210 of the Laws of Hong Kong) or the Crimes Ordinance (Chapter 200 of the Laws of Hong Kong).

20.4 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 20.2 above 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.



## 21. Insurance

- 21.1 Where and to the extent it is stated to be required in the Special Conditions of Contract, the Contractor shall effect and keep in force, and renew upon expiry, throughout the Applicable Period (as defined in Clause 21.3 below):
- 21.1.1 a public liability insurance policy in the joint names of (i) the Contractor and (ii) the Government, (with appropriate cross-indemnity clause as if a separate policy has been issued to each of them) subject to a maximum indemnity amount in the sum of not less than an indemnity amount of HK\$10,000,000 or such other amount as stated in the Special Conditions of Contract for each claim or a series of claims arising from one event, but otherwise unlimited in the aggregate indemnity amount for all claims arising during the entire period of insurance (“public liability insurance policy”); and
- 21.1.2 any other insurance policies specified in the Special Conditions of Contract (if any);
- (a) with an insurance company authorised under the Insurance Ordinance (Chapter 41 of the Laws of Hong Kong) and on such terms and conditions as shall be approved by the Government; and
- (b) (applicable to the public liability insurance policy under Clause 21.1.1 above) against liability to pay damages and compensation for injury or death of any person and loss or damage to any property.
- 21.2 For the purposes of obtaining the Government’s approval of the terms and conditions of the insurance policy, before taking out of the same, if required by the Government, the Contractor shall submit the draft insurance policy to the Government for review no later than one (1) week after the Date of Tender Acceptance.
- 21.3 The Applicable Period for the public liability insurance policy shall be the Contract Period; and for other insurance policies specified to be required in the Special Conditions of Contract, such Applicable Period shall be as stated in the Special Conditions of Contract.
- 21.4 Without prejudice to Clauses 21.1 and 21.3 above, the Contractor shall effect and maintain employer’s liability insurance in respect of all its employees and other staff in accordance with all applicable laws and regulations.

- 21.5 If required by the Government, the Contractor shall deliver to the Government copies of all insurance policies required under the Contract together with receipts or other evidence of payment of the latest premium due under the policies.
- 21.6 For all insurance policies required under the Contract, the Contractor shall comply with and observe duly and punctually all terms and conditions set out in these policies. 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 covered by the relevant insurance policy.
- 21.7 If the Contractor fails to give effect to or maintain any insurance policy 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.
- 21.8 No provision including any indemnity limit specified in any insurance policy required under the Contract shall relieve the Contractor of any liability under the Contract or be construed as a cap on the liability of the Contractor 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.

## **22. Process Agent**

Where the Contractor does not have a place of business in Hong Kong, the Contractor shall irrevocably appoint the person whose name and address are set out in the Appendix to the Terms of Tender 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 shall 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.

## **23. 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.

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

24.1 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. Any person purportedly appointed by the Contractor as agent shall be treated as sub-contractors for the purpose of this Clause 24 and for the whole of the Contract.

24.2 Acceptance of the Tender does not signify the Government's acceptance of any sub-contracting proposal set out in the Tender.

24.3 The Government may impose conditions either to be complied with by the Contractor and/or any proposed sub-contractors before giving any approval under Clause 24.1 above including without limitation the execution of a sub-contractor's undertaking by the proposed sub-contractor in favour of the Government in such form and substance to be prescribed by the Government. Where the Government requests the same, 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.

24.4 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. The Contractor shall be responsible for all acts, defaults, omissions and neglect of any of its officers, employees, agents, sub-contractors (at whatever level), and employees and agents of any such sub-contractor as if they were its own.

## **25. Disclosure of Information**

25.1 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) a brief description of the Services provided or to be provided by the Contractor;
- (b) the Total Estimated Service Price and any other fees, cost and expense payable to the Contractor pursuant to the Contract;
- (c) the engagement by the Government of the Contractor under the Contract and the name and address of the Contractor; and
- (d) the date of award of the Contract.

25.2 Disclosure may also be made by the Government under any of the circumstances specified in Paragraph 26.2 of the Terms of Tender in relation to any information concerning or relating to the Contractor or the Contract or the Services or the Materials, recorded in whatever media.

25.3 Nothing in this Clause 25 or in Paragraph 26.2 of the Terms of Tender shall imply or be construed that the Government owes any duty of confidentiality to the Contractor including without limitation in relation to any information of or concerning this Contract or the Contractor or the Services or the Materials.

## **26. Publicity**

26.1 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.

26.2 Subject to Clause 26.1 above, 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.

26.3 Notwithstanding any consent or approval given under Clause 26.1 or 26.2 above, 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.

## **27. Force Majeure**

- 27.1 If the Contractor becomes aware of any matter likely to constitute a Force Majeure Event, the Contractor shall forthwith notify the Government in writing concerning such matter and provide the Government with all relevant information as the Government may request.
- 27.2 Within seven (7) days after the occurrence of a Force Majeure Event or earlier, the Contractor shall notify the Government in writing of the full particulars of the Force Majeure Event including its nature, extent, how the Force Majeure Event has and/or will materially prevent it from performing the Contract or such part thereof, and likely duration of such material prevention.
- 27.3 Provided the Government is satisfied with the Contractor's claim of a Force Majeure Event which has materially prevented and/or will continue to materially prevent it from performing its obligations under the Contract or such part thereof, the Contract or such part thereof strictly to the extent of such prevention shall be suspended during the subsistence of such Force Majeure Event commencing from a date to be agreed between the Parties ("Suspension due to Force Majeure"). Where the Government is not so satisfied about any alleged claim of a Force Majeure Event, there shall be no Suspension due to Force Majeure. The Contractor may not allege or claim any event as a Force Majeure Event. Any failure by the Contractor to perform any obligation under the Contract shall be treated as default and entitles the Government to terminate the Contract under any applicable Sub-clause of Clause 15.1 or Clause 15.2 of the General Conditions of Contract or partially terminate the Contract under Clause 15.4 of the General Conditions of Contract.
- 27.4 Without prejudice to the generality of Clause 27.3 above, whilst the Suspension due to Force Majeure subsists:
- (a) the Contractor shall not be required to perform any part of its obligations under the Contract strictly to the extent it is materially prevented from doing so by the Force Majeure Event ("Affected Obligations") but it shall use its best endeavours to remove or mitigate the effect of the Force Majeure Event on the Affected Obligations;

- (b) the Government may make alternative arrangements for the performance of the Affected Obligations, whether by another person or otherwise, without compensation to the Contractor;
- (c) the Contractor shall not be entitled to any payment of money in respect of the Affected Obligations (if any money would have been payable in the first place);
- (d) notwithstanding anything in the Contract to the contrary, no compensation shall be payable by either Party to the other due to any losses or damage arising from the Suspension due to Force Majeure; and
- (e) the Contractor shall continue to fully and punctually perform and observe all of its other obligations which are not affected by the Force Majeure Event in full accordance with the requirements of the Contract including those obligations which are not Affected Obligations, and to that extent, all terms and conditions of the Contract shall continue to apply and be in full force and effect.

27.5 Following the issue of a notice by the Contractor under Clause 27.1 above which has led to Suspension due to Force Majeure under Clause 27.3 above, the Contractor shall keep the Government informed once every week or at such longer frequency as may be allowed by the Government, and in any event from time to time upon the request of the Government, of:

- (a) the likely duration of the relevant Force Majeure Event and of its effect of materially preventing the Contractor from performing the Affected Obligations;
- (b) the actions taken or proposed to be taken by the Contractor to mitigate or minimise the effects of that Force Majeure Event (“Mitigation Actions”); and
- (c) any other matters relevant to that Force Majeure Event or the Contractor’s performance affected by that Force Majeure Event.

27.6 As soon as the relevant Force Majeure Event has terminated or otherwise that the Government considers that the Mitigation Actions have minimised the effect of the Force Majeure Event on the ability of the Contractor to perform the Affected Obligations, the Contractor shall forthwith notify the Government, or the Government may on its own, after consultation with the Contractor, by notice in writing to the Contractor, determine the appropriate date for resuming the performance of the Affected Obligations (“Resumption Date”). The Contractor shall immediately after the

termination of the Force Majeure Event or with effect from Resumption Date as determined by the Government in the aforesaid manner, resume performance of the Affected 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 Resumption Date, the Government's decision shall be final in the absence of manifest error.

27.7 Should a Suspension due to Force Majeure subsists for more than thirty (30) days, the Government shall be entitled to, but is not obliged to, terminate the Contract pursuant to Clause 15.3 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 15.4 of the General Conditions of Contract (depending on the election of the Government).

## **28. Illegal Workers**

The Contractor undertakes not to employ illegal workers in the execution of this Contract or any other Government contracts. Should the Contractor be found to have employed illegal workers in breach of this undertaking, the Government Representative may, on behalf of the Government, by notice, terminate this Contract pursuant to Clause 15.1 of the General Conditions of Contract or partially terminate this Contract pursuant to Clause 15.4 of the General Conditions of Contract.

## **29. Notices**

29.1 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 the applicable postal address, facsimile number or email address mentioned in the Appendix (or such other postal address, facsimile number or email address as the addressee has by no less than seven (7) working days' prior written notice specified to the other Party).

29.2 Such notices, demands, invoice, correspondence or other communications shall be addressed as provided in Clause 29.1 above 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 (regardless of whether during or outside normal business hours), two (2) working days (for any place in Hong Kong)

and seven (7) working days (for any place outside Hong Kong) after the date of posting which is a working day;

- (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; or
- (d) if sent by email during normal business hours on a working day, upon despatch unless the sender has received a non-delivery notification from his own computer system.

29.3 Notice, demand, invoice, correspondence or other communication to the Contractor from the Government in the prescribed manner specified in Clause 29.2 above (whether from a Government Representative of the department specified in (1) or specified in (2) of the Appendix) shall be deemed to have been served provided that the notice, demand, invoice, correspondence or other communication has been sent to the correct applicable contact of the Contractor as specified in the Appendix.

29.4 Notice, demand, correspondence or other communication to the Government shall be to the applicable contact(s) as specified in the Appendix (as the same may from time to time be revised) depending on the subject matter to which it relates.

29.5 Nothing in this Clause 29 shall affect the validity of any notice, demand, invoice or communication despatched by personal delivery or by fax or by email outside normal business hours whether on a working day or a non-working day. Any such notice, demand, invoice, correspondence or other communication fulfilling the conditions specified in Clause 29.2 above shall be deemed to have been duly given or made on the next working day following from the date of personal delivery or fax or email. Where posting is not done on a working day, it shall be deemed to have been done on the next working day after such day.

### **30. Entire Agreement**

30.1 The Contract constitutes the whole agreement between the Parties 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. On the other hand, the Government has relied on the Warranties when entering into the Contract.



30.2 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).

### **31. Execution of Further Documents**

The Contractor shall at its own cost and expense do and execute any further things and document(s) (or procure that the same be done or executed) as may be required by the Government to give full effect to the provisions in this Contract and shall provide all such documents and materials to the Government within fourteen (14) days of the date of the Government's written request or such longer period as may be agreed by the Government in writing.

### **32. Variations**

Subject to other provisions of the Contract which provide for the power of the Government to make changes, no waiver, cancellation, alteration or amendment of or to the provisions of the Contract shall be valid unless made by an agreement in writing and duly signed by the Contractor and the Government and in which agreement, the Parties expressly agree to the relevant waiver, cancellation, alteration or amendment of or to the provisions of the Contract as specified therein.

### **33. 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.

### **34. Waiver**

34.1 Time shall be of the essence of the Contract but 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.

- 34.2 Without prejudice to the generality of Clause 34.1 above, 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.

### **35. Admission of Contractor Personnel to Government Premises**

- 35.1 Upon request from time to time by the Government, the Contractor shall provide to the Government a list of the names, posts, staff identity card numbers, addresses and telephone numbers of all Contractor's employees, agents, sub-contractors and those employees and agents of the aforementioned sub-contractors (collectively "Relevant Personnel") who may at any time require admission on behalf of the Contractor to any premises occupied by the Government for the purposes of the Contract if so required by the Government Representative, and in that event such list shall specify the capacities in which those persons are employed by or connected with the Contractor and shall contain such other particulars as the Government Representative may reasonably require.
- 35.2 The Contractor shall ensure that while any of the Relevant Personnel is on the Government's premises they will conform to the Government's normal codes of staff and security practice.
- 35.2A The Contractor shall require all Relevant Personnel, save for those exempted, to present vaccination record of at least the first dose of COVID-19 vaccine prior to their entry into indoor government premises which are their places of work, or for work-related purposes (including for meetings and for fulfillment of duties). The number of vaccine doses required may be revised by prior written notice from the Government to the Contractor in the light of the development of COVID-19 epidemic situation.

- 35.2B Exemption from the requirement to present vaccination record will be granted to (a) those who are medically unfit for COVID-19 vaccination as supported by a valid medical certificate; and (b) pregnant staff with prior exemption to be granted by the Government on a case-by-case basis. The exempted categories of Relevant Personnel mentioned in this Clause may be revised by prior written notice from the Government to the Contractor.
- 35.2C For the purpose of Clauses 35.2A and 35.2B, the Contractor shall comply with the entry requirement of Government premises, implementation approaches, requirement on the vaccination record and other relevant documentations to be presented, consequence of non-compliance, maintenance and updating of the register of vaccination status, and all other necessary requirements as determined by the Government by prior written notice from the Government to the Contractor.
- 35.2D The Contractor shall ensure that the Relevant Personnel will have given consent to the Contractor to pass the personal data in relation to Clauses 35.2A and 35.2B above to authorised persons of the Government for the purposes of the provisions of this Clause 35 and other provisions of the Contract.
- 35.3 The Government Representative reserves the right to refuse to admit to the Government premises any person, whose admission would be, in the reasonable opinion of the Government Representative, undesirable.
- 35.4 In the event that the Contractor fails to comply with this Clause 35 and it is determined that such failure is prejudicial to the interests of the Government, the Government Representative may thereupon terminate the Contract forthwith pursuant to Clause 15.1 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 15.4 of the General Conditions of Contract.

## **36. Assistance in Legal Proceedings**

- 36.1 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.

36.2 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.

### **37. Retention of Records**

The Contractor shall keep and maintain until seven (7) years after the expiry of the Contract, or such longer period as may be agreed by the Parties, full and accurate records in relation to 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 or authorised person access to the records and to make and retain copies thereof as may be requested by the Government or its representative or authorised person.

### **38. Joint and Several Obligations**

38.1 Where the Contractor comprises more than one person, each such person assumes all obligations of the Contractor under or arising from or in connection with or in relation to the Contract on a joint and several basis.

38.2 A reference to the Contractor in this Contract is a reference to each of the persons constituting the Contractor.

### **39. Governing Law and Jurisdiction**

39.1 The Contract shall be governed by and construed in accordance with the laws of Hong Kong.

39.2 The Parties hereby agree to submit to the exclusive jurisdiction of the courts of Hong Kong in relation to any matters or dispute arising out of or in connection with or in relation to the Contract.

### **40. Contracts (Rights of Third Parties) Ordinance**

The Parties hereby declare that nothing in this Contract confers or purports to confer on any person not being a Party to this Contract any benefit or any right to

enforce any term of this Contract under or pursuant to or for the purposes of the Contracts (Rights of Third Parties) Ordinance (Chapter 623 of the Laws of Hong Kong).

#### **41. Order of Precedence**

41.1 In the event of, and only to the extent of, any conflict or inconsistency amongst or between any provisions of the Contract, the following order of precedence shall be applied, but only in so far as is necessary to resolve that conflict or inconsistency:

- (a) the Special Conditions of Contract;
- (b) the Service Specifications;
- (c) the Terms of Tender (Supplement);
- (d) the Interpretation (Supplement);
- (e) the Schedules;
- (f) the General Conditions of Contract;
- (g) the Terms of Tender;
- (h) the Interpretation;
- (i) other Tender Documents which forms part of the Contract; and
- (j) any other materials which were submitted by the Contractor as part of its Tender and attached to the Contract.

41.2 The Materials are items to be prepared and/or supplied by the Contractor pursuant to requirements of the Contract. They shall form part of the Contract. Notwithstanding, unless the Parties agree in writing in the manner specified in Clause 32 of the General Conditions of Contract, no Materials shall seek to waive, alter, cancel or amend any provisions of any documents listed in Clause 41.1 above. No general approval of, or signature by, the Government of any such Material shall be taken as agreement or approval of any such waiver, cancellation, alteration or amendment, unless the Government expressly acknowledges and agrees on a case-by-case basis to this effect. This shall apply even if any such Material is signed or given approval after the Date of Tender Acceptance.

### **Information Required for Periodic Financial Vetting**

The Contractor shall upon request by the Government (“Request”), submit the following information for assessment of its financial capability for purposes of the periodic financial vetting as mentioned in Clause 12.12 of the General Conditions of Contract.

- (a) Originals (or copies certified by its auditors) of the audited accounts of the Contractor, and the audited consolidated accounts of the group if the Contractor is a subsidiary of another company for the three (3) financial years prior to the date of Request. 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 date of Request.
  - (iii) The audited accounts must contain the directors’ report, auditors’ report, statement of financial position (also referred to as balance sheet), statement of profit or loss and other comprehensive income (also referred to as income statement), statement of changes in equity, statement of cash flows 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 the local law of the place of the company’s establishment.
  - (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 Contractor is a joint venture or partnership, audited accounts for each member of the joint venture or partnership must be submitted if the members are incorporated bodies.

Remarks: Unaudited accounts are acceptable only if the Contractor is an unincorporated business where audited accounts are not mandatorily required, or the Contractor is a newly established business 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) shall be provided. The unaudited accounts and tax records must be certified by the sole proprietor, partners or directors of the Contractor, certified public accountants or other accountants acceptable to the Government.

- (b) Management accounts in respect of the period (“unaudited period”) following the latest audited accounts submitted under Paragraph (a)(ii) of this Annex A up to a date not more than three (3) months before the date of Request if such unaudited period 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 a director of the Contractor, or (ii) certified public accountants or other accountants acceptable to the Government as mentioned in Paragraph (a)(iv) of this Annex A;
- (c) Projected statement of profit or loss and other comprehensive income and statements of cash flows for the remainder period of the Contract counting from the Request, showing the projected revenue, operating expenses, capital expenditure and the sources of finance such as upfront investment and/or debt financing. The projected accounts and statements must comply with the following requirements:
  - (i) For a company, they should be certified by a director or company secretary. For a joint venture or partnership, a separate certification from each member of the joint venture or partnership is required.
  - (ii) The assumptions used in preparing the projections shall be reasonable and shall be clearly stated. All the supporting schedules and detailed calculations shall also be provided.
  - (iii) The projections must include at least the projected revenue, details of operating expenses, capital expenditure, sources of

finance, and other particulars showing how the Contractor will deal with the Contract.

- (d) Original letters from bankers, where applicable, confirming lines of credit facilities available to the Contractor and the current undrawn/unutilised balances of such credit facilities on or after a specified date fixed by the Government and stipulating the expiry date of the facilities;
- (e) Copies (certified by the sole proprietor, partners, directors or company secretary of the Contractor) of letters of undertaking, minutes of board meetings or returns of allotment of shares to support injection of capital, where applicable; and
- (f) Such other information as the Government considers appropriate.



**SAMPLE PRICE SCHEDULE**

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

Name of Tenderer: \_\_\_\_\_

Date: \_\_\_\_\_

**Part A – Estimated Service Price**

(a) The rate/unit price

<b>Item No.</b>	<b>Description</b>	<b>Estimated Quantity of the Total Billing Periods within the Contract Period (A)</b>	<b>Rate/Unit Price per Billing Period (HK\$ or Permissible Currency) (B)</b>	<b>Estimated Service Price for the Item specified opposite (i.e. A x B) (HK\$ or Permissible Currency)</b>
	[xxx]  *[(1) complying with all requirements of the Contract including the Service Specifications; and  (2) inclusive of all services and items specified in Paragraph 5.1 of the Terms of Tender and Paragraph [xx] of the Terms of Tender (Supplement)]  [*Editorial Note: <i>Please amend as appropriate.</i> ]			

(b) Total amount of the Estimated Service Price(s) for all Item(s): \_\_\_\_\_

Note: If the Tenderer intends to quote in a Permissible Currency, please specify the Permissible Currency.

## **SAMPLE PRICE SCHEDULE**

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

**Part B – Payment Timetable (not applicable if the billing periods are successive periods within the Contract Period and the Contract Price is payable per billing period and under such situation Clause 11.3 of the General Conditions of Contract shall apply)**

***[For lump sum payment:***

Subject to the other provisions of the Contract, the Contract Price for all Services shall be paid to the Contractor in one lump sum in accordance with Clause 11.2 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 and in accordance with Clause 11.2 of the General Conditions of Contract:

<b>Number of instalments</b>	<b>Services to be performed and materials to be produced and delivered for the instalment to become payable</b>	<b>Amount of the instalment (in percentage of the Contract Price)</b>

]

**Part C – Payment Discount**

1. Tenderers are requested to indicate in the spaces provided below what discounts they would allow on the Contract Price or other amount payable under the Contract (if any) if payment is made in full within –
  - (a) 7 working days from the date of receipt of an invoice or from the due date for such payment as specified in the Contract, whichever is the later:  
\_\_\_\_\_ % discount;
  - (b) 8 to 14 working days from the date of receipt of an invoice or from the due date for such payment as specified in the Contract, 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 (2) digits after the decimal places are quoted for the above discount.

## **SAMPLE PRICE SCHEDULE**

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

4. The period of 7 or 14 working days for payment discount shall be calculated from the date of the receipt by the Government of an invoice or the date the relevant payment falls due, whichever is the later.

**SAMPLE PRICE SCHEDULE**

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

**Part D – Banking Details**

[Please refer to Paragraph 5.7 of the Terms of Tender, which is applicable only if a Tenderer is from a place outside Hong Kong.]

For payment to be made by telegraphic transfer:

- (a) Banker's Name : \_\_\_\_\_
- (b) Banker's Address : \_\_\_\_\_
- (c) Name of Account : \_\_\_\_\_
- (d) Account Number : \_\_\_\_\_
- (e) Sorting Code : \_\_\_\_\_

### SAMPLE INFORMATION SCHEDULE

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

Name of Tenderer: \_\_\_\_\_

Date: \_\_\_\_\_

#### **Table A – Information and documents required under Paragraph 7.1 of the Terms of Tender:**

(a)	Name of the Tenderer	
(b)	Principal place of business of the Tenderer (in address form)	
(c)	Type of business entity of the Tenderer	<b>company / sole proprietorship / partnership / statutory corporation /others*</b>  (*Please delete whichever is not applicable.)
(d)	Shareholders/partners/proprietor of the Tenderer and their percentage of ownership	
(e)	Length of business experience	
(f)	Names of the following: (i) managing director and other directors; (ii) partners; or (iii) sole proprietor	
(g)	Place and date of incorporation or formation	
(h)	Business profile information of the Tenderer including the number and location of full time/contract employees, core business strategies and strength, and industry expertise	
(i)	Names and addresses of banks which are prepared to provide references or other relevant financial data which indicate the financial viability of the Tenderer	

### SAMPLE INFORMATION SCHEDULE

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

(j)	A copy of a valid Business Registration Certificate issued under the Business Registration Ordinance (Chapter 310 of the Laws of Hong Kong) or documentary evidence showing that the Tenderer is exempted from business registration under the Business Registration Ordinance (Chapter 310 of the Laws of Hong Kong); or if the Tenderer does not carry on business in Hong Kong, the equivalent documents issued by the place of business of the Tenderer	Please attach if applicable.
(k)	(if the Tenderer is a company) a copy of the Memorandum (if any) and Articles of Association, Certificate of Incorporation, Certificate of Change of Name (if any) or equivalent documents issued by the authority of the place of incorporation of the Tenderer	Please attach if applicable.
(l)	(if the Tenderer is a company incorporated in Hong Kong or is registered as a non-Hong Kong company under the Companies Ordinance, Chapter 622 of the Laws of Hong Kong) a copy of the latest annual return filed with the Companies Registry and all subsequent filings since the latest annual return; or (if not) the equivalent documents issued by the authority of the place of incorporation of the Tenderer	Please attach if applicable.
(m)	Employee's Compensation Insurance Policy Name of insurer: Policy no.: Expiry date:	

### **SAMPLE INFORMATION SCHEDULE**

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

(n)	A certified extract of board resolution or other documentary evidence acceptable to the Government demonstrating authorisation and approval for the submission of its Tender. This requirement shall always be applicable to a Tenderer which is a company regardless of the mode of submission of Tender. In the case that a Tenderer is a sole proprietorship or a partnership, documentary evidence acceptable to the Government demonstrating authorisation and approval for the submission of its Tender shall also be required if (a) (in the case of Paper-based Tendering), the signatory of the Offer to be Bound, or (b) in the case of Electronic Tendering using an Identification Code, the person submitting the Tender, is not the sole proprietor or a partner (or a general partner in the case of a limited partnership) (as the case may be)	Please attach if applicable.
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**Table B – Information required under Paragraph 8 of the Terms of Tender:**

(a)	Name of the proposed sub-contractor	
(b)	Place of business of the proposed sub-contractors (in address form)	
(c)	Obligations proposed to be performed by the proposed sub-contractor	

**SAMPLE INFORMATION SCHEDULE**

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

**Table C – Information required under Paragraph 16.2 of the Terms of Tender:**

- \* (a) I/We confirm that none of the events as mentioned in Paragraphs 16.1(a) to 16.1(g) of the Terms of Tender has ever occurred.
  
- \* (b) I/We confirm that the following event(s) as mentioned in Paragraphs 16.1(a) to 16.1(g) of the Terms of Tender has occurred:

Date	Details of the Event

Note: \* Please delete whichever is not applicable.

**Table D – Other information which is required to be provided or disclosed in this Schedule (if any) or otherwise any information which the Tenderer wishes to provide:**



**SAMPLE NON-COLLUSIVE TENDERING CERTIFICATE**  
(To be completed and returned together with the tender submission)

To: the Government

Dear Sir/ Madam,

**Non-collusive Tendering Certificate**

1. I/We, (name of the Tenderer) \_\_\_\_\_ of  
(address(es) of the Tenderer) \_\_\_\_\_

refer to the Government's invitation to tender for the Contract ("Invitation to Tender") and my/our Tender in response to the Invitation to Tender.

Non-collusion

2. I/We represent and warrant that in relation to the Invitation to Tender:

- (a) My/Our Tender was prepared genuinely, independently and made with the intention to accept the Contract if awarded;
- (b) My/Our Tender was not prepared with any agreement, arrangement, communication, understanding, promise or undertaking with any person (including any other Tenderer or competitor) regarding:
  - i) prices;
  - ii) methods, factors or formulas used to calculate prices;
  - iii) an intention or decision to submit, or not submit, any Tender;
  - iv) an intention or decision to withdraw any Tender;
  - v) the submission of any Tender that does not conform with the requirements of the Invitation to Tender;
  - vi) the quality, quantity, specifications or delivery particulars of the products or services to which the Invitation to Tender relates; and
  - vii) the terms of my/our Tender,

and I/we undertake that I/we will not, whether before or after the award of the Contract, enter into or engage in any of the foregoing.

**SAMPLE NON-COLLUSIVE TENDERING CERTIFICATE**  
(To be completed and returned together with the tender submission)

3. Paragraph 2(b) of this certificate shall not apply to agreements, arrangements, communications, understandings, promises or undertakings with:
- (a) the Government;
  - (b) a joint venture partner with which I/we have submitted my/our Tender, and such joint venture arrangement has already been notified to the Government in my/our Tender;
  - (c) my/our consultants or sub-contractors, provided that the communications are held in strict confidence and limited to the information required to facilitate that particular consultancy arrangement or sub-contract;
  - (d) my/our professional advisers, provided that the communications are held in strict confidence and limited to the information required for the adviser to render their professional advice in relation to my/our Tender;
  - (e) insurers or brokers for the purpose of obtaining an insurance quote, provided that the communications are held in strict confidence and limited to the information required to facilitate that particular insurance arrangement;
  - (f) banks for the purpose of obtaining financing for the Contract, provided that the communications are held in strict confidence and limited to the information required to facilitate that financing; and
  - (g) any person other than the Government, provided that the Government has given prior written consent.

Disclosure of subcontracting

4. Without prejudice to other requirements set out in the Tender Documents concerning sub-contracting arrangement, in particular, the requirement to seek the Government's prior written approval before sub-contracting, I/We understand that I/we are required to disclose all proposed sub-contracting arrangements for the Contract to the Government in my/our Tender, including those which will be entered into after the Contract is awarded. I/We warrant that I/we have duly disclosed and will continue to disclose such arrangements to the Government.

Consequences of breach or non-compliance

5. I/We understand that in the event of any breach or non-compliance with any representations, warranties and/or undertakings in this certificate or in Paragraph 29.1 of the Terms of Tender, the Government may exercise any of the rights under Paragraphs 29.3 to 29.5 of the Terms of Tender in addition to and without prejudice to any other rights or remedies available to it against me/us.

**SAMPLE NON-COLLUSIVE TENDERING CERTIFICATE**  
(To be completed and returned together with the tender submission)

6. Under the Competition Ordinance (Chapter 619 of the Laws of Hong Kong), bid-rigging is serious anti-competitive conduct. I/We understand that the Government may, at its discretion, report all suspected instances of bid-rigging to the Competition Commission (the “Commission”) and provide the Commission with any relevant information, including but not limited to information on my/our Tender and my/our personal information.

Signed by the Tenderer / Signed by an  
authorised signatory for and on behalf of :  
the Tenderer

Name of the authorised signatory (where  
applicable) :

Title of the authorised signatory (where  
applicable) :

Date :

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## SAMPLE COMPLETENESS CHECK SCHEDULE

Name of Tenderer: \_\_\_\_\_

Date: \_\_\_\_\_

The Tenderer is requested to check and ensure that all of the following proposals, documents and information are submitted with its Tender. The Tenderer shall note Paragraph 3.3 of the Terms of Tender that failure to submit the proposals, documents and information as stipulated therein (viz., items (a), (b) and [xx] specified below) before the Tender Closing Time will lead to the Tender not being considered further. Please check the box below to confirm that the item specified opposite is indeed submitted.

(a) In the case of Paper-based Tendering, an Offer to be Bound set out in Part 4 of the Tender Form (English or Chinese version) containing an original signature by or on behalf of the Tenderer. The Offer to be Bound to be submitted (other than the signature on the Offer to be Bound which must be original) shall be Part 4 of the Tender Form or a printed copy from a softcopy of Part 4 of the Tender Form or a photocopy or a scanned copy of such hardcopy or printed copy. Any manner of reproduction of Part 4 of the Tender Form (including copy-typing) to be submitted as the Offer to be Bound shall not be acceptable and the Tender with the non-conforming Offer to be Bound will not be considered further.

(b) The Unit Price quotations for the Item(s) as specified in the Price Schedule in Hong Kong dollars or a Permissible Currency (see Paragraph 5 of the Terms of Tender).

(c) Other information required in the Price Schedule.

(d) Other information required in the Information Schedule (see Paragraphs 7, 8 and 16.2 of the Terms of Tender).

(e) The signed Non-collusive Tendering Certificate for Paper-based Tendering (see Paragraph 29.2 of the Terms of Tender).

(f) A certified extract of board resolution or other documentary evidence acceptable to the Government demonstrating authorisation and approval for the submission of its Tender. This requirement shall always be applicable to a Tenderer which is a company regardless of the mode of submission of Tender. In the case that a Tenderer is a sole proprietorship or a partnership, documentary evidence acceptable to the Government demonstrating authorisation and approval for the submission of its Tender shall also be required if (a) (in the case of Paper-based Tendering), the signatory of the Offer to be Bound, or (b) in the case of Electronic Tendering using an Identification Code, the person submitting the Tender, is not the sole proprietor or a partner (or a general partner in the case of a limited partnership) (as the case may be).

**SAMPLE COMPLETENESS CHECK SCHEDULE**

(g) All other documents required in the Information Schedule.

(h) The Appendix to the Terms of Tender.