

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

**TENDER FOR THE SUPPLY OF GOODS**

**STANDARD TERMS AND CONDITIONS  
Reference No. BD-TERMS-1**

**FOREWORD**

This document Ref. No. BD-TERMS-1 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 supply of goods 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 are available for download from the e-Tender Box web address: <http://www.gldetb.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-1 (August 2018)) 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:

- |                    |   |
|--------------------|---|
| “Acceptance Note”  | means an acceptance note to be issued under Clause 9.1(a) of the General Conditions of Contract;  |
| “Acceptance Tests” | has the meaning given to it in Clause 8.1 of the General Conditions of Contract;  |
| “Appendix”         | means an appendix attached to the Tender Form;  |
| “Authorised User”  | means, in relation to the types of digital certificates referred to in Paragraph 3.7(b)(ii) of the Terms of Tender: <ul style="list-style-type: none"><li>(a) the person who is named in an e-Cert (Personal) certificate issued by the Hongkong Post or a Personal ID-Cert Class 1 issued by the Digi-Sign Certification Services Limited;</li><li>(b) the authorised user in relation to an e-Cert (Organisational) certificate issued by the Hongkong Post or an Organisational ID-Cert Class 5 issued by the Digi-Sign Certification Services Limited;</li><li>(c) the authorised delegate in relation to an Organisational ID-Cert Class 2 issued by the Digi-Sign Certification Services Limited; or</li><li>(d) any other person specified or recognised as an authorised user by the Government under the terms and conditions of the e-Tender box;</li></ul> |

“a batch of Goods”	means the aggregate quantities of one or more Item(s) to be supplied in one lot by the applicable Deadline Delivery Date for such lot; where there will only be one batch of Goods, references to “each” or “any” or “all” batch(es) of Goods shall mean just that single one batch; where a batch of Goods should comprise only one unit of one Item, throughout the Contract, references to a batch of Goods shall mean just that unit;
“Compliance Schedule”	means a schedule attached to the Tender Form for confirming compliance with the mandatory features set out in the Technical Specifications, and where applicable other essential requirements;
“Contract”	<p>means the contract between the Government and the Contractor comprising the following parts of the Tender Documents and other items as specified below:</p> <ul style="list-style-type: none"> <li>(a) BD-TERMS-1 (August 2018) comprising: the “Tender Form” (G.F. 230), 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> <li>(d) the “Interpretation (Supplement)”;</li> <li>(e) the “Terms of Tender (Supplement)”;</li> <li>(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;</li> <li>(g) the “Special Conditions of Contract”;</li> <li>(h) the “Technical Specifications”; and</li> </ul>

- (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.

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 Date"	means the Date of Tender Acceptance;
"Contract Deposit"	has the meaning given to it in Clause 16.1 of the General Conditions of Contract;
"Contract Period"	means, subject to early termination as provided for in the Contract, the period specified in the Special Conditions of Contract as the "Contract Period"; or in the absence of which the period commencing from the Date of Tender Acceptance until the completion of all obligations by the Contractor in relation to the Goods;
"Contract Price"	means in relation to one or more batch(es) of Goods comprising one or more Item(s), the one-time amount payable for such batch(es) of Goods on and subject to the terms and conditions of the Contract and is to be calculated based on the one-time unit price(s) for such Item(s) as specified in the Price Schedule and the quantity of such Item(s) in that batch(es) of Goods;
"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;
“Deadline Delivery Date”	has the meaning given to the term in Clause 6.5 of the General Conditions of Contract;
“Deliverables”	means all materials (tangible or intangible) of whatsoever nature stored, presented or embodied in any medium, and which apart from the Goods, are delivered or to be delivered by or on behalf of or for the Contractor to the Government under or for the purposes of or in relation to the Contract including without limitation data, documents, information text, drawings, pictures, diagrams, images, sound, music, reports, certificates, manuals, instructions, documentation, databases, plans, models, designs, specifications, records, computer source codes, advice, recommendations, solutions, analyses, compilations; and including all drafts of the foregoing;
“desirable features”	means specifications set out in Technical Specifications which are expressly identified as desirable features (if any);
“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;
“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); for the avoidance of doubt, essential requirements include mandatory features;



“Estimated Goods Price for an Item”	means in relation to an Item, the one-time unit price for that Item as specified in the Price Schedule and multiplied by the estimated quantity of such Item as specified in the Price Schedule;
“e-Tender Box”	means the electronic tendering system adopted by GLD for Tenderers to prepare and submit Tenders electronically;
“ETO”	means the Electronic Transactions Ordinance (Chapter 553 of the Laws of Hong Kong);
“Force Majeure Event”	means: <ul style="list-style-type: none"> <li>(a) any outbreak of war, hostilities (whether war be declared or not), invasion, acts of foreign enemies, rebellion, revolution affecting Hong Kong or the Place of Origin or the delivery route from the Place of Origin to Hong Kong, overthrow (whether by external or internal means) of the Government or the government of the Place of Origin; or</li> <li>(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 20.6 and 20.7 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;</li> </ul> <p>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;</p>

“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-1 (August 2018));
“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;
“Goods”	means all or any of the Items;
“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, materials, data, documents, information, text, drawings, pictures, diagrams, images, sound or music, and any other materials of whatsoever nature stored (tangible or intangible), 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</li> </ul>

Contract; and

- (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;
“Independent Accredited Laboratory”	<p>means a laboratory which:</p> <ul style="list-style-type: none"><li>(a) is accredited 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);</li><li>(b) must not be the same entity as the Manufacturer, or the Tenderer, or the Contractor; and</li><li>(c) must not be an associate or associated person (as defined in Clause 23.3 of the General Conditions of Contract) of the Manufacturer, or the Tenderer, or the Contractor;</li></ul>
“Information Schedule”	means a schedule attached to the Tender Form for completion of the Tenderer’s information;
“Inspections”	has the meaning given to it in Clause 8.1 of the General Conditions of 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 or 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 supply of the Goods to the Government on the terms and conditions set out in the Tender Documents;
“Items”	means the goods 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, and be deemed to be inclusive of all services and subject matters specified in the Contract to form part of the Goods or to be performed in relation to the Goods including Paragraph 5.1 of the Terms of Tender and the provisions in the Terms of Tender (Supplement) supplementing such Paragraph; references to “Item” mean any one of such item(s);
“Locations”	means (a) the delivery location(s) for the Goods as specified in the Interpretation (Supplement), or (b) in the absence of which, the delivery location(s) to be identified in an Order to which a batch of Goods as specified in that Order shall be delivered;
“mandatory features”	means those features identified as “mandatory features” in the Technical Specifications;

“Manufacturer”	means the manufacturer specified in the Particulars of Goods Schedule or such other manufacturer of the Goods as the Government may approve in writing;
“Manufacturing Plant”	means the manufacturing plant specified in the Particulars of Goods Schedule or such other location as the Government may approve in writing;
“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 32.2 of the Terms of Tender;
“Order”	has the meaning given to it in Clause 6.1 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 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 Goods;
“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;
“Overall Specifications”	has the meaning given to the term in Clause 9.2(b) of the General Conditions of Contract;
“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;
“Particulars of Goods Schedule”	means a schedule attached to the Tender Form for completion of the particulars of the Goods offered;
“Parties” (in upper case 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);
“Place of Origin”	means the place of origin of the Goods specified in the Particulars of Goods Schedule which shall be the same place in which the Manufacturing Plant is located;
“PRC”	means the People’s Republic of China;
“Price Schedule”	means the price schedule attached to the Tender Form for completion of the price quotation of the Goods offered and also containing the payment timetable for the Contract Price;
“Procuring Department”	means the bureau or department of the Government specified as such in the Appendix;
“Ready for Use” or “Ready to Use” or “Ready for Service”	means in relation to a batch of Goods, it complies with all requirements specified in Clause 9.2 of the General Conditions of Contract subject to such other additional conditions or exclusions or qualifications as may be specified in the Interpretation (Supplement) (if any);
“Receiving Officer”	means the public officer in charge of a Government department or bureau or establishment to which any of the Goods are to be delivered or such other public officer as he may authorise to accept delivery thereof;
“Schedule”	means the Completeness Check Schedule, the Compliance Schedule, the Particulars of Goods 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;
“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;
“Technical Specifications”	means the specifications referred to in Part 3A of, and in the form attached to, the Tender Form; references to Technical Specifications include the mandatory features as well as those desirable features offered by the Tenderer and accepted by the Government (if any);
“Tender”	means an offer to supply the Goods as submitted by a Tenderer in response to the Invitation to Tender;
“Tender Acceptance”	has the meaning given to it in Paragraph 22 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 in accordance with Paragraphs 3.11 (b) and (c) of the Terms of Tender;
“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 in accordance with Paragraphs 3.11 (b) and (c) of the Terms of Tender;
“Tender Documents”	<p>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-1 (August 2018)) (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:</p> <p>(a) the Interpretation (Supplement);</p> <p>(b) the Terms of Tender (Supplement);</p>

- (c) the Special Conditions of Contract;
- (d) the Technical Specifications;
- (e) the Price Schedule;
- (f) the Particulars of Goods Schedule;
- (g) the Compliance Schedule;
- (h) the Completeness Check Schedule;
- (i) the Information Schedule;
- (j) the Non-collusive Tendering Certificate; and
- (k) 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. 230 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;

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

“Terms of Tender” means the Terms of Tender set out in Part 1 of these Standard Terms and Conditions (Reference No. BD-TERMS-1 (August 2018));

“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;



“Total Estimated Goods Price”	means an amount equal to the summation of all Estimated Goods Prices for all such Item(s) which have been awarded to the Contractor;
“Unit Price” (in upper or lower case)	means the one-time unit price for an Item set out in the Price Schedule;
“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;
“Warranties”	has the meaning given to the term in Clause 3.2 of the General Conditions of Contract;
“Warranty Period”	has the meaning given to the term in Clause 15.1 of the General Conditions of Contract;
“Warranty Services”	has the meaning given to the term in Clause 15.1 of the General Conditions of Contract;
“working day”	means Monday to Friday, other than a public holiday or a day on which Tropical Cyclone Warning Signal No. 8 or above is hoisted or a Black Rainstorm Warning Signal is in force for any 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; agents of the Contractors shall be treated as sub-contractors 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 “writing” include typewriting, printing, lithography, photography, facsimile and the printed out version of a communication by electronic mail and other modes of representing and reproducing words in a legible form;
- (t) 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;
- (u) references to “acceptance of a batch of Goods” or other similar expression shall mean the acceptance by the Government through the issue of an Acceptance Note in respect of that batch of Goods (unless acceptance under Clause 9.1(b) of the General Conditions of Contract is applicable);
- (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 21.5 of the Terms of Tender; and
- (w) the expressions “public body” and “public officer” have the meanings given to them in the General Clauses and Interpretation 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 Unless otherwise provided for in the Tender Documents, all quotations and payments shall be made in Hong Kong dollars or the Permissible Currency.
- 1.6 All and any provisions set out in the Standard Terms and Conditions (Reference No. BD-TERMS-1 (August 2018)) (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-1 (August 2018)) 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.
- 1.7 Where there is any provision in the Standard Terms and Conditions (Reference No. BD-TERMS-1 (August 2018)) 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).

## **PART 1**

### **TERMS OF TENDER**

Unless otherwise specified or indicated below that a particular provision applies to either Paper-based Tendering or Electronic Tendering only, all provisions of the Tender Documents apply to both Paper-based Tendering and Electronic Tendering.

#### **1. Invitation to Tender**

- 1.1 Tenders are invited for the supply 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-1 (August 2018)) comprising the Interpretation, the Terms of Tender and the General Conditions of Contract may be downloaded from the website at <http://www.gldetb.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 CD ROM containing the softcopy of the full set may be collected from the Procuring Department at the address as specified in the Terms of Tender (Supplement), or may be viewed or downloaded from the website of the online services of GLD (i.e., e-Tender Box) after logging in as a registered GLD supplier (or an applicant of GLD supplier) or GLD subscriber through the aforesaid website.
- 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 supply of the Goods 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 and subject to the applicability of Clause 4.1 of the General Conditions of Contract (as specified in the Special Conditions of Contract, if applicable), the estimated quantity/quantities of the Goods specified in the Price Schedule is/are estimate(s) of the quantity of the Goods 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. If Clause 4.1 of the General Conditions of Contract is not applicable, the Government's actual requirements may vary depending on the actual need of user departments and the successful Tenderer must accept any increase or decrease of the stated estimates, but subject to caps mentioned in Clauses 4.3 and 4.4 of the General Conditions of Contract.
- 1.10 Unless otherwise specified in the Terms of Tender (Supplement), this Invitation to Tender is covered by the WTO GPA.

## **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. Any supplementary information or tender addenda can also be viewed or downloaded from the website of the online services of GLD

(i.e., e-Tender Box) after logging in as a GLD supplier (or an applicant of GLD supplier) or GLD subscriber from the website of <http://www.gldetb.gov.hk>.

### **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 Particulars of Goods Schedule, the Compliance 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).
- 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) (for Paper-based Tendering only) 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. Other than printing from a softcopy of the Tender Form obtained from the Government or photocopying of the Tender Form, other means of reproduction by the Tenderer (e.g. by retyping) of the Tender Form for Tender submission is not acceptable;
  - (b) the unit price quotations for all Items (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;
  - (c) the information which is identified as essential information in the Particulars of Goods Schedule; and
  - (d) such other items and documents as specified in the Terms of Tender (Supplement) whereby it is provided that if the Tenderer fails to submit 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 16.1 of the Terms of Tender or evaluate the Tender on an “as is” basis. A complete list of all proposals, documents and information to be submitted are set out in the Completeness Check Schedule.
- 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 A Tenderer shall submit, in one of the following manners, its completed Tender together with all proposals, documents and information required under the Tender Documents or relevant to its Tender in accordance with the terms of the Tender Documents. A Tender submitted through method other than through Paper-based Tendering or Electronic Tendering will not be considered.

Tender Submission:

(a) Paper-based Tendering

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



(b) Electronic Tendering

- (i) the Tender shall be submitted in accordance with the requirements and other terms and conditions of the e-Tender Box, and in such format as prescribed therein; and
- (ii) Tenderers should note that the e-Tender Box only accepts the use of the types of digital certificates specified in the e-Tender Box for submission of Tenders.

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 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) Part 4 “Offer to be Bound” of the Tender Form shall be duly signed by:
  - (1) if the Tenderer is a sole proprietorship, the Tenderer or a person authorised by the Tenderer to sign and submit 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 to sign and submit the Tender for and on behalf of the Tenderer; or
  - (3) if the Tenderer is a body corporate, a director of the Tenderer or one or more persons who are duly authorised by the Tenderer to sign and submit the Tender for and on behalf of the Tenderer.

#### (b) Electronic Tendering

- (i) A Tender will be regarded to be submitted by a Tenderer if it is submitted by the Authorised User of the digital certificate used by the Tenderer to submit its Tender.
- (ii) If any attachment submitted by a Tenderer via the e-Tender Box:
  - (1) does not comply with any format or file attachment requirements of 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(b) or (c) or (d) above by the

Tender Closing Time, the Tender will not be considered further and its Tenderer will be notified of such.

- (iii) The Government will verify the validity of a Tenderer's digital certificate for signing its Tender with the relevant certification authority specified in the e-Tender Box. 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 the relevant Tenderer for signing the Tender 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 complete proposals, information and documents required in the e-Tender Box or the Tender Documents 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 a Black Rainstorm Warning Signal is 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 If a Tenderer submits a Tender by Electronic Tendering, the Tenderer shall, in addition to compliance with the Tender Documents, observe and comply with the requirements and other terms and conditions of the e-Tender Box as set out in or referred to in the e-Tender Box.

### 3.13 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 shall not be altered or erased; any modification shall be effected by striking the incorrect figures and inserting the correct figure in ink above the original figures. All such amendments shall be initialled by the Tenderer in ink.

- (c) Electronic Tendering

In case of modification to the submitted Tender, the Tenderer shall send in a revised Tender superseding the original Tender and this shall be stated in the revised Tender.

- 3.14 (a) Apart from Part 4 – “Offer to be Bound” of the Tender Form (which must be originally signed by or on behalf of the Tenderer), if the original of any document to be submitted as part of the Tender is not available,

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 practice in Hong Kong or the laws of the place of incorporation, formation or establishment of the Tenderer or Manufacturer; and (c) if only a photocopy has been submitted, the Government reserves the right to request such certified true copy after the Tender Closing Date. The Tender may not be considered further if the certified true copy 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(s) quoted by the Tenderer for an Item shall be and be deemed to 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 including without limitation, the supply of such Item, insurance, packing and delivery on an F.I.S. basis (unless otherwise specified in the Terms of Tender (Supplement)).

F.I.S. means free into store, i.e. the successful Tenderer is responsible for the delivery of the Goods, at its own cost, to the designated storage area of the Location(s) within Hong Kong in accordance with all requirements of the Contract.

- 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 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 16 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 The unit price for all Items shall be quoted in Hong Kong dollars or the Permissible Currency. 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.
- 5.6 Payment to the successful Tenderer shall be made in accordance with the payment timetable in Part B of the Price Schedule.
- 5.7 The Tenderer is requested to indicate in the space provided in Part C of the Price Schedule the prompt discount it will allow on any payment under the Contract if made in full within the period of time as specified therein.

- 5.8 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.
- 5.9 If the 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).

## **6. Particulars of Goods**

- 6.1 The Tenderer shall submit all essential information on the Goods offered and other essential information in the Particulars of Goods Schedule together with the Tender before the Tender Closing Time. Otherwise, the Tenderer's Tender will not be considered further. The term "essential information" refers only to information which is identified as essential information in the Particulars of Goods Schedule.
- 6.2 The Tenderer must not offer to supply any used or refurbished Goods to the Government. If a Tenderer fails to comply with this requirement, its Tender will not be further considered. By submitting a Tender, the Tenderer undertakes and declares that all Goods it offers in response to this Invitation to Tender will be fresh from stock and/or a factory.
- 6.3 Depending on the requirements of the Terms of Tender (Supplement), samples of the offered Goods may be requested for evaluation.

## **7. Mandatory Features in the Technical Specifications and Statement of Compliance**

- 7.1 The Technical Specifications set out the mandatory features in respect of the Goods and other obligations to be performed by the Contractor.
- 7.2 The Tenderer shall confirm in the relevant part of the Compliance Schedule that it and its offered Goods comply with all the mandatory features. Where the Tenderer does not complete the relevant part in the Compliance Schedule, subject to any clarification which may be made by the Government, it shall be deemed that the Tenderer confirms compliance. In addition to the Compliance Schedule, depending on the

specification in the Terms of Tender (Supplement), the Tenderer may also be required to provide a point-by-point statement of compliance in the Technical Specifications. If this is so required, references to “Compliance Schedule” throughout this Paragraph 7 shall also be read to include the Technical Specifications.

- 7.3 There may be some mandatory features which will only be fulfilled by the Goods after some further customisation or implementation services as specified in the Technical Specifications or otherwise to the extent necessary (if any) (“Customisation”). In such case, the Tenderer shall equally be required to confirm that its Goods will comply with the relevant mandatory features after the Customisation in the Compliance Schedule.
- 7.4 A Tenderer’s Tender will not be considered further if the Tenderer expressly indicates non-compliance with all or any mandatory features or other requirements in the Tender Documents with which the Tenderer is required to indicate compliance in the Compliance Schedule. The note(s) in the Compliance Schedule further sets out what indication will be taken as such express indication of non-compliance.
- 7.5 Without prejudice to other provisions of the Tender Documents, and subject to any opportunity which may be provided to the Tenderer to provide clarification, or based on the Tenderer’s other submission or based on other evidence available to the Government, where the Government is not satisfied that the Tenderer or its offered Goods comply with any of the mandatory features stipulated in the Technical Specifications (or in the case of any mandatory features which can only be accomplished after Customisation, the Goods will comply with the relevant mandatory features), the Tenderer’s Tender will not be considered further.
- 7.6 Notwithstanding anything in these Terms of Tender or in the submitted Compliance Schedule, the Government reserves the right to seek clarification from the Tenderer or the Manufacturer or authorised distributor or other relevant person to determine, inter alia, if an Item it has offered complies with the mandatory features of the Technical Specifications for such Item (or will comply after necessary Customisation).
- 7.7 Where there is any inconsistency between the information, data, drawings or other documents provided by the Tenderer and those provided by the Manufacturer (whether provided through the Tenderer or obtained by the Government directly from the Manufacturer or from other sources), the tender evaluation will be based on the information, data, drawings or other documents provided by the Manufacturer unless



the Tenderer, upon the seeking of any clarification by the Government, resolves such inconsistency to the satisfaction of the Government. For the avoidance of doubt, the Government is not obliged to seek clarification in the event of any apparent inconsistency.

- 7.8 In addition to the mandatory features, there may be other requirements in the Tender Documents with which the Tenderer is specifically requested to confirm compliance in the Compliance Schedule (if any). The consequence for expressly indicating non-compliance with any such requirements is set out in Paragraph 7.4 above.

## **8. Delivery**

- 8.1 Unless otherwise specified in the Terms of Tender (Supplement), the Goods shall be supplied on an “as and when required” basis through the issue of Order and shall be delivered in accordance with the date and time as specified in the Order (or in the absence of such specification, within fourteen (14) days from the date of the Order).
- 8.2 Where the Terms of Tender (Supplement) do specify the Deadline Delivery Date(s) for the batch(es) of the Goods, Paragraph 8.1 shall not apply. Alternatively, the Deadline Delivery Date(s) may be set out in the Implementation Timetable contained in the Technical Specifications. The exact arrangement shall be as stated in the Terms of Tender (Supplement).
- 8.3 If the Deadline Delivery Date(s) for each batch of Goods in the specified quantities are specified in the Terms of Tender (Supplement) and if requested in the Compliance Schedule, the Tenderer shall confirm compliance with the Deadline Delivery Date(s) in the Compliance Schedule. In the Compliance Schedule, the Government may (but is not obliged to) allow counter-proposal from the Tenderer to the Deadline Delivery Date(s) within a permissible range (if any). If there is such a permissible range, the Tender of a Tenderer which expressly counter-proposes an alternative Deadline Delivery Date that is outside such permissible range will not be considered further.
- 8.4 Unless otherwise specified in the Terms of Tender (Supplement), the Goods shall be delivered on an F.I.S. basis as defined in Paragraph 5.1 above. A Tender, with a unit price quotation on delivery terms other than the aforesaid applicable delivery requirement, or expressly excluding any subject matter or services of whatsoever nature which are required to be covered by that unit price quotation, will not be considered further.

## **9. Certification Requirement and Track Record Requirement**

- 9.1 The Terms of Tender (Supplement) may specify that (a) the Goods offered by the Tenderer; and/or (b) the Manufacturer of the Goods; and/or (c) the Tenderer, shall comply with all such certification requirements as set out in the Terms of Tender (Supplement) (if any) (any of the aforementioned type of certification requirement may be referred to as, “Certification Requirement”).
- 9.2 Alternatively or in addition, the Terms of Tender (Supplement) may specify the essential requirement(s) concerning experience to be complied with by the Tenderer or the Manufacturer or concerning the usage or sale or other records or features in relation to the product(s) offered by the Tenderer for the Goods before its Tender will be considered further (if any) (any of the aforementioned type of essential requirement may be referred to as “Track Record Requirement”).
- 9.3 Where in relation to a Tender, there is any failure to comply with any Certification Requirement or any Track Record Requirement, that Tender will not be considered further.
- 9.4 To prove compliance, the Tenderer shall be required to submit information in the Information Schedule as well as documentary evidence to prove compliance. In the case of a Certification Requirement, the relevant certificate shall be provided to prove compliance as part of the documentary evidence, and, unless otherwise specified in the Terms of Tender (Supplement), shall be certified in accordance with Paragraph 3.14(b) of the Terms of Tender.

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

- 10.1 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/partners;
    - (ii) other directors; and
    - (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 if the Tenderer does not carry on business in Hong Kong, the equivalent document issued by the authority of place of business of the Tenderer;
- (f) if the Tenderer is a company or body corporate, its Memorandum (if any) and Articles of Association, Certificate of Incorporation, Certificate of Change of Name (if any), or if the Tenderer was not incorporated under the Companies Ordinance (Chapter 622 of the Laws of Hong Kong) (or its predecessor Ordinance), the equivalent documents issued by the authority of the place of incorporation of the Tenderer;
- (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 if the Tenderer was not incorporated or registered under the Companies Ordinance (Chapter 622 of the Laws of Hong Kong) (or its predecessor Ordinance), the equivalent documents issued by the authority of the place of incorporation of the Tenderer;
- (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) documentary evidence proving that the authorised person(s) who sign(s) the Offer to be Bound has/have the authority to sign it for and on behalf of the Tenderer if the signatory is not the partner (in the case of partnership), or sole proprietor (in the case of sole proprietorship), or a director (in the case of company); in addition to the foregoing, in the case that the Tenderer is a company, if the Offer to be Bound is not signed by two directors (or one director and one company secretary), the Government reserves the right to request certified extract board resolution authorising and approving the submission of the Tender; and
- (k) names and addresses of banks which are prepared to provide references or other relevant financial data which indicate the financial viability of the Tenderer.

10.2 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 sometime 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 supply the Goods 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 19.2(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 based on the searches with independent local authorities conducted by the lawyer shortly before the legal opinion;
- (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 22 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;
- (d) the execution, delivery and performance of its Tender and the proposed mode of execution, delivery and performance of the Contract (if awarded to the Tenderer) have been duly authorised by all necessary corporate action of the Tenderer, and does not violate any provision of any applicable law, regulation or decree of the Tenderer's place of incorporation, formation or

establishment, or the Memorandum (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.

10.3 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 10.2(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 10.4 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 44.2 of the General Conditions of Contract shall be replaced by the arbitration clause in Paragraph 10.4 below (“written confirmation on arbitration”).

- 10.4 Where the opinion on the question specified in Paragraph 10.2(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 10.3 above, Clause 44.2 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 29.2 of the Terms of Tender”.

## **11. Manufacturer’s Undertaking**

Whether or not an undertaking or letter of intent from the Manufacturer is required and if so, in relation to which Item(s) or which part of the Item(s), shall be as specified in the Terms of Tender (Supplement).

## **12. Sub-contractors**

- 12.1 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. The Manufacturer as stated in the Particulars of Goods will not be treated as a sub-contractor.

- 12.2 The information required in the Information Schedule for each proposed sub-contractor shall cover the information as required in Paragraph 10.1(a) of the Terms of Tender as if references to Tenderer shall mean the proposed sub-contractor.
- 12.3 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.
- 12.4 The Terms of Tender (Supplement) will specify whether or not the Government will require the submission of a legally binding sub-contractor's undertaking. 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 10.2 and 10.3 of the Terms of Tender shall also be provided in relation to the proposed sub-contractor.
- 12.5 The Tenderer shall specify in the Information Schedule the location of the service centre for the provision of the Warranty Services as specified in Clause 15 of the General Conditions of Contract, and the operator of such service centre (whether it be the Contractor or a proposed sub-contractor). The Terms of Tender (Supplement) may specify further requirements concerning the service centre and/or the operator of the service centre.

### **13. 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.

### **14. Counter-Proposals**

- 14.1 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).

- 14.2 If a Tenderer fails to comply with Paragraph 14.1 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.
- 14.3 Counter-proposal to other provisions of the Tender Documents not specified in Paragraph 14.1 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 14.1 above (“Counter-Proposals”), the Counter-Proposals shall be submitted in the following manner:
- (a) the Counter-Proposals shall be attached to Part 4 – Offer to be Bound of the Tender Form;
  - (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 should bear the corresponding clause number of the original provisions unless it is an addition;
  - (d) if it is an addition, the additional provision 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 “[ ]”.
- 14.4 Unless the Government otherwise agrees, Counter-Proposals that are not submitted in accordance with Paragraph 14.3 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.
- 14.5 Notwithstanding and without prejudice to the aforesaid, the Government may, but is not obliged to, negotiate with the Tenderer on 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.

- 14.6 Without prejudice to and in addition to Paragraph 14.2 above, the Government reserves the right not to consider a Tender further should the Tenderer directly or indirectly attempts 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.

## **15. Alternative Standards**

- 15.1 On condition that all of the following are complied with, a Tenderer may offer to supply to the Government Goods which comply with a standard ("Alternative Standard") alternative to any standards specified in the Technical Specifications ("Original Standard"):
- (a) the Tenderer shall identify and give details of the Alternative Standard in its Tender;
  - (b) the Tenderer shall provide a comparison between the Alternative Standard and the Original Standard;
  - (c) the Tenderer shall demonstrate to the Government's satisfaction that the requirements that need to be complied with under the Alternative Standard are no worse than those that need to be complied with under the Original Standard, and that Goods that comply with the Alternative Standard are in all respects (including quality, fitness for purpose and compliance with the Technical Specifications) no worse than Goods which comply with the Original Standard; and
  - (d) documentary evidence is submitted to the Government for the purpose of Paragraph 15.1(c) above.
- 15.2 If the Government considers that an Alternative Standard proposed by a Tenderer is not acceptable to the Government for the purpose of the Invitation to Tender, the Tenderer's Tender will not be considered further unless (a) the Tenderer has also undertaken in its Tender to comply with the Original Standard; and (b) in accordance with the requirements as stated in the Terms of Tender (Supplement) (if any), the Tenderer has provided the requisite certifications to prove that the Goods comply with the Original Standard.

## **16. Request for Information**

16.1 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).

16.2 Any excess proposal or information supplied by a Tenderer which goes beyond what has been requested by the Government pursuant to Paragraph 16.1 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.

## **17. Tenderer's Enquiries**

17.1 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 18.1 of the Terms of Tender.

17.2 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.

17.3 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.

## **18. Communication with the Government**

18.1 Without prejudice to the requirements set out in Paragraph 22 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 34 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 17.1 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.

18.2 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 Manufacturer or proposed sub-contractor or customer or client of the Tenderer directly.

## **19. Negotiations**

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

## **20. Government Discretion**

20.1 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 allegation or 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 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 twenty-four (24) 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 20.6 and 20.7 below and including those who were in such capacity any time within the same period, i.e., twenty-four (24) 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 deficiency(ies) in the performance of any requirement or obligation under any other Government contract awarded by the Head of the Procuring Department regardless of whether the default(s) or deficiency(ies) led to the actual termination of the relevant Government contract and regardless of whether such default(s) or deficiency(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 deficiency(ies) relates to any provisions which survive such termination or expiry, and regardless of whether such default(s) or deficiency(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 20.1(a) to 20.1(g) above are separate and independent, and shall not be limited by reference to or inference from the other of them.

20.2 For the purposes of Paragraph 20.1 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 20.1(a) above;
- (b) details of all infringement claims or allegations or rulings or judgments or decisions or settlement agreements as mentioned in Paragraph 20.1(c) above;

- (c) details of all Contract Defaults as mentioned in Paragraph 20.1(d) above;
- (d) details of conviction as mentioned in Paragraph 20.1(e) above in Hong Kong or any overseas jurisdiction;
- (e) details of any professional misconduct or act or omission as mentioned in Paragraph 20.1(f) above; and
- (f) details of any failure to pay taxes as mentioned in Paragraph 20.1(g) above.

If none of the events as mentioned in Paragraphs 20.1(a) to 20.1(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 20.3 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.

- 20.3 In addition to the information mentioned in Paragraph 20.2 above, the Government reserves the right (but not obligation) to request from a Tenderer or the Manufacturer 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 20.1 above.
- 20.4 If the Tenderer fails to comply with the request made by the Government pursuant to Paragraph 20.3 above within such time as required by the Government, the Government may disqualify the Tenderer pursuant to Paragraph 16 of the Terms of Tender. If the Tenderer has submitted false, inaccurate or incomplete information, the Government may disqualify the Tenderer pursuant to Paragraph 20.1(b) above.
- 20.5 In providing the information required under Paragraphs 20.2 and 20.3 above, the Tenderer may show cause to satisfy the Government that in relation to any of the events as mentioned in Paragraph 20.1 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.

20.6 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).

20.7 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.

20.8 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 20.1 above include persons who were in such capacity at such time of the event referred to in that Sub-paragraph.

## **21. Award of Contract**

21.1 Unless the Government decides that it is in the public interest not to award the Contract, 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) the Tenderer has submitted the lowest tender price (i.e., the lowest amount which is equal to the summation of all Estimated Goods Prices for all Item(s) to which the price evaluation relates, or which is derived by another calculation as may be specified in the Terms of Tender (Supplement) (if any)) amongst all the conforming Tenders; or
- (b) where the Tender Documents contain a 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) the Tenderer has attained the highest combined score amongst all the conforming Tenders based on the marking scheme.

21.2 The term “completeness check” referred to in Paragraphs 21.1(a) and (b) above 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.



- 21.3 For determining the lowest tender price under Paragraph 21.1(a) above or the price score under Paragraph 21.1(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.
- 21.4 By default, 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 Item(s) for all quantities which the Government is entitled to purchase as mentioned in Clause 4.1 or 4.2 of the General Conditions of Contract (whichever is applicable). 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 21.1 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 21.1 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 21.1 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).
- 21.5 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 21.1(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) of the Terms of Tender, its entire Tender will not be considered further.

- 21.6 Regardless of the applicable requirement as mentioned in Paragraph 21.4 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.
- 21.7 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.

## **22. Acceptance**

- 22.1 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.
- 22.2 A duplicate hard copy of the Contract, including the "Memorandum of Acceptance" duly completed by the Government, will subsequently be delivered to the successful Tenderer evidencing the earlier acceptance by post or facsimile transmission, as the case may be.
- 22.3 Tenderers who do not receive any notification within the Tender Validity Period should assume that their Tenders have not been accepted.
- 22.4 Where an Electronic Record is used in the formation of the Contract, the Contract shall not be denied validity or enforceability on the sole ground that an Electronic Record was used for that purpose.

## **23. Contract Deposit**

- 23.1 If the Total Estimated Goods Price (or such other amount specified in the Terms of Tender (Supplement)) payable by the Government to the successful Tenderer exceeds HK\$1.4 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 Goods Price (or two percent (2%) of such other amount as specified in the Terms of Tender (Supplement), if any) (“Contract Deposit”).
- 23.2 The successful Tenderer shall pay the Contract Deposit either in cash or in the form of a banker’s guarantee. Each Tenderer should state 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.
- 23.3 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
  - (c) the banker’s guarantee shall come into effect on the Date of the Tender Acceptance.
- 23.4 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 16.10 of the General Conditions of Contract.

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

- 24.1 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.

- 24.2 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.

## **25. 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 22.1 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.

## **26. 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, e.g., if the Tenderer is no longer the authorised agent for supplying a proprietary product. 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.

## **27. 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.

## **28. 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 or factories and equipment to the Government Representative during the site visits, and (d) provision of tender samples, whether before or after the Tender Closing Time.

## **29. Consent to Disclosure**

29.1 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 Goods supplied or to be supplied by the successful Tenderer;
- (b) the Total Estimated Goods 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.

29.2 Nothing in Paragraph 29.1 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 29.1 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 29.2(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 24.2 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 29.1 above, to the extent the information relates to or concerns a Tenderer, with the prior written consent of that Tenderer.

### **30. Personal Data Provided**

30.1 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 29 of the Terms of Tender).

- 30.2 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 30.1 above, or the disclosure pursuant to Paragraph 29 of the Terms of Tender.
- 30.3 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.
- 30.4 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.

### **31. 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 25 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 (including in particular the Licence), 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 are any Goods samples to be submitted or any presentation or demonstration, the aforesaid right and licence shall extend to such samples, presentation and/or demonstration to be conducted by the Tenderer.

## **32. Warranty against Collusion**

- 32.1 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 32.2 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.
- 32.2 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.
- 32.3 In the event that a Tenderer is in breach of any of the representations, warranties and/or undertakings in Paragraph 32.1 above or in the Non-collusive Tendering Certificate submitted by it under Paragraph 32.2 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 19.1 of the General Conditions of Contract.
- 32.4 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 32.1 above or in the Non-collusive Tendering Certificate submitted by it under Paragraph 32.2 above.
- 32.5 A breach by a Tenderer of any of the representations, warranties and/or undertakings in Paragraph 32.1 above or in the Non-collusive Tendering Certificate submitted by it under Paragraph 32.2 above may prejudice its future standing as a Government contractor or service provider.



- 32.6 The rights of the Government under Paragraphs 32.3 to 32.5 above are in addition to and without prejudice to any other rights or remedies available to it against the Tenderer.

### **33. Warning against Bribery**

- 33.1 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.
- 33.2 The successful Tenderer shall inform its officers, employees (whether permanent or temporary), agents and sub-contractors who are connected with the supply of the Goods 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.

### **34. Environmental Protection**

- 34.1 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.
- 34.2 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;
  - (c) single line spacing should be used and excessive space in the margins and in between paragraphs should be avoided;
  - (d) the use of packaging materials should be minimised; and

- (e) if the Goods are to be packed in a carton box, the carton box packaging should be made from 100% recovered fibre and must be strong enough for storage, stacking and transit.

34.3 In these Tender Documents:

- (a) “recovered fibre” means:
  - (i) postconsumer fibre; or
  - (ii) manufacturing wastes such as:
    - (1) dry paper and paperboard waste generated after completion of the papermaking process; and
    - (2) repulped finished paper and paperboard from obsolete inventories of paper and paperboard manufacturers, merchants, wholesalers, dealers, printers, converters, or others,

but does not include mill broke.

- (b) “postconsumer fibre” means:
  - (i) paper, paperboard and fibrous wastes (including used corrugated boxes, old newspapers, old magazines and mixed waste paper) from retail stores, office buildings, homes and other premises, which have passed through end-usage as a consumer item; and/or
  - (ii) all paper, paperboard and fibrous wastes that enter and are collected from municipal solid waste,

but excluding fibre derived from printers’ over-runs, converters’ scrap and over-issue publications.

- (c) “mill broke” means any paper waste generated in a paper mill prior to completion of the papermaking process, and such paper waste is usually returned directly to the pulping process.

## **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 the Contractor shall be addressed to contact at (1) provided that

- (a) all enquiries concerning the Technical Specifications or other technical aspects of the Goods to be lodged by a potential Tenderer; and
- (b) all correspondence and notices concerning the Order, delivery, testing, inspection, acceptance and after-sale services and warranty of the Goods; and
- (c) unless otherwise specified in the Special Conditions of Contract or unless the Contract Price is payable in instalment, all invoices for the Contract Price for a batch of Goods to be issued by the Contractor shall only be addressed to the Receiving Officer taking delivery of that batch of Goods.

- (1) the Government (Procuring Department):

Address:

Attn:

Facsimile Number:

Email Address:

- (2) the Receiving Officer:

Address: same address as the Goods to which the invoice relates is delivered

Attn: the Receiving Officer

(3) the Tenderer:

Address:

Attn:

Telephone Number:

Facsimile Number:

Email Address:

(4) Process Agent (for a Tenderer incorporated, formed or established outside Hong Kong without a place of business in 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 «SUPPLIER\_NAME» of «SUPPLIER\_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 supply \_\_\_\_\_  
\_\_\_\_\_ 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 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) 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),

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 20.1(a) of the General Conditions of Contract, this Contract shall have a duration specified as the Contract Period in the Special Conditions of Contract (“Contract Period”). 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 Goods.
- 1.2 Unless otherwise expressly specified in the Special Conditions of Contract, an Order for the Goods may be placed by the Government any time during the Contract Period up to the last date of the Contract Period (“Order Period”).

#### **2. Contractor’s Acknowledgement and Contract Performance**

- 2.1 The Contractor acknowledges and agrees that when entering into the Contract, it has been supplied with sufficient information to enable it to supply to the Government the Goods, which shall comply fully with the requirements set out in the Technical Specifications and other provisions of the Contract.
- 2.2 The Contractor further acknowledges that the Government relies on the skill and judgment of the Contractor in the supply of the Goods and the performance of its obligations under the Contract. The Contractor acknowledges and agrees that save to the extent expressly set out in the Contract, it is neither expected nor necessary that the Government will have to provide any assistance or perform any act or do anything whatsoever to ensure the delivery of the Goods and performance of its obligations in accordance with the Contract.
- 2.3 The Contractor shall perform its obligations under the Contract:
  - (a) with appropriately experienced, qualified and trained personnel and with all due care, skill and diligence;
  - (b) in accordance with Good Industry Practice; and

- (c) in compliance with all applicable laws and regulations.
- 2.4 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.
- 2.5 The Contractor shall remain responsible for performing the Contract, and be liable to the Government under the Contract, regardless of whether or not the Goods are manufactured by it.
- 2.6 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.
- 2.7 Without prejudice to the Deadline Delivery Dates and other time requirements to be observed and complied with by the Contractor, whenever any approval or agreement or instruction or direction is sought by the Contractor from the Government in accordance with the requirements of the Contract, the Government is entitled to a reasonable period of time for considering whether any such agreement or approval should be given, and a reasonable period of time to specify such direction or instruction. It will use its reasonable endeavours to give notification to the Contractor of its decision and where applicable any work to be done in order for such approval or agreement or direction or instruction to be given within a reasonable period of time.
- 2.8 In the light of the foregoing, the Contractor will not be entitled to any extension of time or additional payment or exemption from any obligation or liability on the alleged ground (a) that the Contract contains insufficient or unclear or inconsistent or out-of-scope specifications or requirements; or (b) that the Government has not provided any assistance or performed any act to ensure delivery of the Goods or performance by the Contractor of its obligations; or (c) that the Contractor has to expend time and resources reporting to the Government on the progress; or (d) that any non-compliance with any obligation or delay is due to the Manufacturer or any other person; or (e) that the Government has not provided or otherwise in a timely

manner any direction, instruction, information or approval which is not otherwise expressly required under the Contract; or (f) for any approval or agreement which is stated to be required in the Contract, that the Government abstains from giving any such approval or agreement.

- 2.9 The Contractor shall be responsible for the completeness and accuracy of all Deliverables supplied by the Contractor to the Government in connection with the Goods. Without prejudice to any other provisions of the Contract, the Contractor shall indemnify the Government in accordance with Clause 18.2 of the General Conditions of Contract in connection with, any discrepancies, errors or omissions therein.
- 2.10 The Contractor acknowledges that it does not have the right to sell the Goods 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 Goods from any other person.

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

- 3.1 The Contractor warrants, represents and undertakes that:
- (a) as at the time of acceptance and thereafter throughout the Warranty Period, each batch of Goods conforms in all respects to, and operate in accordance with, all requirements of the Contract including the Technical Specifications, the specifications set out in the Particulars of Goods Schedule, and, where applicable, with any sample provided to the Government before or after the Contract award and accepted by the Government;
  - (b) as at the time of acceptance and thereafter throughout the Warranty Period, each batch of Goods is of merchantable quality and is free from defects in design, materials and workmanship, and is fit and sufficient for any particular purpose made known to the Contractor by the Government and to the extent consistent with such particular purpose, for other purposes for which such Goods are ordinarily used;
  - (c) all consent, approval, licences, certifications, and certificates required under the Contract and under all applicable laws and regulations have been duly obtained prior to the commencement of the Contract and are in full force and effect; and will continue to be maintained and if necessary renewed throughout the Contract Period for (1) the performance of the Contract by the Contractor; (2) the supply of the Goods from the Manufacturer at the Manufacturing Plant; (3) (where it is so approved)

performance of any part of the Contract by its sub-contractors including the manufacture, sale, supply and delivery of the Goods; (4) the operation and use of any machinery, equipment and materials for the manufacture of the Goods by the Manufacturer; (5) the operation of any vehicles, vessels, machinery, equipment and other transportation means for the delivery of the Goods; and (6) for the use of the Goods by the Government in the manner provided for or contemplated in the Contract; and none of the aforementioned acts or the purchase or use of the Goods by the Government will contravene any laws and regulations;

- (d) each batch of Goods has been manufactured by the Manufacturer at the Manufacturing Plant from the Place of Origin as specified in the Particulars of Goods Schedule;
- (e) the Contractor has full power, capacity and authority to enter into the Contract and to perform its obligations under the Contract;
- (f) the Contract constitutes valid, legally binding obligations of the Contractor enforceable in accordance with its terms;
- (g) throughout the Contract Period, the Contractor shall comply with all laws and regulations in the performance of the Contract including all of its obligations under the Contract; as at the time of acceptance, each batch of Goods shall comply with all laws and regulations prevailing at the time of acceptance; and throughout the Contract Period, the Manufacturing Plant and all machinery equipment and materials used for the manufacture and storage of the Goods, and all vehicles, vessels, machinery, equipment and other transportation means for the delivery of the Goods, shall comply with all laws and regulations;
- (h) 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;
- (i) 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;
- (j) 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;

- (k) 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;
- (l) 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;
- (m) upon acceptance of a batch of Goods, the Government shall obtain good and marketable title to such batch of Goods; and
- (n) upon acceptance of a batch of Goods, there is no option, right to acquire, mortgage, charge, pledge, lien, hire purchase, or other form of security or encumbrance on, over or affecting the Goods; and there is no agreement or commitment to give or create any of the foregoing and no claim has been made by any person to be entitled to any of the foregoing.

- 3.2 The warranties, representations and undertakings, expressed or implied, contained in Clause 3.1 above and in Clause 21.1 of the General Conditions of Contract and in other provisions of the Contract (including without limitation the Special Conditions of Contract and Paragraph 32.1 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".
- 3.3 Each of the Warranties shall be separate and independent and without prejudice to any other Warranty, and shall not be limited by reference to or inference from any other Warranty or any other provision of the Contract.
- 3.4 Unless otherwise expressly excluded from or provided to the contrary in the Contract, the rights, duties and liabilities imposed on a seller and the rights conferred on a buyer under the Sale of Goods Ordinance (Chapter 26 of the Laws of Hong Kong) apply to bind the Contractor and the Government respectively.



- 3.5 The Government relies on the professional judgment and expertise of the Contractor to ensure that the Goods are in compliance with the Warranties.
- 3.6 All of the Warranties are conditions of the Contract where the non-compliance with any of which entitles the Government, if it so elects, to reject a batch of Goods any time before acceptance of that batch of Goods under Clause 10.1 of the General Conditions of Contract. After acceptance of a batch of Goods, if there is any breach of any of the Warranties, the Government may still reject that batch of Goods under Clause 13 of the General Conditions of Contract. Breach of any of the Warranties concerning Intellectual Property Rights under Clause 21.1 of the General Conditions of Contract may also lead to rejection of the Goods (even after acceptance) in accordance with Clause 22.3 of the General Conditions of Contract. Regardless of whether there is any rejection, the Government's right and claim against the Contractor including under the indemnities in Clauses 18.2 and 22.1 of the General Conditions of Contract arising from the breach of the Warranties shall not be prejudiced.

#### **4. Total Maximum and Minimum Quantities**

- 4.1 This Clause shall only apply if the Special Conditions of Contract expressly state so. The Contractor agrees and commits to sell and the Government agrees and commits to purchase the total quantit(ies) of the Item(s) specified in the Price Schedule on and subject to the provisions set out in the Contract. In addition, the Government has an option to purchase extra quantities of all or any of the Items on and subject to the same terms including the price quotations set out in the Price Schedule up to an extra 30% of the Total Estimated Goods Price ("Excess Items") by issuing a notice to the Contractor any time within the Contract Period.
- 4.2 Where Clause 4.1 does not apply, the Contractor agrees to sell and the Government agrees to purchase the quantit(ies) of the Item(s) specified in the Price Schedule as from time to time Ordered by the Government during the Order Period, on and subject to the provisions set out in the Contract including the caps specified in Clauses 4.3 and 4.4 below.
- 4.3 To the extent that the Government elects to purchase under Clause 4.2 above, the Contractor irrevocably undertakes and agrees to sell and deliver to the Government, in accordance with the terms and conditions of the Contract, such quantities of all and any such Item(s) for an aggregate value up to one hundred and thirty (130) percent of the Total

Estimated Goods Price (or such other percentage as stated in the Special Conditions of Contract).

- 4.4 Where Clause 4.1 does not apply, notwithstanding Clause 4.2 above or any other provision of the Contract, the Contractor agrees that the Government has no obligation to purchase from it such quantity of all or any of the Item(s) which in total value exceeds seventy (70) percent of the Total Estimated Goods Price (or such other percentage as stated in the Special Conditions of Contract) over the whole of the Order Period.
- 4.5 For the avoidance of doubt, the quantities of Excess Items (in the case of Clause 4.1) or total Items Ordered to be taken into account for determining whether the cap specified in Clause 4.3 or 4.4 above is reached (a) may relate to all Items or (b) may relate to one or more but not all Items.
- 4.6 For the avoidance of doubt, without prejudice to all other rights and remedies of the Government whether under the Contract or at law, the Government's obligation under Clause 4.1 or 4.2 above (as the case may be) shall not apply in the event of any early termination of the Contract under Clause 19.1 or 19.2 or 19.3 of the General Conditions of Contract or partial termination of the Contract under Clause 19.4 of the General Conditions of Contract or after exercising its rights under Clause 10.3(f) of the General Conditions of Contract.

## **5. Price Variation**

The prices quoted for the Goods 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).

## **6. Order and Delivery**

- 6.1 Subject to the ordering and delivery arrangement specified in the Special Conditions of Contract for the Goods, whenever required by the Government by a written order signed by the Government Representative and issued to the Contractor during the Order Period ("Order") specifying:
  - (a) the quantity of the Goods to be supplied and delivered to the Government;
  - (b) the Location(s) for the delivery of the quantity of the Goods referred to in (a) above which shall either be specified in the

Interpretation (Supplement) or in the absence of which, in the actual Order to be issued; and

- (c) the date and time for delivery of the Goods referred to in (a) above;

the Contractor shall supply and deliver to the Government the quantity of the Goods so specified in the Order in accordance with the Order and the provisions of the Contract in Ready for Use condition.

- 6.2 If no date and time for delivery of the Goods is specified in an Order, the Contractor shall deliver the quantity of the Goods specified in the Order within fourteen (14) working days from the date of the Order.
- 6.3 Alternatively to Clauses 6.1 and 6.2 above, the date(s) and quantit(ies) for the delivery of each batch of Goods in Ready for Use condition to the Location(s) shall be specified in the Terms of Tender (Supplement) and/or the Special Conditions of Contract (as the case may be). Where there is such specification, Clauses 6.1 and 6.2 above shall not apply.
- 6.4 Further alternatively to Clauses 6.1, 6.2 and 6.3 above, the date(s) for each batch of implemented units (which shall comprise or include the specified quantity of the Items) (“implemented units”) to be duly assembled, delivered, installed, pass all Inspections and Acceptance Tests, and where applicable connected to other equipment or systems of the Government in accordance with all requirements of the Contract including the Technical Specifications and becoming Ready for Use shall be as specified in an implementation timetable (“Implementation Timetable” or “Implementation Plan”) set out in the Technical Specifications. The Implementation Timetable may also specify the time requirements for performing other services.
- 6.5 The delivery date (or the last working day of the delivery period) for a specified quantity of the Goods (a) as determined in an Order to be issued under Clause 6.1 above or under Clause 6.2 above or (b) as stated in the Terms of Tender (Supplement) and/or the Special Conditions of Contract in the manner mentioned in Clause 6.3 whichever is applicable, shall be known as a “Deadline Delivery Date”. The quantity of one or more Item(s) to be delivered in one lot by a Deadline Delivery Date is known as “a batch of Goods” throughout the Contract. Where there will only be one batch of Goods, references to “each” or “any” or “all” batch(es) of Goods shall mean that single one batch throughout the Contract. In the case where Clause 6.4 above applies, the date by which a batch of implemented units (or alternatively referred to as a “batch of Goods”) is to be Ready for Use at the Location(s) shall be known as a “Deadline Delivery Date” (or alternatively referred to as “Completion Date”) for such batch of implemented units. Where there will only be

one batch of implemented units, references to “each” or “any” or “all” batch(es) of Goods shall mean that single one batch throughout the Contract.

- 6.6 Time shall be of the essence of the Contract as regards each Deadline Delivery Date and all other time stipulations set out in the Contract including the Implementation Plan referred to in Clause 6.4 above (if any).
- 6.7 Where this Clause is expressly stated to be applicable in the Special Conditions of Contract, and where there is more than one batch of Goods to be delivered, the Contractor should note that no delivery of the second batch (or where applicable each subsequent batch) shall be made before the issue of Acceptance Note for the first batch (and where the batch of Goods has to be shipped to Hong Kong, no such shipment shall be made before the aforesaid issue of Acceptance Note). No Acceptance Note for the first batch will be issued until and unless the conditions specified in Clause 9.2 of the General Conditions of Contract are fulfilled. If any delay in the first batch fulfilling the aforesaid conditions leads to the delay of the issue of the Acceptance Note, the Contractor shall make up the time lost when delivering the second batch (or where applicable each subsequent batch) to the Location(s) and ensure that the second batch (or where applicable each subsequent batch) is in Ready for Use condition by the applicable Deadline Delivery Date. The Deadline Delivery Date for the second batch (or where applicable for each subsequent batch) shall still continue to apply and be binding on the Contractor notwithstanding such delay.
- 6.8 Each delivery of a batch of Goods shall be accompanied by a copy of the Order issued for that delivery (if any). In respect of each delivery, the Contractor shall upon delivery of a batch of Goods to a Location obtain a receipt from the Receiving Officer, but no such receipt shall constitute an acceptance by the Government of the batch of Goods, or an acceptance or acknowledgement by the Government of the condition, quantity or the nature of such Goods.
- 6.9 Unless otherwise specified in the Terms of Tender (Supplement) or Special Conditions of Contract, the Contractor shall be responsible for delivering the Goods on an F.I.S. basis (as defined in Paragraph 5.1 of the Terms of Tender). The Contractor shall be responsible for delivering the Goods to the Location(s) during the normal business hours (unless the Special Conditions of Contract stipulate otherwise). Where required, the Contractor shall be responsible for stacking the Goods within the designated storage area of each Location.
- 6.10 Where it is specified in the Special Conditions of Contract that the Goods shall not be delivered on an F.I.S. basis but shall be delivered on

other applicable Incoterms of the International Chamber of Commerce (e.g., cost insurance freight (C.I.F.) or free on board (F.O.B.) or ex works (EX.W.)), the Contractor shall comply with the arrangement specified in the Special Conditions of Contract concerning the delivery of the Goods and the documents evidencing the due delivery of the Goods. The Deadline Delivery Date shall be taken as the date when the Contractor is required to deliver and load the Goods to the relevant ship or aircraft or other location under the applicable Incoterms as stated in the Special Conditions of Contract. References to “Location(s)” shall mean the aforesaid applicable location(s).

- 6.11 The Government shall be entitled to postpone the Deadline Delivery Date or any other date specified in the Contract (and where there is an Implementation Plan, any date specified therein) by giving the Contractor not less than fourteen (14) days’ written notice prior to the date to be postponed. All other dates and time shall remain in full force and effect unless the Government shall otherwise determine or unless the postponement is of a material length and the Contractor provides justifications to the satisfaction of the Government that there shall be a corresponding postponement of any of the remaining dates (where applicable).
- 6.12 Without prejudice and in addition to Clause 32 of the General Conditions of Contract (Force Majeure), should it become reasonably apparent to the Contractor that due to certain delay or disruption falling within the description set out in Clause 6.12(a) or 6.12(b) below, a batch of Goods will not be delivered by the applicable Deadline Delivery Date as a result of any of the following events, the Contractor shall, as soon as possible, but in any event no later than seven (7) days after the occurrence of the relevant event, issue a written notice to the Government Representative stating in full detail the alleged event triggering the delay or disruption:
- (a) instructions having been issued by the Government Representative requiring compliance with specifications or requirements not already specified in the Contract or in the Technical Specifications or otherwise not pursuant to the Contract; or
  - (b) the Contractor not having received any necessary information or direction from the Government Representative in accordance with the time specified in the Contract or otherwise within a reasonable time; or the Government has taken more than a reasonable period of time or otherwise more than the time specified in the Contract (if any) to notify the Contractor of its decision on whether certain approval or agreement should be given.

- 6.13 Upon receipt of any notice from the Contractor under Clause 6.12 above, the Government Representative will review the alleged event. If the Government Representative in its reasonable opinion considers that (a) there has indeed been such event as mentioned in Clause 6.12(a) or 6.12(b) above, and that (b) such event will cause a batch of Goods not being delivered by the Deadline Delivery Date, the Government Representative will grant to the Contractor the appropriate postponement of any of the dates specified in the Contract (or the Implementation Plan as the case may be). All decisions of the Government shall be binding on the Contractor (save in the case of manifest error). The Contractor shall not be entitled to raise any subsequent objection or protest due to any alleged event falling within Clause 6.12 above if it has not issued any notice concerning such alleged event in accordance with Clause 6.12 above.
- 6.14 Any postponement or change pursuant to Clause 6.11 or 6.13 above or other applicable provisions of this Contract by the Government shall not:
- (a) oblige the Government to pay any additional remuneration or compensation to the Contractor; or
  - (b) release the Contractor from any of its obligations or liabilities or give rise to any waiver or estoppel in relation to any of its obligations or liabilities; or
  - (c) give rise to any other obligation or liability on the part of the Government.

## **7. Licences and Taxes**

- 7.1 Without prejudice to any other provision of the Contract, the Contractor shall apply for and procure the issue of all export, re-export and import licences, certification, certificates, permits and approvals for the performance of the Contractor's obligations as required under the Contract and under all applicable laws and regulations (regardless of the applicable jurisdiction including the Place of Origin) including those mentioned in Clause 3.1(c) of the General Conditions of Contract and including those specified in the Special Conditions of Contract (if any). The Contractor shall ensure that all of them shall remain valid and subsisting throughout the Contract Period and shall comply with all conditions stated therein, and shall renew them upon expiry any time in the Contract Period. All costs and duties payable arising from the application and issuance shall be borne by the Contractor ("Licence Costs").

- 7.2 The Contractor shall at its own costs and expenses pay for all taxation, duties and imposts of whatever nature which the Contractor may incur in performing the Contract or in respect of any Contract Price receivable or otherwise which may arise from the export of the Goods, regardless of the jurisdiction which imposes such taxation, duties or imposts.

## **8. Inspection Testing and Acceptance**

- 8.1 Each batch of Goods to be delivered to the Government shall be subject to such inspection and/or tests as specified in the Contract (including those set out in the Special Conditions of Contract (if any)) and such other inspection and/or tests as the Government considers appropriate. Depending on the stipulations of the Special Conditions of Contract, inspection and/or tests of the Goods may either be done by the Contractor (in the presence of the Government Representative and if the Government Representative considers appropriate, also with the Government Representative's participation), and/or the Government (with the assistance of the Contractor), 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), and/or such other person as specified in the Special Conditions of Contract. All costs incurred by the Contractor (including those for the appointment of the Independent Accredited Laboratory) 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. Without prejudice to the generality of the foregoing, any inspection and/or tests of the Goods may relate to either a finished product or whilst still in the process of manufacture at the Manufacturing Plant. In addition, the Government may conduct an inspection upon a batch of Goods is delivered to the Location(s). All inspections referred to in this Clause 8.1 and in the Special Conditions of Contract shall be known as "Inspections". All tests referred to in this Clause 8.1, and in the Special Conditions of Contract shall be known as "Acceptance Tests". The Goods must successfully pass all Inspections and Acceptance Tests as one of the conditions before the Acceptance Note for the Goods will be issued under Clause 9.1(a) of the General Conditions of Contract. By default, unless otherwise waived by the Government, all quantities of all Items within each batch of the Goods shall have to pass all Inspections and Acceptance Tests unless otherwise expressly specified in the Special Conditions of Contract that only a sample shall be taken from a batch of Goods for such purposes.

- 8.2 No failure by the Government to make a complaint at any time of any Inspections or Acceptance Tests, and no approval or consent or omission

or waiver in relation to any matter given during or after such Inspections or Acceptance Tests shall constitute an acceptance of a batch of Goods (unless and until an Acceptance Note has been issued in respect of such Goods). The Government reserves all its rights to reject the Goods whether under the provisions of the Contract, in law or otherwise.

## **9. Acceptance**

9.1 A batch of Goods delivered to the Government shall not be regarded to have been accepted by the Government unless and until the earlier of:

- (a) the date on which the Government Representative or the Receiving Officer serves on the Contractor in respect of such batch of Goods a written notice to the effect that the Government has accepted the batch of Goods (“Acceptance Note”) whether or not subject to any qualifications provided that such Acceptance Note will only be issued if all of the conditions specified in Clause 9.2 below are fulfilled (save and to the extent expressly waived or deferred by the Government); or
- (b) provided that the Goods are not required to be submitted to any Acceptance Tests under the Contract and that there is an express statement in the Special Conditions of Contract that the Goods may be accepted in the manner specified in this Clause 9.1(b), a period of one (1) month has expired from the date of a receipt issued under Clause 6.8 of the General Conditions of Contract in respect of such batch of Goods and such batch of Goods or any part thereof has not been rejected by the Government during the afore-said period of one (1) month.

9.2 In relation to each batch of Goods, (a) upon that batch of Goods passing all Inspections, and all Acceptance Tests (where stated to be applicable in the Contract); (b) upon that batch of Goods complying with all of the Technical Specifications, the specifications set out in the particulars of the Goods and all product literature attached thereto (collectively, “Overall Specifications”) and all of the Warranties; (c) upon the successful delivery of the Goods to the Location(s) as specified in that Order in accordance with all requirements of the Contract and the Order by the Deadline Delivery Date; (d) upon fulfilment of such other conditions as specified in the Special Conditions of Contract; (e) upon any activity as stipulated in the Special Conditions of Contract which is required to be completed before acceptance having been completed; and (f) upon due and punctual completion by the Contractor of all obligations which are due to be performed by the Contractor, the Government will issue an acceptance note in respect of that batch of Goods (“Acceptance Note”). Where there is more than one batch of



Goods and that Clause 9.1(b) above does not apply, each batch of Goods shall only be accepted through the Acceptance Note applicable to that batch. Unless otherwise specified in the Special Conditions of Contract, no individual Acceptance Note will be issued in respect of an individual Item within a batch of Goods. Any Acceptance Note to be issued must relate to the entire batch and all quantities of all Items comprised in that batch and that therefore the conditions specified in this Clause 9.2 must be fulfilled by all such quantities of all Items within a batch of Goods before an Acceptance Note will be issued in respect of that batch of Goods.

- 9.3 Where the Government refrains from issuing the Acceptance Note under Clause 9.1(a) above, but the Government does not issue any Rejection Notice under Clause 10.1 of the General Conditions of Contract, this Clause 9.3 shall apply. The Contractor shall comply with all such instructions which may be given by the Government in writing to the Contractor specifying all the work which is required to be done by the Contractor before such Acceptance Note may be issued. No Acceptance Note may be issued until such work is completed to the Government's satisfaction (save to the extent waived by the Government). Alternatively, the Government may, but is not obliged to, issue a qualified Acceptance Note noting the outstanding work to be done. Upon such qualified Acceptance Note, the Contractor shall complete all such outstanding work within such deadline stipulated by the Government.
- 9.4 Throughout the Contract, references to "acceptance of a batch of Goods" shall mean the acceptance under Clause 9.1(a) above or if Clause 9.1(b) is expressly stated to be applicable in the Special Conditions of Contract, under Clause 9.1(b) above.

## **10. Rejections**

- 10.1 Without prejudice to the other rights and claims of the Government, where any quantity of any Item within a batch of Goods (or a sample taken from such batch, if and to the extent only a sample is required to be subject to an Inspection or Acceptance Test as specified in the Special Conditions of Contract (if any)) fails to commence or pass or complete any of the Inspections and/or any of the Acceptance Tests, or is in breach of any of the Overall Specifications, or any of the Warranties ("faulty unit(s)"), the Government may by notice in writing signed by the Government Representative ("Rejection Notice") reject the entire batch of Goods ("faulty batch").
- 10.2 Reference to the failure of any quantity of any Item within a batch of Goods (or a sample taken from such batch) to commence or pass or

complete, any of the Inspections or any of the Acceptance Tests shall include any one of the following failures:

- (a) failure of any quantity of any Item within a batch of Goods (or a sample taken from such batch) to comply with any requirement of the Overall Specifications or any of the Warranties or otherwise any requirement of the Contract as shown in the results of such Inspection or Acceptance Test; or
- (b) failure of any quantity of any Item within a batch of Goods (or a sample taken from such batch) to pass any such Acceptance Test or Inspection in the manner specified in the Special Conditions of Contract; or
- (c) failure of any quantity of any Item within a batch of Goods (or a sample taken from such batch) to satisfy any testing criteria or fulfil any expected result specified in the test plan approved by the Government for any such Inspection or Acceptance Test; or
- (d) failure of any quantity of any Item within a batch of Goods (or a sample taken from such batch) to pass an Inspection any time within one (1) month after the date of a receipt issued under Clause 6.8 of the General Conditions of Contract in respect of a faulty batch which has been delivered; or
- (e) the Contractor's failure to commence (or do all things to enable the commencement of) an Inspection and/or any of the Acceptance Tests by or at the time as stated in the Contract (whether in the Implementation Timetable or in other part of the Special Conditions of Contract); or
- (f) the Contractor's failure to complete (or do all things to enable the completion of) an Inspection and/or any of the Acceptance Tests by or at the time as stated in the Contract (whether in the Implementation Timetable or in other part of the Special Conditions of Contract); or
- (g) the Contractor's failure to provide any duly certified test certificate or laboratory test report in respect of any part of the Acceptance Tests by the time as required in the Contract (whether in the Implementation Timetable or in other part of the Special Conditions of Contract); or else that such certificate or report has been issued but it states that any quantity of any Item from a batch of Goods or a sample taken therefrom fails any of the Acceptance Tests.

10.3 Upon the issuance of a Rejection Notice under Clause 10.1 above, without prejudice to other rights and claims of the Government, the Government may exercise all or any one or more of the following rights (and none of them is mutually exclusive of any of the other of them):

- (a) reject the entire faulty batch;
- (b) require the Contractor to remove the entire faulty batch within the period prescribed in the Rejection Notice;
- (c) require the Contractor to promptly repair the entire faulty batch or at the election of the Government just the faulty unit(s) and procure each unit of each Item in the entire faulty batch (or each faulty unit as the case may be) to pass all or any part of the Inspections and all or any part of the Acceptance Tests not later than a deadline date, all of which requirements and the extent of such requirements shall be as specified by the Government in the Rejection Notice;
- (d) require the Contractor to promptly replace the entire faulty batch, or at the election of the Government just the faulty unit(s) specified in the Rejection Notice, and deliver to the Government the replacement batch or unit(s) of Goods (as the case may be), and procure each unit of each Item in the replacement batch or replacement unit(s) (as the case may be) to pass all or any part of the Inspections and all or any part of the Acceptance Tests, not later than a deadline date, all of which requirements and the extent of such requirements shall be as specified by the Government in the Rejection Notice;
- (e) reject all other batches of Goods which have been Ordered or otherwise scheduled to be delivered under the Contract but not yet accepted;
- (f) refrain from purchasing any Goods which have not been accepted or where applicable, issuing any Order for any of Goods; and the Government's obligation under Clause 4.1 or 4.2 (including the caps as mentioned therein) of the General Conditions of Contract (as the case may be) shall no longer apply regardless of whether the Government also terminates the Contract or partially terminates the Contract under Sub-clause (i) below;
- (g) obtain replacement goods and services as covered by the price quotation of the Goods (including all transportation and insurance) whether for the faulty unit(s) or for the entire batch (as the Government may determine) from a third party as the Government may deem fit in which event the Contractor shall be

responsible for all losses, liabilities, expenses and costs incurred by the Government including without limitation all of the following: (i) any excess cost incurred by the Government for procuring such replacement goods and services; (ii) the costs of all stop-gap measures taken by the Government whilst awaiting the delivery of the replacement goods and/or services; (iii) the extra operation and maintenance costs for operating and maintaining the original property which the faulty unit(s) or faulty batch was supposed to replace; and (iv) all administrative and legal cost incurred by the Government for procuring the replacement goods and services from a third party and for arranging any stop-gap measures;

- (h) charge and demand the payment of liquidated damages for delay up to the date of actual acceptance by the Government of the replacement Goods which is eventually supplied by the Contractor, and which replaces the faulty units or faulty batch (as the case may be) covered in the Rejection Notice; and/or
- (i) terminate the entire Contract pursuant to Clause 19.1 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 19.4 of the General Conditions of Contract depending on the election of the Government.

10.4 If the Government rejects any Goods, the Contractor shall forthwith refund to the Government all Contract Price and all other monies, if any, previously paid by the Government to the Contractor in respect of the rejected Goods plus interest to accrue at the rate specified in Clause 14.13 of the General Conditions of Contract during the period from the date of payment by the Government to the date of refund by the Contractor.

10.5 If the Contractor fails to remove any Goods in accordance with a requirement made under Clause 10.3(b) above, the Government may dispose of the Goods as it sees fit. The Government shall not be liable to the Contractor (in contract, tort or otherwise) in respect of such disposal and the Contractor shall pay the Government all costs and expenses incurred by the Government for the disposal.

10.6 If the right under Clause 10.3(c) or (d) above is exercised, but the repaired or replacement Goods is still found to be in breach of any of the Overall Specifications, or the Warranties, or still fails any of the Inspections or Acceptance Tests, or the Contractor fails to provide the replacement Goods or repair the faulty units or faulty batch (as the case may be), within the time specified in the Rejection Notice or such other time as agreed by the Government, the Government shall be entitled to exercise all or any one or more of the rights set out in Clause 10.3 above

by issuing another Rejection Notice. Where the Contractor delivers the same faulty units or faulty batch which has been rejected and holds it out as replacement Goods or repaired Goods, it shall be deemed to have failed to provide the replacement Goods or repair the faulty units or faulty batch (as the case may be).

- 10.7 If there is any dispute between the Government and the Contractor concerning whether faulty unit(s) or faulty batch complies with any of the Overall Specifications or any Warranties or any other requirement of the Contract or concerning the results of any Inspections or Acceptance Tests (“Dispute”), the Government may, but is not obliged to, appoint a surveyor or an expert or an Independent Accredited Laboratory to be nominated by the Government or otherwise whose nomination is agreed to by the Government in the appropriate field to investigate into and/or establish the validity of the results of any Inspections and/or Acceptance Tests and/or re-conduct any Inspections and/or Acceptance Tests. The surveyor or expert or Independent Accredited Laboratory shall act as an expert but not an arbitrator and the decision of the expert shall be binding on both Parties. The costs of the appointment shall be borne by the losing party of the Dispute. In the event that for any reason the Government does not elect to make any appointment under this Clause 10.7, any dispute shall be resolved in accordance with Clause 44.2 of the General Conditions of Contract (or other provision which replaces or supplements it, if any).
- 10.8 Risk in all Goods rejected or returned by the Government to the Contractor remains with the Contractor (irrespective of the location of the Goods) and they shall be returned to the Contractor at the Contractor’s expense.
- 10.9 Time shall be of the essence of this Contract. Without prejudice to the rights of the Government under Clauses 10.1 and 10.3 above, a batch of Goods may be rejected by the Government by giving a notice to the Contractor to this effect (“Non-delivery Rejection Notice”) if the Contractor fails to deliver the entire quantity of the batch of Goods to all of the applicable Location(s) for that batch of Goods by the Deadline Delivery Date for that batch of Goods or otherwise fails to do so in accordance with the requirements of the Contract and where applicable the Order (“Delayed Goods”).

10.10 Upon the issuance of a Non-delivery Rejection Notice under Clause 10.9 above, without prejudice to other rights and claims of the Government, the Government may exercise all or any one or more of the following rights (and none of them is mutually exclusive of any of the other of them (unless otherwise expressly stated in the Special Conditions of Contract)):

- (a) on top of the rejection of the Delayed Goods, reject also all other batches of Goods which have been Ordered or otherwise scheduled to be delivered under the Contract but not yet accepted through the issue of the Acceptance Note; and/or
- (b) exercise all or any one or more of the rights specified in Clauses 10.3(e) to (i) above (excluding Clause 10.3(h)) in such order as the Government deems fit.

10.11 In lieu of issuance of a Non-delivery Rejection Notice under Clause 10.9 above, without prejudice to other rights and claims of the Government, where the Contractor does eventually deliver the Delayed Goods to the Government, and that the Government does choose to accept the Delayed Goods, and where liquidated damages for delay is provided for in the Special Conditions of Contract, the Contractor shall pay liquidated damages for the delay as stated in the Special Conditions of Contract (where applicable).

## **11. Title and Risk**

11.1 All title, beneficial ownership, interest to, in and of the Goods in respect of which an Acceptance Note has been issued, shall be and shall remain the exclusive property of and shall vest in the Government absolutely forthwith from the issue of such Acceptance Note free and clear of all liens, claims, mortgages, charges, and any other form of encumbrance, contractual rights, and third party rights or interest of whatsoever nature.

11.2 All title, beneficial ownership, interest to, in and of the Goods in respect of which acceptance is under Clause 9.1(b) of the General Conditions of Contract, shall be and shall remain the exclusive property of and shall vest in the Government absolutely forthwith from the date of delivery to the Location(s) free and clear of all liens, claims, mortgages, charges, and any other form of encumbrance, contractual rights, and third party rights or interest of whatsoever nature.

11.3 All risks to and arising from the Goods shall remain with the Contractor, and shall not pass to the Government unless and until acceptance of such Goods.

## **12. Insurance for the Goods**

The Contractor shall take out adequate property insurance in respect of the Goods covering its full value whilst it is in transit and after it has arrived in Hong Kong unless and until acceptance under Clause 9.1 of the General Conditions of Contract. Where in relation to any Goods, the risks mentioned in Clause 11.3 of the General Conditions of Contract still remain with the Contractor as provided for under that Clause, under no circumstances whatsoever will the Government be liable or responsible for any loss or destruction of such Goods or any other property or death or personal injury of any person unless (a) any such loss or destruction of the Goods or any other property is caused after the Goods has been delivered to the Location(s) and that such loss or destruction is due to the Government's gross negligence; or (b) unless any personal injury or death of any person is caused by the negligence (as defined in the Control of Exemption Clauses Ordinance, Chapter 71 of the Laws of Hong Kong) of the Government.

## **13. Rejection after Acceptance**

13.1 Notwithstanding the acceptance of a batch of Goods or any payment of the Contract Price for the batch of Goods, the Government shall be entitled to, any time within the first twelve (12) months or a longer period specified in the Special Conditions of Contract after acceptance, reject any unit of any Item of the batch of Goods ("faulty unit(s)") or the entire batch of the Goods to which the faulty unit(s) belongs ("faulty batch") by giving a notice to this effect to the Contractor ("Rejection Notice") if:

- (a) faulty unit(s) are in breach of any of the Warranties; and
- (b) (1) such breach is not reasonably discoverable in the Inspections and where applicable Acceptance Tests; or (2) even the breach was discovered, the Contractor has given assurance or representation to the Government prior to the Government's acceptance of the faulty batch that the defect or non-conformity causing the breach of the relevant Warrant(ies) has been cured; and
- (c) any change in the condition of the faulty unit(s) or faulty batch is only caused by the defect or non-conformity constituting the breach of any of the Warranties; and other than that, there is no other substantial change in the condition of the faulty unit(s) or faulty batch.

- 13.2 Upon the issuance of a rejection notice pursuant to Clause 13.1(a) above, without prejudice to the other rights and claims of the Government, the Government may exercise all or any one or more of the rights as specified in Clauses 10.3 to 10.8 of the General Conditions of Contract (*mutatis mutandis*).

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

- 14.1 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.
- 14.2 Where the payment timetable stated in the Price Schedule provides that the Contract Price shall be payable in one lump sum, unless otherwise agreed in writing by the Government, in respect of any batch of Goods delivered to the Government, the Government shall not have any obligation to pay the Contractor the Contract Price for such batch of Goods unless and until the batch of Goods has been accepted by the Government. In accordance with the aforesaid requirement:
- (a) Where acceptance of a batch of the Goods is required to be through the issue of an Acceptance Note and that an Acceptance Note has indeed been issued in respect of the batch of the Goods, the Government shall pay the Contractor the Contract Price for the batch of Goods within thirty (30) days after the date of Acceptance Note in respect of such batch of Goods or within thirty (30) days after the receipt of the invoice from the Contractor (which has included all necessary deductions) (whichever is the later).
  - (b) If acceptance of a batch of the Goods can be under Clause 9.1(b) of the General Conditions of Contract as stated in the Special Conditions of Contract, and provided that the Government has not issued any Rejection Notice during that one-month period in respect of that batch of Goods or earlier, the Government shall pay the Contractor the Contract Price for that batch of Goods within thirty (30) days after the expiry of the one-month period as mentioned in Clause 9.1(b) of the General Conditions of Contract or within thirty (30) days after the receipt of the invoice from the Contractor (which has included all necessary deductions) (whichever is the later).



- 14.3 Where the payment timetable stated in the Price Schedule provides that the Contract Price for the batch of Goods (where there is just one batch) or each batch of Goods or all batches of Goods (as the case may be) shall be payable in instalments, the Government shall pay each instalment of the Contract Price for such batch(es) of Goods within thirty (30) days after the due date of the instalment as stated in the payment timetable or within thirty (30) days after the receipt of the invoice from the Contractor (which has included all necessary deductions, set-off and withholding) (whichever is the later). Where there is more than one batch of Goods, unless otherwise expressly specified, the payment schedule as stated in the Price Schedule shall provide for separate payment timetable for each batch of Goods and each instalment amount (as a percentage of the Contract Price) shall be calculated based on the Contract Price for that batch of Goods only. For the avoidance of doubt, unless otherwise specified in the Special Conditions of Contract, no separate payment shall be made for any individual quantity of any Item within a batch. The milestone for each instalment payment must be achieved by all Item(s) and all quantities of such Item(s) covered by a batch before that instalment of the Contract Price for that batch is payable.
- 14.4 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. All things done by the Contractor and all things supplied by the Contractor shall be deemed as things done and supplied within the scope of the Contract. No additional money shall be payable by the Government in the absence of any express provision specifically for the relevant subject matter.
- 14.5 Without prejudice to Clause 14.4 above, the Contract Price is inclusive of and deemed to be inclusive of all charges including the costs of packaging, packing, delivery, transportation, shipping, carriage, insurance, loading and unloading of the Goods and inland freight, broker's fees, custom house's fees, duties, imposts and levies, and all Licence Costs referred to in Clause 7.1 of the General Conditions of Contract, and all other costs and charges for the supply and delivery of the Goods to the Location(s). 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).

- 14.6 Notwithstanding Clause 14.5 above, where the Goods are to be delivered on terms other than F.I.S., the Contract Price shall exclude the charges for all those activities which shall be the responsibility of the Government as buyer depending on the applicable Incoterms of the International Chamber of Commerce which are stated to be applicable in the Special Conditions of Contract.
- 14.7 Where and to the extent this Contract constitutes a standing offer to supply the Goods 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.
- 14.8 The Contractor shall invoice the Government for any payment of the Contract Price. In respect of each batch of Goods which has been accepted and that the Contract Price is payable in the manner specified in Clause 14.2 above, the Contractor shall deliver to the Government at the Location(s) or at such other address specified in the Special Conditions of Contract or such other address stipulated by the Government any time by notice in writing, an invoice setting out the Order number of the delivery (where an Order has been issued), the particulars of the batch of Goods delivered (including the quantity and unit price), the amount of Contract Price payable for the Goods 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. Where the Location(s) are multiple Government departments and/or bureaux, or multiple locations within the same Government department or bureau, the invoice for a batch of Goods delivered to a Government department or bureau or a Location shall be issued and delivered to the Receiving Officer of that Government department or bureau or the Receiving Officer of the Location (unless otherwise specified in the Special Conditions of Contract).
- 14.9 In the case where the Contract Price is payable in the manner specified in Clause 14.3 above, an invoice for an instalment of the Contract Price shall not be issued unless (a) the milestone as specified in the payment timetable in the Price Schedule has been achieved as confirmed by the Government in writing; and (b) the invoice must have taken into account all applicable deductions, set-off and withholding. Unless otherwise specified in the Special Conditions of Contract, an invoice for an instalment should be issued to the postal address of the relevant user department specified in (1) of the Appendix to the Terms of Tender.

14.10 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.

14.11 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.

14.12 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 14, or (b) 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.

14.13 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 in year of 365 days (“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).

- 14.14 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.

## **15. Warranty Services for the Goods**

- 15.1 Without prejudice to the rights and claims of the Government arising from any breach of the Warranties, the Contractor shall, for a period of twelve (12) months after the date of the Government’s acceptance of any Goods or a longer period specified in the Special Conditions of Contract or a longer period committed by the Contractor in its Tender (where applicable) (“Warranty Period”) provide the warranty and after-sale services as specified in this Clause 15 and where applicable any other provisions elsewhere in the Contract including without limitation the Special Conditions of Contract and to the extent not inconsistent also in the Contractor’s Tender for the Contract free of charge to the Government (“Warranty Services”).
- 15.2 In respect of a batch of Goods accepted by the Government, without prejudice to all other rights and claims of the Government, the Contractor shall, from time to time upon the demand of the Government during the Warranty Period, make good and remedy (whether by repair or replacement as the Government may elect) to the reasonable satisfaction of the Government all defects or mal-functions or deficiencies in that batch of Goods (whether arising from defective design, materials, workmanship or otherwise) discovered at any time during the Warranty Period and notified by the Government to the Contractor (“Defective Warranty Goods”). In performing the Warranty Services, the Contractor shall supply all brand new replacement parts and labour at its cost. The Contractor shall promptly make good and remedy all defects, malfunctions and deficiencies (whether by repair or

replacement with brand new Goods or parts of such Goods as the Government may elect) to the Government's reasonable satisfaction no later than the time requirements specified in the Special Conditions of Contract or in the absence of which no later than 48 hours after the Defective Warranty Goods are returned to the service centre or within such other time as the parties may agree. In lieu of returning the Defective Warranty Goods to the service centre, the Warranty Services may be effected on-site at the Location or another location at which the Defective Warranty Goods are located. In doing so the Contractor shall send competent engineers on-site in compliance with all such response time and resolution time as stated in the Special Conditions of Contract.

- 15.3 If the Contractor fails to make good or remedy any defect or malfunction or deficiency in accordance with Clause 15.2 above, the Government may, after notifying the Contractor of its intention, arrange to make good and remedy the defects or malfunction or deficiency by repair or replacement at the Contractor's risk and expense. All costs incurred by the Government arising from such repair or replacement (including cost of replacement parts and units) shall be borne by the Contractor without prejudice to any other rights which the Government may have against the Contractor.
- 15.4 In the event that the Contractor is required under the Contract to replace any Defective Warranty Goods but it does not at the same time call for the return of the Defective Warranty Goods, no responsibility for the Defective Warranty Goods shall rest upon the Government, and the Government may dispose of them after a reasonable time in whatever manner as it sees fit. The Contractor shall compensate the Government all costs and expenses incurred in connection with the disposal. The Government shall not be liable to the Contractor (in contract, tort or otherwise) in respect of such disposal.
- 15.5 The Contractor shall be liable to perform all Warranty Services regardless of whether or not the Goods, or any part thereof, were manufactured by it. If it is not the Manufacturer, without prejudice to its obligations under this Contract, at the request of the Government or where the Contractor cannot perform the Warranty Services on its own, the Contractor shall ensure that the Manufacturer or otherwise the authorised agent as specified by the Contractor for this purpose in the Contract provides the same Warranty Services upon the demand of the Government as if references to the Contractor mean such manufacturer or authorised agent.
- 15.6 Where stated to be required in the Special Conditions of Contract, the Contractor shall ensure that each batch of Goods complies with certain minimum availability level as specified in the Special Conditions of Contract. There shall be an extension of the Warranty Period for that

batch of Goods for non-compliance with the availability level as stated in the Special Conditions of Contract. Upon such extension, the Contractor shall continue to provide the free of charge Warranty Services for the relevant batch of Goods throughout the extension.

- 15.7 Where stated to be required in the Special Conditions of Contract, the Contractor shall provide maintenance services for the Goods on the terms as set out in the Special Conditions of Contract.

## **16. Contract Deposit**

- 16.1 The Contractor shall pay the Contract Deposit in accordance with Paragraph 23 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 23 (in whole or in part)).

- 16.2 If the Contractor fails to comply with Clause 16.1 above, the Government shall have the right to terminate the entire Contract pursuant to Clause 19.1 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 19.4 of the General Conditions of Contract depending on the election of the Government.

- 16.3 Without prejudice to Clause 16.2 above, if the Contractor fails to comply with Clause 16.1 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 Contract Deposit to serve as the Contract Deposit.

- 16.4 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.

- 16.5 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.
- 16.6 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 16.6, the further banker's guarantee must comply with the requirements in Paragraphs 23.3 (a) to (c) of the Terms of Tender.
- 16.7 Where the total Contract Price payable for all Goods to be procured under the Contract is likely to exceed the original Total Estimated Goods 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 the percentage specified in Clause 16.1 above of the revised Total Estimated Goods Price (or of another applicable amount as specified in the Special Conditions of Contract). The additional amount shall be confirmed by the Government in the notice.
- 16.8 If a notice is issued by the Government under Clause 16.7 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 23.3 (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.
- 16.9 If the Contractor fails to comply with Clause 16.6, 16.7 or 16.8 above, the Government shall have the right to terminate the entire Contract pursuant to Clause 19.1 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 19.4 of the General Conditions of Contract depending on the election of the Government.

16.10 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".)

16.11 Where by the time of 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.



## **17. 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.

## **18. Liability and Indemnities**

18.1 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).

18.2 Without prejudice to any other provision of the Contract, the Contractor shall indemnify each of the Government, its assigns, successors-in-title, and its employees, agents and authorised users (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) 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;
- (v) 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;
- (vi) any loss, damage, injury or death referred to in Clause 18.1 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
- (vii) 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.

- 18.3 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.

- 18.4 For the purposes of this Clause 18, “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).
- 18.5 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.

## **19. Termination**

19.1 In the event that:

- (a) the Contractor is in breach of any provision of the Contract which in the opinion of the Government is not capable of remedy;
- (b) 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;
- (c) any Warranty is incorrect, inaccurate, incomplete or misleading;
- (d) the Contractor has made a material misrepresentation (including submission of false statement or inaccurate information) during the tendering process of the Contract;
- (e) 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;
- (f) the Contractor abandons the Contract in whole or in part;
- (g) 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

(h) 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 10.3(i) (Rejection);
- (ii) Clause 10.10(b) (Rejection);
- (iii) Clause 13.2 (Rejection after Acceptance);
- (iv) Clause 16.2 or 16.9 (Contract Deposit);
- (v) Clause 22.3(b) (Intellectual Property Rights Indemnities);
- (vi) Clause 25.3 (Probity);
- (vii) Clause 32.3 (Force Majeure);
- (viii) Clause 33 (Illegal Workers);
- (ix) Clause 40.4 (Admission to Government Premises); or
- (x) Paragraph 32.3(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.

19.2 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.
- 19.3 Separate from the event mentioned in Clause 19.1(h)(vii) above and Clause 32.3 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 32.7 of the General Conditions of Contract.
- 19.4 Instead of terminating the Contract in relation to all batches of Goods pursuant to Clause 19.1 or 19.2 or 19.3 above, the Government may elect, but is not obliged, to terminate the Contract in relation to one or more batches of Goods only ("Partial Termination"). The batches of Goods to which the Partial Termination relates are referred to as "Terminated Goods". The Terminated Goods may cover all or any batches of Goods which have not been accepted up to time of termination.
- 19.5 Each of the grounds entitling the Government to terminate the Contract as specified in Clauses 19.1 to 19.3 above and in each Sub-clause of Clauses 19.1 and 19.2 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.

## **20. Termination Consequences**

- 20.1 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;
    - (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 2, 3, 7, 11, 13, 14.10 to 14.13, 15 to 46 of the General Conditions of Contract, the

Interpretation, the Interpretation (Supplement) and such other provisions as specified in the Special Conditions of Contract); and

- (iv) the obligations of the Contractor in respect of a batch of Goods which has not been accepted before Termination but also have not been rejected by the Government before or upon Termination; and the Contractor shall continue to perform all obligations in full accordance with all applicable provisions of the Contract (but not just those provisions mentioned in Sub-clause (iii) above);
- (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 18.2 of the General Conditions of Contract, in the event of the Termination under Clause 19.1 or 19.2 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) the price payable by the Government for procuring goods and services and/or spare parts under separate contract(s) up to the maximum quantities which would have been procurable under this Contract in excess of the price payable for such Goods and/or such services and/or such spare parts under this Contract; and (ii) in the case of the warranty repair and after-sales services during an uncompleted part of the Warranty Period after the Termination, the Contractor shall be liable to compensate the Government the full cost incurred by the Government for procuring such services from another contractor (or from within the Government); (iii) the costs of any stop-gap measures implemented by the Government pending the procurement of the replacement goods and services; (iv) all administrative and legal costs incurred in (1) monitoring the Contract over any delay prior to the Termination; (2) effecting the Termination; and (3) procuring replacement goods and services and where applicable stop-gap measures as mentioned in (i) to (iii) above; and (v) any difference between those costs arising from maintaining and supporting the existing property with which the Goods were intended to replace; interim and/or final statements of these

losses, damage, liabilities, costs and expenses may be issued from time to time after the Termination by the Government to the Contractor whereupon the Contractor shall be liable to pay such amount as demanded in each of these statements within seven (7) days; and (vi) for the avoidance of doubt, for the determination of the losses as mentioned in sub-clause (i) above, all amounts and costs incurred by the Government shall be taken into account regardless of (1) whether the relevant contractors and/or suppliers are appointed through open tendering or restricted tendering or through direct appointment; (2) whether one single or multiple contractors or suppliers have been appointed for the replacement services and/or goods; (3) whether an in-house team is deployed alone or in conjunction with such contractors and suppliers for performing the replacement services; (4) the difference of manufacturer or model or any specifications of the replacement goods provided they serve the same or similar functions as the Goods; and (5) the time taken for the procurement of the replacement goods and services;

- (d) the Contractor shall forthwith refund to the Government without any deduction all amounts of the Contract Price previously paid under the Contract for the Goods plus interest to accrue at the rate specified in Clause 14.13 of the General Conditions of Contract from the date of payment by the Government to the actual date of complete refund by the Contractor;
- (e) for any batch of Goods which has been accepted by the Government prior to the Termination (or even after Termination under the circumstances mentioned in Clause 20.1(a)(iv) above) and which Contract Price has not been paid as at Termination, the payment for such batch of Goods shall be subject to all deductions, set-off and withholding of all and any amounts due and payable by the Contractor to the Government; and the Government will only pay any balance thereof without interest after all deductions, set-off and withholding have been made and after acceptance of such batch of Goods;
- (f) the Contractor shall remove those Goods which have been rejected by the Government (if any) from the Government's premises at the Contractor's own cost and expenses without delay;
- (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;

- (h) 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; and
- (i) the Contractor shall provide all such assistance as the Government may request from time to time request after the Termination to facilitate an orderly and effective handover of the work already completed under the Contract to the Government or another contractor to be appointed by the Government. Where some Goods have already been accepted, to provide assistance to the Government or its contractor in relation to the installation operation or maintenance of the Goods.

20.2 Upon a Partial Termination pursuant to Clause 19.4 of the General Conditions of Contract:

- (a) the provisions in the Contract to the extent they apply or concern or relate to the Terminated Goods 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 20.1 above (apart from Clause 20.1(a) above, and in the case of Partial Termination under the circumstances mentioned in Clause 19.3 of the General Conditions of Contract, also apart from Clause 20.1(c) above) shall apply save that references to "Termination" shall mean "Partial Termination"; references to "Goods" shall mean the "Terminated Goods".



## **21. Intellectual Property Rights**

### *Warranties and Representations*

21.1 The Contractor hereby warrants and represents that:

- (a) the Goods and the Deliverables to be supplied under the Contract, the process of their manufacture or preparation, and any operation, possession, distribution, export, import or sale by the Contractor of such Goods and Deliverables under the Contract, do not infringe the Intellectual Property Rights of any person.
- (b) If and to the extent licence is required for the Contractor to sell the Goods, the Contractor has a valid and subsisting licence granted from the person who has the legal power to grant the same whether it be the Manufacturer (or its authorised agent or any other rightful person) in its favour which entitles the Contractor to sell and supply the Goods on the terms and conditions set out in the Contract.
- (c) The possession, import, purchase, usage and operation in the manner and for the purposes contemplated by the Contract of the Goods and the Deliverables by the Government, its authorised users, assigns, and successors-in-title of the Goods and the Deliverables will not infringe the Intellectual Property Rights of any person.
- (d) The Contractor is not aware of and has no reason to believe that in relation to the Goods or Deliverables (i) there is any judgment or order or ruling or decision from any court of competent jurisdiction or from any arbitration body that such Goods or Deliverables infringe the Intellectual Property Rights of any person; or (ii) any claims, actions or proceedings or arbitration have been initiated or threatened against it or the Manufacturer or a sub-contractor of the Contractor for infringement of any Intellectual Property Rights of any person; or (iii) any agreement having been entered into to settle any such claims, actions, proceedings or arbitration. Each of the events mentioned in (i) to (iii) above shall be referred to as “Infringement Event”.

### *Notification*

21.2 Within seven (7) days of the first written request from the Government, the Contractor shall provide all such documentary evidence to the satisfaction of the Government to prove compliance with the Warranties specified in Clause 21.1 above.

- 21.3 In the event that there is any Infringement Event (as defined in Clause 21.1(d) above) which has not already been notified to the Government during the tendering stage under Paragraph 20 of the Terms of Tender, without prejudice to the rights and claims of the Government, the Contractor shall immediately notify the Government concerning such Infringement Event, and continue to update the Government concerning the progress and status thereof. In addition, the Contractor shall provide all such information and documents to the Government concerning such Infringement Event as the Government may request.

*Licence to use the Goods and the Deliverables*

- 21.4 Without prejudice to the Contractor's obligations under the Contract including this Clause 21 and Clause 24 of the General Conditions of Contract, unless and to the extent otherwise specified in the Special Conditions of Contract, the Government does not claim ownership of any Intellectual Property Rights which may subsist in the Goods or any of the Deliverables (if any).

- 21.5 The Contractor hereby grants, or in case it is not empowered to do so, shall at its own cost and expense procure that there will be granted to the Government and each of its authorised users, assigns and successors-in-title (collectively "licensees" and each a "licensee") the licences which are non-exclusive (except that ownership and rights as an owner including right to possession shall be on an exclusive basis), royalty-free sub-licensable, irrevocable, transferable, effective throughout the world and throughout the Licence Term for all purposes as stated in the Contract and as and how the licensee sees fit:

- (a) to use, make copies, modify and make adaptations or customisations of the Deliverables or any part thereof; and
- (b) to the extent any Intellectual Property Rights subsist in the Goods or in the design of the Goods, to use, possess, distribute, repair, replace and if required as part of the work to be performed by the Contractor under the Contract, modify, adapt or customise, the Goods and any part of the Goods,

(all of the rights mentioned above in Sub-clauses (a) and (b) above and those as mentioned in the provisions of the Special Conditions of Contract supplementing this Clause 21 shall be collectively referred to as "Licensed Rights"; and the licences as provided for in this Clause 21.5 and in the aforesaid provisions of the Special Conditions of Contract shall be collectively referred to as "Licences").

- 21.6 The Contractor hereby undertakes to procure, obtain and produce for inspection by the Government within seven (7) working days upon

request, at its own cost and expense, all proper licences clearances and releases in writing and completion of all other formalities and requirements necessary to ensure that the Licences have been validly and legally granted to each licensee in accordance with Clause 21.5 above.

21.7 Reference to the Licence Term in Clause 21.6 above shall mean

- (a) in the case of the Licence referred to in Clause 21.5(a) above, the full remaining period (as from time to time extended, renewed or revived) during which all or any of the respective Intellectual Property Rights in the Deliverables continue to subsist under all and any applicable laws (including the laws of Hong Kong), counting from the date the relevant Deliverable is created; and
- (b) in the case of the Licence referred to in Clause 21.5(b) above or any other Licence in relation to any other subject matter as specified in the provisions of the Special Conditions of Contract supplementing this Clause 21, the full remaining period (as from time to time extended, renewed or revived) during which all or any of the respective Intellectual Property Rights in the Goods (or such subject matter as specified in the aforesaid provisions of the Special Conditions of Contract) continue to subsist under all and any applicable laws including the laws of Hong Kong, counting from the date the Goods (or the relevant subject matter) are delivered to the Government.

21.8 Apart from the Contract Price, under no circumstances whatsoever shall the Government or any other licensee be liable or responsible to pay to the Contractor or any other person any money (whether on a recurrent or non-recurrent basis) for all or any of the Licences or for the Licensed Rights.

#### *Waiver of Moral Rights*

21.9 The Contractor hereby irrevocably waives and undertakes to procure, at its own costs and expense, all relevant authors of the Deliverables to irrevocably waive all the moral rights therein (whether past, present or future). The waiver shall operate in favour of the Government, its assigns, authorised users and successors-in-title and shall take effect upon creation or delivery to the Government of the relevant Deliverables or the grant of the relevant Licence (as the case may be).

21.10 In the event that for any reason whatsoever a Licence referred to in Clause 21.5 above has not been granted in favour of a licensee, the Contractor shall forthwith, or shall ensure that the licensor(s) who is

capable of granting the Licence will respectively forthwith, upon the first written demand of the Government execute such deed and all other necessary documents under which the Government, its authorised users, successors-in-title and assigns shall be granted such Licence on the terms set out in Clause 21.5 above.

21.11 References to “authorised users” in this Clause 21 and Clause 22 of the General Conditions of Contract and other parts of the Contract shall include, without limitation, customers of or persons receiving services from the Government or other authorised users of the Goods.

## **22. Intellectual Property Rights Indemnities**

22.1 In addition to, and without prejudice to Clause 18.2 of the General Conditions of Contract and the remaining provisions of this Clause 22, the Contractor shall indemnify and keep indemnified each of the Government, its authorised users, employees, agents, assigns, and successors-in-title (collectively “IP Indemnified Parties”) 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 IP 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 IP Indemnified Party or by an IP 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 (a) above incurred or suffered by an IP Indemnified Party in all and any such Claims,

which arise directly or indirectly as a result of or in connection with, or in relation to the infringement or alleged infringement of any Intellectual Property Right of any person by the Contractor or an IP Indemnified Party due to all or any of the following:

- (i) the exercise of the Licensed Rights;
- (ii) the performance by the Contractor of the Contract or the supply of all or any of the Goods or Deliverables in the manner provided for or contemplated under the Contract;

- (iii) the enjoyment or exercise by that IP Indemnified Party of any of its right or powers under the Contract;
- (iv) (whether or not involving any element of fault or negligence on the part of the Contractor) any act, omission or default by the Contractor in the performance of the Contract;
- (v) the breach of any Warranties concerning Intellectual Property Rights (including those set out in Clause 21.1 of the General Conditions of Contract); or
- (vi) any Infringement Event (as defined in Clause 21.1(d) of the General Conditions of Contract).

(Each of the above is an “infringing act” and 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.)

22.2 In the event that there is an infringing act or an alleged infringing act, the Contractor shall as soon as it becomes aware of the same, but in any event within seven (7) days of the first written request of the Government or such longer period as the Government may allow, at its own costs and expenses, without prejudice to any other rights and claims of an IP Indemnified Party (including in particular those under Clauses 18 and 22 of the General Conditions of Contract):

- (a) procure the consent and licence of all relevant persons on such terms to the satisfaction of the Government to permit the infringing act or alleged infringing act, failing which the Government shall have the right, but not the obligation, to procure the same, and any costs incurred by the Government shall be recovered from the Contractor on a full indemnity basis; or
- (b) replace or modify the Goods so as to avoid infringement or alleged infringement of any third party’s Intellectual Property Rights (in which event the Contractor shall compensate the Government for the full amount of any loss and damage sustained or incurred by the Government arising from such replacement or modification) provided always that any suggestion to make any replacement or modification must first be raised by the Government in writing, and then proposed by the Contractor for the Government’s acceptance and be subject to the same Inspections and Acceptance Tests (as the Government may stipulate) and other applicable terms and conditions of the Contract. If the Government does not raise any suggestion or

refuses acceptance in relation to any proposed modification or replacement, the Contractor must seek the consent and licence pursuant to Clause 22.2(a) above.

22.3 Without prejudice to any other rights and claims that the Government may have under the Contract or at law (including without limitation to claim indemnity from the Contractor in light of any Claims against the Government pursuant to Clause 18 of the General Conditions of Contract and/or Clause 22.1 above), where neither Clause 22.2(a) nor 22.2(b) above can be accomplished or elected to be exercised by the Government (in the case of Clause 22.2(b) above),

- (a) the Government may reject all or any Goods (regardless of whether they have been delivered or accepted) (“IP Infringing Goods”); and
- (b) the Government shall have the right to terminate the entire Contract pursuant to Clause 19.1 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 19.4 of the General Conditions of Contract depending on the election of the Government. Upon such rejection and termination, the Contractor shall forthwith refund to the Government with interest, all monies previously paid to the Contractor under the Contract in respect of all IP Infringing Goods. The interest rate mentioned in Clause 14.13 of the General Conditions of Contract will be applied to accrue from the date of payment by the Government to the date of actual refund by the Contractor.

22.4 As and when the Government may require, and regardless of whether all or any of Goods have been delivered and accepted by the Government, the Contractor shall, at its cost, forthwith upon receiving written directions and instructions from time to time of the Government, take all such actions (including initiating or defending a legal action in its name or in such other manner as the Government deems fit), or provide to the Government all such documents or information in the possession or under the control of the Contractor, to cause all and any claims, demands, or actions instituted against the Government and/or the Contractor to be withdrawn, resisted, disputed, counter-claimed, settled or compromised in such manner as the Government may direct.

## **23. Conflict of Interest**

23.1 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.

23.2 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.

23.3 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 23.1 above.



## 24. Confidentiality

24.1 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) where applicable processed by the Goods or transmitted to the Goods or stored in the Goods; or (d) any Deliverable, advice, recommendations, reports or any other materials containing information belonging to the Government or specifically relating to or relevant to the Goods supplied to the Government (collectively “Confidential Information”) in whatever form or media. The restrictions on disclosure contained in this Clause 24.1 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.

24.2 Without prejudice to any other provision of the Contract, the Contractor shall indemnify and keep each of the Government, its assigns successors-in-title and authorised users from and against everything stated in Clauses 18.2(a) and 18.2(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).

24.3 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 24.1 above shall not use, disclose, publish or reproduce, the Confidential Information for any other purposes without the Government's prior written consent.

24.4 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 24.1 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 24 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.

24.5 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.

- 24.6 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).
- 24.7 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 24 and the Official Secrets Ordinance (Chapter 521 of the Laws of Hong Kong).
- 24.8 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 24.
- 24.9 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 24 and/or specific performance ensuring the compliance of this Clause 24 in light of any threatened or actual breach of this Clause 24, without prejudice to its other rights and claims including those available under the Contract or at law arising from such breach.
- 24.10 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.
- 24.11 The Government may request the Contractor in writing at any time that any Confidential Information disclosed pursuant to the terms of this Clause 24 and any copies, analyses, compilations and extracts thereof whether in hard copies, electronic format or other media be returned, destroyed and/or deleted with a written statement to the effect that upon such return, destruction and/or deletion it has not retained in its possession or under its control, either directly or indirectly, any Confidential Information in whatever form and medium. The Contractor shall comply with any such request from the Government within seven (7) days of receipt of such request.

## **25. Probity**

25.1 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.

25.2 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.

25.3 The Government shall have the right to terminate the entire Contract pursuant to Clause 19.1 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 19.4 of the General Conditions of Contract depending on the election of the Government 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).

## **26. Insurance**

26.1 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 Sub-clause (e) below):

26.1.1 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

26.1.2 any other insurance policies specified in the Special Conditions of Contract (if any);

- (a) with an insurance company authorised under the Insurance Companies Ordinance (Chapter 41 of the Laws of Hong Kong) and on such terms and conditions as shall be approved by the Government;
- (b) (applicable to the public liability insurance policy under Clause 26.1.1 above) against liability to pay damages and compensation for injury or death of any person and loss or damage to any property;
- (c) (applicable to the public liability insurance policy under Clause 26.1.1 above) where such injury or death or loss or damage occurs during the currency of the insurance policy within Hong Kong in connection with the performance of this Contract or otherwise caused by the Goods which are in the custody, possession or under the control of the Contractor (and where the risks to the Goods are still with the Contractor under Clause 11 of the General Conditions of Contract, the Goods are deemed to be in the custody, possession or under the control of the Contractor even if they are at the Government’s premises);
- (d) 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; and
- (e) 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.

26.2 Without prejudice to Clause 26.1 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.

- 26.3 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.
- 26.4 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.
- 26.5 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.
- 26.6 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.

## **27. 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 hereby agrees to appoint a substitute process agent with an address in Hong Kong acceptable to the Government and to deliver to the Government a copy of the substitute process agent's acceptance of that appointment within thirty (30) days. In the event that the Contractor fails to appoint a substitute process agent, or fails to notify the Government of the name and address for service of that substitute process agent, it shall be effective service for the Government to serve the process upon the last known address in Hong Kong of the last known process agent for the Contractor

notified to the Government notwithstanding that such process agent is no longer found at such address or has ceased to act or has ceased to be able to act.

## **28. 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.

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

- 29.1 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 29 and for the whole of the Contract.
- 29.2 Acceptance of the Tender does not signify the Government's acceptance of any sub-contracting proposal set out in the Tender.
- 29.3 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 29.1 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.
- 29.4 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 or supply contract with the Manufacturer (or its agent). 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 the Manufacturer, and employees and agents of any such sub-contractor and those of the Manufacturer as if they were its own.

### **30. Disclosure of Information**

- 30.1 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 Goods supplied or to be supplied by the Contractor;
  - (b) the Total Estimated Goods 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.
- 30.2 Disclosure may also be made by the Government under any of the circumstances specified in Paragraph 29.2 of the Terms of Tender in relation to any information concerning or relating to the Contractor or the Contract or the Goods or the Deliverables (including information recorded in whatever media).
- 30.3 Nothing in this Clause 30 or in Paragraph 29.2 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 relating to or concerning this Contract or the Contractor or the Goods or the Deliverables.

### **31. Publicity**

- 31.1 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.
- 31.2 Subject to Clause 31.1 above, the Contractor shall submit to the Government Representative for approval all the proposed advertising or other publicity material relating to the Contract, the Goods or other products supplied 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.



- 31.3 Notwithstanding any consent or approval given under Clause 31.1 or 31.2 above, whenever required by the Government, the Contractor shall remove all advertisement and publicity materials 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.

## **32. Force Majeure**

- 32.1 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.
- 32.2 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.
- 32.3 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 19.1 or Clause 19.2 of the General Conditions of Contract or partially terminate the Contract under Clause 19.4 of the General Conditions of Contract.
- 32.4 Without prejudice to the generality of Clause 32.3 above, whilst the Suspension due to the 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 procurement 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 the 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.

32.5 Following the issue of a notice by the Contractor under Clause 32.1 above which has led to Suspension Due to Force Majeure under Clause 32.3 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.

32.6 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.

- 32.7 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 19.3 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 19.4 of the General Conditions of Contract (depending on the election of the Government).

### **33. 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 19.1 of the General Conditions of Contract or partially terminate this Contract pursuant to Clause 19.4 of the General Conditions of Contract (depending on the election of the Government).

### **34. Notices**

- 34.1 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 Clause 34.4 below (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).
- 34.2 Such notices, demands, invoice, correspondence or other communications shall be addressed as provided in Clause 34.1 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.
- 34.3 Notice, demand, invoice, correspondence or other communication to the Contractor from the Government in the prescribed manner specified in Clause 34.2 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 in accordance with Clause 34.4 below.
- 34.4 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. Invoices shall be issued to the addressee as specified in Clause 14.8 or 14.9 of the General Conditions of Contract (whichever is applicable).
- 34.5 Nothing in this Clause 34 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 34.2 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.

## **35. Entire Agreement**

- 35.1 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.

- 35.2 All of the provisions of the Contract shall remain in full force and effect notwithstanding the delivery of the Goods and the issuance of any Acceptance Note (except insofar as those obligations which have been fully performed).

### **36. 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.

### **37. 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.

### **38. Severability and Exclusion of the Contra Proferentum Rule**

- 38.1 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.
- 38.2 The Contract is based on the Standard Terms and Conditions (Reference No. BD-TERMS-1 (August 2018)) issued by the Government. Nevertheless, the court or arbitrator interpreting or construing any provision of this Contract shall not apply any rule of construction (including the contra proferentum rule) that a document is to be construed more strictly against any one party which has put it forward.

### **39. Waiver**

- 39.1 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.
- 39.2 Without prejudice to the generality of Clause 39.1 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.

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

- 40.1 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 and sub-contractors 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.
- 40.2 The Contractor shall ensure that while any of the Contractor's employees, agents and sub-contractors is on the Government's premises they will conform to the Government's normal codes of staff and security practice.
- 40.3 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.

- 40.4 In the event that the Contractor fails to comply with this Clause 40 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 19.1 of the General Conditions of Contract or partially terminate the Contract pursuant to Clause 19.4 of the General Conditions of Contract (depending on the election of the Government).

#### **41. Assistance in Legal Proceedings**

- 41.1 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.
- 41.2 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.

#### **42. 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 Goods supplied 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.

#### **43. Joint and Several Obligations**

- 43.1 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.
- 43.2 A reference to the Contractor in this Contract is a reference to each of the persons constituting the Contractor.

#### **44. Governing Law and Jurisdiction**

- 44.1 The Contract shall be governed by and construed in accordance with the laws of Hong Kong.
- 44.2 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.

#### **45. 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).

#### **46. Order of Precedence**

- 46.1 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 Technical 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.

46.2 The Deliverables 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 37 of the General Conditions of Contract, no Deliverables shall seek to waive, alter, cancel or amend any provisions of any documents listed in Clause 46.1 above. No general approval of, or signature by, the Government of any such Deliverable 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 Deliverable is signed or given approval after the Date of Tender Acceptance. In the case of specifications set out in the design for any of the Goods (if any) and test plans for the Acceptance Tests (if any) which have been in form and substance approved by the Government in writing, or which have otherwise been signed by both parties in writing, the Contractor hereby expressly acknowledges and agrees that they serve to further elaborate the objectives and requirements set out in the Contract. None of such further elaboration shall be taken as inconsistency or out-of-scope of the requirements of the Contract.

### **SAMPLE PRICE SCHEDULE**

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

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

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

#### **Part A – Estimated Goods Price**

(a) The unit price

<b>Item No.</b>	<b>Description</b>	<b>Estimated Quantity (A)</b>	<b>One-time Unit Price (HK\$ or Permissible Currency) (B)</b>	<b>Estimated Goods Price for the Item specified opposite (i.e. A x B) (HK\$ or Permissible Currency)</b>
	<p>[xxx]</p> <p>(1) complying with all requirements of the Contract including the mandatory features in the Technical Specifications; and</p> <p>(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); [and]</p> <p>[(3) inclusive of the following desirable features [to be completed by the Tenderer based on the [clause] number of the Technical Specifications:]]</p>			

(b) Total amount of the Estimated Goods 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**

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

Subject to the other provisions of the Contract, the Contract Price for a batch of Goods shall be paid to the Contractor in one lump sum in accordance with Clause 14.2 of the General Conditions of Contract]

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

Subject to the other provisions of the Contract, the Contract Price for [the batch of Goods / each batch of Goods / all batches of Goods] shall be paid to the Contractor by instalments in accordance with the following schedule and in accordance with Clause 14.3 of the General Conditions of Contract:

<b>Number of instalments</b>	<b>Milestone to be achieved for the instalment to become payable</b>	<b>Amount of the instalment (in percentage of the Contract Price for [the batch of Goods / each batch of Goods / all batches of Goods])</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.
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 5.8 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) Address : \_\_\_\_\_
- (c) Name of Account : \_\_\_\_\_
- (d) Account Number : \_\_\_\_\_
- (e) Sorting Code : \_\_\_\_\_

### **SAMPLE PARTICULARS OF GOODS SCHEDULE**

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

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

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

#### **Part A – Particulars of Offer**

[Please refer to Paragraph 6 of the Terms of Tender.]

(The Tenderer shall provide the information below for each Item specified below (or such part(s) of the same Item as specified below).)

Table [xx]:

Item No (as shown in the Price Schedule) or the relevant component of the Item No:

Paragraph No.	Information required	Information to be completed by the Tenderer
1.	Place of Origin	
2.	Name of Manufacturer	
3.	Address of the Manufacturer's factory or plant ("Manufacturing Plant")	
4.	Product Name of the Goods	
5.	Model Number/name/version number of the Goods	
6.	Specifications of the Goods	
7.	Product literature and catalogues	
8.	Authorised agent or distributor of the Manufacturer in Hong Kong	
9.	Packing	
10.	Delivery method and route (where the Place of Origin is outside Hong Kong)	

### **SAMPLE PARTICULARS OF GOODS SCHEDULE**

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

11.	Committed Warranty Period (if longer than the minimum specified in Clause 15.1 of the General Conditions of Contract or in the Special Conditions of Contract (where applicable))	
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*[Editorial Note: Please duplicate the above table for another Item or another part of the same Item which requires provision of the same information and provide a separate table number.]*

- Notes:
- (i) Please use separate sheets if space is inadequate.
  - (ii) Please input N/A if the information is not applicable.
  - (iii) A Tenderer shall submit the essential information in paragraphs \_\_\_\_\_ of [Table \_\_\_\_\_ / each of Tables \_\_\_\_\_] above for the Item(s) (or parts of the Item(s) mentioned in the aforesaid Tables) with its Tender before the Tender Closing Time. Otherwise, the Tender will not be considered further unless upon clarification with the Tenderer, the Government is satisfied the information is not applicable (then in such case the information will not be treated as essential information in relation to the Goods offered by the Tenderer).
  - (iv) If the Tenderer is the Manufacturer, the Tenderer shall enter its own name in paragraph 2.

### **SAMPLE COMPLIANCE SCHEDULE**

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

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

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

#### **Part A – Statement of Compliance**

[Please refer to Paragraph 7 of the Terms of Tender.]

- \*(a) I/We confirm that I/we and my/our offered Goods as more particularly specified in the Particulars of Goods Schedule are **in compliance** with all the mandatory features set out in the Technical Specifications [*and in the case where Customisation is required to ensure compliance with mandatory features as stated in the Technical Specifications, I/we confirm that my/our offered Goods will be in compliance with all such mandatory features after the Customisation*].
- \*(b) I/We confirm that I/we and my/our offered Goods offered are **not in compliance** with the mandatory features set out in the Technical Specifications [*or will not be in the case where Customisation is required*] in the following aspects:

<u>Clause No.</u>	<u>Technical Specifications</u>	<u>Details of Deviation</u>
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- Notes: (i) \*Please delete as appropriate.
- (ii) If a Tenderer does not complete the above Part A, subject to any clarification which may be made by the Government, it shall be deemed that the Tenderer confirms that it and the Goods offered are in compliance with all the mandatory features set out in the Technical Specifications [*and in the case where Customisation is required to ensure compliance with mandatory features, it shall be deemed that they will be in compliance with all such mandatory features after the Customisation*].
- (iii) A Tenderer's Tender will not be considered further if the Tenderer expressly indicates non-compliance with all or any mandatory features. For this purpose, the completion of any one of the three columns under the non-compliance statement above in relation to such non-compliance shall be taken as such express indication. Any other indication which casts doubt on the true intention of the Tenderer may be further clarified.

### **SAMPLE COMPLIANCE SCHEDULE**

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

#### **Part B – Delivery**

Please also refer to the Deadline Delivery Date(s) specified in Paragraph [#] of the Terms of Tender (Supplement) (“applicable provision”)  
(# to be assigned upon a particular tender draft.)

\*(a) I/We confirm that I/we **will** comply with the Deadline Delivery Date(s) as stipulated in the applicable provision.

\*(b) I/We confirm that I/we **will not** comply with the Deadline Delivery Date as stipulated in the applicable provision. [My/our alternative Deadline Delivery Date shall be as follows which I/we understand and agree must not be later than [xx][days/weeks/months] after the aforesaid Deadline Delivery Date (“permissible range”):]

[ \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ ]

Notes: (i) \*Please delete as appropriate.

(ii) If a Tenderer does not complete the above Part B, subject to any clarification which may be made by the Government, it shall be deemed that the Tenderer **will** comply with the Deadline Delivery Date(s) as stipulated in the applicable provision.

(iii) **A Tenderer’s Tender that expressly confirms non-compliance with the Deadline Delivery Date will not be considered further [unless it is within the permissible range as mentioned in paragraph (b) above].** For this purpose, the completion of an alternative date [outside the permissible range] under the non-compliance statement above shall be taken as such express indication. Any other indication which casts doubt on the true intention of the Tenderer may be further clarified.



## **SAMPLE COMPLIANCE SCHEDULE**

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

### **Part C – Confirmation of compliance with certain requirements in the Special**

#### **Conditions of Contract**

[Please refer to Paragraph 7.8 of the Terms of Tender and Clause [#] of the Special Conditions of Contract.]

(# to be assigned upon a particular tender draft.)

☐ I/We\* confirm that I/we\* shall comply with the requirements as stipulated in Clause [xx] of the Special Conditions of Contract.^

☐ I/We\* confirm that I/we\* shall **not** comply with the requirements as stipulated in Clause [xx] of the Special Conditions of Contract in the following aspects:^

<u>Clause No.</u>	<u>Requirement</u>	<u>Details of Deviation</u>
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☐ I/We\* confirm that my/our [e.g. training / warranty services / delivery arrangement / delivery vehicles / service stations / safety measures] for the Item(s) offered will be in compliance with the requirements as stipulated in Clause [xx] of the Special Conditions of Contract.^

☐ I/We\* confirm that my/our [e.g. training / warranty services / delivery arrangement / delivery vehicles / service stations / safety measures] for the Item(s) offered will **not** be in compliance with the requirements as stipulated in Clause [xx] of the Special Conditions of Contract in the following aspects:^

<u>Clause No.</u>	<u>Requirement</u>	<u>Details of Deviation</u>
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Notes: (i) \*Please delete as appropriate.

(ii) ^Please tick the box opposite if the compliance statement is confirmed in the affirmative.

(iii) If a Tenderer does not complete the above Part C, subject to any clarification which may be made by the Government, it shall be deemed that the Tenderer **will** comply with the relevant requirements in the Special Conditions of Contract.

### **SAMPLE COMPLIANCE SCHEDULE**

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

- (iv) **A Tenderer's Tender will not be considered further if the Tenderer expressly indicates non-compliance with all or any requirements.** For this purpose, the completion of any one of the three columns under the non-compliance statement above in relation to such non-compliance shall be taken as such express indication. Any other indication which casts doubt on the true intention of the Tenderer may be further clarified.

### **SAMPLE INFORMATION SCHEDULE**

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

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

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

#### **Table A – Information required in Paragraph 9.4 of the Terms of Tender:**

*[Editorial Note: please insert the relevant information required to prove compliance with a Certification Requirement or Track Record Requirement or put it in a separate Annex to this Information Schedule, where applicable. Please also specify the documentary evidence required if they are required to be in specified form.]*

#### **Table B – Information and documents required under Paragraph 10.1 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 /other*</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/partners; (ii) other directors; and (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 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)	(whether the Tenderer is a company or body corporate) 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:	
(n)	A copy of the relevant document proving that the authorised person(s) who sign(s) the Offer to be Bound has/have the authority to sign it for and on behalf of the Tenderer	Please attach if applicable.

### **SAMPLE INFORMATION SCHEDULE**

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

**Table C – Information required under Paragraph 12 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	
(d)	Location of the service centre in Hong Kong for carrying out the Warranty Services as specified in Clause 15 of the General Conditions of Contract	
(e)	Operator of the service centre (whether it is the Contractor or any proposed sub-contractor as mentioned above)	
[(f)]	Other information required for the service centre and the operator of the service centre	Please complete the separate Annex A (Details of Local Support) attached.]

**Table D – Information required under Paragraph 20.2 of the Terms of Tender:**

- \* (a) I/We confirm that none of the events as mentioned in Paragraphs 20.1(a) to 20.1(g) of the Terms of Tender has ever occurred.
- \* (b) I/We confirm that the following event(s) as mentioned in Paragraphs 20.1(a) to 20.1(g) of the Terms of Tender has occurred:

Date	Details of the Event

Note: \* Please delete whichever is not applicable.

**Table E – 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(s)) \_\_\_\_\_

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 32.1 of the Terms of Tender, the Government may exercise any of the rights under Paragraphs 32.3 to 32.5 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 :



## **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 Terms of Tender that failure to submit the proposals, documents and information as stipulated therein (viz., items (a), (b), (c), (d) (if required) 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. Please note that retyping Part 4 of the Tender Form for submission is not permitted. Part 4 of the Tender Form shall be the actual form as obtained from the Government or a printed copy of the softcopy obtained from the Government or a photocopy of any such form.

☐

- (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) The essential information required in the Particulars of Goods Schedule (see Paragraph 6 of the Terms of Tender).

☐

- (d) The essential information required in Table A of the Information Schedule to show compliance with the Certification and/or Track Record requirement(s) (see Paragraph 9.4 of the Terms of Tender) (if any).

☐

- (e) Other information required in the Price Schedule and the Particulars of Goods Schedule.

☐

- (f) The Compliance Schedule (see Paragraph 7 of the Terms of Tender).

☐

- (g) Other information required in the Information Schedule (see Paragraphs 10, 12 and 20.2 of the Terms of Tender).

☐

- (h) Documentary evidence for proving compliance with Certification Requirement(s) or Track Record Requirement(s) (where applicable) (see Paragraph 9 of the Terms of Tender and Paragraph [xx] of the Terms of Tender (Supplement)).

☐

- (i) The signed Non-collusive Tendering Certificate for Paper-based Tendering (see Paragraph 32.2 of the Terms of Tender).

## **SAMPLE COMPLETENESS CHECK SCHEDULE**

☐

- (j) In the case of Paper-based Tendering, documentary evidence proving that the authorised person(s) who sign(s) the “Offer to be Bound” has/have the authority to sign for and on behalf of the Tenderer if the signatory is not the partner (in the case of partnership), or sole proprietor (in the case of sole proprietorship), or a director (in the case of company) (see Paragraph 10.1(j) of the Terms of Tender).

☐

- (k) All other documents required in the Information Schedule.

☐

- (l) The Appendix to the Terms of Tender.