

# **West Kowloon Cultural District Authority**

## **Procurement Guidelines for Public-Private Partnership (PPP) Projects**

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# I. Objectives

## Scope

1. These West Kowloon Cultural District Authority (WKCDA or the Authority) **Procurement Guidelines for Public-Private Partnership (PPP) Projects**<sup>1</sup> (Guidelines) sets out the procurement process for all development packages in the West Kowloon Cultural District (WKCD) implementing a PPP procurement model that includes a private sector financing element.

2. Under the Enhanced Financial Arrangement (EFA) described in the 2017 Legislative Council Brief (File Ref: SF(37 to HABCS CR 7/1/7/21/1)), the Government of Hong Kong SAR (the Government) will grant the development right of the entire hotel/office/residential (HOR) portion of the WKCD involving 366 620 sqm GFA to the WKCDA at nominal premium. WKCDA will develop the HOR portion through Build-Operate-Transfer (BOT) and income sharing arrangements with private developers so as to provide WKCDA with a steady source of recurrent income. The grant of development rights include:

- a) HOR portions of the WKCD to WKCDA requiring upfront payments to the Government (to be determined through open tendering). For the HOR portion packaged with the Exhibition Centre in Art, Commerce and Exhibition (ACE), no upfront payment to the Government would be required; and
- b) The ACE to WKCDA without upfront payment to the Government.

In addition to the HOR development, WKCDA will tap market interest in developing the Musical Theatre through a PPP arrangement. WKCDA is also considering the feasibility of procuring an artist hostel and more arts education facilities in the WKCD through PPP arrangements.

## Principles

3. These Guidelines are intended to apply to a development package from the point of WKCDA's decision to proceed with procurement using a PPP arrangement through to contract award and financial close. PPP procurement under these guidelines shall be managed by WKCDA so as to adhere the following principles:

- a) Be fair and competitive;
- b) Be transparent and consistently applied;
- c) Any conflicts of interest, whether perceived, actual or potential on personnel involving in the tender assessment are identified and properly managed;
- d) In strict confidence for the evaluation process; and
- e) Be thoroughly documented throughout the tender process by means of, without limitation, written agendas and minutes for meetings, briefings,

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<sup>1</sup> The PPP Guidelines are intended to cover all types of PPP projects at WKCDA, including BOT model.

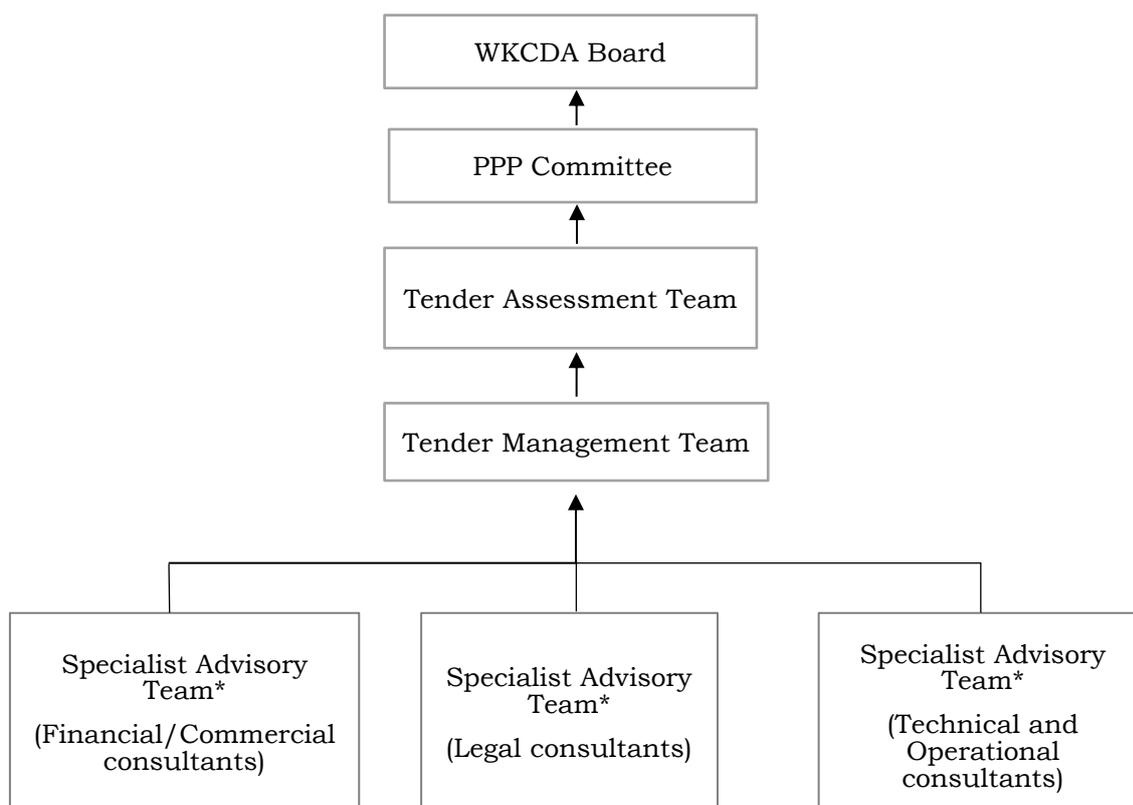
presentations, and interactive workshops, and written answers and queries in respect of all kinds of communication with tenderers.

## II. Approving Authorities

### Overview

4. Each PPP procurement process will adhere to the governance framework outlined in **Figure 1**, with specific functions and roles assigned to each group outlined below.

**Figure 1 PPP governance structure**



\*The Specialist Advisory Teams comprising external consultants will be appointed on an as required basis depending on the PPP evaluation scope. The Tender Management Team will take up the task if all or specific Specialist Advisory Teams are not formed.

### WKCDA Board

5. The WKCDA Board is responsible for all decisions in respect of each PPP procurement, including:

- a) appointing members of the Public-Private Partnership Projects Committee (PPP Committee) and Tender Assessment Team (TAT);
- b) approving the tendering process as well as single-selective tendering if required;

- c) approving to proceed to prequalification implemented by way of an expression of interest (“EOI”), if required, and tender;
- d) approving the key terms of the EOI and the tender;
- e) approving continuation of the assessment process if the number of tenderers are less than three; and
- f) approving the TAT assessment and recommendations for contract award following review and recommendation by the PPP Committee.

### **PPP Committee**

6. The PPP Committee is a standing committee appointed by WKCDA Board for all PPP projects. The PPP Committee shall be constituted of a Chairman drawn from WKCDA Board, the Chief Executive Officer and selected WKCDA Board members. Independent advisors to the PPP Committee may be appointed for individual projects as approved by the WKCDA Board.

7. The PPP Committee is responsible for the independent oversight of the procurement process and the appointment of members of TMT and SATs.

8. The PPP Committee is responsible for approving the EOI (if required) and tender documents once approval to proceed has been granted by the WKCDA Board.

9. The PPP Committee is responsible for reviewing the final EOI assessment report (if any) and tender assessment report prepared by the TAT and recommending the EOI shortlists and preferred tenderer to the WKCDA Board.

10. If the PPP Committee disagrees with the findings of the TAT, it may direct the TAT to undertake further assessment.

11. Full roles and responsibilities of the PPP Committee are set out in its constitution approved by the WKCDA Board.

### **Tender Assessment Team (TAT)**

12. The WKCDA Board shall appoint a TAT constituted of the WKCDA Chief Operating Officer, Chief Financial Officer and General Counsel or their delegates, and/or other additional members as approved by the WKCDA Board.

13. TAT will review the draft EOI/tender assessment report prepared by the Tender Management Team (TMT) and technical, operational, legal commercial and financial findings made by the Special Advisory Teams (SATs) and TMT. Based on these findings, the TAT will evaluate, mark and shortlist tenders, and advise the PPP Committee on the assessment outcome and tender qualifications.

14. The TAT is also responsible for supervising TMT in the development of and obtaining approval of the EOI/tender documents and the EOI/tender assessment plans.

15. The TAT will provide regular communications and updates to the PPP Committee through each project and at key milestones.

### **Tender Management Team (TMT)**

16. The PPP Committee shall appoint a core TMT constituted of senior management representatives covering key aspects of the PPP project. Functions such as planning, engineering, finance and legal should be represented. WKCDA should avoid appointing the same officer to serve on both the TAT and TMT, as far as practicable.

17. The TMT shall be responsible for the conduct and administration of the EOI (if implemented) and tender process

18. The TMT will make and compile technical, legal, commercial and financial findings, or if the same are prepared by the SATs (if formed), review those findings made by the SATs, prepare the draft EOI assessment report and advise the TAT and PPP Committee on assessment outcome and tender qualifications. If the EOI/tender evaluation requires internal WKCDA staff to assess the EOI/tender or assist in the process, the TMT may also appoint dedicated staff to undertake this task.

19. The TMT is also responsible for developing the EOI/tender documents and the EOI/tender assessment plans, and preparing all papers and documents that are required including proposals to proceed, letters of clarification, letters of acceptance and formal agreements. TMT will also offer directions and guidelines to the SATs (if formed) to conduct the evaluation and be responsible for collating the findings into an EOI/tender assessment report for the TAT to review and score.

### **Specialist Advisory Teams (SATs)**

20. If specialist advice is required, the PPP Committee may appoint external consultants to form the SATs comprising:

- a) A technical/operational team with scope to evaluate the development and operational proposal;
- b) A commercial/financial team which will focus on evaluating the financial proposal; and
- c) A legal team which will focus on evaluating any amendments to the development agreement.

21. The SATs (if formed) will comprise specialist external consultants, including commercial/financial, legal, technical, operational and the like. WKCDA should incorporate the requirements on ethical practices, as well as the anti-bribery and confidentiality requirements into their consultancy agreements. The external consultants would be debarred from assisting or partnering with contractors to bid for the contracts arising from the consultancy agreement. Sample clauses in **Appendix A** may be included in the consultancy agreements, where appropriate.

22. The SATs (if formed) will assist the TMT to assess the EOI and tender returns following the rules of the EOI/tender assessment plan and prepare technical/operational, financial/commercial and legal assessment reports to the TAT. The TMT will take up the task if all or specific SATs are not formed. The SATs and TMT will not score the criteria, however they will make a factual assessment of each submission received to enable the TAT in marking.

23. All technical and financial proposals are assessed by the technical members and financial/commercial members of the TMT and SATs (if formed)

independently and separately. In instances where technical and financial related information is required by the other team for the purpose of evaluation, a request may be made to the PPP Committee for selected access to the identified information.

24. Before commencing the EOI/tender process, the SATs shall also have a role to advise the TMT on matters concerning tenders, assist the TMT to undertake and administer the procurement process in accordance with these guidelines, develop the EOI (if any) and tender documentation, the tender assessment plan and EOI assessment plan and to liaise with all stakeholders including WKCDA internal departments and working group.

### **Conflict of interest**

25. For each PPP project, all members of the SATs, TMT, TAT, PPP Committee, WKCDA Board or any independent advisors or consultants or persons involved in the assessment of the EOI and tender submissions (hereinafter collectively referred to as concerted parties) shall declare any conflicts of interest to the Chairman of PPP Committee. The Chairman of PPP Committee shall have the authority to decide whether a member potentially in conflict should stand down from the procurement process. To ensure the tender assessment process is unbiased, and prevent allegations of favouritism and even corruption, the concerted parties shall make a positive declaration on whether or not they have any conflict of interest with the EOI applicants and tenderers. Meanwhile, in order to assist the Chairman of the PPP Committee in determining the proper course of mitigating actions, the set of guidelines in **Appendix B** on managing declared conflict of interest may be followed.

### III. Prequalification Implemented by way of EOI

#### Prequalified Tendering

26. WKCDA PPP procurements will usually adopt open tendering and be publicly advertised. In particular, open tendering must be adopted for HOR and ACE projects under the Enhanced Financial Arrangement. Subject to prior approval from the WKCDA Board, prequalification implemented by way of EOI may be required as part of the open tender. In more limited circumstances only with very strong justifications and where WKCDA is not otherwise required to proceed on the basis of open tendering, prior approval may be sought from the WKCDA Board for single or selective tendering.

27. For open tendering, including where a pre-qualification process is approved, all interested developers, or consortia comprising funders, contractors, operators, and parties of all sorts should be free to submit their response to the EOI and/or tenders.

28. Key considerations in determining if a prequalification process should be undertaken include: ability to efficiently and effectively target appropriate market participants, appeal to market participants by managing an appropriate number of bidders so as to avoid their loss of interest (see paragraph 43), ability to manage level of effort (resourcing), procurement program, tender costs and resources and time investment from a market perspective, etc.

29. In addition to approving the use of prequalified tendering, the WKCDA Board must approve the evaluation criteria for qualifications.

30. Prior to proceeding to a prequalification process, a **Request for Approval to Proceed with Prequalification** shall be submitted to the WKCDA Board for approval and should contain the following information:

- a) Justification for the intended procurement and the timeframe involved, expected capital cost and internal rate of return (IRR);
- b) The type of intended PPP model to be adopted, e.g. BOT, Design, Build and Finance (DBF), Availability PPP, Hybrid PPP (for avoidance of doubt, Build-Own-Operate-Transfer (BOOT) and Build-Own-Operate (BOO) are not allowed);
- c) Justification for adopting a prequalification process;
- d) A summary of key terms of the EOI document including the project definition, scope of development and business operation, key commercial principles and major risks allocation;
- e) An overview of the EOI evaluation governance, including the membership and responsibility of TAT, TMT and SATs; and
- f) Proposed screening and marketing criteria based on:
  - i. Financial capability and capacity;
  - ii. Development qualifications and experience;
  - iii. Financing experience and approach;

- iv. Project understanding and appreciation; and
- v. Vision and proposed business plan.

### **EOI document**

31. Subsequent to the WKCDA Board's approval to proceed with prequalification implemented by way of EOI, the EOI document for the PPP project will be prepared. The EOI document shall provide the necessary information about the development package to assist applicants to prepare the EOI return. The EOI document shall be drafted and compiled by the TMT with support by the SATs, reviewed by the TAT and approved by the PPP Committee and shall contain the following:

- a) Background and drivers of the development package;
- b) Project definition and scope of business operation;
- c) Key commercial principles, including any arrangement for income share mechanisms and upfront payments, and other commercial mechanisms between the public and private sector;
- d) Major risks allocation;
- e) High level summary of specialist reports and legal, commercial, policy and technical constraints;
- f) EOI evaluation criteria and proforma or questionnaire to form the basis of the EOI return;
- g) Timeframe, logistics and protocols for EOI submission;
- h) Proposed performance indicators;
- i) Proposed step-in and termination provisions;
- j) Avenues of redress/appeal on the part of the private partner; and
- k) Protocols on changes in information between EOI and tender.

### **EOI invitation**

32. Invitation for prequalification implemented by way of EOI shall be published on the WKCDA website, selected local and overseas publications and journals, and may be specifically brought to the attention of private sector entities that are known to potentially be highly qualified to deliver the development package. The advertisement should contain a brief description of the project along with its estimated timescale, highlights of any special requirements and closing date. Applicants shall be advised to register with WKCDA in order to collect the EOI document, attend the briefing session and be informed of any queries and responses issued in the clarification process.

33. The timeframe allowed for applications should take into consideration the specific nature of the development package. Sufficient duration should be allowed for the applicants to prepare their applications. Except as otherwise approved by the

PPP Committee, PPP projects shall allow between 1-3 months for an EOI response from the private sector.

### **EOI briefing**

34. Once the EOI has been issued, an EOI briefing session should be organized by the TMT, in particular for complex projects. This session should be open to all interested parties that have registered. Verbal queries raised and responses given during an EOI briefing which may impact other interested parties shall be notified to all interested parties in writing.

### **Clarification process**

35. The EOI phase will include an EOI clarification process which allows applicants to submit written queries to WKCDA.

36. Submitted queries and corresponding responses will be circulated to all applicants that have been registered with WKCDA. The initiating party will not be identified in the circulated EOI clarification responses. If a query should identify any ambiguity, error or omission in the EOI documents, the ambiguity, error or omission shall be corrected by the issue of an EOI addendum.

37. WKCDA will state in the EOI documents that it will make known to all applicants of all queries and replies and warn the applicants not to make any query relating to proprietary aspects of its submission, and if made, the applicants will be required to withdraw the question.

### **EOI submission**

38. All EOI returns shall be submitted on or before the common closing time. The submission time and the EOI opening shall be recorded by the designated officer and witnessed by a second officer.

39. Nevertheless, a late application for prequalification may be considered, provided it is received prior to the opening of any submissions received on or before the common closing time. Approval for the change in the closing date and acceptance of late applications shall require the approval of the chairman of the PPP Committee.

### **Assessment, shortlisting and notification**

40. The TAT with the support of SATs and/or TMT should carry out probity checks on applicants such as professional conduct and ethical practices (see paragraph 106). The EOI assessment will include a screening criteria and a marking criteria. The screening criteria is marked on a pass/fail basis. Applicants will be required to pass the screening criteria prior to proceeding to the marking criteria, which will be scored on the basis of several sub-criteria.

a) **Screening Criteria** - Financial capacity to deliver the project.

b) **Marking Criteria** - Development qualifications and experience, operational experience, project understanding and appreciation, financing experience, approach, vision and business plan.

41. To determine the number of applicants to be shortlisted and invited to tender, the following factors should be considered:
- a) Likelihood of tenderers withdrawing;
  - b) Expected number of applicants/market appetite for the development package;
  - c) Size of the development package; and
  - d) Timeframe allocated for the procurement process.
42. Depending on the factors listed above, an invitation to tender can be issued to all applicants passing a set minimum threshold or to limit the number of applicants that proceed to the tender stage.
43. Qualifying too many applicants may cause some parties to lose interest, as the probability of winning may no longer justify the utilization of resources and investment required for the tender stage. Except as otherwise approved by WKCDA Board, the number of applicants to be shortlisted shall not be less than three and will normally be four to six. If there is sufficient justification, more or fewer tenderers may be selected, subject to approval from the WKCDA Board. If the number of tenderers falls below three after the issue of tender documents, the WKCDA Board shall be notified and given a recommendation as to how the matter should proceed, the tender shall not proceed until the WKCDA Board has given its directions.
44. WKCDA should not permit an applicant to submit more than one application either on its own (as a holding company or as a subsidiary company) or as a participant or shareholder of a joint venture. Individual applicants, once prequalified, should not be permitted to apply for formation of any joint venture amongst themselves. The standard clauses in **Appendix C** may be included in the EOI document.
45. The TMT, with the support of the SATs, will assess the EOI returns and prepare and submit to the TAT a draft EOI assessment report. The TAT will review the draft report and factual findings and evaluate and mark the returns according to the evaluation criteria previously approved by the WKCDA Board, and recommend the shortlist of an appropriate number of top scoring applicants. The PPP Committee will then independently review the EOI assessment report findings. The PPP Committee will then decide via simple majority to recommend the findings and shortlist from the **EOI assessment report** to the WKCDA Board for approval prior to notifying successful applicants.
46. Once the WKCDA Board has approved the EOI assessment report, including the list of **prequalified tenderers** (in particular where the prequalification process has taken a considerable time), the proposed applicants shall be advised that they are being considered for an intended procurement and shall be asked to confirm their willingness to submit a bona fide tender. The proposed applicants may be invited to attend interview with TAT, TMT and SATs to confirm their understanding of the details of the scope, extent, value range, contract arrangement, and programme for the procurement. Proposed applicants who decline shall be replaced with the next best applicant subject to WKCDA Board approval.
47. Upon completion of a prequalification process, each applicant shall be notified in writing, whether or not it has been successful in prequalifying for the

procurement. All discussions, documents and correspondence relating to EOI selection shall be treated as confidential.

**Changes to the Tenderer's organisational structure following shortlisting**

48. Prequalified tenderers are required to notify WKCDA in a timely manner of any changes to their proposed organisational structure, where that change would have affected their response to the EOI submission. The notification shall be accompanied by a full explanation of the reason for the change and the applicant's submission as to why the change does not materially affect the tenderer as pre-qualified.

49. WKCDA will require any replacement member to provide all information requested in the EOI submission within a specified timeframe of the said notification, whereupon it shall evaluate such information using the same terms as in the EOI document.

50. Any changes in the material particulars (e.g. shareholding structure and participants) of a prequalified tenderer which occur between the prequalification and issue of tender documents will require the prequalified tenderer to re-qualify and require the approval of the WKCDA Board.

## IV. Tender

### Proposal to Proceed and Tender Invitation

51. Before proceeding with the tender process, there shall be submitted to the WKCD Board for approval a “**Proposal to Proceed to Tendering**” which should contain:

- a) Key tender terms, including key commercial terms (e.g. tenure and income sharing), scope of development and business operation, development programme and output specifications, major risks allocation and other key BOT terms specified under EFA <sup>2</sup>;
- b) Overview of the tender assessment governance, including the proposed tender assessment criteria and marking scheme, governance framework and membership and responsibilities of TAT, TMT and SATs set up, or any change to the governance framework if already a governance framework had been approved in the prequalification and EOI stage;
- c) For HOR projects under the Enhanced Financial Arrangement, a pre-tender estimate, including Full Market Value (FMV) under specified tender terms of upfront payment to the Government which is the average valuation assessed by three independent valuers <sup>3</sup>, or via another methodology as approved by the WKCD Board. No sub-delegation to the PPP Committee shall be allowed.
- d) For ACE or other PPP projects under the EFA, where the project does not require an upfront payment, WKCD will be required to develop its own assessment of the pre-determined FMV of the development package concerned under specified tender conditions, and prepare pre-tender estimates with the methodology as approved by the WKCD Board.
- e) If alternative proposals are allowed, justification for the alternative proposals.

52. If no prequalification process has taken place, it should also contain: -

- a) Justification for the intended procurement and the timeframe involved, expected capital cost and IRR;
- b) The type of intended PPP model to be adopted, e.g. BOT, Design, Build and Finance (DBF), Availability PPP, Hybrid PPP (for avoidance of doubt, Build-Own-Operate-Transfer (BOOT) and Build-Own-Operate (BOO) are not allowed);

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<sup>2</sup> Guidance on key BOT terms as outlined in the EFA is included in **Appendix D**.

<sup>3</sup> Subject to the duration of the tender preparation stage and market conditions, this assessment may be updated prior to tender close.

c) The screening criteria on the financial capacity required to deliver the project in terms of paragraph 40(a) above.

### **Tender documents**

53. Subsequent to the Board's approval to proceed with the tender, the tender documents shall be finalised. All tender documents must be drafted and prepared by the TMT (with support of SATs if required), reviewed by the TAT and approved by the PPP Committee. In general, the following documents will be required for the tender stage:

- a) Letter of invitation to tender or tender notice, including details of tender briefings and/or site visits;
- b) Instructions to tenderers, including the return mode i.e. by post and/or by email or other electronic means to a designated address;
- c) Project brief;
- d) Conditions of tender including conditions which a tenderer has to serve when submitting tender, the tender validity period, the currency to be used for the contract, any limitation on the means by which tenders may be submitted;
- e) Development agreement with developers/investors including conditions of contract and the form of tender;
- f) User, operational, interfacing and technical requirements/control documents (e.g. WKCDA control and technical documents, quality benchmarks, etc.);
- g) Where there is a profit-sharing mechanism, there should be an open book provision in the conditions of contract, i.e. the successful tenderer should allow WKCDA to examine all its books and accounts in relation to the PPP project.
- h) Tender assessment criteria, methodology and proforma to form the basis of the tender return;
- i) Financial/pricing (such as pricing schedules and financial models);
- j) Offer to be Bound or Form of Tender to be signed and completed by the tenderer;
- k) Payment schedule;
- l) Insurance schedule;
- m) Relevant declaration forms; and
- n) Any reference materials to the bid preparation.

54. The TAT shall review the tender documents and ensure the requirements of the project defined are drawn up in a manner so as to allow open and fair competition. Tender specifications shall not be prepared, adopted or applied with a view to or with the effect of creating obstacles to competition amongst the potential tenderers. Tender documents should be written in easily comprehensible general terms based on the functional, output and performance characteristics, and not around the technical data of a certain model of the goods or equipment to be purchased. There shall be no requirement for or reference to a particular trade mark or name, patent, design or type, specific origin, producer or service provider, unless there is no sufficiently precise or intelligible way of describing the requirements and words such as “or equivalent” are included in the tender documents. Where standards are referred to, where practicable, international standards should be used.

55. The TAT shall review the design and/or performance criteria and other technical requirements, coordinating programming information, and accurate benchmarks to ensure that the tender documents truly reflect the scope and requirements of the intended procurement. Where the intended procurement is designed and administered by external consultant(s), the TAT shall review the output and ensure that the respective consultant(s) are adhering to the requirements set out in these guidelines.

56. Legal and Secretarial Department (with the support of legal consultants as required) shall monitor and review the process of the tender and the development of the tender documents.

57. The pre-tender estimate including FMV should never be disclosed to the tenderers as it may affect the tenderers in the preparation of their tender proposals, which may undermine WKCD's position.

### **Tender invitation**

58. If a prequalification process has not been undertaken, invitation to tenders should be open to all interested parties unless the WKCD Board has approved selective or restricted tendering for that particular project. All interested developers, or consortia comprising funders, contractors, operators, and parties of all sorts are free to submit their tenders. If a prequalified process has been undertaken, only those parties shortlisted at prequalification and EOI stage will be invited to tender.

59. A confidentiality agreement should be issued to all applicants immediately following receiving tender documents. Applicants must enter into the confidentiality agreement in order to be compliant with the requirements of the tender.

### **Tender briefing**

60. Tenderers will be invited to attend a tender briefing session hosted by the TMT and TAT. The purpose of the briefing session is to inform tenderers of the current status of the development package and to flag any key changes that may have arisen since the prequalification and EOI stage (if applicable) that may have impact on the commercial offer. Verbal queries and responses which may have a contractual impact made during a tender briefing shall be notified to all tenderers in writing.

## **Interactive workshop**

61. An interactive workshop process will be appropriate on complex projects in particular where the private sector is required to interpret and respond to an output specification prepared by WKCDA. This will help to ensure that the tenderer's proposals meet the requirements of WKCDA.

62. The adoption of an interactive workshop process for a project will be subject to the approval of the PPP Committee.

63. The TMT supported by SATs will offer workshops with each tenderer on the following work streams before tender submission:

- a) Technical - focusing on discussion of design, construction and planning approval issues;
- b) Operations - focusing on matters relating to the operations of the various facilities to be provided; and
- c) Commercial, legal and financial - focusing on discussion of contractual and commercial matters.

64. An interactive workshop process has benefits to both sides. It provides an opportunity for tenderers to present to WKCDA on the progress of their tender preparation in the context of WKCDA's output requirements and to discuss areas of uncertainty. For WKCDA, it provides greater reassurance that the tenders submitted will be fully developed in line with the tender requirements.

65. Protocols for the conduct of an interactive workshop process will be prepared by the TMT with input from the SATs as required for the approval of the PPP Committee, in accordance with, but not limited to, the following principles:

- a) workshops with tenderers within a short period of time of each other;
- b) the number of representatives of a tenderer attending the workshop shall be limited and attendees shall be notified to the Authority in advance;
- c) the tenderer shall notify the Authority in advance of the subject matter for the workshop; and
- d) procedures for enabling the discussion of proprietary or commercially sensitive information. The protocols will be issued to tenderers in advance of the date for the workshop. Participation in the interactive workshop process will be subject to confirmation that the tenderer agrees to the protocols for the conduct of the workshop.

66. Members of the relevant SATs, the TMT and the TAT will be required to attend the workshops. To maintain a fair and transparent process, the timeframe allocated for each of the workshops and the information provided to the tenderer in workshop will be identical for all tenderers. Attendees from the PPP Committee, TAT, TMT and SATs shall be the same for each tenderer.

67. Tenderers will be required to table a proposed agenda in advance of the relevant workshop.

68. Where a tenderer raises an issue which impacts other tenderers, WKCDA will invite the tenderer to submit a written clarification request, which will be shared,

along with WKCDA's response, with other tenderers.

69. The interactive workshops will be recorded and a written summary of key issues prepared.

70. Discussion during the interactive workshop process or comments made by WKCDA shall not vary or alter the tender documents. Should the WKCDA consider that a modification to the tender documents is required, a tender addendum will be issued in accordance with the relevant tender conditions.

71. The frequency of the interactive workshops may be determined based on a number of factors including: the nature/complexity of the development package, the nature of the specification imposed (particularly if output based), the nature of contractual arrangements to be applied and the extent of the controls reserved by WKCDA.

72. Guidance will be prepared governing the protocols to be applied to the interactive workshop. Training will also be provided to those attending on WKCDA's behalf regarding the conduct of such workshop.

### **Tender clarification process**

73. The tender phase will include a tender clarification process which allows tenderers to submit written queries to WKCDA. Tenderers may submit written queries to WKCDA on an ad-hoc basis from invitation to tender to tender close.

74. Submitted queries and corresponding responses will be circulated to all tendering parties. The initiating party will not be identified in the circulated tender responses. If a query should identify any ambiguity, error or omission in the tender documents, the ambiguity, error or omission shall be corrected by the issue of a tender addendum.

75. WKCDA will state in the tender documents that it will make known to all applicants of all queries and replies and warn the tenderers not to make any query relating to proprietary aspects of its submission, and if made, the tenderers will be required to withdraw the question.

### **Tender submission**

76. Tenderers shall be required to comply with the requirements in respect of "Submission of Tenders" as described below. These requirements shall be clearly described in the tender documents.

- a) A three envelope system will be adopted where tenderers are required to keep the technical proposal separate from the financial proposal in two separate sealed envelopes, and then put in a sealed third envelope before submitting their tender.
- b) The purpose of the three envelope system is to ensure –

- i. All technical and financial proposals are evaluated by the technical members and financial/commercial members of the TMT and SATs independently and separately; and
  - ii. Both the technical proposal and the financial proposal submitted by the tenderer will be received in separate packages to eliminate any possible logistical or conflict problems.
- c) Tenderers shall be advised in the Conditions of Tender, that their tenders shall be submitted in separate sections as follows:
  - i. The **financial proposal**, comprising the Form of Tender and the Financial Offer, alternative Financial Offers and any contractual or commercial statements.
  - ii. The **technical proposal**, comprising all technical details, including where appropriate any alternative technical proposals:
    - Corporate structure and governance (corporate and contractual structures, organisational structure, governance and risk management);
    - Design (design concept, planning, asset function, statutory compliance, building services, engineering and buildability, environmental sustainability and efficiency);
    - Construction (construction management and delivery approach);
    - Construction program;
    - Vision and business plan along with any financial models (without containing information or indication on the Financial Offer or Alternative Financial Offers);
    - Operations management (asset and facilities management lifecycle replacement, lifecycle costs); and
    - Commercial (financing certainty, financial capacity, equity strategy, debt strategy).

Note: the technical documents listed above would be determined on a contract-specific basis and shall be stated clearly in the Conditions to Tenderers.

77. All tenders shall be submitted on or before the designated closing time. The submission time and the tender opening shall be recorded by the designated officer and witnessed by a second officer.

78. Under no circumstance shall late tenders be opened or accepted without the express written approval of the WKCDA Board. Nevertheless, a tenderer shall not be penalized if a tender is received in the office designated in the tender documents after the time specified because of delay due solely to the mishandling on the part of WKCDA's staff.

79. Any prescribed time-limits for submission of tenders shall be adequate to allow the tenderers to prepare and submit tenders before closing of the tendering procedures. In determining any such limit, the needs, complexity of the intended procurement, the extent of subcontracting and financing anticipated are factors to

be taken into account. The timeframe allowed for tender returns should take into consideration the specific nature of the development package. Except as otherwise approved by the WKCDA Board, PPP projects will allow between 3-6 months for a tender response from the private sector.

### **Alternative proposals**

80. In all tenders, tenderers are required to submit a base case technical and financial proposals (base case proposal) that are compliant with the requirements of the tender documents. In tender processes that allow alternative proposals, the alternative proposals (including both technical and financial proposals) must also be evaluated in accordance with the same evaluation procedure for the base case proposal. The WKCDA Board shall be the approving authority for the permission to submit alternative proposals.

81. For each alternative proposal, tenderer should make clear all changes and variations of the alternative proposal from the base case proposal.

82. Tenderers should indicate which of the proposals submitted is the "preferred proposal" i.e. being the proposal which, in their view, provides WKCDA with the optimum solution that meets the objectives and desired outcome of the development package.

83. In submitting alternative proposal(s), tenders should highlight the advantages and disadvantages of the alternative proposals as compared to the base case proposal and in particular the impact on value for money whether that be through enhanced service delivery, reduced risk, speedier delivery and/or lower prices etc.

### **Tender deposit**

84. Upon receipt of an invitation to tender, tenderers shall be required to provide a tender deposit which may take the form of cash (cashier's cheque) or a bond. The pre-specified tender deposit value shall be submitted by tenderers at the time of collection of the tender documents or within such other period as notified to the Tenderers by the Authority.

85. WKCDA will have the right to retain the tender deposit if the tenderer does not submit a bona fide tender or for any reason withdraws its offer at any stage for any reason during the tender validity period.

86. If not retained for the preferred tenderer, the tender deposit will be returned, without interest, after the tenderer has fulfilled all of its obligations and after contract award.

87. Considerations for setting the value of the tender deposit will vary depending on the nature of the project.

### **Tender opening**

88. The officers with responsibility for opening tenders should not take part in tender assessment, selection and approval processes of that particular tender.

89. The tender box shall be locked with two locks. The keys shall be kept by two individual independent key holders appointed by the WKCDA.

90. The originals of each tender submission shall be dated and time stamped. At the opening of the financial proposals, the relevant pages showing the fee and price rates shall be initialed by the officers witnessing the opening of the proposals.

91. The originals of all tenders i.e. tender submissions and opening records shall be retained by the TMT for control purposes.

### **Check for compliance**

92. At the tender closing date, the tender returns should be registered and controlled. Upon receipt of the tender returns, the TMT will conduct a review to confirm that each tenderer has provided the documents, materials and information requested in the tender documents.

93. The TMT (with support of SATs if required) will provide advice to the TAT and PPP Committee in determining:

- a) Whether each tender return is conforming;
- b) Which base case proposals will be assessed; and
- c) Which alternative proposals will be assessed.

94. The SATs and TMT must work with the legal advisors in the SAT to identify any potential or perceived conflicts of interest and probity issues. Any potential probity issues declared by the tenderers will be reviewed and adherence to compliance requirements must be confirmed. To facilitate declaration by tenderers and assessment by SATs, TMT and/or TAT, WKCDA should pre-determine and make known to the tenderers the declaration and checking mechanism, including but not limited to the following –

- a) which staff members and companies are required to make a declaration; and
- b) how the conflict of interest declared and findings of the probity check will affect the tender assessment.

### **Screening assessment**

95. The TMT (and supporting SAT representatives if required) will conduct a screening to ensure that tender submissions satisfying all legal certifications and statements as required within the tender documents are submitted.

96. Where certain tender information is found missing or where a tender contains some technical ambiguities, qualifications or counter-proposals, the TMT

will need to consider carefully whether to seek the missing information or clarification from the relevant tenderer. In general, the TMT shall keep such post-tender closing communication with tenderers to the minimum. TMT shall also record clearly and in full all such communication. Most importantly, TMT must ensure that such communication will not give a tenderer any advantage or perceived advantage over other tenderers. The opportunities that may be given to tenderers to correct unintentional errors of form (for instance, clerical errors) shall not be permitted to give rise to any discriminatory practice.

97. Where the provision of certain information is specified as an “essential requirement” in the tender document and where such information is missing in a tender, the tender shall be considered as non-conforming. The TMT shall not approach the concerned tenderer for the missing information of this nature.

98. Where the missing information relates to factual information which does not materially affect compliance with the essential requirements specified in the tender document, and where there is no room for manipulation by a tenderer by virtue of late submission of such information, the TMT may approach the concerned tenderers for such missing information.

99. In approaching a tenderer for clarification, the TMT must not provide any information that may assist the tenderer to improve his tender to the level of tenders from other tenderers.

100. Under no circumstance shall any amendment to the Financial Offer in the course of the tenderer’s providing technical clarifications be acceptable to WKCDA. If a clarification or correction in respect of arithmetical error results in an adjustment of the Financial Offer, the TMT shall ask the tenderer to confirm whether he is prepared to abide by the adjusted Financial Offer. If the tenderer refuses to so abide, the TMT shall consult the legal advisors in the SAT, the TAT and PPP Committee on how to deal with the tender. Under no circumstances may the TMT assume a tender has been rejected as a qualified bid (expressly or otherwise) without the approval of the WKCDA Board for contract award.

### **Tender presentations**

101. Where it is necessary, as part of the technical assessment, for the tenderers to give presentations to members of PPP Committee, TAT, TMT and SATs members, the detailed arrangement for the presentations shall be stated clearly to the tenderers in the tender documents. Presentations should be conducted following tender submission closing date to allow members to review and seek clarification on relevant sections of the proposal.

102. All tenderers shall have the same opportunities and be subject to the same constraints, including the maximum allowable time for their presentations and the maximum number of participants from each tenderer or requirements as to whom of the personnel must attend the presentation. The tenderers shall be allowed to highlight the key commercial and technical aspects of their technical proposal and mitigate potential misinterpretations during the tender assessment stage. They must however make the presentation based on their submitted tenders and shall not

provide other additional information without prior request of the WKCDA. The procedures, conditions and timeframe of the presentations must be consistent for all tenderers.

### **Post-tender clarification**

103. The purpose of post-tender clarification is to allow WKCDA an opportunity to interrogate bidders on the detail of their submission and to remove any ambiguity around the terms proffered. WKCDA may ask tenderers to confirm in writing answers given by way of clarification. This however is not a negotiation nor does it provide any scope for tenderers to change the terms of the tender submitted. The process is simply one which allows any clarification sought by WKCDA, for that clarification to be recorded and for the bid evaluation to be constructed in light of the clarification received.

### **Tender assessment**

104. TAT shall be responsible of carrying out the tender assessment, with the TMT and/or SAT assisting to analyse the proposals submitted by the tenderers.

105. The tender assessment shall be strictly in accordance with the assessment criteria approved by the WKCDA Board. The individual assessment of the tender returns will include a factual assessment by the SATs and/or TMT and independent review by the PPP Committee.

106. The TAT with the support of SATs and/or TMT should also carry out probity checks on tenderers, including all members of the consortium and their parent or affiliated companies, during the tender assessment. The probity check should examine the following corporate issues regarding the tenderers' current and previous operations:

- a) Professional conduct, e.g. any records of offence/conviction of professional misconduct, or serious breach of contract, etc.
- b) Ethical practices, e.g. any records of unfulfilled legal obligations (such as outstanding tax payment); exploitation of non-skilled workers; or fraud/corruption, etc.

107. All members of the SATs, TMT, TAT, the PPP Committee and WKCDA Board or any independent advisors or consultants or persons involved in the assessment of the tender submissions shall declare any conflicts of interest to the Chairman of PPP Committee. The Chairman of PPP Committee shall have the authority to decide whether a member potentially in conflict should stand down from the procurement process. Access to the tender returns will be restricted to a core evaluation team comprising of technical and financial members of the TMT (and SATs, if required) designated by TAT and all members of TAT.

108. Electronic-copies of the technical proposal will be provided to the designated technical TMT members and SAT (if required). A physical data room will be established to store all physical copies of the tender returns.

109. A copy of the Financial Offer, supporting model (if required) and any other supporting information will be provided to the designated financial and commercial TMT members and SAT (if required).

110. The technical and financial proposals may be assessed in parallel, while maintaining separation between the technical and financial teams. No information in the financial proposal or the financial offer will be made known to any of the designed technical TMT members and SAT and any of the TAT members before the technical assessment are finalized (unless approved by the PPP Committee).

111. Designated technical members of the TMT (and SAT if required) shall prepare and submit to the TAT a technical assessment report on:

- a) Assessment of the strengths, weaknesses and risks of the technical and business case proposal from each tenderer against the relevant assessment criteria and with reference to the tender assessment plan; and
- b) Identification of any material variations in risk and opportunities between the different tenderers.

112. Taking into consideration the recommendations of the technical report, the TAT will conduct individual evaluation of the technical proposals and will score and rank the technical proposal against each assessment criteria.

113. Designated financial members of the TMT (and SAT if required) shall prepare and submit to the TAT a financial assessment report which documents the analysis of income sharing and upfront payment (if any) of the tenders and assessment of the financial assumptions.

114. Taking into consideration the recommendations of the designated financial members of the TMT, the TAT will conduct individual evaluation of the financial proposals and will score and rank the financial proposal against each assessment criteria in the tender assessment plan previously endorsed by the WKCDA Board. The TAT will then determine the total combined score and the overall ranking. Normally, the tender which attains the highest overall score should be recommended.

### **Tender reports**

115. Based on initial technical and financial reports from the TMT, the TAT shall prepare a draft tender report containing a clear recommendation.

116. The draft tender report shall be agreed by the TAT members and submitted to the PPP Committee for independent review and assessment.

117. Following review by the PPP Committee, and if no further analysis by TAT is required, the tender report shall be signed off by the Chairman of the PPP Committee for recommendation for approval to the WCKDA Board.

118. A typical tender report should comprise the following -

- a) Background to the project and purpose of the report;
- b) Summary of the procurement process, including tender process, program, submissions received, declaration on conflicts, etc;
- c) Contractual summary, including key terms and conditions, security arrangements, etc;
- d) Tender selection (if required), including summary of prequalification outcomes;
- e) Tender assessment results, including evaluation criteria and methodology, evaluation governance, findings of the technical and financial assessment, comparison against FMV, tender qualifications and clarifications (if any); and
- f) Recommendations, including preferred tenderer (and reserve, if used), letter of clarification (if necessary), negotiation strategy (if any) and program to contract award.

### **Endorsement and approval**

119. The PPP Committee will review the **tender assessment report** and provide recommendation to the WKCDA Board the TAT's decision of the preferred tenderer or alternative courses of action. Upon selection of the successful tenderer, appropriate probity measures should also be adopted on the side of the successful consortium.

120. If approval is achieved by the WKCDA Board, the tender will be awarded to the **preferred tenderer** or the recommended alternative course of action may be executed including the conduct of negotiation and negotiation team members with the preferred tenderer if required.

121. WKCDA shall not accept any offer on the upfront payment to Government for HOR portion which is unreasonably low (i.e. lower than the pre-determined FMV). If there is no conforming offer satisfying the pre-determined FMV, WKCDA shall cancel the tender.

122. In case the Board considers that it is in the public interest to accept a tender despite an offer of upfront payment which is lower than the pre-determined FMV, WKCDA shall submit the case to the Secretary for Home Affairs for submission to the Chief Executive in Council for consideration and exceptional approval.

### **Post-tender negotiation**

123. The purpose of post-tender negotiation is to reach agreement to provide a better overall outcome for WKCDA than would otherwise be achieved. The requirement for post-tender negotiation can arise for a range of reasons, including the following:

- a) There is ambiguity in the requirements set out in the tender documentation or draft contract that was not identified during the clarification process (e.g. misinterpretation of WCKDA's intention by the tenderer);

- b) The tender proposals may have been sufficiently clear for the purposes of the tender assessment, but WKCDA requires further clarification on details that were not material to the tender assessment and may wish to negotiate more precise solutions; and
- c) The tender to be recommended contains counter-proposals or qualifications to the tender terms which are disadvantageous to WKCDA but are not sufficiently substantial nor deemed non-conforming in nature.

124. For the scenarios listed above, negotiation may potentially reduce the risk of issues arising later in the development as a result of a lack of clarity in the documentation or inconsistencies between the tender proposal and the contract.

125. It should be noted that allowing for negotiating at any stage creates a risk of reducing the transparency of the procurement process.

126. The challenge is increased when negotiations are undertaken after a preferred tenderer is identified, as the bargaining power of the preferred tenderer will be increased. For this reason, it is recommended that negotiations should be avoided and care should be taken during the drafting of the tender documents and the contract to ensure there is clarity in the tender documents and the risk allocation is acceptable.

127. If negotiations are conducted, it is best practice for the preferred tenderer to resubmit its proposal reflecting the agreed amendments for reassessment. This is to ensure that the tender proposal is updated appropriately and the solutions retain value for money. Undertaking of tender negotiation, recommended negotiation strategies, membership of the negotiation team and the scope of negotiation, including the desired outcome(s)/target(s) of the negotiation shall be subject to the approval of the WKCDA Board.

128. The Chairman of negotiations shall be at Chief Officer level, unless otherwise approved by the WKCDA Board. Only officers with no real or potential conflict of interest shall lead or participate in negotiations.

129. The following principles must be observed in all negotiations:

- a) Under no circumstances should confidential information concerning other tenderers' offers be revealed during negotiations;
- b) All tenderers involved in negotiations must be treated fairly and equally, and given access to the same information;
- c) Records must be kept of all negotiation meetings and discussions with tenderers; and
- d) The set of guidelines on conducting post-tender negotiation in **Appendix E** should be adhered to as far as practicable.

### **Tender award**

130. After the tender is evaluated according to the relevant criteria provided in the tender documents, the completion of any negotiations (if applicable), and following approval of **tender award** from the WKCDA Board, WKCDA shall inform

tenderers of the outcome of the tender assessment and unsuccessful tenderers will be notified. If required, a debriefing of the tender assessment process may be conducted for unsuccessful tenderers. A public announcement of the successful bid will be made.

131. If a significant delay in the tender award process is beyond the timeframes specified in the tender documents, it should be considered whether the preferred tenderer will still be capable of achieving the contractual milestones and the commitments made in its proposal. Revision of the timeframe may be required. Extended delays may also provide a basis for unsuccessful tenderers to challenge the award decision, therefore in order to mitigate this risk, realistic timelines for the award process should be established from the outset.

### **Bid completion bond**

132. Upon announcement of the preferred tenderer, the preferred tenderer may be required to submit a bid completion bond. This bond is in place to ensure the awarded tenderer will execute the contract.

133. WKCDA will have the right to retain the tender deposit (see paragraph 84) and draw down the bid completion bond if the corresponding tenderer for any reason withdraws its offer or does not proceed with contract execution.

### **Payment of upfront payment**

134. Upon announcement of the preferred tenderer, the preferred tenderer shall be required to pay the upfront payment within 14 days to WKCDA who shall, within 14 days after receipt thereof, pay the same to the Government.

### **WKCDA rights**

135. For all PPP projects, WKCDA reserves the right, without prior notice, to terminate the procurement process, to change the basis, the procedures, or timescale for the procurement process, or to reject any or all tender returns for any development package and to terminate discussions and clarifications with any or all tenderers at any time and to terminate any subsequent part of the procurement process. WKCDA is not obliged or bound to accept the best, highest combined score, highest Financial Offer or any tender. WKCDA reserves the right to accept any tender which WKCDA in its absolute discretion considers to be most advantageous overall to WKCDA. Under no circumstances shall WKCDA or its advisors incur any liability in respect of such changes to or termination of the tender process or any decision on the award of the tender. This will be stated in each tender invitation document. Approval by the WKCDA Board is required for exercising such rights.

### **Conflict of interest and confidentiality**

136. A conflict of interest arises where a member of the PPP Committee, TAT, TMT, and SATs or any independent advisors or consultants or persons involved in the assessment of the tender submissions has an affiliation or interest which might appear to prejudice their impartiality. If an actual, potential or perceived conflict of

interest exists, WKCD A must undertake a risk assessment and determine the appropriate approach to protecting the interests of WKCD A.

137. The following should be considered to assess: (i) whether a conflict of interest exists; (ii) whether further risk assessment or immediate remedial action is required; and (iii) whether the interests of the WKCD A and the competitiveness of the procurement process could be compromised by the event at hand:

- a) Conflict of duty – do other duties of the individual result in compromising their obligation to WKCD A?
- b) Does the individual have the ability to compromise their obligation to WKCD A by accessing information that may benefit themselves or other parties?
- c) Could the individual compromise the interests of, or their obligation to, WKCD A by potentially influencing or altering the outcome to WKCD A in a way that will benefit the person or other parties?

138. Any disclosures should be directed to the Chairman of the PPP Committee. The Chairman should then review the disclosed situations in consultation with the legal advisers, the WKCD A Board and other stakeholders as required. The reporting and consideration of the potential conflict of interest should be well documented.

### **Classification of Information**

139. Information relating to tenders and contracts should be handled in the following manner:

- a) All communications regarding tenders, from the time tenders are received and opened until a decision is made on the acceptance or otherwise of the tenders must be classified as RESTRICTED (TENDER). Correspondence on prequalification should also be classified as RESTRICTED (TENDER).
- b) Only officers who are specifically authorized to do so may open and handle communications, documents and correspondence (documentation) relating to tenders and contracts. Authorized officers shall handle such documentation with great care and in strict conformity with WKCD A's security requirements for such documentation, distribution of such documentation shall be made on a need-to-know basis.

### **Review**

140. These guidelines should be reviewed from time to time and at a minimum, following the completion of each PPP project. Any major amendments or revisions to these guidelines shall be reviewed by the PPP Committee and submitted to the WKCD A Board for approval. The Board shall approve any deviations from the PPP Guidelines in preparing the EOI (if required), the tender documents and the carrying out of the procurement process as a whole.

## **Appendices**

### **Appendix A. Sample Probity Clauses for Inclusion into Consultancy Agreements**

#### **Information not to be divulged**

1. The Consultant shall not use or divulge, except for the purpose of the Contract, any information provided by the Employer in the Contract or in any subsequent correspondence or documentation. Any disclosure to any person or agent or sub-consultant for the purpose of the Contract shall be in strict confidence and shall be on a “need to know” basis and extend only so far as may be necessary for the purpose of this Contract. The Consultant shall take all necessary measures (including by way of a code of conduct or contractual provisions where appropriate) to ensure that information is not divulged for purposes other than that of this Contract by such person, agent or sub-consultant. The Consultant shall indemnify and keep indemnified the Employer against all loss, liabilities, damages, costs, legal costs, professional and other expenses of any nature whatsoever the Employer may suffer, sustain or incur, whether direct or consequential, arising out of or in connection with any breach of the aforesaid non-disclosure provision by the Consultant or his employees, agents or sub-consultants.

#### **Prevention of Bribery**

2. The Consultant shall prohibit his employees, agents, and sub-consultants who are involved in this Contract from offering, soliciting or accepting any advantage as defined in the Prevention of Bribery Ordinance, Cap 201 when conducting business in connection with this Contract.

#### **Declaration of Interest**

3. The Consultant shall require his employees, agents and sub-consultants who are involved in this Contract to declare in writing to the Consultant any conflict or potential conflict between their personal/financial interests and their duties in connection with this Contract. In the event that such conflict or potential conflict is disclosed in a declaration, the Consultant shall forthwith take such reasonable measures as are necessary to mitigate as far as possible or remove the conflict or potential conflict so disclosed.

4. The Consultant shall prohibit his employees who are involved in this Contract from engaging in any work or employment other than in the performance of this Contract, with or without remuneration, which could create or potentially give rise to a conflict between their personal/financial interests and their duties in connection with this Contract. The Consultant shall also require their sub-consultants and agents to impose similar restriction on their employees by way of a contractual provision.

5. The Consultant shall take all necessary measures (including by way of contractual provisions where appropriate) to ensure that his employees, agents and sub-consultants who are aware of the prohibitions in this clause.

## **Consultant's Declaration**

6. The Consultant shall also submit a signed declaration in a form (**Annex 1**) prescribed or approved by the Employer to confirm compliance with the provisions on ethical commitment as stated in the aforesaid sub-clauses (1), (2), (3), (4) and (5). If the Consultant fails to submit the declaration as required, the Employer shall be entitled to withhold payment until such declaration is submitted and the Consultant shall not be entitled to interest. To demonstrate compliance with the aforesaid sub-clauses (1), (2), (3), (4) and (5) on confidentiality, prevention of bribery, and declaration of interest, the Consultant and their sub-consultants employed for the performance of duties under this Contract are required to deposit with the Employer a code of conduct issued to their staff.

**Declaration Form**  
**by Consultants on Their Compliance with the Ethical**  
**Commitments Requirements**

To: [Name of the Employer]

Agreement No.: .....

Title: .....

In accordance with the Ethical Commitment clauses of the Contract, we confirm that we have complied with the following provisions and have ensured that our directors, employees, sub-consultants, agents are aware of the following provisions:

(a) Prohibiting our directors, employees, agents and sub-consultants who are involved in this Contract from offering, soliciting or accepting any advantage as defined in section 2 of the Prevention of Bribery Ordinance, Cap 201 when conducting business in connection with this Contract;

(b) Requiring our directors, employees, agents and sub-consultants who are involved in this Contract to declare in writing to us any conflict or potential conflict between their personal/financial interests and their duties in connection with this Contract. In the event that a conflict or potential conflict is disclosed, we will take such reasonable measures as are necessary to mitigate as far as possible or remove the conflict or potential conflict so disclosed;

(c) Prohibiting our directors and employees who are involved in this Contract from engaging in any work or employment other than in the performance of this Contract, with or without remuneration, which could create or potentially give rise to a conflict between their personal/financial interests and their duties in connection with this Contract and requiring our sub-consultants to do the same;

(d) Taking all measures as necessary to protect any confidential/privileged information or data entrusted to us by or on behalf of the Employer from being divulged to a third party other than those allowed in this Contract.

(Name of the Consultant) .....  
(Name of the Signatory) .....  
(Position of the Signatory) .....  
(Date) .....

## **Sample Debarment Clauses for Inclusion into Consultancy Agreements**

1. The Consultants shall not, and shall ensure that any of their associated companies, their associates or associated persons or any of their sub-consultants shall not, during the term of this Agreement and for [ ] months thereafter, undertake any services, tasks or jobs or do anything whatsoever for or on behalf of any third party (other than in the proper performance of this Agreement), which touches, concerns or affects the services under this Agreement or which may reasonably be seen to touch, concern or affect the services under this Agreement, except with the prior written approval of the Employer which approval shall not be unreasonably withheld.
2. Without prejudice to the generality of clause (A), the Consultants shall not (whether on their own or through their associated companies, associates or associated persons or in joint venture with others), and shall ensure that any of their sub-consultants shall not,
  - a) undertake or compete for the role of a contractor or supplier or otherwise be involved as a shareholder of the contractor or supplier, in a subsequent procurement of any services and/or goods arising out of or relating to this Agreement;
  - b) undertake any services for a contractor (including acting as a sub-contractor) or supplier in respect of a contract between that contractor or supplier and the Employer for which the Consultants are providing a service arising out of or relating to this Agreement;
  - c) undertake any services for, including, without limitation, provision of advice to, a bidder bidding for a contract arising out of or relating to this Agreement, except with the prior written approval of the Employer.
3. In the event that the Consultants have advised on the preparation of the tender, including tender specifications and tender assessment, the Consultants undertake that under no circumstances will they bid, participate or be financially involved in that or related tender exercise.
4. The Consultants shall take all necessary steps to ensure that under no circumstances will their associated companies, associates, associated persons and sub-consultants participate or be financially involved in the tender exercise referred to in the preceding sub-paragraphs.

## **Appendix B. Guidelines on Managing Conflict of Interest**

### **Section 1.1 Basic Principles for Managing Declared Conflict of Interest**

#### **Section 1.1.1 Fact-finding**

When a report of a conflict of interest is received, the decision-maker should exercise due diligence to:

- a) examine the facts of the case to determine whether there is any conflict;
- b) where necessary, interview the officer/member concerned or conduct other enquires to seek further information on the matter; and
- c) consider whether the conflict of interest situation is serious enough to warrant any further action.

#### **Section 1.1.2 Determining Whether a Conflict of Interest Exists**

In assessing conflict of interest situations, the decision-maker should consider:

- a) whether the declared conflict of interest is an actual or a potential one;
- b) whether there is a possible negative public perception of the conflict, even though the conflict is relatively remote or indirect.

#### **Section 1.1.3 Timeliness**

The decision-maker should manage the conflict of interest declared in a timely manner and ensure that the follow-up mitigating measures are implemented as soon as practicable.

#### **Section 1.1.4 Appropriateness**

The decision-maker should ensure that the mitigating measures to be adopted are commensurate with the nature and magnitude of the conflict and are publicly defensible.

#### **Section 1.1.5 Documentation**

Proper documentation of the rationale for the decisions made and the course of action taken should be maintained.

A sample form for making the declaration, recording the decision made and action taken is at **Annex 2** for reference.

It would be helpful to develop a dossier of precedent cases in managing declared conflict of interest so as to enhance consistency and facilitate sound decisions in managing declared conflict in future.

### **Section 1.2 Handling of Declarations at Meetings**

If the declared conflict is indirect, remote or insignificant, the officer/member concerned may be allowed to participate in the meeting. Otherwise, depending on the nature and seriousness of the conflict, the officer/member concerned may be required, inter alia, by the chairman to:

- a) remain in the meeting as an observer but refrain from voting/making a decision on the matter;
- b) cease to be counted towards the quorum necessary for voting on the decision on the matter; and/or
- c) withdraw from the meeting when the item is being discussed.

If the chairman declares an interest in a matter under consideration, the chairmanship could be temporarily taken over by the vice-chairman, or if one is not available, a senior member of the meeting. If so, depending on the nature and seriousness of the conflict, the chairman may be required to:

- a) remain in the meeting as an observer but refrain from voting/making a decision on the matter;
- b) cease to be counted towards the quorum necessary for voting on the decision on the matter; and/or
- c) withdraw from the meeting when the item is being discussed.

If a member/the chairman has declared a conflict of interest, the chairman or acting chairman should decide whether the member/chairman should be prohibited from gaining access to any related information. The secretary should ascertain whether any such information has already come to his possession.

Where a member/the chairman has already received any document on matters in which he has a conflict of interest, he should immediately inform the secretary of the meeting and return the documents accordingly. He should also be reminded not to disclose the information to other parties. The chairman or acting chairman shall consider if any party will have an edge over the other competing parties as a result of the member's/chairman's possession of the related information, and whether any measures should be taken to ensure a level playing field (e.g. call off the tendering exercise, or appoint a new tender board and invite for quotations again).

All cases of declaration of conflict of interest, and actions taken with justifications should be recorded in the minutes of the meeting.

### **Section 1.3 Positive Declaration**

Depending on operational needs and circumstances, officers/members who participate in tender exercises may be required to declare if they have or do not have any conflict of interest on the matter in order to protect the public interest. Proper documentation of the declaration and follow-up actions, if any, should be maintained.

### **Section 1.4 Mitigating Measures**

#### **(a) Record**

After an officer/a member has declared a conflict of interest, if it is considered sufficient to take note of the conflict only, the decision-maker should advise him/her that he/she should refrain from discussing the issue/matter with the persons involved in the declared conflict and disclosing any confidential information to outsiders.

This applies to conflict of interest situations in which the risk is indirect, remote or insignificant, and the occurrence of such a situation is infrequent.

### **(b) Restrict**

There are situations where it may be necessary to restrict an officer's/a member's involvement in a task in which he has a conflict and access to the related information.

This may apply to conflict of interest situations in which :

- a) such restriction can effectively separate the officer/member from the part of activity or process in which the conflict arises; and
- b) where the conflict is not likely to arise frequently.

Before adopting this measure, the decision-maker should critically assess if restricting the officer/member's involvement can effectively segregate him/her from the activity/process in which the conflict arises.

### **(c) Recruit**

If it is not practical to restrict an officer/a member's involvement and if appropriate, an independent officer/member may be recruited to participate in, oversee, or review part or all of the decision-making process. At times, an independent panel of external experts may be assigned or appointed to help provide an objective assessment/oversight on the matter.

### **(d) Redeploy**

If it is considered inappropriate to allow an officer/a member who has declared a conflict of interest to handle a specific matter, he/she should be relieved of his/her duty which may then be taken up by another officer/member through redeployment.

This measure applies to situations involving serious conflict of interest when 'restriction' or 'recruitment' is infeasible or unable to mitigate the conflict.

### **(e) Relinquish**

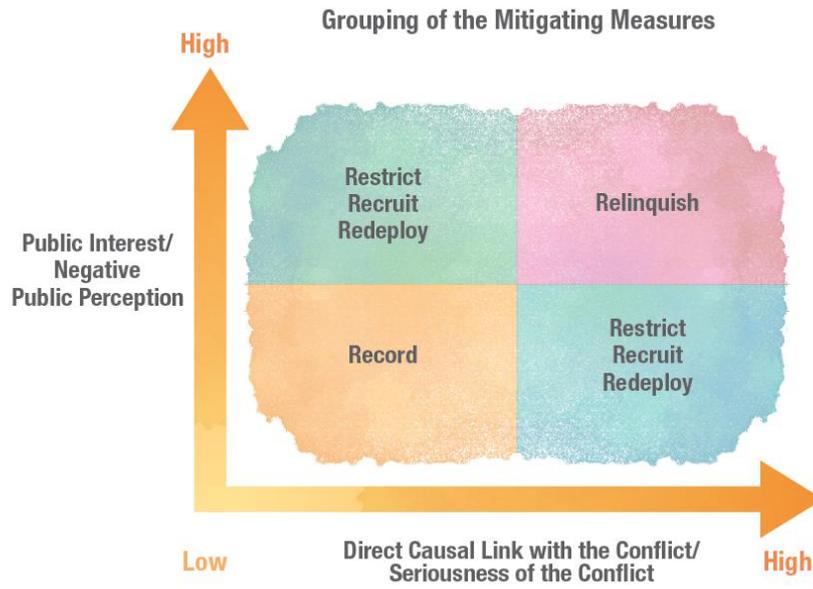
There are situations where an officer/a member's commitment to his/her duty outweighs his/her attachment to his/her private interest, and adopting other mitigating measures are not appropriate or possible.

Under such circumstances, asking the officer/member who has declared a conflict to relinquish his/her personal or private interests, e.g. divesting the investments, could be viable methods for resolving the conflict.

### **Use of the Mitigating Measures**

As shown in the diagram below, the mitigating measure(s) to be deployed would depend on the circumstances of the cases and the level of mitigation should commensurate with the severity of the conflict.

When deciding which mitigating measure(s) to adopt, consideration should also be given to the perception of the public on how far public interest is protected. Sometimes, more stringent measures may be required to address the public concern.



**Declaration and Management of Conflict of Interest**

**Part A – Declaration (To be completed by Declaring Officer)**

To : (Approving Officer)

I would like to report the following existing/potential\* conflict of interest situation arising during the discharge of my official duties:

<b>Persons/companies with whom/which I have official dealings</b>
<b>My relationship with the persons/companies (e.g. relative)</b>
<b>Relationship of the persons/companies with our organisation</b>
<b>Brief description of my duties which involved the persons/companies (e.g. handling of tender exercise)</b>

\_\_\_\_\_  
(Name of Declaring Officer)

(Date)

\* Potential conflict of interest refers to situation that may be developed into an actual conflict in the future.

**Part B – Approval (To be completed by Approving Authority)**

To : (Declaring Officer)

**Part B(i) – In respect of the declaration in Part A of this form, it has been decided that:**

The declaration as described in Part A is noted. You may continue to handle the work as described in Part A, provided that there is no change in the information declared above.

You are restricted in the work as described in Part A.

**Details :**

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You may continue to handle the work as described in Part A, but an independent officer would be recruited to participate in, oversee or review part or all of the decision-making process.

**Details :**

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You are relieved of your duty as described in Part A, which will be taken up by another officer through redeployment.

**Details :**

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You should relinquish the personal/private interest.

**Details :**

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Others (please specify):

**Details :**

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**Part B(ii) – The justification(s) for the measure(s) as described in Part B(i) above is/are:**

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\_\_\_\_\_  
(Name of Approving Officer)

(Date)

### **Appendix C. Sample Clauses to be included in the EOI Document**

1. Tenders will be invited from prequalified tenderers only. WKCDA reserves the right to prequalify any applicant who meets the qualification requirements.
2. If WKCDA becomes aware that a prequalified applicant has ceased to be able to meet the qualification requirements then WKCDA may, at its discretion, disqualify the applicant at any time prior to acceptance of the tender. In such case, WKCDA may add another prequalified applicant or tenderer for the contract.
3. All prequalified applicants will be required to make a statement at the time of tender submission to confirm that there has been no material change in their qualifications.
4. No applicant is permitted to submit more than one application for each prequalification either on its own behalf or as a participant or shareholder of a joint venture. For the purpose of this clause, a holding company and its subsidiaries are considered as one and the same applicant. A holding company and its subsidiaries shall be allowed to submit only one application for prequalification from any one of the companies in the group of companies as defined in section 2(1) of the Companies Ordinance (Cap. 622), either on its own behalf or as a participant or shareholder of a joint venture. The existence of a holding-subsidiary relationship shall be determined as at the date set for the close of prequalification, or if this has been extended, the extended date, and in accordance with the provisions in section 13 to 15 of the Companies Ordinance (Cap. 622). Applications submitted from an applicant on his own behalf who is found to be in breach of this clause or from a joint venture or joint ventures in which any participant or shareholder is found to be in breach of this clause shall not be considered.

## **Appendix D. Key BOT Terms for Tender under Enhanced Financial Arrangements**

1. The length of the BOT contract shall be no more than a fixed number of years agreed with the Government covering the construction and operation periods.<sup>4</sup>
2. Any design brief or control document covering the theme, colour and other essential elements such as the use of District Cooling System and other key terms of the BOT development package (e.g. mode of operation, tenancy mix and marketing strategy, cost and losses to be borne by the BOT developers and senior management appointments) will be subject to approval by the Board.
3. The Authority shall retain the power to cancel the tender at its sole discretion (including but not limited to the situation where there is no conforming offer satisfying the pre-determined FMV).
4. The Authority shall not require the developer to pay another upfront payment apart from the upfront payment attributable to the Government.
5. Technical constraints and requirements in relation to the West Kowloon Terminus of the Express Rail Link, to its best knowledge, in the BOT tender document.
6. The Authority shall set out that the Developers shall not claim any possible losses from the Government which might arise from the operation of the development package.
7. The Authority shall make clear to HOR developers that there should not be expectation for renewal of the sublease upon the expiry of the term of the BOT.
8. If planning permission is required for residential units (including but not limited to serviced apartments) or other uses according to the extant Development Plan, the Authority shall either obtain relevant planning permission before tendering out those land parcels involving residential use, or draw the potential bidders' attention to such requirements in the BOT tenders where appropriate.

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<sup>4</sup> If the Authority needs to provide a BOT period that exceeds the maximum agreed with the Government, the Authority shall submit the request, with justifications, in writing to the Secretary of Home Affairs for subsequent submission to the Chief Executive in Council for consideration and approval.

## **Appendix E. Guidelines on Conducting Post Tender Negotiation**

1. As the negotiator needs the flexibility in conducting post-tender negotiations, the process is highly corruption prone. Any corrupt dealings between the negotiator and the selected tenderer would not be easily detected and such malpractice will definitely hurt the organisation, both in terms of profits and reputation. Post-tender negotiation should therefore be the exception rather than the rule.
2. Post-tender negotiation should normally be conducted with the tenderer whose tender has been found to be clearly the most advantageous to the organisation in relation to the evaluation criteria. Where no one tender is clearly more advantageous or where the most advantageous tender cannot be determined until the counter-proposals have been resolved or withdrawn, it may be necessary to hold negotiations also with the tenderers who have presented the second or the third best proposals. The criteria for the selection of tenderers for negotiations should be objective and reasonable, and should be stated in the invitation to tender to enhance transparency.
3. Since negotiations conducted in a one-to-one situation place the negotiator in a vulnerable position, it is advisable to form a negotiation team of selected staff to conduct the negotiations as far as practicable. The appropriate size of the team depends on the nature and complexity of the contract.
4. Post-tender negotiation should proceed only with the approval of the organisation at an appropriate level, which should also determine the level of staff to undertake the negotiation and the composition of the negotiation team.
5. The following points should be taken into consideration in appointing the negotiation team -
  - a) the team should be authorised in advance to commit the organisation within baselines (e.g. the financial limit for making commitment at the negotiation) set by the organisation; and
  - b) team members should be required to declare any actual or perceived conflict of interest.
6. To minimise the corruption risk, negotiations should be planned and conducted according to broad guidelines set by the organisation.
7. While the negotiation team may be given a free hand in conducting negotiations, it should be issued with written guidelines on prohibited conduct which include -
  - a) disclosing the contents of other tenders which may contain sensitive commercial information (e.g. technical proposals, intellectual property and price offers), or any other information, to assist a particular tenderer in enhancing the competitiveness of his tender proposal;
  - b) indicating to the tenderer the baseline price that the organisation is prepared to accept;
  - c) soliciting or accepting advantages from the tenderer under negotiation; and
  - d) soliciting or accepting entertainment from the tenderer or engage in any social contacts with him during the negotiation process.
8. Hold the negotiation in the organisation's office as a normal practice.

9. At the end of the negotiation, the tenderer should be required to submit in a sealed envelope the “best and final” offer. This practice could help deter manipulation because in the absence of any written confirmation, the tenderer's offer could be misrepresented or ignored for a corrupt purpose.
10. To enhance accountability, details of the negotiation meeting, including the offer of the tenderer, the outcome and any special points made, should be recorded.