

LegCo Panel on Planning, Lands and Works
Follow-up action arising from the meeting on 1 November 2001

In the joint panel meeting of the LegCo Panel on Planning, Lands and Works and the LegCo Panel on Environmental Affairs on 1 November 2001, members requested the Administration to provide some additional information which is now provided as follows:

(a)(i) Relevant provisions in the Settlement Agreement obliging the Government to maintain confidentiality of the content of these documents

Clause 6 of the Settlement Agreement imposes some restrictions on the release of the contents of the Agreement. A copy of the Settlement Agreement has been provided separately.

(a)(ii) Standard provisions in other contracts and agreement obliging the Government to maintain confidentiality

1. There is a standard provision in public works contracts obliging Government to maintain confidentiality of the contents of the contract documents. Clause 8(2) of the General Conditions of Contract for Civil Engineering Works reads “ The Employer (the Government) and the Engineer may use any information provided by the Contractor in accordance with the Contract but shall not divulge such information except for the purpose of the Contract or for the purpose of carrying out any repair, amendment, extension or other work connected with the Works.” A similar provision is also provided in the General Conditions of Contract for Building Works and for Electrical and Mechanical Engineering Works.

2. There is also a standard provision in the Arbitration Rules that “No information relating to the arbitrations shall be disclosed by any person without the written consent of each and every party to the arbitration.”

3. Mediation is a private and confidential process. The mediation rules require that “Confidentiality also extends to the settlement agreement except where its disclosure is necessary for implementation or enforcement”.

(b) In relation to the information in (a) above, whether such confidentiality provisions may hamper/deprive the Legislative Council of the power to monitor public expenditure and prevent the Administration from being accountable to the public

Use of public funds is subject to audit by the Director of Audit whose reports are provided to LegCo for consideration by the Public Account Committee. We do not believe that the said confidentiality provisions would deprive LegCo of the power to monitor public expenditure or prevent the Administration from being accountable to the public. Notwithstanding, consideration is being given to amend the relevant provisions for future contracts expressly to permit the Administration to disclose the terms of dispute settlement to the Public Accounts Committee to facilitate its deliberations of the Director of Audit’s Value for Money Reports.

(c) Information on the system for admission and re-admission into the List of Approved Contractors.

1. Applications from local and overseas contractors for admission to the List of Approved Contractors for Public Works are addressed to the Works Bureau. The suitability of a contractor for inclusion in one or more of the work categories and in a particular group is assessed on the basis of both the contractor’s global business activity and his activity in Hong Kong following his application for admission. Except in the most exceptional circumstances, a contractor will be admitted initially on probation to the appropriate category and group.

2. Upon receipt of an application, Works Bureau will investigate whether the applicant meets the laid down financial criteria and whether he has appropriate technical and management capability in respect of

each particular category and group being applied for. Admission will be subject to the applicant meeting the financial criteria, having appropriate technical and management capabilities and in all other ways being considered suitable for admission into the Approved List.

3. As a condition for admission, all applicants must possess or set up in Hong Kong a place of business as defined in Section 2 of the Business Registration Ordinance (Cap. 310) and employ in Hong Kong, the minimum of full time management and technical personnel with relevant experience in engineering and project management as specified. Admission to the Approved List will be notified in writing to the applicant by Works Bureau. The letter of notification will specify the work category or categories to which the applicant has been admitted, his group and status as either probationary or confirmed. An unsuccessful applicant will be advised of the reasons for not being admitted but will be given the opportunity to present his view of the matter within 14 days from the date of notification before deciding on such action. The non-admission is confirmed if no representation from the applicant is submitted within the specified period.

4. A contractor who has been removed from any category of work under the Approved List for financial reasons or for failure to submit a tender within a period of three years may be allowed to apply for re-admission in this category at any time after removal. However, a contractor who has been removed from any category under the Approved List for any other reasons is not eligible for re-admission in that category for a period of two years from the date of removal. Any application for re-admission will be deemed a fresh application and will be subject to the criteria set forth in the rules for administration for the time being in force.

(d) Information on regulatory actions against non-performance and/or poor performance of contractors.

1. The List of Approved Contractors for Public Works and the associated regulatory regime are put in place to ensure that certain standards of financial capability, expertise, management and safety are

maintained by the contractors carrying out Government works. If doubts arise about the ability of a contractor to meet the minimum standards generally or for particular class of contracts, it is appropriate that he is not allowed to tender for any new work until he can demonstrate that he can meet the required standard.

2. The Secretary for Works reserves the right to remove any contractor from the Approved List or take other regulating action against a contractor such as suspension, downgrading to probationary status or demotion to a lower group, in respect of all or any of the works categories he is in. Before deciding on such action, a contractor will be given adequate warning of the action proposed and advised of the reasons for it and given the opportunity to present his views of the matter.

3. There are guidelines set out for administration and the circumstances under which regulating action may be warranted. Circumstances which may lead to the taking of regulating actions, include, but are not limited to: -

- (a) unsatisfactory performance;
- (b) failure to submit a valid competitive tender for a period of three years;
- (c) failure to submit accounts or meet the financial criteria within the prescribed time;
- (d) failure to answer queries or provide information relevant to the listing status of a contractor on the Approved List;
- (e) serious misconduct or suspected serious misconduct;
- (f) bankruptcy or other financial problems;
- (g) poor site safety record;
- (h) failure or refusal to implement an accepted tender;

- (i) poor environmental performance;
- (j) court convictions, such as contravention of site safety legislation and Employment Ordinance and employment of illegal immigrants;
- (k) failure to employ the minimum number of full time management and technical personnel;
- (l) violation of laws;
- (m) poor integrity of his employees, agents and sub-contractors in relation to any public works contract unless the misconduct is not within the control of the contractor;
- (n) public interest;
- (o) public safety and public health;
- (p) serious or suspected serious poor performance or other serious causes in any public or private sector works contract; and
- (q) failure to comply with any of the rules for administration of the Approved List relating to the capacity or integrity of the contractor.

4. In the event that special circumstances of a particular case arose which warrant taking of regulating action but do not fit into any of the guidelines, the Secretary for Works may nonetheless take regulating action in the particular case as he deems proper. The guidelines in relation to monitoring of contractor's performance are detailed below.

5. Regular reports on contractor's performance are required for all current public works contracts. The reports should normally be quarterly from the commencement of the works until substantial completion of the works. Reports are also required for contractor's performance in the maintenance period and upon issue of the final

payment certificate. An adverse report will be given if the contractor has not performed satisfactorily in the relevant period for reporting.

6. In the event of disagreement with the grading in the performance report, the contractor may appeal to the reporting department. The reporting department shall inform the contractor in writing as soon as a decision has been made and before the report is finalized.

7. If the contractor has been given the first adverse report on performance, the reporting department shall write to him within two weeks of the reporting date advising him that the report is adverse and the reasons for the adverse report, and warning him of the need to improve. The reporting department shall interview the contractor within three weeks of the reporting date to discuss the shortcomings in his performance, the seriousness of the situation, and the need to suspend him from further tendering should there be a consecutive adverse report on performance.

8. If the contractor has been given the second consecutive adverse report on performance under the same public works contract, the reporting department shall interview the contractor explaining that his continuing poor performance requires action to protect Government's interests by ensuring the contractor is not awarded any further contracts in the category of work until confidence in his performance is restored. The reporting department will invite the contractor to agree to voluntary suspension. The contractor should be warned that failure to agree could lead to mandatory suspension which will result in gazetting of the suspension. The reporting department should also confirm other points made at the interview and warn the contractor that at the end of contract his performance will be assessed and if the overall assessment is adverse, he may be downgraded, demoted or removed. He is also informed that he will be placed on a six weekly reporting schedule.

9. The period of voluntary suspension should continue until the suspension has been uplifted. Uplifting of the voluntary suspension should be considered when the contractor has performed satisfactorily for a minimum period of six months or until and in any event an overall

review of the situation should be carried out at the first quarterly review after substantial completion of the contract. If the reporting department considers that the voluntary suspension of the contractor should be uplifted, all other works departments should be consulted to ensure that there are no objections before uplifting.

10. If the contractor is given continuing adverse report on performance under the same public works contract, further interviews with the contractor shall be at the discretion of the reporting department.

11. At the first quarterly review after substantial completion of a contract for which any adverse reports have been received, an overall review should be carried out by the reporting department to decide whether or not a recommendation should be made to the Secretary for Works to downgrade, demote or remove the contractor from the Approved List.

12. If the contractor receives first adverse reports simultaneously in several contracts in a category or receives adverse reports in several categories of work, he may be subject to stronger regulating action.

13. Consideration may be given to extend suspension to other categories of work if a contractor consistently shows poor performance in aspects, such as poor management ability, which are likely to affect other categories of work.

14. Consideration may also be given to suspend a contractor in cases of repeated adverse reports which are not consecutive.

(e) Whether the provision in the Settlement Agreement regarding the eligibility of the joint venture contractors for tendering public works projects is consistent with the existing policy on regulatory actions against non-performance/poor performance of contractors?

1. As a general policy, we will consider taking regulatory action against a contractor when there is evidence of poor performance. In this

case, we would have considered further regulatory action against the contractor if it had been proved through the legal proceedings that the contractor was wrong. Notwithstanding that the arbitrator has made awards on liability which were substantially in Government's favour, these awards were still subject to appeal by the contractor. As the case was not yet concluded following the arbitration awards, the Government was not yet in a position to take regulatory action against the contractor.

2. While the appeal on liability was pending, the contractor offered to mediate the outstanding issues of quantum. As a result of the mediation, a settlement package was agreed whereby the contractor agreed to pay a very substantial sum to settle the Government's claim and both parties agreed to waive their respective rights to pursue their cases against each other any further. The contractor's retention of their tender status was an essential term of the settlement package and the settlement would not have been achieved if the Government had not agreed to this term. As the overall settlement was considered a good deal, the Government was prepared to agree to it in the circumstances of this case.

3. Although the contractor retains its eligibility for tendering for public works, the Government retains its rights, in any subsequent tender evaluation, to take into account the contractor's past performance in accordance with the usual criteria.

(f) To address members' concern that the sanction of six-month mandatory suspension from tendering public works projects, which according to the Administration is the normal regulatory action against non-performance or poor performance of contractors, may not be commensurate with the gravity of the non-performance or poor performance in many cases.

1. As stated in paragraph 1 of the information provided under item (d) above, the List of Approved Contractors for Public Works and the associated regime are put in place to ensure that certain standards of financial capability, expertise, management and safety are maintained

by the contractors carrying out Government works. If doubts arise about the ability of a contractor to meet the minimum standards generally or for particular class of contracts, it is appropriate that he is not allowed to tender for any new work until he can demonstrate that he can meet the required standard.

2. Based on the above principle, suspension of a contractor will normally not be uplifted until he can demonstrate that he can meet the required standard. Such policy applies to all cases of suspensions of contractors from tendering. Please refer to the information provided under item (g) below for the mechanism to review the eligibility of the contractor for tendering public works contracts upon expiry of the suspension period.

(g) To confirm whether there is any mechanism to review the eligibility of the contractor concerned for tendering public works contracts upon expiry of the mandatory suspension period, and if the answer is negative, to give reasons for not putting in place such a mechanism.

1. As stated in paragraphs 9 and 11 of the information provided under item (d) above, there is a mechanism in place to review the eligibility of the contractor for tendering public works upon expiry of the minimum suspension period of six months.

2. The period of voluntary suspension should continue until the suspension has been uplifted. Uplifting of the voluntary suspension should be considered when the contractor has performed satisfactorily for a minimum period of six months or until and in any event an overall review of the situation should be carried out at the first quarterly review after substantial completion of the contract. If the reporting department considers that the voluntary suspension of the contractor should be uplifted, all other works departments should be consulted to ensure that there are no objections before uplifting.

3. At the first quarterly review after substantial completion of a contract for which any adverse reports have been received, an overall

review should be carried out by the reporting department to decide whether or not a recommendation should be made to the Secretary for Works to downgrade, demote or remove the contractor from the Approved List.

(h) Information on how the non-performance and/or poor performance of a contractor in a public works project will be taken into account in the tendering exercise for subsequent public works projects

1. One of our considerations in contract award is that we must have satisfied ourselves that the tenderer is technically and financially capable of carrying out the works before he is awarded the contract. As mentioned in (d) above, we take regulatory actions against poor performers. In addition, we also maintain a performance rating system on contractors' performance. Even if a contractor is not yet subject to regulatory action but his performance rating has been deteriorating or his performance rating falls below 55, the procuring department would have to examine the tenderer's recent performance closely and provide good justifications before the tenderer is recommended for the contract. If the department is not satisfied with the tenderer's recent performance, the tenderer is unlikely to be recommended for the contract.

2. Moreover, in some contracts where quality of service is of paramount importance, we adopt a marking scheme in tender evaluation in which we take into account the tender proposals as well as the tenderer's past performance, in addition to the tender price. We are now moving towards making wider use of the marking scheme in tender evaluation with a simplified procedure.

(i) Information on the mechanism and procedures for handling claims during the life of contracts of public works projects

A contractor may submit a claim to the Engineer if he considers that he is entitled to additional payment or extension of time for completion of the works according to the terms of the contract. Upon receipt of such claim, the Engineer shall determine the

contractor's entitlement. The Engineer may require the contractor to provide any further information to substantiate his claim. In addition, under the present arrangement, the Engineer is required to refer his assessment of the contractor's claim to the Government such that the Government may express its view before the Engineer concludes his assessment. However, the Engineer shall act impartially in determining the contractor's entitlement and he is not bound to accept the Government's view.

(j) Information on the mechanism and procedures for resolving disputes on claims during the life of contracts of public works projects

(i) If there is any dispute between the contractor and the Government arising out of the contract including any dispute as to any decision, instruction, order, direction, certification or valuation by the Engineer, it shall first be referred to the Engineer for a final decision of the Engineer.

(ii) If the contractor or the Government is not satisfied with the Engineer's final decision, either party may request the matter be referred to mediation. Mediation is to be conducted on a voluntary basis and any terms for settlement are subject to agreement by both parties.

(iii) If the matter cannot be resolved by mediation, either party may refer the matter to arbitration. The arbitration award is binding on both parties subject only to a statutory right of appeal on questions of law.

(k) In relation to the information in (i) and (j), whether the Government is bound to resort to mediation and/or arbitration for resolving disputes arising from public works project, and whether this arrangement will prevent the Government from resorting to litigation for dealing with such disputes even when resorting to litigation is clearly in the public interest.

The contract provisions provide for the resolution of disputes by mediation or arbitration. However, it is always open to the parties by agreement to refer a dispute to Court if they consider this preferable to arbitration.

(l) Role of the Engineer in public works contracts and his relationship with the Government and the contractor

The role and duties of the Engineer in a public works contract may be categorized into 3 major areas:

- **Technical expert**
Act as a technical expert and provide technical service to the Government such as providing detail design and technical specifications, carrying out any test or examination on material and workmanship etc.
- **Government's Representative**
Act as a Government's representative in the supervision of the works, site inspection or measurement, ordering of variation and negotiation with the contractor on variations or new rates.
- **Impartial Certifier**
Act as an impartial certifier in the capacity of a professional expert as between the Government and the contractor in the contract, e.g., certify payment due to the contractor, issue completion certificates, fix rates for new items in the event the Government and the contractor fail to reach an agreement, assess claims and make decisions as to any dispute that may arise between the contractor and the Government in connection with the contract.

(m)(i) In relation to (l) above, whether there is any conflict of interest arising from this role in the handling of claims by the Engineer

On some occasions, there may be a conflict of interest in the handling of claims by the Engineer. For example, a contractor's claim arises from a late revision of the drawings made by the Engineer.

However, it unlikely has a significant bearing on fair settlement of claims. Reasons are: (1) the Engineer's assessment is bound by the terms of the contract; (2) the Engineer's assessment is not final, as either party may refer the matter to mediation or arbitration if he is not satisfied with the Engineer's assessment; and (3) where the Government believes that the assessment is not a fair one, the Government might have rejected it notwithstanding that the assessment is in Government's favour, knowing that the assessment would likely be corrected by an arbitrator and the Government might incur some unnecessary expenses in subsequent arbitration. In essence, all contractual claims are eventually to be settled between the Government and the contractor. Requiring the Engineer to assess the claims would only facilitate early settlement, which has been proven to be most convenient and cost-effective and is widely adopted internationally.

(m)(ii) In relation to (l) above, whether there is any conflict of interest arising from this role of the Engineer in the process of mediation/arbitration/litigation of disputes on contract claims.

As the Government and the contractor will be the parties to any mediation/arbitration/litigation there should not be any conflict of interest for dispute resolution purposes. For matters that proceed to disputes, Government would have the assistance of independent experts to advise on technical matters and the conflict of interest issues would be unlikely to arise.