

立法會 *Legislative Council*

LC Paper No. LS47/03-04

Paper for Panel on Planning, Lands and Works and Panel on Home Affairs

The Government has launched an Invitation for Proposals for the development of the West Kowloon Cultural District, inviting the private sector to submit proposals for the planning, design, financing and construction of the West Kowloon Cultural District. The deadline for the submission of proposals has been extended to 19 June 2004. A member of the Panel on Planning, Lands and Works has questioned whether the Government has circumvented the normal procedure of seeking approval for expenditure in public works, and whether the Government has breached its usual accounting practice. The Legal Service Division has been requested to consider these questions.

The Invitation for Proposals

2. In the Main Document of the Invitation for Proposals ("the Invitation"), the Government invites proposals for the planning, design, financing, construction, procuring, fitting out, completion and subsequent operation, maintenance and management of the development of the West Kowloon Cultural District (para. 1.1.4)¹. The Invitation also states as the intention of the Government that the successful proponent will be awarded a land grant for a term of 50 years. Within the term of the land grant the successful proponent will be required to operate, maintain and manage the core arts and cultural facilities (defined in the Invitation) for the operation period (specified as 30 years) (para. 1.1.6). The core arts and cultural facilities will be handed over at no cost to the Government after expiry or early termination of the operation period. The successful proponent would also be required to re-provision certain government, institution, community facilities or utility facilities, and to hand them over to the Government or the utility companies as the case may be (para. 1.2.3.).

3. The Invitation also states that the Government expects the project to be run on a self-financing basis (para. 5.11.2), and will not provide any specific tax relief or exemption in relation to the project (para. 5.12). The successful proponent is required to comply with and satisfy all statutory and legal requirements and obtain at its own cost the approvals and

¹ Paragraph numbers in parenthesis under this section of this paper are those of the Main Document of the Invitation for Proposals

permits in connection with the development, and the development shall be subject to the Buildings Ordinance (Cap. 123) unless otherwise stated.

4. A premium will be agreed between the successful proponent and the Government (para. 8.3.3), and an annual rent equal to 3% of the rateable value will be payable (para. 8.3.4).

Relevant Statutory Provisions

The Basic Law

5. Under Article 7 of the Basic Law, land and natural resources within the Hong Kong Special Administrative Region shall be State property. The Government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development. The revenues derived therefrom shall be exclusively at the disposal of the Government.

6. Article 64 of the Basic Law provides that the Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure.

7. Under article 73 of the Basic Law, approving taxation and public expenditure is amongst the powers and functions of the Legislative Council.

The Public Finance Ordinance (Cap. 2)

8. The Public Finance Ordinance ("the Ordinance") provides for the control and management of the public finances of Hong Kong. Section 3 provides that moneys raised or received for the purposes of the Government shall form part of the general revenue. Section 4 provides that no expenditure shall be charged on the general revenue except as provided by or under the Ordinance or any other enactment.

9. Part II (sections 5 to 9) of the Ordinance specifies the way to seek the approval by the Legislative Council of public revenue and expenditure. Section 5 imposes a duty on the Financial Secretary to cause to be prepared in each financial year estimates of the revenue and expenditure of the Government, and to cause them to be laid before the Legislative Council. Under section 6, the heads contained in the estimates of expenditure for a financial year are required to be included in an Appropriation Bill which shall be introduced into the Legislative Council at the same time as the estimates. Upon the

enactment of the Appropriation Ordinance the estimates of expenditure for the financial year is deemed to be approved. Under section 8, the Financial Secretary may make certain proposals to the Finance Committee of the Legislative Council to make changes to the approved estimates of expenditure. Proposals for changes usually involve expenditure in excess of the sums provided or expenditure not provided for.

The Public Works Programme and the meaning of "Government's public works"

10. Financial information of the Capital Works Reserve Fund is included in Volume II - Fund Accounts of the "Estimates for the year ending 31 March 2004". Some of the Heads in the part on Capital Works Reserve Fund are under "Public Works Programme". The Fund was established by a resolution of the Legislative Council under section 29(1) of the Ordinance. According to the resolution, moneys which may be credited to the Fund include premium income received from land transactions, and such appropriations from the general revenue as may be approved by the Legislative Council. Moneys from the Fund may only be expended for the specific purposes named in the resolution. Amongst them is "for the purposes of the Government's public works programme".

11. The Ordinance does not provide for the meaning of "Government's public works programme". It would be for the Administration to determine, consistent with the provisions of the resolution which established the Capital Works Reserve Fund, what items of public works should be included in the Government's public works programme. As an example, items in the "Public Works Programme" in the "Estimates for the year ending 31 March 2004" include an exhibition gallery and civic place in Tamar; cultural facilities such as museums, theatres, stadia and libraries; as well as open spaces like the Tsim Sha Tsui Promenade Beautification Project. These items are similar in nature to the facilities that the Government intends to have provided in the West Kowloon Cultural District.

Modes of Financing Capital Works Projects in the Past

12. The Clerk to the Panel on Planning, Lands and Works has reviewed the modes of financing of capital works projects in the past. Details of the arrangements are contained in her paper (Annex I). The modes could be summarized into the following five categories: -

- (A) solely by the Government;
- (B) jointly by the Government and subvented organizations;
- (C) jointly by the Government and the private sector;
- (D) through injection of funds as government equity holding or loans; and
- (E) entirely by the private sector.

Members may note that there were instances in the past that projects to build public facilities were financed entirely by the private sector.

13. In a paper submitted to the joint meeting of the Panel on Planning, Lands and Works and the Panel on Home Affairs on 18 November 2003 (CB(1) 322/03-04(06)), the Government stated that development financed entirely by the private sector is not a new concept and has already been applied successfully in Hong Kong. An example given is the development of the Hong Kong Convention and Exhibition Centre and the adjacent hotel, commercial and residential facilities. (The Government has since provided further information on this development, circulated in LegCo Paper No. CB(1)623/03-04. A summary is in Annex II).

Comments of the Financial Secretary

14. The Panel on Planning, Lands and Works has asked the Financial Secretary to comment on issues relating to the West Kowloon Cultural District development. Apart from the questions raised by a member of the Panel as stated in the first paragraph of this paper, the Panel also asked the Financial Secretary to respond to various questions summarized below :-

- (a) whether the funding arrangements and/or the accounting arrangements are in breach of sections 3 and 4 of the Public Finance Ordinance;
- (b) whether the development is a project under the Government's Public Works Programme;
- (c) the Government's definition of "Public Works Programme"; and
- (d) whether and how far the Government has fulfilled its constitutional obligations under Article 64 of the Basic Law in respect of the implementation arrangements for the West Kowloon Cultural District development.

15. Reply from the Financial Secretary has been circulated to members in LegCo Paper No. CB(1)736/03-04). The gist is stated below for members' reference :-

- (a) On compliance with the Public Finance Ordinance: the West Kowloon Cultural District is conceived as an integrated and financially self-supporting development of arts, cultural, entertainment and a commercial facilities and must be viewed holistically. The approach does not involve the charging of expenditure on the general revenue and section 4 of the Ordinance will not apply.

- (b) On relationship of the project to the public works programme: the Financial Secretary reiterated that the Invitation for Proposals does not envisage public funding of works within the scheme area. Therefore neither the development nor any part of it is treated as a project within the public works programme.
- (c) On compliance with Article 64 of the Basic Law: the arrangements for implementing the project appear to be entirely consistent with Article 64 of the Basic Law.

Analysis

Whether the Government has circumvented the normal procedure of seeking approval for expenditure in public works

16. Under section 4 of the Ordinance, expenditure charging on the general revenue is required to be approved by the Legislative Council. Pursuant to such a requirement, a project which involves expenditure from the general revenue would have to be included in the public works programme for the purpose of obtaining approval of the Legislative Council. The Government has informed members on various occasions that the development does not involve the charging of expenditure on the general revenue. Thus there is no need to follow the procedure of seeking approval as public expenditure. In the light of Article 64 of the Basic Law, it would be the duty of the Government to satisfy the Legislative Council that the current proposed mode of development was not preferred to circumvent the approval procedure.

Whether the Government has contravened its usual accounting practice

17. If the question relates to the technical issues of Government accounting practice, it is the duty of the Government to provide further details to satisfy members pursuant to Article 64 of the Basic Law. However, if the question relates to the merits of the proposed mode of development or whether other modes of development should be preferred, these would be policy decisions for members to judge.

Whether it is reasonable for the Government to claim that the project is not public works

18. Pursuant to the requirement of obtaining approval of the Legislative Council for expenditure from the general revenue, a project which requires funding from the general revenue would be included into the Public Works Programme for the purpose of obtaining such approval. The decision whether to use public funds to finance the project is an executive decision. So long as the Government is acting within its powers and the law, the court would not interfere with an executive decision since the reasons for the decision are peculiarly a matter for the executive. It would be legitimate for the Legislative Council to

ask the Government to satisfactorily account under Article 64 of the Basic Law that the proposed mode of financing is a sound policy decision.

Encl.

Prepared by

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**Funding arrangements for capital works projects for
the provision of public infrastructure and community facilities**

(A) Projects financed solely by the Government

Public works projects financed solely by the Government form part of the Government's Public Works Programme ("PWP") and are funded under the Capital Works Reserve Fund ("CWRF")

2. Proposals on these projects are normally put to the Public Works Subcommittee ("PWSC") for consideration before they are put to the Finance Committee ("FC") for approval. Some examples are given in paragraph 8 of this paper.

(B) Projects financed jointly by the Government and subvented organizations

3. Capital subventions are funded under CWRF and are generally understood as subvention of works projects undertaken by subvented organizations. The level of subvention is a matter of policy, which is usually explained in the relevant funding proposals. Examples of capital subvention projects are new buildings, extensions and reprovisioning of existing facilities of tertiary institutions and hospitals.

4. Starting from the legislative session in 1996-97, capital subvention projects have been subject to the examination by the Public Works Subcommittee prior to submission to the Finance Committee.

(C) Projects financed jointly by the Government and the private sector

5. Projects under this category are not common in the past and were delivered under specific financial and other arrangements in each case. The Cyberport and the Hong Kong Disneyland may be the most prominent examples of this category in the past 10 years.

Cyberport

6. In the case of the Cyberport, under the relevant Project Agreement, the developer, Pacific Century Group, is responsible for the provision and procurement of funds to meet all project expenses. Government's capital

contribution is the value of the land for the residential portion at the time of grant of development right to the developer. The developer is required to hand back to the Government, through a company set up for the purpose, the completed Cyberport Portion and to sell the units in the residential portion in the open market. The developer is entitled to receive a share of the surplus sales proceeds to be derived from the sale of the units in the residential portion. The rental income and any other income to be generated from the Cyberport Portion belong to the Government.

7. The relevant LegCo Panels were consulted on the Cyberport development before the Government signed the Project Agreement with the developer. No funding proposal in respect of the design and construction of the Cyberport development has been put to the PWSC and FC. However, for the construction of roads, drains, waterworks and other essential infrastructure to support the Cyberport developments, approvals for funds from the CWRP of \$964 million and \$231.8 million were obtained in May 1999 and May 2000 respectively from the PWSC and FC.

Hong Kong Disneyland

8. According to the project agreements signed in December 1999, the Hong Kong Disneyland is to be constructed and operated by a joint venture company, Hongkong International Theme Parks Limited, in which the Government owns a 57% share and The Walt Disney Company (WD) owns 43%. Excluding the land premium, Phase 1 of the project was estimated to cost, on opening, \$14.1 billion to be financed as follows:

	\$b
Government Equity, payable in cash	3.25
WD Equity, payable in cash	2.45
Government Loan	6.1*
Commercial Loan	2.3*
Total	<u>14.1</u>

* *including capitalised interest of approximately \$0.5b and \$0.2b respectively.*

9. On 26 November 1999, the Finance Committee approved a commitment to inject \$3,250 million as equity, to provide \$5,619 million as a loan from the Capital Investment Fund to Hongkong International Theme Parks Limited and an investment of \$4,000 million in subordinated equity by the Capital Investment Fund representing land premium for the Phase I site to allow the company to proceed with the development and operation of Hong Kong Disneyland.

10. Also on 26 November 1999, on the recommendation of PWSC, FC accepted in principle the financial implications, estimated at \$13.569 billion, for the site formation, construction of associated infrastructure and the provision of government, institution and community facilities in connection with the development of the Hong Kong Disneyland. Subsequently, proposals were put to PWSC and FC for the upgrading of different parts of these works to Category A of the PWP.

11. In connection with the Hong Kong Disneyland project, the Government is obliged under the Master Project Agreement of the project to procure a rail shuttle service between Yam O and the theme park. For this purpose, the Government entered into a Penny's Bay Rail Link Project Agreement with MTR Corporation Limited ("MTRCL") in late July 2002. In order to bring the project rate of return to a minimum acceptable commercial level of 11.25%, the Government has undertaken in the Project Agreement to waive its claim for \$798 million (at present value) worth of dividends otherwise payable by MTRCL to Government as a shareholder over the next few years. The Subcommittee on Matters Relating to the Implementation of Railway Development Projects was briefed on the draft Project Agreement in July 2002, and members had deliberated on the legal issues relating to the proposed waiver of dividends.

(D) Projects financed through injection of funds as government equity holding or loans

12. The Government has equity holdings in a number of statutory corporations. Examples are MTRCL, Kowloon-Canton Railway Corporation, Hong Kong Science and Technology Parks Corporation and the Airport Authority. Works projects carried out by these corporations are often financed by, inter alia, Government's injection of equity into these corporations or loans from the Government to these corporations. Such injection of equity and loans are financed by the Capital Investment Fund and approval of FC is required for disbursement of funds from the Capital Investment Fund.

13. In some cases, the Government sought approval from FC for the Government to provide loans from the Loan Fund to finance works projects undertaken by statutory corporations or public companies pursuant to the implementation of public policies. Examples include a loan provided to the former Hong Kong Industrial Estates Corporation in March 1990 to meet the development costs of an industrial estate in Tseung Kwan O, and a loan to the Hong Kong Productivity Council in May 1988 for constructing a special-purpose building to house its present and planned facilities.

14. For projects under this category, the Government will also provide the essential public infrastructure such as public transport interchange facilities, external roads, drainage etc. The essential public infrastructure forms part of the PWP and hence is funded by CWRP.

(E) Projects financed entirely by the private sector

BOT tunnels

15. Some tunnels in Hong Kong were built by the private sector under "Build, Operate and Transfer" franchises. These tunnels are the Cross-Harbour Tunnel, Eastern Harbour Crossing, Tate's Cairn Tunnel, Western Harbour Crossing and the Tai Lam Tunnel and Yuen Long Approach Road. The franchise of the Cross-Harbour Tunnel expired on 31 August 1999 and the assets of the Cross-Harbour Tunnel Company Limited including the tunnel were vested in Government upon expiry of franchise. Existing BOT tunnels are governed by their respective ordinances enacted at different points in time.

Tourism-related projects

16. In recent years, a few tourism-related projects are financed entirely by the private sector without requiring payments from the General Revenue Account or the Funds established under the Public Finance Ordinance. Examples of these projects are -

- (a) preservation, restoration and conversion of Former Marine Police Headquarter for tourism related uses;
- (b) preservation, restoration and conversion of the Central Police Station, Victoria Prison and the Former Central Magistracy for tourism related uses; and
- (c) the Tung Chung Cable Car Project.

17. The first two projects are pertinent to preservation of heritage and promotion of tourism. According to the relevant LegCo Briefs, the Administration considers that given budgetary and other constraints on Government, there is a strong case for a new approach, i.e. to engage private sector resources, to preserve and exploit these facilities with commercial potential. Both projects are procured through an open tender process. The Project Agreement for the project involving the Former Marine Police Headquarter, with a site area of about 1.23 hectare, was signed on 12 June 2003. The project involving the Central Police Station, Victoria Prison and the Former Central Magistracy, with a site area of about 1.45 hectare, is scheduled to be tendered in the first quarter of 2004.

18. For both projects, the successful proponent is/will be offered a 50-year land grant for the site and responsible for preserving, restoring, repairing and renovating the site and the buildings. The successful proponent is/will also be responsible for the future management, operation, and maintenance of the developments. The relevant terms are/will be stipulated in the Project Agreement signed between the Government and the successful proponent.

19. Before the Administration invited tenders for the projects, it briefed the Panel on Economic Services on the projects. As the projects do not require government funding (excluding any concession in land premium), no proposal in respect of the projects has been put to the PWSC nor FC.

Tung Chung Cable Car Project

20. Based on an implementation framework approved by the Executive Council, the Government issued a Project Brief to invite detailed proposals for the finance, design, construction, operation and maintenance of the cable car system. The Government received three proposals and then short-listed two proponents, including MTRCL, for further negotiations in January 2002.

21. In July 2002, the Government entered into a Provisional Agreement with MTRCL. The Provisional Agreement provides the basis for MTRCL to commence work on the Project before the Government grants a 30-year franchise to the Company. This includes developing a suitable design for the Tung Chung cable car system and its ancillary developments, carrying out requisite environmental and technical studies, and completing the necessary statutory procedures.

22. The Tung Chung Cable Car Bill was introduced into LegCo on 12 February 2003. The Bill was to provide the legal framework for the grant of a franchise for the operation of a cable car system linking Tung Chung and Ngong Ping on Lantau Island on a "Build-Operate-Transfer" (BOT) basis. The Bill also set out the rights and obligations of the franchisee during the franchise period. The Bill was enacted on 28 May 2003.

23. The detailed provisions relating to the construction and operation of the cable car system are governed by a Project Agreement signed between the MTRCL and the Government on 19 November 2003.

24. The LegCo Panel on Economic Services was consulted on the Project a few times since February 2001 and was briefed on the Bill on 25 November 2002. As the construction of the cable car system and the related developments does not require Government funding, no funding proposal for the purpose has been put to the PWSC nor FC.

25. To support the cable car system and related developments in Ngong Ping, FC, on the recommendation of PWSC, approved in April 2003 a commitment of \$235.3 million for construction of various infrastructure facilities.

**A summary on the financial arrangements of the
Hong Kong Convention and Exhibition Centre**

The land was provided by the Government to the Trade Development Council ("TDC") by a private treaty grant, free of premium, for the construction and operation of the exhibition centre.

2. The arrangement was that a complex consisting of an exhibition/conference centre and supporting facilities with hotel, commercial and residential accommodation would be constructed for the TDC free of charge. The exhibition centre and related facilities would be retained by the TDC and the hotel and other commercial areas would be assigned to the successful consortium. The TDC also commissioned an indicative design which was made available to parties who had expressed interest in the project.

3. Finally the New World Development Company obtained the contract. The project was entirely financed by New World. In addition, it would pay the TDC an upfront payment of HK\$75 million, phased over three years, to fund TDC's expenses, plus a bond of HK\$25 million which will be returnable to the New World when it meet milestone construction dates. It was also responsible for marketing, furnishing and operating the exhibition centre complex by appointing an internationally renowned operator approved by the TDC. Under the operating arrangement, the TDC would receive annually 5% of gross sales from the exhibition/conference centre with a guaranteed minimum. New World would also provide offices space in the new complex to the TDC free of charge. Surrounding and connected to the exhibition/conference centre were two hotels, an office tower and a further tower of apartments. This portion of the complex was assigned to New World.