

(Translation)
香港特別行政區政府
The Government of the Hong Kong Special Administrative Region

運輸及房屋局

香港九龍何文田佛光街 33 號



Transport and Housing Bureau

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28 November 2016

Mr Derek Lo
Clerk to Legislative Council Panel on Housing
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road, Central
Hong Kong

Dear Mr Lo,

**Legislative Council Panel on Housing and Panel on Development
Joint meeting on 15 November 2016**

I enclose the supplementary information requested by Members at the joint meeting on 15 November 2016 for Members' reference please.

Yours sincerely,

(original signed)
(Rayson Chan)

for Secretary for Transport and Housing

Legislative Council Panel on Housing and Panel on Development
Joint meeting on 15 November 2016

Supplementary Information

PURPOSE

At the joint meeting of Legislative Council Panel on Housing and Panel on Development on 15 November 2016, Members requested the Government to provide supplementary information regarding the public housing development at Wang Chau and other issues. This paper provides the relevant information.

CONSULTANCY STUDY

2. The Government conducted two consultancy studies for the development, including-

- (i) The Planning and Engineering Study (P&E Study)¹ entrusted to the Hong Kong Housing Authority by the Government and the Hong Kong Science and Technology Parks Corporation; and
- (ii) The study on the engineering works at Lin Cheung Road Site, Sham Shui Po and Wang Chau, Yuen Long - Investigation, Design and Construction Study (Investigation, Design and Construction Study)² conducted by the Civil Engineering and Development Department (CEDD).

PROVISIONS IN RELATION TO CONFLICT OF INTEREST IN CONSULTANCY AGREEMENTS

3. According to Technical Circular (Works) No. 3/2004A and Technical Circular (Works) No. 18/2005, the Government will specify in consultancy agreements the requirement for the consultant to declare immediately any actual or potential conflict of interest. Except with the prior written approval of the

¹ The consultancy agreement was awarded on 30 July 2012 and completed in September 2015.

² The consultancy agreement was awarded on 18 March 2015 and is still on-going.

relevant Government department, the consultant shall not undertake any jobs for and on behalf of any third party which touches, concerns or affects the services of the consultancy agreement. The consultant can only use the information and other particulars obtained through the services of the consultancy agreement in the concerned Government project and strict confidentiality should be observed. Except with the prior written consent or as instructed by the relevant Government department, the consultant shall not disclose such information or particulars to any other person.

INVESTIGATION, DESIGN AND CONSTRUCTION STUDY

4. The objective of the “Investigation, Design and Construction Study” conducted by CEDD is to carry out site investigation, detailed design, tendering, project administration, etc., for the site formation, roadworks, retaining structures, footbridge, and other infrastructural works associated with Phase 1 of the Wang Chau public housing development. The study is conducted by Ove Arup & Partners Hong Kong Ltd (OAP). The study was commenced in March 2015 and is expected to be completed by end 2022.

5. The contract provisions on “confidentiality” and “conflict of interest” in the consultancy agreement (No. CE 64/2014(CE)) between the CEDD and OAP were based on the standard clauses in the above-mentioned technical circulars (see **Attachment 1 and 2**).

6. CEDD conducted a detailed review of the records of the consultancy agreement for the infrastructure project in Wang Chau (No. CE 64/2014 (CE)) and confirmed that OAP did not comply with the “confidentiality” and “conflict of interest” provisions in the consultancy agreement as OAP failed to apply for prior approval for undertaking a private development project, and did not follow strictly the company’s internal procedures on preventing improper use of information, resulting in the information obtained from the Government consultancy agreement being quoted in the planning application of the private development project.

7. In accordance with the Development Bureau (DEVB)’s Technical Circular (Works) No. 3/2016 (see **Attachment 3**), the Government has suspended OAP from bidding all categories of consultancy agreements under the jurisdiction of the Engineering and Associated Consultants Selection Board for three months (from 7 November 2016 to 6 February 2017). The regulating action is considered a proper penalty that will bring certain impact on the company. There has been no precedent case that consultants were penalised due to non-compliance of the “confidentiality” and “conflict of interest” provisions in consultancy agreements.

8. As explained by the Government at the joint meeting on 15 November 2016, the correspondences between CEDD and OAP in respect of the issue on “confidentiality” and “conflict of interest” are bound by the confidentiality requirements of the agreement, and as such we may not be able to provide those correspondences to the Legislative Council (LegCo). We fully understand the LegCo’s concern. DEVB is carefully examining whether such correspondences can be disclosed and is seeking legal advice on this regard.

THE P&E STUDY

9. As mentioned in the information paper the Government submitted to the Panel on Housing on 18 October 2016, the objective of the P&E Study was to study the technical feasibility of the development in the aspects of planning, construction and environment, etc. The consultancy was commenced in July 2012. Various parts of the study were completed in phases and the whole study was completed in September 2015.

10. The P&E Study was procured by the two-envelope system, which include two components on technical proposal and fee proposal. With reference to the list of consultants of the Transport Department and Environmental Protection Department, the Housing Department (HD) invited tenders from ten consultants and received five. OAP obtained the highest combined score in the tender exercise and the consultancy was awarded to OAP with a consultancy fee of HKD\$22 million. So far, HD has not found any unauthorised use of restricted information in the P&E Study by OAP.

FUNDING PROPOSAL

11. The two studies mentioned above (the parts paid by the Government) are items under Category D of the Capital Works Reserve Fund Block Allocation Head 711 (Housing). They were approved by the Government under delegated authority.

12. As regards the Public Works Project item B780CL "Site Formation and Infrastructure Works for Development at Wang Chau, Yuen Long" (i.e. Wang Chau Phase 1), the Government’s target is to seek funding approval from Finance Committee at a suitable time in the financial year 2017-18. The Government is also seeking approval for Capital Works Reserve Fund Block

Allocation, in which two items under Head 701 (Land Acquisition) are for the land acquisition costs for the above PWP Item.

Development Bureau
Transport and Housing Bureau
November 2016

Appendix A

Special Conditions of Employment Clauses
on Ethical Commitment by Consultants

No.	Marginal heading	Clause
1	Confidentiality	<p>SCE 1 Replace Clause 9 of the General Conditions of Employment by the following clause:</p> <p>(A) Except as necessary for the performance of the Services the Consultants shall not (except with the prior written consent or as instructed by the Director's Representative) disclose the terms and conditions of this Agreement or any report, document, specification, drawing, plan, software, data or other particulars furnished by or on behalf of the Employer in connection therewith, or any such or similar information generated or produced by the Consultants pursuant to this Agreement, to any person other than a person employed or engaged by the Consultants in carrying out this Assignment, an agent of the Consultants, any approved sub-consultant or the Consultants' accountants, insurers and legal advisers.</p> <p>(B) Any disclosure to any person, agent, sub-consultant, accountant, insurer, legal adviser permitted under sub-clause (A) of this clause 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 purposes of this Agreement.</p> <p>(C) The Consultants shall take all necessary measures (including by way of contractual provisions where appropriate) to ensure that their directors, employees, agents, sub-consultants, accountants, insurers and legal advisers as mentioned in sub-clause (A) are aware of and shall comply with the confidentiality and non-disclosure provisions contained in this Agreement. If required by the Employer, the Consultants undertake to procure for and on behalf of the Employer a confidentiality agreement in a form to be prescribed by the Employer from any director, employee, agent, sub-consultant, accountant, insurer and legal adviser to whom any confidential information is to be disclosed.</p>

		<p>(D) The Consultants shall not without the prior written consent of the Director's Representative publish, either alone or in conjunction with any other person, in any newspaper, magazine, periodical or through any electronic medium, any article, photograph or illustration relating to this Agreement.</p> <p>(E) If the Consultants have provided the Employer with documents and information which they have declared in writing to be confidential and stamped accordingly whether in relation to their practice or special circumstances or for other good causes, unless the Director within two months of receipt of such information by notice in writing disagrees, then that information will be treated as confidential. In relation to disputes between the Employer and the Consultants, the Employer may subject to the following provisions disclose the outline of any dispute and the terms of settlement for which a settlement agreement has been reached with the Consultants or the outcome of the arbitration or any other means of resolution of dispute to the Public Accounts Committee of the Legislative Council upon its request. Before disclosures are made to the said Committee, the Employer shall inform the Consultants. Disclosures shall not be made to the said Committee before expiry of the first 6 months from the date of the settlement agreement, arbitration award or, as the case may be, outcome of other means of resolution of dispute without the written consent of the Consultants but such consent shall not be unreasonably withheld. The Consultants shall be deemed to have given their consent to disclosures on the expiry of the first 6 months from the date of the settlement agreement, arbitration award or, as the case may be, outcome of other means of resolution of dispute. The Consultants may, if they consider necessary to protect the sensitive nature of certain information relating to them, request the Employer to disclose such specified information to the said Committee strictly on a confidential basis. If the Employer considers that there are legitimate grounds to accede to the Consultants' request, the Employer shall convey the request to the said Committee for its consideration.</p> <p>(F) The Consultants 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,</p>
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		<p>arising out of or in connection with any breach by the Consultants or their directors, employees, agents, sub-consultants, accountants, insurers or legal advisers of this clause.</p> <p>(G) The provision of this clause shall survive the termination of this Agreement (however occasioned) and shall continue in full force and effect notwithstanding such termination.</p> <p><i>[Sub-clause E is taken from ETWB TCW No. 29/2003 and included here for completeness and this sub-clause shall be amended in accordance with any future revision of the ETWB TCW No. 29/2003 as appropriate]</i></p>
2	Prevention of bribery	<p>SCE 2 Replace Clause 45 of the General Conditions of Employment by the following clause:</p> <p>The Consultants shall prohibit their directors, employees, agents and sub-consultants who are involved in this Agreement from offering, soliciting or accepting any advantage as defined in the Prevention of Bribery Ordinance, Cap 201. The Consultants shall also caution their directors, employees, agents and sub-consultants against soliciting or accepting any excessive hospitality, entertainment or inducements which would impair their impartiality in relation to the Assignment. The Consultants shall take all necessary measures (including by way of contractual provisions and/or providing training workshops where appropriate) to ensure that their directors, employees, agents and sub-consultants are aware of the aforesaid prohibition and will not solicit or accept any advantages, excessive hospitality etc when conducting business in connection with this Agreement.</p>
3	Declaration of ethical commitment	<p>SCE 3 The Consultants shall submit a signed declaration in a form prescribed or approved by the Employer to confirm compliance with the provisions on confidentiality and ethical commitment as stated in SCE Clauses 1 and 2 when demand is made for payment under this Agreement at a frequency, which shall not be more frequent than once per month, as specified by the Director's Representative. If the Consultants fail to submit the declaration as required, the Employer shall be entitled to withhold payment until such declaration is submitted and the Consultants shall not be entitled to interest in that period.</p>

4	Acknowledgement of being notified of the ethical requirements	SCE 4 The Consultants acknowledge that they have been reminded that dishonesty, theft and corruption on their part or those of their directors, employees, agents or sub-consultants who are involved in this Agreement may lead to prosecution under, without limitation, section 9 of the Prevention and Bribery Ordinance, Cap 201; section 17, section 18D or section 19 of the Theft Ordinance, Cap 210 and section 161 of the Crimes Ordinance, Cap 200. These offences commonly carry upon conviction terms of imprisonment.
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Note:

Reference has been made in the above SCE clauses to the General Conditions of Employment of Engineering and Associated Consultants. Therefore, when the SCE clauses are incorporated into the General Conditions of Employment of Architectural and Associated Consultants, consequential amendments may need to be made, e.g. the numbering of sub-clauses; and the use of "Consultant" instead of "Consultants".

Sample Declaration Form by Consultants
on their compliance with the ethical commitments requirements
(to be attached to the payment application submitted by the Consultants)

To: Director's Representative

Agreement No.:

Title:

In accordance with the [Special Conditions of Employment Clause SCE 3]:

(1) We confirm that we have complied with the following provisions and have ensured that our directors, employees, agents and sub-consultants are aware of the following provisions:

- (a) Prohibiting our directors, employees, agents and sub-consultants who are involved in this Agreement 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 Agreement;
- (b) Taking all measures as necessary to protect any confidential/privileged information or data entrusted to us by or on behalf of the Employer, **or any such or similar information generated or produced by us pursuant to this Agreement**, from being divulged to a third party other than those allowed in this Agreement.

Amended
Aug 2015

(2) We further confirm that we have ensured that our accountants, insurers and legal advisers are aware of the provisions requiring us taking all measures as necessary to protect any confidential/privileged information or data entrusted to us by or on behalf of the Employer, **or any such or similar information generated or produced by us pursuant to this Agreement**, from being divulged to a third party other than those allowed in this Agreement.

Amended
Aug 2015

(Name of the Consultants)
(Name of the Signatory)
(Position of the Signatory)
(Date)

**Sample Declaration Form by Contractor
on their compliance with the ethical commitments requirements
(to be attached to invoice submitted by the Contractors)**

To: The Engineer for the Contract

Contract No.:

Title:

In accordance with the [Special Conditions of Contract Clause SCC 3], we confirm that we have complied with the following provisions and have ensured that our directors, employees, sub-contractors, agents are aware of the following provisions:

- (a) Prohibiting our directors, employees, agents and sub-contractors 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-contractors 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-contractors 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 Contractor)
(Name of the Signatory)
(Position of the Signatory)
(Date)

Appendix

Special Conditions of Employment Clause

Conflict of Interest and Debarring

SCE [] Clause 46 of the General Conditions of Employment is deleted and replaced by the following:

- (A) On appointment and during the term of this Agreement and for []¹ months thereafter, the Consultants must declare any interest if it is considered to be in actual, apparent, potential or perceived conflict with the Services, including any interest or association the Consultants, their associated companies, their associates or associated persons or any of their sub-consultants may have with any contractors, suppliers, specialist contractors or sub-contractors. The Consultants shall during the term of this Agreement and for [] months thereafter forthwith notify the Employer in writing and keep the Employer notified of all or any facts which may reasonably be considered to give rise to a situation where the financial or other interest of the Consultants, their associated companies, their associates or associated persons or any of their sub-consultants, conflict or compete, or may conflict or compete, with the Consultants' duties to the Employer under this Agreement.

For purpose of this Clause 46 of the General Conditions of Employment, the “term of this Agreement” shall mean the period from appointment of the Consultants until completion of the Agreement, i.e. upon issue of the letter of completion of Agreement by the Employer.

- (B) The Consultants shall not, and shall ensure that any of their associated companies, their associates or associated persons

¹ The duration of the restraint should be filled in by the procuring department taking into account the specific nature of the Services involved and the legitimate interests that the Government has to protect.

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 or which may reasonably be seen to touch, concern or affect the Services, except with the prior written approval of the Director's Representative which approval shall not be unreasonably withheld.

(C) Without prejudice to the generality of sub-clause (B), 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,

- (i) 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;
- (ii) 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 ;
- (iii) 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.

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.

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.

- (D) The Consultants shall render their advice or recommendations pursuant to this Agreement to the Employer on an impartial basis without giving favour to any particular product, services or equipment in which the Consultants have a commercial interest. The Consultants shall notify the Employer immediately and in writing and keep the Employer notified of any actual, apparent, potential or perceived conflict they or their associated companies, associates or associated persons or any of their sub-consultants may have in, or any association or connection they or the aforesaid persons may have with, any of the services, products or equipment proposed or recommended by the Consultants under this Agreement. The Consultants shall obtain from each and every one of their directors, employees, agents and sub-consultants who are involved in this Agreement a binding undertaking to observe this sub-clause.
- (E) The Consultants shall require their directors, employees, agents and sub-consultants who are involved in this Agreement to declare in writing to the Consultants and keep the Consultants informed regularly of any actual, apparent, potential or perceived conflict between their personal/ financial interests and their duties in connection with this Agreement, including all or any facts which may reasonably be considered to give rise to a situation which the financial interests of such persons, conflict or compete, or may conflict or compete, with the Consultants' duties to the Employer under this Agreement. In the event that such conflict is disclosed in a declaration, the Consultants shall

forthwith take such reasonable measures as are necessary to mitigate as far as possible or remove the conflict so disclosed.

(F) The Consultants shall prohibit their directors and employees who are involved in this Agreement from engaging in any work or employment other than in the performance of this Agreement, with or without remuneration, which could give rise to any actual, apparent, potential or perceived conflict between their personal/financial interests and their duties in connection with this Agreement. The Consultants shall require their agents and sub-consultants to impose similar restriction on their directors and employees by way of a contractual provision.

(G) The Consultants shall take all necessary measures (including by way of contractual provisions where appropriate) to ensure that their directors, employees, agents and sub-consultants who are involved in this Agreement are aware of the provisions under the aforesaid sub-clauses (B) to (F). Where the Consultants have obtained the written approval of the Director's Representative to appoint sub-consultants to undertake any part of the Services, the Consultants shall take all necessary steps to procure and ensure that the same covenants as in this Special Conditions of Employment Clause, *mutatis mutandis*, are imposed on the sub-consultants and shall take all necessary steps to enforce such covenants.

(H) In this Special Conditions of Employment Clause,

“associated company” or “associated companies” in relation to the Consultants means

any company which is the holding company or subsidiary company or sister company of the Consultants. A “sister company” means a company which belongs to the same holding company as the Consultants’.

“associate” or “associates” in relation to the Consultants means

- (i) any partner of the Consultants; or
- (ii) any company one or more of whose directors is in common with one or more of the directors of the Consultants.

“associate person” or “associated persons” in relation to the Consultant means

- (i) any person who has control, directly or indirectly, over the Consultants; or
- (ii) any person who is controlled, directly or indirectly, by the Consultants; or
- (iii) any person who is controlled by, or has control over, a person at (i) or (ii) above.

“control” in relation to another person means holding office as a director or the power of a person to secure

- (i) by means of the holding of shares or interests or the possession of voting power in or in relation to that or any other person; or
- (ii) by virtue of powers conferred by any constitution, memorandum or articles of association, partnership, agreement or arrangement (whether legally enforceable or not) affecting that or any other persons;

that the affairs of the first-mentioned person are conducted in accordance with the wishes of that other person.

“director” means any person occupying the position of

director by whatever name called and without limitation a de facto or shadow director.

- (I) The Consultants shall submit a signed declaration in the form prescribed in Appendix [] to these Special Conditions of Employment (with only such amendments thereto as may previously have been agreed in writing by the Employer) to confirm compliance with the provisions as stated in the above sub-clauses when demand is made for payment under this Agreement at a frequency, which shall not be more frequent than once per month, as specified by the Director's Representative. If the Consultants fail to submit the declaration as required, the Employer shall be entitled to withhold payment until such declaration is submitted and the Consultants shall not be entitled to interest in that period."

Note

Reference has been made in the above SCE clause to the General Conditions of Employment of Engineering and Associated Consultants. Therefore, when the SCE clause is incorporated into other sets of General Conditions of Employment such as the General Conditions of Employment of Architectural and Associated Consultants, consequential amendments may need to be made, e.g. the numbering of sub-clauses; and the use of "Consultant" instead of "Consultants".

Sample Declaration Form by Consultants
on their compliance with the conflict of interest avoidance
and debarring requirements
(to be attached to the payment application submitted by the Consultants)

To: Director's Representative

Agreement No.:
Title:

In accordance with SCE Clause [], we confirm and declare that we have complied with the provisions stated therein. We further confirm and declare that we have taken action to ensure that our associated companies, associates or associated persons, sub-consultants, employees and agents are aware of the provisions therein stipulated including the following:

- (a) our associated companies, associates or associated persons or any of our 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 third party (other than in the proper performance of this Agreement), which touches, concerns or affects the Services or which may reasonably be seen to touch, concern or affect the Services, except with the prior written approval of the Director's Representative;
- (b) our associated companies, associates or associated persons, and any of our sub-consultants shall not,
 - (i) 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;
 - (ii) 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 we are providing a service arising out of or relating to this Agreement;
 - (iii) 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;

- (c) we are under an obligation to render advice or recommendations pursuant to this Agreement to the Employer on an impartial basis without giving favour to any particular product, services or equipment in which we have a commercial interest. We also have an obligation to notify the Employer immediately and in writing and keep the Employer notified of any actual, apparent, potential or perceived conflict we or our associated companies, associates or associated persons or any of our sub-consultants may have in, or any association or connection we or the aforesaid persons may have with, any of the services, products or equipment proposed or recommended by us under this Agreement. Each and every one of our directors, employees, agents and sub-consultants who are involved in this Agreement have given a binding undertaking to observe the aforesaid;
- (d) our directors, employees, agents and sub-consultants who are involved in the Agreement are required to declare in writing to us and keep us informed regularly any actual, apparent, or potential or perceived conflict between their personal/financial interests and their duties in connection with this Agreement, including all or any facts which may reasonably be considered to give rise to a situation which the financial interests of such persons, conflict or compete, or may conflict or compete, with our duties to the Employer under this Agreement. In the event that such conflict is disclosed in a declaration, we are under an obligation to forthwith take such reasonable measures as are necessary to mitigate as far as possible or remove the conflict so disclosed; and
- (e) our directors and employees who are involved in the Agreement are prohibited from engaging in any work or employment other than in the performance of this Agreement, with or without remuneration, which could create or potentially give rise to any actual, apparent, potential or perceived conflict between their personal/financial interests and their duties in connection with the Agreement. Our agents and sub-consultants are required to impose similar restriction on their directors and employees by way of a contractual provision.

(Name of the Consultants)

(Name of the Signatory)

(Position of the Signatory)

(Date)

Annex I

performance score as given in such late report will be incorporated into the consultant's PPR in the updating as mentioned in paragraph 13 above or in the next quarterly updating whichever opportunity arises first. It is however noted that such late incorporation of consultant's performance score into the current PPR will not have any retrospective effect on the award of consultancies or decisions made in any consultant selection exercise that has already been conducted.

*Management of and Regulating Actions on Poor Performers**Consultants Review Committee*

15. Departments procuring consultancy agreements shall set up a Consultants Review Committee (CRC) to manage consultants' performance reporting and to take regulating actions (such as suspension from bidding) against poor performers. The composition and terms of reference are given at **Appendix E**.

Adverse Report

16. The consultant should be forewarned on his unsatisfactory performance, as far as possible, before the issue of an adverse report. The warning should be in the form of a letter signed by an officer of at least D2 level, and addressed to the consultant at principal level so that their senior personnel could be promptly alerted. The adverse reports should be adequately justified with facts and evidence.

Regulating Actions (Adverse Report)

17. Regarding the taking of regulating actions, consultancies are categorized such that the suspension will be confined to the concerned category, except under the circumstances described in paragraphs 21 and 22. Details of the categories are provided in **Appendix F**.

18. Normally only one category will be assigned to an assignment. However, in exceptional circumstances where more than one category has been assigned to an assignment, suspension will be applied to all the assigned categories.

19. In the case of a consultancy agreement being undertaken by an unincorporated joint venture, the suspension shall be applied to all individual

consultants in the joint venture.

20. A consultant shall be suspended from bidding for new agreements of the same category(ies) as the agreement being assessed for a minimum period of three months after receiving two consecutive adverse Interim Reports on an assignment. The period of suspension shall be extended to a minimum of twelve months, counting from the first day of the suspension, after receiving the third consecutive adverse Interim Report on the same assignment. The commencement date of suspension shall be determined by the CRC, and the consultant shall be notified in writing, and notwithstanding the above, the lifting of the suspension shall be determined by the CRC subject to consideration to be made in accordance with paragraph 24.

Regulating Actions (Technical Competence)

21. Technical competence of consultants would normally be assessed before they are engaged in Government consultancy agreements. However, it could not be precluded that some consultants may fall below the standard during the course of their service. As such, the Reporting Officer is required to assess and confirm if a consultant is technically competent in Section F of Part I of the Performance Report. To enhance consistency in assessment and taking follow up actions, some guidelines are provided as follows:

- (a) Technical incompetence is a serious assessment towards a consultant. Therefore such assessment must be carefully considered and substantially justified.
- (b) If a consultant is assessed as technically incompetent in a Performance Report (irrespective of whether it is an Interim Report, a Special Report or a Final Report), the consultant shall be suspended from bidding for further consultancies for at least six months in one or more of the categories under either the AACSB or EACSB to be determined by the CRC of the procuring department. For unincorporated joint ventures, the regulating action shall apply to all individual consultants in the joint venture. The commencement date of suspension shall be determined by the CRC.
- (c) The suspension shall only be lifted upon the CRC being satisfied that the consultant has become technically competent. In addition to those described in paragraph 24, if necessary, the CRC may also interview the

consultant's top management, conduct quality audit on the consultant's services and require the consultant to provide necessary evidence of improvement as appropriate.

Regulating Actions (Other Circumstances)

22. Apart from taking regulating action based on the number of consecutive adverse Interim Reports received by a consultant or any assessment indicating that the consultant is technically incompetent to undertake further assignment, Government may under other circumstances take regulating actions, including suspension of the consultant from bidding all categories of consultancies under AACSB and/or EACSB. Such circumstances shall include but not be limited to:

- (i) serious misconduct or suspected serious misconduct;
- (ii) failure or refusal to implement an accepted offer;
- (iii) court convictions;
- (iv) violation of laws;
- (v) poor integrity of his employees unless the consultant has taken reasonable measures to prevent or the misconduct is not within the control of the consultant;
- (vi) serious or suspected serious poor performance or other serious causes in any public or private sector project;
- (vii) bankruptcy or other financial problems; and
- (viii) public interest.

In such circumstances, the approval of AACSB and/or EACSB is required prior to taking regulating actions. The procuring department which initiated the taking of any regulating action shall continuously review the circumstances including lifting of the regulating action upon improvement shown by the consultant. The CNPIS allows departments to log major noticeable events about a consultant. Departments should record any major agreement-related incident/event in the system. However, to avoid inconsistency, any major non-performance incident/event which is not specifically related to an agreement should be reported to AACSB/EACSB for coordinating the record of the incident/event in the CNPIS.

23. The Final Report and the Special Report will not be counted in the application of the rule mentioned in paragraph 20 regarding consecutive adverse reports for imposing regulating action. However, these reports may be taken as a reference or basis in taking regulating action in accordance with paragraph 21 or for special circumstances described in paragraph 22 and for the assessment panel to consider if a consultant should be longlisted or shortlisted in a consultant selection exercise.

24. When imposing a suspension, under any cause, of a consultant from bidding for Government consultancy agreements, the CRC is required to specify the suspension period by making reference to the minimum period stated in this Circular as appropriate. In all cases, the suspension lifting date should be subject to review by the CRC before the original suspension period is about to elapse. The CRC should consider the latest performance of the consultant in executing the assignment concerned, performance of the consultants in other projects, and any improvement measures carried out by the consultant in respect of his organization, staffing and company operating procedures, and other relevant information in order to decide if a suspension should be extended or lifted as originally scheduled.

Appeal

25. A consultant who does not agree with the performance assessment made on him or the regulating action imposed on him, may appeal in writing, with substantiations and supporting evidence, to the head of the department procuring the consultancy service within 14 calendar days from the date when the copy of the performance report or the suspension notice is sent to the consultant. The appeal can be delivered either by post or by email. Late submissions will not be considered. The head of department should decide on the case within one month if practicable, and such decision shall be final. Any imposed regulating actions will only be lifted when the head of department is satisfied that the appeal is sustained. If the appeal is sustained and the original assessment has to be amended, the procuring department shall void the original report and resubmit a new version in the CNPIS. The result of the successful appeal will not have any retrospective effect on the award of consultancies or decisions made in any consultant selection exercise that have already been conducted. A log of appeals from consultants should also be input into the CNPIS by the departments concerned.

Sub-consultants

26. Regulating actions will not be applied to sub-consultants who do not have direct contractual relationship with the department. However, in case of circumstances mentioned in paragraph 22 above found on any sub-consultants, regulating action of suspending the sub-consultants from bidding for Government agreement should also be considered by the procuring department.

Record of Regulating Actions

27. A record of regulating actions on consultants is maintained in the CNPIS and the departmental CRC imposing a suspension on a consultant should record the detail in the CNPIS immediately so that the information may be accessed by the other CNPIS users. Extension or lifting of the suspension should also be recorded in the CNPIS upon decision made by the CRC. To ensure that the consultants selection board(s) concerned is alerted of all the relevant suspension cases, departments are required to separately keep AACSB and/or EACSB informed of the imposition, extending and lifting of all suspension cases relevant to the board.

Consultants Review Committee

Composition and Terms of Reference

Composition

- Chairman : D2 level or above
Secretary : senior professional rank or above
Members : at least a D1 officer and one other officer of at least professional rank

Terms of Reference

1. To review the performance of the consultants providing consultancy services to the department.
2. To endorse performance reports and make supplementary comments, if necessary.
3. To decide and take regulating actions, including suspension from bidding and lifting of any suspension imposed previously, against consultants receiving two or more consecutive adverse Interim Reports, and to keep the relevant log(s) in the CNPIS on regulating actions updated.
4. To consider circumstances, other than adverse Interim Reports, as mentioned in paragraphs 21 and 22 in Annex I of this Circular.
5. To obtain approval from AACSB or EACSB before taking regulating actions as required under paragraph 22 in Annex I of this Circular.

Categorization of Consultancies

I. AACSB

1. Architectural
2. Building Services
3. Structural Engineering
4. Quantity Surveying
5. Landscape Architectural
6. Building Surveying

II. EACSB

1. Civil infrastructure and development(CE)
2. Drainage and sewerage (DS)
3. Electrical and mechanical (EM)
4. Environmental (EP)
5. Geotechnical and slope (GE)
6. Roads and associated structures (HY)
7. Town planning (TP)
8. Traffic and transport (TT)
9. Waterworks (WS)
10. Specialists (SP)