

Avoiding Conflict of Interest in Government Procurement

(Chapter IA of the Stores and Procurement Regulations)

STORES AND PROCUREMENT REGULATIONS

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CHAPTER IA

AVOIDING AND MANAGING CONFLICT OF INTEREST IN GOVERNMENT PROCUREMENT

GENERAL AND APPLICABILITY

180. It is the responsibility of all public officers to ensure the integrity and impartiality of the Government's procurement process. Conflict of interest situations may arise in cases where a public officer exercises his authority, influences decisions and actions or gains access to valuable information, perhaps but not necessarily restricted or confidential. Conflict of interest may also arise from participation by consulting firms/organisations (hereinafter referred to as "consulting firms") or contractors in government procurement. All public officers involved in procurement must be alert to situations which may lead to actual, potential or perceived conflict of interest and ensure that sufficient safeguards are in place to avoid such situations from arising or manage such situations. The principles and guidelines set out in this Chapter apply to all types of government procurement including revenue contracts, irrespective of value.

AVOIDING AND MANAGING CONFLICTS WITH PRIVATE INTERESTS

185. All public officers involved in government procurement, including in particular the head or chairperson, members and/or secretary of all committees/working groups responsible for preparing tender documentation (including tender specifications and marking schemes), tender opening teams, tender assessment panels (TAPs), departmental tender committees (DTCs), departmental consultants selection committees (DCSCs), tender boards and consultants selection boards, must —

- (a) **avoid** conflicts, whether actual, potential or perceived, arising between their official duties and their private interests. Private interests include the financial and other interests of the public officer, the public officer's relatives and close associates, or persons to whom the public officer is indebted or owes a favour, as defined in relevant civil service guidelines (including Civil Service Bureau Circular No. 2/2004 on "Conflict of Interest" or any updated version);
- (b) **declare** all such conflicts or relevant private interests as soon as the public officer is aware of them to enable his supervisors, the head or the chairperson of the relevant tender preparation team, tender opening team, TAP, DTC, DCSC, tender board or consultants selection board to decide whether the public officer should continue to be involved in the specific procurement exercise;
- (c) **observe** prevailing civil service code and guidelines on how to prevent or deal with conflict of interest situations; and
- (d) **observe** prevailing Security Regulations and not make unauthorised disclosure or take advantage of any tender-related information whether or not for personal gain.

186. All public officers involved in preparing tender documentation (including tender specifications and marking schemes), assessing tenders and conducting negotiations must declare whether they have any actual, potential or perceived conflict of interest upon their taking up of the respective responsibilities in procurement matters and as soon as they become aware of such actual, potential or perceived conflict of interest. Departments must state in each tender report whether or not the public officers involved in preparing tender documentation (including tender specifications and marking schemes), assessing tenders and conducting negotiations have declared their interest and, where conflicts of interest (actual, potential or perceived) have been identified, what remedial action has been taken. A specimen declaration and undertaking is at Appendix I(A).

187. The head or chairperson, members and/or secretary of all tender opening teams, DTCs, DCSCs, tender boards and consultants selection boards who handle procurement matters are required to sign an undertaking upon taking up these responsibilities, and are also required to renew their undertaking at least annually. A specimen undertaking is at Appendix I(B).

188. COs of the procuring department must —

- (a) **remind** all colleagues involved in government procurement, at regular intervals, to observe strict confidentiality rules with regard to tender-related information and to declare any private interests as may arise in relation to the procurement, or in relation to the parties offering the stores, services or revenue contracts being procured;
- (b) **ensure** that all declarations are drawn to the attention of the head or the chairperson of the tender preparation team, tender opening team, TAP, DTC, DCSC, tender board or consultants selection board as the case may be. If the public officer making the declaration is the head or the chairperson himself, his declaration should be drawn to the attention of his supervisor. All such declarations and actions taken must be recorded and filed properly;
- (c) if a public officer has declared an interest and the supervisor, the head or the chairperson of the tender preparation team, tender opening team, TAP, DTC, DCSC, tender board or consultants selection board rules that the public officer should not continue to handle the specific procurement exercise, **redeploy**, if necessary, other staff to take the place of the public officer who has declared an interest in the procurement exercise; and
- (d) **consider** and if appropriate draw up supplementary guidelines to fit the circumstances of the department on the detection, avoidance and management of conflicts in government procurement, making reference to the “Government Procurement of General Goods and Services” published by the Independent Commission Against Corruption as appropriate.

AVOIDING AND MANAGING CONFLICTS THAT MAY ARISE FROM THE DIFFERENT ROLES OF CONSULTING FIRMS/CONTRACTORS

190. Departments must be alert to the potential conflict of interest which may arise from the different roles or assignments a consulting firm or contractor may take up, whether in relation to the same project for which that consulting firm or contractor was or remains engaged by the Government in the first place, or other related projects.

191. It is not possible to list all situations in which potential conflicts of interest may arise. One typical situation is where a firm/organisation (hereinafter referred to as “firm”), having acted as Government’s consultant for a project, bids as a contractor or is involved as a controlling shareholder or subcontractor of the contractor in a subsequent exercise for the procurement arising out of the consultancy or which was the very subject of the consultancy.

192. To ensure that Government receives from consulting firms objective professional advice which is not tailored or fashioned with regard to promoting that consulting firm’s or its associate’s products and/or services, and to maintain a level-playing field in the procedures for government procurement, departments must —

- (a) **ascertain** as far as practicable, before the award of a consultancy, whether there is any reason to disqualify a consulting firm which has expressed an interest in undertaking a government consultancy on grounds of actual, potential or perceived conflicts of interest;
- (b) **oblige** the selected consulting firm to report on situations which may give rise to those conflicts; and
- (c) **debar** the selected consulting firm and its associate(s) from participating in any subsequent exercise for the procurement arising out of or which was the very subject of the consultancy, save for the circumstances specified in SPR 194.

Departments should consult the Department of Justice (D of J) on the provisions to be included in consultancy briefs and consultancy agreements to reflect the requirements in SPR 192(b) and (c) above.

193. There may be circumstances where a strict ban on future participation in procurement exercises is not practicable. Departments which are not able to comply with the principles and guidelines set out in SPR 192 above must approach the relevant consultants selection board (or tender board if the professional advice is procured through a tender exercise) for a ruling.

194. If, for reasons acceptable to the relevant consultants selection board, a department would not want to debar a firm which has acted as its consultant and/or the consultant’s associates from participating in exercises for the procurement arising out of or which was the very subject of the consultancy, the department must —

- (a) **review** the recommendations of the consultant, including the proposed tender specifications for the implementation tender, to satisfy itself that the tender document is and is seen to be objective and unbiased having regard to the role and recommendations of that consulting firm. The relevant CO should appoint a review committee comprising public officers who have **not** been involved in the consultancy in question and who can serve as a credible and effective checking body, and the decisions should be clearly recorded; and
- (b) **specify** in the tender notices for the implementation tenders that the firm appointed for the consultancy studies is a potential bidder but that all the information which was made available to that firm and all the advice which the firm has provided and which is relevant to the tender will equally be made available to all potential tenderers upon request.

Under no circumstances may a consulting firm (including its associates) that has advised on the preparation of the tender document, including tender specifications and marking scheme, be allowed to bid, participate or be financially involved in that or related tender exercise.

195. (a) Departments must bear in mind the requirement that all consulting firms must not only have, but be seen to have, an equal opportunity to participate in any consultants selection exercise. Where members of a consulting firm participate with government departments in committees, working groups, boards, etc. in the course of which the need to engage consulting firms to perform assignments arises, departments must without any delay —
- (i) **require** the person concerned to disengage himself immediately from the committee, working group, board, etc., as the case may be; or
 - (ii) **request** the person concerned to undertake in writing that his consulting firm will not compete for, participate or be financially involved in the assignment whether as the main consultant or sub-consultant or otherwise.
- (b) Departments must not put pressure on prospective consulting firms to employ particular sub-consultants or be over-enthusiastic in matching sub-consultants with consulting firms. Information on the availability of specialist sub-consultants should be provided to all firms in the invitation to submit an expression of interest (EOI) and/or a tender, if it is considered essential for the main consultants to have such information.

196. When a consulting firm submits a bid as a main consultant while concurrently bidding as a sub-consultant of other competing main consultant(s) in the same consultants selection exercise or when a consulting firm teams up as a sub-consultant with more than one bidding main consulting firm, the question of potential or perceived role conflict may arise unless these different roles are disclosed to all participants, including those bidding as main or sub-consultants. Departments shall require all consulting firms to disclose their competing roles, if any, in a consultants selection exercise and to confirm in the consultancy proposal that no confidential information, confidentiality restrictions or restraints of trade or business have been contravened in lodging the proposal in which the main consultant and/or sub-consultant are in common or affiliated with the sub-consultant of another bidder. Departments should consult D of J as necessary to include a provision in the consultancy brief and consultancy agreement reflecting the aforesaid requirements.

197. Under special circumstances, advice may need to be sought from technical experts outside the Government (paragraph 3 of Appendix III(G)1). To ensure that the Government receives from outside technical experts objective professional advice which is not intended to favour any particular consulting firms or contractors, and to maintain a level-playing field in the procedures for government procurement, departments must —

- (a) **ascertain** as far as practicable, before the engagement of any outside technical expert, whether there is any reason to disqualify such expert who has expressed an interest in undertaking the role of technical expert on grounds of actual, potential or perceived conflicts of interest; and
- (b) **oblige** the outside technical expert engaged to report on situations which may give rise to those conflicts.

Departments may consult the D of J as appropriate on the provisions to be included in the letter or agreement when engaging outside technical experts to reflect the requirements in SPR 197(b) above. The outside technical experts should be invited to complete the declaration/undertaking at Appendix I(C).

198. If actual, potential or perceived conflict of interest is identified in engaging the outside technical expert, it should be drawn to the attention of the Chairman of the TAP as specified in paragraph 5 of Appendix III(G)1. The actions taken should be properly documented and reported to the DTC, DCSC, tender board or consultants selection board as appropriate.

Appendices

- Appendix I
- (A) Specimen Declaration and Undertakings by Public Officers Involved in Preparing Tender Documentation (including Tender Specifications and Marking Schemes), Assessing Tenders and Conducting Tender Negotiations
 - (B) Specimen Undertakings by Head or Chairperson, Members and/or Secretary of Tender Opening Teams/Departmental Tender Committees/Departmental Consultants Selection Committees/Tender Boards/Consultants Selection Boards
 - (C) Declaration and Undertakings by Technical Advisor who are not Public Officers

**Declaration and Undertakings by Public Officers Involved
in Preparing Tender Documentation (including Tender Specifications
and Marking Schemes), Assessing Tenders and
Conducting Tender Negotiations
(SPR 186)**

[Tender Reference and Subject]

I hereby declare that there is no conflict of interest, whether actual, potential or perceived, between my official duties to the Government in relation to the captioned tender exercise, including without limitation those in relation to the preparation of the tender documentation (including tender specifications and marking schemes), the assessment of tenders and the conduct of negotiations, and my financial, professional, commercial, personal or other interests.

2. I undertake to —

- (a) hold in strict confidence all tender information that I have access to through my official duties to the Government in relation to the captioned tender exercise, including without limitation those in relation to the preparation of the tender documentation (including tender specifications and marking schemes), the assessment of tenders and the conduct of negotiations. Tender information includes details of tenders received and any other sensitive, restricted or confidential information relating to a tender;
- (b) refrain from making any unauthorised disclosure or taking advantage of any tender information referred to in paragraph 2(a) above whether or not for personal gain;
- (c) declare any actual, potential or perceived conflict of interest with my official duties to the Government in relation to the captioned tender exercise, including without limitation those in relation to the preparation of the tender documentation (including tender specifications and marking schemes), the assessment of tenders and the conduct of negotiations immediately when I become aware of any such conflict; and
- (d) take steps to avoid any conflict of interest with any potential tenderer or tenderer by not putting myself in a position of obligation towards any of them; for example, by not accepting any favour or lavish or excessive entertainment, and not over-socialising with any of them.

3. The undertakings in paragraphs 2(a) and (b) above shall not apply —

- (a) if and when the disclosure and information therein referred to becomes a matter of public knowledge (other than by reason of a breach of paragraphs 2(a) and (b) above); or

- (b) to any communications or disclosures caused or permitted by me to colleagues in the Government who are or are expected to be involved in the course of their official duties in the captioned tender exercise or parts thereof.
- (c) to disclosures of any information in circumstances where such disclosure is required pursuant to any law, regulation, rule of any relevant stock exchange, or order of a court or arbitral authority of competent jurisdiction.

4. I understand that I may be subject to disciplinary action should I make a false declaration or fail to observe any of my above undertakings.

Signed : _____

Name (block letters) : _____

Title/Rank : _____

Date : _____

**Undertakings by Head or Chairperson, Members and/or Secretary of
Tender Opening Teams/Departmental Tender Committees/Departmental
Consultants Selection Committees/Tender Boards/
Consultants Selection Boards
(SPR 187)**

I undertake to hold in strict confidence all tender information that I have access to through my position as a head/chairperson/member/secretary of the above Tender Opening Team/Departmental Tender Committee/Departmental Consultants Selection Committee/Tender Board/Consultants Selection Board. Tender information includes details of tenders received and any other sensitive, restricted or confidential information relating to a tender.

2. I undertake not to make any unauthorised disclosure or take advantage of any tender information referred to in paragraph 1 above whether or not for personal gain.

3. I undertake to declare any actual, potential or perceived conflict of interest with my official duty as a head/chairperson/member/secretary of the Tender Opening Team/Departmental Tender Committee/Departmental Consultants Selection Committee/Tender Board/Consultants Selection Board immediately when I become aware of any such conflict.

4. I undertake to take steps to avoid any conflict of interest with any potential tenderer or tenderer by not putting myself in a position of obligation towards any of them; for example, by not accepting any favour or lavish or excessive entertainment, and not over-socialising with any of them.

5. I understand that I may be subject to disciplinary action should I fail to observe any of my above undertakings.

Signed : _____
Name (block letters) : _____
Title/Rank : _____
Date : _____

**Declaration and Undertakings by
Technical Advisor who are not Public Officers
(SPR 197 and Appendix III(G)1)**

[Tender Reference and Subject]

To: The Government of the Hong Kong Special Administrative Region (“Government”)

I hereby declare that there is no conflict of interest, whether actual, potential or perceived, between my role as the technical advisor in relation to the captioned tender exercise and my financial, professional, commercial, personal or other interests.

2. I undertake to —

- (a) hold in strict confidence all tender information that I have access to through my role as the technical advisor in relation to the captioned tender exercise. Tender information includes details of tenders received and any other sensitive, restricted or confidential information relating to a tender;
- (b) refrain from making any unauthorised disclosure or taking advantage of any tender information referred to in paragraph 2(a) above whether or not for personal gain;
- (c) declare any actual, potential or perceived conflict of interest with my role as the technical advisor in relation to the captioned tender exercise immediately when I become aware of any such conflict;
- (d) take steps to avoid any conflict of interest with any potential tenderer or tenderer by not putting myself in a position of obligation towards any of them; for example, by not accepting any favour or lavish or excessive entertainment, and not over-socialising with any of them;
- (e) perform my role as the technical advisor on a professional and impartial basis in accordance with applicable professional standards in the Hong Kong and international markets; and
- (e) not to offer, solicit or accept any advantage as defined in the Prevention of Bribery Ordinance (Cap. 201 of the Laws of Hong Kong) in relation to my duties as the technical advisor in the captioned tender exercise.

3. The undertakings in paragraphs 2(a) and (b) above shall not apply —

- (a) if and when the disclosure and information therein referred to becomes a matter of public knowledge (other than by reason of a breach of paragraphs 2(a) and (b) above);

- (b) to any communications or disclosures caused or permitted by me to the public officers of the Government who are or are expected to be involved in the course of their official duties in the captioned tender exercise or parts thereof; or
- (c) to disclosures of any information in circumstances where such disclosure is required pursuant to any law, regulation, rule of any relevant stock exchange, or order of a court or arbitral authority of competent jurisdiction.

4. I agree that in the event of any breach or threatened breach of the provisions of this Declaration and Undertakings, money damages are unlikely to be a sufficient remedy and the Government shall be entitled, in the discretion of the court, to an injunction to restrain the said breach or threatened breach in addition to and not in lieu of any other equitable or any legal relief including damages.

5. Each of the provisions of this Declaration and Undertakings is severable and distinct from the others and, if one or more of such provisions or any part thereof is or becomes illegal, invalid or unenforceable, the legality and enforceability of the remainder of this Declaration and Undertakings shall not be affected or impaired in any way.

6. This Declaration and Undertakings shall be subject to and construed in accordance with the laws of Hong Kong.

In witness whereof, this Declaration and Undertakings has been executed and delivered as a deed on the date written below.

Signed, sealed and delivered)
by *[name of individual]* on *[date]*) *[signature of individual]*
as his deed in the presence of:) *[affix seal]*

[signature of witness]
Name: *[witness name]*
Address: *[witness address]*

Glossary

CO	: Controlling Officer
DAS	: Director of Accounting Services
DCSC	: Departmental consultants selection committee
D of J	: Department of Justice
DTC	: Departmental tender committee
EOI	: Expression of interest
SMS Framework	: Standard Marking Scheme Framework
SPRs	: Stores and Procurement Regulations
TAP	: Tender assessment panel