

SECTION 5 REGULATING ACTIONS

5.1 General

5.1.1 The List, Specialist List and the associated regulatory regime are put in place to ensure that certain standards of financial capability, expertise, management and safety are maintained by the contractors carrying out Government works. If doubts arise about the ability of a contractor to meet the minimum standards generally or for a particular class of contracts, it is appropriate that he is not allowed to tender for any new work until he can demonstrate that he can meet the required standard.

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

5.1.3 Circumstances which may lead to the taking of regulating actions include, but are not limited to: -

- (i) unsatisfactory performance;
- (ii) failure to submit a valid competitive tender for a period of three years;
- (iii) failure to submit accounts or meet the financial criteria within the prescribed time;
- (iv) failure to answer queries or provide information relevant to the listing status of a contractor on the List and/or the Specialist List within the prescribed time;
- (v) misconduct or suspected misconduct;
- (vi) winding-up, bankruptcy or other financial problems;
- (vii) poor site safety record;
- (viii) failure or refusal to implement an accepted tender;
- (ix) poor environmental performance;
- (x) court convictions, such as contravention of site safety legislation and Employment Ordinance and employment of illegal workers;

- (xi) failure to employ the minimum number of full time management and technical personnel;
- (xii) violation of laws;
- (xiii) poor integrity of his employees, agents and sub-contractors in relation to any public works contract unless the misconduct is not within the control of the contractor;
- (xiv) public interest;
- (xv) public safety and public health;
- (xvi) serious or suspected serious poor performance or other serious causes in any public or private sector works contract;
- (xvii) failure to comply with any of the Rules for Administration of the List or the Specialist List giving rise to reasonable suspicions as to the capability or integrity of the contractor;
- (xviii) failure to provide proof of complying with all the IMS requirements for the purpose of upkeeping the operation of the IMS.

5.1.4 The following Sub-sections set out the guidelines for administration and the circumstances under which regulating action against contractors may be warranted. They apply to contractors/suppliers on both the List and the Specialist List. In the event that special circumstances of a particular case arose which warrant taking of regulating action but do not fit into any of the guidelines, the Secretary for Development may nonetheless take regulating action in the particular case as she deems proper.

5.2 Removal, Suspension, Downgrading or Demotion of Contractors

5.2.1 Letters notifying contractors of their removal, suspension, downgrading or demotion from the List and/or the Specialist List will be issued only by the Development Bureau and be signed by the Deputy Secretary for Development (Works).

5.2.2 If the tenderer or, if the tenderer is a partnership or an unincorporated or incorporated joint venture, any participant of the partnership or unincorporated joint venture or shareholder of the incorporated joint venture is under suspension from tendering for public works in a particular category or in all categories, his tender for that particular category or for all categories, as the case may be, will not be considered unless the suspension is lifted by the Works Department or the Development Bureau by the date set for the close of tender, or if this has been extended, the extended date. If the tenderer or, if the tenderer is a partnership or an unincorporated or incorporated joint venture, any participant of the partnership or unincorporated joint venture or shareholder of the incorporated joint venture is under voluntary suspension from tendering for public works in a particular category or in all categories, at the date of tender invitation but subsequently revokes the voluntary suspension without agreement in writing from either the Works Department or the Development Bureau, his tender for that particular category or for all categories, as the case may be, will not be considered.

5.2.3 The following guidelines shall be adopted by the heads of departments in deciding whether to recommend to the Development Bureau that a contractor on the List and/or the Specialist List should be removed, suspended, downgraded or demoted. Such a recommendation, which shall be personally endorsed by the Director, Deputy Director or an equivalent D3 officer of the department concerned, will normally be initiated by the Managing Department of the relevant category of the List and/or the Specialist List after consultation with any other departments which may be affected by the action proposed. The guidelines shall be treated as indicating the normal sanction to be imposed in given circumstances. It is open to the heads of departments to recommend a more severe or less stringent action if particular circumstances warrant it.

- (a) Circumstances warranting removal from all categories in which the contractor is listed
 - (i) Misconduct.
 - (ii) Complicity in the misconduct of an employee, agent or sub-contractor.
 - (iii) Removal by the Registered Contractors' Disciplinary Board from the Contractors' Register maintained under the Buildings Ordinance. If a contractor is disciplined by the Registered Contractors' Disciplinary Board, the Director of Buildings shall inform the Development Bureau so that consideration may be given to the imposition of an appropriate penalty (removal, suspension, downgrading or demotion) in respect of the contractor's position on the List and/or the Specialist List. When a contractor, who is also on the Contractors' Register kept by the Building Authority, is removed from the List and/or the Specialist List for misconduct, the Development Bureau may refer the case to the Building Authority who may then decide under the Buildings Ordinance whether or not to refer the case to the Registered Contractors' Disciplinary Board.
 - (iv) Bankruptcy and winding up of business.
 - (v) Poor performance or other serious causes which is/are considered by the Secretary for Development as serious in any public or private sector works contract.
- (b) Circumstances warranting removal from a particular category
 - (i) Failure to submit a competitive tender within a period of three years in any category despite being eligible to do so, or submission of non-conforming tenders on three or more occasions within a period of three years in any category; provided that such practice gives rise to reasonable suspicions as to the capability or integrity of the contractor concerned. For the purpose of this sub-paragraph, tenders withdrawn after the tender closing date shall be considered as non-submission of tender and where the provision of certain information is an "essential

requirement” of a tender, the tender without giving such information or giving incomplete information stipulated as essential requirement shall be considered as non-conforming. A competitive tender is defined as a conforming tender which is capable of being accepted under the Government’s procurement guidelines, rules and procedures and the tender price does not exceed 25% of the average tender price of all tenders received under the tender exercise. Any tender which is non-conforming or is not capable of being accepted under the Government’s procurement guidelines, rules and procedures shall not be considered as a competitive tender. A warning letter shall be sent by the Managing Department, copied to the Development Bureau at least six months but not more than one year before the expiry of the three-year period, to any contractors who appear likely to fall into this situation. If, at the expiry of the period, no tenders have been submitted, a further letter seeking explanation shall be sent. The Managing Departments should take all reasonable explanations into account before recommending removal. A contractor who tenders for a project open to contractors in more than one category shall be credited with having tendered in each of those eligible categories for which he is listed. Records of contractors’ tenders, whether accepted or not, are to be maintained by the Managing Department of the relevant category. When a department other than the Managing Department calls tenders in a category, the tenders shall be reported to the Managing Department after acceptance, or as the case may be, approval of the cancellation of the tender exercise by the Central Tender Board or Public Works Tender Board or other relevant approving authority.

- (ii) Withdrawal of tenders in a category within the tender validity period therefor on two or more occasions within a 12-month period as stipulated under Sub-section 5.13 below.
- (iii) Poor site safety record in a category.
- (iv) Poor performance in a category, normally but not necessarily on more than one contract.
- (v) Failure to obtain Quality Management System certification after having been suspended for three years (including voluntary and mandatory suspension).
- (vi) Failure to submit a tender in a category within a period of three years despite being eligible to do so.
- (vii) Failure/continued failure to satisfy requirements on the management and technical capability after having been suspended from tendering in a particular category under sub-paragraph 5.2.3(d)(v) below.

Removal or suspension from the List and/or the Specialist List or from a particular category thereof will not normally prohibit a contractor from acting as a sub-contractor on a public works project, provided that the Reporting

Department is satisfied that the contractor is suitable for acting as the sub-contractor for the public works project in question.

- (c) Circumstances warranting mandatory suspension from tendering in all categories (A time limit for review to be set in all cases but should not be longer than six months)
- (i) Suspected misconduct.
 - (ii) Indications of cash flow problems (care must be taken that suspension on these grounds will not aggravate the problems).
 - (iii) Poor performance, where it is desirable to ensure that the contractor completes his current commitments before undertaking further projects. Guidelines for monitoring of performance in Sub-section 5.4 below should be followed prior to a recommendation for suspension.
 - (iv) Suspected serious poor performance or other serious causes in any public or private sector works contract.
 - (v) Poor environmental protection record.
 - (vi) Poor site safety record.
- (d) Circumstances warranting mandatory suspension from tendering in a particular category (A time limit for review to be set in all cases but should not be longer than six months)
- (i) Poor performance in a contract. Guidelines for monitoring of performance given in Sub-section 5.4 below should be followed prior to a recommendation for suspension. While poor performance in a particular category will generally warrant suspension only in that category of work, departments may consider recommending to the Development Bureau for suspension to be extended to other categories if the contractor repeatedly shows poor performance in aspects, such as poor management ability, which are likely to adversely affect other categories.
 - (ii) Poor site safety record in a category.
 - (iii) Failure to comply with the provisions for employment of Technician Apprentices and Building and Civil Engineering graduates as required.
 - (iv) Failure to comply with the provisions for mandatory employment of Qualified Tradesmen and Intermediate Tradesmen as required.
 - (v) Failure to submit information and/or satisfy requirements on the management and technical capability.

- (vi) Failure to obtain Quality Management System certification as required.
- (vii) Withdrawal of tenders in a category within the tender validity period therefor on two or more occasions within a 36-month period as stipulated under Sub-section 5.13 below.
- (viii) Failure to submit Sub-contractor Management Plans as required.
- (ix) Failure to comply with the provisions for employment of sub-contractors registered from the Subcontractor Registration Scheme as required.
- (e) Circumstances warranting downgrading or demotion in a particular category
 - (i) Poor performance, normally but not necessarily on more than one contract (in the case of probationary contractors in the lowest groups, this will normally warrant removal from the List and/or the Specialist List).
 - (ii) Failure/continued failure to satisfy the requirements on the management and technical capability after having been suspended from tendering in a particular category under sub-paragraph 5.2.3(d)(v) above but the management and technical capability satisfies the requirements of a probationary contractor in the same group or a lower group within a specified category.

5.2.4 In determining for the purpose of paragraphs 5.1.3(v), 5.2.3(a)(i) and 5.2.3(c)(i) whether a contractor has committed acts of misconduct or suspected misconduct, the acts or omissions of:

- (a) a director of a company (incorporated or unincorporated) or a partner in a partnership or a participant/shareholder of a joint venture;
- (b) any person who, under the immediate authority of the board of directors, exercises managerial functions; and
- (c) any employees, agents or sub-contractors of the contractor including persons referred to in (a) or (b) above shall be deemed to be the acts or omissions of the contractor unless the contractor has no knowledge (actual or implied) or ought not to have known or not being reckless as to the misconduct or suspected misconduct.

5.2.5 For the purpose of paragraphs 5.1.3(v), 5.2.3(a)(i), 5.2.3(a)(ii) and 5.2.3(c)(i), “misconduct” means any unlawful behaviour involving corruption or fraud or breach of faith whether or not the person charged with an offence is convicted for offence involving the unlawful behaviour but a conviction of a criminal offence shall be conclusive for the requirement of misconduct. “Suspected misconduct” shall be construed accordingly but if the person is charged with any offence involving corruption, fraud or breach of faith, it shall be conclusive for

the requirement of suspected misconduct.

5.2.6 Pursuant to paragraphs 2.1.10 and 3.1.10, a contractor failing to provide proof of complying with all the IMS requirements for the purpose of upkeeping the operation of the IMS will be mandatorily suspended from tendering in all categories. The contractor shall prove to the Development Bureau that the IMS requirements are met before he is considered for reinstatement.

5.2.7 The Secretary for Development may additionally initiate regulating actions on contractors under the following circumstances:

- (a) Persistent convictions pertaining to site safety and other construction activities;
- (b) Repeated failure to submit accounts and supplementary information and satisfy retention requirements in force at the time;
- (c) Be convicted of illegal worker offences for more than two times within a rolling 12-month period;
- (d) Contravention of the Employment Ordinance;

5.2.8 The measures referred to Sub-section 5.2 are cumulative and not mutually exclusive. The Secretary for Development may take one or more measures where the circumstances of the case warrant so.

5.3 Uplifting of Mandatory Suspension

5.3.1 Contractors suspended on a mandatory basis by the Development Bureau for whatever reason are required to meet the normal entry criteria including submission of the latest audited or management accounts where appropriate for a financial check before consideration can be given to their reinstatement on the List and/or the Specialist List. Failure to meet these requirements may result in downgrading to probationary status, demotion to a lower group or removal from a category of the List and/or the Specialist List.

5.4 Contractors Given Adverse Reports on Performance

5.4.1 The purpose of removal, suspension, downgrading or demotion of contractors from the List and/or the Specialist List following an Adverse report is to ensure that: -

- (a) only suitable competent contractors are allowed to tender for contracts;
- (b) pressure is put on the contractor to improve his performance; and
- (c) contractors are all treated alike: firmly, but with consistency and fairness.

5.4.2 Please note sub-paragraph 4.6.4(c) above for the requirement of sending an advance copy of the Report on Contractor's Performance to the contractor.

5.4.3 For tenders invited without the exact category of work having been specified, the

department managing the contract will act as the Managing Department for the purpose of performance reporting and taking appropriate regulating actions.

5.4.4 Government must act fairly when taking regulating actions. Contractors must, therefore, be provided with the gist of Government's case and be given adequate warning of proposed actions so that they may have the opportunity to present their view of the matter. Full consideration must be given to any points raised by contractors before action is taken.

5.4.5 Because the circumstances of contracts and contractors vary greatly, the following actions to be taken for consecutive Adverse reports are not rigid requirements, but if they are not followed, written justification is required on file.

(a) 1st Adverse report: -

- (i) Warning Letter - The Chairman of the Reporting Review Committee (RRC) shall write on behalf of his Director to the contractor within two weeks of the reporting date advising him that the report is Adverse and the reasons for the Adverse report, and warning him of the need to improve (standard letter at **Appendix 5A**). The Managing Department will be advised of the same.
- (ii) Interview - The Chairman of the RRC or his representative shall interview the contractor within three weeks of the reporting date to discuss the shortcomings in his performance, the seriousness of the situation, and the need to suspend him from further tendering should there be a consecutive Adverse report. The Chairman shall write on behalf of his Director to the contractor confirming the points made. It is particularly important to include the warning of possible suspension in the letter to the contractor. The Managing Department will be advised of the same.

(b) 2nd consecutive Adverse report: -

- (i) Voluntary Suspension - The Chairman of the RRC or his representative shall write to the Managing Department for approval to interview the contractor with the aim of seeking the contractor's agreement to voluntary suspension i.e. to refrain from tendering. Upon receipt of the approval from the Managing Department, the Chairman of the RRC will then interview the contractor explaining that his continuing poor performance requires action to protect Government's interests by ensuring that the contractor is not awarded any further contracts in the category until confidence in his performance is restored. The Chairman of the RRC will invite the contractor to agree to voluntary suspension and to confirm this in writing to the Director of the Managing Department. The contractor should be warned that failure to agree could lead to mandatory suspension which will result in gazetting of the suspension. The Chairman should also confirm other points made at the interview and warn the contractor that at the end of the contract his performance will be assessed and if the overall assessment is Adverse, he may be downgraded,

demoted or removed. He is also to be informed that he will be placed on a six weekly reporting schedule.

- (ii) On receipt of confirmation of voluntary suspension in writing, the Director of the Managing Department will circulate this confirmation to all the Works Departments, the Housing Authority and the Development Bureau under restricted cover. The start date of the voluntary suspension shall be the date a contractor agrees to the suspension in writing or the date the Managing Department receives the written confirmation from the contractor concerned, whichever is the later. The period of voluntary suspension should continue until the suspension has been uplifted by the Managing Department. Uplifting of the voluntary suspension should be considered when the contractor has performed satisfactorily for a minimum of six months or until and in any event an overall review of the situation should be carried out at the first quarterly review after substantial completion/satisfactory completion of the contract (or de facto completion where certificates of substantial completion/satisfactory completion have not been issued). If voluntary suspension was made during the maintenance period or defects liability period, uplifting of the voluntary suspension should be considered when the contractor has performed satisfactorily for a minimum period of three months. The Chairman of the RRC shall write to the Director of the Managing Department recommending uplifting of voluntary suspension who shall then consult all the other Works Departments to ensure that there are no objections to the uplifting. Confirmation of the uplifting of suspension shall then be made by the Managing Department to all the Works Departments, the Housing Authority and the Development Bureau under restricted cover.
- (iii) If the contractor does not agree to voluntary suspension, the Chairman of the RRC shall write to the Managing Department recommending that the contractor be suspended on a mandatory basis. If the Managing Department agrees to the recommendation, a proposal for mandatory suspension of the contractor shall be made to the Development Bureau and copied to the RRC. The Managing Department should only disagree with the recommendation of the Chairman of the RRC if there is a possibility that suspension of the contractor could adversely affect other contracts held by the contractor. The Chairman of the Managing Review Committee (MRC) shall write under restricted cover to all the Works Departments, the Housing Authority and the Development Bureau advising why the recommendation for mandatory suspension of the contractor has not been supported. Mandatory suspension of a contractor will be actioned by the Development Bureau and published in both the Government Gazette and the web site of the Development Bureau.
- (iv) Six Weekly Reporting – This shall be introduced after the second consecutive Adverse quarterly report and continued until a Not Adverse

report is received. Thereafter normal quarterly reports apply. If the six weekly reports on a contract have been discontinued and the contractor subsequently receives a further Adverse report, the six weekly reports should be immediately reintroduced until a Not Adverse report is received. Six weekly reports carry the same weight as quarterly reports and should be completed and processed in exactly the same manner. The RRC should normally review the six weekly reports shortly after they have been received, to ensure the effectiveness of the more intense monitoring system.

(c) Continuing Adverse reports: -

Six weekly reporting should continue. Further interviews with the contractor shall be at the discretion of the Reporting and Managing Department.

(d) End of contract: -

At the first quarterly review after substantial completion/satisfactory completion of the contract (or de facto completion where certificates of substantial completion/satisfactory completion have not been issued) for which any Adverse report has been received, an overall review should be carried out by the RRC to decide whether or not a recommendation should be made to downgrade, demote or remove the contractor from the List and/or the Specialist List. The Managing Department should be informed of the RRC decision.

(e) More than one contract receiving Adverse reports in a category: -

(i) If a contractor receives 1st Adverse reports simultaneously in several contracts in a category, the Managing Department may consider stronger regulating action than those recommended in sub-paragraph 5.4.5(a) above.

(ii) At the stage when voluntary suspension is proposed, if the contractor has Adverse reports in contracts under two Reporting Departments, but in the same category, the Director of the Managing Department may decide to interview the contractor personally.

(f) Adverse reports in several categories: -

At the stage when voluntary suspension is proposed, within the general framework of the guidelines, Managing Departments of the several categories involved should agree as to who should interview the contractor and to which category or categories the suspension should apply. If this cannot be resolved, the matter should be referred to the Development Bureau for a decision.

5.4.6 Departments may consider recommending suspension to be extended to other categories if a contractor consistently shows poor performance in aspects, such as poor management ability, which are likely to affect other categories of work. In such cases, the Chairman of the RRC shall write to the Chairman of the MRC recommending suspension in

more than one category. The Chairman of the MRC will assess the reasons given by the RRC and make a follow-up recommendation to the Development Bureau.

5.4.7 Notwithstanding the provisions given in paragraph 5.4.5 above for consecutive Adverse reports, the RRC should consider recommending suspension in cases of repeated Adverse reports which are not consecutive. The procedure shall be similar to that set out in sub-paragraph 5.4.5(c) above.

5.4.8 In the case of contracts being carried out by joint venture, partnerships or consortia, the regulating actions arising from poor performance on a contract shall be applied equally to all individual members of the joint venture.

5.5 Non-submission of Accounts and Information

5.5.1 Failure to submit accounts, answer queries or provide information within the prescribed time will warrant: -

- (a) mandatory suspension from tendering; or
- (b) removal from the List and/or the Specialist List.

5.5.2 Contractors failing to submit accounts within the following time limits shall be suspended automatically from tendering.

Submission	Contractors	Time Limit
Annual Audited Accounts	Contractors on the List of Approved Contractors for Public Works - Groups A, B & C	6 months after the end of the accounting period
	Contractors/Suppliers on the List of Approved Suppliers of Materials and Specialist Contractors for Public Works	6 months after the end of the accounting period
Half-yearly Management Accounts	Contractors on the List of Approved Contractors for Public Works - Group C	6 months after the end of the accounting period

5.5.3 Within two months but not less than one month before the prescribed time limit, a letter shall be sent by registered post to contractors to warn them that they will be suspended unless accounts are submitted within the time limit. Under no circumstances would extension of the due date be granted.

5.5.4 A contractor suspended under paragraph 5.5.2 above will not be reinstated automatically upon submission of accounts. The reinstatement shall only be considered after the contractor has submitted all his omitted accounts and has proved to the satisfaction of the

Finance Section of Development Bureau that his financial position meets all the criteria appropriate to his group and status.

5.5.5 If a contractor ignores the requirements to answer queries or provide information within the specified time for financial assessment, he shall be suspended from tendering automatically until he has proved that his financial position meets all the criteria appropriate to his group and status.

5.5.6 Should the contractor fail to submit two consecutive audited accounts within 6 months after the end of the last accounting period, or be suspended for one full year under paragraph 5.5.2 or 5.5.5 above, and yet no actions have been taken by him in good faith to uplift himself from the suspension status, he shall be removed automatically from the List and/or the Specialist List.

5.5.7 These procedures will be applied by the Development Bureau. The Works Departments will not be consulted prior to taking action but will immediately be informed.

5.5.8 If any member of a joint venture or consortium is suspended from tendering under these procedures, then the joint venture or consortium shall be ineligible to tender.

5.6 Failure to Meet the Financial Criteria

5.6.1 Failure to meet the financial criteria or requirements as established by the Development Bureau within the prescribed time will warrant:-

- (a) mandatory suspension from tendering (a time limit for review to be set and the contractor will be subject to a financial vetting before being considered for reinstatement); or
- (b) downgrading to probationary status or demotion to a lower group of the List and/or the Specialist List; or
- (c) removal from the List and/or the Specialist List.

5.6.2 If a contractor ignores the requirements to make good the shortfall in employed and/or working capital within the specified time for retention purpose, he shall be suspended automatically from tendering for a minimum period of six months or until the shortfall is rectified, whichever is later.

5.6.3 Should the contractor fail to make good the shortfall within one year from suspension, he shall be removed automatically from the List and/or the Specialist List.

5.6.4 The following regulating actions shall be applicable to the contractors on the List and/or the Specialist List and be imposed against those contractors incurring substantial loss in their business: -

- (a) If any contractor suffers from an average loss rate greater than 20% in any one year, a warning letter shall be sent by the Finance Section of Development

Bureau (copied to SEO(PS), Development Bureau and all the Works Departments) reminding the contractor that should the average loss rate exceed 30% based on the audited accounts of the subsequent financial year, the contractor may be downgraded, demoted or removed from all the categories in which he is listed. Upon notification, the Works Departments shall increase their general vigilance in supervising the contractor's works.

- (b) If any contractor suffers from an average loss rate greater than 30%, the contractor shall be :
 - (i) downgraded to probationary status if he holds a confirmed status in any group or category; or
 - (ii) demoted to confirmed status of a lower group if he holds a probationary status in the higher group; or
 - (iii) demoted to a lower group if he is under a category in the Specialist List which has no probationary status; or
 - (iv) suspended from tendering if he holds a probationary status in the lowest group or category or is under a category in the Specialist List which has no probationary status.
- (c) For contractors regulated under sub-paragraph (b) above, if their average loss rates continue to be above 30% based on the audited accounts for the following two financial years, the regulating actions in sub-paragraph (b) above shall be imposed again. A contractor who has been suspended from tendering under sub-paragraph (b)(iv) above will be removed from the List and/or the Specialist List.
- (d) Provided that the contractor has not been removed from the List and/or the Specialist List, if his latest audited accounts show that the average loss rate is less than 30%, the regulating action imposed under sub-paragraph (b) or (c) above could be uplifted and the contractor could reinstate his status to that just before the latest regulating action subject to meeting all the criteria including financial requirements appropriate to his group and status.
- (e) If the contractor's accounts show that the average loss rate exceeds 30%, the contractor can inject capital to strengthen the shareholder's funds or net worth, which will be taken into account in determining the revised loss rate for the year under review.
- (f) A contractor who is regulated under the Profitability Trend Analysis (PTA) may apply to waive the application of PTA upon the provision of full justification. In this regard, approval will be granted only under special circumstances.

5.6.5 These procedures will be applied by the Development Bureau. The Works Departments will not be consulted prior to taking action but will immediately be informed.

5.7 Contractors Convicted of Contraventions of the Employment Ordinance (Cap. 57)

5.7.1 Any contractors convicted of three or more offences under the Employment Ordinance (Cap. 57), in respect of separate incidents in a rolling 12-month period, shall be compulsorily and automatically suspended from tendering for public works for six months. The suspension shall take effect from the date of the last conviction. Convictions in respect of all public and private contracts shall be counted.

5.7.2 On expiry of the six-month suspension period, if there have been no further convictions as defined in paragraph 5.7.1 above under the Employment Ordinance (Cap. 57) during the suspension period, the suspension shall be lifted. If there have been any further conviction/convictions as defined in paragraph 5.7.1 above during the suspension period, the suspension shall automatically continue for six months from the date of the last conviction until there is no further conviction during the extended period or further extended period.

5.7.3 The date of conviction, not the date of commission of the offence, shall be used in determining action under these procedures.

5.7.4 These procedures will be applied by the Development Bureau. The Works Departments will not be consulted prior to taking action but will immediately be informed.

5.7.5 The General Condition of Tender in relation to the statement of convictions under the Employment Ordinance (Cap. 57), as shown in the web site of the Development Bureau, shall be included in all tender documents.

5.7.6 A tender will not be considered if, by the date set for the close of tender, or the extended date if this has been extended, the tenderer or, if the tenderer is a partnership or an unincorporated or incorporated joint venture, any participant of the partnership or unincorporated joint venture or shareholder of the incorporated joint venture is suspended from tendering under the provisions of this Sub-section.

5.7.7 Departments shall include in the tender reports submitted to the relevant Tender Board a statement stating that the recommended tenderer is not suspended from tendering under the provisions of this Sub-section.

5.7.8 A conviction against each participant of the partnership or unincorporated joint venture or shareholder of the incorporated joint venture shall be counted as a conviction against a partnership or an unincorporated joint venture or incorporated joint venture with different participants for the partnership or unincorporated joint venture or different shareholders for the incorporated joint venture for which the conviction was made.

5.7.9 For a limited company which substituted a partnership or sole proprietor or a limited company which substituted another limited company as defined in Sub-section 6.5, the limited company shall disclose the name of the entity prior to the substitution, where such substitution takes place within the 12-month period prior to the tender closing date. Convictions of the limited company including convictions of the entity (which includes partnership or sole proprietorship or limited company) before substitution, which fall within the 12-month period prior to the tender closing date, shall be taken into account in the tender assessment.

5.7.10 Where the tenderer is a partnership or an unincorporated or incorporated joint venture, the provisions of paragraph 5.7.9 above shall apply to participants of the partnership or unincorporated joint venture or shareholders of the incorporated joint venture who is/are limited company/companies.

5.8 Contractors Convicted of Employing Illegal Workers or of Having Illegal Workers on Sites under their Control

5.8.1 Any contractors convicted of three or more offences under the Immigration Ordinance (Cap. 115), for employing illegal workers or for having illegal workers on sites under their control in respect of separate incidents in a rolling 12-month period, either as main contractors or sub-contractors (whether nominated, specialist or domestic) or otherwise as persons/companies who have control over or are in charge of the construction sites, shall be compulsorily and automatically suspended from tendering for public works for six months. Illegal workers shall mean any persons on construction sites who are illegal immigrants; or any persons who, being not lawfully employable by virtue of Section 17G(2) of the Immigration Ordinance, have committed an offence under Section 41 by contravening the conditions of stay in force in respect of them. The suspension shall take effect from the date of the last conviction. Convictions in respect of all public and private contracts shall be counted.

5.8.2 On expiry of the six-month suspension period, if there have been no further convictions as defined in paragraph 5.8.1 above under the Immigration Ordinance (Cap. 115) during the suspension period, the suspension shall be lifted. If there have been any further conviction/convictions as defined in paragraph 5.8.1 above during the suspension period, the suspension shall automatically continue for six months from the date of the last conviction until there is no further conviction during the extended period or further extended period.

5.8.3 The date of conviction, not the date of commission of the offence, shall be used in determining action under these procedures.

5.8.4 These procedures will be applied by the Development Bureau. The Works Departments will not be consulted prior to taking action but will immediately be informed.

5.8.5 The General Condition of Tender in relation to the statement of convictions under the Immigration Ordinance (Cap. 115), as shown in the web site of the Development Bureau, shall be included in all tender documents.

5.8.6 A tender will not be considered if the tenderer or, if the tenderer is a partnership or an unincorporated or incorporated joint venture, any participant of the partnership or unincorporated joint venture or shareholder of the incorporated joint venture is suspended from tendering under the provisions of this Sub-section, unless the suspension is lifted by the date set for the close of tender, or if this has been extended, the extended date.

5.8.7 Departments shall include in the tender reports submitted to the relevant Tender Board a statement stating that the recommended tenderer is not suspended from tendering under the provisions of this Sub-section.

5.8.8 A conviction against each participant of the partnership or unincorporated joint venture or shareholder of the incorporated joint venture shall be counted as a conviction against a partnership or an unincorporated joint venture or incorporated joint venture with different participants for the partnership or unincorporated joint venture or different shareholders for the incorporated joint venture for which the conviction was made.

5.8.9 For a limited company which substituted a partnership or sole proprietor or a limited company which substituted another limited company as defined in Sub-section 6.5, the limited company shall disclose the name of the entity prior to the substitution, where such substitution takes place within the 12-month period prior to the tender closing date. Convictions of the limited company including convictions of the entity (which includes partnership or sole proprietorship or limited company) before substitution, which fall within the 12-month period prior to the tender closing date, shall be taken into account in the tender assessment.

5.8.10 Where the tenderer is a partnership or an unincorporated or incorporated joint venture, the provisions of paragraph 5.8.9 above shall apply to participants of the partnership or unincorporated joint venture or shareholders of the incorporated joint venture who is/are limited company/companies.

5.9 Contractors Convicted of Site Safety or Environmental Offences or Incurring Serious Incidents on a Construction Site

5.9.1 Please refer to DEVB TCW No. 3/2009 for details.

5.10 Non-compliance with the Provisions for Employment of Technician Apprentices and Building & Civil Engineering Graduates

5.10.1 Please refer to ETWB TCW No. 12/2003 for details.

5.11 Non-compliance with the Provisions for Mandatory Employment of Qualified Tradesmen and Intermediate Tradesmen

5.11.1 Please refer to WBTC No. 13/2002 for details.

5.12 Failure to Obtain Quality Management System Certification as Required

5.12.1 Please refer to WBTC No. 13/2001 and ETWB TCW No. 13/2001A for details.

5.13 Withdrawal of Tenders within the Tender Validity Period

5.13.1 A tenderer shall exercise reasonable care in preparing his tender. A tenderer who engages in any of the following inappropriate conducts, some of which may involve breaches of contract, may find himself the subject of regulating action:

- (a) withdrawal of his tender within the tender validity period;
- (b) refusal to comply with the Conditions of Tender;
- (c) refusal to withdraw a tender qualification or post-tender qualification irrevocably and unconditionally unless such qualification is explicitly permitted in the Conditions of Tender; and
- (d) refusal to make good the shortfall in working capital within the specified time required for the award of the tender.

5.13.2 Refusal may be by way of positive refusal or failure to respond to requests or enquiry from the Employer or his agent. Failure to respond in the specified manner or by the specified deadline may also be regarded as failure to respond. The inappropriate conducts listed in paragraph 5.13.1 above are regarded as withdrawals of tenders in a particular category within the tender validity period.

5.13.3 Upon becoming aware of the inappropriate conduct as described in paragraph 5.13.1 above, the procuring department shall seek legal advice from the Legal Advisory Division (Works) of Development Bureau on whether legal action is recommended.

5.13.4 The Government may take legal action against a tenderer to recover damages where there has been a breach of an implied contract by the tenderer. In any event, withdrawal of a tender by the tenderer under any of the situations mentioned in paragraph 5.13.1 above and which gives rise to reasonable suspicions as to the capability or integrity of the tenderer shall result in regulating action being taken against the tenderer unless the tenderer can offer an acceptable explanation for such conduct.

5.13.5 Where it is established that a tenderer engages in conduct as described in paragraph 5.13.1 above and which gives rise to reasonable suspicions as to his capability or integrity, the procuring department shall notify the Chairman of the related Managing Review Committee (MRC) within one week enclosing copies of the relevant correspondence with a copy to the Secretary for Development (Attn: PAS(W)4) advising him of the name of the defaulting tenderer, the tender closing date, the contract number, the contract title, the predominant category of works and the type of conduct as described in paragraph 5.13.1 above.

5.13.6 Upon receipt of the said notification from the procuring department, the

Chairman of the MRC shall take the following actions:

- (a) If the notification is the first one in a rolling 36-month period, the following actions should be taken.
 - (i) The MRC Chairman shall write on behalf of his Director to the tenderer preferably within two weeks from the date of receipt of the notification from the procuring department, seeking an explanation from the tenderer as to the reasons for the inappropriate conduct (using the standard letter at **Appendix 5B**).
 - (ii) If the MRC Chairman is satisfied with the tenderer's explanation, the tenderer shall be advised (using the standard letter at **Appendix 5C**) that the inappropriate conduct will be recorded but will not be counted for the purposes of taking regulating actions.
 - (iii) If the tenderer has failed to respond or if the MRC Chairman is not satisfied with the tenderer's explanation and considers that the inappropriate conduct could have been reasonably avoided, the tenderer should be warned (using the standard letter at **Appendix 5D**) that should he engage in further inappropriate conduct as described in paragraph 5.13.1 above either in the next 12-month period or 36-month period, regulating actions will be taken in accordance with sub-paragraphs (b) or (c) below unless the tenderer can offer an acceptable explanation for such conduct.
- (b) If the notification is the second one in respect of the same category of work in a rolling 12-month period, the following actions should be taken.
 - (i) The MRC Chairman shall follow the same procedures laid down in sub-paragraphs (a)(i) and (a)(ii) above.
 - (ii) If the tenderer has failed to respond or despite the tenderer's explanation, the MRC Chairman is satisfied that the inappropriate conduct gives rise to reasonable suspicions as to the capability or integrity of the tenderer, he shall recommend to the Secretary for Development to remove the tenderer from that particular category. The Secretary for Development will give a further opportunity to the tenderer to present his case before determining whether the tenderer's inappropriate conduct gives rise to reasonable suspicions as to his capability or integrity. If the Secretary for Development makes a determination against the tenderer then the tenderer shall be removed from that particular category of the List or the Specialist List.
- (c) If the notification is the second one in respect of the same category of work in a rolling 36-month period, the following actions should be taken.
 - (i) The concerned MRC Chairman should follow the same procedures laid down in sub-paragraphs (a)(i) and (a)(ii) above.

- (ii) If the tenderer has failed to respond or despite the tenderer's explanation the MRC Chairman is satisfied that the inappropriate conduct gives rise to reasonable suspicions as to the capability or integrity of the tenderer, the MRC Chairman shall recommend to the Secretary for Development to suspend the contractor from tendering for public works contracts in that category for six months. The Secretary for Development will give a further opportunity to the contractor to present his case before deciding whether to take regulating action against him as recommended by the MRC Chairman.

5.13.7 If the Secretary for Development decides to take regulating action against a tenderer in accordance with this Sub-section 5.13 and the tenderer is a joint venture, then each and every participant (in the case of an unincorporated joint venture) or shareholder (in the case of an incorporated joint venture) shall be subject to the same regulating action.

5.13.8 For the purpose of counting the number of tender withdrawal and taking regulating action, the date of withdrawal shall be taken as the tender closing date of the contract concerned. In the event that there is uncertainty as to which date is the date of withdrawal, the decision of the Secretary for Development in this connection is final.

5.13.9 The Note to Tenderers in relation to regulating actions on inappropriate conducts, as shown in the web site of the Development Bureau, shall be included in all tender documents.

5.14 Contractors Convicted of Contraventions of Section 27 of the Public Health and Municipal Services Ordinance (Cap. 132)

5.14.1 Please refer to ETWB TCW No. 22/2003 and 22/2003A for details.

5.15 Non-compliance with the Provisions for Engagement of Sub-contractors Registered from Subcontractor Registration Scheme

5.15.1 Please refer to Chapter 7 of the PAH, available in the website of CEDD, for details.

