SECTION 6  CHANGE OF COMPANY NAME, SUBSTITUTION AND TRANSFER OF BENEFITS AND OBLIGATIONS OF CONTRACTS

6.1 Notification of Change of Name

6.1.1 When the company name of a contractor has been changed, the contractor shall notify the Secretary for Development in writing of the change in name and submit:

(a) a copy of the Business Registration Certificate in the new name;

(b) (i) in the case of a company incorporated in Hong Kong, a copy of the Certificate of Change of Name issued under Section 107(3)(b) of the Companies Ordinance (Cap. 622); or

(ii) in the case of a registered non-Hong Kong company, a copy of the Certificate of Registration containing the current corporate name issued under Section 779(1)(b) of the Companies Ordinance (Cap. 622), and a legal opinion (original copy) from a lawyer practising in the country in which the company was incorporated confirming that under the law of that country a change of name by a company does not affect any rights or obligations of the company, or render defective any legal proceedings by or against it, and any legal proceedings that could have been commenced or continued against it by its former name may be commenced or continued against it by its new name. The authenticity of the lawyer’s professional qualifications also needs to be certified correct by a government or related establishment;

(c) a list of all current contracts with any and all of the works group of departments; and

(d) change of bank accounts, if any.

6.2 Actions to be Taken by the Development Bureau

6.2.1 Subject to the receipt of the above documents from the contractor, the Development Bureau will:

(a) register the change of name in the List and/or the Specialist List and category in which the contractor was previously listed under the former company name; and notify the Managing Department(s) of the change.
6.2.2 Contractors are required to: -

(a) submit the original or certified true copy of their latest audited accounts after the aforesaid change; and

(b) answer all reasonable enquiries from the Development Bureau to ascertain that the financial criteria and requirements for both retention and tendering purposes are met. Alternatively, a contractor’s audited accounts immediately before the change and his most up-to-date management accounts after the change would be accepted in lieu of the latest audited accounts after the change if the contractor’s auditors can confirm to the Development Bureau that there is no impact on the contractor’s financial position arising from the change.

6.3 Actions to be Taken by the Managing Departments

6.3.1 Upon the notification of the Development Bureau, the corresponding Managing Department for the category or categories in which the contractor is listed shall consider whether the changes will affect the ability of the contractor to perform satisfactorily and collect from the contractor all the necessary documents in relation to his technical ability in the new name such as copy of Quality Management System certificate and the Certificate of Registration of General/Specialist Contractor. The Managing Departments shall investigate if necessary and recommend to the Development Bureau whether there should be any change in the contractor’s status within one calendar month from the date of referral by the Development Bureau. The procedures of submitting a recommendation are the same as those given in paragraph 2.4.3 above. Regardless of the outcome of the action taken, existing contracts with the contractor will remain unaffected. The contractor will continue to be allowed to tender for contracts under the appropriate category or categories in which the contractor is listed unless the Managing Department recommends to the Development Bureau that the contractor should be suspended from tendering.

6.3.2 The Managing Departments should note that a change of name only does not affect the legal status, or any of the rights or obligations of the company. It is therefore not necessary to initiate procedures such as the issue of questionnaires, as if it were a request by a new contractor for admission to the List and/or the Specialist List. The contractor should simply be addressed by the new name in the administration of all current contracts.

6.4 Notification to Departments

6.4.1 The Development Bureau will inform all relevant departments of the change of name and any consequential changes in the contractor’s status under the List and/or the Specialist List.
6.5 Substitution

6.5.1 The structure of a contractor may change, for example, from a partnership or sole-proprietorship to a limited company or a company may wish to transfer its listing status to its holding or subsidiary company. All these cases are regarded as applications for substitution.

6.5.2 Application for substitution will be considered/allowed to cater for genuine organizational restructuring to suit the business needs of contractors whilst upholding government procurement principle of open and fair competition. Subject to the conditions and procedural requirements as set out in paragraphs 6.5.3 to 6.5.6 below, a contractor may submit an application for substitution which, if approved, will permit another company (the “new company”) to inherit the company listing status, records of company experience, past performance, convictions, accidents and regulating actions of the company being substituted (the “outgoing company”).

6.5.3 The “Notes for Application for Substitution” at Appendix 6A describes the pre-requisites and essential information for the completion of the substitution process. A sample of undertaking, which should be signed by both the outgoing company and the new company is shown at Appendix 6B. The date of approval for substitution will be the day executing novation agreements of all outstanding contracts, if any, among the outgoing company, the new company and the Government.

6.5.4 Upon receipt of an application for substitution, SEO(PS) of the Development Bureau will refer the application to the Managing Departments concerned for the vetting of the technical and management capability of the new company. These cases will be handled in the same manner as application for admission. In addition, all Works Departments will be required to check whether the outgoing company has any outstanding contracts with them and confirm to SEO(PS) of the Development Bureau within 3 working days the full list of contracts requiring novation. The basic principle is to novate all contracts where final payment certificates have not yet been issued and those contracts where final payment certificates have been unilaterally issued by the Engineers/Architects but disputed by the contractor. Works Departments should however be reminded to check cautiously all contracts still undertaken by the outgoing company (such as those in Maintenance Periods) and bring to the attention of the Development Bureau if exceptional contracts have to be included in or excluded from the novation list. Upon confirmation by the Works Departments the full list of contracts to be novated, SEO(PS) will forward the lists together with the application to the Finance Section of Development Bureau for financial vetting. The new company will be assessed financially on whether it is eligible for admission and for taking up the outstanding contracts surrendered by the outgoing company.

6.5.5 If the Managing Departments recommend the substitution, they should submit an updated list of outstanding contracts requiring novation and a list of outstanding issues that have to be cleared by the outgoing company before novation and substitution can be proceeded. If discrepancies are found between this list of outstanding contracts and the one collected previously for financial vetting, SEO(PS) will draw the attention of the Finance Section of Development Bureau, who may conduct a re-assessment on the new company’s
financial capability if required. Separately, SEO(PS) will coordinate the returns from Works Departments on outstanding issues and request the outgoing company to furnish the required documents. Having collected the required documents from the outgoing company, SEO(PS) will send the documents to the relevant Works Departments for vetting. If only one department is involved in the novation process, that department should follow up all issues related to the novation and advise SEO(PS) of the date fixed for the execution of novation agreement(s). The Secretary for Development will issue a letter to the new company approving its inclusion in substitution of the outgoing company on the date of executing novation agreement(s). If the novation agreement(s) is subsequently not executed on the specified day, the approval for substitution will become void and invalid. In the event that more than one Works Department are involved in the novation process, SEO(PS) will facilitate as a central coordinator between the relevant Works Departments and the outgoing and new companies. The Works Department which holds the greatest contract value for those outstanding contracts requiring novation will be responsible for the logistical arrangement for the novation procedures such as checking of documents on authorized signatories, preparation of standardized novation agreement forms and arranging venue for signing novation agreements.

6.5.6  In processing an application for substitution, the Secretary for Development will take into account all relevant information and has the sole discretion to withhold the approval if there are reasonable grounds to believe that there is a breach of professional integrity in relation to the application, such as false declarations, leading to violation of the government procurement principle of open and fair competition.

6.6 Transfer of Benefits and Obligations of Contracts

6.6.1  Apart from the substitution process as mentioned in Sub-section 6.5 above, a contractor may apply to transfer his benefits and obligations under a contract with the Government to a third party only if he is being wound up, will no longer be in existence, or is unable to complete the contract. Under such circumstances, the Government may, on balance and in the interest of the Government and public fund, agree to a novation instead of terminating the contract. In that event, the contractor will normally be removed from the List and/or the Specialist List in accordance with Section 5 above. In all the aforementioned cases, a novation agreement is required. One of the basic requirements is that the third party must be an approved contractor under the relevant category/categories of works in the List and/or the Specialist List. Approval to the novation is subject to and conditional upon the Government’s agreement to the terms of the novation agreement.

6.7 A Novation Agreement

6.7.1  For public works contracts, a novation agreement is a tripartite agreement entered into by the Employer (Government), the contractor and a third party, whereby the contractor is released from and the third party assumes all the Contractor’s obligations and rights under the stated contract(s). The two standard forms of novation agreement are shown at Appendices 6C & 6D. More than one contract may be included in a novation agreement.
6.7.2 For all novation, advice from the Legal Advisory Division (Works) of Development Bureau must be sought on any proposed change to the standard forms of novation agreement.

6.7.3 The departments concerned must check to ensure that the third party taking over the contract has the technical, management and financial capability and is a fit substitute for the outgoing contractor. In the event that the contractor has assigned the financial benefit of his contract with the Government to a financial institution, the contractor is required to resolve matters relating to the financial assignment to the satisfaction of the Government before the Government considers agreeing to the proposed novation (see also Sub-section 6.8 herein below).

6.7.4 Before a novation agreement is executed, departments concerned should first confirm the financial capability of the third party with the Finance Section of Development Bureau. They should apply to the Secretary for Development (Attn: PAS(W)4), with a copy of confirmation memo from the Finance Section of Development Bureau, for approval in principle before the execution of the novation agreement. In the application, the details of the contract, the parties involved in the novation agreement and the expected time required for the completion of the novation agreement should be indicated. The Development Bureau will monitor the progress of the arrangement.

6.7.5 All three parties shall execute the agreement on the same date. In the case where the contract to be novated is made between the Government and the contractor together with other person or persons trading as an unincorporated joint venture, such other person or persons shall also join in the execution of the agreement. Copies of the executed novation agreement shall be sent to the Secretary for Development (Attn: PAS(W)4) and the Secretary for Financial Services and the Treasury within 3 working days from the date of execution.

6.8 Performance Bond, Joint Venture Guarantee and/or Insurance

6.8.1 Where any performance bond, any guarantee and/or any insurance is required for a contract and if the contract is to be novated then a substituting performance bond, guarantee and/or insurance policy must be provided by the third party, in the contractually required form, prior to the execution of the novation agreement. The outgoing company shall be required to clear the following outstanding issues for each contract with the Government which requires novation, if applicable, at least 2 weeks before execution of novation agreement:

(a) The outgoing company must provide documentary proof that any insurance policy required under the contract also covers the new company to the same extent as that for the outgoing company. If the original insurance policy(ies) includes other parties in joint names, the new policy(ies) should cover these parties as well.

(b) In the event that an existing contract involves a Nominated Sub-contract, the outgoing company, the new company and the relevant Nominated Sub-contractor should novate the Nominated Sub-contract. The original and a copy of the novated Nominated Sub-contract should be produced to the
relevant Works Department for inspection and, if found acceptable to the Works Department, the original novated Nominated Sub-contract will be returned to the applicant and the copy thereof shall be retained for record. The novated Nominated Sub-contract should have a clause to the effect that the novated Nominated Sub-contract shall take effect only on the date when the novation agreement in respect of main contract is executed.

(c) The outgoing company must provide documentary proof that any Professional Indemnity Insurance required for the contract also covers the new company to the same extent as that for the outgoing company. If the original insurance policy(ies) includes other parties in joint names, the new policy(ies) should cover these parties as well.

(d) The outgoing company must provide documentary proof that any bond(s) and surety(ies) required for the contract also covers the new company to the same extent as that for the outgoing company. Alternatively, new bonds and surety(ies) acceptable to the Government may be furnished. In the event that a substituting bond and/or surety(ies) cannot be made available at the date of the novation agreement, a supplementary agreement in the format of Appendix 6E should be executed immediately after the execution of the novation agreement for that particular contract.

(e) The outgoing company must provide documentary proof that he has resolved matters relating to the financial assignment if he has assigned the financial benefit of his contract with the Government to a financial institution.

(f) The outgoing company must provide other documents as specified and required by the Secretary for Development.

6.8.2 Where the third party is a limited liability joint venture company, each shareholder of the company will be required to execute a Joint Venture Guarantee prior to the execution of the novation agreement.