APPENDIX 6A Notes for Application for Substitution

Substitution involves a company, firm or joint venture (the new company) which is normally not on the List of Approved Contractors for Public Works (the List) or the List of Approved Suppliers of Materials and Specialist Contractors for Public Works (the Specialist List) substituting for an approved contractor (the outgoing company) on the List and/or the Specialist List. The following requirements must be complied with for any application for substitution:

(1) The conditions and pre-requisites set out in Sub-section 6.5 and this Appendix 6A must be complied with for any application for substitution.

(2) All contractors on the List and/or the Specialist List including those who are currently under suspension are eligible to apply for substitution. Approval on substitution will only be given if the outgoing company is cleared of all suspension.

(3) Applications involving a contractor on the List for substituting contractor on the Specialist List, or vice versa, are not permitted unless the contractors involved are within the same company group\(^1\) for at least three years prior to the date of application for substitution. Applications involving a contractor not on any of the List or the Specialist List for substituting contractor on either the List or the Specialist List are also not permitted, if the businesses of the new company do not cover the categories in the List or the Specialist List to which the businesses of the outgoing company belong, unless the contractors involved are within the same company group for at least three years prior to the date of application for substitution. The Secretary for Development shall have the absolute discretion to determine whether the businesses of the new company are covered by the categories in the List or the Specialist List to which the businesses of the outgoing company belong.

(4) The outgoing company must surrender to the new company and the new company must assume from the outgoing company all relevant managerial and technical staff and other resources previously vested with the outgoing company.

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\(^1\) Two Contractors are regarded as within the same company group if they are companies, or undertakings within either of the following, with valid documentary proof:
- companies within the same ‘group of companies’ within the meaning of the Companies Ordinance (Cap. 622),
- undertakings where one is a ‘parent undertaking’ in relation to the other, within the meaning of the Companies Ordinance (Cap. 622), or
- undertakings where both are ‘subsidiary undertakings’ in relation to the same ‘parent undertaking’, within the meaning of the Companies Ordinance (Cap. 622).
(5) If the new company meets the admission criteria, the substitution will be approved subject to the outgoing company being still on the company register kept by the Registrar of Companies (for a limited company) or the unincorporated body or partnership has not yet been dissolved as at the date of the approval.

(6) Normally, all novation agreements of outstanding contracts, if any, the Government has previously entered into with the outgoing company are to be executed among the new company, the outgoing company and the Government on the day of substitution unless otherwise recommended by the Managing Departments. Here, outstanding contracts refer to contracts where final payment certificates have not yet been issued and contracts where final payment certificates have been issued unilaterally by the Engineers/Architects but disputed by the contractor.

(7) The outgoing and the new companies have to submit a duly executed undertaking to the Government as shown at Appendix 6B jointly prior to substitution. If the substitution involves execution of novation agreements, the undertaking may be signed on the day of substitution together with but prior to the signing of novation agreements.

(8) Once the new company has been included in the List and/or the Specialist List, the following listing status and records of the outgoing company are deemed to have been transferred to the new company and will be regarded as the listing status and records of the new company in the consideration of its future bids for Government works:

(a) company experience in undertaking public works contracts, and private sector contracts including the Housing Authority contracts in and outside Hong Kong;

(b) performance reports and performance ratings kept by the Development Bureau;

(c) conviction records of offences committed under Land (Miscellaneous Provisions) Ordinance (Cap. 28), Immigration Ordinance (Cap. 115), Employment Ordinance (Cap. 57), Factories and Industrial Undertakings Ordinance (Cap. 59), the Public Health and Municipal Services Ordinance (Cap. 132), the Occupational Safety and Health Ordinance (Cap. 509), Shipping and Port Control Ordinance (Cap. 313), Anti-pollution Control Ordinance (Cap.311), Noise Control Ordinance (Cap. 400), Waste Disposal Ordinance (Cap.354), Water Pollution Control Ordinance (Cap. 358), Dumping at Sea Ordinance (Cap.466), Ozone Layer Protection Ordinance (Cap.403) and Environmental Impact Assessment Ordinance (Cap.499), the Merchant Shipping (Local Vessels) Ordinance (Cap. 548), Hazardous Chemicals Control Ordinance (Cap. 595), and other ordinances and related subsidiary legislations;
(d) regulating actions taken against the outgoing company; and

(e) accident records under the public works contracts kept by the Development Bureau.

(9) In an application for substitution, the following documents must be furnished:

(a) a legal opinion from an independent legal firm certifying that subject to the novation agreements for outstanding public works contracts, there has been full transfer of the relevant liabilities, assets, staff and resources from the outgoing company to the new company upon completion of organizational restructuring. Under exceptional circumstances subject to the Secretary for Development’s absolute discretion, the transfer, after the substitution, of those liabilities, assets, staff and resources that are relevant to

(1) the private sector contracts to be novated; or
(2) the public works contracts and are shared with the outgoing company;

may be considered and allowed if justified with proof demonstrated by the outgoing and the new companies. The Secretary for Development shall have the absolute discretion to decide whether to allow this post-substitution transfer and impose conditions this transfer has to comply with. If such conditions cannot be compiled with, the new company will be subject to removal from the List or the Specialist List;

(b) a deed provided by the new company to undertake continual employment of personnel and staff that are relevant to the listing requirements as specified in Appendix 2C and/or Appendix 3C, whichever appropriate, for a period of three years, if the application is not based on a change of structure of the outgoing contractor from a partnership (comprising individuals only) or sole proprietorship to a limited company. Any replacement of personnel and staff that are relevant to the above-mentioned listing requirements shall only be allowed on the basis of equal or better quality;

(c) a deed provided by the outgoing company to undertake not to make any reference to any of its company experience and past performance records;
(d) a certified copy of the Application by Firm or by other Body Unincorporate for Registration of Business Carried On by such Body in Hong Kong [i.e. Form 1(c) issued by the Inland Revenue Department] of the outgoing company, if the application is based on change of structure of the outgoing contractor from a partnership (comprising individuals only) or sole proprietorship to a limited company.

(e) a full list of the new company’s directors and shareholders filed in the Companies Registry;

(f) a certified true copy of Business Registration Certificate, the Certificate of Incorporation and the Memorandum & Articles of Association of the new company, if applicable;

(g) the original or a certified true copy of the latest 3 years’ unconsolidated audited accounts, if any, of the new company;

(h) a certified statement of outstanding contracts of the new company (including contracts held with the private sector including the Housing Authority); and

(i) a certified statement of all contracts to be novated in respect of the outgoing company.

(10) Both the outgoing company and the new company shall follow the rules set out in Development Bureau Technical Circular (Works) No. 7/2014 and prepare the necessary documents for the signing of an Undertaking to the Government as shown at Appendix 6B, and the execution of the novation agreements which will be held on the date of approval of the proposed substitution.