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<p><i>From</i> Secretary for Development</p> <p><i>Ref</i> (022UY-01-10) in DEVB(W) 510/10/01</p> <p><i>Tel. No.</i> 2848 2105</p> <p><i>Fax No.</i> 2536 9299</p> <p><i>Email</i> etslam@devb.gov.hk</p> <p><i>Date</i> 31 August 2009</p>	<p><i>To</i> Distribution</p> <p><i>(Attn : _____)</i></p> <p><i>Your Ref.</i> _____</p> <p><i>dated</i> _____</p> <p><i>Fax No.</i> _____</p> <p><i>Total Pages</i> 3 + encl.</p>
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ETWB TC(W) No. 8/2003 **Rejection of Unreasonably Low Bids**

As set out in ETWB TC(W) No. 8/2003 “Rejection of Unreasonably Low Bids”, a works department may reject a tender which is unreasonably low in terms of price and which may therefore affect the tenderer’s capability to carry out and complete the Contract and/or deliver work of the quality required in accordance with the terms of the Contract. Guidelines on the assessment of the reasonableness of a bid are provided in the Technical Circular.

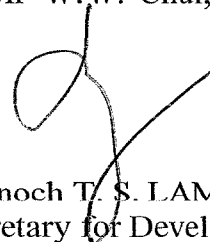
2. The Agreement on Government Procurement of the World Trade Organization (WTO GPA) contains express provisions in relation to the question of unreasonably low bids. Article XIII.4(a) provides that “if an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract”. Furthermore, Article XIII.4(b) provides that “the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous”.

3. In light of the above WTO GPA’s provisions, legal advice has been sought that for contracts covered by WTO GPA, enquiries must be made with the tenderer before the procuring department decides not to award the contract to the tenderer if a procuring entity has doubts (arising from the unreasonably low bid) on the capability of the tenderer. Further, with consideration that a consistent approach be adopted for all contracts and consultancies, the same procedures should be complied with in other contracts and consultancies not covered by WTO GPA in the same manner. Against the above, the following provisions are hereby introduced to supplement the policy and provisions laid down in ETWB TC(W) No. 8/2003 and shall be read in conjunction with ETWB TC(W) No. 7/2004 “Examination of Tenders and Submission of Tender Reports”:

- (a) If a procuring department considers that, *prima facie*, a bid is unreasonably low and as such they have concern about the tenderer’s capability to fulfil the relevant contract, the department shall make sure that the tenderer does comply with the conditions of participation, and carry out enquiry to find out whether or not the

tenderer is capable of fulfilling the terms of the contract prior to making tender recommendation.

- (b) The procuring department shall inform the tenderer of the precise points that have given rise to their concern on unreasonably low bid and the tenderer's capability to fulfil the contract. The tenderer shall be asked to provide explanations. For example, if the unreasonably low bid is made up of various items and the price/rate for some of these items are considered unreasonably low, the procuring department shall ask for explanations in respect of the specific items.
 - (c) In considering the tenderer's reply, care shall be taken to ensure that the tenderer will not take the opportunity to change or qualify their tender prices or rates or to enhance their tender or to cause any unfairness to any other tenderers.
 - (d) The tenderer shall be advised of the prohibition referred to in sub-paragraph (c) above and that any explanation given by the tenderer at this stage will only be used to assess whether the tender price is unreasonably low and whether the tenderer is capable to fulfil the contract. If the tenderer gives any explanation which has the potential to introduce any change to the tender (such as qualifying the tender prices or rates for future variations), LAD(W)'s advice shall be sought. Any qualification shall be dealt with in accordance with the established procedures.
 - (e) For tenders for works contract, a sample letter to the tenderer on unreasonably low bids is attached at **Appendix A**. Project officers may amend the sample letter to suit the needs of their individual contracts including consultancy agreements. In case of doubt, LAD(W) should be consulted.
 - (f) The recommendation made to the relevant Tender Board or Consultants Selection Board must be fully justified taking into account the outcome of the enquiry made with the tenderer. Departments should also note paragraph 8 of ETWB TC(W) No. 8/2003 that the head of the procuring department must be personally satisfied with and agree to the recommendation made to the relevant Tender Board or Consultants Selection Board in case of rejection of an unreasonably low bid.
 - (g) For the avoidance of doubt, the above provisions apply to all works contracts and fee proposals for consultancies caught by ETWB TC(W) No. 8/2003, irrespective of whether they are covered by WTO GPA or not.
4. The above have been vetted by LAD(W) with ILD/DoJ consulted and shall take immediate effect. In case of any query, please contact Mr W.W. Chui, PAS(W)3, at telephone number 2848 2704.



(Enoch T. S. LAM)
for Secretary for Development

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Appendix A

Sample Letter to Tenderer with Unreasonably Low Bids

To : the Tenderer

Dear Sirs,

Contract No. and Title

I refer to your tender for the captioned contract dated *DD/MM/YYYY*.

Your tender price is considered unreasonably low and it raises doubts as to whether you are capable of fulfilling the terms of the Contract. *[Procuring departments shall also cite the prices or unit rate of any major items which are considered as unreasonably low, or other specific issues in relation to the tender price that the procuring department considers relevant in casting doubt on the tenderer's capability.]*

You are invited to provide clarification or justification or any information which may be helpful in explaining why the tender price is not unreasonably low and how you are able to fulfil the contract at such a low price on or before *DD/MM/YYYY*.

Please note that only clarification or justification or any information provided in response to the third paragraph above can be submitted. You are not allowed to introduce any change to the tender.

Please note that this letter shall not be construed as either an acceptance or a rejection of your tender. All tenders are still under consideration and the Government of the Hong Kong Special Administration Region does not bind itself to accept any tender irrespective of whether the tender is the lowest bid or, where the assessment of the tenders is based on a marking scheme or formula approach, the tender has the highest overall mark.

Yours faithfully,

(The Engineer/Architect/Surveyor/Supervising Officer/Maintenance Surveyor designate)

香港特別行政區政府

The Government of the Hong Kong Special Administrative Region

政府總部
環境運輸及工務局
運輸及工務科
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Environment, Transport
and Works Bureau
Government Secretariat
Transport and Works Branch
Murray Building, Garden Road,
Hong Kong

Ref : ETWB(PS)106/43
Group : 5, 6, 15

22 February 2003

Environment, Transport and Works Bureau
Technical Circular (Works) No. 8/2003

Rejection of Unreasonably Low Bids

Scope

This Circular sets out broad guidelines on rejection of unreasonably low bids. The Circular applies to tenders for capital works and maintenance works contracts, and fee proposals for consultancies under the purview of the relevant Tender Boards and Consultants Selection Boards.

Effective Date

2. The Circular shall take effect from 1 March 2003.

Effect on Existing Circulars

3. This Circular has no effect on other Circulars. It should however be read in conjunction with ETWB TCW No. 51/2002, which contains a General Condition of Tender clause on rejection of unreasonably low tenders for works contracts.

Background

4. One of the Government's objectives in procurement is to obtain goods and services at the best value for money taking into account not only the competitiveness in prices, but also compliance with users' requirements, reliability of performance, qualitative superiority, whole-life costs and after-sale support, where applicable. It is not in the interest of the Government to accept an unreasonably low bid.

Policy

5. Departments should adopt a flexible approach and reject bids which have been priced unreasonably low.

Broad Guidelines

6. It is not practical, if not impossible, to set quantitative guidelines for determining whether a bid is unreasonably low or not. Each case should be considered on its own merits and professional judgement should be exercised.

7. Assessment of the reasonableness of a bid should take account of the following:

- (a) prices, including overall prices as well as any unit rates for major items, quoted by other contractors or consultants who have submitted tenders or bids for the contract or consultancy;
- (b) pre-tender estimates for the contract or consultancy;
- (c) prices, including overall prices as well as any unit rates for major items, quoted by the successful tenderers or consultants in recent tender exercises;
- (d) market rates for major items, if available from other sources;
- (e) cost build-up rates, including staff rates;
- (f) whether the price is heavily front-loaded.

8. The head of the procuring department must be personally satisfied with and agree to the recommendation made to the relevant Tender Board or Consultants Selection Board to reject an unreasonably low bid. The recommendation itself must be fully justified.

Special Condition of Tender

9. The Special Condition of Tender at **Appendix A** should be incorporated into the tender documents for every capital works and maintenance works contract which the General Conditions of Tender does not contain such clause.

Letters Inviting Technical and Fee Proposals

10. For consultancies, the standard clauses at **Appendix B** should be included in letters inviting technical and fee proposals.

(W S Chan)
Deputy Secretary for the Environment,
Transport and Works (Transport and Works) W2

Special Condition of Tender for Incorporation in Works Tender

SCT ___ Without prejudice to the generality of other General Conditions of Tender and Special Conditions of Tender, the Employer may reject a tender which in the opinion of the Employer is unreasonably low in terms of price and may therefore affect the tenderer's capability to carry out and complete the Contract and/or deliver work of the quality required in accordance with the terms of the Contract.

**Standard Clauses to be Included in
Letters Inviting Technical and Fee Proposals for Consultancies**

- ◆ Subject to the Government's right to reject bids which are considered to have been priced unreasonably low, the selection of consultants will be determined on the basis of a combined assessment of technical merit and cost. Your fee proposal will be construed as a bid for this consultancy and, unless under very special circumstances, there will be no fee negotiations.
- ◆ The Government is not bound to accept any proposal it may receive. In addition, the Government will reject bids which are considered to have been priced unreasonably low.