

Technology Voucher Programme

Model Probity Clauses and Non-Collusion Clauses for Inclusion in Quotation/Tender Invitation Documents

Note: *The appropriate wording to be used will depend on the specific project and quotation/tender, and that the wording set out below is intended to act as a general reference only. The HKSAR Government makes no express or implied warranties of accuracy, fitness for use, or enforceability of the model probity and non-collusion clauses and the certificate provided below in relation to any specific quotation/tender. Parties should seek independent legal advice if they have any doubts regarding their rights or responsibilities.*

Model probity wording in quotation/tender invitation documents:

Probity Clauses

(1) The bidder/tenderer shall not, and shall procure that his directors, employees, agents and sub-contractors shall not, offer, solicit or accept an advantage as defined in the Prevention of Bribery Ordinance (Cap. 201), in connection with the quotation/tendering and execution of this contract.

(2) Failure to so procure or any act of offering, soliciting or accepting advantage referred to in (1) above committed by the bidder/tenderer or by a director, employee, agent or sub-contractor of the bidder/tenderer shall, without affecting the bidder/tenderer's liability for such failure and act, result in his quotation/tender being invalidated.

Model non-collusion wording in quotation/tender invitation documents:

Non-collusion Clauses

(1) The bidder/tenderer must ensure that the bid is prepared without any agreement, arrangement, communication, understanding, promise or undertaking with any other person (except as provided in paragraph 4 of the Probity and Non-collusive Quotation/Tendering Certificate referred to below), including regarding price, bid submission procedure or any terms of the bid. In the event of any breach of this clause by any bidder/tenderer, *[name of applicant enterprise]* reserves the right to invalidate the bid submitted by that bidder/tenderer and seek damages.

(2) Bid-rigging is inherently anti-competitive and is considered serious anti-competitive conduct under the Competition Ordinance (Cap. 619). Bidders/Tenderers who engage in bid-rigging conduct may be liable for the imposition of pecuniary penalties and other sanctions under the Competition Ordinance.

(3) Upon quotation/tender submission, the bidder/tenderer shall submit to *[name of applicant enterprise]* a Probity and Non-Collusive Quotation/Tendering Certificate (in the form set out at Appendix to this invitation to quotation/tender duly signed by an authorised person on the bidder's/tenderer's behalf.

Guidance on non-collusion clauses in formal contracts

In addition to including wording to address bid-rigging and other anti-competitive collusive conduct in the invitation to quotation/tender and requiring the submission of a probity and non-collusive quotation/tendering certificate, applicant enterprises should consider including clauses in their formal agreements with successful bidders/tenderers that provide contractual protections in the event that it is discovered that the quotation/tender process was subject to collusion. Such contract clauses may include:

- (a) Wording to state that the formal agreements are entered into in reliance of the statements made by the bidder/tenderer in the probity and non-collusive quotation/tendering certificate and conditional upon the effectiveness and veracity of the certificate;
- (b) The right for the applicant enterprise to terminate the contract with the successful bidder/tenderer and recover damages where it is discovered that the quotation/tender process was subject to collusion; and
- (c) Exceptions to any confidentiality undertakings that allow the applicant enterprise to report and provide documents and information regarding the anti-competitive collusive conduct to the Competition Commission (and other authorities as relevant).

Model Clauses in Probity and Non-Collusive Quotation/Tendering Certificate
(for Submission by Bidder/Tenderer to Applicant Enterprises)

Notes:

- (1) *The appropriate wording to be used in the Certificate will depend on the specific project and quotation/tender, and that the wording set out below is intended to act as a general reference only.*
 - (2) *This Certificate should be **addressed to the applicant enterprise** (showing its full name as shown on the Business Registration Certificate) and include the **signature of a person authorised to sign the relevant contract on behalf of the bidder/tenderer, together with his/her name and position and the date of signing clearly shown at the end of this Certificate.***
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Probity and Non-Collusive Quotation/Tendering Certificate for [Project Title] (the “Project”)

1. We, [name of bidder/tenderer] of [address of bidder/tenderer] refer to the quotation/tender for the Project (the “Quotation/Tender”) and our bid in relation to the Quotation/Tender.

Probity

2. We represent and warrant that in relation to the Quotation/Tender:
 - (a) we shall not, and shall procure that our directors, employees, agents and sub-contractors shall not, offer, solicit or accept an advantage as defined in the Prevention of Bribery Ordinance (Cap. 201), in connection with the quotation/tendering and execution of the contract for the Project; and
 - (b) failure to so procure or any act of offering, soliciting or accepting advantage referred to in paragraph 2(a) above committed by us or by a director, employee, agent or sub-contractor of us shall, without affecting our liability for such failure and act, result in our bid being invalidated.

Non-collusion

3. We represent and warrant that in relation to the Quotation/Tender:
 - (a) Our bid was developed genuinely, independently and made with the intention to accept the contract for the Project if awarded;
 - (b) Our bid was not prepared with any agreement, arrangement, communication, understanding, promise or undertaking with any person (including any other bidder/tenderer or competitor) regarding:
 - (i) prices;

- (ii) methods, factors or formulas used to calculate prices;
- (iii) an intention or decision to submit, or not submit, a bid;
- (iv) an intention or decision to withdraw a bid;
- (v) the submission of a bid that does not conform with the requirements of the quotation/tender;
- (vi) the quality, quantity, specifications or delivery particulars of the products or services to which this quotation/tender relates; and
- (vii) the terms of the bid,

and we undertake that we will not, prior to the award of the contract for the Project, enter into or engage in any of the foregoing.

4. Paragraph 3(b) of this certificate shall not apply to agreements, arrangements, communications, understandings, promises or undertakings with:
- (a) *[name of applicant enterprise]*;
 - (b) a joint venture partner, where joint venture arrangements relevant to the bid exist and which are notified to *[name of applicant enterprise]*;
 - (c) consultants or sub-contractors, provided that the communications are held in strict confidence and limited to the information required to facilitate that particular consultancy arrangement or sub-contract;
 - (d) professional advisers, provided that the communications are held in strict confidence and limited to the information required for the adviser to render their professional advice in relation to the Quotation/Tender;
 - (e) insurers or brokers for the purpose of obtaining an insurance quote, provided that the communications are held in strict confidence and limited to the information required to facilitate that particular insurance arrangement; and
 - (f) banks for the purpose of obtaining financing for the Project, provided that the communications are held in strict confidence and limited to the information required to facilitate that financing.

Disclosure of subcontracting

5. We understand that we are required to disclose all intended sub-contracting arrangements relating to the Quotation/Tender to *[name of applicant enterprise]*, including those which are entered into after the contract for the Project is awarded. We warrant that we have duly disclosed and will continue to disclose such arrangements to *[name of applicant enterprise]*.

Consequences of breach or non-compliance

6. We understand that in the event of any breach or non-compliance with any warranties or undertakings in this certificate, *[name of applicant enterprise]* may, at its discretion, invalidate our bid, exclude us in future quotations/tenders, pursue damages or other forms of redress from us (including but not limited to damages for delay, costs and expenses of re-quotation/re-tendering and other costs incurred), and/or (in the event that we are awarded the contract for the Project) terminate the contract.
7. Under the Competition Ordinance, bid-rigging is serious anti-competitive conduct. We understand that *[name of applicant enterprise]* may, at its discretion, report all suspected instances of bid-rigging to the Competition Commission (the “Commission”) and provide the Commission with any relevant information, including but not limited to information on our bid and our personal information.

Disclosure of information

8. We understand that our bid will be used by *[name of applicant enterprise]* to apply for funding support under the Technology Voucher Programme (“TVP”) administered by the Innovation and Technology Commission (“ITC”) of the HKSAR Government. By submitting our bid, we consent to the disclosure and use by *[name of applicant enterprise]* to ITC and further disclosure by ITC to other Government bureaux/ departments, statutory bodies or third parties of the information (including personal data) contained in our bid for the purposes of processing the TVP application, conducting research and survey, compiling statistics, meeting requirements of the law and/or performing their functions, and if the application is approved, monitoring the Project, disbursing funding or related purposes.