

**BUNUT (500)/275/(132)/33KV SUBSTATION**

**TRANSMISSION SUBSTATION DESIGN AND BUILD CONTRACT**

**TENDER DOCUMENT – CONTRACT REF. NO. PLS-150059**

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**VOLUME 1**

**PART I – TENDER PROCEDURES**

**SECTION 3 – INSTRUCTIONS TO TENDERER**

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This Section specifies those procedures to be followed by the Tenderer in the preparation and submission of the Tender Offer. Information is also provided on the process for the submission and evaluation of the Tender Offers and award of the Contract. These Instructions to Tenderer should also be read in conjunction with the requirements set out in the Tender Particulars contained in Section 2 of Part I of the Tender Documents.

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## 1 GENERAL PROVISIONS

### 1.1 Definitions

For the purpose of these Instructions to Tenderer:

- 1.1.1 "**Affiliate**" means, in relation to any person, a subsidiary of that person or a holding company of that person or any other subsidiary of that holding company (and, for the purposes of these Instructions to Tenderer, the terms "holding company" and "subsidiary" shall have the meaning given to such terms under the Companies Act (and, for the avoidance of doubt, such meanings shall apply regardless of the jurisdiction of incorporation of the relevant company)).
- 1.1.2 "**Authorised Signatory**" means the person (or persons) authorised by the Tenderer to exercise the rights and powers and perform the functions set out in Sub-Clause 4.6 [*Corporate Authorisation*].
- 1.1.3 "**Close Family Member**" means, in relation to any person,
- (a) his/her spouse or partner;
  - (b) one of his/her children, siblings or parents;
  - (c) the spouse or partner of his/her children or siblings; or
  - (d) any member of his/her household (other than a domestic employee).
- 1.1.4 "**Closing Date and Time**" means the date and time by which the Tender Offer is required to be received by the Employer, as set out in the Tender Particulars.
- 1.1.5 "**Companies Act**" means the Companies Act 1965 (ACT 125).
- 1.1.6 "**Confidential Information**" means any information, irrespective of the medium in which such information is conveyed, communicated or embedded, which:
- (a) is disclosed to the Tenderer (whether before or after the date of issuance of the Tender Documents) by or on behalf of the Employer;
  - (b) relates, either directly or indirectly, to this tender process or the Works; and
  - (c) is not otherwise in the public domain.
- 1.1.7 "**Consortium Tenderer**" means a Tenderer formed by way of a joint venture, consortium or other unincorporated group between two or more persons.

- 1.1.8 "**Contract**" means the agreement to be entered into between the Employer and the successful Tenderer, as selected by the Employer in connection with this tender process, a draft of which is set out in the Form of Contract.
- 1.1.9 "**Corporate Authorisation**" means, with respect to the Tenderer:
- (a) a properly executed board or shareholder resolution;
  - (b) a power of attorney; or
  - (c) such other evidence of authority,
- in each case satisfactory to the Employer and which authorises such Tenderer's Authorised Signatory in accordance with the requirements of sub-paragraph (a) of Sub-Clause 4.6 [*Corporate Authorisation*].
- 1.1.10 "**Corporate Information Schedules**" means the documents set out in Part II, Section 3 of the Tender Documents.
- 1.1.11 "**Discount**" means a discount to the Tender Price, offered by the Tenderer by way of a separate letter.
- 1.1.12 "**Eligibility Requirements**" means the eligibility requirements as set out in the Tender Particulars.
- 1.1.13 "**Employer**" means the entity named in the Tender Particulars.
- 1.1.14 "**Employer's Tender Representative**" means the person named in the Tender Particulars as being the Employer's single point of contact in connection with this tender process.
- 1.1.15 "**Evaluation Criteria**" means the criteria, which will be used to assess and evaluate the Tenderers and their Tender Offers, set out in Part I, Section 4 of the Tender Documents.
- 1.1.16 "**Form of Contract**" means the documents listed under the heading "Form of Contract" in Part III of the Tender Documents.
- 1.1.17 "**Form of Tender**" means the document entitled "Form of Tender" set out in Part II, Section 1 of the Tender Documents.
- 1.1.18 "**Form of Tender Security**" means the document entitled "Form of Tender Security" set out in Part II, Section 2 of the Tender Documents.
- 1.1.19 "**Government Authority**" means the federal, national, state or local government of and any governmental department, state owned entity, ministry, commission, board, bureau, agency, regulatory authority, instrumentality, judicial, legislative

or administrative body of Sarawak or Malaysia, or of any other jurisdiction where the Works are to be performed, or any subdivision of any of them.

- 1.1.20 "**Instructions to Tenderer**" means this document.
- 1.1.21 "**Key Employee**" means, any employee of the Employer and/or Sarawak Energy or any Affiliate of the Employer and/or Sarawak Energy who is responsible for the management or administration of budgetary or procurement decisions.
- 1.1.22 "**Lead Member**" means, with respect to a Consortium Tenderer, the lead member of such Consortium Tenderer.
- 1.1.23 "**Local Content**" means (in descending order of preference):
- (a) business entities registered with the Unit Pendaftaran Kontraktor dan Juruperunding (UPKJ) as having Bumiputera status within Sarawak (or, where such UPKJ certification is not possible, certification by another suitable authority acceptable to the Employer);
  - (b) Sarawak-based business entities registered with the UPKJ;
  - (c) other business entities registered and incorporated in Sarawak and majority owned and controlled by Sarawakians; and
  - (d) any other business entities registered and incorporated in any State of Malaysia and majority owned and controlled by Malaysians.
- 1.1.24 "**Multilateral Development Bank**" means any multilateral financial institution which provides financial support to developing countries, including the following institutions:
- (a) African Development Bank Group;
  - (b) Asian Development Bank;
  - (c) European Bank for Reconstruction and Development;
  - (d) European Investment Bank;
  - (e) Inter-American Development Bank Group; and
  - (f) World Bank Group.
- 1.1.25 "**Notification of Award**" means the notification of award issued by Sarawak Energy Berhad, on behalf of the Employer, to the successful Tenderer.
- 1.1.26 "**Performance Bond**" means the guarantee described in Sub-Clause 2.19 [*Performance Bond*], which delivery shall be procured by the successful Tenderer.

- 1.1.27 "**Related Party**" means a director, partner or an officer of the Tenderer.
- 1.1.28 "**Ringgit**", "**RM**" or "**MYR**" means Malaysian Ringgit, the lawful currency of Malaysia.
- 1.1.29 "**Sarawak**" means the State of Sarawak, Malaysia.
- 1.1.30 "**Sarawak Energy**" means Sarawak Energy Berhad (Company No. 007199 D).
- 1.1.31 "**Sarawak Energy Director**" means any director of the Employer and/or Sarawak Energy or any director of any Affiliate of the Employer and/or Sarawak Energy.
- 1.1.32 "**Taxes**" means all direct and indirect taxes imposed in any jurisdiction by any Government Authority, including income taxes, corporate taxes, withholding taxes, goods and services taxes (or any other similar value added taxes), customs duties, fees, levies, imposts, charges, royalties (including for raw materials), dues or assessments of any nature.
- 1.1.33 "**Tender Appendices**" means the appendices set out in Part II, Section 4 of the Tender Documents.
- 1.1.34 "**Tender Documents**" means those documents referred to in Sub-Clause 3.1 [*Contents of Tender Documents*], which have been issued to the Tenderer as part of this tender process and any addenda, clarification letters, notices or other communications issued by the Employer in connection with this tender process.
- 1.1.35 "**Tender Offer**" means those documents comprising the formal offer for the execution of the Works required to be completed by the Tenderer, which is to be submitted to the Employer by the Closing Date and Time in accordance with these Instructions to Tenderer.
- 1.1.36 "**Tender Particulars**" means the tender particulars set out in Part I, Section 2 of the Tender Documents.
- 1.1.37 "**Tender Price**" means the price or amounts set out in the Form of Tender.
- 1.1.38 "**Tender Security**" means the security required to be submitted by the Tenderer with its Tender Offer.
- 1.1.39 "**Tender Validity Period**" means the period of time during which the Tenderer's Tender Offer shall remain valid and open for acceptance by the Employer, as set out in the Tender Particulars (as may be extended from time to time in accordance with these Instructions to Tenderer).
- 1.1.40 "**Tenderer**" means any person(s), including all members of a Consortium Tenderer, issued with a copy of the Tender Documents, and includes any successors and assignees of such person(s).

- 1.1.41 "**Tenderer Director**" means any officer or director of the Tenderer or any officer or director of any Affiliate of the Tenderer.
- 1.1.42 "**Tenderer Parties**" means collectively, any Tenderer Director and any of the Tenderer's Affiliates and proposed Subcontractors.
- 1.1.43 "**Tenderer's Representative**" means the person authorised by the Tenderer to act as its single point of contact in connection with this tender process.
- 1.1.44 "**Works**" means the works to be completed by the successful Tenderer under the Contract.

## 1.2 Interpretation

- (a) Throughout the Tender Documents, except where the context otherwise requires:
- (i) all words and expressions used in these Instructions to Tenderer shall be interpreted in accordance with the matters set out in the Form of Contract;
  - (ii) all capitalised terms used in these Instructions to Tenderer shall, unless otherwise defined in these Instructions to Tenderer, have the meaning assigned to them in the Form of Contract;
  - (iii) all references to "include", "includes" and "including" shall be deemed to be followed by the words "without limitation";
  - (iv) "written" or "in writing" means hand-written, type-written, printed or electronically made, and resulting in a permanent record;
  - (v) references to a "Part", "Section", "Schedule", "Clause", "Sub-Clause" or a "sub-paragraph" is a reference to a part, section, schedule, clause, sub-clause or a sub-paragraph of the Tender Documents; and
  - (vi) all headings are inserted for convenience only and shall not be taken into consideration for the purpose of interpretation.
- (b) Any Clauses of these Instructions to Tenderer which, by their nature, are intended to survive the cancellation, conclusion or termination of the tender process, shall survive the cancellation, conclusion or termination of the tender process.

## 1.3 Communication

Unless otherwise expressly stated in these Instructions to Tenderer:

- (a) all correspondence, notices, requests for clarifications or other communications relating to this tender process shall be in writing and sent by mail, courier, personal delivery or by electronic means; and



- (b) all communications regarding this tender process, up and until notification of the successful Tenderer, shall only be directed to the Employer’s Tender Representative.

#### **1.4 Language and Applicable Law**

- (a) Subject to sub-paragraph (b) of this Sub-Clause, the Tender Offer and all communications, correspondence and documents relating to the tender process shall be in the English language.
- (b) The following documents constituting the Tender Offer may be in any other language, provided they are accompanied by a certified English translation:
  - (i) documents required to be in a language other than English for the purposes of legal efficacy;
  - (ii) official documents issued by governmental agencies or authorities that are not originally in the English language; or
  - (iii) documents issued by third parties that are not originally in the English language (e.g. letters of award of contract, certificates of completion of works issued by other employers).
- (c) This tender process is governed by the laws of Malaysia, as applicable in Sarawak.

## **2 REQUIREMENTS FOR THE TENDER PROCESS**

### **2.1 Scope of Tender Offer**

The Tender Offer shall be submitted for the whole of the Works.

### **2.2 Compliance with Tender Documents**

- (a) By agreeing to participate in this tender process, the Tenderer agrees to:
  - (i) comply with and be bound by all rules, regulations and requirements relating to this tender process as set out in the Tender Documents, including in these Instructions to Tenderer;
  - (ii) examine all instructions, terms, specifications and other requirements set out in the Tender Documents; and
  - (iii) complete all schedules and appendices provided as part of the Tender Documents in sufficient detail to demonstrate the Tenderer’s ability to meet the Employer’s requirements for the Works.
- (b) Any failure by the Tenderer to comply with sub-paragraph (a) of this Sub-Clause may, at the Employer’s sole and absolute discretion, result in the Tenderer being disqualified from the tender process and/or the Tender Offer being rejected.

### **2.3 Letter of Acknowledgment**

The Tenderer shall return the letter of acknowledgment (enclosed with the cover letter to the Tender Documents) to the Employer within the time period stated in the Tender Particulars.

#### **2.4 Eligibility to Tender**

In order to participate in this tender process the Tenderer is required to meet the Eligibility Requirements. The fact that the Tenderer has been provided a copy of the Tender Documents does not imply that the Tenderer has met the Eligibility Requirements.

#### **2.5 Non-Disclosure Obligations**

- (a) The Tenderer shall:
- (i) hold the Confidential Information in absolute confidence and secrecy and use the Confidential Information for the sole purpose of participating in this tender process and not for any other purpose;
  - (ii) not in any manner, in whole or in part, disclose, or cause or permit the disclosure of, any Confidential Information except:
    - (A) to any person who has a clear and strict need to have access to the Confidential Information in order to facilitate the Tenderer's participation in this tender process;
    - (B) where required to be disclosed under applicable laws including the rules of any applicable listing authority or stock exchange or by a Government Authority; or
    - (C) with the specific prior written consent of the Employer;
  - (iii) ensure that any person to whom disclosure is made pursuant to subparagraph (a)(ii) of this Sub-Clause, agrees to be bound by non-disclosure obligations which are no less stringent than the obligations which are contained in the provisions of this Sub-Clause;
  - (iv) implement and maintain suitable systems and processes to ensure the safe and secure storage, management and handling of the Confidential Information (including procuring that any person to whom Confidential Information is disclosed shall sign a written non-disclosure agreement on terms no less stringent than the provisions of this Sub-Clause); and
  - (v) notify the Employer immediately if it suspects, or becomes aware of, any unauthorised use, storage, copying or disclosure of the Confidential Information and do anything required by the Employer to prevent or stop such unauthorised use, storage, copying or disclosure or any threatened unauthorised use, storage, copying or disclosure.
- (b) Upon receipt of any request by the Employer, the Tenderer shall:

- (i) immediately destroy all original and copies of documents containing Confidential Information, including documents and other materials derived from the Confidential Information; and
  - (ii) if so requested by the Employer, provide a certificate signed by a director or authorised officer of the Tenderer, confirming compliance with the obligations set out in this sub-paragraph.
- (c) Except in the case as described in sub-paragraph (d) of this Sub-Clause, the Tenderer shall not, during the course of this tender process (including after the issuance of the Notification of Award or the Contract), disclose or issue any announcement or circular in relation to this tender process (or any aspect of it), including:
- (i) the Tenderer's participation or standing in this tender process;
  - (ii) the outcome of this tender process, including the issuance of the Notification of Award or Contract; and
  - (iii) the Employer's tender evaluation process as described in Clause 6 [*Evaluation of Tender Offers*],
- irrespective of whether such disclosure, announcement or circular is considered to have been made public or not, without the prior written consent of the Employer.
- (d) Sub-paragraph (c) of this Sub-Clause shall not apply where the relevant disclosure, announcement or circular is required to be made under applicable laws including the rules of any applicable listing authority or stock exchange or by a Government Authority, in which case the Tenderer shall consult with the Employer as to the form and the extent of the proposed disclosure, announcement or circular.

## **2.6 No Participation with Other Tenderers**

The Tenderer or its shareholders, or any of their respective Affiliates, shall not participate in this tender process, or submit a Tender Offer, together with any other Tenderer, without the prior written consent of the Employer.

## **2.7 Subcontracting**

The Tenderer shall not be permitted to subcontract the whole of the Works.

## **2.8 Tender Offer from Consortium Tenderers**

- (a) A Tender Offer may be submitted by a Consortium Tenderer, provided that the members of the Consortium Tenderer collectively satisfy the Eligibility Requirements.

- (b) A Tender Offer submitted by a Consortium Tenderer, and in case of a successful Tender Offer, the Contract, shall be signed so as to be legally binding on all members on a joint and several basis.
- (c) Without the written consent of the Employer,
  - (i) no changes to the composition of a Consortium Tenderer (including the withdrawal of any member of a Consortium Tenderer who has been shortlisted by the Employer to participate in the tender process with that particular Consortium Tenderer) shall be permitted after the Employer's prequalification of such Consortium Tenderer, or after the Closing Date and Time if a prequalification process has not been conducted by the Employer; and
  - (ii) no member, who has been shortlisted by the Employer to participate in the tender process with a particular Consortium Tenderer, shall be permitted to submit a Tender Offer with any other Consortium Tenderer.

## 2.9 Conflict of Interest

- (a) The Tender Offer shall include a declaration (in the prescribed form set out in the Corporate Information Schedules) of the nature and extent of any conflict of interest that may exist or potentially arise in relation to this tender process and the Tenderer shall submit, as part of its Tender Offer, a proposal for avoiding any such conflicts of interest.
- (b) A conflict of interest situation may include circumstances where it may be perceived that the Tenderer could possibly influence the outcome of the tender process through, for example a pre-existing relationship with the Employer or through the Tenderer's relationship with another Tenderer.
- (c) If the Tenderer is of the opinion that it has no conflict of interest with respect to this Tender Process, the Tender Offer shall include a declaration (in the prescribed form set out in the Corporate Information Schedules) confirming this fact.

## 2.10 Persons Connected with a Director of the Employer or a Key Employee

- (a) The Tender Offer shall include a declaration (in the prescribed form set out in the Corporate Information Schedules) of the nature and extent of any of the following circumstances that may exist or arise in relation to this tender process:
  - (i) if the Tenderer or any Related Party is connected with any Sarawak Energy Director, in accordance with Section 122A of the Companies Act;
  - (ii) if any Sarawak Energy Director is a Related Party to a Tenderer;

- (iii) if the Tenderer or any Related Party is a Close Family Member of any Key Employee or is in any business relationship with any Key Employee; or
  - (iv) if to the best of the Tenderer's knowledge and belief, having made all reasonable enquiries, there is any other circumstance that may cause any Sarawak Energy Director or any Key Employee to have an actual or potential interest in the proposed Contract (within the meaning of the Companies Act or otherwise).
- (b) If none of the circumstances as set out in this Sub-Clause exist, the Tender Offer shall include a declaration (in the prescribed form set out in the Corporate Information Schedules) confirming this fact.

### **2.11 Ethical Conduct, Anti-Corruption and Bribery**

- (a) The Employer requires that the Tenderer observe the highest standard of ethical practices throughout the tendering process and, in case the Tenderer becomes the successful Tenderer, during the execution of the Works.
- (b) The Employer may, in its sole and absolute discretion:
- (i) reject a Tender Offer or, in case the Tenderer becomes the successful Tenderer, immediately terminate any Contract; and
  - (ii) impose sanctions on the Tenderer at any time, including declaring the Tenderer ineligible, either indefinitely or for a stated period of time, from participating in any tender process conducted by the Employer,
- if at any time the Employer determines that the Tenderer has, directly or indirectly through another party, engaged in unethical practices (including the violation of any environmental laws, rules or regulations), corrupt practices, fraudulent practices, collusive practices, coercive practices or other prohibited practices, including activities which constitute money laundering or financing of terrorism under any applicable laws.
- (c) The Tender Offer shall include the Tenderer's:
- (i) responses to the ethical conduct, anti-bribery and corruption due diligence questionnaire; and
  - (ii) ethical conduct, anti-bribery and corruption declaration, set out in Schedule 7 [*Ethical Conduct, Anti-Bribery and Corruption Due Diligence Questionnaire and Declaration*] of the Corporate Information Schedules. The Employer shall be entitled to carry out its independent assessment of the Tenderer's past and current conduct with respect to ethical practices, anti-corruption and bribery behaviour.
- (d) For the purposes of these Instructions to Tenderer:

- (i) **"corrupt practice"** means the offering, giving, receiving or soliciting, either directly or indirectly, anything of value with a view to improperly influence the actions of a person, including the Employer;
- (ii) **"fraudulent practice"** means any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit, or to avoid an obligation;
- (iii) **"coercive practice"** means impairing or harming, or threatening to impair or harm, either directly or indirectly, any party or the property of a party, with the intention of improperly influencing the actions of another party; and
- (iv) **"collusive practice"** means:
  - (A) an arrangement between two or more parties designed to achieve an improper purpose, including improperly influencing the actions of another party and/or the process of determining competitive pricing for the Works; or
  - (B) any act or omission in contravention of the Competition Act 2010.

## 2.12 Health, Safety and Environmental Management

- (a) The Tenderer acknowledges that it shall be required, during the execution of the Works, at all times:
  - (i) to take all necessary steps to establish and maintain the highest levels of health, safety and environmental protection, consistent with best industry practice and in compliance with all legislative requirements, the requirements of Government Authorities and the requirements of the Employer;
  - (ii) to take all reasonable precautions to maintain the health and safety of all of its personnel, other personnel involved in the Works and members of the public; and
  - (iii) to protect the environment and to limit damage and nuisance to people and property resulting from pollution, noise and other consequences of its operations.

Further reference is made to Tender Appendix D [*Employer's Administration Requirements*] and to Schedule 10 [*Health, Safety and Environmental Management*] of the Corporate Information Schedules that shall be completed by the Tenderer.

- (b) The Tenderer shall incorporate as part of its Tender Price all costs and expenses required to comply with its health, safety and environmental management obligations in the execution of the Works.

### **2.13 Information Security Management System**

In carrying out the Works, the successful Tenderer may be required to comply with the Employer's information security management system ("ISMS") requirements as may be notified by the Employer to the successful Tenderer from time to time. Such requirements may include the vetting of those personnel required to work within identified restricted access zones across the Employer's generation, transmission and distribution assets, including any related IT networks and services. Subject to the Employer's specific ISMS requirements, the successful Tenderer may also be required to establish its own procedures and protocol with respect to the security of any third party software required to be installed within the Employer's network.

### **2.14 Conditions of Employment**

- (a) In carrying out the Works, the successful Tenderer shall ensure that it fully complies with all applicable laws, including the laws of Sarawak, regarding the employment of personnel and shall otherwise ensure that all personnel engaged in the Works are, amongst other things:
  - (i) subjected to conditions of employment that are no less favourable than those observed in similar positions of employment available in Sarawak;
  - (ii) treated and assessed fairly and equitably;
  - (iii) above the minimum age for working according to all applicable laws, including Principle 5 of the UN Global Compact Principles;
  - (iv) not subjected to slavery, servitude or forced labour; and
  - (v) provided with accommodation conditions acceptable to the Employer.
- (b) Tender Offers that display a commitment to promoting the diversity of its employees, the establishment and continued improvement of working conditions and the promotion of the health and safety of personnel will be viewed favourably by the Employer during the tender evaluation process.

### **2.15 Local Content**

- (a) The Tenderer shall, within its Tender Offer, display its commitment to maximise the opportunity for the participation of Local Content in the execution of the Works and promote opportunities for knowledge transfer.
- (b) In preparing and submitting its Tender Offer, the Tenderer will be required to provide details within the relevant Tender Appendix:
  - (i) of its committed minimum levels of support for Local Content that will be involved in the performance of the Works; and

- (ii) explaining how it intends to satisfy the Employer's requirements for Local Content.
- (c) The Employer reserves the right to request such further information or evidence from the Tenderer as it may reasonably require, to ensure that the principles for supporting and promoting opportunity for the participation of Local Content in the Works are satisfied.
- (d) The successful Tenderer's commitments relating to the level of participation of Local Content will be enforceable contractual obligations under the Contract and the successful Tenderer will be required to regularly report such levels of participation and the Employer shall be entitled to continually monitor such activities during the execution of the Works.
- (e) For the purposes of this Sub-Clause:
  - (i) the value of any Plant, Materials and labour not originating from sources from within Malaysia; and
  - (ii) any portion of the Works that are purportedly to be performed through the use of Local Content but are subsequently further subcontracted to entities that do not constitute Local Content,

shall not be recognised or attributed by the Employer towards fulfilling the committed levels of participation of Local Content.
- (f) In order to satisfy the Employer's requirements for Local Content participation, the Tenderer shall satisfy the Employer that:
  - (i) the Local Content has the necessary qualifications, capability and resources to meet the Employer's requirements for the Works and be genuinely involved in the execution of the Works (including deploying Bumiputeras and Sarawakians to substantially perform the Works);
  - (ii) the supply of any equipment, materials and labour required for the Works originates from sources within Sarawak (or otherwise, within Malaysia); and
  - (iii) the Local Content is not subcontracted to entities that do not constitute Local Content and/or do not meet the Local Content requirements in this Sub-Clause (including subcontracting from Bumiputera companies to non-Bumiputera companies).

## **2.16 Corporate Social Responsibility**

- (a) Tender Offers that display a commitment to high standards of corporate social responsibility, through good corporate citizenship, will be viewed favourably by the Employer during the tender evaluation process.



- (b) Examples of initiatives encouraged by the Employer include sponsorships, charitable initiatives or general community services, which promote the following principles:
  - (i) creation of economic opportunities for Sarawakians;
  - (ii) investment in local communities;
  - (iii) sustainability; and
  - (iv) transparency and community engagement.
- (c) As part of its Tender Offer, the Tenderer shall provide details of its corporate social responsibility initiatives. Further reference is made to Schedule 12 [*Corporate Social Responsibility*] of the Corporate Information Schedules that shall be completed by the Tenderer.

#### **2.17 Good Corporate Governance**

- (a) The Tenderer is expected to at all times, during the execution of the Works and during its participation in this tender process, adopt good corporate governance practices and corporate citizenship, and to respect the interests of all its stakeholders (including its employees, suppliers and the wider community).
- (b) By participating in this tender process, the Tenderer shall take all necessary steps to preserve and maintain the integrity and reputation of the Employer at all times.

#### **2.18 Personal Data**

By submitting a Tender Offer, the Tenderer shall be deemed to provide explicit consent to the Employer, in accordance with the requirements of the Personal Data Protection Act 2010, to process its personal data for the purposes of, or related to, the tender process.

#### **2.19 Performance Bond**

- (a) The Performance Bond shall comply with all requirements stated in the Form of Contract, and shall:
  - (i) be for the amount set out in the Tender Particulars;
  - (ii) be in the form set out in Contract Appendix J [*Form of Securities*];
  - (iii) be a single guarantee procured by the successful Tenderer and issued by a bank:
    - (A) with an office located in Malaysia; and
    - (B) registered with the relevant Government Authorities.

- The issuing bank shall have a minimum credit rating of "A" (Standard & Poor's) or "A3" (Moody's) or be approved in advance in writing by the Employer;
- (iv) expire no earlier than the date stated in the Tender Particulars; and
  - (v) where the successful Tenderer under applicable Laws comprises of a joint venture, consortium or other unincorporated grouping of two or more persons, be provided in the name of all the entities comprising the successful Tenderer.
- (b) Any proposed minor deviations to the Performance Bond should be set out in Tender Appendix M [*Deviations to Contract Agreement, Contract Particulars, Conditions of Contract and Contract Appendices B, I, J and K*].
  - (c) As part of the Tender Offer, the Tenderer shall provide the Employer with a letter of support from its proposed guarantor confirming that the guarantor will deliver the Performance Bond to the Employer in compliance with the requirements of this Sub-Clause and within twenty-eight (28) days of the date of the Notification of Award.

### **3 TENDER DOCUMENTS AND TENDER PROCESS**

#### **3.1 Contents of Tender Documents**

The Tender Documents consist of the Employer's cover letter dated 16<sup>th</sup> June 2017 and Part I, II, III and IV, comprising of:

- (a) Part I – Tender Procedures:
  - (i) Section 1 – Introduction;
  - (ii) Section 2 – Tender Particulars;
  - (iii) Section 3 – Instructions to Tenderer;
  - (iv) Section 4 – Evaluation Criteria; and
  - (v) Section 5 – Tender Submission Checklist.
- (b) Part II – Information to be Included with Tender Offer:
  - (i) Section 1 – Form of Tender;
  - (ii) Section 2 – Form of Tender Security;
  - (iii) Section 3 – Corporate Information Schedules; and
  - (iv) Section 4 – Tender Appendices.
- (c) Part III – Form of Contract:
  - (i) Section 1 – Contract Agreement;

- (ii) Section 2 – Contract Particulars;
  - (iii) Section 3 – Conditions of Contract; and
  - (iv) Section 4 – Contract Appendices.
- (d) Part IV – Employer Supplied Information and Documents

### 3.2 Conditions of Contract

The copyright owner of the Conditions of Contract is Sarawak Energy. The Conditions of Contract are exclusively for use as provided under the licence agreement entered into between Sarawak Energy and FIDIC and, consequently, no part of the Conditions of Contract may be reproduced, translated, adapted, stored in a retrieval system or communicated, in any form or by any means, whether mechanical, electronic, magnetic, photocopying, recording or otherwise, without prior permission from Sarawak Energy.

### 3.3 Deviations to the Form of Contract

- (a) The Employer discourages major deviations, or even a significant number of minor deviations, to the Form of Contract. Tender Offer's containing deviations may be determined by the Employer as being materially non-conforming to the requirements of the Tender Documents.
- (b) To the extent that the Tenderer proposes any deviation to the Form of Contract, it shall do so at its own risk by documenting in Tender Appendix L [*Deviations to Contract Appendices A, C, D, E, F and H*] and Tender Appendix M [*Deviations to Contract Agreement, Contract Particulars, Conditions of Contract and Contract Appendices B, I, J and K*]:
  - (i) the nature and impact of the proposed deviation; and
  - (ii) the adjustment to the Tender Price in the event that the Employer requires that the proposed deviation is withdrawn.
- (c) The Tender Price is submitted on the basis that the deviations documented by the Tenderer within Tender Appendix L [*Deviations to Contract Appendices A, C, D, E, F and H*] and Tender Appendix M [*Deviations to Contract Agreement, Contract Particulars, Conditions of Contract and Contract Appendices B, I, J and K*] are accepted by the Employer and incorporated in the Contract.
- (d) Any deviations not expressly documented in Tender Appendix L [*Deviations to Contract Appendices A, C, D, E, F and H*] or Tender Appendix M [*Deviations to Contract Agreement, Contract Particulars, Conditions of Contract and Contract Appendices B, I, J and K*] may not be considered by the Employer.

### 3.4 Clarification of Tender Documents

If the Tenderer requires clarification of any matter set out in the Tender Documents it shall notify the Employer's Tender Representative in writing at any time up to fourteen

(14) days prior to the Closing Date and Time. The Employer will respond in writing to any such request and reserves the right to issue such response to all Tenderers.

### **3.5 Issuing of Addendum**

- (a) The Employer may amend the Tender Documents by issuing an addendum at any time up to seven (7) days prior to the Closing Date and Time.
- (b) Any addendum will be issued to all Tenderers in writing, clearly noting that it is to be read as an addendum to the Tender Documents.
- (c) Once issued, the contents of an addendum shall form part of the Tender Documents, as of the date of issuance of the addendum, notwithstanding the date of receipt by the Tenderer.

### **3.6 Tender Briefing**

- (a) For the assistance of all Tenderers, the Employer may arrange a tender briefing on such date(s) and time(s), and at such location(s), as set out in the Tender Particulars (if any). If so stated in the Tender Particulars, attendance at a tender briefing is mandatory.
- (b) Not later than two (2) days prior to a tender briefing, the Tenderer shall inform the Employer of the persons that will be attending the tender briefing on its behalf (limited to a maximum of three (3) persons).

### **3.7 Site Visit**

- (a) For the assistance of all Tenderers, the Employer may arrange a visit to the site on such date(s) and time(s), and commencing from such meeting point, as set out in the Tender Particulars (if any). If so stated in the Tender Particulars, attendance at a site visit is mandatory.
- (b) Where a date and time for a site visit is not set out in the Tender Particulars, the Tenderer is nevertheless advised to arrange with the Employer's Tender Representative to visit and examine the site and its surroundings and obtain for itself all information that may be necessary for the preparation of a complete Tender Offer.
- (c) Not later than two (2) days prior to a site visit, the Tenderer shall inform the Employer of the persons that will be attending the site visit on its behalf.
- (d) The Tenderer may not visit the site or carry out any examinations or tests without the prior written consent of the Employer's Tender Representative (which shall not be unreasonably withheld).
- (e) In participating in any site visit, the Tenderer and its personnel or agents agree to release and indemnify the Employer, including their personnel and agents, from all liability for death or personal injury, loss of or damage to property or any

other loss, damage, costs and expenses arising as a result of or in connection with the site visit.

## **4 PREPARATION OF TENDER OFFER**

### **4.1 Cost of Tendering**

The Tenderer shall bear all costs associated with the preparation and submission of the Tender Offer and its participation in the tender process. The Employer (and its officers, directors, employees and agents) shall in no case be responsible or liable for any such costs, regardless of the conduct or the outcome of the tender process.

### **4.2 Documents Comprising the Tender Offer**

(a) The Tender Offer shall (before being placed into an additional single, sealed envelope, in accordance with sub-paragraph (b) of Sub-Clause 4.10 [*Sealing and marking of Tender Offers*]) be structured and presented in three separate volumes, which shall be in individual sealed envelopes and distinctly labelled as:

- (i) Volume 1: Priced Commercial;
- (ii) Volume 2: Unpriced Commercial; and
- (iii) Volume 3: Technical,

with the structure and content of each volume required to be in the format as set out below:

#### **Volume 1: Priced Commercial**

- 1.1 Form of Tender
- 1.2 Tender Security
- 1.3 Tender Appendix B [*Contract Price*]

#### **Volume 2: Unpriced Commercial**

- 2.1 Tender Submission Checklist
- 2.2 Corporate Information Schedules (Schedules 1 – 13)
- 2.3 Tender Appendix I [*Insurance*]
- 2.4 Tender Appendix J [*Form of Securities*]
- 2.5 Tender Appendix K [*Form of Parent Company Guarantee*]
- 2.6 Tender Appendix M [*Deviations to Contract Agreement, Contract Particulars, Conditions of Contract and Contract Appendices B, I, J and K*]

#### **Volume 3: Technical**

- 3.1 Tender Appendix A [*Scope of Works*]
- 3.2 Tender Appendix C [*Work Schedule*]

- 3.3 Tender Appendix D [*Employer’s Administration Requirements*]
- 3.4 Tender Appendix E [*Employer’s Technical Requirements*]
- 3.5 Tender Appendix F [*Employer’s Deliverables*]
- 3.6 Tender Appendix G [*Contractor’s Information*]
- 3.7 Tender Appendix H [*Subcontractors*]
- 3.8 Tender Appendix L [*Deviations to Contract Appendices A, C, D, E, F and H*]
- 3.9 Tender Appendix O [*Other Relevant Information*]

- (b) Within each volume, the Tenderer shall use tagged dividers protruding the Tender Documents to separate and identify the different appendices and documents (including each Schedule comprising the Corporate Information Schedules), and the appropriate document name shall be shown on each tag.

#### **4.3 Tender Price**

- (a) The Tender Price shall be clearly stated in the Form of Tender and shall be calculated by reference to, and in accordance with, the pricing basis set out in the Tender Particulars.
- (b) Irrespective of the pricing basis set out in the Tender Particulars, the Tenderer shall fill in rates and prices for all items of the Works in accordance with the requirements set out in Tender Appendix B [*Contract Price*].
- (c) The Tenderer acknowledges and agrees that prior to the issuance of the Notification of Award or Contract, the Employer shall, in its discretion and acting in consultation with the Tenderer, be entitled to rationalise the rates and prices as provided by the Tenderer in Tender Appendix B [*Contract Price*] for purposes of:
  - (i) evaluating the Tender Price submitted by the Tenderer as part of the Tender Offer; and/or
  - (ii) determining the Accepted Contract Amount under the Contract.
- (d) A Discount may be offered by the Tenderer, provided that:
  - (i) any such offer of a Discount shall:
    - (A) be received by the Employer prior to the Closing Date and Time; and
    - (B) not be withdrawn or modified on and from the Closing Date; and
  - (ii) the Employer may, in its absolute discretion, take into account the Discount offered by the Tenderer in its evaluation of the Tender Offer

and shall be entitled to treat the final Tender Price of such Tender Offer to be the price read with the Discount.

- (e) On and from the Closing Date and Time, the Tenderer shall under no circumstances be permitted to amend its Tender Price (including by way of an offer of a Discount), regardless of:
  - (i) any change in applicable laws (including the introduction of any new Taxes);
  - (ii) any fluctuations in the cost of materials and/or labour; or
  - (iii) any other occurrence.

#### **4.4 Tender Price Inclusive of All Taxes**

- (a) Subject to the matters contained in this Sub-Clause and unless otherwise specified in the Form of Contract, the Tender Price submitted by the Tenderer is required to be stated inclusive of all Taxes which may be imposed or payable in connection with the Works.
- (b) The Tender Price shall be stated exclusive of GST applicable to the Works.
- (c) In accordance with sub-paragraph (b)(i) of Sub-Clause 14.14 [*Taxes*] of the Conditions of Contract in the Form of Contract, the Tenderer also specifically notes that the Tender Price is to exclude any import duties (in accordance with the Customs Act 1967) payable to the relevant Government Authority in relation to the importation of machinery, equipment and associated spare parts (as determined by the Government Authority) forming part of the Permanent Works.
- (d) Without prejudice to sub-paragraphs (a) to (c) of this Sub-Clause, the Tenderer shall particularly familiarise itself with:
  - (i) the Goods and Services Tax Act 2014;
  - (ii) all customs regulations and associated laws applicable in Sarawak and Malaysia;
  - (iii) all laws applicable to the payment of withholding tax within Sarawak; and
  - (iv) the Lembaga Pembangunan Industri Pembinaan Malaysia (CIDB) Act 1994, which requires contractors and builders undertaking construction works exceeding a certain contract value to pay a levy to the Construction Industry Development Board (CIDB).

#### **4.5 Currencies and Payment**

The Tender Price and all rates and the prices set out in the Tender Offer shall be quoted by the Tenderer in Ringgit and the successful Tenderer shall be paid in Ringgit.

#### **4.6 Corporate Authorisation**

- (a) The Tenderer shall provide an appropriate Corporate Authorisation identifying and authorising the Authorised Signatory to:
  - (i) act in the name of the Tenderer as its authorised and official representative in connection with this tender process and, in respect of Consortium Tenderers, to conduct all business for and on behalf of any and all members of such Tenderer during the tender process;
  - (ii) sign the Tender Offer and irrevocably bind the Tenderer on all matters connected with this tender process;
  - (iii) deliver and receive any document (including the Tender Security), instruction or instrument for and on behalf of the Tenderer; and
  - (iv) do all other acts and things and sign or execute (under hand or under seal) and deliver any and all other documents and give any and all notices which may be required or which the Authorised Signatory, in its discretion, considers necessary in connection with the Tenderer's participation in the tender process, including in respect of the matters set out in sub-paragraphs (a)(i) to (a)(iv) of this Sub-Clause.
- (b) The Tenderer and/or the Authorised Signatory may delegate any of its rights, powers and functions (other than signing the Tender Offer) to the Tenderer's Representative.

#### **4.7 Tender Security**

- (a) As part of the Tender Offer, the Tenderer except for Sarawakian Tenderer, shall provide the Employer with the Tender Security for the value set out in the Tender Particulars.
- (b) The Tender Security may be provided, at the Tenderer's option, in any of the following forms:
  - (i) an unconditional bank guarantee in the Form of Tender Security set out in the Tender Documents, or such other form of security confirmed in writing as being acceptable to the Employer; or
  - (ii) cash, bank draft, cashier's cheque or certified cheque made payable to the Employer,

and shall be issued by a bank which is registered, and which has offices, in Malaysia (and which is otherwise acceptable to the Employer).
- (c) In the event that the Tenderer wishes to propose any minor deviations to the Form of Tender Security set out in the Tender Documents, the Tenderer shall, no later than fourteen (14) days prior to the Closing Date and Time, obtain the Employer's prior written consent to any such proposed deviations (which



consent shall be given in the Employer's sole and absolute discretion). Any failure by the Tenderer to comply with sub-paragraph (c) of this Sub-Clause may, at the Employer's sole and absolute discretion, result in the Tenderer being disqualified from the tender process and/or the Tender Offer being rejected.

- (d) For unsuccessful Tenderers, the Tender Security will be returned by the Employer as promptly as possible upon execution of the Contract between the Employer and the successful Tenderer.
- (e) The Tender Security of the successful Tenderer will be returned by the Employer as promptly as possible once the performance bond, required to be provided in accordance with the Contract, has in fact been provided to the Employer.
- (f) In the Employer's reasonable discretion, the Tender Security may be forfeited without notice, demand or other legal process if the Tenderer has breached a material aspect of this tender process, including circumstances where:
  - (i) the Tenderer sought to influence the outcome of the tender evaluation process (including by way of an offer of a Discount after the Closing Date and Time);
  - (ii) the Tender Offer contains any false or materially misleading statements which the Tenderer knew, or ought to have known, to be false or misleading;
  - (iii) the Tenderer has, directly or indirectly through another party, engaged in a corrupt practice, fraudulent practice, coercive practice, collusive practice (as each term is defined in sub-paragraph (d) of Sub-Clause 2.11 [*Ethical Conduct, Anti-Corruption and Bribery*]), or other prohibited practices;
  - (iv) the Tenderer has withdrawn, substituted and/or modified its Tender Offer during the Tender Validity Period without the Employer's prior written consent or instruction; or
  - (v) the Tenderer, after notification that its Tender Offer has been successful, fails to:
    - (A) acknowledge a Notification of Award validly issued in accordance with Sub-Clause 7.1 [*Contract Award*];
    - (B) sign the Contract in accordance with (and within the times set out in) the Tender Documents (or any reasonable timeframes specified by the Employer); or
    - (C) furnish any required performance bond and (if applicable) any Parent Company Guarantee in accordance with the Contract.

- (g) In circumstances where the Tender Security includes an expiry date, such expiry date shall be no earlier than ninety (90) days after the date of expiry of the Tender Validity Period.

#### **4.8 Tender Validity Period**

- (a) The Tender Offer shall in all circumstances remain open and valid for the Tender Validity Period and a Tender Offer with a shorter validity than the stipulated Tender Validity Period may be rejected by the Employer.
- (b) In certain circumstances, the Employer may request that the Tenderer agrees to extend the Tender Validity Period. Such requests (and the Tenderer's response to such request) shall be in writing.
- (c) The Tenderer is not bound to agree to any request by the Employer to extend the Tender Validity Period and any refusal to extend the Tender Validity Period will not cause the Tenderer to forfeit its Tender Security.
- (d) If the Tender Validity Period of a Tender Offer is extended:
  - (i) the Tenderer shall (at its own cost) accordingly extend the validity of the Tender Security to reflect the extended Tender Validity Period; and
  - (ii) all provisions set out in these Instructions to Tenderer regarding the release and forfeiture of the Tender Security shall continue to apply during the extended period of validity of the Tender Security.
- (e) If the Tenderer agrees to an extension of the Tender Validity Period, it is not permitted to modify its Tender Offer without the Employer's express written consent.

#### **4.9 Format and Signing of Tender Offer**

- (a) The Tender Offer shall be submitted in hard copy and/or soft copy in such numbers as is set out in the Tender Particulars.
- (b) Without limiting sub-paragraph (a) of this Sub-Clause, if it is stated in the Tender Particulars that the Tender Offer is required to be submitted in soft copy, then the Tenderer shall include, on a CD-ROM or portable USB memory stick (or such other electronic format as may be acceptable to the Employer), the relevant documents required to be completed by the Tenderer as part of its Tender Offer. The soft copy of these documents shall be:
  - (i) certified by the Tenderer as a true and complete version of the corresponding hard copy submitted; and
  - (ii) in an editable format capable of being read using MS<sup>®</sup> Office XP applications without further conversion.
- (c) The Tenderer shall prepare one (1) original version of the documents comprising its Tender Offer and clearly mark it "ORIGINAL".

- (d) Each copy of the original version of the Tender Offer, which is required to be submitted in accordance with the Tender Particulars, shall be:
- (i) a complete photocopy of such signed original version; and
  - (ii) clearly marked "COPY",
- and, in the event of any discrepancy between the original version and any copy of the Tender Offer, the original version of the Tender Offer shall prevail.
- (e) The original and all copies of the Tender Offer shall be typewritten in indelible ink and be signed by the Authorised Signatory of the Tenderer, with any interlineations, erasures or overwriting within the Tender Offer only valid if initialled by the Authorised Signatory. If the Tenderer is a Consortium Tenderer, the Tender Offer shall be signed so as to be legally binding on all members on a joint and several basis.

#### **4.10 Sealing and Marking of Tender Offers**

- (a) The Tenderer shall prepare and enclose the original and all copies of its Tender Offer in accordance with the requirements set out in Sub-Clause 4.2 [*Documents Comprising the Tender Offer*]. The different volumes shall be in separate sealed envelopes (the inner envelopes) and each envelope shall be:
- (i) duly marked as "Volume 1: Priced Commercial", "Volume 2: Unpriced Commercial" or "Volume 3: Technical" as applicable;
  - (ii) marked as "ORIGINAL" and "COPY" as applicable;
  - (iii) marked "Confidential" with the Tender reference and title and the Closing Date and Time; and
  - (iv) identify the Tenderer.
- (b) The envelopes shall, once sealed and marked in accordance with sub-paragraph (a) of this Sub-Clause, be secured as one package, in an additional single sealed envelope, container or box (the outer package), which shall:
- (i) not contain any markings that may identify the Tenderer;
  - (ii) be addressed to the Employer's address for submission of Tender Offers in accordance with the Tender Particulars;
  - (iii) state the Closing Date and Time;
  - (iv) bear the warning "Do not open before the Closing Date and Time"; and
  - (v) bear the following in bold letters:

**BUNUT (500)/275/(132)/33kV SUBSTATION  
TRANSMISSION SUBSTATION DESIGN AND BUILD CONTRACT  
TENDER DOCUMENTS – CONTRACT REF. NO. PLS-150059**

- (c) The Employer will not assume any responsibility for the misplacement of any Tender Offers which are improperly sealed or marked.

## **5 SUBMISSION AND OPENING OF TENDER OFFERS**

### **5.1 Closing Date and Time**

- (a) The Tender Offer shall be received by the Employer at the address for submission of Tender Offers set out in the Tender Particulars by no later than the Closing Date and Time.
- (b) The Employer may, in its sole and absolute discretion, extend the Closing Date and Time by issuing an addendum to all Tenderers.
- (c) In the Employer's sole and absolute discretion, any Tender Offer delivered to the Employer after the Closing Date and Time may be declared late and be rejected by the Employer and returned unopened to the Tenderer.

### **5.2 Employer to Acknowledge Receipt**

- (a) The receipt of the Tender Offer will be acknowledged by written advice from the Employer to the Tenderer within seven (7) days following the Closing Date and Time.
- (b) The Employer's acknowledgment of receipt of a Tender Offer does not imply that it has been admitted for consideration.

### **5.3 Withdrawal, Substitution and Modification of Tender Offers**

- (a) The Tenderer may withdraw, substitute or modify its Tender Offer (including by way of an amendment of its Tender Price), provided that a written notice, that is duly signed by the Tenderer's Representative, of the withdrawal, substitution or modification is received prior to the Closing Date and Time.
- (b) Prior to the Closing Date and Time, in relation to any:
- (i) substitution or modification of Tender Offers, the substituted or modified Tender Offer shall accompany the relevant written notice issued to the Employer and shall be clearly marked "SUBSTITUTION" or "MODIFICATION"; or
  - (ii) withdrawal of a Tender Offer, the Tenderer shall deliver its notice of withdrawal to the Employer in an envelope duly marked "WITHDRAWN".

- (c) If the Tenderer withdraws its Tender Offer prior to the Closing Date and Time, it is not permitted to submit another Tender Offer (except for its substituted or modified Tender Offer), directly or indirectly, in connection with this tender process.
- (d) During the Tender Validity Period, a Tender Offer may not be withdrawn, substituted or modified except:
  - (i) with the prior written consent of the Employer. In such circumstances, the Tenderer notes that notwithstanding any such consent provided, the Employer may impose sanctions in accordance with its rights under Sub-Clause 6.7 [*Employer's Rights*]; or
  - (ii) upon the instructions of the Employer.
- (e) Any attempt by the Tenderer to withdraw, substitute or modify its Tender Offer during the Tender Validity Period without the Employer's prior written consent or instruction may result in the Tenderer being disqualified, its Tender Offer being rejected and/or its Tender Security being forfeited.

## **6 EVALUATION OF TENDER OFFERS**

### **6.1 Employer's Evaluation of Tender Offers**

- (a) The Employer will, in accordance with the Evaluation Criteria, evaluate all substantially responsive Tender Offers on the basis of the information submitted by each Tenderer, with a view to determining the Tender Offer representing best value in accordance with the Employer's own internal policies and individual project requirements.
- (b) Without limiting the Employer's right to consider all information submitted by each Tenderer, in evaluating Tender Offers the Employer will have regard to the matters set out in the Evaluation Criteria.

### **6.2 Employer's Due Diligence**

The Employer shall be entitled to carry out its independent due diligence and assessment of the Tenderer and any of the Tenderer Parties in order to verify that:

- (a) the financial viability of the Tenderer satisfies the Eligibility Requirements; and/or
- (b) neither the Tenderer or any Tenderer Party is or has been:
  - (i) sanctioned (including being debarred) by a Multilateral Development Bank; and/or
  - (ii) engaged in any of the prohibited activities or practices described in Clause 2.11 [*Ethical Conduct, Anti-Corruption and Bribery*].

### **6.3 Comparison of Tender Offers**

As part of the evaluation process the Employer will compare all substantially responsive Tender Offers to determine the Tender Offer that represents the best value to the Employer.

### **6.4 Determination of Responsiveness**

- (a) The Employer will determine the responsiveness of the Tender Offer based on the requirements of the Tender Documents.
- (b) Any Tender Offer determined by the Employer to be materially non-conforming to the requirements of the Tender Documents may be rejected and the Tenderer may not be provided with the opportunity to correct any such material non-conformance.
- (c) The Employer may evaluate a Tender Offer with immaterial non-conformances, provided that the Employer determines that the Tender Offer is substantially responsive to the requirements of the Tender Documents.

### **6.5 Tender Price Prevails**

The Tender Price shall prevail, notwithstanding any arithmetical errors in any other parts of the Tender Offer. In case of any discrepancy between amounts stated in words and figures, the amount in words will prevail.

### **6.6 Clarification of Tender Offers**

- (a) The Employer may as part of the evaluation process, request that the Tenderer provides written clarification of certain aspects of its Tender Offer and/or attend a clarification meeting with the Employer.
- (b) Any responses given by the Tenderer in accordance with this Sub-Clause shall be deemed to be incorporated within the Tender Offer.

### **6.7 Employer's Rights**

- (a) The Employer is not obliged to:
  - (i) consider or evaluate any Tender Offer; or
  - (ii) award the Contract to the Tenderer submitting the lowest Tender Price, or accept any Tender Offer, and reserves the right to accept, disqualify or reject any Tender Offer or to cancel the tender process at any time without any obligation (including any obligation to inform affected Tenderers of the grounds, justification or reason for such action) and without incurring any liability to any Tenderer.
- (b) The Employer's rights set out in this Sub-Clause shall:

- (i) apply at any and all times during the tender process notwithstanding that any Tenderer(s) may have been notified as a successful or preferred Tenderer; and
  - (ii) survive the cancellation, conclusion or termination of the tender process.
- (c) Notwithstanding any other provision of these Instructions to Tenderer to the contrary, the Employer (and its officers, directors, employees and agents) shall not, under any circumstances, whether as a result of breach of contract, indemnity, tort (including negligence), strict liability or otherwise, be liable to any Tenderer (or any member or shareholder of any Tenderer) for any loss of profit, loss of revenues, loss of use of equipment, loss of chance or opportunity, loss of contract, cost of capital or for any indirect, special, incidental, punitive, exemplary or consequential loss or damage which may be suffered by the Tenderer (or any member or shareholder of any Tenderer), as a result of or in connection with this tender process.
- (d) The Employer may, in its absolute discretion, impose sanctions against a Tenderer, including the imposition of a penalty or disqualification of such Tenderer from participation in relation to this tender process and/or any future tender process carried out by the Employer and/or Sarawak Energy, for any failure to comply with any of the requirements of this tender process including:
  - (i) submission of a Tender Offer that contains false information or falsified documents, or the concealment of such information in the tender process in order to influence the outcome of eligibility screening or any other stage of the tendering;
  - (ii) any unsolicited attempt by a Tenderer to unduly influence the outcome of the tender process in its favour;
  - (iii) withdrawal of a Tender Offer or refusal to sign and return the acknowledgement of its agreement to the terms and conditions set out in the Notification of Award, or sign and return the Contract, without justifiable cause;
  - (iv) unauthorised use of one's name or using the name of another person or entity for the purpose of tendering; and/or
  - (v) refusal or failure to post the required Tender Security in accordance with Sub-Clause 4.7 [*Tender Security*].
- (e) Nothing contained in the Tender Documents shall be deemed to have waived or modified any of the rights or remedies of the Employer and Sarawak Energy under or in connection with this tender process, or at law or in equity or otherwise. The Employer and Sarawak Energy reserve all of their respective

rights and remedies (including the enforcement of such rights and remedies at any time and from time to time).

#### **6.8 Non-disclosure of Evaluation Information**

Information relating to the examination, evaluation, comparison and qualification of Tender Offers, including recommendation for Contract award, will not be disclosed to Tenderers or any other persons not officially concerned with such process.

#### **6.9 Improper Influence of the Evaluation Process**

Any attempt by the Tenderer to improperly influence the outcome of the evaluation process (including by way of an offer of a Discount after the Closing Date and Time) may result in the Tenderer being disqualified, its Tender Offer being rejected and/or its Tender Security being forfeited.

### **7 AWARD OF CONTRACT**

#### **7.1 Notification of Award**

- (a) Prior to the expiration of the Tender Validity Period, the Employer will, by written notice, notify the successful Tenderer that its Tender Offer has been accepted by issuing a Notification of Award.
- (b) The Notification of Award shall specify the terms and conditions on which the successful Tenderer is awarded the Contract.
- (c) The successful Tenderer shall:
  - (i) within ten (10) business days of the date of the Notification of Award, sign and return the acknowledgement of its agreement to the terms and conditions set out in the Notification of Award; and
  - (ii) within twenty-eight (28) days of the date of the Notification of Award obtain and procure, at its cost, the delivery of the Performance Bond to the Employer.
- (d) Upon the Employer's receipt of the signed acknowledgment and the Performance Bond:
  - (i) the Employer will commence preparation of the finalised form of the Contract; and
  - (ii) the Notification of Award will, until such time as a finalised form of the Contract is executed, constitute the binding agreement between the Employer and the successful Tenderer for the Works.
- (e) Upon receipt of the Contract, the successful Tenderer shall, within the timeframe so required by the Employer, duly sign and return it to the Employer. If the successful Tenderer fails to sign and return the Contract within the timeframe required by the Employer, the Employer shall be entitled to treat such failure as



a repudiation of the agreement referred to in sub-paragraph (d)(ii) of this Sub-Clause.

- (f) The Notification of Award may be issued by the Employer or Sarawak Energy Berhad, on behalf of the Employer.

## **7.2 Failure to Sign the Acknowledgement or Provide the Performance Bond**

If the successful Tenderer fails to:

- (a) sign and return the acknowledgement of its acceptance to the terms and conditions set out in the Notification of Award within ten (10) business days of the date of the Notification of Award; and/or
- (b) fails to provide a Performance Bond compliant with Sub-Clause 2.19 [*Performance Bond*] within twenty-eight (28) days of the date of the Notification of Award,

the Employer shall be entitled to treat such failure as an annulment of the Notification of Award and the Employer shall be entitled to award the Contract for the Works to any other party.

## **7.3 Notification to Unsuccessful Tenderers**

- (a) Upon entering into a binding agreement with the successful Tenderer, the Employer will notify all other Tenderers that their Tender Offer has not been successful. In providing such notification, the Employer will not disclose any information regarding the successful Tenderer's Tender Offer.
- (b) The Employer will not return the original or copies of any Tender Offer submitted by any Tenderer.

## **7.4 Tender Debriefing**

The Employer may, if requested in writing by an unsuccessful Tenderer within twenty-one (21) days following receipt of notification that its Tender Offer has not been successful, arrange for a tender debriefing with such unsuccessful Tenderer to discuss the grounds on which its Tender Offer was not selected. During any tender debriefing process, the Employer will not disclose any information regarding any other Tender Offer.