

PRO FORMA SUB-CONTRACTOR'S UNDERTAKING

THIS UNDERTAKING is made on the..... dayof
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BY

whose registered office is at [*address*]

("Sub-contractor")

IN FAVOUR OF

Environmental Campaign Committee of the Hong Kong Special Administrative
Region of the People's Republic of China ("ECC")

WHEREAS

- (A) By an invitation to tender, the ECC invited Tenders for two contracts to supply food waste smart bins to facilitate food waste collection at private housing estates *for the ECC* ("Contract") upon the terms and conditions of the Contract ("Invitation to Tender").
- (B) [Name of the Tenderer] ("Tenderer") has submitted a tender in response to this Invitation to Tender.
- (C) The Tenderer proposes to appoint the Sub-contractor to perform the work as more particularly specified in the Sub-contractor Table of the Information Schedule submitted by the Tenderer as part of its tender.
- (D) It is a submission requirement of the Tender Documents that [each Tenderer / the successful Tenderer] shall procure the Sub-contractor to execute this Undertaking.

NOW THIS UNDERTAKING witnesses as follows:

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1. All words and expressions, and rules of interpretation defined or used in the Interpretation and where applicable Interpretation (Supplement) of the Tender Documents issued by the ECC for the Invitation to Tender shall, unless specifically defined or redefined herein or the context otherwise requires, have the same meaning or otherwise shall have equal force when used in or interpreting this Undertaking. All obligations undertaken by the Sub-contractor are in consideration of the ECC approving the Tenderer's appointment of this Sub-contractor under Clause 27.1 of the Conditions of Contract should the Contract be awarded to the Tenderer.
2. The Sub-contractor warrants and undertakes to the ECC that, should the Tenderer be awarded the Contract and become the Contractor, it will perform all obligations of the Contractor under the Contract to the extent that they have been sub-contracted to the Sub-contractor as specified in the Schedules specified in Recital (C) above then submitted by the Contractor to the ECC as part of its tender (and the Sub-contractor acknowledges that it has a copy of these Schedules) and discharge all liabilities of the Contractor in relation to or in connection with or arising from such obligations (collectively, "Sub-contracted Obligations") as if references to the Contractor in all provisions in the Contract in relation to such Sub-contracted Obligations shall mean the Sub-Contractor with effect from the date of this Undertaking until all such Sub-contracted Obligations have been duly fulfilled and duly discharged.
3.
 - (a) The ownership of all Intellectual Property Rights which exist in the Deliverables which are produced or provided by Sub-contractor shall as from creation become, and at all times thereafter, remain vested in the ECC.
 - (b) Without prejudice to the generality of Clause 2 above, the Sub-contractor hereby grants or in case it is not empowered to do so, shall at its own cost and expense procure that there will be granted, for the benefits of each of the ECC, its authorised users, assigns and successors-in-title the Licence on the terms set out in Clause 20.5 of the Conditions of Contract to the extent that any subject matter covered by the Licence or any part thereof is to be supplied by the Sub-contractor in the performance of the Sub-contracted Obligations.

4. The Sub-contractor shall not be discharged or released from this Undertaking by any arrangement made between the ECC and the Contractor or by any change in obligations of the Contractor under the Contract or by any forbearance granted by the ECC to the Contractor as to payment, time, performance or otherwise whether or not such arrangement, change or forbearance may have been or is made or granted with or without knowledge or assent of the Sub-contractor.
5. Without prejudice to Clause 4 above, the obligations of the Sub-contractor under this Undertaking shall remain in full force and effect and shall not be affected or discharged in any way by, and the Sub-contractor hereby waives notice of:
 - (a) any suspension of, variation or amendment or supplement to the Contract (including without limitation extension of time for performance) or any concession or waiver by the ECC, in whole or in part, in respect of the Contractor's obligations under the Contract;
 - (b) any provision of the Contract being or becoming illegal, invalid, void, voidable or unenforceable;
 - (c) the termination of the Contract for any reason;
 - (d) any forbearance or waiver of any right of action or remedy that the ECC may have against the Contractor and/or the negligence, failure, omission, indulgence or delay by the ECC in enforcing any right, power, privilege to or remedy available to the ECC in relation to the obligations of the Contractor set out in the Contract;
 - (e) the voluntary or involuntary liquidation, bankruptcy, dissolution, sale of assets, receivership, general assignment for benefit of creditors, insolvency, reorganisation arrangement, composition, or other proceedings of or affecting the Contractor or its assets, or any change in the constitution or membership or shareholding or director or management of the Contractor (as the case may be) or that the Sub-contractor is no longer a subsidiary of the Contractor;

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- (f) any assignment or sub-contracting by the Contractor of any or all of its obligations set out in the Contract, whether or not such assignment or sub-contracting has been consented to; and
 - (g) without prejudice to the generality of the foregoing, any fact or event (whether similar to any of the foregoing or not) which in the absence of this provision would or might constitute or afford a legal or equitable discharge or release of or defence to the Sub- contractor, other than an express release of its obligations by the ECC.
- 6. This Undertaking shall extend to all Sub-contracted Obligations under the Contract as the same may from time to time be amended or supplemented and the Sub-contractor hereby prospectively consents to whatever amendment, variation or supplement which may be made to the Contract.
- 7. This Undertaking shall have immediate effect on the Date of the Tender Acceptance issued to the Tenderer (if any). This Undertaking shall cover all of the Sub-contracted Obligations and shall remain in full force and effect and irrevocable until all such Sub-contracted Obligations mentioned in Clause 2 above have been performed and discharged but all provisions stated in Clause 19.1(a)(iii) of the Conditions of Contract which are deemed incorporated herein by virtue of Clause 13 below as well as Clauses 1, 3, and 7 to 15 of this Undertaking shall continue to survive.
- 8. This Undertaking is in addition to and shall not merge with or otherwise prejudice or affect any contractual or other right or remedy or any guarantee, undertaking, indemnity, lien, pledge, bill, note, charge or any other security which the ECC may at any time hold (collectively “Security”) and this Undertaking may be enforced by the ECC without first having recourse to any of the Security or taking any steps or proceedings against the Contractor, and notwithstanding any release, waiver or invalidity of the Security.
- 9. Any demand, notification or certificate given by the ECC specifying amounts due and payable under or in connection with any of the provisions of this Undertaking shall be conclusive and binding on the Sub-contractor.
- 10. The obligations expressed to be undertaken by the Sub-contractor under this Undertaking are those of primary obligor and not as a surety.

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11. This Undertaking shall be governed by and construed according to the laws for the time being in force in the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong").
12. The ECC and the Sub-contractor shall first refer any dispute or difference arising out of or in connection with this Undertaking to mediation in accordance with The ECC of the Hong Kong Special Administrative Region Mediation Rules prevailing at the time.
13. If the said dispute or difference is not settled by mediation according to Clause 12 above, the ECC may institute litigation in respect of the said dispute or difference in the courts of Hong Kong. The ECC and the Sub-contractor agree to submit to the exclusive jurisdiction of the courts of Hong Kong..
14. All documents arising out of or in connection with this Undertaking shall be served:-
 - (a) upon the ECC, at _____,
marked for the attention of _____,
telephone number _____, facsimile number _____
_____ and email address:
_____;
 - (b) upon the Sub-contractor, at _____,
marked for the attention of _____,
telephone number _____, facsimile number _____
_____ and email address:
_____.
15. Without prejudice to other provisions of this Undertaking including Clause 2, all provisions of the Contract (other than the Terms of Tender) shall be deemed incorporated herein, mutatis mutandis, and save in the case of those provisions concerning (a) any approval, consent, notices and any other form of communication to be given by the ECC including any Order and Acceptance Note or Rejection Notice (as the ECC will communicate directly with the Contractor (unless and to the extent the ECC also chooses to do the same to the Sub-contractor)); (b) any obligation of the ECC to the Contractor (including

payment obligation); (c) the Contract Deposit (as no Contract Deposit is required from the Sub-contractor); and (d) any provision concerning any Item not covered by the Sub-contracted Obligations. References therein to “Contract” shall mean this Undertaking, and references therein to “Contractor” shall mean the Sub-contractor.

16. For the avoidance of doubt, the Sub-contractor acknowledges and agrees that the ECC has no obligation to the Sub-contractor, including any obligation of the ECC to the Contractor under the Contract (including any payment obligation).
17. Nothing in this Undertaking shall be taken as an assignment or transfer of any rights or obligations or liabilities from the Contractor to the Sub-contractor. The Sub-contractor acknowledges and agrees that all the Sub-contracted Obligations shall be borne by the Contractor and Sub-contractor jointly and severally. Notwithstanding this Undertaking, the Contractor shall remain liable and responsible for all acts, omissions and defaults of the Sub-contractor and its employees, agents and sub-sub-contractors of whatever tier as if they were the acts, omissions and defaults of the Contractor.
18. If this Undertaking is required to be submitted as part of the Tender but the Tenderer is not eventually awarded with the Contract, this Undertaking shall be void ab initio but not otherwise. Where the Tenderer is eventually awarded the Contract, all references to “Tenderer” shall mean such Contractor.

IN WITNESS whereof this Undertaking was executed as a deed by the Sub-contractor on the date first above written.

THE COMMON SEAL OF THE SUB-	)
CONTRACTOR	)
IS HEREUNTO AFFIXED	)
AND	)
SIGNED ON BEHALF OF THE SUB-	)
CONTRACTOR BY:	)
Name:	)
Title: Director	)
	)
Name:	)
Title: Director/Company Secretary	)

as witnessed by:

Name:
Title:

Notes:

- (1) Please adopt and modify the execution clause in accordance with the execution requirements of the applicable laws of the place of incorporation of the Sub-contractor. For example, if the Sub-contractor does not and is not required to keep a common seal or seal, it is not required that the Sub-contractor affixes a common seal or seal in the execution of this document but the execution of this document as a deed must be in accordance with the laws of the place of its incorporation. As mentioned in Paragraph 10.4 of the Terms of Tender, a legal opinion will be required for this Undertaking.
- (2) Where the Sub-contractor is a Hong Kong company, this Undertaking shall be signed by at least two directors or one director and one company secretary or if the Sub-contractor only has one director, by that sole director (“default mode of execution”). If this Undertaking is signed in this manner, in accordance with section 127(5) of the Companies Ordinance (Chapter 622 of the Laws of Hong Kong), the affixation of the

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common seal is not necessary but not otherwise. The above wording that the Common Seal is affixed shall mean that the Common Seal is deemed affixed in accordance with the aforesaid statutory provision. Where the default mode of execution is not adopted, the Common Seal (but not the company's rubber chop) must be affixed and the execution shall be supported by a certified extract of board resolution authorising the affixation of the common seal and the execution of this Undertaking by the signatory(ies) other than as mentioned above. Regardless of the mode of execution, this Undertaking shall be accompanied with a "Company Particulars Search" obtained from the Companies Registry or equivalent documents and (if the default mode of execution is not adopted) a certified extract of the articles of association of the Sub-contractor showing how the common seal shall be used. The aforesaid certified extract shall be certified by at least one director or one company secretary or such other person agreeable to the ECC. For the avoidance of doubt, neither the presence nor absence nor insufficiency of these notes in the executed version of this Undertaking or any document referred to herein shall vitiate the effect of this Undertaking.