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**Panel on Manpower**

**Background brief prepared by the Legislative Council Secretariat  
for the meeting on 17 May 2012**

**Government policy relating to the outsourcing of service contracts**

**Purpose**

This paper gives an account of the relevant discussions by the Panel on Manpower ("the Panel") on the Government policy relating to the outsourcing of service contracts.

**Background**

2. Since 2001, the Administration has required all contractors of government service contracts to sign written employment contracts with their employees (except temporary relief workers). Such contracts should stipulate major employment terms including wage rate, working hours, rest days, etc. so as to safeguard employees' rights and benefits.

3. On 6 May 2004, the Administration introduced a mandatory wage requirement ("MWR") for government service contracts for the purpose of tender assessment. Under this mandatory requirement, a tender offer shall not be considered if the monthly wages offered by the tenderer are less than the average monthly wages (which relate to an average number of normal hours of work per day and an average number of standard working days per month) for the relevant industry/occupation as published in the latest Census and Statistics Department ("C&SD")'s Quarterly Report of Wage and Payroll Statistics ("the Quarterly Report") at the time when the tenders are invited. MWR also applies to sub-contracting arrangement and procurement of the same kind of government services under direct purchase authority. MWR applies to tenders invited on or after May 2004. The purpose of MWR is to ensure that the

wages of non-skilled workers engaged by government service contractors are not lower than the market rates.

4. At the Panel meeting on 11 April 2011, the Administration informed the Panel that in tandem with the Statutory Minimum Wage ("SMW") implementation, the following new arrangements would be introduced for government service contracts that relied heavily on the deployment of non-skilled workers (such as cleaners and security guards) -

- (a) for new contracts tendered on or after 1 May 2011, contractors would be mandated to pay their non-skilled workers at not less than SMW plus one paid rest day in every seven days; a transitional arrangement had also been introduced for higher-paid occupations to which the average market monthly wages published by C&SD in March 2011 (i.e. the Quarterly Report for December 2010) would continue to apply until the rate of SMW plus one paid rest day in every period of seven days caught up; and
- (b) for existing contracts straddling 1 May 2011, the Government might provide, on an exceptional and one-off basis, top-up payment to service contractors to meet the increase in wage costs of non-skilled workers, arising solely and directly from meeting the SMW requirement with effect from 1 May 2011 until the expiry of the contracts concerned.

5. Following the implementation of SMW, the Administration made a special arrangement to authorize in principle bureaux/departments to provide top-up payments to service contractors in respect of existing service contracts to cover their wage cost increase arising solely and directly from SMW implementation in order to protect the employment of existing employees as well as to ensure the continued provision of public service.

### **Standard employment contract**

6. To better protect labour rights and benefits, the Administration introduced a standard employment contract ("SEC") for use by contractors of government service contracts in their employment of non-skilled workers to carry out government service contracts in April 2005.

7. The key features of SEC are as follows -

- (a) the monthly wage payable to a non-skilled worker should be no less than the amount committed by the contractor in the relevant tender offer if he has worked in accordance with the working hours and working days as specified in SEC. Any allowance, under whatever title, should be paid on top of the committed monthly wage;
- (b) as a control measure, with the employees' consent, all wages should be paid directly by way of autopay into the individual employee's bank account;
- (c) contractors should be responsible for the costs of all operational and administrative expenses, as well as the depreciation of all assets and equipment. No fee or deposit, under whatever title, should be collected from their non-skilled workers;
- (d) the workplace should be specified. Where necessary, deployment of the worker to other workplaces within the same region should be on an ad hoc and limited basis or only under exceptional circumstances. This flexibility is essential to cater for special operational requirements of the procuring department;
- (e) copies of the signed SEC should be kept by the contractor, the worker and the relevant procuring department for reference; and
- (f) variation of employment terms shall not extinguish or reduce any right, benefit or protection conferred upon the employee by the contract and has the latter's written agreement. A copy of such variation should also be provided to the worker and the relevant procuring department for reference.

8. Upon the implementation of SMW on 1 May 2011, the Administration had revised SEC setting out, among others, the specified monthly wages for hours worked and one paid rest day in every period of seven days, according to the SMW level. The new SEC should apply to new government service contracts awarded on or after 1 May 2011.

### **Administrative sanctions**

9. Since 27 March 2004, a demerit point system has been applied to tenders for government service contracts invited thereafter. Under the demerit point

system, procuring departments are required to issue a default notice to their contractors for each breach of contractual obligations in respect of wages, working hours and the requirement for signed written contracts with employees (except temporary relief workers). Each default notice will result in one demerit point. A tender offer should not be considered if the tenderer has received from one or more departments a total of six demerit points during the four most recent quarters (before the tender closing date).

10. Following the implementation of SEC, any contractor of government service contracts who has failed to use SEC, distorted or altered the term of the contract to the disadvantage of the non-skilled workers, and/or is found to have breached the contractual terms not in connection with the law, wages, working hours and the requirement for signed written contracts with non-skilled workers, would be subject to administrative sanction. Individual procuring departments will in future issue default notices to contractors for breaches of these contractual terms in accordance with the service contracts. They will also take into account these default notices issued to contractors for evaluation of their future tenders.

### **Deliberations of the Panel**

11. The Panel discussed issues relating to the Government policy relating to the outsourcing of service contracts at its meetings on 2 December 2004, 17 March 2005, 21 October 2010 and 11 April 2011. The main concerns of members are highlighted in the ensuing paragraphs.

#### Scope of workers covered by SEC

12. Concern had been raised as to why SEC was applicable to non-skilled workers only. The Administration explained that SEC was mainly intended for the protection of elementary workers.

#### Adoption of SEC by public funded organizations

13. Regarding the suggestion that SEC should be adopted by all public funded organizations, the Administration advised that it would encourage public funded organizations to adopt SEC. The Administration had already written to all public funded organizations encouraging them to adopt the mandatory requirement.

### Responsibility of contractors and subcontractors

14. According to the Administration, subcontracting was normally not permitted in government service contracts (excluding construction services) that deployed a large number of non-skilled workers, and prior approval had to be obtained from the procuring department before sub-contracting for the services to be provided by the main contractor was allowed. In exceptional cases where subcontracting was allowed, the main contractor should be held responsible for any subcontractor's breach of the service contract.

15. Members called on the Administration to promote good employer's practices, such as the employment of more full-time employees and offering higher wage rates to employees, through awarding higher marks for such employers in the marking scheme for tender assessment.

### Provision of paid rest days and meal breaks

16. Some members expressed disappointment that the Administration had not indicated clearly whether workers would be provided with paid meal breaks under the new wage arrangement for non-skilled workers engaged under government service contracts upon the implementation of SMW on 1 May 2011.

17. The Administration advised that while MWR de facto set, to a certain extent, non-statutory minimum wages for certain occupations, there was no express provision in SEC requiring the provision of paid meal breaks. Neither the Minimum Wage Ordinance (Cap. 608) ("MWO") nor the Employment Ordinance (Cap. 57) ("EO") prescribed that meal breaks or rest days should be with pay or otherwise. These matters had all along been subject to the agreement between employers and employees having regard to the circumstances of individual enterprises and operational needs. MWO stipulated the circumstances under which meal breaks should constitute hours worked for the purpose of computing SMW: if an employee was, during his meal break, in attendance at a place of employment in accordance with the contract of employment or with the agreement or at the direction of the employer, such time should be included in the hours worked by the employee for computing SMW, irrespective of whether he was provided with work or not. If meal breaks were regarded as working hours of the employee according to his employment contract or agreement with his employer, such hours should also be taken into account in computing SMW. Under the new wage arrangement, the Government would mandate service contractors to pay their non-skilled workers at not less than the SMW rate plus one paid rest day in every period of seven days. To ensure that the monthly wage level of non-skilled employees could

meet the SMW rate of \$28 per hour irrespective of the number of calendar days in a month, the monthly rate to be entered into in SEC would have to be set on the basis of 31 days, i.e. 27 working days plus 4 rest days, per month for those working six days a week.

18. There was a view that section 5 of EO provided an adequate legal basis for the Administration to mandate service contractors to provide their non-skilled workers with paid rest days and meal breaks. Under this provision, every contract of employment, which was a continuous contract, should, in the absence of any express agreement to the contrary, be deemed to be a contract for one month renewable from month to month. There was a call on the Administration to amend the legislation to make it a statutory requirement for employers to provide employees with paid meal breaks and rest days.

19. The Administration did not consider it necessary to introduce legislative amendments to regulate the provision of paid rest days and meal breaks. The Administration explained that under EO, employers must provide their employees engaged under a continuous contract with at least one rest day in every period of seven days. However, EO was silent on payment for rest days. Like enterprises in the private sector, at the time of signing SEC, contractors and their workers could negotiate and agree on the terms of employment such as working hours, including arrangements and any payment for meal breaks having regard to the nature of work, characteristics of the industries and operational needs of the company. If and after a contractor and his employees had entered into employment terms specifying that meal breaks were part of the working hours, the employer should not unilaterally vary or remove such employment terms without the consent of employees.

20. In response to members' enquiry, the Administration advised that the provision of one paid rest day in every period of seven days was developed solely for government service contacts that relied heavily on the deployment of non-skilled workers and in no way sought to set a guideline for the private sector. It would be for private enterprises to decide on their individual appropriate arrangements, taking into account their own business conditions, affordability and needs. Under EO, employers must provide their employees engaged under a continuous contract with at least one rest day in every period of seven days. However, EO did not prescribe whether rest days should be with pay or not. Whether rest days were paid should be subject to the prevailing agreement and/or practices between an employer and his employees rather than the relevant arrangement adopted by the Labour Department ("LD") or the Government.

## Review of SEC

21. Concern was raised about the possibility of some unscrupulous employers changing the employment terms or laying off some of their workers, in order to reduce the additional SMW-induced staff costs. There was a view that the Administration should revise SEC for use by contractors of government service contracts so as to enhance the protection for those non-skilled workers employed under such contracts.

22. The Administration advised that EO provided protection against unreasonable and unlawful dismissal as well as unilateral variation of employment terms and conditions by employers. Employees who suspected their employment rights infringed might make enquiries with or seek assistance from LD. All complaints received would be promptly and thoroughly investigated. LD would make every effort to take out prosecution against willful offenders and where there was sufficient evidence.

23. There was a suggestion that the Administration should stipulate clearly in SEC that service contractors should not lay off their existing staff but engage new staff in order to reduce their liabilities towards employees in respect of severance or long service payment. It was pointed out that as an employee's entitlement for severance or long service payment was calculated by reference to the number of fully reckonable years of service and a pay rate at two-thirds of the last full month's wage, a break in service would unduly have negative impact on the employee's entitlement.

## Special top-up arrangement

24. Members were concerned about the measures adopted by the Administration to ensure that the special top-up payments would go to the workers who were the target beneficiaries.

25. As advised by the Administration, procuring departments had all along been monitoring their contractors in accordance with their existing contract management system. Various safeguard measures had been taken to ensure that the top-up payments went to the pocket of non-skilled workers who were the target beneficiaries of the special arrangement. Such measures included direct checking with concerned workers on wages received and verification of documents submitted by contractors supporting their top-up payment applications, such as payroll records of non-skilled workers deployed to carry out government services under contracts during the relevant month, workers' attendance records, autopay records and other documents showing the increase in wage costs. The Administration also advised that there were established

channels for workers to voice their grievances and seek assistance, and those who suspected their employment rights being infringed were encouraged to report to LD.

### **Relevant papers**

26. A list of the relevant papers on the Legislative Council website is in the **Appendix**.

Council Business Division 2  
Legislative Council Secretariat  
11 May 2012

## Appendix

### Relevant papers on Government policy relating to the outsourcing of service contracts

| Committee         | Date of meeting         | Paper                           |
|-------------------|-------------------------|---------------------------------|
| Panel on Manpower | 2.12.2004<br>(Item I)   | <u>Agenda</u><br><u>Minutes</u> |
| Panel on Manpower | 17.3.2005<br>(Item III) | <u>Agenda</u><br><u>Minutes</u> |
| Panel on Manpower | 21.10.2010<br>(Item II) | <u>Agenda</u><br><u>Minutes</u> |
| Panel on Manpower | 11.4.2011<br>(Item IV)  | <u>Agenda</u><br><u>Minutes</u> |
| Panel on Manpower | 15.12.2011<br>(Item V)  | <u>Agenda</u><br><u>Minutes</u> |
| Finance Committee | 6.1.2012<br>(Item 3)    | <u>Agenda</u><br><u>Results</u> |

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