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Panel on Manpower

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 21 April 2015**

Outsourcing of government service contracts

Purpose

This paper provides background information and gives an account of the relevant discussions by the Panel on Manpower ("the Panel") on issues relating to the outsourcing of government 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 leave 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. In March 2005, the Administration introduced a standard employment contract ("SEC") for non-skilled workers¹ for use by contractors of government service contracts in order to better protect labour rights and benefits. Upon the implementation of the Statutory Minimum Wage ("SMW") on 1 May 2011, government service contractors are required to sign SEC with their non-skilled workers with specification that the remuneration of staff should be adjusted in accordance with future revisions of the prescribed minimum hourly wage rate under the Minimum Wage Ordinance (Cap. 608) ("MWO"), and the employee's wage should not be lower than the adjusted wage level.

¹ Non-skilled workers are those performing functions comparable to the duties of civil servants in the Model Scale 1 grades, namely the grades of Car Park Attendant II, Explosives Depot Attendant, Ganger, Gardener, Property Attendant, Supplies Attendant, Ward Attendant, Workman I, Workshop Attendant and Workman II.

Deliberations of the Panel

Policy of outsourcing government service contracts

4. Most members expressed dissatisfaction that the Administration considered the outsourcing policy from the employers' perspective, without giving due regard to the need to enhance the protection for workers engaged under government service contracts. These members raised concern as to whether the Administration had any plan to conduct a comprehensive review of the policy relating to the outsourcing of government service contracts. Some other members urged the Administration to critically review the need to recruit more civil servants if there was a long-term manpower need for services provided by the outsourced workers. There was a view that the Administration should seriously consider converting the outsourced posts into permanent ones.

5. The Administration advised that apart from engaging civil servants, the Government had a long history of using the private sector to deliver public services. This was in line with the objectives of maintaining a small and efficient civil service, and promoting business opportunities and jobs in the private sector. According to the Administration, the civil service had grown steadily to meet the demand for new or improved services to the public in recent years. Civil servants were employed for meeting long-term operational needs and functions included policy formulation, regulatory control, law enforcement and statutory functions.

Protection of employees under SEC

6. Some members expressed grave concern about the adequacy of protection provided for employees under SEC. These members pointed out that many outsourced contract workers were denied pay rise, promotion prospects and fringe benefits. As an employee's entitlement to severance payment ("SP"), long service payment ("LSP") and other benefits under the Employment Ordinance (Cap. 57) ("EO") was calculated by reference to the number of fully reckonable years of service, a break in service would unduly have negative impact on the employee's entitlement. There was a suggestion that the Administration should mandate in government service contracts that if there was a change of contractors at the end of the contract period, the incoming contractor should take over the workers of the outgoing contractor and allow these workers to carry over their years of service to the new contract for calculation of statutory employment benefits, including SP and LSP awarded to an employee in the event of retrenchment and termination of employment.

7. The Administration advised that it had considered measures to ensure that in outsourcing contracts, the interests of outsourced workers would be better protected. Where an outsourced service contract was going to expire, existing employees would be advised three months before the expiry date. The relevant procuring department would post up a notice so that the affected workers might seek assistance from the Labour Department ("LD"), if necessary. In conducting a tender exercise for a new contract, invitation for tenders would be issued ahead of the expiry of the existing contract with a view to awarding the next contract at the earliest possible time, so as to allow time for the outgoing and incoming contractors to discuss and make necessary arrangements for the takeover. Besides, contractors willing to offer their staff a higher wage rate and not violating employment-related laws or SEC terms might attract higher scores in the tender evaluation. The scores in these aspects might carry a weighting as high as some 20% in the tender evaluation. The Administration further advised that a demerit point system was applied to tenders for government service contracts invited on or after 1 May 2006, under which procuring bureaux/departments would issue a default notice to their contractors for each breach of contractual obligations to their non-skilled workers (except temporary leave relief workers) employed for carrying out government service contracts. Each default notice would result in one demerit point. If a tenderer had, over a rolling period of 36 months, accumulated an aggregate of three or more demerit points obtained on or after 1 May 2006 from one or more bureaux/departments, its tender offer would not be considered for a period of five years from the date the third demerit point was obtained.

8. As regards the proposal of imposing a requirement on incoming contractors to take over the workers of the outgoing contractor, the Administration advised that there were problems with such a proposal. Firstly, if the incoming contractor had to take over the existing employees of the outgoing contractor, he would have practical difficulties in estimating his liability for provision of employment benefits, in particular those contingent liabilities like SP or LSP, if he was to assume the responsibility for the years of service of the outgoing contractor's employees. Secondly, contractors who wished to bid for such government contracts would need to know the employment profile of individual workers currently working on the site before they could assess the cost implication of taking over their years of service in the new contract. It would nonetheless be very difficult for them to have access to such information, as there might be concern about privacy/commercial secrecy if the employment records were made available to potential bidders.

9. Members were advised that EO provided protection against unreasonable and unlawful dismissal as well as unilateral variation of employment terms and conditions by employers. The Administration pointed out that employees of

the outgoing contractor would either receive termination payment, including SP, if the eligibility criteria under EO were met; or have their years of service with the outgoing contractor continued to accrue if they opted to stay with the outgoing contractor by accepting the offer to renew their employment contracts. 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.

10. On the suggestion that SEC should be adopted by all public funded organisations, the Administration advised that it would encourage public funded organisations to adopt SEC, and had already written to all public funded organisations encouraging them to adopt the mandatory requirement. The Administration further advised that SEC was mainly intended for the protection of outsourced non-skilled workers in respect of monthly wages, working hours and method of wage payment. Other employment terms and conditions, including fringe benefits to be enjoyed by the workers concerned, should be determined by the mutual agreement between employers and employees.

Provision of paid rest days and meal breaks

11. Some members expressed disappointment that there was no express provision in SEC requiring the provision of paid meal breaks for non-skilled workers engaged under government service contracts upon the implementation of SMW. The Administration advised that neither MWO nor EO prescribed that meal breaks or rest days should be with pay or otherwise, although it was stipulated under EO that employers must provide their employees engaged under a continuous contract with at least one rest day in every period of seven days. 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. 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.

12. The Administration further advised that with the introduction of SMW, it had mandated government 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 irrespective of the number of calendar days in a month, the monthly rate to be entered into in SEC had to be set on the basis of 31 days, i.e. 27 working days plus four rest days, per month for those working six days a week. The Administration added 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.

Responsibility of contractors and subcontractors

13. 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 subcontracting 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.

14. 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.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
15 April 2015

Appendix

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

| Committee | Date of meeting | Paper |
|---------------------|-------------------------|--|
| Panel on Manpower | 2.12.2004 (Item I) | <u>Agenda</u> <u>Minutes</u> |
| Panel on Manpower | 17.3.2005 (Item III) | <u>Agenda</u> <u>Minutes</u> |
| Panel on Manpower | 21.10.2010 (Item II) | <u>Agenda</u> <u>Minutes</u> |
| Panel on Manpower | 11.4.2011 (Item IV) | <u>Agenda</u> <u>Minutes</u> |
| Panel on Manpower | 15.12.2011 (Item V) | <u>Agenda</u> <u>Minutes</u> |
| Finance Committee | 6.1.2012 (Item 3) | <u>Agenda</u> <u>Results</u> |
| Panel on Manpower | 23.5.2012 (Item V) | <u>Agenda</u> <u>Minutes</u> |
| Legislative Council | 25.3.2015 | [Question 12] Asked by: Hon KWOK Ka-ki <u>Outsourcing of public services</u> |