

Legislative Council Panel on Trade and Industry

Hong Kong's Obligations under the World Trade Organization Agreement on Government Procurement (GPA)

INTRODUCTION

This paper serves to brief Members on Hong Kong's obligations under the World Trade Organization (WTO) Agreement on Government Procurement (GPA) and seeks Members' views on the revised remuneration proposals for the Deputy Chairmen (when performing the role of the Chairman in the latter's absence) and members of the Review Body on Bid Challenges.

BACKGROUND

Objective and Coverage of GPA

2. The objective of the GPA is to ensure non-discriminatory treatment amongst domestic and foreign goods, services and suppliers, and to enhance the transparency of the public procurement system. The GPA applies to procurement of goods and services by any contractual means by central or sub-central government entities as well as entities listed by Parties to the GPA. The precise coverage for each Party is subject to negotiations among the WTO members concerned, and is set out in an appendix to the GPA. Only contracts of a value of not less than the threshold values specified in the appendix are covered by the GPA.

Hong Kong's Accession to GPA

3. Hong Kong acceded to the GPA in May 1997, which entered into force for Hong Kong on 19 June 1997. All government bureaux, departments, and five quasi-government entities, viz. the Housing Authority, the Hospital Authority, the Airport Authority, the Mass Transit Railway Corporation (MTRC) and the Kowloon-Canton Railway Corporation (KCRC), are covered by the GPA. For government bureaux and departments, the relevant threshold values are:

- (a) 130,000 SDR¹ for procurement of products and services other than construction services; and

¹ SDR (Special Drawing Rights) is an international currency unit created by the IMF. Conversion rates are published regularly by the IMF. 1 SDR is about HK \$10.5.

(b) 5,000,000 SDR for construction services.

For quasi-government entities listed above, the threshold values are:

(a) 400,000 SDR for procurement of products and services other than construction services; and

(b) 5,000,000 SDR for construction services.

Hong Kong's Obligations under GPA

General Principles

4. As a Party to the GPA, we are obliged to uphold the GATT2/WTO principles of national treatment (NT) (i.e. treatment to foreign products, services and suppliers shall be no less favourable than that accorded to domestic products, services and suppliers), and most-favoured nation (MFN) treatment (i.e. treatment to products, services and suppliers of one Party shall be no less favourable than any other Party) in our public procurement.

Procedural Requirements

5. The GPA also sets out detailed procedural requirements in order to ensure non-discrimination and transparency of public procurement process. For instance, there are specific provisions governing the preparation of tender specifications, tendering procedures including various time-limits for tender application and award of contract, and selection of tenderers. Procuring entities are also obliged to publish their procurement notices and notices of contract awards, and to provide explanation and pertinent information to unsuccessful tenderers. In addition, Parties to the GPA are required to publish promptly their procurement laws, regulations and procedures, and to report annual procurement statistics.

Bid Challenge System

6. Article XX of the GPA stipulates that each Party to the GPA shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the GPA. Challenges should either be heard by a court or by an impartial and independent review body. The bid challenge procedures shall provide for rapid interim measures to preserve commercial opportunities, and for correction of breaches of the GPA or compensation for the loss or damages suffered.

7. An independent administrative body, the Review Body on Bid Challenges (Review Body), was thus set up in December 1998. A brief on the operation of the Review Body is attached at Annex A for Members' reference.

Remuneration for Members of Review Body

8. At the Finance Committee (FC) meeting on 7 January 2000, we proposed in FCR(1999-2000)57 to establish an arrangement for payment of honoraria for the Chairman and Deputy Chairmen of the Review Body to replace the temporary arrangement which has been in practice since January 1999.

9. In order to maintain the impartiality of the Review Body and also having regard to its quasi-judicial nature, we considered it inappropriate to carry out the duties by civil servants and therefore resorted to finding a candidate from private practice. Drawing reference to the fees for engaging outside legal professionals by the Government, we proposed to pay an honorarium to the Chairman at an hourly rate between \$4,000 to \$5,000. For the two Deputy Chairmen, we proposed an hourly rate between \$2,000 and \$2,500 when either one performs the role of the Chairman in the latter's absence. Taking into account of the small caseload of the Review Body³, and the fact that the time spent by the Chairman may be as few as 2 hours for a case, we believe that it would be more cost effective for the Government to remunerate the Chairman and Deputy Chairmen on an hourly basis.

10. Considering that the major tasks of the Review Body would be conducted or closely guided by the Chairman (establishing whether there is a prima facie case; guiding a Panel to hear and rule on the challenges, and to recommend appropriate rapid interim measures, corrective measures or compensation; preparing Panel report etc.), we did not propose to remunerate the remaining 9 members of the Review Body given that the level of input required of the members will be relatively low.

11. The views expressed by FC Members on our proposals set out in paragraphs 9 and 10 above and our responses, are detailed below:

- (a) FC Members felt that the rates of remuneration for the Chairman and Deputy Chairmen should be aligned, given that the latter has to take up the full responsibilities of the Chairman when acting in his capacity.

³ So far in 1999, the Review Body has only received two complaints. The Chairman only spent 2 hours in concluding the first case as it is outside the purview of the Review Body. The second case was withdrawn by the complainant three weeks after its submission before rapid interim measures were recommended. The Chairman spent 5.5 hours in processing the second case.

- ⇒ The original rates were formulated on the basis that the market rates for legal professionals vary significantly subject to different qualifications, experiences and status. Nonetheless, in view of Members' comments and the nature of the acting appointment, we are prepared to align the rates for the Chairman and Deputy Chairmen.
- (b) FC Members felt that members of the Review Body should also be remunerated despite their lower level of input.
 - ⇒ We were and remain of the view that the major responsibilities would fall on the Chairman, and the members will not be required to provide professional input in the process. That said, we have no difficulties in principle to remunerate the members at a nominal rate as a gesture of recognition of their service. In accordance with the principles for remunerating non-officials serving on boards and committees set up by the Government approved by Finance Committee on 9 July 1980 and re-affirmed on 5 March 1993, we propose to remunerate the members at the standard rate (i.e. \$785 per member per sitting at a hearing).
- (c) Some FC Members were concerned about the basis whereby the Government would monitor the time spent by the Chairman on an individual case.
 - ⇒ In reimbursing the Chairman for the handling of an individual case, the Chairman would need to provide a breakdown of the time spent on the various stages of the case concerned. Moreover, the Chairman is underpinned by the Secretary to the Review Body who is a civil servant.
- (d) Some FC Members also requested to have more information on the remuneration of members of bid challenge systems of other Parties to the GPA.
 - ⇒ Members may wish to note that the information we managed to gather so far (Annex B) is rather scanty, given that detailed information regarding remuneration packages are often classified, while some Parties' cases have little relevance to our case as their bid challenge systems are composed of government officials or judges.

Revised Financial Implications

12. As explained in FCR(1999-2000)57, we do not expect the number of complaints to be received by the Review Body will increase significantly in view of the open, fair and transparent procurement system of Hong Kong. Assuming that there will be 3 appeal cases to be processed each year, and that the Chairman will on average spend 20 hours⁴ in concluding a case, the financial implication of our original proposal is estimated to be no more than \$300,000 for a year. Aligning the rates for the Chairman and Deputy Chairmen should not have additional financial implications. The additional honoraria to be paid to members under the revised proposal in paragraph 11(b) above will be no more than \$10,000⁵.

WAY FORWARD

13. Subject to comments from Members at this meeting, we will submit a revised proposal to the Finance Committee in order that appointments to the Review Body be made as soon as practicable.

ADVICE SOUGHT

14. Panel Members are invited to note the obligations of Hong Kong as a Party to the WTO GPA, and to discuss the revised proposal on the remuneration for the members of the Review Body on Bid Challenges in this note.

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⁴ The Panel is required, under the Rules of Operation of the Review Body, to handle complaints in a timely manner, i.e. to conclude a challenge within 90 days (and at most within 180 days). Hence we do not expect the time spent on each case will increase substantially. We therefore consider that it is reasonable to assume the Chairman will spend an average of 20 hours on each case.

⁵ Assuming 2 sittings (each last lasts 2 to 3 hours) are required for hearing a case, the estimated expenditure for the honorarium for members for a case (with two members sitting in a Panel) is \$3,140. Assuming 3 cases a year, the estimated expenditure for remuneration for members will be \$9,420.

Brief on the Operation of the Review Body

The Review Body on Bid Challenges was formally established on 30 December 1998. The operation of the Review Body is guided by the Rules of Operation of the Review Body, which were devised on the basis of provisions of the WTO GPA. A flowchart showing the operation of the Review Body is at Appendix. A Guide to the Review Body is available for public consumption on the Internet, and the Rules of Operation of the Review Body are also available upon request.

Operation of the Review Body in 1999

2. Since its establishment, the Review Body has received two applications for challenge against breaches of the WTO GPA. In the first case, the Chairman of the Review Body concluded that it was outside the purview of the Review Body. In the second case, the complainant at the same time lodged a complaint to the Central Tender Board (CTB). The CTB conducted a review of the case, and subsequently reversed its earlier decision and awarded the contract to the complainant. The complaint to the Review Body was thus withdrawn, before the Panel held a hearing for the challenge.

3. Apart from these two complaints, the Secretariat also received a total of 17 written enquiries from members of the public, which were mostly requests for copies of the Rules and Guide to the Review Body.

4. The small caseload of the Review Body only goes to reinforce the open and non-discriminatory nature of the public procurement system in Hong Kong.

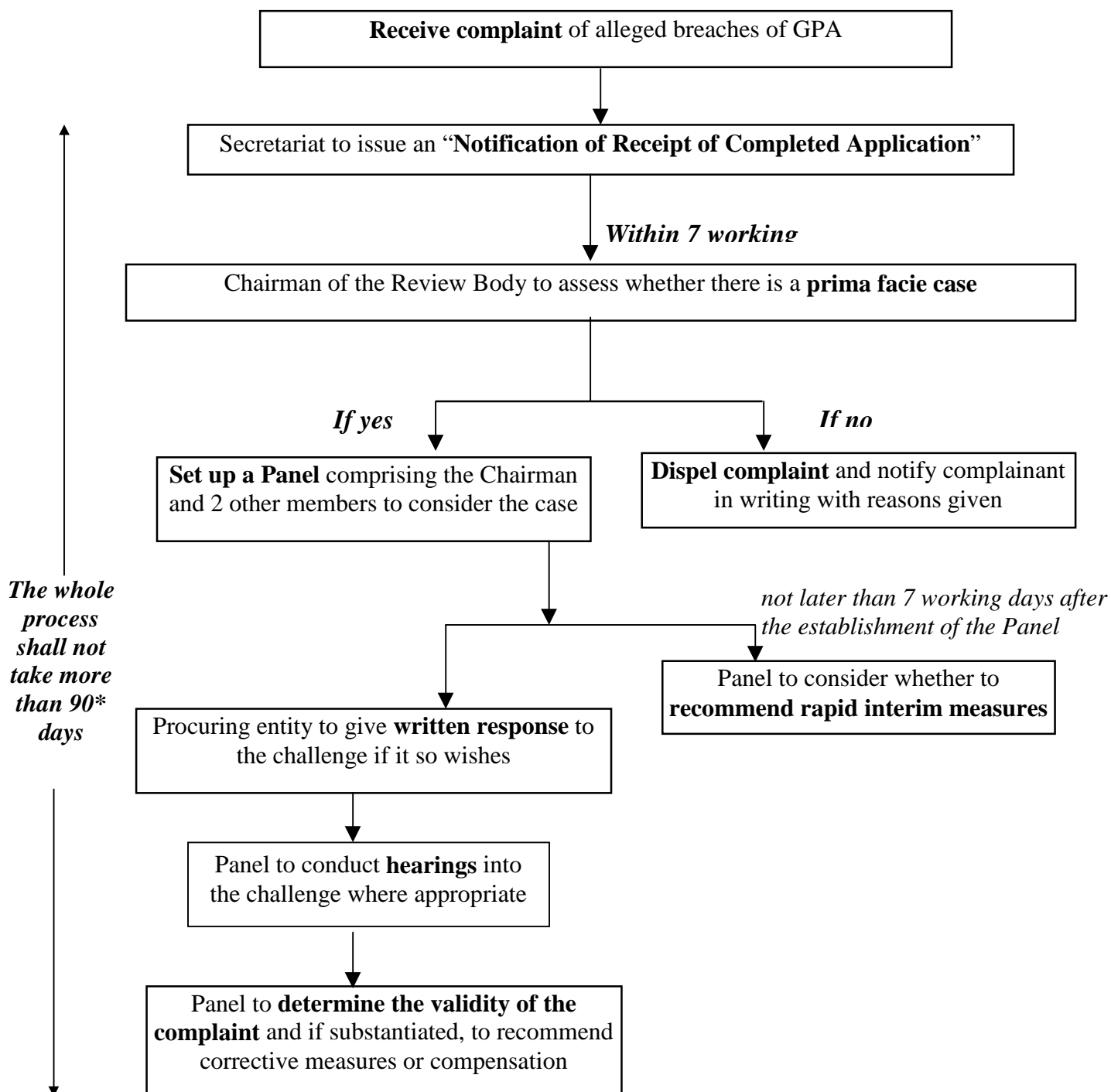
Review of the Operation of the Review Body

5 The Trade and Industry Bureau has undertaken to conduct a review of the operation of the Review Body one year after its establishment. We are seeking comments from relevant bureaux/departments as well as non-government entities on suggestions for improvements. So far, the majority indicated that the Review Body has been operating satisfactorily, and that in view of the small caseload of the Review Body last year, it appears pre-mature to conduct a full-scale review at this stage. We will continue to monitor the operation of the Review Body and improve the system where appropriate.

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Flow Chart Showing the Operation of the Review Body



Note:

1. *Remarks: The Panel may, when necessary based on the facts of the challenge, extend the time for arriving at a determination/recommendation, but in no circumstances shall the inquiry process last beyond 180 days after the date when notification of receipt of completed application is issued.
2. Panel decisions are made available to the public upon request.

Remuneration of Members of Other Bid Challenge Systems

Some FC Members enquired at the meeting on 7 January regarding the remuneration for non-official members of bid challenge systems of other parties to the GPA⁶.

2. Members may wish to note that some bid challenge systems are composed of government officials/government lawyers (e.g. US, Korea) or serving judges (e.g. Austria, Denmark), who are remunerated according to their respective salary scale. Some Parties use their courts to serve as their respective bid challenge systems (e.g. Ireland, Italy, Greece). Information of the remuneration for their members is hence not relevant to our consideration of the remuneration for non-official members of the Review Body on Bid Challenges. Also, detailed remuneration packages are often classified information.

3. So far, we have only gathered information regarding of the remuneration of the members of the Canadian International Trade Tribunal (CITT) which is relevant for our purpose. CITT is a quasi-judicial tribunal comprising a Chairman, 2 Vice-Chairmen and up to 6 other permanent members and up to 5 temporary members. The annual salary ranges are as follows:

- Chair C\$134,300 - C\$158,000⁷
(*approx. HK\$725,220 – HK\$853,200*)
- Vice-Chairmen C\$107,100 - C\$126,000
(*approx. HK\$578,340 – HK\$680,400*)
- Member C\$93,200 - C\$109,600⁸
(*approx. HK\$503,280 – HK\$591,840*)

⁶ Parties to the GPA are: Aruba; Canada; European Community and its 15 member states; Hong Kong, China; Israel; Japan; Korea; Liechtenstein; Norway; Singapore; Switzerland and the United States.

⁷ For comparison purpose, the salary of a Canadian Deputy Minister and a university president is about C\$220,000.

⁸ The Chairman may assign any one member of the Tribunal to deal with a procurement complaint. Hence the role played by a Tribunal member is different from that of a Panel member of the Review Body on Bid Challenges in Hong Kong.

4. The above salary ranges do not reflect bonuses which can be paid to the members. Such bonuses were instituted in the last two years in Canada to try to close the perceived gap between federal government employees and their private counterparts. The members also receive a benefits package, which cannot be quantified but its value can be worth 30% of the salary. Specific salaries paid to individual members of the CITT is confidential.

5. Given their very different circumstances, it is difficult to draw any direct comparison of the remuneration packages for non-official members of bid challenge systems of other Parties to the GPA even if such information is available.

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