

立法會
Legislative Council

LC Paper No. CB(2)920/17-18(04)

Ref : CB2/PL/MP

Panel on Manpower

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 26 February 2018**

Protection for employees of government service contractors

Purpose

This paper provides background information on outsourcing of government service contracts and gives an account of the relevant discussions by the Panel on Manpower ("the Panel") on issues relating to the protection for employees of government service contractors.

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

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.

under the Minimum Wage Ordinance (Cap. 608) ("MWO"), and the employee's wage should not be lower than the adjusted wage level.

4. According to the Administration, outsourcing is one of the tools for government departments to deliver public services. Whether outsourcing is required is at the discretion of individual departments having regard to their operational needs. If public services are outsourced, the procuring departments shall devise an effective monitoring mechanism to ensure that a contractor performs to standard and complies with the terms of a contract.

Deliberations of the Panel

Protection of employees under SEC

5. 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.

6. The Administration advised that it had introduced 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 might attract higher scores 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 might, in accordance with the relevant service contract, issue default notices to the service contractor who had breached the contract terms, and awarded demerit points for the relevant non-compliance items.² If a service contractor had accumulated three demerit points over a rolling period of three years preceding the tender closing date, its tender offers would not be considered by the Government in the subsequent five years.

7. The Administration further advised that in addition to the Demerit Point System, it also put in place the Debarment Mechanism under which if a service contractor was convicted of a specified offence under EO, its tender offers would not be considered by the Government for a period of five years from the date of conviction.

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

² These included failing to sign SEC with its employees, or failing to observe the contractual obligations stipulated in SEC in respect of wages, working hours and auto-payment of wages.

promptly and thoroughly investigated. LD would make every effort to take out prosecution against willful offenders and where there was sufficient evidence.

Provision of paid rest days and meal breaks

10. 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.

11. 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 contracts that relied heavily on the deployment of non-skilled workers and in no way sought to set a guideline for the private sector.

Review of policy relating to outsourcing of government services

12. Some members urged the Administration to critically review the need to convert the outsourced posts into permanent ones and recruit more civil servants if there was a long-term manpower need for services provided by the outsourced workers. 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.

13. Most members had time and again called on the Administration to conduct a comprehensive review of the policy of outsourcing government services, with a view to enhancing the protection of the concerned employees' rights and entitlements under EO. To this end, some members suggested that the Administration should amend EO to the effect that the outsourced service contractors were required to make annual upward wage adjustment for their employees. Some members also suggested that in the event of wage defaults by a service contractor, the Administration should make reference to section 43C of EO concerning the liability of a principal contractor and superior sub-contractors in the construction industry to pay outstanding wages of employees of sub-contractors and settle the outstanding wages of the affected outsourced workers.

14. The Administration advised that the adjustment of wage level of individual employees should be market driven. As regards the application of section 43C of EO to the procuring departments, the Administration drew members' attention to the fact that EO was not applicable to the Government and that section 43C of EO was confined to the construction industry. Should it be expanded to cover other trades and industries, it would involve a major policy change and immense financial implications. Moreover, the default contractor had legal obligation under EO to clear the outstanding wages and other termination payments to its employees.

15. At its meeting on 21 April 2015, the Panel passed a motion urging the Administration to, among others, conduct a comprehensive review of the existing outsourcing system, so as to strengthen the protection of entitlements of the employees concerned.

Revised guidelines on the tendering of government outsourced services

16. Members were advised that having regard to members' suggestions to incentivize contractors of government outsourced services to pay higher wages to non-skilled workers, the Administration promulgated the revised guidelines on the tendering of government outsourced services ("the revised guidelines") on 27 May 2016. The revised guidelines, which applied to service contracts that relied heavily on the deployment of non-skilled workers, required all bureaux/government departments to include by default assessment criteria on tenderers' proposed wage rates and working hours for non-skilled workers in the

marking scheme, if adopted, for tender evaluation. All other things being equal, those tenderers who were willing to pay higher wages to their non-skilled workers would obtain higher marks in the technical aspect, and hence had a better chance to compete for the contract. Nonetheless, procuring departments might propose appropriate weightings for the technical and price aspects based on their actual operational requirements for consideration by relevant tender committees.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
22 February 2018

Appendix

Relevant papers on protection for employees of government service contractors

Committee	Date of meeting	Paper
Panel on Manpower	2.12.2004 (Item I)	Agenda Minutes
Panel on Manpower	17.3.2005 (Item III)	Agenda Minutes
Panel on Manpower	21.10.2010 (Item II)	Agenda Minutes
Panel on Manpower	11.4.2011 (Item IV)	Agenda Minutes
Panel on Manpower	15.12.2011 (Item V)	Agenda Minutes
Finance Committee	6.1.2012 (Item 3)	Agenda Results
Panel on Manpower	23.5.2012 (Item V)	Agenda Minutes
Legislative Council	25.3.2015	[Question 12] Asked by: Hon KWOK Ka-ki Outsourcing of public services
Panel on Manpower	21.4.2015 (Item V)	Agenda Minutes
Panel on Financial Affairs	6.6.2016 (Item IV)	Minutes Administration's supplementary information LC Paper No. CB(1)1074/15-16(01)

Committee	Date of meeting	Paper
Panel on Manpower		Administration's response LC Paper No. CB(2)509/17-18(01)

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22 February 2018