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Panel on Manpower

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 15 January 2019**

Protection of non-skilled workers of government service contractors

Purpose

This paper provides background information on outsourcing of government service contracts and gives an account of the past discussions by the Panel on Manpower ("the Panel") on issues relating to the protection of non-skilled workers¹ engaged by government service contractors ("GSCs").

Background

2. Since 2001, the Administration has required all GSCs 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 workers for use by GSCs in order to better protect labour rights and benefits. Upon the implementation of the Statutory Minimum Wage ("SMW") on 1 May 2011, GSCs 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)

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.

("MWO"), and the employee's wage should not be lower than the adjusted wage level.

4. In 2017, the Secretary for Labour and Welfare set up an inter-bureaux/departmental working group² ("the Working Group") to explore feasible options to improve government outsourcing system ("GOS") with a view to enhancing the protection of reasonable employment terms and conditions as well as labour benefits for non-skilled workers engaged by GSCs. As set out in the Chief Executive's 2018 Policy Address, the Working Group had completed the review. The Government has accepted the Working Group's recommendations on the improvement measures in respect of government service contracts (excluding construction service contracts) that rely heavily on the deployment of non-skilled employees.

Deliberations of the Panel

Employment rights and benefits of non-skilled workers

Level of wage

5. Most members expressed concern that many non-skilled workers engaged by GSCs were remunerated just at the SMW rate, and were denied annual pay adjustment and fringe benefits. Some members took the view that GSCs should be required to make annual upward wage adjustment for their employees. Some members considered that the minimum wage level for non-skilled workers engaged by GSCs should be set no less than the latest median wage of the relevant industries so as to ensure that these workers' wage level was close to the market level. To this end, the Administration should make reference to the median monthly wages for different trades and industries as released by the Census and Statistics Department in setting the wage level in the marking schemes for tender assessment.

6. The Administration advised that while the adjustment of wage level of individual employees should be market driven, the wage levels of non-skilled workers engaged by GSCs were protected under MWO and that the SMW rate was reviewed on a regular basis. The Administration further advised that the

² The Working Group comprise representatives from the Labour and Welfare Bureau, the Financial Services and the Treasury Bureau, the Food and Environmental Hygiene Department, the Leisure and Cultural Services Department, the Housing Department, the Government Property Agency and the Labour Department.

Low-income Working Family Allowance Scheme would help relieve the financial pressure of low-income working families.

Provision of paid rest days and meal breaks

7. Some members expressed disappointment that there was no express provision in SEC requiring the provision of paid meal breaks for non-skilled workers engaged by GSCs upon the implementation of SMW. These members considered that the Government, who was the largest employer in Hong Kong, should take the lead in enhancing employees' benefits by stipulating paid meal breaks in the employment terms for non-skilled workers engaged by GSCs. Some other members, however, considered it unnecessary to stipulate paid meal breaks in the employment terms for these workers in the light of the diversity of job nature involved. These members pointed out that following the implementation of SMW and the provision of paid meal breaks by some enterprises, the increase in wage cost had eventually transferred to the consumers.

8. The Administration advised that neither MWO nor the Employment Ordinance (Cap. 57) ("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. Members were advised that while GSCs had to specify the meal breaks in SEC, they were not compulsorily required to offer pay for the meal breaks in the light of the operational difficulties in providing paid meal breaks to GSCs' employees under service contracts of some procuring departments.

Reckonable years of service

9. Some members expressed concern that consequent upon frequent change of GSCs, it had been difficult for non-skilled workers of these GSCs to accumulate continuous years of service with the same employer although they had remained in the same posts for years. This would adversely affect their statutory employment benefits such as leave entitlement, severance payment ("SP"), long service payment ("LSP") and other benefits under EO which were calculated by reference to the reckonable years of service. Some members suggested 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. Some members took the view that the wage level of non-skilled workers in the new contracts for the same jobs should not be lower than that in the previous ones.

10. The Administration advised that when awarding new contracts to GSCs, individual employees' years of service would be regarded as unbroken if their employers remained unchanged. However, it was a complicated issue to mandate the incoming GSCs to take over the workers of the outgoing GSCs and adopt the "no worse off" principle for the wage level of these workers. Firstly, if the incoming contractors had to take over the existing employees of the outgoing contractors, they would have practical difficulties in estimating their liabilities for provision of employment benefits, in particular those contingent liabilities like SP or LSP, if they were to assume the responsibility for the years of service of the outgoing contractors' 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 contracts. 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.

Government outsourcing system

Tender assessment

11. Most members took the view that Administration should improve GOS with a view to enhancing the protection of employment terms and conditions as well as labour rights and benefits of non-skilled workers of GSCs. These members called on the Administration to review the "lowest bid wins" principle in the tender assessment for outsourced services. For instance, the marking schemes for assessing service contractors should be revised by assigning a higher weighting of 70% for the technical and quality factor relating to employees' benefits, with the remaining 30% for the price factor.

12. The Administration explained that it did not assess tenders of outsourced service contracts primarily based on the "lowest bid wins" principle. There was no pre-set ceiling on the weightings of the assessment criteria and procuring departments might propose the relevant weightings based on their actual operational requirements for consideration by relevant tender committees. Procuring departments would generally specify the performance requirements in the tender specifications, whereas the employment terms and conditions of

non-skilled employees were stipulated in SEC. In general, a marking scheme used by procuring departments should normally adopt a 30%-40% weighting for the technical aspect, as against a weighting of 70%-60% for the price aspect.

13. Members were further advised that to encourage tenderers to enhance the employment terms and conditions of non-skilled workers, the Administration revised relevant guidelines in May 2016 and the wage level and working hours of non-skilled workers had become mandatory assessment criteria when procuring departments adopted a marking scheme for evaluating non-construction service contracts that relied heavily on the deployment of non-skilled workers. 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.

Demerit Point System and Debarment Mechanism

14. Members were advised that a Demerit Point System ("DPS") 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 contractors who had breached the contract terms, and awarded demerit points for the relevant non-compliance items.³ 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. In addition, the Administration had 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.

15. Noting that only one GSC had so far been suspended from tendering after having accumulated three demerit points in the past, some members cast doubt about the effectiveness of DPS. These members also expressed concern that GSCs would seldom be awarded demerit points for non-compliance of relevant items. The Administration advised that the relevant bureaux and departments were conducting a review of DPS and would keep members posted of the review findings.

³ 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.

Motions passed by the Panel

16. At the Panel meeting on 26 February 2018, the Panel passed four motions urging the Administration to, inter alia, review the tender assessment mechanism, review the content of SEC to enhance the employment benefits of non-skilled workers engaged by GSCs, and increase the deterrence of DPS.

17. The Administration responded that the Working Group would study the tender assessment criteria, content of SEC and duration of government service contracts in order to strengthen the protection of the labour rights and benefits of the eligible employees. The Working Group targeted to complete the review in the third quarter of 2018, and members would be updated on the review findings in due course.

Latest proposal to enhance the protection of non-skilled workers engaged by government service contractors

18. At the policy briefing-cum-meeting of the Panel on 16 October 2018, members were briefed on the Working Group's recommendations on the improvement measures in respect of government service contracts that relied heavily on the deployment of non-skilled employees. These included increasing the technical weighting in marking schemes for tender assessment to not less than 50%, increasing the weighting for "wage level" as an assessment criterion to at least 25 marks out of 100 marks in the technical assessment, enhancing the employment benefits of non-skilled employees including entitlement to a contractual gratuity, statutory holiday pay upon employment for not less than one month and additional remuneration for working when Typhoon Warning Signal No. 8 or above was hoisted, and encouraging procuring departments to adopt a tenure of not less than three years for the service contracts where operational situations permitted.

19. While welcoming the proposed improvement measures, some members were concerned about the actual wage increase of the workers concerned. Some members considered that the rate of gratuity and the overall weighting for "wage level" as an assessment criterion in the marking schemes for tender assessment should be further increased.

20. The Administration advised that in addition to "wage level", other consideration factors such as innovation and job security would also be taken into account in the tender assessment. Hence, the Administration did not see much room for further increasing the relative weighting of "wage level" as an assessment criterion in the technical assessment of government service

contracts. Nonetheless, it was believed that the proposed increase in the technical weighting and weighting of "wage level" and other improvement measures would bring about higher wages for workers engaged by GSCs and better protect their employment rights and benefits. According to the Administration, the proposal would incur a 6% increase in the wage bill or 4% to 5% increase in the overall cost of the service contracts.

21. Some members enquired whether the proposed improvement measures would be applicable to existing service contracts. The Administration explained that in view of the lead time required for the preparatory work, the improvement measures would only be applicable to service contracts tendered from 1 April 2019 onwards.

22. The Administration will brief the Panel on the details of the improvement measures to enhance the protection of non-skilled employees engaged by GSCs at the meeting on 15 January 2019.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
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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)
Panel on Manpower	26.2.2018	Agenda Minutes
Panel on Manpower	16.10.2018	Agenda Minutes

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