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Panel on Manpower

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 16 June 2020**

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) ("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.

4. As announced in the Chief Executive's 2018 Policy Address, the Government would introduce new measures² to enhance the protection of the employment terms and conditions as well as labour benefits of non-skilled workers engaged under government service contracts (excluding construction service contracts) that rely heavily on the deployment of non-skilled employees ("improvement measures"). The improvement measures included, among others, increasing the technical weighting and weighting of wage level in the marking schemes of tender evaluation and providing contractual gratuity to non-skilled employees engaged by GSCs, which have taken effect from 1 April 2019. The Panel discussed the improvement measures and the relevant issues at three meetings in 2019 and received views from deputations at two of these meetings.

Deliberations of the Panel

Tender assessment of the government outsourcing system

5. Most members took the view that Administration should improve government outsourcing system ("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.

6. 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. Under the improvement measures, the normal technical weighting in tender evaluation would be increased to the range of 50% to 70% and price weighting would be decreased correspondingly to the range of 30% to 50%. In addition, to encourage GSCs bidding the service contracts to increase the wages for non-skilled employees, the weighting of wage level as an assessment criterion would be increased to at least 25% in the technical assessment. With the combined effect of increasing

² The improvement measures were recommended by an inter-bureaux/departamental working group ("the Working Group") set up by the Secretary for Labour and Welfare in 2017 to explore feasible options to improve government outsourcing system. The Working Group comprised 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.

the weightings in the two aspects mentioned above, the wage level would account for at least 12.5% in the overall assessment.

7. Some members, however, considered that the overall weighting for "wage level" as an assessment criterion in the marking schemes for tender assessment should be further increased. There was a view that tenders offering the SMW rate should get no score in the technical assessment.

8. 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. As a common practice among most of the procuring departments, no score would be accorded for the wage level in the technical assessment if the wage rate was just equivalent to the SMW rate. On the other hand, a tender would obtain full score for wage level if the wage level was the highest amongst all tenders. The Administration further advised 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.

9. Some members were of the view that the weighting for working hours as well as provision of safety training and protective equipment in the tender assessment should be increased so as to improve the long working hours situation and occupational safety of non-skilled employees of GSCs.

Demerit Point System and Debarment Mechanism

10. 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 the Employment Ordinance (Cap. 57) ("EO"), it would be

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.

debarred from participating in government procurement for a period of five years from the date of conviction.

11. 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.

12. The Administration advised that during the review of GOS carried out by an inter-bureaux/departmental working group set up in 2017, a review of DPS was conducted in tandem with a view to enhancing the regulatory efforts on GSCs. With the implementation of the improvement measures, the scope of DPS would be expanded accordingly.

Employment rights and benefits of non-skilled workers

Level of wage

13. 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 considered that a wage adjustment mechanism should be incorporated in the service contracts so as to ensure that the wage level of the non-skilled employees of GSCs would not seriously lag behind the prevailing wage level in the labour market. Some members took the view that GSCs should be required to make annual upward wage adjustment for their employees.

14. As regards the wage level for non-skilled workers engaged by GSCs, some members considered that the minimum wage level 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 adopt 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.

15. 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. Moreover, there would be technical difficulties to mandate a wage adjustment mechanism in the tender specifications.

Provision of paid rest days and meal breaks

16. 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, especially those workers performing cleansing duties, 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.

17. 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. Under SEC, provision of paid meal breaks that were counted as hours worked would be reflected by a higher wage level. Notably, with the combined effect of increasing the technical weighting and the weighting of wage level in the marking scheme for tender assessment, the wage level would account for at least 12.5% in the overall assessment. As such, GSCs bidding the contracts that were offering higher wage to non-skilled employees would get higher scores, hence standing a better chance of being awarded the contract. 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

18. 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. No mark should be accorded to the tenders for new service contracts if the wage level for the same jobs was lower than that offered by the existing GSCs.

19. 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 a "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.

Entitlement to contractual gratuity

20. Most members welcomed the proposal of requiring GSCs to pay contractual gratuity to their non-skilled employees, i.e. 6% of the total wages earned by the non-skilled employees of GSCs during the relevant employment period. Some members were concerned that some unscrupulous GSCs might dismiss their employees prior to their completion of service so as to evade their statutory obligation of paying contractual gratuity. Members were advised that the Government would need to consider how to address the issue from the contractor management perspective.

21. Some members cautioned that the knock-on effect of providing contractual gratuity to non-skilled employees of GSCs would incur an increase in the wage bill of the service contracts in the private sector and thus raising the wage level of non-skilled employees across the board. The increase in wage cost would eventually be transferred to the consumers at large. The Administration advised that the contractual gratuity was to be borne by the Government as GSCs would take into account the additional wage cost in preparing the tender price.

Protection of non-skilled employees under government service contracts tendered before 1 April 2019

22. Some members considered that the improvement measures should also be extended to non-skilled employees of GSCs engaged under government service contracts tendered before 1 April 2019. Members were advised that to enable more non-skilled workers to benefit from the improvement measures, the Administration would put in place transitional arrangements for service contracts at tendering stage or already awarded during the period between the announcement of the new measures in the Policy Address on 10 October 2018 and 31 March 2019. Some members, however, remained of the view that the coverage of transitional arrangements was too narrow, and the improvement measures should be applicable to all government service contracts in force.

23. Given that non-skilled employees engaged under new service contracts from April 2019 would receive contractual gratuity, some members suggested that the Government should provide subsidy to those engaged under service contracts awarded under the old terms in order to make up the difference in pay. The Administration advised that it was a matter of fair competition among GSCs, bearing in mind Hong Kong was a signatory of the Government Procurement Agreement under the World Trade Organization. Along the principle of open and fair competition, variation to contracts and subsidy to contractors should be avoided. The Government would need to uphold the contractual spirit. While individual procuring departments could negotiate with the contractors in respect of extension of the existing government service contracts as appropriate, the Government would not require GSCs tendered before 1 April 2019 to adopt the improvement measures.

Motions passed by the Panel

24. At the meeting on 15 January 2019, the Panel passed four motions urging the Administration to, inter alia, further enhance the employment benefits of non-skilled workers engaged by GSCs in various aspects, including further increasing the weighting of the wage level as an assessment criterion, making annual wage adjustment, providing paid meal breaks and providing subsidy to non-skilled workers of GSCs engaged under existing service contracts. During the discussion on the working arrangements and labour benefits for government outsourced workers performing cleansing duties in public toilets at the meeting held on 21 May 2019, the Panel passed two motions urging the Administration to continue to enhance GOS in various aspects, covering provision of necessary clothing, equipment and rest room for non-skilled employees engaged by GSCs, as well as require GSCs providing public toilet cleansing services to provide employees with paid meal breaks.

Latest development

25. The Administration will brief the Panel on the progress report on the review of the improvement measures for non-skilled employees engaged by GSCs.

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
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**Relevant papers on the protection of non-skilled workers 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
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)
Panel on Manpower		Administration's response LC Paper No. CB(2)509/17-18(01)
Panel on Manpower	26.2.2018	Agenda Minutes

Committee	Date of meeting	Paper
Panel on Manpower	16.10.2018	Agenda Minutes
Panel on Manpower	15.1.2019 (Item IV)	Agenda Minutes
Panel on Manpower	19.2.2019 (Item V)	Agenda Minutes
Panel on Manpower	21.5.2019 (Item III)	Agenda Minutes CB(2)1576/18-19(01) CB(2)1720/18-19(01)
Legislative Council	8.1.2020	Official Record of Proceedings (Question 15)
Legislative Council	8.1.2020	Official Record of Proceedings (Question 16)
Legislative Council	22.4.2020	Official Record of Proceedings (Question 8)

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