

Hong Kong

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1.Does your legal system provide specific procedures for the award of contracts by contracting authorities?

Yes, government procurement is conducted under the Stores and Procurement Regulations (“SPR”) issued by the Financial Secretary under the Public Finance Ordinance (“PFO”). The SPR is supplemented by Financial Circulars (“Circulars”) issued by the Secretary for Financial Services and the Treasury from time to time. The procurement rules in the SPR are binding on all government bureaus and departments except financially autonomous public bodies such as the Airport Authority, the Housing Authority and Housing Department, the Hospital Authority and the MTR Corporation Limited, which are empowered to define their own procurement procedures. The regulatory framework covers the entire procurement process including needs assessment, specification of corresponding tender requirements to contract management and monitoring. It covers the procurement of goods and services as well as engineering services and construction works.

2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?

Yes, the procedures laid down in these Regulations and Circulars are fully consistent with the provisions in the World Trade Organisation Agreement on Government Procurement (“WTO GPA”).

i. For purchase of goods and services, the Government Logistics Department (“GLD”) acts as the purchasing agent for specific stores and equipment required by user departments and a few non-government organisations. The user departments will pay for these stores from their own account but rely on GLD for expertise in sourcing, tendering, negotiations and contract administration. The goods purchased by GLD on behalf of user departments are diverse: they include aircraft for the Government Flying Service, electronic parking devices for Transport Department, arms and ammunition for the Police, chlorine for water treatment plants and gases for medical and industrial purposes.

ii. Construction services are procured by the individual works departments concerned, under the general supervision of Development Bureau. In addition to giving general guidance and technical advice on tendering procedures and contract administration matters in respect of works contracts, Development Bureau maintains a register of approved works contractors and a central works contractors performance report system and provides financial vetting support where necessary.

iii. Services procured by Government also include consultancy services on financial or management aspects as well as other types of service contracts. Typical examples of service contracts tendered by Government are cleaning, property management, management of parking meters, and operation of transport and waste management facilities.

3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?

Yes, both depend on the value of the contracts. The procedures laid down in these Regulations and Circulars are fully consistent with the provisions in the WTO GPA. In general, the departments of Hong Kong Government are entitled to conduct their own procurement up to a certain value. For purchases of goods and services (excluding engineering and construction services), this threshold is set at 130,000 SDR¹ (about HKD\$1.58 million); for engineering and construction services it is set at 5,000,000 SDR (about HKD\$60.8 million). For purchases beyond these limits, to ensure the proper conduct of the procurement and to avoid intra-departmental collusion, departments have to seek the approval of particular tender boards before entering into a contract with the successful bidder. For non-Government public bodies including the Housing Authority and Housing Department, the Hospital Authority, the Airport Authority and the MTR Corporation Limited; the threshold for contracts of a value of not less than 400,000 SDR (around HKD\$4.9 million). For procurement of goods and specified services²; the threshold is set at 5,000,000 SDR (about HKD\$60.8 million) for construction services.

4. In what way does the contracting authority have to inform the market about the intended procurement?

¹ Special Drawing Rights (“SDR”) is an international currency unit set up by the International Monetary Fund. The currency US dollar equivalent to 1 SDR is about US1.56.

² Specified services stipulated in Annex 4 of Appendix I in Hong Kong, China’s Offer WTO GPA (http://www.wto.org/english/tratop_e/gproc_e/hkc4.doc) include computer and related services, rental / leasing services without operators, other business services, courier services, telecommunications services, environmental services, financial services and transport services.

Pursuant to s325(a)(ix) SPR, government procurement exceeding HKD\$1.43 million (for goods and general services) and HKD\$4 million (for construction and engineering services) in value is

normally done by the use of open and competitive tendering procedures so as to provide the existing service providers and new contractors an equal chance to bid on every project. Notice of tender invitations are published in the Government Gazette and if necessary, in the local press, on the internet and in selected overseas journals for the particular trade / products. Limited or restrictive tendering procedures are, in line with the WTO GPA provisions, only employed under specified exceptional circumstances. Where the nature of the contract (such as a contract that is time critical or one that requires particularly high levels of skills and proven reliability) dictates that tenders have to be invited from qualified suppliers/contractors, this may be done by selective tendering or prequalified tendering.

5.Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?

No specified requirement in SPR, however, it is worth noting that the government policy encourages open and fair competition.

6.Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?

No specified requirement in SPR. However, with reference to the specimen provided in Appendix III (c) SPR, for pre-qualified tendering, that the joint ventures with other firms will be considered. Therefore, by analogy, bidders are allowed to submit joint offers for pre-qualified tendering.

7.Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?

There is no relevant legislation or regulation with regard to such policy. However, with reference to the wordings set out in the Financial Services and the Treasury Bureau website (www.fstb.gov.hk/tb/eng/procurement/tendero4.html): ‘We treat all tenderers on an equal footing. We do not discriminate between products on the basis of their country of origin. In drawing up tender specifications for the goods or services to be procured, we ensure that the characteristics laid down for the goods or services will not create unnecessary obstacles to international trade. We ensure that all potential tenderers are given the same information for them to prepare their bids.’ Therefore, it is possible to submit a tender for the contract directly from abroad without having a registered or branch office in the Country.

8.If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?

With reference to s320(c) of SPR, the qualification criteria and assessment method shall not discriminate among foreign contractors/suppliers or between domestic and foreign contractors/suppliers, therefore, neither domestic nor foreign bidders shall receive preferences in the award of contracts. Additional supporting documents are needed as required by the tender documents.

9.Is a multinational bidding consortium allowed to submit a bid?

Please refer to Q6 & Q7

10.In which language do the tenders have to/can be submitted and which form is required,

e.g., written form, fax, e-mail or digital?

In both traditional Chinese and English. With reference to s340(a) SPR, for contracting authority wishing to publish tender notices in the Government Gazette, three copies of draft notices in Chinese and English have to be forwarded to Official Languages Division of Civil Service Bureau, which will forward to the Assistant Clerk to the Executive Council after vetting the Chinese translation. Both Written form and Electronic Tendering System are available for submitting tenders: <https://www.ets.com.hk/English/LoginLogoff/logon.asp>.

11.Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?

Yes, s340(d) SPR stipulates that, adequate time shall be provided to allow both local tenderers and tenderers outside Hong Kong to prepare and submit tenders. A minimum of three weeks is normally required. For procurements covered by WTO GPA, at least 40 days shall be allowed for receipts of tenders and no less than 25 days for applications to be pre-qualified to tender.

12.Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?

Pursuant to s360 SPR, a tender deposit is not normally required. However, where a tender is required as a pledge of tenderer's good faith, the tender documents shall specify the amount of the deposit and the methods of payment. Tender deposits will be refunded to unsuccessful tenderers without interest.

13.Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?

Yes, as for the selection criteria, with reference to s370 (b) SPR, the assessment panel shall examine tenders against the technical specifications, terms and conditions laid down in the tender documents to determine whether the criteria are fully conformed. The contracting authority should take into account the followings in the evaluation, inter alia:

- i.technical and financial capability of the tenderers and their past performance records. For work contracts, the guidelines laid down in the relevant Development Bureau Technical Circulars (Works) currently in force issued by the Development Bureau shall be followed (http://www.devb-wb.gov.hk/FileManager/EN/technical_circulars/C-2007-01-0-1.pdf). For service contracts of a value exceeding \$5 million, or contracts for supply of goods which require also the provision of service of a value exceeding \$5 million, financial vetting shall be conducted of a tenderer who is being considered for the award of the contract in order to ensure that the tenderer is financially capable of fulfilling the contract requirement;
- ii.Timely delivery or completion;
- iii.Compatibility with existing or planned purchases;
- iv.After sale support and service including maintenance and spare parts provisions, warranty and/or guarantees;
- v.Running and maintenance costs; and
- vi. Fair market prices.

Requirements (ii) – (iv), where applicable, shall be included in the tender specifications. In respect of requirement (v), departments should ask tenderers to provide an estimate of running and maintenance costs for the equipment or system supplied to enable a fair price comparison to be made.

On the contrary, if prior approval is obtained for the use of marking scheme³ in the evaluation of tenders, usually the tenders which attains the highest overall score

shall be recommended.

14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?

Yes, the laws of Hong Kong provides for protection prior to the award of the contract. An independent Review Body on Bid Challenges was set up on 30 December 1998 to deal with complaints from suppliers/contractors or potential suppliers/contractors on alleged breaches of the WTO GPA Agreement. A challenge shall be lodged in the prescribed form within 10 working days after the supplier/contractor knew or reasonably should have known the basis of the challenge. A 'Notification of Receipt of Bid Challenge' shall be issued to the complainant by the Secretariat once the formality of complaint is completed. The Chairman of the Review Body shall decide within 7 working days from the issue of the 'Notification of Receipt of Bid Challenge' whether a prima facie case is established for the challenge to be accepted for inquiry and a Panel to be appointed to consider the challenge. The Chairman shall take into consideration the following conditions in respect of the challenge:

- i. The challenge is made in respect of a procurement covered by the WTO GPA;
- ii. The complainant is a supplier or a potential supplier who has or has had an interest in the procurement concerned;
- iii. The information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with the provisions of the WTO GPA;

³ S350(f) SPR: Departments may consider adopting a marking scheme in the tender evaluation in accordance with the 'Guidelines for adopting a marking scheme for tender evaluation'. The use of a marking scheme for tender evaluation requires the prior approval of the relevant tender board.

- iv. The challenge is filed with the prescribed time limits; and
- v. The complainant has filed sufficient information.

The Chairman, on the basis of the information provided in the complaint form, may come to the view that the challenge should not be accepted for inquiry or he/she may request for further investigation with regard to the complaint. (http://www.tid.gov.hk/english/trade_relations/tradefora/reviewbody/reviewbody.html)

15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?

The independent Review Body on Bid Challenges will deal with all relevant procurements covered by the WTO GPA and referred to in Appendix I thereto of estimated contract value not less than the relevant thresholds specified in Annexes I and 3 of Hong Kong, China's schedule of commitments under the WTO GPA. However, no relevant provision governing the procurement which falls outside the thresholds set out in WTO GPA. Appendix I: Government Entities which Procure in Accordance With the Provisions of this Agreement Threshold: 130,000 SDR for goods and services other than construction services 5,000,000 SDR for construction services Appendix 3: All other entities which procure in accordance with the provisions of this Agreement Threshold: 400,000 SDR for supplies and services other than construction services, 5,000,000 SDR for construction services (http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm)

16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a

damage award?

There is no time limit on filing the challenges before the complainants knew or reasonably should have known the basis of the challenge. The Chairman, nevertheless, may receive and consider a late challenge (i.e. a challenge which is not lodged within 10 days), if he finds that there is a reasonable cause for such delay.

However, a challenge shall not be considered if the complaint is filed later than 30 working days after the complainants knew or reasonably should have known the basis of the challenge.

17. Can your office:

i.give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?

ii.represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?

iii.Please name a contact person within your office for questions of public procurement law!

Yes, our office has the competence to

i.Advise clients on public procurement law in Hong Kong and;

ii.Represent foreign clients in relation to litigious matter through associated firm BOASE, COHENS & COLLINS Contact: Mr. Colin Cohen – colin@boasecohencollins.com

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