

Hong Kong, China

Legal and institutional framework

Hong Kong, China recognizes the crucial importance of clear and comprehensive procurement regulations in curbing corruption in public contracting. Government procurement is conducted under the Stores and Procurement Regulations (SPR), issued as administrative regulations under the Public Finance Ordinance (PFO). Financial circulars supplement these provisions. The Prevention of Bribery Ordinance (PBO) has penal provisions for bribery. The procurement rules in the SPR are binding on all government bureaus and departments except financially autonomous public bodies, which are empowered to define their own procurement procedures. This regulatory framework covers the entire procurement process, from needs assessment and specification of corresponding tender requirements to contract management and monitoring. It covers the procurement of goods and services as well as of engineering services and construction works.

In general, the departments of Hong Kong, China's administration 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 HKD1.3 million (about USD170,000), for engineering and construction services it is set at HKD3 million (about USD390,000). 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. These boards, comprising at least three government officials, are appointed by the Financial Secretary to consider and decide independently on the acceptance of tenders.

Procurement methods and procedures

Corruption in public procurement may result from the arbitrary choice of procurement methods and proceedings. Consequently, it is important to provide clear and comprehensive regulations regarding the different methods used for public procurement. In Hong Kong, China, open and competitive tendering is the norm. Selective tendering may be used where the nature of the contract requires tenders from qualified suppliers, especially where there is a frequent need for tenders for such services or articles and not all contractors or suppliers in the market can provide the required services or articles. In these cases, procuring departments

may therefore establish lists of prequalified suppliers (i.e., approved contractors). They have to publish up-to-date lists of approved contractors and the application method yearly. To ensure open and transparent competition, in which as many tenderers as possible can participate, single-source or restricted tendering is generally allowed only with the prior approval of the Permanent Secretary for Financial Services and the Treasury. The specific circumstances under which this approach can be chosen are described in detail in the SPR.

The SPR prescribe the content of tender documents, provide mandatory standard contract forms, and the tender terms and general conditions of contract. The standard tender form contains an anti-bribery clause allowing the Government to terminate the contract without incurring any liability for compensation if the contractor or any of its employees or agents is found to have committed an offense under the PBO or any subsidiary legislation made thereunder.

Tender evaluation and notification procedures are outlined in detail in the SPR. The selection criteria are not explicitly defined, as these depend on the requirements deemed fit for each particular tender. Factors such as price, life-cycle costs, performance reliability, quality, and after-sale support may be taken into account. If a marking scheme is used for evaluating a tender, the relevant tender board has to approve the scheme in advance. The use of a marking scheme in tender evaluation and an outline of the selection criteria form part of the tender documents, and are known to tenderers.

Hong Kong, China's procurement regulations allow procurement agencies to conduct pre- and post-award negotiations under certain circumstances and in accordance with the procedures set out in the SPR. Such negotiations must be nondiscriminatory and the circumstances in which they are allowed must be stated in the invitation to tender.

Transparent and nondiscriminatory qualification criteria and proceedings are a critical precondition of transparency in public procurement. Apart from selective tendering, for which a list of approved contractors may be maintained as described in paragraph 3 above, there may be circumstances that require prequalifying tenderers on the basis of their financial and technical capability to undertake a particular project or supply a particular product. If such a prequalification exercise is required, the criteria may concern only the contractors' ability to meet the requirements of the tendered contract.

All tenderers are informed of the tender result, including the identity of the successful bidder. The tender sum and the date of award of the contract are published in the *Government Gazette* and on the Internet.

The reason for the selection of the winning bid is not always stated but unsuccessful tenderers are informed of the reason why their tenders were unsuccessful.

Safeguarding and enforcing integrity

To bolster the integrity of bidders' and agencies' staff in public procurement, Hong Kong, China has put in place conflict-of-interest regulations. Government procurement personnel have to observe the Civil Service Regulations, which lay down stringent provisions to prevent conflicts of interest and acceptance of advantages. Furthermore, the PBO prohibits bribery in the civil service and sets out sanctions such as dismissal, imprisonment, and fines. Particularly harsh sanctions are imposed for fraudulent practices in procurement. Procurement personnel are required to report any attempts of bribery to the Independent Commission against Corruption (ICAC), and specific training in integrity and corruption prevention is conducted for procurement personnel.

While no law explicitly provides for debarment, it is well-publicized administrative practice to remove a company found to have committed offenses under the PBO from the list of approved contractors and to temporarily suspend it from bidding.

In addition, regular audits of the procurement process are conducted through the independent Audit Commission and the Government Logistics Department. Information about procurement processes is kept and stored separately. The requested storing period is three months for unsuccessful tenders for contracts not covered by the World Trade Organization Government Procurement Agreement (WTO-GPA) or not less than three years for all tenders for contracts covered by the WTO GPA.

To detect any attempt to infringe procurement regulations, contractors or organizations are entitled to complain to the procuring department, the tender board, or the Office of the Ombudsman about the proceedings or the result of a tender exercise; there is no limit on the period allowed to do so. Allegations of corruption can be submitted directly to the ICAC.

Additionally, for contracts covered by the WTO-GPA, contractors or suppliers may file a complaint to the Review Body on Bid Challenges against alleged breaches of the WTO-GPA such as discriminatory qualification or selection procedures. This body comprises 12 members selected from a wide range of groups, including the legal profession. The supplier has 10 days to file the complaint from the time the supplier came to know or reasonably should have known its factual basis. The

Review Body may determine the validity of a challenge and the recommended corrective measures or compensation.

A way forward

Hong Kong, China has enacted a comprehensive and detailed procurement framework. For contracts not covered by the World Trade Organization Agreement on Government Procurement (WTO GPA), their storing period in respect of tender document of unsuccessful tenders is three months. Hong Kong, China may wish to review whether the storage period for unsuccessful tenders for contracts not covered by the WTO-GPA (three months) is long enough to allow the law enforcement agencies to investigate effectively alleged cases of corruption cases in respect of contracts not covered by the WTO-GPA.

Relevant documentation

Bilingual legal information systems containing relevant ordinances such as the PFO and PBO: <http://www.legislation.gov.hk/eng/home.htm>

Electronic Tendering System: <https://www.ets.com.hk/>

Government online information center for government procurement (dealing with government tenders, conflict-of-interest regulations, tender procedures, and other such matters): <http://www.fstb.gov.hk/tb/eng/procurement/content.html>

Online guide to the Review Body on Bid Challenges: http://www.tid.gov.hk/english/trade_relations/tradefora/reviewbody/reviewbody.html