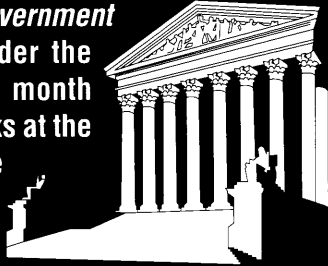


New Tender Regime Coming

In a change to existing tender practices the Government will in the future begin to comply with the renegotiated Agreement on Government Procurement under the GATT/WTO. This month J.A. McInnis looks at the background to the changes that are coming.



Some Background

The Agreement on Government Procurement, or the 'Agreement', is one of several plurilateral trade agreements which came out of negotiations for the General Agreement on Tariffs and Trade, namely the GATT Tokyo Round of negotiations and later the Uruguay Round of negotiations for formation of the World Trade Organisation. The Agreement was actually renegotiated between 1985 and 1994 by a 'Committee on Government Procurement' and the final text was opened for acceptance on April 15th 1994. In the past Hong Kong had been a party to the original Agreement but had not sought to sign or belong to the new or renegotiated Agreement until lately. Hong Kong was able to sign the original Agreement and remains eligible to sign the renegotiated Agreement because under the WTO Agreement a 'separate customs territory' may become a member of the WTO and the terms of accession are negotiated. Hong Kong has long been a separate customs territory. Many readers will be aware from news reports that China itself is currently trying to finalize its independent accession to the WTO Agreement and also many separate plurilateral trade agreements as well which could include the renegotiated Agreement. Both Hong Kong and Singapore are signatories to both the Final Act of the Uruguay Round as well as the Agreement establishing the WTO. However, neither Hong Kong nor Singapore originally rushed to sign the renegotiated Agreement. The reasons that Hong Kong did not do so were because the Agreement contained sectoral nonapplication and reciprocity provisions which Hong Kong saw as against principles of national treatment and non-discrimination which it favours. Broadly construed these principles meant in practice that Hong Kong had a fairly free hand in tendering although it accepted that it would act non-discriminatorily.

The Agreement

Very briefly, the Agreement is designed to secure greater international competition in the worldwide government procurement market or the tendering that governments undertake for goods and services. The Agreement contains detailed rules for government purchasing and how tenders should be invited and awarded. It is designed to ensure greater transparency in tendering practices and the award of contracts.

Hong Kong

Hong Kong operates a series of tender boards through the Government Supplies Department or 'GSD'. The GSD prepares and issues invitations to tender, makes recommendations to competent tender boards for contract awards, administers execution of contracts and provides information. In 1993 for example contracts awarded through GSD totalled approximately \$2.8 billion. This total is separate from tenders procured through the Government Supplies Tender Board, Public Works Tender Board, Marine Tender Board, and certain others. The Agreement itself will also apply to tenders which are invited by public sector enterprises such as the MTRC and the KCRC. These and other invitations to tender will in future be covered by the renegotiated Agreement.

Hong Kong as a Signatory

On December 5 1996 the Committee on Government Procurement held a meeting which approved Hong Kong's application for accession to the Agreement, or what is also called 'membership'. With the approval a formal deposit of a signature to the Agreement is made.

Singapore as a Signatory

Singapore in comparison applied for accession to the Agreement in November 1995. Following bilateral consultations between Singapore and the Committee on Government Procurement a decision by the Committee inviting Singapore to accede on terms as well was made on 20 September 1996. It is interesting to note that both Hong Kong and Singapore are proceeding roughly along the same timetable and will thus be making changes to their respective tender regimes which should make it easier for contractors and suppliers based in either jurisdiction to bid for each others contracts..

Summary

In summary the Agreement will have far-reaching implications for all stages of public tendering and the award of contracts in Hong Kong and other countries in the region such as Singapore which also accede to it. At present there is little oversight of the award of tenders locally. Review Boards are not assigned as a matter of course to review complaints although complaints may always be raised with the Director of Government Supplies, the relevant Tender Board itself, the Commissioner of Administrative Complaints or even the ICAC. In a few cases unsuccessful tenderers have sued but recent caselaw suggests that this route is very difficult to win upon. Without sanctions against anti-competitive or collusive behaviour such as that in many other countries the possibility for abuse is present. The Agreement will introduce new means of dealing with potential abuses and better ensuring a level playing field. Some of these changes will be looked at in part 2 of this article next month.

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