Review Body on Bid Challenges

Summaries of Panel Cases

Case No.	Brief Description
01/2019	The rejection of a tender proposal for the supply of 240,000 metric tonnes of sodium hypochlorite solution to the Government of the Hong Kong Special Administrative Region (HKSARG)
03/2017	The rejection of a tender proposal for the replacement of customs radar monitoring system ("CRMS") for the Government of the Hong Kong Special Administrative Region (HKSARG)
02/2011	The rejection of a tender proposal for the design, supply and installation of a replacement air traffic management system and the provision of related services to the Hong Kong International Airport
01/2007	The rejection of a tender proposal for the provision of maintenance services for East Kowloon, West Kowloon and Tsuen Wan Area Traffic Control Systems to the Government of the Hong Kong Special Administrative Region (HKSARG)
01/2005	The rejection of a tender proposal for the supply of digital audio recording and transcription services for the courts of the Hong Kong Special Administrative Region (HKSAR)
04/2003	The rejection of a tender proposal for the supply of a fire-fighting vessel to the Government of the Hong Kong Special Administrative Region (HKSARG)
03/2003	The rejection of a tender proposal for the supply of 174,000,000 tablets of Nifedipine sustained-release tablet 20 mg to the Government of Hong Kong Special Administrative Region (HKSARG)
02/2003	The rejection of tender proposals for Central Reclamation Phase III
01/2003	The rejection of a tender proposal for the supply of a reloadable card operated parking system ("RCOPS") and the provision of related services to the Government of Hong Kong Special Administrative Region (HKSARG)
01/2001	The rejection of a tender proposal for the supply, installation and maintenance of a system of Speed Enforcement Camera ("SEC") to the Government of the Hong Kong Special Administrative Region (HKSARG)

Review Body on Bid Challenges

Summary of Case No. 01/2019

The rejection of a tender proposal for the supply of 240,000 metric tonnes of sodium hypochlorite solution to the Government of the Hong Kong Special Administrative Region (HKSARG)

Company A (the complainant) lodged a bid challenge to the Review Body against the HKSARG (the respondent) for breaching Article XV:5 of the revised World Trade Organization Agreement on Government Procurement (revised GPA) in a tender exercise for the supply of 240,000 metric tonnes of sodium hypochlorite solution.

The complainant argued that the respondent has failed to award a contract to the supplier who had submitted the most advantageous tender or the lowest price in the tender exercise. Moreover, the complainant disagreed with the respondent's claim that it had failed to provide documentary evidence which clearly indicated that each of the tank containers proposed to be used in its tender complies with the specified requirements for the delivery of sodium hypochlorite solution (concerned tender requirements).

The complainant further contended that the respondent had failed to inform it of its unsuccessful bid promptly.

A Panel comprising the Chairman and two members of the Review Body was set up to consider the bid challenge. Neither the complainant nor the respondent had requested a hearing. Having considered the basis of the complaint with related documents in support, the factual information as well as the written representations submitted by the Parties, the Panel has reached the findings as summarized below.

1. The Panel found that the information provided by the complainant in response to the respondent's tender clarification questions in October 2018 failed to strictly comply with the concerned tender requirements in that they failed to submit valid inspection certificates (valid on the Tender Closing Date) for 10 of the 14 tank containers indicating compliance with the specified requirements for the delivery of sodium hypochlorite solution. Hence, the Panel concluded that the respondent was not in breach of Article XV:5 of the revised GPA in refusing to award the contract to the complainant for non-compliance with the concerned tender requirements.

2. The Panel however held that the respondent was in breach of Article XVI:1 of the revised GPA as the respondent only formally informed the complainant of its unsuccessful bid in writing seven weeks after the contract was awarded, and replied the complainant's inquiry that the tender result was not available when it was fully aware the contract had been awarded.

Based on the above findings, the Panel concluded that the challenge is partially substantiated and recommended the respondent to pay the cost of the complainant in this bid challenge.

Review Body on Bid Challenges

Summary of Case No. 03/2017

The rejection of a tender proposal for the replacement of customs radar monitoring system ("CRMS") for the Government of the Hong Kong Special Administrative Region (HKSARG)

Company A (the complainant) lodged a bid challenge to the Review Body against the Hong Kong Special Administration Region (HKSARG) (the respondent) for breaching Article VIII:2(a), Article X:4 and Article X:11 of the revised World Trade Organization Agreement on Government Procurement (revised GPA) in a tender exercise for the replacement of customs radar monitoring system ("CRMS").

The complainant argued that as the tenderer was required by some technical specifications in the tender to utilise output (in proprietary format) from another system, the requirement precluded suppliers other than the contractor of that other system from this tender. The respondent also required the complainant to obtain written approval by a government department on sharing signal to the CRMS and the complainant had to provide their reply with supporting documents on very short notice.

Moreover, the complainant disagreed with the respondent's claim that the tender was not covered by the revised GPA.

A Panel comprising a Chairman and two members of the Review Body was set up to consider the bid challenge. The complainant proposed that the respondent should suspend the signing of the contract with the awarded bidder as a Rapid Interim Measure (RIM). Having considered the written representations of the respondent, the Panel decided not to recommend the respondent to implement RIM, taking into account the status quo that the contract had already taken effect and the balance of convenience was in not suspending the tender contract.

The Panel conducted a one-day hearing to examine the case. The decision of the Panel is summarized as follows -

1. The Panel was of the view that tender was not covered by the revised GPA, for which the classification of tender work did not fall under the commitment of Hong Kong, China under the revised GPA. The Panel acknowledged that all government procuring entities are bound to conduct a pre-tender valuation before issuing an invitation for tender, and considered that the valuation for the subject tender had been conducted properly and in accordance with the revised GPA.

2. For the claim of breaching the revised GPA, the Panel considered that, even if tender was covered by the revised GPA, the Panel found no evidence that Articles VIII:2(a), X:4 or X:11 had been breached.

3. As the Panel could not find any substance that substantiates the alleged breach of any of the aforesaid articles of the revised GPA, the complaint was rejected.

Review Body on Bid Challenges

Summary of Case No. 02/2011

The rejection of a tender proposal for the design, supply and installation of a replacement air traffic management system and the provision of related services to the Hong Kong International Airport

Company A (the complainant) lodged a bid challenge to the Review Body against the Government of the Hong Kong Special Administration Region (HKSARG) (the respondent) for breaching the Agreement on Government Procurement (GPA) of the World Trade Organization (WTO) in a tender exercise for the design, supply and installation of a replacement Air Traffic Management System (ATMS) and the provision of related services to the Hong Kong International Airport.

The complainant alleged that the ATMS proposed by the successful tenderer did not have a proven performance record prior to the date of tender submission. As one of the Conditions of Tender provided that "[a] proposed system with no proven performance record will not be considered further", the complainant considered that the respondent had breached Article XIII.4(c) of the WTO GPA, which reads "[a]wards shall be made in accordance with the criteria and essential requirements specified in the tender documentation".

A Panel comprising the Chairman and two members of the Review Body was set up to consider the bid challenge. As the contract between the respondent and the successful tenderer had commenced, the complainant applied for no further steps to be taken by the HKSARG as a Rapid Interim Measure (RIM) with a view to preserving its business opportunity. Having considered the written representations of the respondent and the response of the complainant, the Panel decided not to recommend the respondent to implement RIM on grounds of public interest and given the correspondence thus far suggested that the issue at stake was at most a question of semantics.

Following the Panel's decision against the recommendation for an RIM, the complainant informed the Review Body that it no longer requested a hearing, but that a Paper Review would suffice. The respondent adopted a neutral position on the matter of whether a hearing should be held. The Panel then decided to consider the bid challenge based on the written submissions of both the complainant and the respondent without conducting a hearing. The decision of the Panel is summarised as follows -

1. The Panel accepted that the wording "a system with proven performance record" must be read in context with relevant provisions of the tender document, and hence the word "System" should mean "the tenderer with the umbrella System", otherwise the respondent could neither install a new sub-system nor adopt new technology, because a new sub-system by its very nature could not possess a proven performance record. The insistence on interpreting the relevant clause to mean a past system in its entirety with a proven performance record therefore could not be correct.

2. Moreover, the Panel found that the relevant sub-system of the ATMS proposed by the successful tenderer did possess the necessary "proven performance record". It had not seen any unfairness or bias which the respondent had operated on any tenderer including the complainant.

3. The Panel could see no basis to support the complainant's case and therefore dismissed the complaint.

Review Body on Bid Challenges

Summary of Case No. 01/2007

The rejection of a tender proposal for the provision of maintenance services for East Kowloon, West Kowloon and Tsuen Wan Area Traffic Control Systems to the Government of the Hong Kong Special Administrative Region (HKSARG)

Company A (the complainant) lodged a bid challenge to the Review Body against the HKSARG (the respondent) for breaching Article XIII(4) of the World Trade Organization Agreement on Government Procurement (GPA) in a tender exercise for the provision of maintenance services for East Kowloon, West Kowloon and Tsuen Wan Area Traffic Control (ATC) systems.

The complainant and another company (Company B) were the only two tenderers who had submitted tenders in full compliance with the requirements set out in the tender documents. The tender contracts were eventually awarded to Company B (the successful tenderer). The complainant considered that there was impropriety and/or irrationality in the marking scheme and HKSARG failed to make the awards in accordance with the criteria and essential requirements specified in the tender documentation. The complainant alleged that the successful tenderer failed to fulfil the requirement of "confirmation on the availability of spare parts for maintenance of in-station equipment" set out in the tender documentation as the successful tenderer should not be able to confirm the availability of five "critical" in-station spare parts. In a reply letter given by the respondent to the complainant, these five spare parts were regarded as "non-core" elements. However, this categorization of "core" and "non-core" elements was not defined or specified in the marking scheme or the tender document.

A Panel comprising the Chairman and two members of the Review Body was set up to consider the bid challenge. A one and a half-day hearing was conducted to examine the case.

The major points in the decision of the Panel are summarised as follows -

- The Panel was of the view that as long as the tenderer could reasonably assure the Tender Assessment Panel at the time of assessment that the necessary spares would be available if and when required, the Tender Assessment Panel was entitled to regard the tender requirement of "confirmation on the availability of spare parts for maintenance of in-station equipment" as satisfied. How and where the tenderer was to secure such spare parts was not the concerns of the Tender Assessment Panel.

- The successful tenderer made a confirmation on availability of spare parts in its tender proposal and two companies (Companies C and D) were named as supporting companies with their letters of support annexed. The Panel accepted that having regard to the past experience of the successful tenderer in maintaining the ATC System in Hong Kong Island, and Companies C's/D's and their staff's experience in maintaining ATC system and undertaking to hold sufficient spare parts, the Tender Assessment Panel had no reason to doubt the ability of the successful tenderer to secure the necessary spare parts for maintenance purpose.

- The Panel also accepted that the respondent's classification of in-station equipment into "core" and "non-core" elements was only to respond to the complainant's query regarding "critical" spare parts in the ATC System and not otherwise. The writer of the reply letter was not a member of the Tender Assessment Panel and he was out of town at the time of tender assessment. There was no evidence to suggest that the Tender Assessment Panel adopted a secret classification not made known to the tenderers at the time of tender.

- The Panel considered that the Tender Assessment Panel had taken into consideration all relevant matters and excluded all irrelevant matters in the conduct of the assessment. The award of full marks for the concerned item to the successful tenderer was in accordance with the criteria and requirement set down in the tender documentation. The assessment was fair and there was no procedural error.

In view of the above reasons, the Panel determined that the challenge was not substantiated and the tender exercise had not breached the GPA.

Review Body on Bid Challenges

Summary of Case No. 01/2005

The rejection of a tender proposal for the supply of digital audio recording and transcription services for the courts of the Hong Kong Special Administrative Region (HKSAR)

Company A (the complainant) lodged a bid challenge to the Review Body against the HKSAR Government (the respondent) for breaching Articles XIII(1)(b), XIII(4)(b) and (c), XVIII(2)(a), (b) and (c) of the World Trade Organization Agreement on Government Procurement (GPA) in a tender exercise for the supply of digital audio recording and transcription services for the courts.

The respondent rejected the complainant's tender proposal on the ground that the complainant failed to comply with the mandatory requirements specified in the Terms of Tender and the tender was awarded to another company (Company B). The complainant, however, asserted that the respondent was not justifiable in rejecting its tender and in awarding the contract to Company B.

A Panel comprising the Chairman and two members of the Review Body was set up to consider the bid challenge. A one and a half-day hearing was conducted to examine the case.

The major points in the decision of the Panel are summarised as follows-

- The Panel was of the view that when considering whether the challenge was submitted within the deadline (i.e. within the 30-day period), if the last day was a public or general holiday, it should be excluded from the limitation period. Hence the bid challenge was submitted within the timeframe.

- The Panel considered that the requirement of providing two full sets of fixed microphones as spares must be met by the tenderer. This requirement was independent of whatever spare microphones that might be used in the Judiciary, and of the Contractor's obligation to transport spare parts and its rights to use government spare parts. The complainant's failure to comply with this requirement had entitled the respondent to reject the tender proposal.

- The Panel considered it not reasonable to give only two days to the complainant to clarify simple matters of its tender proposal. However, it did not affect the rejection of the complainant's tender because of its failure to comply with the requirement of providing spare microphones.

- The Panel considered that all tender proposals had received the same treatment by the tender evaluation team and did not see any unfair or discriminatory treatment by the respondent against the complainant.

- The Panel considered that the alleged breaches of the contract terms by Company B, if they existed at all, were only minor breaches in post award performance and were matters of contractual liability. There was no evidence showing that Company B was ineligible for the award.

In view of the above reasons, the Panel determined that the challenge was not substantiated and the tender exercise had not breached the GPA.

Review Body on Bid Challenges

Summary of Case No. 04/2003

The rejection of a tender proposal for the supply of a fire-fighting vessel to the Government of the Hong Kong Special Administrative Region (HKSARG)

Company A (the complainant) lodged a bid challenge to the Review Body against the HKSARG (the respondent) for breaching Article XIII (4) (b) of the World Trade Organization Agreement on Government Procurement (GPA) in a tender exercise for the supply of a new fire-fighting vessel.

The respondent rejected the complainant's tender on the ground that the complainant could not conform to the mandatory warranty requirements and the requirements on financial information. The complainant, however, asserted that the respondent misconstrued the terms of the warranty provided and failed to recognize that the financial information submitted did meet the requirements in the tender invitation.

A Panel comprising the Chairman and two members of the Review Body was set up to consider the bid challenge. As neither party requested a hearing and the Panel did not find it necessary to conduct a hearing, both the complainant and the respondent supplied the Panel with written submissions. The decision of the Panel is summarized as follows -

1. The Panel was of the view that the complainant's warranty offer, when properly construed, served the mandatory warranty requirements, and this ground alone should not have prevented the complainant's tender from being further examined by the respondent.

2. On financial documentation, the Panel considered that the complainant had failed to provide its audited financial statement in a form that enabled the respondent to assess complainant's financial capability. The Panel agreed that such failure was sufficient to justify the respondent's rejection of the complainant's tender.

3. The Panel rejected this complaint and concluded that there had not been a breach of the GPA.

4. The Panel was however concerned that the procuring entity's interpretation of the warranty offered by the complainant was somewhat uncommercial. The Panel advised that a course in interpretation of commercial documents be provided to officers carrying out the screening process.

Review Body on Bid Challenges

Summary of Case No. 03/2003

The rejection of a tender proposal for the supply of 174,000,000 tablets of Nifedipine sustained-release tablet 20 mg to the Government of Hong Kong Special Administrative Region (HKSARG)

Company A (the complainant) lodged a bid challenge to the Review Body against the HKSARG (the respondent) for breaching Articles III, IV, VI and XII of the World Trade Organization Agreement on Government Procurement (GPA) in a tender exercise for the supply of 174,000,000 tablets of Nifedipine sustained-release tablet 20 mg.

The respondent said that although the price offered by the complainant was the lowest among the tenderers, its tender proposal was not accepted since the holder of the Certificate of Registration issued by the Pharmacy and Poisons Board of Hong Kong as provided by the complainant in its tender proposal was not the complainant itself. Besides, there were discrepancies between the drug samples and the information and data of the product specification submitted by the complainant. Further, the complainant failed to provide all the required documentary evidence as set out in the Conditions of Tender.

The complainant, however, maintained that for pharmaceutical products manufactured outside Hong Kong, the required submission of marketing authorization issued by the national control authority of a member country of the International Conference on Harmonization (ICH), the People's Republic of China or Australia as set out in the Conditions of Tender created unnecessary obstacles to international trade. The complainant also considered the requirement a form of discriminatory treatment regarding the country of origin, hence breaching Articles III and IV of the GPA. Moreover, the complainant added that the Conditions of Tender did not require that as far as the pharmaceutical product was concerned, the tenderer should be the holder of the Certificate of Registration issued by the Pharmacy and Poisons Board of Hong Kong, and that each tablet should bear the printed information of its major ingredients. Therefore, the rejection of the complainant's tender proposal by the respondent on the above grounds was a breach of Article VI and paragraph 2(g) of Article XII of the GPA.

A Panel comprising a Deputy Chairman and two members of the Review Body was set up to consider the bid challenge. The complainant proposed that the respondent should suspend the execution of the contract as a Rapid Interim Measure (RIM) to allow a negotiation between the two parties. Having considered the written representations of the respondent and the response of the complainant, the Panel decided not to recommend the respondent to implement RIM on grounds of public interest.

The Panel conducted a hearing to examine the case on 15 August 2003. The decision of the Panel is summarized as follows:

1. The Panel considered the standard of ICH an international standard. The adoption of the ICH standard was in conformity with paragraph 2(b) of Article VI of the GPA. Moreover, manufacturers of non-ICH member countries could apply to any ICH member country for the granting of marketing authorizations. Thus, the relevant condition of tender was not discriminatory.

2. The Panel accepted the grounds on which the respondent rejected the tender proposal offered by the complainant.

3. In view of the above reasons, the Panel determined that the tender exercise had not breached the GPA.

Review Body on Bid Challenges

Summary of Case No. 02/2003

The rejection of tender proposals for Central Reclamation Phase III

Three companies (Company A, B and C) lodged bid challenges to the Review Body against the Hong Kong Special Administrative Region Government (the respondent) for breaching the World Trade Organization Agreement on Government Procurement (GPA) in a tender exercise for the Central Reclamation Phase III.

A Panel comprising the Chairman and two members of the Review Body was set up to consider the various complaints made by the complainants. The Panel conducted a five-day hearing to examine the case.

The Panel was of the view that Company A had established a breach of the GPA with regard to its complaint regarding a tender condition on pricing certain portion of the work, namely the Special Condition of Tender Clause 2 (SCT2). According to SCT2, failure to price the tender in accordance with the condition may invalidate the tender. Company A was able to comply with the condition and it had the highest score among the tenderers. However, the respondent decided eventually not to apply the SCT2. Company A was then no longer the lowest bidder.

The Panel's recommendations in respect of this bid challenge are as follows :

1. The Panel recommends the procuring entity asks both Company A and the successful bidder to re-tender.

2. If the Respondent feels unable to accept the above recommendation because it has entered into a binding contract with the successful bidder, the Panel asks the Procuring Entity to insert in all tenders a clause which enables the suspension of the implementation of the successful contract for so long as the contract is subject to a review by the Panel.

The Panel also made general and specific observations relating to confidentiality, transparency and burden of proof.

For the other challenges raised by the three companies, the Panel did not find that there had been any breach of GPA.

Review Body on Bid Challenges

Summary of Case No. 01/2003

The rejection of a tender proposal for the supply, delivery, installation, commissioning, maintenance, training and warranty for a reloadable card operated parking system ("RCOPS") and the provision of other related services to the Government of Hong Kong Special Administrative Region (HKSARG)

Company A (the complainant) lodged a bid challenge to the Review Body against the HKSARG (the respondent) for breaching Article XIII.4 of the World Trade Organization Agreement on Government Procurement (GPA) in a tender exercise for the supply, delivery, installation, commissioning, maintenance, training and warranty for a reloadable card operated parking system ("RCOPS").

The respondent rejected the complainant's tender because the former claimed that the latter's technical proposal were inferior to the successful tenderer in the aspects including PDR Memory Capacity, PDR Operational Capabilities, Back-end System Capability, CCS system Memory Capacity, Battery and Law Enforcement indication. However, the complainant alleged that the respondent failed to evaluate or properly assess complainant's offer and therefore in breach of the GPA.

A Panel comprising the Deputy Chairman and two members of the Review Body was set up to consider the bid challenge. Having preliminarily examined the case, the Panel recommended the respondent to suspend the tendering procedures until the end of the hearing as a Rapid Interim Measure (RIM). The respondent at first accepted the Panel's recommendation, and yet, due to the outbreak of SARS, the hearing did not commence until early May 2003. As there was a certain urgent to have the 1,000 parking meters and system well tested in order to see what subsequent modifications would be necessary, the respondent requested that the RIM should be then discharged. Having regard the public interest on the issue, the Panel granted a discharge of the RIM.

A five-day hearing was conducted to examine the case. The decision of the Panel is summarized as follows -

1. The respondent breached the GPA in the subject procurement as the respondent failed to make proper queries to the complainant and therefore the technical assessment of the complainant's offer was flawed. Furthermore, some of the members of the Assessment Panel did not have enough technical knowledge to properly and fully understand the technical materials contained in the tender document. As a result, they wrongly applied the assessment criteria and misinterpreted the technical requirement of the specifications.

2. Since the Panel is not able to determine if the complainant would have won the Tender if the respondent had fully complied with the GPA, the Panel will not recommend as corrective measures that the Tender awarded to the successful bidder be set aside.

3. The Panel recommended the respondent should only appoint properly qualified persons to Assessment Panels to assess technical submissions.

4. The Panel recommended that the determination on the confidentiality of any information provided or to be provided to a Panel be completed before the commencement of the inquiry.

5. The Panel further recommended to the Government to implement the recommendation made in Case No. 01/2001 concerning the insertion in all tenders covered by the GPA, a clause which enables the procuring entity to suspend implementation of the successful contract for so long as the contract is subject to a review by a Panel set up under the Review Body.

Review Body on Bid Challenges

Summary of Case No. 01/2001

The rejection of a tender proposal for the supply, installation and maintenance of a system of Speed Enforcement Camera (SEC) to the Government of the Hong Kong Special Administrative Region (HKSARG)

Company A (the complainant) lodged a bid challenge to the Review Body against the HKSARG (the respondent) for breaching Articles III.1 and XIII.4 of the World Trade Organization Agreement on Government Procurement (GPA) in a tender exercise for the supply, installation and maintenance of a SEC system.

The respondent rejected the complainant's tender because the former claimed that the latter's proposed SEC system failed to meet tender specifications in respect of the system power supply and the photo image resolution requirement. However, the complainant alleged that the respondent had wrongfully and in breach of GPA rejected its offer. The complainant also alleged that the successful tenderer, Company B, was incapable of undertaking the contract in accordance with the requirements of the tender without breaching its intellectual property rights (IPR). Apart from compensation for loss and damage suffered, the complainant requested the suspension of the procurement procedures under the tender.

A Panel comprising the Chairman and two Members of the Review Body was set up to consider the bid challenge. Having preliminarily examined the case, the Panel recommended the respondent to suspend the procurement procedures until the end of the hearing as a Rapid Interim Measure (RIM). The respondent accepted the Panel's recommendation.

A two-day hearing was conducted to look into the case. The decision of the Panel is summarised as follows -

1. The respondent made an error in rejecting the complainant's tender. There was a breach of Article III.1 of the GPA by the respondent in that the complainant's tender was incorrectly rejected for alleged "non-compliance". Accordingly, a less favourable treatment was accorded to the complainant when compared to the treatment afforded to other tenderers. The respondent also breached Article XIII.4(c) of the GPA because the award was not made in accordance with "the criteria and essential requirement" specified in the tender, since there was no justifiable cause for rejection of an otherwise compliant tender.

2. The Panel considered that it was not the correct body to determine the claims relating to IPR. In any event, the complainant failed to satisfy the Panel that Company B was not "capable" as alleged to undertake the contract.

3. The Panel agreed to lift the RIM imposed on the respondent because the complainant's tender price was considerably higher than all the other tenders, and even if it had reached the evaluation stage, it would not have been successful on the ground of price.

4. The complainant brought this case to the Panel relying on two separate grounds of challenge, i.e. its tender was wrongfully rejected and the successful tenderer, Company B, was not capable of undertaking the contract without infringing its IPR. The first was upheld but the second was rejected. The Panel therefore ruled that the respondent should pay the complainant one half of its reasonable costs of the hearing.

5. This decision explains the working of the GPA and sets out some of its material terms. It also explains the circumstances of its adoption in Hong Kong and also attaches the Rules of Operation of the Review Body on Bid Challenges.