

## **Housing Department's tendering arrangement for the lease of a shop in a housing estate Investigation Report**

The complainant complained to this Office against the Housing Department (“HD”) in October 2022.

### **The Complaint**

2. The complainant ran a plumbing and electrical repair shop in one of HD’s housing estates. In June 2022, he submitted a rental tender for another shop designated as “plumbing and electrical repair” (“the Shop”) in the housing estate. On 7 July, HD wrote to inform him that his tender did not succeed because he was already running a shop providing the same services in that housing estate.

3. According to the complainant, HD would lay down in the Special Conditions of Tender of some shops that tenders from bidders operating the same trade as the designated trade of the shop being put out to tender may not be considered. Since the Special Conditions of Tender of the Shop did not include such condition, he had not breached the conditions of tender. Moreover, three business operators in the same housing estate were each operating two or three shops. HD should not reject his tender on the grounds that he was already running a plumbing and electrical repair shop in the housing estate. Besides, HD had set a much lower Reference Rent for the Shop compared with that of his shop in the same housing estate.

4. In sum, the complainant was dissatisfied with HD mainly because:

- (1) HD had not specified in the Special Conditions of Tender that tenders from bidders operating the same trade in the housing estate concerned may be rejected. HD then mistakenly considered his tender to have violated tender conditions and disqualified him from bidding for the lease of the Shop and rejected his tender (“**Allegation (1)**”);
- (2) While the Special Conditions of Tender of the Shop did not stipulate that tenders from bidders operating the same trade in the housing estate concerned may not be considered, the complainant noticed that the

Special Conditions of Tender of other shops had included this condition. Nevertheless, bidders would not be able to tell from the vague meaning of the condition HD's criteria for approving tenders and the factors to be considered in determining priority. That was in contrary to the principles of transparency and fairness (“**Allegation (2)**”); and

- (3) HD had set a much lower Reference Rent for the Shop, which was unfair to him (“**Allegation (3)**”).

## **Our Findings**

### *Procedures for Rental Tendering for Shops and Relevant Principles*

5. In 2000, the Commercial Properties Committee (“the Committee”) under the Hong Kong Housing Authority (“HKHA”) approved the principles of and guidelines for the leasing of shops. The major principles specified in the Committee paper include: the commodities and services provided by the winning bidder should meet the local needs in terms of variety, quality and price; open and effective competition are encouraged to avoid monopoly as far as practicable; and the best return for HKHA should be achieved without precluding the aforesaid principles. On prevention of monopoly, the guidelines further stipulate a general principle that where this is a second shop available for operating an existing trade in a housing estate, it should not be leased to the operator running the same trade in the estate if possible. Nevertheless, the existing tenant might be granted the tenancy if no other bidders offer a reasonable tendered rent for the shop.

6. Where a commercial property (including a shop) under HKHA is put out to tender, interested parties will submit a bid indicating the tendered rent and the tenancy will be granted to the highest bidder. On the tender closing date, HD will open and scrutinise all the tenders. A list of shortlisted tenders will be compiled and the cheque or cashier's order of the deposit attached to those enlisted will be banked in. A Chief Estate Surveyor of HD will then examine whether the tender of the highest bidder is acceptable.

7. Prior to putting out a shop to open tender, HD will set the Special Conditions of Tender for the shop based on the latest situation of the trade, facilities and the housing estate concerned. The Special Conditions of Tender usually include a condition

stipulating that tenders from bidders operating the same trade within the housing estate concerned, as the prescribed in the tender, may not be considered (“the Condition”). The original version of the Condition reads, “*tenderers are reminded that tenders from any persons/companies already operating the same trade or from those who have successfully bid for a tenancy of the same trade in this estate/commercial centre (whether a tenancy agreement has been signed or not) may not be considered.*”

### ***Background and Sequence of Events***

8. In June 2022, HD put out the Shop to open tender for operation of plumbing and electrical repair services for a tenancy period of three years. The advertisement of the invitation to tender was published on newspaper and the website of HD. The Special Conditions of Tender of the Shop did not include the Condition mentioned in the preceding paragraph.

9. The closing time for tenders for the lease of the Shop was 10:00 a.m. on a day in June 2022, and all the tenders submitted were opened by HD’s tender team. Having scrutinised all the tenders, the team shortlisted those satisfying the Special Conditions of Tender (including the one from the complainant) and banked in the cheques or cashier’s orders attached to the tenders for deposit payment.

10. On 7 July 2022, HD wrote to the complainant informing him that his tender did not succeed because there was “inappropriacy” in it (i.e. he was already operating the same trade in the housing estate concerned).

### ***HD’s Response***

#### Allegation (1)

11. HD explained that the Special Conditions of Tender of the Shop did not include the Condition (see **paras. 7 and 8**) because there were quite a few vacant shops when the Shop was put out to tender, and tenders from existing tenants already operating plumbing and electrical repair services in the housing estate might still be considered if there were no other tenderers. Hence, HD had not put the Condition in the Special Conditions of Tender of the Shop so that existing tenants operating plumbing and electrical repair services in the housing estate would not be discouraged from bidding.

12. HKHA’s invitation to tender for leasing of shops is part of its commercial

operation. HD's omission of the Condition in the Special Conditions of Tender aimed to attract more tenders so as to increase the chance for leasing the Shop, and that was a commercial decision in line with the major principle of achieving the best return for HKHA (see **para. 5**). With or without the Condition in the Special Conditions of Tender, HD would consider the same factors in determining which tenderer should be granted the lease. Hence, it would not affect the result of the tender exercise or cause unfairness to the complainant.

13. The complainant's tender satisfied the Special Conditions of Tender, and therefore the complainant was enlisted as one of the eligible bidders. He was not barred from participating in the tender for leasing the Shop (see **para. 9**).

14. It was specified in the General Conditions of Tenders of the Shop that HKHA does not bind itself to accept any offer and is not bound to accept an offer with the highest offer or any offer at all. The complainant was a tenant operating a plumbing and electrical repair shop in the housing estate's market at the time he submitted his tender. As there were other tenderers offering reasonable tendered rent for the Shop, HD considered that local residents should be given more choices of plumbing and electrical repair service providers. Therefore, after scrutinising the shortlisted tenders (including the complainant's), HD decided to reject the complainant's tender, hence he was not granted the tenancy. Such decision was based on the principles of and guidelines for the leasing of shops (see **para. 5**).

15. HD clarified that the complainant's tender was rejected, not because it could not satisfy the conditions of tender, but because the complainant was not chosen in the tender process. Had the complainant been the only tenderer bidding for the lease of the Shop with a reasonable tendered rent, he would have been awarded the tender. HD admitted that it was unsatisfactory that its letter to the complainant dated 7 July 2022 had caused misunderstanding by indicating that the failure of his tender was due to "inappropriacy" (see **para. 10**).

16. As regards the complainant's allegation that three operators were running more than one shop within the housing estate concerned (see **para. 3**), HD explained that those operators were awarded the tenders for the tenancy of more than one shop in the estate under different circumstances, which included that there was only one tender submitted during the tender exercise, and the business to be operated in the second outlet was slightly different from that of the operators' original shop.

### Allegation (2)

17. HKHA explained that the Condition served as a reminder for prospective tenderers, especially the existing tenants, to consider participating in the tender exercise. HKHA's invitation to tender for shop rental is part of its commercial operation and it may have different considerations at different times for an individual shop. After reviewing the situation, HD considered that inclusion of the Condition in the Special Conditions of Tender as a standing condition may discourage existing tenants from submitting a tender, which would in turn undermine competition and make it impossible to achieve the best return for HKHA. Hence, HD was of the view that it should continue to consider on a case-by-case basis whether the Condition shall be included in each respective open tender for leasing of shops, so as to safeguard the interests of HKHA.

18. HD would peruse each shortlisted tender and consider factors including the details of the tender received and the tendered rent, the combination of shops and business environment of all existing shops in the housing estate concerned, whether the tenderer was an existing tenant and the local demand.

### Allegation (3)

19. Reference Rent, as specified in the Special Condition of Tender, is determined with reference to the rental of HKHA's properties and private properties in the market as well as the trade, location and size of the shop concerned, the population of the housing estate and business environment.

20. The Reference Rent, which is for tenderers' reference, is the expected rent assessed based on the market information prior to open tender. The monthly rental for the shop will be determined by the tendered rents from tenderers. Upon receipt of the tenders, HD will assess whether the tendered rents from tenderers are reasonable with reference to the latest market rates. Hence, even if a tenderer offers a rent identical to or higher than the Reference Rent, it does not mean it is reasonable. As the location and business environment of the shop operated by the complainant was different from those of the Shop, the rents of the shops are not comparable.

## **Our Comments**

### ***Allegation (1)***

21. We have scrutinised the information provided by HD, including the principles of and procedures for the leasing of HKHA's shops, the tendering documents of the Shop and HD's relevant work records. HD clarified that the complainant's tender satisfied the conditions of tender and relevant information showed that the complainant was shortlisted as an eligible tenderer, which means he was not rejected from the tender exercise for leasing the Shop (see **paras. 9 and 13**). In other words, HD had not disqualified him from bidding. Moreover, the complainant's tender had in no way been affected whether or not the Special Conditions of Tender had included the Condition (see **para. 12**). After examining all shortlisted tenders (including the complainant's), HD did not award the tender to the complainant because it intended to bring in other service providers of plumbing and electrical repair. In our view, that was policy and commercial consideration, which is in line with HKHA's principles and guidelines to prevent monopoly (see **paras. 5 and 14**).

22. Nevertheless, we find that HD had not accurately described the facts when informing the complainant of the tender result (see **paras. 10 and 15**), which might have caused the complainant to misunderstand that he had been disqualified from bidding. In our opinion, HD should review the way it informs tenderers of the tender results so as to avoid misunderstanding.

23. In light of the analysis in **paragraphs 21 and 22**, we consider Allegation (1) unsubstantiated but there were other inadequacies on the part of HD.

### ***Allegation (2)***

24. We consider that the meaning of "may not be considered" in the Condition is not absolute and is confusing as it could be interpreted in different ways. We have reservation about HD's considerations in determining whether the Condition should be included in the Special Conditions of Tender (such as inclusion of which would remind prospective tenderers to consider whether to bid for the lease, discourage existing tenants to submit tenders which would in turn undermine competition). Moreover, needless to say, not all tenders will succeed. Instead of predicting whether prospective tenderers will be discouraged by the Condition, the primary task for HD is to enable prospective tenderers to make informed decision (including whether to submit a tender).

25. In our opinion, how HD ensures that a tender exercise is processed in an open, transparent and fair manner is more important than the Condition itself. While HD would consider commercial factors relating to the leasing of shops, as the executive arm providing public rental housing and ancillary facilities including shops in public housing estates, from the perspective of public administration, HD should at the same time ensure transparency of the assessment criteria for tender exercises. That is to enable prospective tenderers to make informed decisions. The procedures for processing tenders should also be fair, open and specific to attract more tenders that are competitive and meet the conditions, so that the most suitable operator can be selected.

26. Moreover, we notice from the information provided by HD that one of the Department's principles for the leasing of shops is to facilitate open and effective competition, which includes transparent rental arrangements as far as practicable. As regards the complainant's allegation that HD had failed to make available to bidders the criteria adopted in scrutinising tenders and factors in determining priority, we have studied the tendering documents of the Shop and found no mention of such criteria and factors, which was in contrary to the aforesaid principles. In our view, the fact that HD did not make available to tenderers the principles for approving tenders is against its intention to enable reasonable, fair and transparent tender exercises.

27. We have made reference to Government's arrangements for other types of tenders and noticed that those tendering documents usually contain a brief account of what factors the department concerned would consider in approving tenders and the related process. For example, the previous and current performance of a tenderer, assessment criteria regarding technical and fees, etc. Among different types of tenders, although the conditions and contents may vary, they share common principles of openness and transparency. Regarding the shops under HKHA, considering the principle and practice of prevention of monopoly (see **paragraph 5**) is overarching, and that the tendered rent is not the only consideration in assessing tenders, HD should consider explaining the general principle of prevention of monopoly and relevant considerations to tenderers through proper channels (whether or not such information would be set out in the conditions of tender). The purpose is to ensure transparency of information for prospective tenderers to make informed decisions and to avoid similar disputes with tenderers. Besides, it can also help members of the public and tenderers to monitor the tender process so as to prevent impropriety. In fact, a Legislative Council paper reveals that HD had previously explained the letting and rent policies on HKHA's shops, stating concisely the criteria and practice for prevention of

monopoly<sup>Note</sup>, which means such information could be made public. We consider such criteria rather straightforward, and inclusion of the information in the tendering documents will allow prospective tenderers to understand the requirement.

28. In view of the analysis in **paragraphs 24 to 27**, we consider Allegation (2) substantiated.

### ***Allegation (3)***

29. HD had already explained what factors it would consider when setting the Reference Rent (see **paras. 19 and 20**). As the setting of Reference Rent is HD's professional judgement, which is not an administrative matter subject to our investigation, we would not comment on this.

### **HD's Response to Our Comments**

30. As regards Allegation (1), HD considered that although HD had not accurately described the facts in the letter to the complainant, the reason for rejecting his tender was clearly explained. Besides, HD later clarified the matter with the complainant by writing and by phone. Hence, HD considered that the notification letter could be amended to better describe the facts, but it did not amount to inadequacy.

31. Regarding Allegation (2), HD explained that in vetting the tenders for leasing shops, it usually awards the tender to the highest bidder. This principle is made public on the websites of HKHA and HD. Nevertheless, such principle of "awarding the tender to the highest bidder" may not be applicable in some cases such as when a tenderer is a former tenant having records of breaching tenancy conditions. HD would put the factors that may affect the vetting of tenders as standard conditions and include them in the Conditions of Tender. That said, the principle of prevention of monopoly does not necessarily render the principle of "awarding the tender to the highest bidder" not applicable. Where there are no other offers of reasonable tendered rent, an existing tenant may be granted the lease of another outlet. Hence, based on commercial consideration, HD did not include the condition relating to prevention of monopoly as a standing condition to safeguard HKHA's interest.

---

<sup>Note</sup> Paragraph 8.1 of the Paper No. CB (1)1277/01-02(01) of the Legislative Council's Panel on Housing: "Where there is more than one operator for a designated trade, however, it is HA's policy that the second outlet should not be let to the tenant of the first, or an associate of that company, unless no other operator comes forward."



32. According to HD, when other Government departments put out shops to tender, they usually do not publish other principles for approving tenders. The assessment criteria of the technical aspect we mentioned (see **para. 27**) do not apply to shops whose lease will be awarded subject to the tendered rent offers. Given that the contents of tenders for other types of properties are different from those of commercial properties, it is difficult to compare their vetting considerations. When vetting tenders for leasing shops, HD will take into account a number of factors, which is the Department's commercial consideration and professional judgement. It is difficult for HD to simply set out the criteria for approving tenders and factors in determining priority. In HD's opinion, the relevant procedures for tender exercises for shops have been reasonable, fair and transparent.

### **Our Further Comments**

33. Regarding Allegation (1), we consider that clear and accurate notification to tenderers of the tender result is to ensure and demonstrate a fair and transparent process of tender exercise, which is of paramount importance. On HD's notification letter to the complainant, his tender was rejected because there was "inappropriacy" in it. In fact, the complainant's tender had not breached the conditions of tender. Despite HD's explanation that the "inappropriacy" mentioned was the fact that the complainant was already operating the trade prescribed in his tender in the same housing estate (see **para. 10**), the notification letter had still failed to accurately describe the situation and caused misunderstanding. This Office, therefore, maintains our views about Allegation (1) in the above.

34. Regarding Allegation (2), we mentioned other Government departments' tendering arrangements to explain the need for a general principle of maintaining transparency in tender exercise. Although HD noted that it was difficult to simply set out the criteria for assessing tenders and the factors in determining priority (see **para. 32**), we consider that HKHA had already established the major principles and relevant guidelines for leasing of shops on which HD vetted tenders, and HD should, therefore, allow tenderers to know those principles and considerations to ensure a transparent process of tender exercise. This complaint case demonstrates that HD's failure to explain clearly to tenderers the principle and practice of prevention of monopoly had led to disputes and complaints. Although HD had emphasised the principle of prevention of monopoly does not necessarily render the principle of "awarding the tender to the highest bidder" not applicable, and it had not included this in the Condition

of Tenders based on commercial consideration (see **para. 31**), HKHA had made it clear that prevention of monopoly is a general principle which, among others, HD should follow when vetting tenders. Hence, we are of the view that HD should let tenderers know about this general principle so that the tenderers would know under what circumstances existing tenants would be allowed to rent the second outlet in the same housing estate (see **para. 5 and Note**). In view of the above, we maintain our views on Allegation (2).

## **Conclusion and Recommendations**

35. Overall, we consider this complaint **partially substantiated**.

36. We have the following recommendations to HD:

- (1) review the description of tender results in the notification letter to tenderers to avoid misunderstanding; and
- (2) consider explaining to tenderers through proper channels the general principle of prevention of monopoly and considerations pertinent to the vetting of tenders for leasing shops.

**Office of The Ombudsman**

**September 2023**

**We will post the case summary of selected investigation reports on social media from time to time. Follow us on Facebook and Instagram to get the latest updates.**



**Facebook.com/Ombudsman.HK**



**Instagram.com/Ombudsman\_HK**