

Bills Committee on Building Management (Amendment) Bill 2005

Procurement by Owners' Corporations and Managers

1. At the meeting of the Bills Committee on 17 May 2005, Members raised concerns about the proposed tender procurement requirement to be imposed on owners' corporations (OCs) and managers under the Bill, and requested the Administration –

- (a) to address the concern that increasing the threshold from \$100,000 to \$200,000 might lead to more disputes, as the increase would mean giving OCs more discretion in the procurement of goods and services;
- (b) to spell out in the Building Management Ordinance (BMO) the sorts of goods or services which could be regarded as “urgent items” and needed not go through the required procurement procedures; and
- (c) to explain how the Administration could ensure the enforceability of the proposed amendments to the tender procurement provisions under the BMO (especially for buildings without OCs), since the Administration would not introduce any penalty clauses to address non-compliance or make provisions to invalidate procurement contracts which had not gone through the proposed procurement requirements.

Below are the responses of the Administration to Members' concerns.

Existing Provisions in the BMO

2. The existing section 20A(2) of the BMO stipulates that –

“Any supplies, goods or services the value of which exceeds or is likely to exceed-

- (a) the sum of \$100,000 or such other sum in substitution therefor as the Authority (*i.e. the Secretary for Home Affairs*) may specify by notice in the Gazette; or
- (b) a sum which is equivalent to 20% of the annual budget

of the corporation or such other percentage in substitution therefor as may be approved by the corporation by a resolution passed at a general meeting,

whichever is the lesser, shall be procured by invitation to tender.

In the public consultation conducted in mid-2003, in addition to rectifying the anomaly about the legal effect of the above provision¹, we have proposed to lower the minimum percentage of an OC's annual budget for the purpose of tendering from the existing 20% to 10% (while retaining the specified sum of \$100,000² in the existing BMO).

3. There was, however, heated debate on the subject. Some respondents regarded 10% of the annual budget to be too huge a sum while others, mostly OCs and the property managers, regarded it too minimal to require tendering and endorsement at owners' meetings. The latter foresaw that tenders and owners' meeting would be a commonplace and a significant amount of resources and manpower would have to be devoted to the arrangements and proceedings required under the proposal. On the other hand, 10% of the annual budget may only mean at most thousands of dollars for single-block tenement buildings. This calls into question the necessity of tendering and having owners' meetings under such circumstances.

Thresholds for Tendering and Approval by Owners' Meeting

4. Taken all the views into consideration, we have refined the proposal in the Bill as follows –

(a) Any procurement of supplies, goods and services which exceeds the sum of \$200,000 (*\$100,000 in the existing BMO*) or a sum which is equivalent to 20% (*same as in the existing BMO*) of the annual budget of the OC³, whichever is the lesser, shall be done by invitation

¹ The same provision in section 20A(2) of the BMO is also set out in the Code of Practice on procurement of supplies, goods and services issued by the Secretary for Home Affairs. We propose to delete the provision in the Code of Practice so as to clear the anomaly that, by virtue of the reproduction of the provision in section 20A(2) in the Code of Practice, the provision is not intended to have legal effect.

² Or such other sum in substitution therefor as the Authority may specify by notice in the Gazette.

³ Or such other sum in substitution therefor as the Authority may specify by notice in the

to tender.

- (b) Any procurement of supplies, goods and services which exceeds the sum of 20% of the annual budget of an OC⁴ shall be accepted or rejected by a resolution passed at a general meeting of the OC.

5. The proposals in the Bill are set out more clearly in the table below –

Thresholds	Procurement Amount	Percentage of Annual Budget of OC
1. Tendering	>\$200,000	>20%
2. Owners' Meeting	-	>20%

6. We believe that the revised proposals are closer to reality and have managed to strike a balance between the protection of owners' rights and the operation of OCs. There are now two questions to ask whenever an OC makes procurement: (i) whether the threshold for tendering has been reached; and (ii) whether the threshold for a resolution at an owners' meeting has been reached.

7. The threshold for tendering is set at 20% of the annual budget or \$200,000, whichever is the lesser. For the large estates with a huge annual budget, it will mean tendering is required whenever the procurement is at or above \$200,000. We consider this is a reasonable amount. Moreover, we have not specified that all tenders have to be open tender and tendering itself should not be viewed as arduous or unachievable. After all, greater transparency of an OC's decisions would be beneficial to all the parties concerned.

8. As for the threshold for endorsement at owners' meetings, we have adjusted it to 20% of the annual budget (without a fixed monetary amount). We consider the owners will have the right to vote on the procurement since 20% will already mean some 2½ months' share of management fees⁵ on the part of individual owners. Any expenditure

Gazette.

⁴ Or such other sum in substitution therefor as the Authority may specify by notice in the Gazette.

⁵ One month's management fee will mean around 8.33% (1/12) of the annual management expenses.

exceeding this amount merits the approval of the owners and an objective selection procedure.

Renewal of Contracts

9. We have received many enquiries about the treatment for renewal of contracts. Strictly speaking, under the current proposal in the Bill, renewal of contracts should be treated alike as any kind of procurement. In other words, renewal of contracts which reach the relevant thresholds should be done through tendering and endorsement at owners' meeting.

10. That said, having regard to Members' views raised at the Bills Committee and also the views of the deputations from the public and the professional organizations, we agree that for renewal of contracts where the majority of the owners would like to retain the existing service, it is acceptable from the policy point of view that the tendering requirement could be waived.

11. Subject to Members' views, we propose to further revise the procurement requirements to the effect that for renewal of contracts which exceeds the sum of \$200,000 or a sum which is equivalent to 20% of the annual budget of the OC⁶, whichever is the lesser (i.e. the threshold set for tendering), the management committee may put the procurement proposal to an owners' meeting for approval without going through the process of tendering. In other words, while the tendering requirement could be waived, the procurement still needs to be endorsed by majority of the owners at an owners' meeting. It must be stressed that this applies also to procurement which exceeds the sum of \$200,000 but is below 20% of the annual budget of the OC (under normal circumstances, if such procurement has been put to tender, there is no need for it to be endorsed at owners' meeting). Owners may then decide by majority vote whether they agree to renew the contract without going through the tender process. If owners vote down the proposal, the management committee will then need to tender out the procurement.

12. Building managers, as well as OCs, also need to comply with the same procurement requirements under the Bill. For building managers,

⁶ Or such other sum in substitution therefor as the Authority may specify by notice in the Gazette.

if they wish to waive the tendering requirement for renewal of contracts, they have to put the procurement proposal to the owners' meeting of the OC, or if an OC has not been formed, the owners' meeting convened in accordance with the DMC⁷.

List of “Urgent Items”

13. During the public consultation, there were views that putting the tendering requirements into the BMO would reduce flexibility and create hindrances for the work of the OC, especially in times of emergency. Having considered such practical difficulties, we have included a provision in the Bill to allow OCs to pass a list of urgent items at the owners' meeting – the statutory procurement requirements for items included in the list could be waived.

14. We have re-considered the matter, taking into account views expressed by Members of the Bills Committee and the depositions from the public and the professional organizations. We foresee grave difficulties for the OCs and building managers to draw up such a list of urgent items for pre-approval at an owners' meeting. Firstly, there is always the possibility that the pre-approved list is not exhaustive. Secondly, there is high risk of abuse of this proposed system – OC could simply pass a list which is so general that all procurement could be regarded as urgent. Thirdly, even when the OC acts in good faith, the term “urgent” is still subject to interpretation. The proposal, which is aimed at giving flexibility to the work of an OC, might in the end create more disputes among owners.

15. We therefore seek Members' views on whether we should delete from the Bill the proposed provisions relating to urgent items. This means that all procurement (howsoever urgent) will need to go through the statutory steps (i.e. tendering and owners' meeting) if the thresholds have been reached. While this might be seen as reducing the flexibility of the work of an OC, our experience is that emergency works of a building will unlikely cost over \$200,000 or 20% of the annual budget of an OC (which are the thresholds proposed in the Bill).

⁷ In accordance with section 34F of the BMO, provisions in Schedule 8 will be applicable if they are consistent with the DMC of the building.

16. There were also concerns among Members that it is not practical to do tendering for professional service, especially legal service. We have considered the matter but could not find strong justification for exempting professional service from the procurement requirements. Firstly, general retainer service should be below \$200,000 or 20% of the annual budget of an OC and need not be tendered out. Secondly, for litigation fee that might be above the statutory thresholds, we consider that there is strong reason for the owners to be kept informed. In fact, we have received complaints from owners that the OC or the building manager has engaged lawyers in lawsuits without their prior knowledge. As the litigation fee could be a very huge amount, the owners have every right to know about and have a say on the procurement of the legal service.

Non-Compliance of the Procurement Requirements

17. In the Administration's original proposal that was put to the public for consultation, non-compliance of the procurement requirements will be subject to a penalty clause⁸. We have, however, received strong objection against the insertion of a penalty clause. It was argued that the introduction of such a clause would discourage owners from participating in the voluntary work of OCs and serve no healthy purpose. We have therefore done away with the penalty clause in the Bill. Without a penalty clause, non-compliance of the procurement requirements will have to be dealt with through civil means.

18. Some Members were concerned that without a penalty clause, it will be difficult for owners to enforce the provisions without going through the court. There was the suggestion that while the penalty clause should not be imposed on owners/OCs, it should at least be imposed on the building managers. We, however, consider that any parties who are subject to the same set of statutory requirements should be treated equally with regard to non-compliance. Furthermore, it would be impractical to impose a penalty on the manager only as he may claim that the procurement has been made with the consent of the OC,

⁸ Under the Administration's original proposal, any member of a management committee who contravenes the procurement requirements shall be guilty of an offence and shall be liable on conviction to a maximum fine of \$50,000, unless he proves that the offence was committed without his consent or connivance and that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised in the circumstances.

who is not subject to the legal sanction.

19. There are actually a handful of precedent cases⁹ at the Lands Tribunal regarding procurement by OCs/managers – this shows that the channel for OCs/individual owners to seek a definite resolution is there. Whilst some of the previous court cases were ruled in favour of the OCs/managers (who have not complied with the procurement requirements), this was because of the present ambiguity in the procurement provisions in the BMO. With the proposed amendments, it will be crystal clear that the procurement requirements are statutory and mandatory and have to be followed by both the OCs and the building managers.

20. Another suggestion made at Bills Committee is about the validity of the contracts which are procured without following the statutory requirements. In this regard, the ruling in *宜高物業管理有限公司 對新蒲崗大廈業主立案法團* (DCCJ 14835/2000) is relevant. In this case, the chairman of the OC has signed the renewal agreement with the incumbent management company although the renewal was neither endorsed by the management committee nor the OC. The court ruled that unless expressly authorised by the OC, neither the OC chairman nor the management committee has the authority to enter into agreement which has binding effect on the OC. The court further commented that the building manager should be aware of the relevant provisions in the BMO. The renewal agreement was therefore not valid.

21. We have not, however, stipulated in the BMO that any contracts which are not procured properly will become void or unenforceable – on the practical reason that the repair/renovation works may have safety implications to the building. Furthermore, it may cause commercial loss to bona fide parties who do not have knowledge of the non-compliance of the procurement procedures.

Home Affairs Department
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⁹ *Chau Chun-wai v Incorporated Owners of Joyful Villa* (LDBM 177/1995) and *Pokfulam Development Company Limited and Others v The Incorporated Owners of Scenic Villa* (LDBM 70/2000).