

Bills Committee on Building Management (Amendment) Bill 2005

Consequences for Non-Compliance with the Procurement Requirements

1. This paper sets out the Administration's proposal to include an express provision in the Building Management Ordinance (BMO) (Cap.344) regarding the consequences for non-compliance with the procurement requirements. This paper should be read in conjunction with LC Paper No. CB(2)2617/04-05(05) – *Procurement by Owners' Corporations and Managers*.

BACKGROUND

2. LC Paper No. CB(2)2617/04-05(05) – *Procurement by Owners' Corporations and Managers* sets out the Administration's proposals regarding the procurement requirements for owners' corporations (OCs) and managers. Following the amendments, if a procurement proposal reaches the stipulated thresholds in section 20A of the BMO, tendering will need to be conducted and/or a resolution at an owners' meeting will need to be sought.

3. Under the present proposal in the Building Management (Amendment) Bill 2005 (clause 13), there is no provision regarding the consequences of non-compliance with the procurement requirements. Without such a provision, non-compliance will have to be dealt with through civil litigation. In the judgment of *Wong Tak Keung Stanley v The Management Committee of The Incorporated Owners of Grenville House* (CACV 244/2003), it was held that (paragraphs 40-41) –

“It was also submitted for the Respondent that there was no specific remedy for contravention of section 20A(2). However, it is at least arguable that at common law, where the intended consequence of the failure to comply is not stated in the legislation, the thing done under the statute is invalidated. Whether the thing done is wholly void or merely voidable depends on the circumstances (Bennion, *Statutory Interpretation* 4th ed Section 10, pp. 32-35).

The Application sought an order "voiding" the appointment. If the Applicant were to succeed at trial, it would be for the tribunal to decide whether the appointment was void or voidable and depending on the facts found, on what terms e.g. on the basis of a quantum meruit."

OPTIONS

4. We are aware of Members' concerns on the enforceability of the statutory procurement requirements if there is no provision stipulating the consequences of non-compliance.

5. One option is to impose criminal sanction for non-compliance. However, as explained in LC Paper No. CB(2)2617/04-05(05) – *Procurement by Owners' Corporations and Managers*, the proposal has been met with strong objections during the public consultation.

6. Another option is to stipulate in the BMO that a contract for the procurement of supplies, goods or services shall be void if it is entered into without following the relevant procurement requirements. Again, we have explained in the same paper above that this option is not viable.

RECOMMENDATION

7. Having considered the various options, we recommend for Members' consideration to introduce an express provision in section 20A of the BMO that where proceedings are taken for the enforcement of any procurement contract to which section 20A applies, the Lands Tribunal may make such orders and give such directions in respect of the rights and obligations of the contractual parties, including whether the procurement contract is void or voidable, as the Tribunal may deem fit having regard to all the circumstances of the case and in particular (but not limited to) the following factors –

- (a) whether the relevant supplies, goods or services have been procured by invitation to tender;
- (b) whether an owners' meeting has been convened to consider the procurement;
- (c) whether the Code of Practice on the procurement of supplies,

goods and services issued under section 44(1)(a) of the BMO has been observed;

- (d) the urgency of the works required;
- (e) the progress of the works;
- (f) whether the owners have benefited from the contract;
- (g) whether the owners have suffered any financial loss and the extent thereof;
- (h) whether the contractor who undertakes the relevant works under the contract has acted in good faith; and
- (i) whether the contractor who undertakes the relevant works under the contract has suffered any financial loss and the extent thereof.

Views Sought

8. Members' views are invited on the above.

Home Affairs Department
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