

Bills Committee on Building Management (Amendment) Bill 2005

Matters Arising from 9 and 23 March 2006

Matters Relating to Procurement Requirements

1. At the Bills Committee meetings on 9 and 23 March 2006, Members discussed the procurement requirements under the revised section 20A of the Building Management Ordinance (BMO) (Cap.344) [LC Paper No. CB(2)2617/04-05(05) – *Procurement by Owners' Corporations and Managers* and LC Paper No. CB(2)1322/05-06(03) – *Consequences for Non-Compliance with the Procurement Requirements*]. Below are the Administration's responses to the various issues raised at the meeting.

CONSEQUENCE FOR NON-COMPLIANCE

Advice from the Department of Justice

Reference to Company Law

2. Members asked whether the Companies Ordinance (Cap.32) provides that in case a company the staff of which had signed a contract with another company without proper authorization and had thus caused commercial loss to the latter, the former would be held liable to the commercial loss incurred.

3. The directors of a company may bind the company in contracts in their capacity as its agents. Section 157 of the Ordinance provides that the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification. Case law extends further the protection for third parties through the Turquand's rule¹, which protects a person dealing with a company bona fide and without notice of the fact that the company's internal

¹ Vanessa Stott's Hong Kong Company Law, 8th edition, pg.235-238. As a related matter, the District Court judge has expressed his views in *Equal Property Management Limited and The Incorporated Owners of San Po Kong Mansions* (DCCJ 14835/2000) that the Turquand's rule is not applicable to owners' corporations though he did not intend to create a precedent on applicability of the rule to owners' corporations.

management requirements have not been followed. Under the rule, he is not required to investigate to ensure that all internal regulations have been complied with; in the absence of facts putting him on inquiry, he is entitled to assume that all matters of internal management and procedure required have been complied with. This rule is to a great extent codified by section 5B of the Companies Ordinance. An act of a company, including a transfer of property to or by the company is not invalid by reason only that the company contravenes section 5B(1), which provides that a company shall not do anything that is not authorised by its objects as stated in the memorandum of association and shall not exercise any power which is expressly excluded or modified by its memorandum or articles of association. Resolutions of companies passed at improperly convened or inquorate meetings are generally held to be good as against or for the benefit of third parties.

4. Under common law, generally speaking, where an agent exceeds his authority and enters into a contract with a third party purportedly for and on behalf of his principal, the agent is regarded to have given a warranty to the third party that he has authority to enter into the contract. Hence, he is liable for any loss caused to such third party by a breach of that implied warranty, even if he has acted in good faith, under a mistaken belief that he has such authority². When a director negotiates a contract, he impliedly represents to the other contracting party that he has authority to bind the company. If he lacks this authority, he is liable for the loss which the other party suffers as a result of entering into the contract³.

5. Members also asked about the position of promoters. Section 32A of the Companies Ordinance provides for pre-incorporation contracts. Under section 32A(1), where a contract purports to have been made in the name or on behalf of a company at a time when the company has not been incorporated, the contract shall have effect as a contract entered into by the person purporting to act for the company or as agent for it and he shall be personally liable on and entitled to enforce the contract accordingly. The company may, after incorporation, ratify the contract to the same extent as if it had already been incorporated at that time and as if the contract had been entered into on its behalf by an agent acting

² Bowstead & Reynolds on Agency 17th ed. 2001, para.9-060.

³ Vanessa Stott's Hong Kong Company Law 8th ed, p.243.

without its authority.

Legal Advice on Procurement under the BMO

6. The Department of Justice has also given its views on the consequence for non-compliance with the procurement requirements under the BMO. The various types of non-compliance with the statutory procurement requirements laid down in the revised section 20A are set out below –

- (a) Where procurement by tender is not required – failure to comply with the standards and guidelines specified in the Code of Practice on the Procurement of Supplies, Goods and Services (Code of Practice) [section 20A(1)];
- (b) Where procurement by tender is required – failure to procure the supplies, goods or services by tender [revised section 20A(2)];
- (c) Where procurement by tender is required and where tender is conducted – failure to comply with the tender procedures set out in the Code of Practice [section 20A(3)];
- (d) Where procurement by tender is required and where tender is conducted – failure to obtain resolution by owners at a general meeting of the corporation for acceptance of the tender [revised section 20A(2A)].

Breach of the Code of Practice

7. In case of non-compliance with the Code of Practice [i.e. section 20A(1) and (3)], in the light of the decisions of the Lands Tribunal⁴ that it is not law and is thus directory, it appears that a breach of the Code of Practice should not be the reason for invalidating the relevant contract. So far as contract law is concerned, a contract may be invalidated by reason of illegality or inconsistency with public policy. A contract is not an illegal contract if it simply fails to comply with an administrative

⁴ *Pokfulam Development Company Limited v The Incorporated Owners of Scenic Villas* (LDBM 70/2000), *The Incorporated Owners of Million Fortune Industrial Centre v Jikan Development Ltd and Another* [2001] 3 HKLRD 588.

code.

8. To avoid unnecessary litigation, the Department of Justice suggested that an express provision should be added to the effect that a contract for the procurement of any supplies, goods or services shall not be rendered void or voidable by reason only of non-compliance with section 20A(1) and (3).

Breach of the Mandatory Requirements

9. In accordance with a judgment at the Court of Appeal⁵, section 20A(2) of the BMO (regarding tendering) is a mandatory requirement. It is also our policy intent that the new section 20A(2A) (regarding approval at an owners' meeting) should also be a mandatory requirement. Whilst these are clearly mandatory requirements, as advised by the Department of Justice, breaches of section 20A(2) and the new section 20A(2A) should not render the procurement contract void or voidable for the following reasons –

- (a) There are a number of precedents in the statutes which provide that non-compliance with statutory requirements shall not by itself render the contract void or voidable⁶.
- (b) The interest of third parties would be greatly and adversely affected if contracts are “unwound”. The contractors/suppliers for the supplies, goods or services might have entered into legally binding contracts with their own contractors/suppliers, incurred costs and expenses, employed workmen, commenced preparatory work or even completed a major if not entire part of the contract.

⁵ *Wong Tak Keung, Stanely v The Management Committee of the Incorporated Owners of Grenville House* (CACV 244/2003)

⁶ Examples include section 34 of the Trade Description Ordinance (Cap.362) which states that a contract for the supply of goods shall not be void or unenforceable by reason only of a contravention of any provision of the Ordinance; section 129 of the Banking Ordinance (Cap.155) which provides that the contravention of any prohibition in the Ordinance shall not render the contract unenforceable; sections 280 and 304 of the Securities and Futures Ordinance (Cap.571) which provide respectively that a transaction is not void or voidable by reason only that any civil or criminal (as the case may be) market misconduct has taken place in relation to or as a result of it; and section 4 of the Non-Local Higher and Professional Education (Regulation) Ordinance (Cap.493) which provides that a contract under which a regulated course which is not an exempted course or registered course is offered shall not be void or voidable solely by reason of the course's not being an exempted course or registered course.

- (c) There is the problem of time lapse. The longer the time lapse, the greater the possibility of inconvenience and injustice that might be caused to third parties.
- (d) By way of analogy, an act of a company, including a transfer of property to or by the company is not invalid by reason only that the company contravenes section 5B(1) of the Companies Ordinance (see paragraph 3 above).
- (e) The need for the contractors/suppliers having to sue for recovery of costs incurred or loss suffered can be avoided. Under common law⁷, where services are rendered under a void contract, the supplier may be able to recover a reasonable remuneration for the work done, even though there is no binding contract between the parties. Similarly, a person who renders services under a contract that is unenforceable will be entitled to a *quantum meruit*⁸ if the other party has failed to carry out his part provided that the restitutionary claim does not undermine the policy of the statute (or common law rule) rendering the contract unenforceable⁹. Thus, as a general rule, the corporation has to pay for the supplies, goods or services provided under a procurement contract even if it is concluded in the breach of the statutory requirements and is subsequently declared void or unenforceable.
- (f) It appears that more inconvenience and problems will be caused if the relevant contract is declared void or liable to be avoided

⁷ *Craven-Ellis v Canons Ltd* [1936] 2 K.B. 403.

⁸ So much money as the plaintiff reasonably deserves to have. In case of frustrated contract, a quantum meruit claim will only lie in respect of work done after the date of frustration. Modern law sees it as preventing unjust enrichment. (*Information from the Hong Kong Legal Dictionary, Butterworths, 2004*) In the law of contracts, *quantum meruit* is a doctrine by which the law infers a promise to pay a reasonable amount for labor and materials furnished, even in the absence of a specific legally enforceable agreement between the parties. *Quantum meruit* also describes a method used to determine the exact amount owed to a person. A court may measure this amount either by determining how much the defendant has benefited from the transaction or by determining how much the plaintiff has expended in materials and services. Courts have crafted four basic elements that the plaintiff must prove before she may recover under the doctrine of *quantum meruit*: (1) that valuable services were rendered; (2) that the services were rendered to the defendant; (3) that the services were accepted, used and enjoyed by the defendant; and (4) that the defendant was aware that the plaintiff, in performing the services, expected to be paid by the defendant. The doctrine of *quantum meruit* is contained in court decisions and, to a lesser extent, in statutes. (*Information from Answers.com; West's Encyclopedia of American Law, 1988 by The Gale Group, Inc.*)

⁹ Chitty on Contract, Vol.1 (29th ed) 2004, para.29-080.

and the procurement is required to be conducted again by tender or re-tender.

10. For reasons set out in paragraph 9 above, the Department of Justice further suggested that an express provision should be added to the effect that a contract for the procurement of any supplies, goods or services shall not be rendered void or voidable by reason only of non-compliance with section 20A(2) and (2A).

The Administration's Views

11. There are now four options for Members' consideration. They are –

- (a) As advised by the Department of Justice, to include an express provision in the BMO to the effect that a contract for the procurement of any supplies, goods or services shall not be rendered void or voidable by reason only of non-compliance with section 20A(2) and (2A) [Option A].
- (b) As suggested by some Members, to include an express provision in the BMO to the effect that a contract for the procurement of any supplies, goods or services shall be rendered void by reason only of non-compliance with section 20A(2) and (2A) [Option B].
- (c) As suggested by some other Members, to include an express provision in the BMO to the effect that a contract for the procurement of any supplies, goods or services shall be rendered void by reason only of non-compliance with section 20A(2) and (2A) at the instance of, say, the majority votes of the owners at a general meeting convened under the BMO or certain percentage of the shares of owners [Option C].
- (d) As previously suggested by the Administration in paragraph 7 of LC Paper No.CB(2)1322/05-06(03), to include an express provision in the BMO that where proceedings are taken for the enforcement of any procurement contract to which section 20A(2) and (2A) applies, the court 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 court may deem fit having regard to all the circumstances of the case and in particular (but not limited to) certain stipulated factors [Option D].

Option A: Contracts NOT Void

12. The Department of Justice has set out its legal opinion with regard the position under the Company Law and quoted many precedents in the statutes to support Option A. That said, the proposal to include an express provision in the BMO that non-compliance with section 20A(2) and (2A) will not render the procurement contract void or voidable may have the effect of undermining the importance of the procurement requirements that need to be complied with by owners' corporations and building managers.

13. As to whether a provision to stipulate that non-compliance with section 20A(1) and (3) of the BMO, i.e. the Code of Practice, will not render the procurement contract void is needed, the Administration has no strong views. We are of the view that given the many court judgments on the matter, the directory nature (instead of mandatory) of the Code of Practice is already very clear.

Option B: Contracts Void

14. This option also gives a higher degree of certainty on the consequence – all contracts that are procured without complying with the statutory requirements should be rendered void. If there are disputes over the matter, it is likely there will be legal proceedings to follow. Under this option, the court will render void any contracts for the only reason that the procurement requirements stipulated in the revised section 20A(2) and (2A) have not been complied with. There is very little flexibility given to the court – it could not take into account all circumstances of the case in determining the issue. Once the court is satisfied that the procurement requirement has not been followed, it has to rule that the procurement contract is void.

Option C: Contracts Void at Discretion of Owners

15. This option empowers owners to determine whether any contracts that are procured without complying with the statutory requirements should be rendered void at the instance of the owners themselves.

16. This option in fact means empowering the corporation (whether by the majority of votes at an owners' meeting or at the instance of a certain percentage of shares of owners) to determine whether the procurement contract should be ratified (the opposite of void) – and hence avoiding the need for owners or the owners' corporation to seek a ruling from the court. Members may, however, wish to note that if the corporation alone could have the power to determine the validity of the contract, the other party, i.e. the contractor/supplier who undertakes the relevant works or supplies the service under the procurement contract (including those who are bona fide parties who do not have knowledge of the non-compliance of the procurement procedures) may be deprived of the opportunity to make representation to the court.

17. Furthermore, whilst we could stipulate that only those procurement contracts which have been entered into without complying with the requirements under the revised section 20A(2) and (2A) could be void at the discretion of the corporation, there could still be a lot of disputes as to whether, and if so, to what extent the requirements under the revised section 20A(2) and (2A) have not been complied with. There might be abuse by owners and corporations in exercising their rights even for contracts which have fully complied with the statutory requirements. Owners who are dissatisfied with the resolution (whether it is to void or ratify the contract) may exercise their right under paragraph 1(2) of Schedule 3 to the BMO to request the chairman to convene another extraordinary general meeting to discuss the same matter over and over again.

18. This option will also mean that a corporation may “ratify” a procurement contract which has been entered into without complying with the statutory requirements. Whilst one could argue that this may be the wish of the majority of the owners, this will mean that a corporation, if it so wishes, could waive the tendering requirements even for huge-sum contracts.

Option D: Court to Determine Validity of Contracts

19. This option is similar to Option B but the court will be given the discretion to determine whether the procurement contract should be void or voidable at the discretion of the owners¹⁰ and also to take into account all circumstances of the case when making the decision and/or granting the relief. The court would be able to strike a balance between upholding the principle of compliance with the procurement requirements and the interest of the owners and other innocent party (e.g. the supplier/contractor who has no knowledge of the non-compliance of the procurement procedures).

20. We note some Members' concern that this proposal would cause uncertainties to the contractual parties. However, unless we stipulate clearly in section 20A of the BMO that all contracts entered into without complying with the statutory procurement requirements should not be rendered void (i.e. Option A as suggested by the Department of Justice), or the extreme opposite, that any such contracts should be null and void (i.e. Option B), any provision regarding the validity of a procurement contract could not provide certainty to the contractual parties. It follows that we will inevitably have to accept certain degree of uncertainties in the BMO on this matter, unless either Option A or Option B is accepted by Members (and it must be noted that not even Option B could guarantee that the contracts concerned will definitely be rendered void). This is in fact in line with the judgment of *Wong Tak Keung Stanley v The Management Committee of The Incorporated Owners of Grenville House* (CACV 244/2003) which 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

¹⁰ The court may make an order that the procurement contract is voidable at the instance of the owners' corporation. Under such circumstances, the court should also make an order that a meeting of the corporation be called, held and conducted in such manner as the court thinks fit, so as to determine whether the contract should be void. Reference could be made to section 114B of the Companies Ordinance (Cap.32). If the resolution is not passed, it will be deemed that the procurement contract is ratified.

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*."

21. In making such orders and giving such directions, the court should have regard to the requirements under the revised section 20A(2) and (2A) of the BMO and all the circumstances of the case. In paragraph 7 of LC Paper No. CB(2)1322/05-06(03) – *Consequences for Non-Compliance with the Procurement Requirements*, the Administration proposed to include some factors to assist the court in considering the case¹¹. This is in line with the provisions in many other legislation, like Schedule 2 to the Control of Exemption Clauses Ordinance (Cap. 71) which sets out the matters to which the court shall have regard when determining whether an exemption clause is fair and reasonable, and also section 7 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) which sets out the matters to which the court shall have regard when deciding whether to exercise its powers in relation to a party to the marriage and a child of the family. We note some Members' views that this might cause uncertainties to the contractual parties. However, setting out the relevant considerations in the legislation will provide guidance to the contractual parties, notably the owners' corporations and the owners, who are laymen to law – this will especially be useful when they consider whether to make an application to the court. Such a provision will also facilitate the legal proceedings and assist the court in making the orders.

Determination of Liabilities

22. Another issue is about the determination of liabilities among the

¹¹ They are (a) whether the relevant supplies, good 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.

contractual parties if the procurement contract is declared void (whether by the court or by the owners' corporation). Some Members suggested that provisions should be included in the BMO to the effect that the court should determine the liability of the parties to a procurement contract on a *quantum meruit* basis (please see paragraph 9(e) and footnote 8 above).

23. Whilst we have no objection to the principle, we do not think that the BMO is the right vehicle for including such provision regarding claims from contractual parties. The BMO is to facilitate the incorporation of owners of flats in buildings or groups of buildings, to provide for the management of buildings or groups of buildings and for matters incidental thereto or connected therewith. We consider that the determination of liability among the contractual parties is beyond the scope of the BMO and the Bill. The legal relations between owners and persons not referred to in section 45(4) of the BMO (e.g. suppliers/contractors) should, in general, be governed by the law of agency and, where a corporation is involved, by company law¹². This view is in line with a Lands Tribunal judgment¹³. In addition, there are already common law principles governing the remedies for invalidated or illegal contracts, including in judgments relating to building management cases¹⁴. We therefore consider that there is no need to introduce a provision in the BMO to set out the mechanism for determination of liabilities among contractual parties in the case where a procurement contract is void.

Guidelines and Standard Forms

24. Some Members suggested that guidelines and standard forms should be drawn up to assist owners' corporations, building managers and contractors in complying with the revised procurement requirements. We note Members' suggestions and will take this into account when we

¹² Paul Kent and others, *Building Management in Hong Kong*, Butterworths, p.350.

¹³ In *Universal Property Management Services Limited against The Incorporated Owners of Ying Ga Garden* (LDBM 33/1997), it was ruled that the BMO deals solely with on-going building management problems. Once a party has ceased to be the manager, right of action pertaining to service contract cannot be based on the Ordinance, but on general law relating to, say breach of covenant, breach of contract, amount due or tort and action should lie in a conventional court instead of the Tribunal.

¹⁴ *Universal Property Management Services Limited against The Incorporated Owners of Ying Ga Garden* (LDBM 33/1997), *Wide Project Construction (H.K.) Limited and The Incorporated Owners of Yen Dack Building* (HCA 3759/2002) and *Wong Tak Keung Stanley 馮德全 The Management Committee of The Incorporated Owners of Grenville House* (CACV 244/2003).

work out the publicity programme for the enactment of the Bill. At the same time, Members may like to note the judgment given in a District Court case¹⁵. In this case, the chairman of the corporation signed the renewal agreement with the incumbent management company although the renewal was neither endorsed by the management committee nor the corporation. The court ruled that unless expressly authorised by the corporation, neither the chairman nor the management committee has the authority to enter into agreement which has binding effect on the corporation. The court further commented that any person who has business dealings with an owners' corporation, including the building manager, ought to be familiar with the relevant provisions in the BMO. The renewal agreement was therefore null and void.

LIABILITY OF MEMBERS OF MANAGEMENT COMMITTEE

25. Members were concerned whether members of a management committee (be it the chairman, the vice-chairman or the secretary) who enter into a procurement contract without complying with the statutory requirements should be held personally liable. Members suggested that this should be clearly spelt out in the BMO to provide a deterrent effect for non-compliance with the procurement requirements.

26. We have proposed in clause 15 of the Bill to include a new section 29A regarding the personal liability of members of management committee. The new section provides that no member of a management committee, acting in good faith and in a reasonable manner¹⁶, shall be personally liable for any act done or default made by or on behalf of the corporation in the exercise or purported exercise of the powers conferred by the BMO on the corporation; or in the performance or purported performance of the duties imposed by the BMO on the corporation. As advised by the Department of Justice, whether or not a member of a management committee will be personally liable for his act depends on the circumstances of each case. He would be able to claim protection under section 29A of the BMO if he acts in good faith and in a reasonable manner. In the case of non-compliance with the statutory procurement requirements, although the member may claim that he has acted in good

¹⁵ *Equal Property Management Limited and The Incorporated Owners of San Po Kong Mansions* (DCCJ 14835/2000).

¹⁶ To be introduced through Committee Stage Amendments, as agreed at Bills Committee.

faith, it would be extremely unlikely that he could successfully claim that he has acted in a reasonable manner.

27. In the light of Members' concerns, we propose to include an express provision under section 20A of the BMO that for the avoidance of doubt, any person who enters into a procurement contract on behalf of the corporation in breach of section 20A(2) and (2A) of the BMO shall be held personally liable for any claims unless section 29A applies.

PROCUREMENT OF RELATED SUPPLIES, GOODS OR SERVICES

28. Members were concerned that upon the enactment of the Bill, some corporations might split the huge-sum contract into mini-contracts so as to avoid the need to comply with the procurement requirements like tendering and/or endorsement at owners' meeting.

29. Inclusion of an expression provision that all related contracts must be regarded as a single procurement might on the one hand avoid abuse by some management committees, but on the other, reduce the flexibility of some corporations. This might be the case where the value of the initial repair works of a building is below the statutory thresholds but on initial inspection, some further defects are spotted which will cost a huge sum. Whilst the further repair works (if the value exceeds the statutory thresholds) must be procured in accordance with the statutory requirements, if an express provision is included stipulating that all related works must be counted as one, it begs the question on whether the initial repair works, which have been completed already, are in contravention of the suggested provision. We have also seen real-life cases where the seemingly related works (like renovation works for the residential part and the commercial part; or renovation works for the lobby and the roof) are splitted into two because the owners' corporation intentionally wants to select the best contractor for the different works. Introduction of an express provision to prohibit the splitting of related contracts will likely result in more disputes among owners.

30. Furthermore, we have doubts on the enforceability of the proposed provision. Whether two or more procurement contracts are related or not is subject to interpretation (whether the relation is by stages;

the types of works or the parts of the building). We have, on the suggestion of the Bills Committee, made reference to the Stamp Duty Ordinance (Cap.117). Sections 29 and 29G of the Ordinance stipulate that a conveyance on sale or an agreement for sale being certified at a particular amount mean that such conveyance or agreement contains a statement certifying that the transaction effected by the instrument does not form part of a larger transaction or series of transactions in respect of which the amount or value, or aggregate amount or value, of the consideration exceeds that amount. The phrase “does not form part of a larger transaction or series of transactions” is subject to interpretation. According to the explanatory notes issued by the Stamp Office of the Inland Revenue Department, transactions which have co-ordination or interdependence will be regarded as a series of transactions. We do not think this could be adopted in the context of procurement for building management purposes.

31. We have also made reference to the Industrial Training (Construction Industry) Ordinance (Cap.317) which provides that the Construction Industry Training Authority should be financed by the levy imposed on contractors based on the value of all construction works exceeding a certain amount. Section 2B of the Ordinance stipulates that the total value of a construction operation, in the case the contract is a term contract, the aggregate of the respective values of all construction operations carried out as required by works orders issued under the contract; and in the case the construction are carried out in stages, the aggregate of the respective values of all stages of the operations so carried out. However, the phrase in the Ordinance is applicable to works carried out in stages only. Moreover, the provision is related to the charging of levy on contractors and there is an implication on revenue for the Construction Industry Training Authority. We do not think inclusion of similar provision in the BMO for procurement contracts will be enforceable.

32. That said, we note Members’ concerns. The Administration is of the view that if such undesirable situation is noted by owners, they may exercise their rights under paragraph 1(2) of Schedule 3 to the BMO to request the chairman of the management committee to convene an extraordinary general meeting to discuss the matter.

CONTINUOUS ENGAGEMENT OF THE INCUMBENT CONTRACTOR/SUPPLIER FOR SUPPLIES, GOODS AND SERVICES

33. We note the diverse views of Members on whether the tendering requirements could be waived if the owners decide to continuously engage the incumbent contractor/supplier for the provision of supplies, goods and services. The Administration retains the view that owners should be allowed to choose whether to go through a fresh tendering exercise or continuously engage the incumbent contractor/supplier at their own wish, subject to a resolution passed at a general meeting of owners.

34. We have previously used the term “renewal of contracts”. As the term may imply renewal with the same contractor/supplier based on the same set of terms and conditions as in the original contract, which is against our intent that owners may negotiate with the contractor/supplier for presumably better terms and conditions in the subsequent contract, we have stopped using the term. We will take this into account when we draft the Committee Stage Amendments.

PROCUREMENT OF LEGAL SERVICE

35. Members enquired whether legal service could be put to tender. We have consulted a number of legal professionals about the market practice. While it is not common for legal service to be selected through open/public tender, many legal professionals advised that quotations in the form of hourly/daily rate (subject to a maximum cap) or a lump sum fee could be given to the owners’ corporations to facilitate their consideration of the appointment.

36. Some Members further suggested that owners should be informed whenever the owners’ corporation is engaged in lawsuits. We concur with the view that owners have every right to know about and have a say about any litigation involved by their owners’ corporation. That said, there might be practical difficulties with the proposal. Under section 18 of the BMO, an owners’ corporation shall maintain the common parts and the property of the corporation in a state of good and serviceable repair and clean condition; carry out such work as may be ordered in respect of the common parts; and do all things reasonably necessary for the

enforcement of the obligations contained in the deed of mutual covenant (DMC) for the control, management and administration of the building. In performing such statutory duties, an owners' corporation may inevitably need to initiate litigation (or be sued) – like suing owners for outstanding management fees, applying for court orders compelling owners to remove unauthorized building works, seeking injunction order compelling owners to comply with the terms in the DMC, etc. There might be practical difficulties for the management committees if the BMO requires that an owners' meeting must be convened for every single legal action to be initiated by the corporation or whenever the corporation is sued. We consider that management committee, being a representative body appointed by the owners, should generally be empowered to handle these relatively standard or minor building management issues.

37. We note that under the BMO, the appointment of an accountant by an owners' corporation has to be endorsed at a general meeting of the owners, regardless of the fee level. We consider that the same arrangement could be adopted for the appointment of lawyers. We therefore propose to expand section 18(2) of the BMO to provide that a corporation may, in its discretion, retain and remunerate solicitors and barristers by a resolution passed at a general meeting of the owners.

38. Most owners' corporations nowadays have engaged a legal representative to provide some basic building management service, like attendance at management committee or owners' meetings, providing advice on the DMC of the building and the BMO, etc. For legal actions related to relatively standard or minor building management issues like those referred to in paragraph 36 above, the owners' corporation will likely engage the same lawyer as legal representative (whether at additional fee or in some cases, the general retainer fee is already inclusive of certain types of services relating to litigation). The financial implications on the corporation are unlikely to be huge. Owners will also have the channel to know about these standard and minor litigation matters through the minutes of the management committee meetings, which are required to be displayed in a prominent place in the building within 28 days of the date of the meeting. If, however, there is need for the owners' corporation to seek further legal advice from another lawyer, or to appoint, through the solicitor, a barrister to represent the corporation

at the court, under our proposal, regardless of the level of the legal fee, such appointment has to be endorsed at a general meeting of the owners. We consider that the proposal would offer better protection for the interests of the owners and at the same time ensure the smooth operation of the owners' corporations.

LIST OF "URGENT ITEMS"

39. As requested, we have attempted to draw up two sample lists of "urgent items" for Members' consideration (please see Annex).

ADVICE SOUGHT

40. The procurement requirements in the BMO involve a number of very complicated legal issues. Members' views are invited on the above. Subject to Members' views, we will introduce Committee Stage Amendments as appropriate.

Home Affairs Department
April 2006

List of Urgent Items (A)

Any item which the Chairman of the Management Committee considers urgent, provided that it is :

- (1) related to emergency maintenance in respect of water supply, electricity supply, gas supply, safety of lifts/elevators, fire safety, sewerage/drainage system or structural safety of the building; or
- (2) emergency maintenance carried out for the purpose of public safety.

Any item which the authorised person approved by the owners' corporation by a resolution passed at a general meeting of owners considers urgent, provided that it is :

- (1) related to emergency maintenance in respect of water supply, electricity supply, gas supply, safety of lifts/elevators, fire safety, sewerage/drainage system or structural safety of the building; or
- (2) emergency maintenance carried out for the purpose of public safety.

Any item which an owner/owners (e.g. the Chairman, the Vice-chairman and the Secretary) or other persons (e.g. management company) appointed by the owners' corporation by a resolution passed at a general meeting of owners consider(s) urgent, provided that it is:

- (1) related to emergency maintenance in respect of water supply, electricity supply, gas supply, safety of lifts/elevators, fire safety, sewerage/drainage system or structural safety of the building; or
- (2) emergency maintenance carried out for the purpose of public safety.

List of Urgent Items (B)

- (1) Any accident or emergency resulting in suspension of water supply in the building
- (2) Any accident or emergency resulting in suspension of electricity supply in the building
- (3) Any accident or emergency resulting in suspension of gas supply in the building
- (4) Any accident or emergency putting the sewerage system, drainage system or sewage treatment system of the building in such a state as to cause nuisance to owners, residents or the public
- (5) Any accident or emergency putting the lifts and elevators of the building in such a state as to constitute a risk to the safety of owners, residents or the public
- (6) Any accident or emergency putting the fire service installation of the building in such a state as to constitute a risk to the safety of owners, residents or the public
- (7) Any accident or emergency putting the structural conditions of the building in such a state as to constitute a risk to the safety of owners, residents or the public
- (8) Any accident or emergency that constitutes a risk to public safety