

6. Procurement of Supplies, Goods and Services by OCs

Q186 : What is the statutory threshold for OCs to procure by invitation to tender?

A :

Threshold	Invitation to tender	Meeting of OC
> \$200,000	✓	–
> 20% of the annual budget of OC	✓	✓

Section 20A(2) and (2B)

The table above summarizes the statutory thresholds with regard to procurement of supplies, goods and services by OCs. According to section 20A(2) of the BMO, any procurement which exceeds or is likely to exceed –

- (a) the sum of \$200,000; or
- (b) a sum equivalent to 20% of the annual budget of the OC,

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

For any procurement that exceeds the sum of 20% of the annual budget of the OC, whether a tender is accepted or not shall be decided by a resolution of the owners passed at a general meeting of the corporation.

All OCs must follow the above statutory requirements in procuring supplies, goods or services for the corporation.

Q187 : If the service contract is \$600,000 for 4 years, does the OC have to procure by invitation to tender?

A :

Yes. As the service contract exceeds the statutory threshold of \$200,000, the OC shall procure by invitation to tender.

Section 20A(2)

Q188 : For single-block building where the annual budget is lower, will there be another statutory threshold for procurement by the OCs?

A :

The statutory threshold for procurement is applicable to all buildings, regardless of their number of units.

Q189 :

What are the requirements for conducting a tender exercise?

A :

OCs shall comply with the requirements specified in the “Code of Practice on Procurement of Supplies, Goods and Services” published by the Home Affairs Department in conducting a tender exercise. The Code of Practice is available at all District Offices and at the website www.buildingmgt.gov.hk.

Q190 :

In conducting a tender exercise, is it a must to carry out open tender? Is quotation or restricted tender acceptable?

A :

In conducting a tender exercise, it is advisable to carry out open tender. However, quotation or restricted tender may be accepted with care. For some of the procurement exercise, such as procurement of legal services, quotations may be a more common form of invitation to tender.

Q191 :

Could the MC form a working group to carry out the procurement?

A :

There is no provision in the BMO which empowers an MC to delegate its powers and duties to a working group. If an MC wants to form a working group to handle the administrative work of the procurement exercise, it is important to observe the requirements stipulated in the BMO and the “Code of Practice on Procurement of Supplies, Goods and Services” with regard to the procedures of the tender exercise and the acceptance of the tenders submitted.

For procurement whose value exceeds a sum equivalent to 20% of the annual budget of the OC, whether the tenders submitted are accepted or not shall be decided by the general meeting of the corporation. For procurement whose value is lower than 20% of the annual budget of the OC, the MC shall decide whether tenders are accepted or not. The working group does not have any statutory duty or power to perform the functions of an MC.



Q192 :

Do MC members have to declare any interest in the tendering exercise?

A :

The “Code of Practice on Procurement of Supplies, Goods and Services” provides that a member of the MC shall disclose in writing to the MC any personal or pecuniary interest that he may have in any of the tenders to be considered by the MC or the OC. An MC member who has indicated a personal or pecuniary interest in the tender shall abstain from voting in the selection of such tender at a meeting of the MC.

Q193 :

Can MC members accept gifts, discounts or free services (e.g. decorating a MC member’s flat) from tenderers or contractors?

A :

MC members should not solicit or accept any advantage from any tenderer, supplier or contractor in relation to the tender exercise. Examples of an advantage include money, loan, reward, gifts, discounts or free services. Solicitation or acceptance of any advantage may contravene the Prevention of Bribery Ordinance (Cap. 201).

Q194 :

Could an OC waive the tendering requirement for urgent works?

A :

No. Any procurement which exceeds or is likely to exceed the statutory threshold (i.e. the lesser of \$200,000 or a sum equivalent to 20% of the annual budget of the OC) shall be procured by invitation to tender.

Section 20A(2)

A list of pre-qualified service providers for emergency works or repair may be drawn up to minimize the time required for sourcing and ensure that only eligible ones are invited to bid.

Q195 :

What could the owners do if they suspect that their OC has split a large-sum contract into mini-contracts so as to avoid the tendering requirement?

A :

The owners may seek a declaration from the court on the validity of the mini-contracts. The court will consider all the circumstances of the case in making the decision. One of the factors that will be considered by the court, as set out in section 20A(7) of the BMO, is whether the contract has been split from a contract of greater value for the sole purpose of avoiding the compliance of requirements in section 20A(2) (i.e. procure by invitation to tender) or section 20A(2B) (i.e. tender shall be accepted or rejected by the general meeting of the corporation).

Section 20A(2), (2B) and (7)

If the contract is procured through fraudulent or corrupt means, a report should be made to the Police or the ICAC.

Q196 :

Are there any requirements for the procurement of professional service (e.g. legal service)?

A :

The procurement of all supplies, goods or services required by a corporation shall comply with the requirements stipulated in the BMO. There is no exception for procurement of professional service.

Section 20A

For the procurement of legal service, 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 OCs to facilitate their consideration of the appointment.

Court case: Incorporated Owners of Hip Wo House v. Galant King Development Limited [HCCW 248/2006]

Q197 :

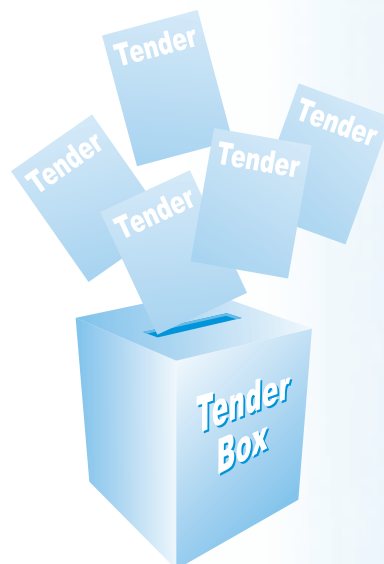
After the tenders are received, who shall be responsible for deciding whether a tender is accepted or not? Does the MC have the authority to reject some of the tenders and only shortlist a few for the owners to choose from at the general meeting of the corporation?

A :

For tenders whose value does not exceed 20% of the annual budget of the OC, the MC shall decide whether tenders are accepted or not.

Section 20A(2B)

For tenders whose value exceeds 20% of the annual budget of the OC, whether the tenders submitted are accepted or not shall be decided by the general meeting of the corporation. The MC does not have the authority to reject some of the tenders and all tenders have to be put up to the general meeting of the corporation. The MC may shortlist a few as recommendations to the owners, yet it will be up to the owners to decide which tender is accepted and which ones are rejected.



Q198 :

If an OC wants to procure supplies, goods or services from an incumbent supplier, can it do so without invitation to tender?

A :

The OC does not have to comply with the tendering requirement stipulated in section 20A(2A) of the BMO if all of the following criteria are satisfied –

Section 20A(2A)

- (a) the relevant supplier is providing supplies, goods or services to the OC for the time being;
- (b) the relevant supplies, goods or services are of the same type as the supplies, goods or services that is provided by the supplier for the time being; **and**
- (c) the corporation decides by a resolution of the owners passed at a general meeting of the corporation that the relevant supplies, goods or services shall be procured from that supplier on such terms and conditions as specified in the resolution, instead of by invitation to tender.

Despite the above, it is advisable for OCs to conduct tendering exercise so as to obtain the more updated market information.

Q199 :

If an OC has previously procured from ABC company 3 years ago, can it now engage ABC company again for a contract of \$300,000 without invitation to tender?

A :

No, the OC shall procure by invitation to tender as ABC company is not a supplier engaged by the OC for the time being. The criteria for waiving the tendering requirement are not satisfied.

Section 20A(2A)

Q200 :

If an OC is now procuring security services from ABC company, can it engage ABC company for a cleansing contract of \$300,000 without invitation to tender?

A :

No, the OC shall procure by invitation to tender as security services and cleansing services are not of the same type. The criteria for waiving the tendering requirement are not satisfied.

Section 20A(2A)

Q201 :

Can the MC negotiate for better terms and conditions in engaging the incumbent supplier for a new contract? Does the MC need to inform the owners about the new terms and conditions?

A :

The MC may negotiate with the incumbent supplier for better terms and conditions in signing the new contract. The terms and conditions shall be approved by the owners at a general meeting of the corporation should the tendering requirement be waived.

Section 20A(2A)

Q202 :

If the owners do not agree to the continuous engagement of the incumbent supplier at the general meeting of the corporation, what should the MC do?

A :

In such case, it means that the criteria for waiving the tendering requirements are not satisfied. The MC should thus comply with the statutory requirement under section 20A(2) of the BMO and procure by invitation to tender.

Section 20A(2) and (2A)

Q203 :

If an OC is going to continuously engage the incumbent supplier for a contract whose value exceeds \$200,000 but is below 20% of the annual budget of the OC, then does it have to convene a general meeting of the corporation?

A :

If the OC wants to waive the tendering requirement, then the MC has to convene a general meeting of the corporation. At the meeting, the owners have to pass a resolution that the relevant supplies, goods or services shall be procured from the incumbent supplier on such terms and conditions specified in the resolution, instead of by invitation to tender.

Section 20A(2), (2A) and (2B)

If, however, the OC decides to carry out the tendering exercise, then there is no need to convene a general meeting of the corporation, as tender whose value does not exceed 20% of the annual budget shall be submitted to the MC which may accept or reject them.

Q204 :

If a procurement contract does not comply with the “Code of Practice on Procurement of Supplies, Goods and Services”, will the contract be void?

A :

A contract for the procurement of any supplies, goods or services shall not be void by reason only that it does not comply with the Code of Practice.

Section 20A(5)

Q205 :

What are the consequences if an OC does not comply with the Code of Practice?

A :

A failure of an OC to comply with the Code of Practice shall not of itself render the OC liable to criminal proceedings of any kind. Yet, such failure may be relied upon in any legal proceedings as tending to establish or to negative any liability which is in questions in such proceedings.

Section 44(2)

Q206 :

If a procurement contract does not comply with the statutory requirements under section 20A(2) (relating to tendering) or 20A(2B) (relating to the passing of resolution at meeting of the corporation), will the contract be void?

A :

The contract shall not be void by reason only that it does not comply with section 20A(2) or (2B). However, the contract may be avoided by the corporation by a resolution passed at a general meeting of the corporation in accordance with section 20A (6) of the BMO.

Section 20A(6)

It is important for the OC and the owners to fully understand the implication of invoking section 20A(6) before they pass a resolution to such effect. OCs are strongly recommended to seek independent legal advice and explain to owners the possible consequence, including the legal and financial implications on the OC and the owners.

Q207 :

If a procurement contract does not comply with the statutory requirements under section 20A(2) and (2B), what could the owners do?

A :

The owners may adopt the following courses of action –

- (a) Not less than 5% of the owners may request the chairman to convene a general meeting of the corporation in accordance with paragraph 1(2) of Schedule 3 to the BMO. The corporation may then decide to avoid the contract by a resolution passed at the general meeting in accordance with section 20A(6) of the BMO. It is important to note that the corporation may only avoid the contract for the reason that the contract does not comply with section 20A(2) or (2B).
- (b) Owners may also seek a declaration from the court on the validity of the contract. The court will take into account all the circumstances of the case, including the list of factors stipulated under section 20A(7) of the BMO. The court may then make orders (including whether the contract is void or voidable) or give directions in respect of the rights and obligations of the contractual parties.

The above courses of action are not necessarily exclusive to each other. Even if a resolution is passed or rejected by the corporation, owners may still seek a declaration from the court. However, if the court has given any order with regard to the case, then the resolutions passed by the corporation would be subject to the court's order.

OCs and owners are strongly recommended to seek independent legal advice on the possible consequence, including the legal and financial implications on the OC and the owners, before they take action on the above.

Q208 :

If the owners think that the procurement contract is too expensive, can they invoke section 20A(6) and pass a resolution to avoid the contract at a general meeting of the corporation?

A :

No. Section 20A(6) could only be invoked for the reason that the procurement contract does not comply with the statutory requirements stipulated under section 20A(2) and (2B).

Section 20A(6) and (7)

Section 20A(6)

Q209 :

If a procurement contract is avoided by an OC in accordance with section 20A(6) of the BMO, does the OC still have to pay the contractor / supplier?

A :

If a procurement contract is avoided by an OC, the contract may still be valid for the period before the resolution is made. Thus, the OC may still have to pay for the works that have been carried out by the contractor or services that have been provided by the supplier or any compensation claimed by the contractor in accordance with the contract provisions. The amount of payment will be subject to negotiation between the OC and the contractor / supplier or any court order.

Section 20A(6)

It is therefore important for the OC and the owners to fully understand the implication of invoking section 20A(6) before they pass a resolution to such effect. OCs are strongly recommended to seek independent legal advice and explain to owners the possible consequence, including the legal and financial implications on the OC and the owners.

Q210 :

If a procurement contract is declared void by the court under section 20A(7), does the OC still have to pay the contractor / supplier?

A :

Section 20A(7) provides that the court may make such orders and give such directions in respect of the rights and obligations of the contractual parties as the court thinks fit. Whilst the court may make an order that the contract shall be void, it may also give directions in respect of the contractual obligations (e.g. payment) between the OC and the contractor / supplier.

Section 20A(7)

Q211 :

If a procurement contract is already avoided by an OC in accordance with section 20A(6), can an individual owner still go to the court and seek a declaration over the validity of the contract?

A :

Yes. A resolution of the owners to avoid the contract under section 20A(6), no matter such resolution is passed or not, does not preclude an owner from making an application to the court.

Section 20A(7)

It is therefore important for the OC and the owners to fully understand the implication of invoking section 20A(6) before they pass a resolution to such effect. OCs are strongly recommended to seek independent legal advice and explain to owners the possible consequence, including the legal and financial implications on the OC and the owners.

Q212 :

Section 20A(7) sets out a list of factors which will affect the court's decision on the validity of the contract. Will all the factors be taken into account? Are there any weightings for these factors?

A :

The court will take into account all the circumstances of the case in making the decision. These include, but are not limited to, the factors listed out under section 20A(7). BMO does not provide for the weightings for these factors. Each case will be considered by the court on its own merit.

Section 20A(7)

Q213 :

If a person, say the chairman of the MC, enters into a procurement contract that does not comply with section 20A(2) or (2B), can the OC or the contractor claim against the chairman for any loss arising from the contract? Can the chairman claim protection under section 29A?

A :

Section 20A(9) provides that subject to section 29A, any person who enters into a procurement contract that does not comply with section 20A(2) or (2B) may be personally liable for any claims arising from the contract. Section 29A provides that no MC member, acting in good faith and in a reasonable manner, shall be personally liable for any act done or default made by or on behalf of the OC in the exercise or purported exercise of the powers conferred by the BMO on the OC; or in the performance or purported performance of the duties imposed by the BMO on the OC.

Section 20A(9)

The chairman would only 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 chairman may claim that he has acted in good faith, the chance that he could successfully claim that he has acted in a reasonable manner is rather low. That said, the liability of the chairman in such a claim will ultimately be determined by the court.

Court case: 宜高物業管理有限公司 訴 新蒲崗大廈業主立案法團 [DCCJ 14835/2000]

