

Chapter 10 Procurement Arrangements for Owners' Corporation

From time to time, an OC has to procure the supplies, goods and services required for building management and maintenance works. For example, it may engage the services of a management company or a cleansing company, appoint an engineering company to carry out maintenance works, and purchase maintenance materials, etc.

An OC shall make a procurement in accordance with the relevant provisions of the BMO.

Procurement requirements

- Any supplies, goods or services the value of which exceeds or is likely to exceed the sum of **\$200,000** shall be procured by invitation to tender by the OC.
- For supplies, goods or services the value of which exceeds or is likely to exceed **20% of the annual budget of the OC** –
 - ◆ such goods or services shall be procured by invitation to tender by the OC; **and**
 - ◆ whether a tender is accepted or not shall be decided by a resolution passed by a majority of votes at a general meeting of the OC.

Section 20A(2)(a)

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



It should be noted that if the value of a procurement exceeds or is likely to exceed 20% of the annual budget of the OC, the MC shall submit **all** the tenders received to a general meeting of the OC. Whether a tender is accepted or not shall be decided by a resolution passed by a majority of votes at the general meeting of the OC.

After assessing the tenders, the MC may shortlist and recommend a few to the owners. However, the MC cannot reject any tenders received without the approval of a general meeting of the OC.

Value of the supplies, goods or services	Shall be procured by invitation to tender	Whether a tender is accepted or not shall be decided at a general meeting of the OC
> \$200,000	✓	–
> 20% of the annual budget of the OC	✓	✓



Quiz

When does the OC have to invite tenders and/or select a tender by a resolution passed at a general meeting of the OC?

Q: Suppose that the OC has to carry out maintenance works and the cost of hiring an engineering company is \$1,200,000, representing about 40% of the OC's annual budget. Under such circumstances, does the OC have to invite tenders and hold a general meeting to select a tender?

A: Since the value of procurement exceeds 20% of the OC's annual budget, the OC shall, in accordance with the BMO, invite tenders and select a tender by a resolution passed by a majority of votes of the owners at a general meeting of the OC.

Q: Suppose that the OC has to procure cleansing services and the cost of such services is \$300,000, representing about 10% of the OC's annual budget. Under such circumstances, does the OC have to invite tenders and hold a general meeting to select a tender?

A : Since the value of procurement exceeds \$200,000, the OC is required to invite tenders. However, as the value of such services does not exceed 20% of the OC's annual budget, the OC is not required to select a tender by a resolution passed at a general meeting of the OC. In that case, the MC may decide whether to accept the tender(s) received.

Q : Suppose that the OC has to procure cleansing materials and the cost of such materials is \$50,000, representing about 5% of the OC's annual budget. Under such circumstances, does the OC have to invite tenders and hold a general meeting to select a tender?

A : Since the value of procurement does not exceed \$200,000 nor 20% of the OC's annual budget, the OC is not required under the BMO to invite tenders or hold a general meeting to select a tender. Having said that, by inviting tenders, owners can make a comparison and obtain the latest market information. Therefore, the OC may consider inviting tenders even though it is not a requirement under the BMO.

Code of Practice

- In making procurement and conducting tendering exercise, the OC shall ensure that the procurement details and tendering procedures comply with the standards and guidelines specified in the “*Code of Practice on Procurement of Supplies, Goods and Services*” (Code of Practice). The Code of Practice is available at all District Offices and can be downloaded from HAD Homepage on Building Management (www.buildingmgt.gov.hk).
- A failure on the part of the OC to comply with the Code of Practice shall not of itself render the OC liable to criminal proceedings of any kind. However, such failure may be relied upon in any civil or criminal proceedings as tending to establish or to negative any liability which is in question in such proceedings.
- Any procurement contract made by the OC shall not be void by reason only that it does not comply with the standards and guidelines specified in the Code of Practice.

Section 20A(1)

Section 44(2)

Section 20A(5)

Continuous engagement of the incumbent supplier

- If the OC intends to continuously engage the incumbent supplier and the following conditions are met, the tendering requirement stipulated in the BMO may be waived. In other words, though the value of procurement exceeds \$200,000 or 20% of the annual budget of the OC, tendering is not required if the following conditions are met.

Section 20A(2A)

- The conditions are as follows –
 - ◆ the supplier concerned must be the one engaged by the OC for the time being;
 - ◆ the supplies, goods or services to be procured by the OC are of the same type as those which are for the time being supplied by the supplier; **and**
 - ◆ the OC decides by a resolution of the owners passed at a general meeting of the OC that –
 - invitation to tender will not be made; **and**
 - the supplies, goods or services shall be procured from that supplier on such terms and conditions as specified in the resolution.
- All the above conditions must be met for the OC to be allowed to waive the tendering requirement.

It is advisable for OCs to conduct tendering exercise so as to obtain the more updated market information.

Consequences of non-compliance with procurement requirements

- Failure of the OC to comply with the procurement requirements stipulated in the BMO (i.e. to procure by invitation to tender or decide whether a tender is accepted or not by a resolution of the owners passed at a general meeting of the OC) may have effect on –
 - ◆ the validity of the procurement contract;

- ◆ the personal liability of the person who enters into the contract.

Validity of a procurement contract

- Any procurement contract made by the OC shall not be void by reason only that it does not comply with –
 - ◆ the tendering requirement; or
 - ◆ the requirement of deciding whether a tender is accepted or not by a resolution of the owners passed at a general meeting of the OC.

Section 20A(6)(a)

- In the event that the procurement contract made by the OC does not comply with procurement requirements set out in the paragraph above, the owners may –

(a) avoid the contract by a resolution of the owners passed at a general meeting of the OC; or

Section 20A(6)(b)

(b) seek an order from the court with regard to the validity of the contract.

Section 20A(7)



It should be noted that before passing a resolution to avoid a procurement contract, it is important for the OCs and the owners to fully understand the implication of passing such a resolution. OCs are strongly recommended to seek independent legal advice and explain to the owners the possible consequence, including the legal and financial implications on the OC and the owners, e.g. whether the OC is required to compensate the supplier after the resolution is passed and the amount of compensation payable, etc.

In addition, the OC should be aware that under section 20A(6)(b), a contract may be avoided by the OC only for the reason that it does not comply with the statutory procurement requirements.

- In the legal proceedings concerned, the court will take into account all the circumstances of the case, including (but not limited to) the following factors –
 - (a) whether the OC has procured by invitation to tender;
 - (b) whether the OC has convened a general meeting to select the tenders;
 - (c) whether the OC has complied with the Code of Practice;
 - (d) whether the contract has been split from another contract for the sole purpose of lowering the value of the contract so that compliance of the statutory procurement requirements can be avoided;
 - (e) whether the procurement is urgently required;
 - (f) the progress of any activities or works in relation to the procurement;
 - (g) whether the owners have benefited from the contract;
 - (h) whether the owners have incurred any financial loss due to the contract and the extent thereof;
 - (i) whether the supplier has acted in good faith;
 - (j) whether the supplier has benefited from the procurement contract; and
 - (k) whether the supplier has incurred any financial loss due to the procurement contract and the extent thereof.
- The court may make orders or give directions in respect of the rights and obligations of the contractual parties, including but not limited to –
 - ◆ declaring that the procurement contract is valid;
 - ◆ declaring that the contract is void;

- ◆ declaring that the contract is voidable.

- If the court makes an order that the contract is voidable at the instance of the OC, it shall also make an order that a general meeting of the OC be convened and held in such manner as the court thinks fit, so as to decide whether the contract is to be avoided.

Section 20A(8)

Personal liability

- Any person who enters into a procurement contract otherwise than in compliance with the statutory procurement requirements may be personally liable for any claims arising from the contract.

Section 20A(9)

Keeping of documents

- All tender documents, copies of contracts, accounts and invoices and any other documents relating to the procurement shall be kept by the OC for not less than 6 years.

Section 20A(4)

