

Construction Industry Council

Committee on Procurement

Meeting No. 001/13 of the Committee on Procurement was held on Wednesday, 20 March 2013 at 2:30pm at Meeting Room No.1, 15/F, Allied Kajima Building, 138 Gloucester Road, Wanchai, Hong Kong.

The following items have been discussed at the Com-PCM Meeting No. 001/13 (Open-Door Session):

Agenda Item	Paper	Major Resolutions/ Progress Highlights
1.1	CIC/PCM/R/004/12 (for discussion)	Confirmation of the Progress Report Members confirmed the Progress Report of Meeting No. 004/12 held on 7 December 2012.
1.2	CIC/PCM/R/004/12 (for discussion)	Matters Arising from the Previous Meeting <u>Item 4.4 – Revised Categorisation of the CIC Publications</u> At the last meeting of the Committee on Procurement (Com-PCM), some Members raised enquiries on the revised categorisation of the CIC Publications. As suggested by the Chairman, the Secretariat gathered the relevant Council Paper and enclosed it in Paper CIC/PCM/P/001/13 for Members’ consideration. Details were discussed under Agenda Item 1.3. <u>Item 4.6 – Summary Reports of the Task Group on NEC3 Collaborative Contracts</u> The Task Group on NEC3 Collaborative Contracts had embarked on drafting an FAQ document. A preliminary draft version of the FAQ document on NEC3 Collaborative

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		<p>Contracts was enclosed in Paper CIC/PCM/P/004/13 for Members’ information. Details were discussed under Agenda Item 1.5.</p> <p><u>Item 4.7 – Report of the Task Force on the Selection of Consultants and Contractors</u></p> <p>An edited draft of the Guidelines on the Selection of Consultants was under review by the Task Force Chairman and the various Chapter Authors. Details were discussed under Agenda Item 1.6.</p>
1.3	CIC/PCM/P/001/13 (for discussion)	<p>Revised Categorisation of the CIC Publications</p> <p>Members took note of the Paper CIC/PCM/P/001/13 regarding the revised categorisation of the CIC publications. Members also reviewed the documents formerly published by the Com-PCM, namely the “Guidelines on Partnering” and the “Guidelines on Contract Price Fluctuation System”, and determined whether any changes to their categorisation were required.</p> <p>It was agreed that the aforesaid two Guidelines could maintain the original categorisation with the previous descriptions or definitions of the categories as specified in the “Preface” of the published materials. It was further suggested that the effective date of the new categorisation should be clearly defined so as to draw a clear line of demarcation. A note was suggested to be placed on the CIC website to state the effective date of the revised categorisation for the new publications.</p> <p>In terms of the definitions of the new categorisation, a Member enquired on the justifications</p>

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		<p>required and the consequences of not following the Guidelines or Codes of Conduct. The Chairman stated that the enquiries should be referred to the Council for deliberation and follow-up.</p> <p>With regards to categorisation of the document that was currently under drafting by the Task Force on the Selection of Consultants and Contractors (i.e. the Guidelines on the Selection of Consultants), Members suggested that because the document had not been published, it should be revised according to the new categorisation and be categorised as “Reference Materials”.</p>
1.4	CIC/PCM/P/008/13 (for discussion)	<p>Report of the Task Force on Competition Law</p> <p>Members were briefed on the progress and possible deliverables of the Task Force. Members were informed that the article, entitled “Hong Kong’s New Competition Law: An Introduction”, previously submitted to the Com-PCM and hence the Council would be published in the CIC newsletter for stakeholders’ information. Members also took note of the tabled Paper CIC/PCM/P/008/13 enclosing a copy of the information brief prepared by the Task Force Chairman which summarised the key points of the Competition Ordinance. Members reviewed the Paper and endorsed the publication of the information brief as a Factsheet in the CIC website. A copy of the aforesaid Factsheet on the Competition Ordinance is enclosed in Annex A.</p> <p>Members took note that a “Competition Law cum Security of Payment Forum” was scheduled for 3 May 2013. The morning session of the Forum would focus on the</p>

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		Competition Ordinance and the associated compliance measures.
1.5	<p>CIC/PCM/P/002/13 (for information)</p> <p>CIC/PCM/P/003/13 (for information)</p> <p>CIC/PCM/P/004/13 (for information)</p>	<p>Report of the Task Force on NEC3 Collaborative Contracts</p> <p>(a) <u>Progress Updates of the Task Force and Task Group on NEC3 Collaborative Contracts</u></p> <p>Members took note of the Papers CIC/PCM/P/002/13 and CIC/PCM/P/003/13 enclosing the Summary Reports of Meeting Nos. 003/12 and 001/13 of the Task Group on NEC3 Collaborative Contracts. Members were briefed on the progress of the Task Force and Task Group on NEC3 Collaborative Contracts.</p> <p>Members were advised that the Task Group had embarked on drafting a Frequently Asked Question (FAQ) document on NEC3 Collaborative Contracts. A preliminary draft version of the document was enclosed in Paper CIC/PCM/P/004/13 for Members' information. Members were also informed that the draft FAQ document was under review by Task Force Members and that the Task Force and Task Group on NEC3 Collaborative Contracts would further edit the draft FAQs before finalising the document for formal submission to the Com-PCM for endorsement.</p> <p>(b) <u>CIC's Position on NEC3 Collaborative Contracts</u></p> <p>Members deliberated on CIC's position regarding the application of NEC3 Collaborative Contracts in Hong Kong. Key points of Members' deliberation were summarised as follows:</p>

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		<ul style="list-style-type: none"> - In light of the current limited experience on the use of NEC3 Collaborative Contracts in the Hong Kong construction industry, Members agreed that it would be difficult and pre-mature to draw conclusion regarding their suitability for application in Hong Kong. It was therefore suggested that the objective and focus of the Task Force would be on the sharing of knowledge and experience on the use of NEC3 as a form of collaborative contracts in Hong Kong, instead of measuring or evaluating the applicability of NEC3 in the Hong Kong construction industry. - Chairman stated that the Com-PCM and its Task Force should not be seen as endorsing or promoting the use of the NEC3 suite of contracts as it was only one kind of standard forms of contract in Hong Kong. Nevertheless, whilst there was a growing interest or need for industry participants to understand this new form of contract, the Task Force might set out to aid industry stakeholders’ understanding on the subject. - Members noted that the prime objective of the Com-PCM was to promote collaborative working. Whilst the proposed FAQ document looked into the practical application of NEC3 Collaborative Contracts, a message should be made in the document that there were other means or forms of contract that could be established to encourage collaborative working.
1.6	Verbal Report	<p>Report of the Task Force on the Selection of Consultants and Contractors</p> <p>Members were briefed on the status of the draft “Guidelines on the Selection of Consultants”</p>

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		<p>(to be re-categorised and termed “Reference Materials on the Selection of Consultants”). Members were informed that subsequent to the last meeting of the Com-PCM, the first edited draft of the Guidelines on the Selection of Consultants was circulated to the various Chapter Authors for review. Comments received from two Chapter Authors were being followed-up by the Task Force Chairman.</p> <p>Members were further advised that owing to the Task Force Chairman’s recent engagement as the Chairman of the Committee on Environment and Technology, a new Chairman would be appointed for the Task Force on the Selection of Consultants and Contractors.</p>
1.7	CIC/PCM/P/005/13 (for discussion)	<p>Report of the Task Force on Employer-Procured Insurance Policies in Construction Contracts</p> <p>Members took note of the Paper CIC/PCM/P/005/13 enclosing the Progress Report of Meeting No. 001/13 of the Task Force on Employer-Procured Insurance Policies in Construction Contracts.</p> <p>It was reported that at the meeting, representatives of MTR Corporation Limited (MTR) and the Development Bureau shared with Members MTR’s project insurance approach and details of the “Environment, Transport and Works Bureau Technical Circular (Works) No. 7/2005 – Procurement of Construction Related Insurance” that set out the guidelines on the method of procurement of construction related insurance for public works construction contracts respectively. Task Force Members also shared views and experience on the application of Employer-Procured Insurance Policies in Hong Kong and internationally. In terms of the possible deliverables of the Task Force, Chairman of the Task Force suggested</p>

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		that Reference Materials in the form of a Factsheet or Frequently Asked Questions could be the possible way forward.
1.8	CIC/PCM/P/006/12 (for discussion)	Year Plan for 2013/2014 Members noted and confirmed the year plan.
1.9	AOB	Nil.

Procurement Factsheet No. 001/13 The Competition Ordinance

1. Purpose

This factsheet provides general information on the Competition Ordinance for industry stakeholders' reference.

2. Background

Hong Kong's new *Competition Ordinance* applies to businesses in all sectors of the economy, including construction industry clients, contractors and sub-contractors. The Construction Industry Council (CIC) has convened a Task Force on Competition Law to help inform members about the new law.

3. Timetable for the new law

Some provisions have already come into effect: these provide for the establishment of a Competition Commission, appointment of Commissioners and publication of guidelines on the new law. The "conduct rules" and the enforcement provisions of the Ordinance are not yet in force and the timetable for their commencement has not yet been announced.

4. Purpose of the Competition Ordinance

The *Competition Ordinance* aims to uphold the competitive process. Two "conduct rules" prohibit any person or company from behaving in a way that prevents, restricts or distorts competition in Hong Kong. (A "merger rule" also provides for review of potentially anti-competitive mergers but this applies only to telecommunications carriers.)

5. To whom does the Competition Ordinance apply?

The Competition Ordinance applies to any "undertaking", which includes: "any entity ... engaged in economic activity". Organisations of all forms (e.g. companies, trade associations, trusts) must comply, as well as individuals who are engaged in "economic activity".

Many "statutory bodies" will be exempted, initially, but the Government has stated its expectation that "they should adhere to the competition rules even though they are not subject to the law."

Various exemptions and exclusions are provided for, and undertakings will be able to apply to the Competition Commission either for a "block exemption" for agreements of a particular type, or a more specific "decision", where the proposed agreement or conduct can be justified on economic grounds.

6. What does the "First Conduct Rule" prohibit?

The "First Conduct Rule" prohibits collusive agreements and understandings between competitors. For example, rival contractors must not agree on their respective bids in a tender process; and must not share information about their proposed prices at a trade association meeting.

The First Conduct Rule does not apply to small-scale undertakings (i.e. to agreements or concerted practices among undertakings having a combined annual turnover of less than HK\$200,000,000) unless the conduct is "serious anti-competitive conduct".

"Serious anti-competitive conduct" means price fixing; allocation of sales, territories, customers or markets; limiting or controlling the production of certain goods or supply of services; or bid rigging. Even a small undertaking could be liable to prosecution and penalties if it participates in any of these four kinds of conduct.

Overseas, construction industry businesses have been heavily penalised for engaging in bid rigging, bid rotation, and cover pricing. Hong Kong businesses should take care to avoid any such practices.

7. What does the "Second Conduct Rule" prohibit?

The "Second Conduct Rule" prohibits abuse of a "substantial degree of market power", with the object or effect of lessening competition in a market.

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For example, a monopoly supplier of a material must not delay deliveries of its product to a particular customer who has recently entered the industry, and supply it an inferior quality product (while charging it the same prices), with the aim of forcing it out of the industry.

Merely having a substantial degree of market power is not an infringement of the Second Conduct Rule: it is the abuse of a substantial degree of market power to lessen competition that the law prohibits.

A “substantial degree of market power” is not defined in the Ordinance but is normally found where an undertaking is not constrained in its business decision-making by the reactions of its rivals and customers. Market shares are relevant but not decisive as to whether market power exists. Factors such as ease of entry into the market, the bargaining power of buyers and suppliers, and the degree of product differentiation are also significant. The new Competition Commission will prepare guidelines on market definition and assessment of market power.

The Second Conduct Rule does not apply to undertakings whose individual annual turnover is less than HK\$40,000,000.

8. What is the role of the Competition Commission?

The Competition Commission is responsible for enforcing the *Competition Ordinance*, promoting public understanding of competition law, conducting market studies and promoting competition compliance measures for businesses.

The Commission cannot impose penalties: if it considers a penalty is warranted, it must prove the infringement before the Competition Tribunal.

“Warning notice” and “infringement notice” procedures will give undertakings the opportunity to correct their conduct and avoid prosecution. The Commission may also enter into “leniency agreements”, providing a

person or corporation with immunity from pecuniary penalties in return for that person’s cooperation in an investigation or proceedings. Overseas, leniency is commonly granted to the first undertaking to defect from a cartel and cooperate with the agency in its investigation and prosecution of other cartel members.

9. What powers will the Competition Tribunal have?

The Competition Tribunal (to be formed in August 2013) will be made up of the judges of the Court of First Instance.

The Tribunal will have powers to:

- impose monetary penalties (up to 10% of the infringing undertaking’s annual turnover);
- make remedial orders;
- disqualify individuals from acting as company directors;
- review certain Commission decisions; and
- order payment of damages to a person who has suffered loss due to anti-competitive conduct.

10. What are the likely next steps?

Once the Chief Executive has appointed Commissioners, it is likely they will hire staff and begin consultation on the guidelines that further explain the new law. The Commission will probably launch a public education programme regarding the new law.

Overseas businesses commonly include competition law training in their compliance programmes, to assist their staff to avoid infringing the law. Before the *Competition Ordinance* comes into full force, construction industry businesses should consider whether they currently are involved in any agreement or conduct that might infringe the new law and, if so, make alternative arrangements to ensure compliance with the conduct rules.

March 2013

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