Appendix

Case Analysis of the Ombudsman

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In this part, several cases closely related to citizens' daily life and have aroused public attention were chosen to be analysed in order to alert the public departments of the necessary attitude and standard when dealing with such cases as well as making known to the public the defect occurred in these cases, with an aim to arouse citizens' awareness of protecting their own rights and interests.

Case I – Supervision on Management of Economic Housing

Main Points:

- Power of economic housing management
- Feasibility of curator's delegation of power through authorization
- Legality of delegation of the power of management
- Housing Bureau's duties in management
- The right/access to information and principle of goodwill in administrative procedures
- The rights to know and decision-making power of Condominium Unit Proprietors' General Assembly

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Case summary:

A citizen complained to the CCAC that the Housing Bureau (IH) did not fulfil its duties under law in management of economic housing. After collecting information, the CCAC found that the complaint had grounds and thus conducted an investigation and adopted necessary measures.

The facts in the case were:

1) On 2nd July 2004, management committee of condominium A and property management company B (the old one, of which license holder was Mr. W) signed a "letter of entrustment" and an "agreement" indicating a "contract of service". B (old) had the right to collect management fees from the householders of A and, at the same time, bore the obligation to provide property management services to A.

2) On 6th December 2004, B (old) declared its closure to the Financial Services Bureau (FSM).

3) On the following day (7th December), a new property management company with the same name B was registered to the FSM. The registered tax payer was Mr. C.

4) W, in the name of the license holder of B (old), signed a "power of attorney" (POA) indicating that:

   "All and necessary powers are delegated to the authorized person (C)…on behalf of the license holder (authorizer), to exercise the power of management of the building (A). The authorized person shall especially engage in the below matters:

   1. to act as a property manager to the administrative authority of Macao on behalf of the authorizer;

   2. to sign necessary documents on behalf of the authorizer in aforementioned acts."

5) On 9th March 2005, W submitted the POA to the IH.

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Analysis

1. As the so-called "power of management" of condominium A which was claimed to be possessed by company B (old) was, in fact, an integration of creditor's right and liabilities originated from the "contract of entrustment of management" (the so-called "letter of entrustment") signed between management committee of A and company B. **The POA signed by Mr. W, in fact,**

has transferred his contractual status in the "contract of property management service" for condominium A to Mr. C.

2. Under Article 418 of the *Civil Code*, **without consent or ratification of the management committee of condominium A, company B (old) (Mr. W) shall not transfer his contractual status to other parties.**

3. Moreover, under Article 251 and 255 of the *Civil Code*, the authorizer's disposal through "authorization" is restricted to the rights and interests that s/he is able to dispose of. The authorizer shall not delegate the power that s/he cannot dispose of to another person and cannot "authorize" the **responsibilities** that s/he shall fulfill to another person through a POA. Therefore, the contents of **the aforementioned POA were legally infeasible.**

4. Although W submitted the **"legally infeasible" POA** to the IH on 9th March 2005, until 9th June 2006, there has been no information showing that the IH had conducted any analysis on the legality of the POA.

5. It is necessary to mention that it is the IH's duty to supervise the management of communal parts of economic housing and it has the power to urge the management entities to abide by law and rules (under Decree Law No. 41/95/M of 21st August). Therefore, the IH should know which management entities were managing the economic housing. In case of changing the management entity, the IH has the responsibility to identify the new management entity.

6. On the other hand, the IH also has the responsibility to oversee whether the acts of management entities have violated the law. Once illegal acts are found, appropriate measure shall be adopted in order to ensure the legality of management of economic housing.

7. In this sense, in the case of condominium A, when the IH received the POA, it should have analysed its legality (including whether it was "legally infeasible") and promptly explained to the condominium unit proprietors of A after the problem had been found so that the Condominium Unit Proprietors' General Assembly, which has the right to "agree" or "disagree" the replacement of management entity, could make a resolution. **Nevertheless, the IH neither conducted any analysis nor notified the Condominium Unit Proprietors' General Assembly at that time.**

8. Moreover, had the IH followed up and analysed the legal problems brought about by the aforementioned POA, it would not be difficult to find that B (the old one, of which the license holder was W), designated by the management

committee of condominium A to provide management service, declared its closure to the FSM on 6th December 2004, condominium A was then managed by property management company B (the new one, of which the license holder was C), thus clearly identifying the management entity and fulfilling its duty of supervision more effectively.

9. Therefore, the IH should draw on the experience in this case in order to avoid similar problems.

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10. Meanwhile, regarding whether the fact that C provided management service for A in the name of B without the condominium unit proprietors' knowledge has constituted fraud, the legal staffs of the IH conducted a legal analysis on 26th July 2006, which concluded that **"Regarding whether the fact should be reported to judicial authorities, since the requirements for criminal evidence are more than that for civil evidence, it is not suitable to judge it as a criminal offence based on current information. From the perspective of the legally protected interests which were infringed upon, evidence provided by the condominium unit proprietors of A is required. At the same time, due to complexity of the IH's position, it will be easy to be mistaken without the proprietors' support. Therefore, careful decision is required."** The opinion was referred to the subsidiary department in charge of property management affairs upon approval of the IH's Director.

11. The IH's legal analysis did not totally deny the possibility of constitution of fraud and also pointed out that "evidence provided by the condominium unit proprietors (of A) is required" and that "it will be easy to be mistaken without the proprietors' support. Therefore, careful decision is required." In the sense, the subsidiary department in charge of property management affairs should have informed the condominium unit proprietors of A after receiving the analysis so that they could provide the evidence they possessed and decide whether to hold the Condominium Unit Proprietors' General Assembly for deliberation.

12. Moreover, the Organizational Law of the Housing Bureau provides that it has the duties to *"encourage condominium unit proprietors to participate in property management affairs and fulfill the obligations provided by applicable regulations and norms", "to provide information and suggestions about im-*

provement of property management service", "to assist in the establishment and operation of the management entities of condominium buildings, and to assist in holding Condominium Unit Proprietors' General Assembly and provide appropriate assistance".

13. However, according to the information provided by the IH to the CCAC, the IH has never notified the condominium unit proprietors of A of relevant information.

14. In fact, according to the analysis conducted by the IH based on the information recorded, there were no signs clearly showing that someone had committed fraud. However, as the condominium unit proprietors of A are the interested parties of the case, they have the right to know every detail of the case. In addition, the legal analysis of the IH did not rule out the possibility that the proprietors possessed information that could prove the fraud. Since the case involved the management activities of property management entity and its legality, under the law, the decision should be made by the Condominium Unit Proprietors' General Assembly comprised thereof.

15. **Therefore, the IH should fulfil its duties provided by the law to notify the condominium unit proprietors of A of the case and provide appropriate legal assistance if needed.**

16. **Anyway, the IH should provide detailed and clear information to the condominium unit proprietors within its competence under the principle of goodwill[2] in order to avoid similar cases from recurring in the future.**

17. On the other hand, if the IH has created a database of economic housing management entities and promptly arranged and updated the information about the operation of the entities (including commercial registration and/or business tax), it would have facilitated punctual discovery of the extinguishment of the management entity so that the IH could solve the problem as soon as possible. In fact, "to create a database of housing management entities" is one of the

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[2] Article 8 of the *Code of Administrative Procedure* states that:

1. In any forms of administrative activities and any stage of the administrative activities, the Public Administrative Authority and private individual shall act and build up relationship in accordance with the principle of goodwill.

2. In observance of the aforementioned provision, they shall consider the basic value of the law that shall be respected in actual situation, especially:

a) counterpart's confidence brought by the activities;

b) the purpose of activities that have been carried out.

IH's duties provided by its organizational law.

18. The chief of the subsidiary department in charge of property management affairs stated that in 2006 and 2007, the IH collected information about registration of business tax of the companies that provided management service for all economic housing, but the information was not updated in 2008 due to heavier workload of the department.

19. Regularly obtaining and updating information about the management entities' business tax registration and other commercial registration from the FSM and the Commerce and Movable Property Registry is a feasible method to update the information. Nevertheless, if the authority introduces to the *System Governing the Personnel of Property Management Business and Services*, which will be formulated shortly, regulations that require the management entities to notify the administrative authorities of certain significant facts within a designated period after they occur, the rules will also help the authorities get the latest information about property management.

20. **Therefore, the IH not only needs to create a database which facilitates the supervision on the management of the communal parts of economic housing but also has to establish a proper mechanism for effective management of the database (including updates of the information).**

Afterwards, the CCAC proposed a number of improvement measures to the IH.

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The IH's made the following response:

1) The IH will strengthen its supervision on property management in order to avoid the same problem from recurring again. The IH also stated that it was working on the "database of property management" in order to get the information about property management entities more effectively and conduct prompt supervision.

2) In the regulation *Registration System of Condominium Management Entities and Management Service Personnel* which is being draft, there will be more concrete and specific rules regulating management companies in order to enhance their transparency.

3) Regarding the case of delegation of management service contract of A, the IH stated that they had already contacted the current management committee, but the members did not attend the relevant meeting. The IH will follow up the matter and provide assistance.

Finally, the CCAC decided to archive the case.

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Conclusion:

Inspiration of the case:

(1) The administrative authority which has the power to supervise economic housing management should be clear about the status of the management of buildings promptly;

(2) To get comprehensive and clear information;

(3) To be clear about one's own scope of duties and the powers, and responsibilities of Condominium Unit Proprietors' General Assembly;

(4) To promptly assist in solving problems concerning condominium management.

Case II – Application for Economic Housing and Related Procedures

Main Points:

- Statutory requirements for application for purchase of economic housing
- Documents proving the length of time of residence in Macao
- Housing Bureau's criteria for assessment and reasons
- Procedure and methods of handling unaccepted certifications submitted by applicants
- The right of remedy possessed by applicants
- The relationship between objection and administrative judicial appeal
- Violation of Article 70 of the *Code of Administrative Procedure*

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Case summary:

1. Regarding the procedure of economic housing application initiated in 2005 by the IH, the CCAC has received many complaints from applicants since late 2006, indicating that the IH removed them from the waiting list according to Clause 1d) of Article 8 of *Regulations on Purchase of Housing Built under the System of Housing Development Contracts* (Decree No. 26/95/M of 26th June amended by Administrative Regulation No. 25/2002 of 16th December, hereinafter designated as "Regulations on Purchase"), for the reason that they were not able to submit documents which proved the length of time of their residence in Macao was longer than that shown by their ID cards.

2. An applicant, C, stated that he has been residing in Macao since 1978 in his application form, but his ID card showed that the date of first issue was 1994. Then C submitted his transcript for academic year 1984-1985 of a local school as the proof, but the IH removed him from the waiting list for the reason of "not submitting required documents". C raised an objection to the IH but was rejected. Finally, C filed a complaint to the CCAC.

3. According to Clauses 1 and 2 of Article 7 of the "Regulations on Purchase", and Clause 5b) of Article 4 of Decree Law No. 13/93/M of 12th April (regarding revision and adjustment of norms of housing development contracts), residing in Macao for at least 5 years is one of the requirements for application for economic housing. Item 3 of the notice entitled "About Purchase of Housing Built under the System of Housing Development Contracts" issued by the IH in May 2005 also indicated this requirement.

4. Item 1 of the scoring list in Appendix II of the "Regulation on Purchase" indicates that:

   - *0 points for those who have been residing in Macao for more than 5 years but less than 10 years;*

   - *15 points for 10-20 years;*

   - *30 points for over 20 years.*

   Clause 6 of Article 10 indicates that *"In case more than one applicant gets the same score, those whose monthly income is lower will rank higher. If there are applicants who still have the same ranking, the applicant of who the representative has been residing in Macao for longer time will be given higher priority."* Therefore, the length of time of residing in Macao is one of the factors in ranking eligible applicants on the waiting list.

5. Clause 3 of Article 6 of the "Regulations on Purchase" indicates that "*period of residence shall be proved by identification documents. If the identification documents are not sufficient to prove it, other methods are needed*." The application form for bidding for housing development contract also noted that "*If identification document cannot prove the length of time of the representative's residence in Macao, other documents are required."*

6. To conclude, there are 2 cases in which the length of time of residence has to be proved by documents besides the identification documents:

   (1) The applicant's ID card shows that s/he has been residing in Macao for less than 5 years, but in the application form, the length of time declared is 5 years or longer.

   (2) The applicant's ID card shows that s/he has been residing in Macao for 5 years or more, but in the application form, a longer period of time was declared.

In these cases, if the length of time of residence filled in the application form is longer than that shown by the ID card and the certification document submitted by the applicant is accepted by the IH, they will be advantaged.

7. In case (1), if the applicant is not able to submit certification, or has submitted documents which cannot not prove that s/he has fulfilled the requirement of the minimum length of time of residence in Macao (5 years), the IH can certainly remove the applicant from the list for the reason that the applicant "does not fulfil the requirements for application" under Clause 1b) of Article 8 of the "Regulations on Purchase".

8. In case (2), if the applicant does not submit the certification documents within a designated period, the IH will remove the applicant from the waiting list for the reason that *"the applicant does not fill up the deficiency of required documents within the designated period"* under Clause 1d) of Article 8 of the "Regulations on Purchase". This practice is controversial because what the phrase *"the applicant does not fill up the deficiency of required documents"* refers to cannot be confirmed based on its literal meaning. Does the word "documents" purely refers to those which are used to prove that the applicant fulfills ordinary requirements, or also the documents which are used to prove the facts which help the applicant to get extra scores?

9. The CCAC thought that if the length of time of applicants' residence in Macao was longer than that shown by their ID cards, they should bear the onus of proof under Clause 1 of Article 87 of the *Code of Administrative Procedure*. If the applicants know that they are not able to submit any feasible documents to prove it but still declare that the length of time of their residence is longer than that shown by their ID cards, it will result in a wastage of resource as the administrative authority has to assess and check the documents. Therefore, doing so violates the principle of goodwill. In this sense, removal from the waiting list is a normal way to deal with such cases.

10. Nevertheless, if the applicant has already submitted documents to prove his residence period in Macao was longer than that shown by his ID card within the designated period but the documents are not accepted by the IH, the conclusion will be different. Since whether the IH accepts them or not cannot be foreseen and controlled by the applicant and there is no regulation indicating that "*if the certification documents submitted are not accepted by the authority as evidence, the applicant is considered to be not filling up the deficiency of required documents"*, if the IH removes the applicant from the waiting list

under Clause 1d) of Article 8 of the "Regulation on Purchase", the legality will be called into question.

11. In early 2007, the CCAC notified the IH of the aforementioned stance, but the IH stated that many of the applicants were removed from the list in the application procedure because the proof they submitted were not accepted. If those applications in fact have fulfilled the statutory requirements and have been re-accepted, the ranking on the entire waiting list is expected to experience a significant change, resulting grievance of some of the applicants whose rankings drop subsequently due to the change. The IH also pointed out that some applicants who had been removed from the waiting list had filed judicial appeals to the Administrative Court. One of them won the appeal but the IH has filed an appeal against it to the Court of Second Instance.

12. Since the final judgment of the judicial authorities might affect the IH's stance in law enforcement, the CCAC followed up after the appeal was adjudicated.

13. In mid-2008, the collegial bench of the Court of Second Instance ruled against the IH. The IH stated to the CCAC that they had already followed the court's judgment to place the applicant on the waiting list for economic housing again. As to other cases that happened at the same time in which the documents submitted to prove the length of time of the applicants' residence in Macao was longer than that shown by their ID cards were rejected by the IH, **or the applicants never submitted any documents to prove that length of time of their residence in Macao was longer than that shown by their ID cards, the IH sustained the original decisions.** The IH also stated that next time when economic housing is opened for application again, the promotion would be strengthened in order to remind applicants that they should fill in the forms based on the documents and proofs they were able to submit.

14. As the CCAC did not agree on the aforementioned stance of the IH and the IH was revising the regulation regarding public housing, it is necessary for the CCAC to write to the IH to state its stance for reference of the revision (the stance does not conflict with the court's point of view on related appeals).

15. The CCAC also discovered that there were alleged illegalities in IH's notifications of related administrative acts and handling of interested parties' right of complaint in the procedure of application for economic housing. Therefore, the Commission commenced a formal investigation on these facts and C's case to advance a more comprehensive analysis.

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Analysis:

1. Under Item a of Article 68 of the *Code of Administrative Procedure*, after making the decision regarding the request made by the interested party, the interested party shall be notified. Article 70 regulates the contents of notifications by providing that *"channels and time limit for filing administrative complaint" and "pointing out whether judicial appeal can be made against the act"* (Items c and d of the article) are two of the necessary points in the notice.

2. Regarding notification of results of the application for economic housing, Article 9 of the "Regulations on Purchase" states that the IH shall publicize the provisional list/confirmed list, but it does not specifically regulate the contents of notification. Therefore, Article 70 of the *Code of Administrative Procedure* is subsidiarily applicable.

3. However, some members of the IH believed that it was not necessary to point out the channels for complaints in the confirmed list of application for economic housing due to Clause 3 of Article 28 of the *Code of Administration Litigation (When a compulsory administrative complaint against a revocable act is required prior to filing a judicial appeal, if Articles 149, 150 and 156 of the Code of Administrative Procedure are not observed, judicial appeal shall not be filed.)* If the applicant did not raise any objection against the provisional list within a designated period under Clause 3 of Article 9 of the "Regulations on Purchase", s/he should not file any judicial appeals.

4. It is necessary to point out that "judicial appeal shall not be filed" stated in the aforementioned article is only applicable in the cases when it is "compulsory" to file an administrative complaint against a revocable act prior to filing a judicial appeal.

5. Clause 1 of Article 148 of the *Code of Administrative Procedure* provides that *"Objection can be raised against any administrative acts, but not in the cases regulated by other laws."* It shows that raising objection is voluntary in principle. It is compulsory only in exceptional cases expressively stated by laws. Clause 3 of Article 9 of the "Regulations on Purchase" states that *"Objection against the temporary list **can** be raised to the Director of the IH within 15 days counting from the day the notice is publicized in the Official Gazette."* (The underline only exists in this text.) Using the word "can" means that the objection is voluntary. Therefore, **the staff members' explanation of the fact that the IH did not indicate the channels and time limit for administrative**

complaint when publicizing the confirmed list, i.e. their understanding of applicant's objection as the prerequisite of filing judicial appeal to the court, is groundless.

6. On the other hand, the IH did not point out to the applicants whether they could file judicial appeal against the IH's decision (removal from the waiting list or the rankings) under Item d of Article 70 of the *Code of Administrative Procedure* when publicizing the confirmed list.

7. In fact, according to Clause 1 of Article 26 of the *Code of Administrative Litigation*, in case where publication or notification is compulsory, if the people do not know the meaning, the decision maker and the date of the relevant decision due to deficiency in the content, the period for judicial appeal shall not begin. In this clause, the contents do not include the absence of "whether judicial appeal can be filed against the relevant administrative act". Moreover, although the authority has the obligation to point out what Article 70 of the *Code of Administrative Procedure* provides for to the parties concerned, if the obligation is not fulfilled, the parties concerned have the right to consult the authority under Clause 2 of Article 27 of the *Code of Administrative Litigation*. Also, following the enquiry/request for redressing raised by the parties concerned, the period for judicial appeal shall be suspended until the administrative authority makes up for the sufficiency of the notice.

8. Therefore, if applicants are dissatisfied with the IH's decision of removing them from or changing their rankings in the confirmed list and thus exercise the right provided by Clause 2 of Article 27 of the *Code of Administrative Litigation* to ask the IH for channels and ways to file a complaint, while the IH replies that "the applicant did not raise an objection within the statutory period after the provisional list was publicized, so s/he does not have the right to file a judicial appeal" and the applicants hence missed the opportunity to file the judicial appeal, the IH shall be liable to responsibilities due to violation of the principle of goodwill under Clause 2 of Article 8 (the principle of goodwill) and Clause 2 of Article 9 (the principle of cooperation between the administrative authority and people) of the *Code of Administrative Procedure*. In this case, the judicial appeal filed by the misled applicant may be accepted by the Judiciary, even if it is filed when the designated period expires.

9. On the other hand, since the IH has mistaken that raising an objection within a designated period following the publication of the provisional list is the prerequisite of applicants' judicial appeal, in practice, the notification made by

the IH to the applicant regarding its decision upon the latter's objection indicated that *"according to Article 25 of the Code of Administrative Litigation, the applicant can file a judicial appeal to the Administrative Court within 30 days following the receipt of this letter"*.

10. The aforementioned case is not the one in which the applicant exercised the right provided by Clause 2 of Article 27 of the *Code of Administrative Litigation* to raise an enquiry/request for the IH's amendment, but the IH did not make any response or provide wrong information, leading to suspension/cancellation of the period for judicial appeal. However, due to the IH's misinterpretation of the provision, which was that the period for judicial appeal started from the day the applicant received the notice about the IH's decision regarding the objection raised, not the day the confirm list was publicized. Due to the principle of goodwill (the interested parties' trust to the administrative authority), the period for judicial appeal shall start from the day indicated in the IH's reply.

11. As to applicant C's case, the details obtained after investigation are as below:

Date	Facts
22.02.06	The IH publicized the provisional list, which indicated that C should submit a POA
27.02.06	C submitted relevant documents according to the IH's requirement
25.08.06	The IH notified C that C should submit documents to prove the length of time of his residence in Macao declared in his application form
04.09.06	C submitted a copy his transcript for academic year 1984/1985 of a local school to the IH
13.12.06	The IH publicized the confirmed list which showed that C had been removed from the list
15.12.06	C sent letters to the IH and the Chief Executive to express his "disagreement" on the removal
26.12.06	The IH received the aforementioned letter sent by C to the Chief Executive from the Office of the Secretary for Transport and Public Works
16.01.07	The Chief of the Housing Allocation Division made a report, suggesting the superior rejecting the objection raised by C (the report was submitted to the Secretary for Transport and Public Works following the Deputy Director's approval on 17.01.2007)
27.02.07	C sent letters to the IH and the Chief Executive to follow up the matter
08.03.07	In response to the follow-up, the Chief of the Housing Allocation Division wrote a report indicating that he had already reported to the Secretary for Transport and Public Works but had not received any instruction. He still suggested rejecting C's objection (The report was submitted to the Secretary for Transport and Public Works following the Deputy Director's approval.)
18.03.07	The Secretary issued an order regarding the two reports submitted by the IH – to agree on the stance of the Legal Advisor of the Office of the Secretary regarding the report of C's complaints over his removal from the list. The report indicated that since C had been residing in Macao for over 5 years, the IH should include him in the confirmed list. The removal is a revocable act and can be repealed within a statutory period under Article 130 of the *Code of Administrative Procedure*. The report also reminded the IH to reply to C and pointed out the Secretary's scope of power (The Secretary does not have the power to decide whether the removal shall be repealed or sustained.)

Date	Facts
09.04.07	Since C did not receive any reply, he wrote to the Office of the Secretary to follow up the matter. (The Secretary ordered the IH to follow up the matter.)
23.04.07	IH's staff members wrote a report to suggest the superior rejecting C's objection (approved by the Deputy Director)
26.04.07	The IH sent C a response to C's query about the application for economic housing and pointed out the basis for the removal.
02.05.07	The Chief of the Housing Allocation Division wrote a report to suggest reporting to the Secretary that the IH had made a reply to C
25.05.07	C wrote to the Office of the Secretary, asserting that the IH's reply was unreasonable and that "I cannot find any other channels to complain." (The Secretary issued an order to request the IH to follow up the matter.)
08.06.07	The IH's staff members made a report indicating that on 26.04.07, the IH made a reply regarding C's "same application", therefore, according to the law, the IH had no obligation to make another decision. (The report was submitted to the Secretary following the Deputy Director's approval.)

12. Clause 3 of Article 9 of the "Regulations on Purchase" states that *"Within 15 days since the notice is publicized in the Official Gazette, objection against the provisional list can be raised to the Director of the IH."* (The underline only exists in this text.)

13. Raising objection, as a means for parties concerned to file a complaint against an administrative act, urges the actor to review the act so that a new decision which benefits the parties concerned may be made.

14. In this case, the IH requested C to submit a POA after the provisional list was released and C did what he was requested to do. In other words, C could not raise any objection at that time. Due to the IH's carelessness, it requested C to submit documents to prove the length of time of his residence in Macao on 25th August 2006 and C did it within the designated period. However, C was removed from the confirmed list, so C did not realize the IH's decision of the removal until the confirmed listed was publicized. It was not until this moment that C had the right to raise an objection. (Please refer to Clause 1 of Article 148 of the *Code of Administrative Procedure*.)

15. Clause 1 of Article 148 of the *Code of Administrative Procedure* provides that

"Objection can be raised against any administrative acts but not in the cases regulated by other laws." The "Regulations on Purchase" do not prohibit parties concerned from raising an objection against administrative acts carried out by the IH after the confirmed list is released.

16. Therefore, C's disagreement on the removal of his name from the confirmed list written to the IH on 15th December 2006 should be considered as execution of his right to raise objection. In fact, the reports made by the staff members afterwards showed that the IH admitted that the aforementioned letter sent by C served as an objection.

17. When the IH publicized *the removal of C from the confirmed list*, the IH neither notified C of which authorities would accept his objection and the period for raising objection nor pointed out that judicial appeal could be filed against the decision according to Items c and d of Article 70 of the *Code of Administrative Procedure*. However, C raised an objection to the IH within the statutory period (2 days after the confirmed list was released).

18. On 15th December 2006, C raised an objection to the IH, but the Deputy Director agreed on the suggestion of "rejecting the objection" made by the Chief of the Housing Allocation Division on 17th January 2007. When the IH made the decision regarding C's objection, the period for making the decision designated by Clause 4 of Article 9 of the "Regulations on Purchase" had already expired (The decision regarding the objection raised shall be made within 20 days.) Also, the IH did not notify C of the decision of "rejecting the objection raised" within the statutory period (8 days, please refer to Article 71 of the *Code of Administrative Procedure*) but refered the case to the Secretary for reply.

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19. It is necessary to emphasize that C has submitted documents to the IH to prove the declared length of time of his residence was longer than what was shown in his ID card, but the IH did not accept the documents and removed his name from the list. Since C could not foresee whether the documents he submitted would be accepted or not and there was no regulation indicating that "if the certification documents submitted are not accepted by the authority as evidence, the applicant is considered to be not filling up the deficiency of required documents", the CCAC considered that the relevant decision was legally groundless.

20. As to the Secretary for Transport and Public Works, a legal advisor of the Office wrote a report regarding the removal, which indicated that it was a revocable act, so the IH could repeal the act within the statutory period. Otherwise, the act would become effective when the period expires. The Secretary made his approval on the report. In other words, the Secretary's stance is the same as the CCAC's.

21. Nevertheless, there is no information showing that the IH did conduct analysis, research or follow up on the aforementioned report with the Secretary's order of approval. On the contrary, the IH claimed in the reply regarding C's objection that the IH had made a **response to his query** but not his objection. Also, the reply letter did not indicate that judicial appeal could be filed and the period for the appeal. As a result, C mistook that there was no other channel to complain. Although the IH realized the misunderstanding, in the two letters sent to C later, the IH did not inform C that he could file a judicial appeal. Therefore, the IH's conduct obviously violated the principle of goodwill.

22. In the sense, the period for C to file a judicial appeal against the IH's removal of his name in the list should not be counted. The act has a revocable defect, therefore it cannot be considered as redressed due to the expiry of the period for judicial appeal. In other words, the defect still exists. The IH shall revoke the act under Article 130 of the *Code of Administrative Procedure*.

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23. Therefore, the CCAC adopted the following measures according to its statutory authority:

    1) To render recommendations to the IH to urge it to:

        a. repeal the decision of removing C's application for economic housing from the confirmed list;

        b. review whether there are any other cases in which the IH have provided incorrect information to the applicants, resulting their misunderstanding that they did not have the right to file a judicial appeal. If there are such cases, the IH shall adopt measures to remedy the mistake;

c. As there is no law regulating that raising objection is the prerequisite of judicial appeal, the IH should observe Items c and d of Article 70 of the *Code of Administrative Procedure* to specify the availability of raising objection against the IH's decision and the designated period, and point out that judicial appeal can be filed when publicizing the confirmed list of applicants for economic housing in the future.

2) To suggest the IH that if the IH still sustain the requirement that "not filling up the deficiency of required documents within the designated period" will lead to removal of the applicant's name in the list when revising the law related to public housing, the IH shall clearly define "not filling up the deficiency of required documents" (for example, whether the required documents purely include those proving that the applicant fulfils ordinary requirements or also those used to prove the facts that result in extra points that the applicant can get). If the IH commences the economic housing application procedure before revising the law, the IH should not remove any applications from the list for the reason that the documents submitted by the applicants as proof are not accepted by the IH.

3) Since this case also involves the IH's "response de facto" to its supervisory department's order in real cases, a copy of the aforementioned recommendation/suggestion will be referred to the Secretary of Transport and Public Works for information.

24. In response to recommendations b) and c), the IH admitted that never indicating the channels for judicial appeal in provisional lists and confirmed lists was only irregular in form. The IH denied misunderstanding of "the prerequisite of executing economic housing applicants' right to file a judicial appeal", stating that they never provide wrong information such as "the applicant does not have the right to file a judicial appeal if s/he does not raise an objection within the statutory period after the provisional list is publicized". Therefore, the IH will not take any measures regarding the fact that the confirmed list did not notify the channels for complaint, but has promised to indicate information about complaint under the law in confirmed lists in the future. Recommendation item b) is only to urge the IH to review other cases in the past and adopt measures to make up for mistakes if there are any. The IH clearly asserted that there were no cases in which the same mistake exists and there were no other applicants who have filed complaints over infringement upon their right to complain due to wrong information provided by the IH. Therefore, the IH's

response has no conflict with the CCAC's recommendations.

25. Although the IH did not mention recommendation item a) in its response, the response was made over 90 days after the day the recommendation was rendered. Under the law, the recommendation was considered to be accepted by the IH. Therefore, the CCAC wrote to the IH to follow up the handling of the case of the removal. The IH replied that the decision had been repealed and C's ranking in the confirmed list had been restored. Also, the IH has already written to C to notify of the situation.

26. As the IH has accepted the recommendations rendered by the CCAC, this case has been archived.

* * *

Conclusion

Inspiration of the case:

(1) Administrative authorities should formulate and follow a clear set of rules when handling a procedure involving a vast number of interested parties.

(2) Administrative authorities should clearly notify the interested parties of the reasons of their decisions.

(3) Administrative authorities should be clear about the right to remedy that the interested parties are entitled to and notify them of the requirements for exercising the right.

Case III – Procedure of Allocation and Sale of Economic Housing

Main Points:

- Application by those who has been allocated public servant's quarters
- Difference between applications in the names of "family" and "group"
- Allocation of economic housing to an applicant and his cohabitant in the name of "family" but the applicant's marital relationship with his spouse has not yet been dissolved
- Interested parties' legitimate expectation due to the authority's maladministration (or even illegal administration); the balance between the two

The CCAC received a citizen's complaint indicating that the IH realized that his marital relationship with his spouse had not yet been dissolved and thus refused to carry out the procedure of purchase of economic housing for his cohabitant, surnamed Ho. Then the IH many times requested the complainant to submit the decree of divorce; otherwise Ho would not be allowed to go through the procedure. Also, the IH would not accept the complainant's application for removal of a member from his family unless the complainant submitted the certificate of parental right to the son of the complainant and Ho rendered by the Court of First Instance.

As to submission of the certificate of parental right, since the law assumes that the mother is entitled to parental right to her illegitimate child, the complainant has no need to reach any agreement with Ho. The parental right to their son is assumed to be exercised by Ho under the law. Therefore, after the CCAC pointed out the related provisions, the IH no longer requested the complainant to submit the certificate of parental right. However, **the IH still insisted that Ho would not be allowed to go through the procedure of purchase of economic housing until the complainant submitted the decree of divorce with his spouse.**

As the CCAC discovered that there were signs of administrative irregularity in the process of the allocation of economic housing to Ho, the Commission then commenced an investigation and proved that there were several administrative illegalities and irregularities in the IH's handling in the case. They are listed below:

I. The IH approved the complainant's application for social housing without investigating whether he was a tenant of other properties

1. The complainant is a retired public servant. On 10th September 1987, he was approved by the former Financial Services Department to rent a T2-type unit of public servant's quarters. After that, the complainant lived with Ho and their son without dissolving his marital relationship with his wife who continued to live at the aforementioned unit.

2. On 15th March 2004, the complainant submitted an application for rental of social housing to the IH in his name. Following the assessment, the IH thought that although the complainant was a retired public servant who received a pension of MOP6,199.00 per month, he was disabled and both his cohabitant and son were sick. According to the complainant's social and economic conditions at that time and Article 6 of Decree Law No. 69/88/M, the IH exceptionally approved his application for renting a T2-type social housing unit as his residence with Ho, his step son and their son on 18th February 2005.

3. The IH stated that at that time, the complainant declared that Ho was his spouse and never revealed his marital relationship with another woman. He did not reveal the fact that he had rented a unit of public servant's quarters either. However, the aforementioned process of allocation of social housing reflected that there was a lack of a system of mutual communication between the IH and the Financial Services Bureau (FSM). As a result, the complainant managed to rent both public servant's quarters and social housing in his own name at the same time without being discovered by the authorities.

4. In fact, when the IH assessed the complainant's application for social housing, it should adopt measures to check whether he really had any difficulties in owning a house in order to avoid improper allocation of social housing. Moreover, under Article 43 of Decree Law No. 69/88/M of 8th August, if a tenant of social housing or any of his family members possesses or leases other properties, the IH can unilaterally terminate the contract of lease of social housing when it expires. In other words, if the IH has promptly found that the social housing applicant had rented a unit in public servant's quarters, it would have prevented or handled this case expeditiously so that public housing resources or welfare would not be abused by the same group of people (or the same person).

II. The IH never separates "family" application from "group" application for economic housing

5. Under Article 4 of Decree Law No. 13/93/M of 12th April, eligible citizens can apply for economic housing in the name of an "individual", a "family" or a "group" with no blood relationship. "Family" members shall "live together and be linked with blood relationship, affinity, adoption or any other relationships traditionally equivalent to these". A "group" shall be "a group of people without blood relationship with each other, but they will live together in the economic housing unit they purchase." No matter in whose name the application for economic housing was made, all members shall not possess any properties and appear in any lists of approved applicants for economic housing. Otherwise, their applications will not be approved.

6. In fact, the aforementioned regulation is relatively stringent to the people who apply for economic housing in the name of "family". However, the CCAC saw that when accepting and handling the applications for economic housing, the IH never separated "family" application from "group" application or assessed whether the members' status fulfilled the statutory requirements. Due to the principles of fairness and goodwill, the CCAC thought that the IH could still sustain the aforementioned standard. However, it is necessary to note that if the IH really thinks that there are difficulties in separating "family" application from "group" application (especially identifying the relationships between members) under Decree Law No. 13/93/M of 12th April, the relevant restrictions/requirements should be cancelled when revising the law in the future so that the "legality in administration" can be reflected.

III. The IH should not allocate economic housing to Ho without making any correction

7. In the case, Ho submitted an application as the representative of her "family" for the plan of allocation of economic housing launched in January 2003. At that time, Ho declared that the complainant was her spouse in her application form. Other members included two sons (one is of her and the complainant; another is of her and her ex-husband). In April 2006, Ho was given a chance to select an economic housing unit based on her family's ranking in the general list. The complainant notified the IH of his marital

relationship with another woman in the stage of selection of economic housing units. According to the IH's rules, applicants and their spouses, as declared in their application forms, shall together register as the buyers of the economic housing units they purchase. Therefore, the IH thought that Ho and the complainant should not purchase the allocated unit together until the complainant completed the divorce procedure and registered as one of the buyers or the complainant would be removed from the "family" members' list. However, if the complainant is removed, Ho's application should be assessed, ranked and graded once again.

8. It is necessary to point out that according to Clauses 1 and 2 of Article 10 of Decree Law No. 26/95/M of 26th June, the rankings of applicants are based on their status at the time when they submitted the application and the information stated in their application forms but not the status when they "officially sign the deed". Untrue information in the application form or removal of members from the "family" or "group" normally affects the grade, the ranking and finally the eligibility to "select" the unit.

9. However, the IH has a different explanation of what they have done: The complainant made a written statement on 7th April 2006 indicating that he would submit the Court of First Instance's decree of the dissolution of his marriage in order to express his willingness and promise to dissolve the wedlock. Also, the social housing unit that they resided in was originally meant for public servant's quarters and the owners of other units at the building strongly opposed to transforming the vacant units into social housing. In order to ease their resentment, the IH should have the social housing tenants who had already settled down in the units moved away as soon as possible. The IH considered economic housing allocation as one of the solutions and that their ranking, in fact, made them eligible to purchase an economic housing unit despite one of the members' marital relations has yet to be clarified. However, the complainant's statement can also prove his willingness and promise to solve the problem concerning his marriage. Therefore the IH, by taking account of the principle of goodwill, approved Ho's application and made her the appointed buyer on 13th April 2006, while the complainant was a member of Ho's family. Nevertheless, the IH stated that the procedure of purchase would not be carried out unless he submitted the decree of divorce.

10. After allocating economic housing to Ho, the IH still insisted that the com-

plainant should submit the decree of divorce with his spouse to prove that Ho's statement and declaration were true. The IH's stance reflects that **the IH considered that Ho applied for purchase of economic housing in the name of family and that if the complainant submitted the decree of divorce with his spouse afterwards, the facts that Ho had declared (including the fact that the complainant was Ho's spouse) could be proved to be true.**

11. Nevertheless, it is necessary to point out that when Ho stated in her application form that the complainant was her spouse in 2003, the marital relationship between the latter and another woman still had not been dissolved. (The complainant claimed that he started to go through the divorce procedure in March 2008.) Since he had impediment to marriage, he and Ho had no marital or de-facto marital relationship with each other. In this case, the complainant, Ho and the two sons should not apply for economic housing in the name of a "family" under law. According to the law, if Ho wants to apply for economic housing in the name of "family", the complainant shall be removed from the list of Ho's family members in the application form. Also, Ho's application shall be re-assessed and her eligibility shall be based on the new ranking.

12. When Ho went through the "selection" period in 2006, the IH already realized that the complainant and Ho had no legal or de-facto marital relationship with each other, i.e. part of the information or statement in Ho's application form was untrue. In the sense, the IH should have promptly adopted measures to follow up instead of considering the complainant, Ho and the two sons as members of a family (on condition that the complainant should submit the decree of divorce with his spouse afterwards) without making any rectification. The IH should not have assessed and ranked the application based on the information stated in the form and allowed the family to select a unit according to the ranking. Moreover, the elimination of impediment (of marriage/de facto marriage) between Ho and the complainant does not depend on the written statement unilaterally made by the complainant (which stated that the decree would be submitted to the IH as soon as the Court of First Instance rendered the decree to dissolve the marriage), since the statement cannot replace or be equivalent to the court's adjudication of a case, nor can it be impossible to have any retroactive legal effect to dissolve his impediment of marriage/de facto marriage to Ho.

13. In fact, the IH's insistence that the complainant should submit the decree of divorce to prove that what Ho stated and declared was true cannot effectively solve/make up for the problem concerning the untrue information in Ho's application form. It is because only if the court's decree retroacts his divorce to the day of the complainant and his wife's separation which was **two years or over two years** prior to the day Ho submitted the application (one of the statutory requirements for de-facto marriage is that "two people willingly living together like a couple for at least **two years**"), will this retroactive effect (the complainant's is undissolved marriage would no longer exist since the day the decree retroacts) be possible to make the relationship between the complainant and Ho in 2003 fulfil Articles 1471 and 1472 of the *Civil Code* which defined de facto marriage. On the contrary, if the decree of divorce submitted by the complainant does not have the aforementioned retroactive effect, he and Ho cannot use it to prove that the statement "the complainant is Ho's spouse" in the application form for economic housing is true.

14. Moreover, with reference to the current legal system, there are only regulations on allocation of social housing that allow the administrative authority to exceptionally approve certain individuals or families' applications that may not fulfill any of the requirements (Decree Law No. 69/88/M of 8th August). However, there are no similar regulations on the allocation of economic housing (including Law No. 13/80/M of 6th September, Decree Law No. 13/93/M of 12th April and Decree Law No. 26/95/M of 26th June). In other words, no "exceptional case" in which allocation to certain individuals or groups without following normal assessment and allocation procedures is allowed. Therefore, the IH exceptionally allowed Ho to be an appointed buyer based on the grade and ranking for the reason of "easing people's resentment" was obviously illegal.

IV. The IH should take into consideration Ho's legitimate expectation of possessing an economic housing unit

15. The IH insisted that if the "family" hoped to enter into a deed by then, the complainant should fulfil his promise to submit the decree of divorce with his wife (but whether it has retroactive effect or not was not mentioned) in order to prove that what Ho had declared and stated was all true. Other-

wise, the case would be considered as false statement. In other words, the IH has the power to retract the documents of recognition and approval issued to the applicant for the reason that she has violated Clause 6 of Article 27 of Decree Law No. 13/93/M *("If the appointed buyer has made false statements about any of the requirements provided by Clauses 5, 6 and 7 of Article 4, the Bureau can retract the recognition and approval documents before the deed is made.")*.

16. In fact, as mentioned before, merely requesting the complainant to submit the decree of divorce is not sufficient to make the "untrue marital relationship" become true. Therefore, this request is indeed illegal. Meanwhile, the IH applied Clause 6 of Article 27 of Decree Law No. 13/93/M of 12th April as the punishment for not submitting the decree of divorce was also inappropriate.

17. In fact, Clause 6 of Article 27 of Decree Law No. 13/93/M of 12th April is against false statement regarding the requirements under Clauses 5, 6 and 7 of Article 4 of the same decree law, which refers to the false statement regarding the ordinary requirements for appointed buyer of economic housing (such as age, length of time of residence in Macao and possession of valid identification documents, etc.) or the false statement made in order to evade the requirement that members of the group shall not be owners of any real estate or land in Macao or concessionaires of any private lands in Macao. This provision does not provide any mechanism of punishment against filling untrue information in the application form. Therefore, the IH claimed that Article 27 of Decree Law No. 13/93/M of 26th June can be used as the basis for withdrawal of the document of recognition which has been issued to Ho was inappropriate. On the other hand, although Clause 1 of Article 8 of Decree Law No. 26/95/M of 26th June states that the IH can remove relevant groups from the list of applicants for the reason that *"the applicants made false or untrue statements or used fraudulent methods before they receive the keys in order to obtain the units"*. However, unless the IH can prove that Ho "deliberately" filled untrue information in the application form although she "realized" the fact that the complainant was not her legal spouse, the IH could not "sanction" Ho according to Clause 1 of Article 8 of Decree Law No. 26/95/M.

18. Moreover, the complainant informed the IH that he had marital relationship with another woman in the stage of selection of economic housing

unit. Later on 7th April 2006, he also made a written statement to the IH indicating that the decree would be submitted to the IH as soon as the Court of First Instance made the judgment of dissolution of the marriage. In other words, before the IH decided to allow Ho to be an appointed buyer on 13th April 2006, it had already realized the fact that the complainant's marital relationship with another woman had not yet been dissolved. That is, the IH still "wrongly" allocated a unit to Ho and allowed them to live there until now although they **realized** that what she had filled in the application form was legally **untrue**. Therefore, as far as the principle of goodwill is concerned, the IH should take into consideration it cannot lay the blame on Ho completely for the "wrong" allocation. Also, the IH should consider whether it should take account of Ho's legitimate expectation of possessing an economic housing unit aroused from the Bureau's processing of her allocation.

V. Proposals/Suggestions

19. Therefore, the CCAC adopted the below measures within its competence:

    a. To suggest the IH and the FSM to establish a mutual communication mechanism regarding allocation of public housing, especially the cases involving applications by public servants and retired public servants in order to promptly verify whether the applications have fulfilled the legal requirements and avoid abuse of the government's housing resources and welfare.

    b. To suggest the IH that it should analyse the requirements regarding the relationships among members of "groups" and "families" applying for economic housing when reviewing the execution of Decree Law No. 13/93/M of 12th April. If the IH considers the aforementioned classification to be unnecessary and practical difficulties exist, the relevant restrictions/requirements should be cancelled in future revisions.

    c. To recommend the IH to note that the request for the complainant's decree of divorce when handling Ho's application, in fact, cannot possibly prove that "the complainant is Ho's spouse" stated by Ho is true unless the court's decree retroacts his divorce to the day the complainant and his wife separated which should be two years or over two years prior to the day Ho made such statement. Meanwhile, the IH should

review Ho's case and also take into consideration the fact that it cannot lay the blame completely on Ho for the "wrong" allocation and Ho's legitimate expectation arose from the fact that she could obtain an economic housing unit.

* * *

Following the CCAC's intervention, the IH accepted the recommendation and followed up the case as below:

a) The IH agrees on the suggestion about establishment of communication mechanism.

b) In order to reasonably utilize housing resources and uphold traditional moral values, the IH has cancelled the category of "group" in the revision of housing regulations. That means only families or individuals can apply for economic housing.

c) The IH no longer insists that the complainant should submit the decree of divorce with his spouse. Also, the inaccurate information filled in Ho's application form (the complainant is Ho's husband) has already been corrected by the IH within their competence and the parties concerned have been notified of the relevant measures.

Finally, the CCAC archived the case.

* * *

Conclusion

Inspiration of the case:

(1) Administrative authorities should have sufficient exchange of information with each other. For example, in cases involving retired public servants' applications for social housing, the IH should, via the FSM, make sure whether the applicants have been allocated public servant's quarters.

(2) The administrative authority should by all legal means investigate the status of the applicants' "families" in order to correctly check whether the applications fulfil the legal requirements.

(3) In the cases where the applicant, whose marital relationship has not been dissolved, sets up a family with his/her cohabitant, the IH should be very careful and seek correct legal basis when handling such applications.

(4) When the administrative authority's illegality directly gives rise to legitimate expectation by the interested parties, the administrative authority should strike a balance between public and private interests.

Case IV – Flammable Goods Business Operational Requirements and Safety Issues

Main Points:

- Strict requirements for approval of individual's temporary occupation of public land
- The fire safety equipments of "flammable goods storage and the exemption"
- Approving individual's continuous occupation of public land without the authorities' approval and prompt update of relevant requirements
- Supervision of flammable goods business and storage
- Insufficient alert to dangerous products

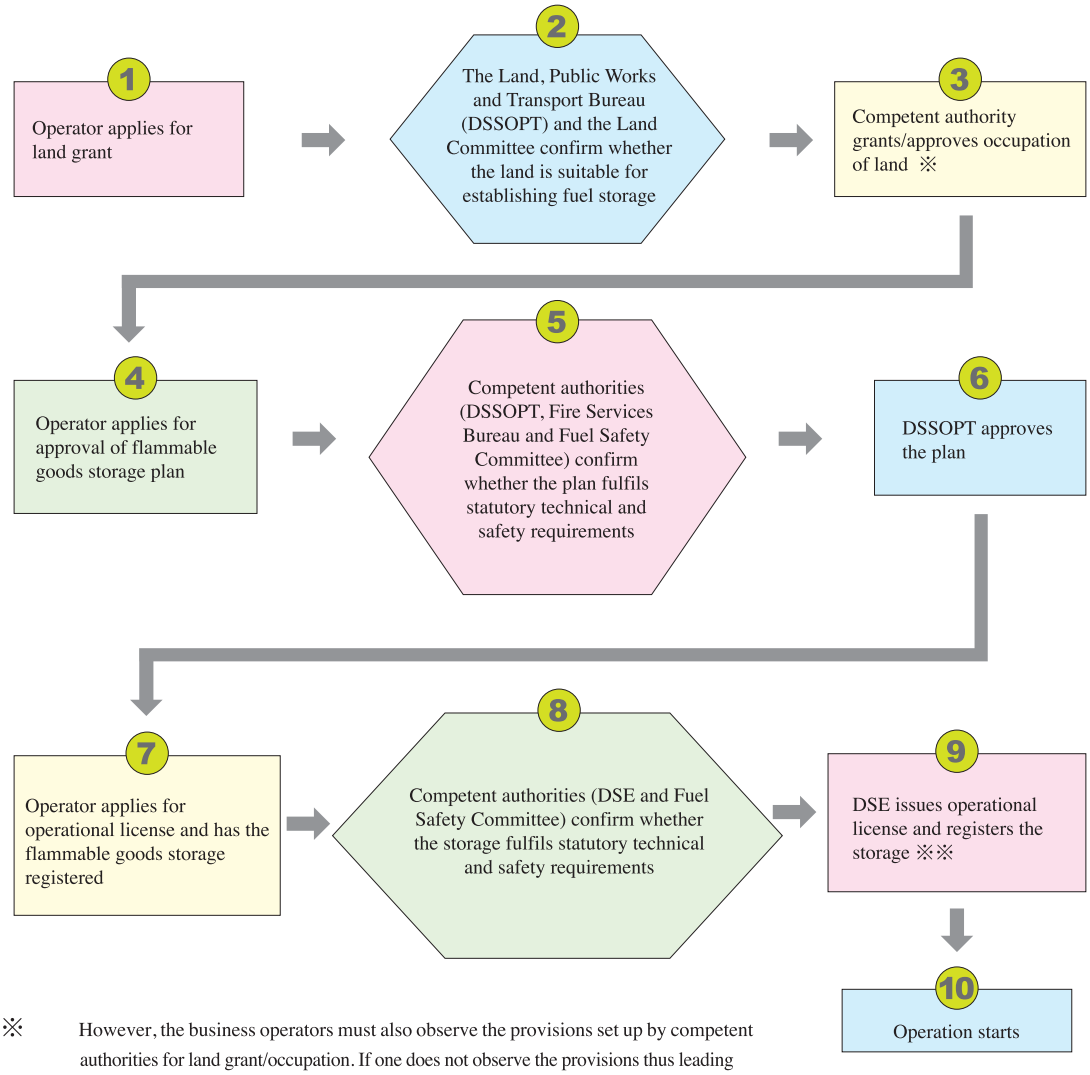
A citizen reported to the CCAC that company A had been operating an unlicensed petroleum gas business for many years but the law-enforcement authorities failed to supervise it. It was discovered in the preliminary investigation that the company had no license and has been using a piece of land located at the Ilha Verde persistently without land occupation approval. The discovery shows that the competent authorities did not fulfil their statutory duties regarding flammable goods business. Therefore, the CCAC commenced a formal investigation.

* * *

Introduction:

1. Operators of flammable goods business shall have facilities for storing flammable goods (commonly known as fuel storage/intermediate storage) which shall fulfil the provisions under the *Safety Rules of Flammable Goods Storage*. Storage of liquefied petroleum gas shall also fulfil the provisions under the *Safety Rules of Liquefied Petroleum Gas Containers Storage*.

2. Since the competent authorities (Flammable Goods Storage Supervisory Committee/Fuel Safety Committee and the Economic Services (DSE)) thought that **flammable goods storages should be established in Macao**, any people or entities that wished to start flammable goods business but had not yet acquired ownership/possession of any private lands in Macao shall **apply for government's land grant in order to establish flammable goods storages** and go through a series of administrative procedures. The procedures are described below:



※ However, the business operators must also observe the provisions set up by competent authorities for land grant/occupation. If one does not observe the provisions thus leading to expiration of land grant/termination of lease contract/disapproval of license renewal, the competent authorities has the power to "recover the land" according to law.

※※ Unlicensed operator can be fined or ordered to close the storage.

3. As the above graph shows, the law provides a mechanism of **multi-layered assessment** on the supervision of the business of such dangerous products as flammable goods. They strictly restrict the locations of flammable goods storages as well as divide the power among several departments to "control" the assessment of the plan (including the technical plans of structure and fire safety). Then they supervise the "opt-to-operate" storages through similar multi-department "controlled" facilities and venues, and "registration" mechanism. Following a series of strict requirements, the licensing department will issue a license which enables the operation to start.

* * *

Case details:

I . The DSSOPT did not strictly set up the terms and conditions of the temporary occupation license issued to A

1. Information shows that on 22nd January 2002, A submitted an application to the Chief Executive through the DSSOPT to lease through temporary occupation a piece of land located at Estrada Marginal da Ilha Verde to store vacant petroleum gas containers, but A did not submit the "land usage plan" to competent authority for assessment under the *Land Law*. On 29th April 2002, the DSSOPT issued a 1-year Temporary Occupation License No. X/2002 to A for the purpose of storing petroleum gas containers without requiring the company to submit the plan. **The DSSOPT**, which was responsible for organizing land grant files and providing opinions, **explained the reason was that A had stated that they would not undertake construction work on the land when submitting the application.**

2. As the authority did not require A to submit the land usage plan due to A's statement that "A would not build any buildings", the authority should have quoted the statement as terms to restrict the party concerned so that if A violated the statement, the authority could require A to observe relevant statutory requirements (e.g. submission of land usage plan for assessment). However, the authority did not do so but required in the license that "the temporary occupation license could be renewed only if the competent authorities issued a certificate of approval of the land usage plan". In other words, whether or not A "would build any buildings", A should submit the land usage plan when applying for license renewal. Otherwise the license would not be renewed.

3. The DSSOPT explained that the renewal terms contained in A's temporary occupation license – "'the relevant land usage plan shall be approved by the DSSOPT' – were only **the staff's habitual insertion in accordance with the content of former temporary occupation licenses issued…. The terms were not important because A did not undertake construction work at the lot".**

4. Although the DSSOPT stated that the aforementioned terms indicated in temporary occupation license no. X/2002 "was not important", when A applied for renewal on 17th February 2003, the DSSOPT wrote to require A to submit the land usage plan without having any information indicating that A has already built/would build on the plot of land on 5th March 2003. Moreover, the DSSOPT stressed that it would only handle the application of renewal after the plan was approved.

5. If the explanation is true, that means **the DSSOPT staff members had "habitually inserted the terms in the temporary occupation license of A" at the beginning and then "habitually" considered the approval of land usage plan as a requirement for renewal again when assessing A's application of renewal**, without conducting any strict and in-depth analysis on the case.

6. **On 20th June 2003, A submitted the facility plan and structural plan of the flammable goods storage located at Ilha Verde to the DSSOPT**. In other words, A's plan has changed from "no building" to "with building". In this sense, the administrative authority's requirement for the plan of land usage for assessment was "justified afterwards".

II. Insufficient basis for A's exemption from establishment of "Spray System" offered by the DSSOPT

1. On 23rd March 2004, the DSSOPT notified A that the plan of flammable goods storage was approved on the condition that A should follow the opinion of the Fuel Safety Committee and the Fire Services Bureau (CB). The latter suggested that a **Spray System** should be equipped at the intermediate storage.

2. In response to the CB's opinion, A revised its plan of flammable goods storage many times. The company applied for exemption from the installation of the aforementioned system due to insufficient water pressure.

Therefore, the DSSOPT consulted the Fuel Safety Committee and the CB again, but the latter still maintained the same opinion and pointed out that the DSSOPT is the competent authority in exercising the power of exemption. (As for the CB's aforementioned opinion about fire safety, the Committee did not have any objection and agreed that the DSSOPT is the competent authority in exercising the power of exemption.)

3. On 8th September 2005, L, a staff member of the Urbanization Department of the DSSOPT, made a report, pointing out that **the CB might suggest installing Spray System at the storage of flammable liquid and gas if they deemed it necessary and suitable with reasonable explanation according to the *Fire Safety Rules*. According to the *Safety Rules of Liquefied Petroleum Gas Containers Storage*, the CB has the power to order extra fire safety measures for storages under applicable special rules, but the rules do not specify the installation of Spray System at the storages. L also pointed out that SPCIs (*Sistema de Protecção Contra Incêndio*/ "Fire Safety System" in English) were not installed at all existing intermediate storages at Ilha Verde and not all the SPCIs installed could operate effectively. Finally, L asserted that the plan submitted by A generally fulfilled the aforementioned safety rules.** According to this report, the Chief of the Urbanization Department had a "favorable commend" (*parecer favorável*) on A's plan. The Deputy Director and the Director of DSSOPT issued orders of "approval" respectively. On 21st September 2005, the DSSOPT notified A that the DSSOPT had a "favorable stance" on its plan of flammable goods storage.

4. In other words, the DSSOPT has already informed A that the requirement for installation of Spray System by the CB was exempted.

5. Article 18 of the *Safety Rules of Liquefied Petroleum Gas Containers Storage* stipulates that "In addition to these rules, the CB may order extra fire safety measures for storage." ("*Para além do disposto no presente regulamento, pode ser determinada pelo CB a adopção nos parques de medidas adicionais de protecção e combate a incêndios nos termos da regulamentação específica aplicável*"in Portuguese. The underline only exists in this text.) There can be two different interpretations of this provision: **The first one is that the CB has the power to order fire safety measure for storages as prescribed by other related laws (e.g. installation of designated fire safety system), even though such measures are not compulsory**

under relevant laws. The second one is that the CB's power of making such order is still restricted by relevant fire safety laws. Unless there are laws providing that the fire safety measures are essential/compulsory, the CB cannot make a binding request.

6. Under the *Fire Safety Rules*, Spray System is not concluded as a compulsory fire safety measure. The CB, the Fuel Safety Committee and the DSSOPT thought that the requirement for installation of the system was only a non-binding suggestion and the DSSOPT had the power to decide whether or not to accept the suggestion. In other words, the authorities adopted the second interpretation.

7. Nevertheless, it is worthy to point out that if the legislator's intention in legislating this law is indeed consistent with the second interpretation; that is, the CB's requirement for fire safety measures for liquefied petroleum gas containers storage by exercising the power entrusted by other regulations (such as *Fire Safety Rules*) are not necessarily "binding". Then it is not necessary to formulate this provision. In particular, the *Fires Safety Rules* is a "general law". Since "general law" supplements "special law", the CB had no need to require the installation of special fire safety system (such as Spray System) according to Article 18 of the *Safety Rules of Liquefied Petroleum Gas Containers Storag*e.

8. On the contrary, as the legislator attached much attention to the requirements for safety of liquefied petroleum gas containers storage, from this perspective, then the purpose of the text "may order" in Article 18 is to "empower" the CB to **mandate** the adoption of fire safety measures prescribed by other applicable specific technical rules for this type of storage so as to "strengthen fire security measures against this type of storage". In this sense, the authorities should explore whether the first interpretation of Article 18 can better reflect "the legislator knows how to express the best solution with appropriate words". Whether "fire safety measures prescribed by other applicable specific technical rules" conforms to the reality is an issue to be resolved by the revision of the relevant rules.

9. Anyway, even though the CB's suggestion was not considered binding, the DSSOPT had the discretion to decide whether to adopt it or not. However, the DSSOPT should still exercise its discretion carefully. If it did not adopt the suggestion eventually, it should "provide due reasons" in accordance with the law.

10. It is worthy to point out that when the CB suggested A to install the relevant fire safety system at the storage, they pointed out that **the installation was necessary to "effectively control fire and ensure the safety of the facility". Also, the CB made the request due to the reason that "there had been a number of flammable goods storage at Ilha Verde".** Therefore, when the DSSOPT utilized its discretion in allowing the exemption, they should consider from the perspective of whether there are "other ways" to achieve the aforementioned effect. Also, they should clearly state the reason for exemption and point out why fire safety would not be affected though the CB's suggestion of fire safety measure was not adopted. Nevertheless, the DSSOPT **never** had any analysis or disproof of the aforementioned suggestion of the CB in the report which was used as the basis for exercising the discretion.

11. Although L stated in the report that SPCIs were not installed at all intermediate storages at Ilha Verde, while some of them did not operate effectively, these were not the sufficient reasons for exempting A from the installation of SPCI.

12. First, the CB's patrol report of the intermediate storages at Ilha Verde (all of them have been submitted to the DSSOPT) reflected that a number of the storages never fulfilled the fire safety requirements set up by the CB. Therefore defective operation of those facilities was not sufficient to show that the CB's requirements were "unnecessary" or "improper".

13. Moreover, safety amenities/requirements for liquefied petroleum gas containers storages are very important because no matter workers, passers-by or those who live near the storages, the safety of their possession and life are constantly endangered by insufficient safety amenities/requirements. Meanwhile, if there are other storages operating in the same area, establishing a new one will significantly enlarge the risk. In other words, for the first storage, safety amenities/measures matching a certain standard will be enough. However, when another storage is established nearby, even though its safety amenities/measures match the same standard, the level of risk to the area where they situate has increased. The threat to the residents nearby will, in turn, be more intense. Since there were already several fuel storages at Ilha Verde and the fire safety amenities of some of them are not yet up to the standard set up by the authorities, if more intermediate storages are set up there, the fire hazard will definitely be severer. Therefore,

when the authorities assess plans of flammable goods storage, they should not grant exemption from installing SPCIs by merely taking into consideration the fact that other storages are still operating even though they do not fulfil the requirements for fire safety.

14. Nevertheless, L only pointed out in his report made in September 2005 that the situations of other storages at Ilha Verde, but in so doing, he "loosened" the requirements for A's fire system without taking into consideration other storages at the district or analysing the influence on fire safety to the district by establishing a new storage. However, L's analysis was finally adopted by the DSSOPT.

15. After a fire occurred at Ilha Verde in 2003, the fire hazard at the district extensively concerned the public. The government promised to move the storages away and **strictly supervise safety precautions before taking the action**. For residents at the district, they naturally believed that the government would "strictly ensure the safety of the storages" due to the aforementioned promise. However, how the DSSOPT handled A's case disappointed citizens as well as undermined their comprehensive knowledge of the fire hazard.

16. **The aforementioned situation shows that in the process of exempting A from installing Spray System, the DSSOPT's exercise of discretion (exemption) was not founded on the purpose of "fire safety" and was short in reasoning**, as Clause 2 of Article 115 of the *Code of Administrative Procedure* provides that "*Adopting vague, contradictory or **insufficient** basis which cannot explain the reason for taking the action is **equivalent to not giving any reasons***." (The underline only appears in this text.)

17. It is worth mentioning that on 18th July 2008, the DSSOPT pointed out to the CCAC that "**According to the flammable goods storage plan submitted by A before September 2005, A's storage did not have a roof (or zinc cover). In reality, it is not possible to install Sprinklers or Spray System. Therefore, the DSSOPT thinks that the company has no need to install the aforementioned system**." Nevertheless, neither L's report on 8th September 2005 nor the Bureau's order of approval of the report stated that "A's storage did not have a roof. In reality, it is not possible for installing the Spray System" as the reason for the exemption of installing the system. Therefore, the DSSOPT's explanation only proved that the

exercise of discretion in the process of handling application for petroleum gas containers storage plan lacked sufficient reasoning.

18. Moreover, even if the aforementioned explanation had been included as the reason for the exemption in the relevant report and decision, it was not a generally supported reason according to some professional technicians.

19. Therefore, both from the perspectives of reality or procedure, the DSSOPT's exercise of exemption from the CB's requirement of installing the fire extinguishing system has the defect of "insufficient reasoning".

III. DSSOPT's chaotic internal procedure

Information shows that although the DSSOPT exempted A from installing the Spray System in September 2005, between 2006 and 2007, the technical staffs suggested A to fulfil the CB's requirements of installing the aforementioned system repeatedly when assessing A's revised plan of fuel storage or the application for temporary occupation license. This reflects that **the DSSOPT did not have an effective internal mechanism to keep relevant staffs informed of the latest information status of the cases in hand (including exemption from the compulsory requirements by other departments offered by the DSSOPT), leading to contradictory stances and affecting the credibility of the administrative authorities.**

IV. The DSSOPT "tacitly" allowed A to occupy public land "without a legal license"

1. On 29th April 2002, A was granted a 1-year license of temporary occupation of land (to expire on 28th April 2003), but A did not observe the terms for renewal (submission of the approved land usage plan). Therefore, the license was not renewed. Until 11th December 2006, the Land Committee issued another temporary occupation license to A.

2. **Although A's illegal occupation of land was amended, it was illegal of the DSSOPT to allow the company to occupy the plot of land at Ilha Verde without a license between 2003 and 2006.**

3. In fact, according to the *Land Law*, if the temporary occupation license is not renewed, the administrative authority has the power to request the occupier to move away from the relevant plot of land within a certain period.

If the occupier does not move away by the deadline, the Chief Executive or the authorized party (Secretary for Transport and Public Works) can order a removal and fine the occupier. Temporary Occupation License No. X/2002 issued by the Land Committee to A also indicated that "*when the license expires or is void, the occupier shall clear the lot within 60 days and has no right to claim for compensations in any forms*".

4. Nevertheless, the DSSOPT did not submit A's case to the Secretary for Transport and Public Works and the Land Committee, the competent authorities to deal with applications for renewal and matters about removal, for instruction. On the contrary, the DSSOPT let A occupy the land persistently without an effective license and its explanation was that "the DSSOPT is not worried of not being able to recover the land temporarily occupied by A and the government has not yet had any plans to use the land."

5. The CCAC did not agree on the aforementioned explanation because it is the DSSOPT's duty to supervise the legality of land usage and "facilitate" the illicit occupiers to move away. Therefore, no matter whether or not the government has the intention to "use" the land occupied by A, the DSSOPT has the responsibility to "facilitate" the administrative procedure to force the illegal occupier to move away since A has already violated the rules of land usage – not completing the procedure of renewal of the temporary occupation license.

6. Moreover, the public power shall be used "only for the best interest of the public". After the fire occurred at the Ilha Verde on 1st August 2003, the government promised to move the storages away. Therefore, moving the storages away from the community is, in fact, in competence with the public's interests. Since the removal of licensed storages from the district "due to respect for citizens' rights and their legally protected interests" fits "public interests", the government certainly should not use the piece of land which "did not have any intended plans" as intermediate storage of petroleum gas containers. It is because the increase of storages is in conflict with the public interests that the government is supposed to seek.

7. A's occupation of the land is based on the temporary occupation license issued by the Land Committee. **Without renewal of the expired license, A was not the rightful occupier of the land and the continuous occupation of the land was not "an interest protected by the law".**

8. Moreover, after the fire occurred on 1st August 2003, the residents and community associations of the district expressed their wish for moving the storages. Also, the authorities openly promised to fulfil their wish. Therefore, the competent authorities should take into consideration the wish when handling the case of A's occupation of land with an expired license. The DSSOPT's "omission" (not initiating the procedure to recover the land) undoubtedly reflects its indifference towards the wish.

9. Therefore, the DSSOPT's approach has obviously violated the "principles of legality, seeking interest for the public and participation" regarding administrative procedure provided by the law.

10. According to the CCAC's findings, the DSSOPT's attitude of handling the cases of individual's illegal occupation of land was passive (it only took action according to complaints) and "tolerant". Such attitude undoubtedly encouraged illegal occupation of land. In 2007, the CCAC analysed and discussed this problem in its system review "Analysis of Land Grant and Supervisory System" and rendered suggestions to the DSSOPT to improve the supervisory system of land usage (including introducing heavier punishment through law revision and formulating convenient and effective prosecution procedure to suppress illegal occupation of public owned land). Moreover, since the DSSOPT admitted on 18th July 2008 that "it did not have any particular staff responsible for renewal of temporary occupation licenses and therefore it has never actively told occupiers to submit applications. The DSSOPT will only follow up the cases until the occupiers voluntarily submit applications for renewal…. As the methods in the past were not appropriate, **the DSSOPT has already input the data about renewal of temporary occupation licenses into the computer system and allocated particular staff to follow up. Once they find any license about to expire, they will inform the holders to submit application for renewal. Thereafter if the occupiers submit the applications for renewal after their licenses expire, the DSSOPT will handle the cases according to the provisions of the *Land Law*."** (The underline only exists in this text.) Therefore, the CCAC has no need to render recommendations to the DSSOPT regarding the illegalities in handling A's illegal occupation of land.

V. The DSE has "tacitly allowed" A to operate flammable goods business without a license for many years

1. Information shows that A applied for the operation of flammable goods business respectively to the DSE and the Secretary for Economy and Finance on 28th September and 7th December 2001. However, since A did not submit the plan of flammable goods storage under law, the DSE did not consider it to be a valid application for the license. On 25th June 2002, the DSE notified A in written form to submit application documents as required by law, otherwise, the DSE would not assess its application.

2. On 5th March 2002, the Flammable Goods Storage Supervisory Committee wrote to the DSE, indicating that the Committee had been many times informed by the Macao Customs that A had imported a lot of petroleum gas through the Lotus Bridge Checkpoint and that there were sales advertisements of the company on newspapers. Therefore, it was suspected that the company was operating relevant business. On 19th June, the Committee informed the DSE again that the storage established by A at Ilha Verde did not fulfil the requirements under Decree Law No. 19/89/M and requested the DSE to follow up the case.

3. According to law, parties that intend to operate flammable goods business shall acquire "prior approval" from due authorities and "register" their storages. Therefore, when the DSE received the aforementioned reports from the Committee, they were supposed to adopt measures to check whether the company was actually operating the business or not. Once the operation was verified unlicensed, they should initiate prosecution procedure.

4. However, the DSE did not commence prosecution procedure immediately but extended A's grace period for rectification due to the reasons that "A is applying for the registration document" and "the DSE is following up relevant application for land grant".

5. In fact, the *Industrial Licensing Regime* empowers the authorities to offer "grace period" to people who do not fulfil requirements regarding ordinary industrial activities in order to rectify their irregularity within the time limit. However, the law defines storage of petroleum gas containers as a **severely risky activity.** For the operators without prior approval, the authorities shall not only issue a warning but also immediately commence prosecution procedure. **Therefore, it was illegal for the DSE to adopt**

the regulation of the aforementioned "grace period" for unlicensed operators.

6. The case file also shows that after the DSE decided to extend the "grace period", the preliminary examiner of the case was responsible for notifying A, but there is no written record about whether s/he had notified the company or not. Even the staff has "forgotten whether s/he had notified A according to the superior's instruction". **This reflects that the DSE did not adopt a strict mechanism regarding notification of decisions to the interested parties**.

7. **It is worth pointing out that although the DSE realized that the company allegedly operated the petroleum gas business without a license in March 2002, it has turned a blind eye to relevant irregularities and even never declared to the company that its operation without any prior approval and registration of flammable goods storage was illegal. Only upon the CCAC's intervention into the case, the DSE notified A that it should not operate the business without a license in July 2007. In August, punishment procedure was commenced against A.**

8. As for the fact that the DSE did not commence sanctionary procedure after knowing A's unlicensed operation in 2002, the Acting Director stated that the main reasons were: **1) As a new operator of petroleum gas business, A's operation could enhance the competitions in local market and facilitate decrease of price of petroleum gas; 2) the company has already applied for land grant from the DSSOPT. However, the assessment process has not been complete. The administrative authorities were also responsible to the outcome. Therefore, it was not suitable for the DSE to sanction A and suspend its business in Macao; 3) The company has been operating in Macao for a period of time and thus has had a certain number of customers, so the suspension will cause inconvenience to citizens.**

9. The CCAC thought that the reasons above were not valid.

10. In fact, increase of operators certainly enhances competition in a business circle, but the administrative authorities, especially those in charge of licensing, could not "forego law enforcement" for the reason that the existence of unlicensed operators helped decrease the price. It is necessary to stress that this business is highly risky comparing with ordinary

industrial or commercial activities. In order to avoid the hazard of this business to public security, in 1989, the authorities established the *Safety Rules of Flammable Goods Storage*, which provide the basic technical requirements for such facilities. The rules also provide a "transitional period" within which the existing/operating storages shall have necessary maintenance. When the period ends, the storages that do not fulfil the requirements under the rules shall be ordered to close. In other words, when the period ends, **it is reasonable for the general public (including consumers of the flammable goods and the residents who live near the storages) to believe that all operating flammable goods storages and the newly established ones have fulfilled statutory requirements for safety. This is the key to the fulfillment of the rules' objective to "ensure public safety" and the basis for citizens' trust in the authorities.**

11. Since A was established after the *Safety Rules of Flammable Goods Storage* entered into force and the company can "openly" use its storage to operate the business, the public naturally believe that the storage has fulfilled statutory technical requirements. However, the truth is that the company has never obtained any license. In other words, whether or not the storage used by the company has fulfilled the basic requirements provided by the law has not been confirmed by the competent authorities. Therefore, **the DSE, that has not adopted any measure against A's unlicensed operation for years, has disregarded citizens' trust in the legitimacy of all "open" operators of the business in Macao. In this sense, the Safety Rules of Flammable Goods Storage is just meaningless text. Then how does it ensure "public safety"? This is worrying indeed.**

12. Moreover, if the DSE allows newcomers to "**operate the business without a license" in order to decrease the price of the products, then it is not fair for those whose storages have had necessary maintenance under the *Safety Rules of Flammable Goods Storage*.**

13. The DSE also pointed out that since A had submitted an application for land grant and there were deficiencies in handling the case, the DSE thought that the operator should not be the one to be blamed for unlicensed operation.

14. In the process of land grant, the DSSOPT archives cases and provides opinion and the Chief Executive or other lawfully authorized parties make the final decision. **The DSE did not participate in the whole process**

of land grant and it was not the superior or supervisory entity of related departments. Therefore, the DSE was not qualified/has no power to make any comment on whether the DSSOPT was deficient in performing such task.

15. Moreover, even if the DSSOPT was deficient in handling the land grant application, the DSE should not excuse its "indifference" in A's unlicensed operation by using this reason. Otherwise, **the DSE, the only supervisory authority of related business activities, has doubtlessly admitted that it has the power to "make up for" the "deficiencies" made by the administrative authorities in another procedure (land grant application assessment) by not punishing unlicensed operators.** If such basis for "not punishing" is reasonable, then the administrative authorities can apply "indifference" to "compensate" for the civil liabilities that they should take due to administrative illegality/irregularity in another procedure. However, what is the legal basis? In fact, if the operator thinks that the public department's delay in handling this application for land grant has caused the operator's loss, the operator has the right to claim indemnification from the authority through judicial procedure. Anyway, it is impossible for a public department which is neither a superior nor supervisory entity to judge the liabilities and even the amount of compensation.

16. The DSE also pointed out that A has been operating in Macao for a period of time and thus has had a certain number of customers, so punishment or suspension of its business would **cause inconvenience to citizens**. It is necessary to reiterate that A's business was **highly risky**. Since the company started its unlicensed operation in 2002, the Flammable Goods Storage Supervisory Committee had informed the DSE many times that A's storage **did not fulfil** the requirements under Decree Law No. 19/89/M. Although the conditions were improved after the joint patrol conducted by the Fuel Committee and the DSE, **it has never fulfilled the requirements**. Moreover, the Committee pointed out many times in the letters sent to the DSE that the "temporary basic safety measures" that A was required by the former to adopt were short-term but essential.

17. In fact, the Fuel Committee thought that "A's storage only fulfilled the necessary safety requirements for a petroleum gas storage until late 2006 and 2007. However, the company had used the storage of petroleum gas well before that and it was a potential hazard to public safety."

18. As the Acting Director of the DSE said, "In fact, the DSE is not a technical department, so it does not possess the professional knowledge about the petroleum gas business." In other words, the DSE was not qualified for judging whether A's storage has fulfilled essential "safety requirements". Therefore, after the DSE received the report from the technical department (Flammable Goods Facilities Supervisory Committee), it should not let the storage that "has not been confirmed to have fulfilled the nessential safety requirements" to continue its operation for the reason that "suspension of A's business may cause inconvenience to citizens". On the contrary, the DSE should immediately commence prosecution procedure and order A to suspend the business under law in order to avoid the "potential hazard to public security" caused by its operation.

19. **It is necessary to emphasize that after the fire occurred at Ilha Verde on 1st August 2003, the government promised to "strictly ban all facilities where flammable goods were illegally stored". However, in this case, the DSE did not "strictly banned" A's "facility where flammable goods were illegally stored" but has turned a blind eye to its "open" illegal operation. This has obviously disappointed citizens who trusted in the authorities' promise and affected the government's credibility**.

VI. DSE's vague and groundless decisions

1. According to A's case file, the investigative staff suggested in the report dated 18th January 2008 that A should be **"fined"** for its unlicensed operation and ordered to immediately **"suspend the operation of its petroleum gas storage".** On 28th March 2008, the Acting Director issued an order to "approve the suggestion". According to Article 82b) of Decree Law No. 11/99/M of 22nd March (*Industrial Licensing Regime*), Petroleum Gas Company A was fined MOP30,000.

2. The Acting Director of the DSE pointed out to the CCAC that since it realized that A would be granted a license in a short time, he only agreed to fine A but disagreed on "suspension of its operation". However, it is necessary to point out that if the Acting Director's decision was totally or partly different from the suggestions indicated in the report which was the basis for the decision, he should "explain the reason" under law. However, the Acting Director showed his approval in his order without pointing out the reason for disagreeing on "suspension of the operation". Therefore, the

aforementioned decision has a defect in form.

3. Although the defect was "amended" due to the expiration of the period for judicial appeal, the DSE should still observe the regulations regarding explanation of reasons under the *Code of Administrative Procedure* in order to ensure the legality of public administration and the transparency of each step of the procedure. It should also clearly state the content of its decisions in order to avoid misunderstandings (including its staff).

VII. The DSE lacks an effective mechanism to supervise the progress

1. The CCAC also discovered that there were illegalities and irregularities in the DSE's handling of a case involving another petroleum gas company (**company B**) which has violated related rules.

2. Information shows that on 27th July 2001, the Chief of the Economic Activities Inspection Department suggested the Director carrying out a patrol regarding the aforementioned case, but the latter did not make any decision (the Acting Director said that he had already forgotten the reason why the decision was not made.) Moreover, the DSE has not taken any action to urge to follow-up the "suspended" case "awaiting the Acting Director's order" for a long time. As a result, the follow-up was not resumed until it has been "suspended" for **around 1 year**. This shows that the DSE lacked a suggestive/supervisory mechanism to ensure the fulfillment of "the principle of efficiency" of handling administrative illegalities, indirectly affecting the authorities' credibility.

VIII. DSE's ineffective internal communication and inapplicable archiving system/mechanism

1. In order to follow up the alleged violation in B's case, on 4th September 2007, the Economic Activities Inspection Department asked the Licensing and Consumption Tax Division (the subsidiary department responsible for the licensing of flammable goods business) whether B had applied for flammable goods storage registration certificate and the Division replied that B possessed the certificate.

2. However, the certificate has already been cancelled by the former Economic Department in 1997. Without any information showing that the

aforementioned decision has been revoked or cancelled, it is inappropriate of the Division to tell the Economic Activities Inspection Department that B possessed the certificate without indicating that it had already been "revoked".

3. After the Department received the reply, the related staff members suggested the DSE archiving B's case on 6th September and 8th October 2007 for the reason that B "possessed" a flammable goods storage registration certificate and there were no other matters to be dealt with. The suggestion was approved by the Chiefs of the Industry and Commerce Inspection Division and the Economic Activities Inspection Department.

4. In fact, the file of the case indicated the internal notices issued by the former Commercial Department (the department responsible for licensing of flammable goods business before the DSE was restructured) on 21st November 2001 and 26th August 2002, which pointed out clearly that the aforementioned certificate had already been revoked. Therefore, the Licensing and Consumption Tax Division's reply, that B possessed the certificate, was obviously different from what the information showed. The Economic Activities Inspection Department should have conducted a further inspection in order to make sure which subsidiary unit's information was incorrect or outdated, but the Department suggested archiving the case for the reason that B possessed the certificate, reflecting that the Department did not carefully handle the case.

5. Although the aforementioned suggestion made by the Economic Activities Inspection Department was finally not adopted by the leadership, the latter did not make any instruction until the suggestion has been made for over 9 months and the CCAC has intervened into the case. The Acting Director explained that "it took a long time to search the order issued by the former Director of the Economic Department to revoke B's registration certificate (because there were too many files stored by the DSE), therefore he could not immediately issue an order after the chief of the Department submitted the suggestion."

6. In fact, the DSE is responsible for issuing licenses of various businesses/facilities, so there are certainly plenty of files stored in the DSE. However, if it takes the DSE 9 months to search internal information/records, how can the public believe that it can fulfil its supervisory functions "responsibly and effectively"? Since the "minimum requirements" set up by the

legislator for different business activities cannot be fulfilled, public interests will eventually be infringed upon.

7. Therefore, it is necessary for the DSE to review the internal archiving system/mechanism in order to ensure that the mechanism of searching internal information/records can satisfy the needs to fulfil the supervisory functions on a confidential and safe basis.

IX. A's case reflects the competent authorities' inadequate supervision of the flammable goods business and their storages

1. Overall, in the case, A started operating the flammable goods business in March 2002. However, they commenced it before completing proper procedures and fulfilling the statutory requirements. Instead, the company gradually applied for the authorities' approval of the "plan" of its storage after the business was commenced and revised its plan twice to match the authorities' requirements. It was not until July 2008 that the company completed the licensing procedures and obtained the flammable goods storage registration certificate. By then the company had already operated without a license for 6 years. Although the authorities finally fined A (MOP30,000) against its unlicensed operation in April 2008, the decision was made only following the CCAC's intervention.

2. It is necessary to emphasize that the purposes of the **multi-layered assessment and supervision conducted by various authorities** provided by the current law are, from an active perspective, to "urge" operators to observe relevant laws/requirements to work on the safety of their storages and, from a passive perspective, by the means such as "land recovery", "punishment" and "suspension of operation", to sanction the operators who do not observe the laws/requirements and to stop the operation of the unequipped and unsafe storages in order to avoid severe hazard to the safety of the workers and even the general public.

3. However, this case reflects that even though the authorities have proved that they were able to sanction A and order A to close its storage under the law, they have never enforced the law strictly. As a result, the statutory supervisory mechanism could not exert its effect.

4. In fact, report no. 112/CSC/2009 made by the Fuel Safety Committee on **29th June 2009** pointed out that the authorities would "enhance the super-

vision and management of relevant storages and the surrounding environment" through the measures such as "frequent inspections" and "reducing the load of storage of flammable goods" in order to "make timely intervention and to reduce the hazard of the fuel stored in the area as much as possible. Also, they will communicate with the operators and residents to enhance the transparency and effectiveness of the supervision and sooth their worry related to the removal and safety." However, if the inspection is not supported by strict prosecution and sanction, it will be difficult to ensure the effectiveness of the supervision. Also, it will be unfair to the operators who observe the law and such inspection will not be able to warn the operators who tend to "procrastinate" and do not improve the safety conditions of their storages/business to fulfil their obligation according to the authorities' requirements. In this sense, the authorities will not be able to "enhance the reliability and effectiveness of its supervision".

5. Therefore, it is necessary for the authorities to pay attention to how every competent entity supervises flammable goods business and properly review the current assessment system in order to ensure that the execution of their supervisory functions are not only theoretical, and, especially, that citizens' safety of life and property is not severely threatened by "ineffective law-enforcement".

* * *

The CCAC rendered recommendations respectively to the DSSOPT and the DSE and reported to the Office of the Secretary for Transport and Public Works and the Office of the Secretary for Economy and Finance so that the authorities will comprehensively review the mistakes in the competent entities' supervision of flammable goods business, the regulations of flammable goods storage (including requirements for installation of fire safety system) as well as relevant assessment mechanisms.

The CCAC rendered the below recommendations to the DSSOPT:

(1) To review the temporary occupation licensing and re-assessment systems, carefully formulate and execute the terms and conditions of licensing. If the DSSOPT discovers that the occupiers do not observe the terms and conditions,

it should report the cases to the competent authorities;

(2) To carefully exercise discretion. If the DSSOPT exercises its discretion of not adopting the unbinding suggestions made by other competent entities under the law, it should state the reasons;

(3) To review the internal operation mechanism in order to keep responsible staffs informed of the latest information/status of the cases in hand (including exemption from the compulsory requirements from other departments).

The CCAC rendered the below recommendations to the DSE:

(1) To comprehensively review the supervision of flammable goods business; to enforce the legal provisions in punishments and suspension of operation; not to offer unlicensed operators any "grace period" which the law does not provide;

(2) To improve the management and organization of archiving in order to ensure the case files contain important information (including written records of notifications to parties concerned) and clearly reflect the decisions/acts made or conducted by the authority and their legal bases;

(3) To review the mechanism of communication among the subsidiary departments in order to ensure the accuracy of information transferred between them;

(4) To formulate/strengthen the supervising mechanism of the progress of administrative violation cases in order to ensure the "principle of efficiency" in administrative procedure;

(5) To review the feasibility of internal archiving system/mechanism in order to ensure that the mechanism of searching internal information/records can satisfy the authority's needs to fulfil the supervisory functions on a confidential and safe basis.

After that, the DSSOPT replied that it fully accepted the CCAC's recommendations and would adopt relevant measures, including:

(1) To strictly observe the *Land Law* by requesting applicants for temporary occupation license to submit the "land usage plans" as a compulsory requirement; to carefully establish and review the applicability of the terms and conditions

according to reality. If any operators are found not observing the terms and conditions, the DSSOPT should refer the cases to the competent authorities.

(2) To make proper guidelines regarding the exercise of discretion; when exercising discretion, the officers should refer to precedents and consider the objective conditions such as the importance of the issue, the location, the function and purpose of the decision and the influence on the public. At the same time, they should insert all different opinions into the case files. The results of special cases should be circulated to notify the relevant staff in order to be used as the standard for handling similar cases in the future. In this sense, the transparency of the exercise of discretion will be enhanced and it will be strictly controlled.

(3) To improve the working procedures and establish better personnel training, working guidelines and information security management procedures.

* * *

The DSE did not respond to the CCAC to declare its rejection of the recommendations and the relevant rationale for over 90 days since it received the recommendations. Therefore, according to the inverse interpretation of Clause 5 of Article 12 of Law No. 10/2000, the CCAC considered the recommendations to be accepted.

The CCAC is still following up the matters regarding the competent authorities' handling of the cases of unlicensed operation of flammable goods business.

* * *

Conclusion

(1) In approving public land for private use, the competent authorities should only allow individuals to use public land after they have issued them licenses under the law.

(2) As to assessment of private business license, the authorities should be more alert to the nature of the business and understand its influence on the residents nearby and even the entire society. Since flammable goods are dangerous, its trading should only be permitted if all statutory requirements have been satisfied.

(3) Since flammable goods are very dangerous products, the supervisory entities should constantly and strictly enforce the law and strictly suppress unlicensed operation or violation of statutory requirements.

Case V – Contracting of Planning and Organization of Exhibition

Main Points:

- Planning and organization of large scale exhibition ("Exhibition of Achievements")
- Method and procedure of selecting qualified company in the market
- Consideration for scheduling and technical factors in administrative procedure
- Knowledge of the legal system of "direct awarding"
- Thorough and truthful disclosure of the criteria for decision of "direct awarding"
- Correct application of preliminary assessment and awarding procedures
- Power of spending involved in awarding and report to the superior as soon as possible

The CCAC received a complaint indicated that the direct awarding of the service contract of "Exhibition of Achievements of the 10th Anniversary of Macao SAR (Beijing)" (hereinafter designated as "Exhibition of Achievements") by the Government Information Bureau (GCS) to company P without going through open tender was allegedly illegal and irregular.

Following further investigation, the CCAC's stance is:

1. The services of planning and organization involved in this case ("Exhibition of Achievements") are bound by Decree Law No. 122/84/M of 15th December, while the *Code of Administrative Procedure* is subsidiarily applicable.
2. In September 2008, the GCS received the Chief Executive's instruction to hold the "Exhibition of Achievements". Since the GCS did not have any experience in holding such large scale exhibition, it decided to "out-source" the planning and organization of the exhibition to a private company.

3. Therefore, the GCS started to gather information about the local companies which were qualified to provide the service. The person in charge indicated that *"According to… the information about local companies obtained through our participation (in charge of news) in exhibitions held by other departments in the past and informal communication with other public departments (the Macao Government Tourism Office, the Civic and Municipal Affairs Bureau and the Macao Trade and Investment Promotion Institute), we realized that there are only a few selectable enterprises. The exhibition will be held in Beijing with the presence of national leaders. P, as the only local company that has a branch in Beijing (also the first one that has obtained the CEPA), has held the inauguration ceremony of the Sai Van Bridge with the presence of national leaders. Therefore, P's relevant experience is considerably guaranteed. Also, since P has the financial sufficiency to prepay the expense, the GCS preliminarily considered P as the only one qualified…. Due to the aforementioned factors, though the GCS has not yet confirmed to contract the project to P, it is inclined to choose P as the partner of this activity. Therefore the GCS has then focused on initiating a series of consultation and follow-up work with P."*

4. The facts show that in early October 2008, the GCS contacted P for contracting the organization of the "Exhibition of Achievements", inviting the company to contact potential venues and multi-media companies and "contact relevant production companies in Beijing". Moreover, the staff of the GCS had a meeting with P on 20th October 2008 to have an initial discussion on the framework and schedule of the "Exhibition of Achievements".

5. It can be observed that as early as October 2008, the GCS preliminarily determined that **except P, no other companies in local market has the ability and experience to provide this type of service, i.e. P was the only qualified company.** In addition, as time was getting closer, the GCS decided to initiate a series of consultation and follow-up work with P. Later, the planning and eventually the organization of the "Exhibition of Achievements" were directly contracted to P.

6. However, the reasons for the GCS's decision of direct awarding (**"P was the only qualified company"**) were not revealed thoroughly in the relevant records. These reasons included the following points:

   (1) The GCS's information about the qualified company;

   (2) The criteria adopted by the GCS to identify a qualified company; The fac-

tors included the fact that the exhibition will be held in Beijing with the national leaders' presence and P, as the only local company that has a branch in Beijing (also the first one that has obtained the CEPA), has held the inauguration ceremony of the Sai Van Bridge which was also attended by the national leaders.

(3) Guarantee of the qualified company's financial sufficiency and quality of work.

7. Although the reasons for directly awarding the contract to P ("The marketing service company P has rich experience in organizing large exhibitions" and "the schedule is tight".) as indicated in the direct awarding proposal of the "service of planning" made "afterwards" on 6th November 2008 reflected that P was a competent and experienced company and that "the schedule is tight", they were not sufficient to clearly show that P was the only choice for the administrative authority.

8. Article 1 of the current *Code of Administrative Procedur*e states that:

1) Administrative Procedure refers to a succession of orderly acts and formalities conducted to formulate and express the idea of the administrative authority, or the execution of such idea.

2) Administrative file refers to a set of documents that reflect the acts and procedures that formulate an administrative procedure. Whatever that guides the administrative authority to make a decision (formulates the administrative authority's decision) is administrative procedure.

One of the main functions of administrative procedure is to reflect the process of how the administrative authority seeks interests for the public so as to ensure the legality and justification of the administrative authority's decision. These functions are more obviously seen in the exercise of discretion just as in this case, where the GCS determined P as the only local company qualified for holding the "Exhibition of Achievements".

9. Administrative file is an effective and important tool because it reveals how the administrative authority perceives and evaluates relevant public interests (such as the "Exhibition of Achievements" in this case).

10. In this case, how to determine P as the only local company qualified for holding the "Exhibition of Achievements" was an important factor in justifying the reason why the administrative authority was "inclined to" award the contract

to P. According to the aforementioned provision under the *Code of Administrative Procedure* and the principle of good governance, the GCS should indicate in writing how it determined P as the only local company qualified for holding the "Exhibition of Achievements" in the relevant administrative file in order to avoid unnecessary misunderstanding and doubts.

11. Meanwhile, under Decree Law No. 122/84/M of 15th December, the GCS could also choose an appropriate company to discuss the project through the "preliminary assessment procedure" which is more objective and transparent.

12. In fact, the "Exhibition of Achievements" involved multi-media, multi-angle display methods and applications which require specific and professional techniques. In addition, the event was to be held outside the territory of Macao – Beijing, making the exhibition more "special". According to Clause 2 of Article 6 of Decree Law No. 122/84/M of 15th December, even if the "estimated price" of the service to be acquired has not been confirmed, the Chief Executive can decide to undertake a "preliminary assessment procedure" in order to confirm which private entity is qualified to provide the goods or service needed, due to the "special techniques" involved in the service.

13. Since Decree Law No. 122/84/M of 15th December does not clearly stipulate how to carry out the procedure of preliminary assessment of "acquisition of service", this procedure could be duly simplified under the principles of seeking public interests, fairness, goodwill and efficiency required in an administrative procedure (compared with the preliminary assessment procedure bound by Decree Law No. 74/99/M of 8th November). For example, the authorities can shorten the time for submission of applications due to tight schedule if they invite candidates through public notice.

14. In this case, if the GCS publicized the needs for organizing the multi-media, multi-angle and 3-dimentional Exhibition of the Achievements of the 10th Anniversary of Macao SAR in Beijing and called for companies with technical quality and capability to submit information such as their company profile (including description of their ability, experience and privilege, etc.) and letter of intent, etc., then the authority could choose the suitable candidate according to the assessment criteria and requirements set up in advance; so as to conclude that "P is the only company qualified to hold the 'Exhibition of Achievements'". Not only the formulation for such a result of "P is the only choice" would have been sufficiently reflected in the relevant administrative file, the process would have also been more objective and transparent in order

to prevent the criticism of "under-the-table operation", which undermined the GCS's reputation.

15. Although the GCS has determined to contract the works of planning and eventually the organization of the "Exhibition of Achievements" to a professional private company, it could first carry out the procedure of procurement of planning service according to law. After the plan was submitted, the GCS could carry out another procedure to acquire the service of organization according to the framework put forth in the planning report to select a suitable company **(It could be another company, not the one that provided the design)** to render the service, so as to accomplish the "Exhibition of Achievements" project. Meanwhile, **the GCS could also contract the whole project (including planning and organizing) to a professional private entity through one procurement procedure under the law**.

16. In this case, the file of the awarding procedure shows that **the GCS has carried out two separated procurement procedures:**

(1) The planning of the "Exhibition of Achievements" was directly contracted to P on 10th November 2008; after P completed the planning report,

(2) The organization was directly contracted to P on 1st July 2009.

17. However, according to the CCAC's findings through investigation, on 28th October 2008 – before the GCS suggested to the Chief Executive that the "advance planning service" should be directly contracted to P – the GCS had "determined" to directly contract the whole "Exhibition of Achievements" project (including both planning and organization) to P.

18. Under this prerequisite, the GCS should clearly reveal its consideration in the contracting process and the file. In other words, "why" and "how" to directly award the whole project of the "Exhibition of Achievements" to P should be "recorded" in the relevant administrative file.

19. Information shows that in late October 2008, before P completed the planning, although the GCS was not able to confirm the exact budget of organizing the "Exhibition of Achievements", **it should, objectively speaking, be able to foresee that the expense would surely exceed MOP750,000 – the minimum amount of budget that requires an open tender under Clause 1b) of Article 7 of Decree Law No. 122/84/M. At the same time, the GCS has also determined that P was the only company qualified for holding the exhibition and intended to contract the whole project (including planning and**

organization) to the company. Also, P was willing to work on this project.

20. In fact, under the regulations of Decree Law No. 122/84/M, if the administrative authority can determine that only a certain private entity is qualified to provide the goods or service needed according to the principles of legality, seeking public interests, goodwill and efficiency, then the administrative authority can neglect whether the estimated price of procurement requires an "open tender" or a "written quotation" but can proceed with the procurement through a direct awarding procedure.

21. Moreover, since the GCS is directly subordinated to the Chief Executive and maximum spending power of the GCS's Director is obviously less than the minimum amount that requires an open tender, the Director doubtlessly should submit an open tender exemption proposal to the Chief Executive for approval since the former was not empowered to approve for the budget of the exhibition even if the estimated price has not yet been confirmed.

22. Therefore, in late October 2008, the GCS could have, according to Clause 2b) of Article 7 and Clause 4 of Article 8 of Decree Law No. 122/84/M, reported to the Chief Executive the reasons for considering P as the only local company qualified to hold the "Exhibition of Achievements" and suggested the Chief Executive exempting the open tendering procedure and allowing the GCS to directly discuss its organization with P. Following the Chief Executive's approval, the GCS could "legally and reasonably" have more in-depth discussion with P. **In this sense, the GCS's intention in late October 2008 – to contract the whole project of the "Exhibition of Achievements" (planning and organization) to P – would be orderly recorded in the relevant administrative file through timely and lawful procedure.**

23. To sum up, in this case, when the GCS determined that P was the only local company qualified to hold the "Exhibition of Achievements" (both planning and organization) in late October 2008, it should commence the procedure under the law to report to the Chief Executive and apply for his approval of "exemption from open tender" so as to directly award the whole project to P. In so doing, the GCS's "consideration" would be truly recorded in the administrative file.

Therefore, the CCAC rendered recommendations to the GCS to urge the latter to draw the experience from this case. In procurement procedure, it should respect and observe relevant procurement regulations and the *Code of Administrative Procedure* in order to prevent future misfeasance of "not truthfully revealing the process of how the authority made the decision" in the administrative file from recurring again.

In response to the CCAC's recommendations, the GCS expressed truthful gratitude and accepted the suggestions. Then the CCAC archived this case.

Conclusion:

The inspiration of this case:

(1) The authority did not fully exert the procedures of "preliminary assessment" and "awarding" in handling the contracting matters.

(2) When selecting companies with special qualification in the market, the authority should be especially careful and thoroughly record objective conditions and information and include them as reference of the final decision.

(3) If the person-in-charge foresees that the budget exceeds his maximum spending power and needs the approval of his superior, he should report to the superior and ask for approval as soon as possible.

(4) If there is no other choice and the authority considers in the very beginning that there is only one qualified company, the "timeline" and disclosure of information are crucial. Improper handling or negligence can cause doubts and even suspicion of the legality of the procedure.

(5) The authority should comprehensively and thoroughly understand and enforce the current legal system of procurement in order to prevent unnecessary misunderstanding.

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