

APPENDIX I

LEGAL COMMENTARY REPORTS SUBMITTED TO CHIEF EXECUTIVE BY CCAC IN 2012

Paragraphs 9 and 10 of Article 4 of the *Organic Law of the Commission Against Corruption of Macao SAR*, approved by Law no. 10/2000 of 14th August (amended by Law no. 4/2012 of 26th March), stipulate that:

“The Commission Against Corruption is entitled to:

(...)

9) With regard to any shortcomings it finds in any legal provisions, namely those involving rights, freedoms, safeguards or any legitimate interests of the individuals, formulate recommendations or suggestions concerning their interpretation, amendment or repeal, or make suggestions for new legislation. When, however, the matter falls within the powers of the Legislative Assembly, it shall merely inform the Chief Executive in writing on its position;

10) Propose to the Chief Executive the enacting of normative acts which may improve the work of the public institutions and enhance the respect for legality in the administration, particularly by eliminating factors which may facilitate corruption and illicit practice or ethically reproachable practice;

(...).”

In 2012, the CCAC submitted a number of commentary reports to the Chief Executive, with the aim to enhance system building and administrative efficiency, exerting the Commission’s functions in implementing the policy plan. It also provides useful reference for decision-making departments. The following are some of the commentary reports submitted by the CCAC:

- 1) – Legal opinion on the amendment of grant conditions and transfer regarding a lot in the south of Estrada do Istmo to develop into hotels (including the transfer of equity by the owners) (brief analysis);
- 2) – Legal opinion on the “Pre-qualification of international tender regarding

the reclamation of land in a particular district and construction of the dike of the new development zone” (Report no. 2);

- 3) – Opinion concerning the bill of *Legal Regime of Urban Construction*;
- 4) – Opinion concerning the bill of *Legal Regime of Urban Construction* – Supplementary part;

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Among the aforementioned reports, we chose to publish two of them here for the knowledge of the public due to the fact that the contents of the reports are with greater social impact and will draw great attention among the population.

**Legal opinion on the “Pre-qualification of
international tender regarding the reclamation of
land in a particular district and construction of the dike of
the new development zone”**
(Report no. 2)

Part I: Preface

- 1) On 11th January 2012, the Commission Against Corruption (CCAC) received documents (official letter no. 232/GDI/2012) sent by the Infrastructure Development Office, including:
 1. **Notice** — Pre-qualification of international restricted tender regarding the reclamation of land in a particular district and construction of the dike of the new development zone (Chinese and English version);
 2. **Tender** — Pre-qualification of international restricted tender regarding the reclamation of land in a particular district and construction of the dike of the new development zone (Chinese and Portuguese version).
- 2) Due to the reports and opinions submitted previously by the CCAC, much improvement has been made in the tender documents.
- 3) As the documents received by the CCAC were incomplete, among which the “bidding rules” were missing, and there was hardly any supplementary information, such as proposal, among others, and therefore the CCAC’s scope of analysis was restricted and opinions could only be given on several issues of greater importance.
- 4) Upon requesting instructions, the CCAC will submit the commentary reports to the Cabinet of the Chief Executive for reference.

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Part II: Analysis

- 1) Why is the term “international tender” used?
 1. In fact, the term “international tender” **is never directly introduced in Decree Law no. 74/99/M of 8th November, and this possibility is only mentioned in its Paragraph 2 of Article 63.**
 2. The issue related to the so-called "international tender" is never directly mentioned in Decree Law no. 122/84/M of 15th December and the possibility of acquiring goods outside the Macao SAR, excluding contracting of work (empreitada), is only mentioned in its Article 22.
 3. Even though the reclamation of land may need enterprises which are established outside the Macao SAR to participate, the adoption of “international tender” is deemed unnecessary.
 4. It is not convincing enough to determine this tender as an "international tender" due to the reason that it is open to Mainland enterprises.
 5. It is worth noting that for the tender to open to enterprises outside the Macao SAR, it should be backed by adequate reasons and approval should be gained from the competent authority (Paragraph 2 of Article 63 of Decree Law no. 74/99/M of 8th November⁷). However, in the submitted document, **there is neither related approval mentioned nor proposals sent for approval attached.**

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7 The contents of the respective Paragraph: “2. Due to the characteristics of the construction projects, professional enterprises established outside the region can be accepted in the bid. However, this circumstance shall be subject to the order made by the authority competent to accept the enterprises and shall be presented with reasons.”

2) Why is pre-qualification of restricted tender adopted?

1. In the documents submitted, **reasons for adopting the aforementioned type of tender are not presented**, i.e. not clearly pointing out the difference between “pre-qualification” and “non pre-qualification”.
2. **Pre-qualification, being an exceptional regime, should be adopted with adequate reasons** to show to the public the interests the administrative authority seeks for and for the sake of the transparency and fairness of the bidding process.
3. Pre-qualification should only be adopted when it is unable to acknowledge whether the bidders can meet the technical requirements.
4. **Under normal circumstances**, the nature of the construction work and the need to introduce enterprises outside the Macao SAR including those from the Mainland to participate in the bid are **all the more reasons to adopt other types of tender instead of open tender**.
5. Considering the scope and professionalism of this reclamation of land project, **there may be justifiable reasons for the Infrastructure Development Office to adopt “Pre-Qualification of Restricted Tender”, the CCAC thus does not express its stance regarding this issue.**

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1) **Objective of tendering**

1. Paragraph 2 of the tender documents states that:

“2. *Objective of tendering*

- 2.1 *This tendering aims at assessing candidate bidders and eight prospective candidates will be invited to submit bidding proposals for the construction with regards to “Pre-qualification of international restricted tender regarding the reclamation of land in a particular district and construction of the dike of the new development zone”. In the event of equal points scored in the eighth place, more prospective candidates, instead of the total mentioned above, shall be selected.*

2.2 *The principal reserves the rights to cancel this tender and the prospective candidates have no rights to ask for any compensation.”*

2. This statement is incorrect. The objective **should be contracting construction project** instead of selecting bidders as mentioned;
3. What the above paragraph indicating is the types of tenders instead of the objective of tendering. Amendment should be made accordingly.

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2) Evaluation criteria

1. Qualified bidders should be invited to submit bidding proposals according to the law.

Paragraph 2 of Article 109 of Decree Law no. 74/99/M stipulates:

“Article 109 (Tendering system)

(...).

2. *Regarding the pre-qualification of restricted tender, entities which fulfil **professional, technical, economic and financial conditions** or other conditions required in the notice as stated in Paragraph 1 of Article 110 can raise the request for candidacy.*

(...).”

In addition, Paragraph 3 of the same Article states that:

**“Article 109
(Tendering system)”**

(...).

3. The principal should invite prospective candidates who meet the qualifications in the pre-qualification process based upon the information stated in Sub-paragraph c of Paragraph 1 of Article 110 to submit the bidding proposals.”

To sum up the aforementioned two Paragraphs, only the contents of Sub-paragraph c of Paragraph 1 of Article 111 could be the evaluation criteria, which stipulate that:

**“Article 110
(Launch of tendering process)”**

1. The process of pre-qualification of restricted tender starts from publishing notice, in which the content should include:

(...);

c) Information concerning requirement of candidacy includes documents or declarations stating the candidate’s status and whether the candidate meets the conditions required in the aforementioned sub-paragraph. Such documents or declarations could be verified afterwards;

(...).”

A number of data which can be quoted are listed throughout; other evaluation criteria cannot or should not be adopted.

2. According to Sub-paragraph c of Paragraph 1 of Article 110 of Decree Law no. 74/99/M, upon setting out the requirements for the bidders, the principal shall invite qualified ones to submit bidding proposals.
3. To adopt the pre-qualification of restricted tender is for the sake of curbing unqualified contractors to submit bidding proposals, but not for the convenience of bid evaluation.

This could be inferred in Sub-paragraph g of Paragraph 1 of Article 110, in which the contents include:

***“Article 110
(Launch of tendering process)***

1. The process of pre-qualification of restricted tender starts from publishing notice, in which the content should include:

(...);

g) The number of entities invited to submit bidding proposals.

(...).”

4. In addition, Paragraph 2 of Article 112 of the same Decree Law stipulates:

***“Article 112
(Criteria for award of contract)***

(...).

2. If conditional tenders or drawings made by bidders or revised versions are involved, or the number of entities who have made requirement of candidacy equals to or is below the number of invited entities stated in the tender notice, the acquisition shall follow the stipulation stated in the public tender.”

Pre-qualification here refers to assessing the qualification of bidding companies based on the above indicators and all bidders who are evaluated as qualified will then be invited to submit bidding proposals.

In the course of pre-qualification, the principal shall lay down standardised evaluation criteria for all bidders and merely select bidders who are placed in higher positions to participate in the next round of bidding.

Sub-paragraph 10 in the tender documents states that:

“10. Criteria for selection and award of contract

10.1 Selection criteria: When assessing the qualification for candidacy, the first eight candidates whose scores are equivalent to or exceeding 65% of the total score will be selected. In the event of equal points scored in the eighth place, more prospective candidates, instead of the total mentioned above, shall be selected.

10.2 Criteria for award of contract: In the stage of bid evaluation, the bidding company which offers the lowest price quote in its bidding proposal shall be awarded the contract.”

Why are eight qualified bidders selected to submit bidding proposals? Under normal circumstances, all qualified bidders are entitled to submit their bidding proposals.

What if all of the eight invited companies do not submit their bidding proposals, what will the next step be? Is it a must to restrict the number of bidders? Why is the number restricted to eight, but not five or three? Will it be better if the number of bidders is not restricted?

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3) Evaluation criteria and selection of bidders (Sub-paragraph 19 of bidding rules)

The Sub-paragraph stipulates:

“19. The evaluation criteria and weighting of the criteria in the application form of qualification for candidacy, selection criteria for the candidates

Evaluation criteria and weighting of the criteria in the application form of qualification for candidacy is as follows:

<i>Evaluation criteria</i>	<i>Weighting</i>
<i>Professional and technical conditions</i>	
- Construction plan	25%
- Sand provision plan	20%
- Equipments	8%
- Similar construction experience	25%
<i>Economic and financial conditions</i>	
- Price of completed construction project	10%
<i>Integrity and honesty</i>	12%

Selection criteria: When assessing the qualification for candidacy, the first eight candidates whose scores are equivalent to or exceeding 65% of the total score will be selected. In the event of equal points scored in the eighth place, more prospective candidates, instead of the total mentioned above, shall be selected."

1. In this type of tender, there are two time slots that require choices and decisions making:
 - (1) The first one is to determine whether the bidders meet all requirements of technical, economic and financial conditions;
 - (2) The second one is to invite qualified bidders to submit bidding proposals in order to award the contract.
2. In the first time slot, various technical parameters stipulated in law are considered.
3. In the second time slot, the contents of the bidding proposals are considered and the one with the lowest price quote will be awarded the contract. This has to be mentioned in the bidding documents in advance. Compared to the last proposal, the scoring descriptions in this proposal are significantly more balanced and justifiable, despite that we are still reserved regarding some details.

With regards to whether integrity and honesty should be included in one of the evaluation criteria, as the public works department has long

been quantifying this vector, in order to keep the consistency of the administrative regulations and conventions, we are not going to give any consideration and analysis in this aspect.

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4) Other aspects in the bidding documents

Based on the structure, wordings, expressions and regulatory contents of the whole tender documents, there is still much room for perfection and improvement. Due to time constraint, we will not make analysis here.

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Part III: Conclusion

Upon analysing the bill, the CCAC believes that:

1. Due to limited information on hand, opinions are only given on several issues of greater importance.
2. By analysing the contents and structure of the tender documents, there is still much room for improvement. However, due to time constraint, we are not giving any opinions here.
3. The issues raised in this report and the relevant analysis serve as reference for the relevant entity, what options to take depends on the decision of the competent authority.

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The above opinions serve as reference only.

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Commission Against Corruption, 2nd February 2012.

The Commissioner Against Corruption
Fong Man Chong

Opinion concerning the bill of
Legal Regime of Urban Construction

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Part I: Preface

- 1) On 13th January 2012, the Commission Against Corruption (CCAC) received the bill of *Legal Regime of Urban Construction* transferred by the Cabinet of the Chief Executive which is currently under discussion in the Executive Council. The CCAC is requested to give analysis and render opinions on some contents in the bill.
- 2) Other documents sent to the CCAC included the reasons for legislation and comparison tables between the old and new regimes.

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Part II: Analysis

Paragraph 9 of Article 4 of Law no. 10/2000 of 14th August (*Organic Law of the Commission Against Corruption of the Macao SAR*) stipulates:

“Article 4
Powers

The Commission Against Corruption is entitled to:

(...);

9) With regard to any shortcomings it finds in any legal provisions, namely those involving rights, freedoms, safeguards or any legitimate interests of the individuals, formulate recommendations or suggestions concerning their interpretation, amendment or repeal, or make suggestions for new legislation. When, however, the matter falls within the powers of the Legislative Assembly, it shall merely inform the

Chief Executive in writing on its position;

(...).”

Thus we have made a brief analysis on the bill.

1. The bill of *Legal Regime of Urban Construction* (hereafter the bill) is divided into seven chapters, in which Article 1 stipulates:

***“Article 1
Objective***

It is a legal regime that regulates the activities of civil engineering and safeguards the structural safety of urban construction in the Macao SAR.”

Upon analysing the bill, it is not difficult to find that **the technical contents contained in Chapter two to five** (which are also the key contents) of the *General Regulations on Urban Construction* (approved by Decree Law no. 79/85/M of 21st August) **are not enclosed in the bill, thus we have the following doubts:**

- 1) **Is the government’s intention to put forward the bill to comprehensively amend the current *General Regulations on Urban Construction*?**
- 2) **Or does the legislature merely aim at strengthening the supervision on construction and engineering and therefore supervisory measures are introduced in the bill?**
- 3) The contents (or most of the articles) of the entire bill are **incompatible** with the objectives mentioned in Article 1; or be frank, **the contents are inconsistent with the objectives, and incompatible with the name of the bill.** Thus we suggest making the following adjustment:
 - a) Alter the name of the bill to ***Supervisory System on Urban Building and Construction*** and meanwhile make amendment on the contents of Article 1 of the bill because most of the contents of the bill are not as the contents described as in Article 1.

- b) Keep the current *General Regulations on Urban Construction* effective and do not immediately repeal it. If there is contradiction with this bill (if it will become the future law), regard this bill as the priority.
- c) Make adjustment to other contents of this bill based on the above opinions.
- d) Start to formulate the new *General Regulations on Urban Construction* – especially the parts involving technical contents.

Otherwise, this bill has become just a name and has not stipulated any technical regulations concerning construction and formulated relevant execution and supervisory system.

2. The *Structural Safety Protection of Urban Construction* mentioned in Article 1 of the bill **seems to be misleading because the bill does not regulate this content. In fact, we can hardly find any related article concerning this content in the bill** – even though Chapter 2 of *General Regulations on Urban Construction* is kept in Article 34 of the bill, the act of just keeping Chapter 2 and repealing the rest of the articles is very risky. **Chapter 3 to 5 of *General Regulations on Urban Construction* involves a lot of technical criteria, once they are repealed without any new rules immediately implemented, chaotic situation will occur and criticism will be faced, surely retarding the development of the construction industry.**
3. In addition, there are some other legislations concerning urban construction and safety, such as:
 - Decree Law no. 60/96/M of 7th October;
 - Decree Law no. 42/97/M of 13th October.
4. Article 2 of the bill also leads to other problems: **numerous concepts/definitions are listed throughout, but articles relating to these concepts in the main content could hardly be found.**
5. Paragraph 3 of Article 8, Paragraph 1 of Article 9 and Paragraph 3 of Article 12 of the bill stipulate, “(...) which also do not affect the sanctions imposed in accordance with the stipulation in this provision or other current legislations.”

However, concrete sanctions have never been mentioned in this bill.

6. Article 24 of the bill stipulates:

***“Article 24
Illegal Acts***

1. *Violation of this law constitutes administrative illegality, in exception of the cases where this law is applicable.*
2. *The sanction policy and procedure of administrative illegality as stipulated in the previous paragraph are formulated by complementary legislation, without affecting the application of the next article.”*

Law no. 13/2009 of 27th July stipulates: the amount of administrative fine shall not exceed \$500,000;

This bill violates Paragraph 3 of Article 3 of Law no. 13/2009.

It is the law which determines violation, but it would be inappropriate if sanctions are imposed by administrative regulations.

7. Notification is mentioned in Articles 25 and 28 of the bill, but the contents are incomplete. These legislative approaches have to be improved.

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8. Article 32 of the bill stipulates:

***“Article 32
Delegation of powers***

The powers of the Director of the Land, Public Works and Transport Bureau, as pointed in this law, shall not be delegated to the others, in exception of the powers for determining the order of suspension of construction and that of prohibition of construction.”

However, Article 20 of the bill stipulates:

**“Article 20
Supervision of powers**

1. ***The Land, Public Works and Transport Bureau is entitled to supervise the compliance of this law and relevant complementary legislations.***
2. *In executing the supervisory powers, the Land, Public Works and Transport Bureau shall request other public departments and entities to provide all necessary collaboration or assistance.*
3. *For the effect of Paragraph 1, the staff of the Land, Public Works and Transport Bureau are entitled to the powers of the authority to enter the following places for supervision, particularly concerning the work of inspection:*
 - 1) *The common parts of a condominium based upon the condominium regime;*
 - 2) *Places open to the public, including the ones need to be charged.”*
1. Why is the director not entitled to delegate the powers to his/her subordinates?
2. **The scope and content of supervisory powers are very vague; the objectives are not clear as well.**

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Similarly, Article 33 is also vague. The content of the article is:

**“Article 33
Succession of supervisory authority**

Through administrative regulations, the powers of the supervisory authority stipulated in this law shall be transferred to the current or future entity.”

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9. The concept of public authority, which is a term used in Penal Law – see Articles 312, 319, 320 and 321 of the *Penal Code*, is adopted in Paragraph 3 of Article 20.

The purpose for permitting the public authority to enter some places is to inspect some objects and observe some situation in person. The personnel on site have the obligation to collaborate and launch relevant administrative investigation procedure.

It seems inappropriate to permit the staff of the Land, Public Works and Transport Bureau to enter private places without setting some pre-requisites or conditions. This privilege lacks rationality, what if there is abuse of powers? Moreover, considering the current organisation structure and operation of the Bureau, is it able to enforce the law?

Similar problems also appear in Article 21 in which the contents are vague and not clear.

Anyhow, it should be like Paragraph 6 of Article 9 in which on-site record should be made.

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10. Article 23 stipulates that:

**“Article 23
Judicial writ**

1. *If there is an illegal construction undergoing in a condominium or an independent unit which, as shown by strong and apparent signs, severely damages or will severely damage the structure of the condominium whilst the inspection staff of the Land, Public Works and Transport Bureau are unable to enter the condominium or independent unit for investigation, **the Director of the Bureau shall make a formal request with reasoning to the judge of the Criminal Court to obtain the judicial writ issued by the Court to enter the condominium or the independent unit.** The stipulation of Paragraph 1 of Article 162 of the Code of Penal Litigation shall be applied necessarily to the judicial writ.*

2. *For the effect of the above stipulation, construction which may cause collapse and danger to a condominium is considered construction which will cause severe damage to the structure of the condominium.”*

Administrative activities and penal litigation activities are mixed up in the bill.

Please refer to Sub-paragraph f of Paragraph 1 of Article 264, Article 266, Sub-paragraph a of Paragraph 1 of Article 267 of the *Penal Code* for the signs of danger. In short, it is related to behaviour of danger.

The criminal sanctions against dangerous crimes are subject to the control of a set of strict legal principles.

Under normal circumstances, only when the signs of criminal crimes are shown and the case for investigation has been commenced could the judge of the Criminal Court execute his/her power. As the stipulation of Article 23 is too simple, how could the judge of the Criminal Court deal with it? It seems that there is a lack of thorough thinking.

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Part III: Conclusion

Upon analysing the bill, the CCAC believes that:

1. **The purpose of legislation should be re-clarified. Does it merely aim at strengthening the supervision over a condominium or does it involve the technical criteria needed to be followed during construction in a condominium?** Consider formulating two sets of law for regulation.
2. If the purpose of legislation is to strengthen the supervision of the Land, Public Works and Transport Bureau over urban construction, **the name, objective and the content of relevant measures as well as the powers of the Bureau as stated in the bill should be amended** (Please refer to Part II for some of the contents).

3. If the government **could not immediately put forward a new draft of the bill regarding the current *General Regulations on Urban Construction*** (mainly concerning the part of technical criteria), **the CCAC believes that it is deemed unnecessary to repeal it, otherwise chaotic situation will occur and criticism will be faced.**
4. In the bill, **numerous technical amendments have to be made and some fundamental concepts have to be clarified.** In addition, the concepts and systems of administrative law and penal litigation law should not be mixed, otherwise execution could hardly be carried out.
5. **Numerous articles in the bill should also be perfected from the perspective of legislation** (Due to time constraint and limited information on hand, we just render the above opinions).

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The above opinions only serve as reference for the Chief Executive.

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Commission Against Corruption, 2nd February 2012.

The Commissioner Against Corruption
Fong Man Chong