

## Chapter 4

### Section 7 - Nominated Permittee Approval/ Withdrawal/ Removal Procedure

#### 1.0 Introduction

1.1 Under sections 10G, 10H, 10I and 10J of the Land (Miscellaneous Provisions) Ordinance (LMPO), provisos have been made whereby the contractor of a permittee of an excavation permit (XP) or emergency excavation permit (EXP) may become the nominated permittee.

1.2 Section 10 subsection 5 of the LMPO states “... where-

- (a) any person, other than a permittee of an XP or EXP, makes or maintains an excavation or emergency excavation to which the permit relates;
- (b) there is a breach of any condition of the permit as a result of any conduct of the person; and
- (c) there is a nominated permittee in relation to the permit at the time of the breach of the condition,

then—

- (d) where the condition is under the permit to be complied with by the permittee, the permittee shall be guilty of an offence and shall be liable on conviction to a fine at level 5;
- (e) where the condition is under the permit to be complied with by the nominated permittee, the nominated permittee shall, unless he is already guilty of an offence under subsection (3), be guilty of an offence and shall be liable on conviction to a fine at level 5; or
- (f) where the condition is under the permit to be complied with by both the permittee and the nominated permittee, then—
  - (i) the permittee, unless he is already guilty of an offence under subsection (3); and
  - (ii) the nominated permittee, unless he is already guilty of an offence under subsection (3)
 shall each be guilty of an offence and shall each be liable on conviction to a fine at level 5.”

In essence, the nominated permittee will be held liable for contravention of permit conditions to be observed by the nominated permittee or both the permittee and nominated permittee.

## 2.0 Legal Requirements for Approval of Nomination

2.1 The nomination of a contractor to be the nominated permittee of an XP has to go through the following stages in sequence:

- (i) The permittee sends a notice to the Authority nominating a contractor as the nominated permittee of the permit under section 10H(1) of LMPO.
- (ii) The nominated contractor sends a notice to the Authority giving consent to the nomination and agreement to comply with the conditions in the permit under section 10I(1) of LMPO.
- (iii) Upon receipt of these notices, the Authority may approve/disapprove the nomination of the contractor as a nominated permittee under section 10J(1) of LMPO.

## 3.0 Nomination Approval Procedure

3.1 For normal Excavation Permit Management System (XPMS) account users, the nomination procedure mentioned in para. 2.1 can all be done via XPMS. For an ad-hoc XPMS account user, as the account would not have a List of Acceptable Nominated Permittees for selection, an ad-hoc XPMS account user can only select “Other” and type in the name of the contractor to be nominated. In addition, an ad-hoc XPMS account user is required to submit a duly completed Form HYD 83 to the respective XP processing team by post or by hand in order to complete the nomination procedure. The duly completed Form HYD 83 has to be signed by the permittee first signifying his nomination. Then, it has to be signed by the contractor signifying the contractor’s consent to the nomination and agreement to comply with the permit conditions. For a non-XPMS user, submitting the duly completed Form HYD 83 is the only means of nomination for both the permittee and the nominated contractor.

*[Note: If only the permittee has an normal XPMS account and the nominated contractor has not registered an XPMS user account for contractor, the permittee shall nominate his contractor through XPMS **and** submit the duly completed Form HYD 83 with his nominated contractor’s consent to the respective XP processing team by post or by hand in order to complete the nomination procedure. Facsimile or photocopy of the Form HYD 83 will not be accepted.]*

3.2 For any excavation work which falls within any one of the following

conditions, assessment of the nomination application by the E/CTO is not required.

- (i) For excavation on the footpath, the area of excavation is not more than 100m<sup>2</sup>.
- (ii) For excavation on the carriageway, the area of excavation is not more than 10m<sup>2</sup>.

3.3 For excavation not within the above two conditions, the E/CTO of the respective Highways Department (HyD) Regional Office should assess the nomination application. It is essential that the E/CTO is satisfied that the nominee is capable of complying with the Conditions of Permit set for the nominated permittee. The nominee or the permittee shall submit evidence to substantiate the nominee's capability both in terms of technical and management experience and financial capability as stipulated in para. 3.4 and 3.5.

3.4 A contractor's technical and management experience in road works is important as far as road excavation is concerned. In this respect, the criteria for admission into Group A Probationary of the Roads and Drainage Category of the Development Bureau (DEVB) List of Contractors will provide a useful reference for assessment of the adequacy of the nominee as the nominated permittee in terms of both his technical and management experience and financial capability.

3.5 For a contractor to be approved by the E/CTO of the respective HyD Regional Office as a nominated permittee, the contractor shall:-

- (i) possess a minimum working capital of \$1.6 million.
- (ii) satisfactorily complete public Roads and Drainage works or utilities trenching works within the past five years, to a total value of not less than \$10 million. His experience as sub-contractor may count. Private sector experience substantiated will also be accredited.

3.6 Upon receipt of application, the E/CTO of the respective HyD Regional Office shall forward information of the nominee's financial capability to the Senior Treasury Accountant (STA) of HyD Headquarters who should be responsible for checking the minimum working capital requirement as specified in para. 3.5(i) above based on the latest audited financial

statements (i.e. the latest auditor's report together with the balance sheet, profit and loss account and notes to the accounts of the nominee) submitted by the nominee while the E/CTO should check the compliance with the requirement as specified in para. 3.5(ii) above. STA shall notify the E/CTO the result of his assessments.

3.7 The E/CTO of the respective HyD Regional Office shall notify the permittee and the nominee the result of the assessment, with reasons if the nomination is disapproved. Also, the E/CTO should update the list of the approved nominated permitted in XPMS after any approval has been granted.

3.8 Checking the technical and financial experience as stated in paragraph 3.5 is not required if the contractors are on the List of Contractors of Development Bureau (DEVB) or on a government department's own lists. The applicant should provide a list of such contractors to the Chief Highway Engineer/Research and Development (CHE/R&D) of HyD for registration as acceptable nominated permittees.

#### **4.0 Withdrawal of Nominated Permittee by Permittee**

4.1 Under section 10H(2) of the LMPO, a permittee may withdraw the nomination of a contractor. The permittee is required to send a notice of withdrawal to the E/CTO of the respective HyD Regional Office and the contractor.

4.2 Section 10H(3) of the LMPO stipulates that a notice of withdrawal under section 10H(2) takes effect on the date of receipt of the notice by DHy or his delegated officers in the respective Regional Offices, or such later date as is specified in the notice.

#### **5.0 Withdrawal of Nominated Permittee by Nominated Permittee**

5.1 Under section 10I(2) of the LMPO, a nominated permittee in relation to an XP or EXP may withdraw his consent and agreement to comply with the Conditions of Permit as a nominated permittee. He has to send a notice of withdrawal to the E/CTO of the respective HyD Regional Office and the permittee.

5.2 In accordance with section 10I(3) of the LMPO, a notice of withdrawal

under section 10I(2) takes effect on the date of receipt of the notice by the E/CTO of the respective HyD Regional Office or such later date as is specified in the notice

## **6.0 Withdrawal of Nominated Permittee by the Authority**

6.1 Under section 10J(2) of the LMPO, the E/CTO of the respective HyD Regional Office, under the delegated authority of DHy may withdraw his approval given under section 10J(1) to the nomination of a contractor as a nominated permittee in relation to an XP or EXP

- (i) if the E/CTO is satisfied that the nominated permittee is incapable of complying with any of the conditions which under the permit are to be complied with by the nominated permittee; and
- (i) by sending a notice of withdrawal to the permittee of the permit and the nominated permittee. Such notice of withdrawal shall take effect on the date specified in the notice.

Before sending a notice of withdrawal to the permittee, the E/CTO is required to seek approval of the Deputy Director of Highways via the Assistant Director/Technical. There was no appeal mechanism under the Ordinance.

6.2 However, if the nominated permittee has no improvement and also performed unsatisfactorily in other XPs for the same permittee, HyD may remove the contractor from the list of acceptable nominated permittees of that permittee. HyD will notify the contractor, the permittee (respective project Office and Headquarters of the company/ government department) and DEVB.

## **7.0 Registration of Contractors as Acceptable Nominated Permittees**

7.1 For administrative convenience, CHE/R&D, in exercising the powers delegated by DHy, may register contractors working for the applicants as acceptable nominated permittees for that respective applicant in advance of the XP or EXP applications.

7.2 When the applicant applies for an XP or EXP and nominates his contractor as the nominated permittee, the E/CTO of the respective HyD Regional Office will check from XPMS and will approve the nomination if the nominee has already been accepted as an acceptable nominated permittee.

7.3 For the purpose of registration, the applicant should submit to CHE/R&D in advance a list of contractors based on which the applicant will nominate

his contractors as nominated permittees. The applicant is required to provide the contractors' financial statements and records of past job experience of his contractors to substantiate his applications.

- 7.4 Upon receipt of applications, CHE/R&D will forward audited financial statements of the nominees to STA who will conduct checks to ascertain if the nominees have met the minimum financial requirements as specified in para. 3.5(i) above. STA shall notify CHE/R&D the result of his assessments.
- 7.5 Upon receipt of applications, CHE/R&D will conduct check to ascertain if the contractors have possessed the technical and management experience.
- 7.6 CHE/R&D will notify the applicant the results of the assessment. If CHE/R&D is satisfied that the nominees have the necessary financial capability and technical and management experience and considered to be suitable as nominated permittees, CHE/R&D will put the nominees into the registration list of acceptable nominated permittees for the respective utility undertaking. The lists may be viewed through XPMS.