



RESTRICTED

**DEVELOPING RULES AND PROCEDURES FOR THE
COMMUNITY PUBLIC PROCUREMENT REGIME
AND
BONDS, GUARANTEES AND BID SECURITIES
FOR ADMINISTERING PUBLIC PROCUREMENT IN THE
COMMUNITY
PROPOSALS FOR CONSIDERATION BY COUNCIL FOR TRADE
AND ECONOMIC DEVELOPMENT (COTED)**

CARICOM SECRETARIAT

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COMMUNITY PROTOCOL ON PUBLIC PROCUREMENT

Scope and Coverage

The Community Protocol on Public Procurement identified a number of areas where common rules, standards, norms and guidelines should be established to improve efficiency and transparency in public procurement in the Community. Some of the areas which were outlined in the Background Paper presented at the Second Meeting of the Reconvened Task Force on 8 December 2020 have been replicated below for ease of reference. There is also a recognition that Member States (Contracting Parties) are at different stages in the development and use of public procurement rules and procedures at the national level. Therefore, these rules and procedures should be set as minimum standards to ensure acceptance and ease of compliance by all contracting Parties. The areas for which these standards are to be developed, in keeping with the Community Public Procurement Protocol are:

- (i) Rules and guidelines governing procurement planning, advertising, media, e-procurement, security of bids, establishment of bid evaluation committees, timeframes and content and fees for bidding documents (Article 15 (4) of the Protocol);
- (ii) Procedures and conditions that guarantee transparency, fairness and objectivity in receiving and opening bids (Article 17 (3) of the Protocol);
- (iii) Common rules on the content, submission, maintenance and accessibility of information relating to procurement proceedings (Article 22 (1) (2) of the Protocol);
- (iv) Common rules for the disqualification of suppliers and common rules and minimum standards for procuring entities to use in the assessment of suppliers' eligibility to participate in procurement proceedings (Article 24 (4) (5) of the Protocol);
- (v) Norms and Standards to be complied with in the Community public procurement regime (Article 27 of the Protocol);
- (vi) Common rules for non-discriminatory, timely, transparent and effective challenge and review procedures – administrative (Article 28 (1) of the Protocol).

Proposals for consideration by COTED

The general framework for the rules and standards in public procurement has been proposed for consideration and discussion by the Reconvened Task Force and is set out below as follows:

1. COMMON RULES AND GUIDELINES FOR BID SUBMISSION AND EVALUATION

- (i) The adoption of the general rule of not less than six weeks or at least 40 calendar days for bid submissions from the date of the invitation to bid or the date of the availability of the bidding documents;
- (ii) The timeframe for submission of bids should be expressed in “calendar days” in keeping with the provisions of the Community Public Procurement Protocol [Article 16 (c)];
- (iii) The “fit-for-purpose approach with some indicative guidance” is recommended to take into account the procurement of goods, which may not require all that time for bid submission;
- (iv) For complex items and works, the period for bid submission from the date of invitation to bid or the date of availability of the bidding documents shall be not less than twelve weeks;
- (v) A definition or explanation of complex items should be defined in the rules for legal certainty;
- (vi) The adoption of the common practice for deadline and place for receipt of bids to be specified in the invitation to bid in the procurement notice;
- (vii) The adoption of the procedure and general guidelines for bid opening with respect to time, place and for the bids to be opened in public in the presence of bidders and their representatives;
- (viii) The adoption of general guidelines relating to confidentiality and examination of bids.

2. COMMON PROCEDURES FOR SUBMISSION OF BIDS (TENDERS)

- (i) Submission of tenders within the set deadline not later than the date and time period for receipt of tenders;
- (ii) Submission of tenders in the language(s) specified in the tender documents;
- (iii) Submission of duly signed tenders;

- (iv) Submission of the required number of tender copies (requirements could be established in relation to e-procurement);
- (v) Respect of the required tender validity period;
- (vi) Submission of the required tender guarantee for the correct amount, for the correct duration, with the correct wording;
- (vii) Submission of all required documents.
- (viii) Late tenders must be returned to bidders unopened
- (ix) Procuring entities shall accept late tenders in circumstances where the procuring entity has ascertained that such tenders were delayed as a result of force majeure.

3. COMMON PROCEDURES FOR EVALUATION OF BIDS (TENDERS)

- (i) Evaluation of tenders must begin soon after opening of tenders;
- (ii) Evaluation period must be specified at the opening of tenders with due consideration given to mitigating factors that may hinder completion within established timeframe;
- (ii) The pre-announced criteria for the evaluation of tenders must be applied by the Evaluation Committee;
- (iii) Application of the criteria in the tender evaluation and the contract award processes;
- (iv) Compliance with the checks and balances by the Evaluation Committee.
- (v) A general rule for the chairperson and secretary of the Evaluation Committee to have non-voting powers;
- (vi) Requirement for all members of the Evaluation Committee including the chairperson and secretary to sign the declaration of impartiality and confidentiality.

- (vii) public entities and public servants, where a conflict of interest does not exist, ought not to be restricted.

4. RULES ON THE QUALIFICATIONS AND ELIGIBILITY OF SUPPLIERS

- (i) Automatic eligibility and qualification of CARICOM nationals as defined in Article 32 of the Revised Treaty and Article 24 of the Protocol for procurement opportunities that are at or above the thresholds for goods, services and works;
- (ii) The prohibition of rules that include qualification procedures that are intended to restrict market access;
- (iii) The prohibition of requirements that discriminate against nationals of a Member State of the Community that is a Party to the Protocol;
- (iv) The prohibition of conditions that would require the bidder or tenderer to establish a commercial presence in the Member State that intends to procure the goods, services or works.
- (v) The process of qualification of suppliers must be carried out by the procuring entity;
- (vi) The process must be objective, non-discriminatory, proportionate and transparent;
- (vii) The process must be applied at the stage of determining which suppliers are not excluded (qualification); and which tender is most favourable

5. RULES FOR THE DISQUALIFICATION OF SUPPLIERS

- (i) The disqualification of a supplier should not be used as a mechanism to restrict competition;
- (ii) A supplier should not be disqualified on the grounds of affiliation, association, ethnicity, nationality, gender, religion, etc.;
- (iii) The adoption of rules for the disqualification of firms or individuals that intentionally submit false, misleading or materially inaccurate information to a

procuring entity; where a conflict of interests exists, where the supplier is in a state of insolvency/bankruptcy and conviction for criminal offences;

- (iv) Consideration should be given, in-keeping with the “Rehabilitation of Offenders” programmes in Member States, to allow persons who may have committed certain infractions of the law to participate in public procurement activities.
- (iv) The adoption of rules that would exclude public entities and public servants from participating in procurement activities. Exceptions to this requirement should be clearly established.
- (v) The adoption of rules for the blacklisting of suppliers that have been disqualified for very serious infractions?
- (vi) The adoption of rules for disqualification on other grounds such as: corruption, collusion, coercion and persistently poor performance of suppliers and contractors;
- (vii) The development of harmonized or common guidelines based on objective criteria to assess the performance of contractors with a history of poor performance and establish benchmarks for disqualification of suppliers or contractors;
- (viii) The provision of language for the legal definition of “corruption” and other such practices.

6. COMMON RULES FOR EFFECTIVE SUPPLIER REVIEW AND CHALLENGE

- (i) Adoption of common guidelines for triggering Supplier Challenge and Review in terms of who can submit complaints, the form for submitting complaints and what information should be contained in the complaint;
- (ii) The adoption of common rules on the procedure to be followed by procuring entities throughout the Supplier Challenge and Review process.

7. PROCEDURE FOR EFFECTIVE SUPPLIER CHALLENGE (PROCURING ENTITY)

- (i) The application for reconsideration of the decision must be submitted to the procuring entity that took the decision or action;
- (ii) The application for reconsideration must be submitted in writing;
- (iii) The application for reconsideration must be properly addressed to the Head of the procuring entity;
- (iv) The application for reconsideration must contain a clear identification of the loss or injury suffered (or likely to be suffered) and the alleged non-compliant action or decision; and
- (v) The application for reconsideration must be submitted no later than the time period established in law (Protocol or national legislation).

8. PROCEDURE FOR EFFECTIVE SUPPLIER CHALLENGE (INDEPENDENT BODY)

- (i) The application for review of the decision or failure to take a decision by the procuring entity must be submitted to the independent body;
- (ii) The application for review must be addressed to the Head of the Independent body;
- (iii) The application for review must be submitted in writing within the time specified in the existing law or regulation (standstill period);
- (iv) A supplier or tenderer may request of the independent body to entertain an application for review outside that period (standstill) if significant public interest considerations so justify;
- (v) The independent body may order the suspension of the procurement proceedings where an application is received in (iv) above, unless urgent public interest considerations require that the procurement proceedings should proceed;
- (vi) The application for review must be based on a dissatisfaction with the decision of or action by the procuring entity.

9. PROCEDURE FOR EFFECTIVE SUPPLIER CHALLENGE (THE COURT)

- (i) A supplier or tenderer may submit an application to the courts for judicial review if there is dissatisfaction with the decision of the independent body;
- (ii) Where an application is made to the court, the competence of the independent body to entertain the matter ceases;
- (iii) A supplier or contractor participating in the procurement proceedings to which the application relates, as well as any procuring entity whose interests are or could be affected by the application, shall have the right to participate in challenge proceedings;
- (iv) The participants in challenge proceedings shall have the right to be present, represented and accompanied at all hearings during the proceedings;
- (v) The participants in challenge proceedings shall have the right to be heard; the right to present evidence, including witnesses; the right to request that any hearing take place in public; and the right to seek access to the record of the challenge proceedings subject to the law of the Member State or Contracting Party to the Protocol.

PROPOSALS NOT COVERED BY THE PROTOCOL

Framework Agreements on Emergency Procurement

The issue of Emergency Procurement is not a requirement under the Community Protocol on Public Procurement. There was a recommendation for its inclusion and the development of common rules emerged from a regional workshop facilitated by the Caribbean Development Bank (CDB) and the World Bank. There was overwhelming support from regional public procurement officials for elaboration of common guidelines for Emergency Procurement. The basis for these common rules on Emergency Procurement is premised on the reality that the Community and the Caribbean Region is prone to natural disasters on an annual basis. It must be noted that the annual hurricane season runs from 1 June to 30 November every year and, consequently, the implementation of emergency procurement guidelines and policies would assist Member States in planning in advance for these eventualities. Standard templates where

available and in place within the region, including the one in use by the Caribbean Disaster and Emergency Management Agency (CDEMA) should serve as a model for use by Member States. It must also be noted that some Member States have provisions for Framework Agreements in Emergency situations in their national public procurement legislation.

Proposals for Framework Agreements

- (i) Framework Agreements may be made for to both emergency situations and goods, services and works that are the subject matter of public procurement;
- (i) In the case of emergency situations, the Framework Agreement must be in relation to assistance during emergency situations. The emergency could be a natural or man-made disaster or a conflict;
- (ii) The Framework Agreements may be flexible but should cover goods, services and works;
- (iii) The Framework Agreements should take into account resource and capacity constraints as well as the fragility and vulnerabilities of the Contracting Party;
- (iv) The Framework Agreements must be time specific. Some jurisdictions adopt a timeframe of three (3) years;
- (v) The subject matter of the Framework Agreements must follow the principles and international best practice for solicitation (invitation to tender) and evaluation;
- (vi) Competition and not direct selection must serve as a guiding principle for establishing Framework Agreements with private sector entities. The established list of national and Community list of suppliers should provide information in the case of complex procurements;
- (vii) A prequalified list of suppliers could be considered in certain circumstances but the principles of selection (procedural fairness, non-discrimination and transparency) should be the guiding principles;
- (vii) It is proposed that the Community Framework Agreement Model should include both the “open” and “closed” agreement with the requisite requirements and provisions;
- (viii) The drafting of the Community Framework could benefit from the provisions set out in the UNCITRAL Model Law on Public Procurement 2014 and other provisions based on international best practice.

Guidelines and Standards for Bonds, Securities and Guarantees

Proposals for Adoption

Bid Security

- (i) The bid security provides security after the successful tender is accepted and where required, its application should be without discrimination.
- (ii) Bid security should apply fairly and without discrimination to bid submissions to protect the procurement entity from withdrawal or modification at the point of tender (bid security);
- (iii) It has been proposed for consideration a uniform approach to the application of the per centum rate on bid security which is usually, across the region, between 2.5 to 5 percent of the procurement contract value;
- (iv) A sliding scale approach is proposed to ensure that MSMEs can access the public procurement market;

Performance Bonds

- (v) Bonds, securities and guarantees should apply to all suppliers (non-discriminatory);
- (vi) The securities or guarantees should apply in the event of the failure on the part of a supplier or suppliers to execute the contract (performance security) and should be a requirement that is applied uniformly without discrimination;
- (vii) The development of a uniform or harmonized set of definitions for the bonds, securities and guarantees used in public procurement across the Community for clarity and certainty;
- (viii) Establishment of a framework of common per centum rate of procurement contract values on a sliding scale to enhance suppliers and tenderers expectations and enhance the ease of doing business with Contracting Parties to the Protocol;
- (ix) Due regard must be given to the requirements for performance bonds, guarantees and tender securities before contractors sign or undertake procurement contracts in Member States that are Contracting Parties to the Protocol.

- (x) Some Member States require performance bonds, guarantees and tender securities to be obtained from local banks and insurance companies in the country where the contract will be undertaken. A letter of guarantee or letters of credit (as the case may be) from a bank, insurance company or other financial institutions (credit unions, etc.) is acceptable;
- (xi) Other Member States require that the contractor from the sending Member State (Contracting Party) must enter into a joint venture arrangement with a local contractor. In that situation, the performance bond, guarantee or tender security must be jointly applied by members of the consortium or joint venture;
- (xii) It is proposed that a bond for advance payment should be implemented as a form of guarantee to protect the procuring entity in the event of bankruptcy of the contractor or other cause;
- (xiii) The per centum rate of the bond for advance payment could be determined using the methodology of the same sliding scale that is proposed for performance bonds and tender security in relation to the value of the procurement contract;
- (xiv) It is proposed that a distinction should be made and definitions provided for “mobilization fee” and “advance payment fee” and the standardization of the per centum payment structure in line with the procurement contract value.
- (xv) It has been proposed that there should be a uniform approach to the application of the per centum rate on performance bond, guarantees and securities for procurement contract value across the region;
- (xvi) A sliding scale is recommended for performance bonds, guarantees and securities which is set out in the table below;
- (xvii) It is recommended that bonds and securities should apply to goods in addition to public works depending on the nature of the procurement;
- (xviii) It is recommended that credit unions be included among the list of financial institutions that could provide bonds, guarantees and securities to their customers for participation in the Community Public Procurement regime;
- (xix) It is recommended that the list of definitions for the different instruments should be so drafted to provide clarity and legal certainty.

Table 1: Proposed Guidance for application of Per Centum Rates

Contract sum (incl. VAT) (US\$ million)	Performance bond cover (% of contract value)	Estimated Bond Value (US\$) upper limit
< Value below the Protocol Thresholds for works	Not required at the regional level	Not applicable
3.0m - 3.5m	Not more than 10%	300,000 - 350,000
3.5m - 4.0m	9 %	315,000 - 360,000
4.0m - <5.0m	8.5%	340,000 - 425,000
≥5.0m	8%	>400,000