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## ATTACHMENT III

# THE PUBLIC PROCUREMENT MANUAL

Community Public Procurement Regime

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## **INTRODUCTION – SETTING THE CONTEXT**

The regional public procurement regime in the Caribbean Community is based on:

- 1) The legal context,
- 2) Bilateral international agreements,
- 3) International co - funded Projects.

### **The legal context:**

The Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy was signed by the Heads of Government of the Caribbean Community on July 5, 2001. The Revised Treaty provides overarching justification for the establishment and implementation of a regional Public Procurement regime. In Article 239 of the Revised Treaty Member States agreed to “*elaborate a Protocol relating inter alia to government procurement*”. Additionally, the Community has taken steps to facilitate cross border trade and the free movement of goods and services within the CSME in Article 79 and, for the prohibition and removal of restrictions on the provisions of services in Chapter Three, observing the principle of non – discrimination as contained in Article 8, all of which has direct bearing on public procurement of goods and services.

The Community Public Procurement Protocol was adopted by the Conference of Heads of Government (CHOG) at the Thirtieth Intersessional Meeting held in St. Kitts and Nevis from 26-27 February 2019. The enactment of the relevant provisions of the CARICOM Model Public Procurement Bill would allow Member States that become Contracting Parties to implement the obligations in the Protocol at the national level.

### **The regime established by the provisions of the Revised Treaty - CARICOM Single Market and Economy will be referred to below as “CSME”**

The underpinning purpose of CSME is to facilitate the expansion of all forms of economic activity. As in most small developing countries, Member State governments are generally

the largest procurers of goods and services in their respective national contexts. Consequently, the collective volume and value of Public Procurement region-wide is considerable (estimated at 20% of GDP to be USD\$12,098,300,000 in 2003). The volume and value of public procurement in the CARICOM region estimated at 20 % of GDP was approximately USD\$13,013,938,586 (XCD \$34.74 billion) in 2017.

An effective public procurement policy is fundamental to the success of the single market in achieving the stated Objectives of the Community as set out in Article 6 of the Revised Treaty. Some of these include:

- Improved standards of living and work,
- Full employment of labour and other factors of production,
- Accelerated, coordinated and sustained economic development and convergence,
- Expansion of trade and economic relations with third States,
- Enhanced levels of international competitiveness, and
- Organization for increased production and productivity.

1. Legal context of Public Procurement regime of the Caribbean Community is composed of:

- the Protocol on public procurement for the Caribbean Community,
- the CARICOM Model Public Procurement Bill, and
- [the Caribbean Community Public Procurement Rules of Procedure (work-in-progress)].

2. International agreements having bearing on public procurement are:

- Economic Partnership Agreement (EPA) between the European Community and CARIFORUM,
- Free trade agreement with United States (under negotiation),
- GATS (General Agreement on Trade in Services),
- Bilateral agreement with Dominican Republic and Costa Rica. [Provision for negotiating public procurement agreement in the future].

**All include disciplines in the area of public procurement.**

3. International projects

International projects include: 2003: Grant from Inter-American Development Bank (IDB) and Canadian International Development Agency (CIDA) which objective is to support CARICOM in its efforts to establish an effective regional regime for public procurement that facilitates the full implementation of the CSME, and to participate more effectively in external trade negotiations relating to public procurement. Support under the 10<sup>th</sup> and 11<sup>th</sup> European Development Fund) to assist the Community with the development of the infrastructure and instruments for an integrated, unified public procurement market in the CSME.

**The Framework Regional Integration Policy on Public Procurement (FRIP)** is the basic instrument for the establishment of a public procurement regime.

However, legal obligations to implement national legislation that give national effect to regional obligations are established by the Protocol on Public Procurement for the Caribbean Community (henceforth “the Protocol”).

The Protocol sets out the conditions and procedures necessary for the full integration of the national procurement markets of the Member States into a single, unified and open area through the design and implementation of a regional best practice regime for Public Procurement.

The objective of the Protocol is to set out the conditions and procedures necessary for the full integration of the national procurement markets of the Member States into a single, unified and open area through the design and implementation of a regional best practice regime for public procurement.

In particular, the Protocol aims to:

(a) create the necessary competitive and non-discriminatory conditions to facilitate achievement of value for money; (b) provide opportunities for access to a single market with regional sales opportunities; (c) strengthen the competitiveness of the regional supplier base in particular in relation to micro, small and medium-sized enterprises; and (d) encourage the rational use of scarce resources.

The Protocol is composed of the preamble and nine parts: 1) General provisions, 2) Scope and coverage, 3) Information and communication technologies, 4) Procurement proceedings, 5) Transparency, fairness and supplier challenge, 6) Technical cooperation and assistance, 7) Institutional arrangements, 8) Special provisions, and 9) Final provisions.

For the purpose of this Manual the most relevant are the first seven parts of the Protocol since they deal with award of public procurement contracts.

On the basis of the Protocol, the Community should develop a CARICOM Model Law on Public Procurement to enable the enactment of harmonized provisions for implementing the Protocol by Member States participating in the CSME.

Finally, there are Procurement Standard Operating Procedures (PSOP) developed on the basis of the Community Public Procurement regime to regulate additional details concerning the conduct of the open tendering method of procurement, and to a lesser degree, the restricted tendering (selective bidding) and the single source procurement (direct awards). It is because the latter two methods may be applied only exceptionally, in strictly limited circumstances (while the open tendering is the default method of procurement). Member States may want to define themselves, further details concerning conduct of the restricted tendering and the single source procurement in their national regulations.





## PART I - BASIC CONCEPTS AND ELEMENTS OF THE PUBLIC PROCUREMENT REGIME

### 1. Scope and coverage of public procurement rules

**Public procurement** is the acquisition of goods, services or works or any combination thereof, for or on behalf of **procuring entities** by way of purchase, rental, lease, concession or hire-purchase with or without an option to buy but not with a view to commercial resale or use in the production of goods and services by private commercial entities for commercial use.

Any object of public procurement can be supply of goods (a goods contract), provision of services (a services contract) or execution of works (works contract) or combination of two or more types of subject matters (a mixed contract).

A specific form of the public procurement is a **concession**.

The concession is defined by the Protocol as a *long-term contract for **works** (see below for the definition of works) in relation to which the remuneration for the works to be carried out consists solely of the right to exploit the activity or of a combination of the right to exploit the activity and the right to payment and the **concessionaire** bears the **risk** inherent in the exploitation by providing funding for the activity or otherwise.*

**Concessions** are often used to deliver major infrastructure projects such as the construction and operation of roads, bridges or tunnels. When the concessionaire receives all of its remuneration by way of tolls directly charged to users (of the infrastructure, for example driver using a bridge), consideration is derived from “exploitation” of the work by its users and not from the procuring entity which awards the concession. The concessionaire takes the financial and operational risk when it funds the construction of the work and operates it without a guarantee that it will be able to recoup its investment and make a profit over the period of the concession.

The Protocol also uses the term “procurement opportunity” which is understood as “*a situation in which suppliers may, through a bidding process, demonstrate their interest in*

*supplying and their capacity to supply procuring entities with goods, services or works or any combination thereof*".

**"Goods"** mean all kind of property other than real property, money, security or choses in action<sup>1</sup>.

**"Services"** mean services provided against remuneration other than wages<sup>2</sup> and include **consulting services**.

The term **"works"** means the **carrying out any of the following activities**:

construction, reconstruction, assembly, altering, manufacturing, processing, installation, improvement, commissioning, demolition, maintenance, repair or renovation, in relation to building, civil engineering, structural engineering, electrical engineering, mechanical engineering and other engineering [and technology] projects.

Works include also goods and services incidental to the carrying out of the activities referred to in above, provided that the value of the goods or services does not exceed the value of the activity to which they relate.

## **2. Parties to the procurement contract**

Any public procurement contract includes two parties: a **procuring entity** and a **supplier**.

**A procuring entity** is the entity which acquires goods, services or works being the object of the public procurement contract.

**Procuring entities** which are obliged to follow public procurement rules comprise:

all central, sub-central or local government entities, statutory bodies, state-owned companies and any other undertakings in a Member State that use **public funds** to procure

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<sup>1</sup>The term used to describe a property right or the right to possession of something that can only be obtained or enforced through legal action.

<sup>2</sup>Employment contracts are excluded from the public procurement regime.

goods, services or works, the benefit of which would be for public use and not for commercial gain.

The term “**public funds**” means monies derived from:

(a) revenue including all tolls, taxes, imposts rates, duties, fees, penalties, forfeitures, rents and dues, proceeds of sale and all other receipts of a Contracting Party’s Government, from whatever sources arising, and over which Parliament has the power of appropriation, including the proceeds of all loans raised; and

(b) any trust or other monies held, whether temporarily or otherwise, in the name of a Contracting Party’s Government.

Public procurement rules are applicable if three conditions are cumulatively satisfied:

1. the procuring entity (i.e. an entity satisfying the definition provided above),
2. acquires goods, services or works (see above for the definitions),
3. against consideration which comes from and is financed with public funds, as defined above).

**The other party of the public procurement is a supplier.**

**A supplier** is as a party (an individual or a company) which sells goods, provides services or executes works which are the subject of the public procurement. The legal definition of a supplier provided by the Protocol means a national of a Contracting Party, who offers the execution of works or the supply of goods or services on a market but does not include State-owned entities.

Suppliers who submit **bids**(which can be also referred to as “tenders”) in a given procurement procedure (see below for the definition) are referred to as “**bidders**” (or “tenderers”)<sup>3</sup>. Also, the terms bidding documents and tender(ing) documents have the same meaning.

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<sup>3</sup>For the purposes of this Manual the terms “bidder” and “tenderer” as well as “bid” and “tender” have the same meaning.

Suppliers may apply for public procurement **individually** or as a group **by means of joint bidding**.

Suppliers may wish to submit bids together for a contract mainly in those cases where they are not able on their own to meet requirements of the procuring entity concerning financial and economic standing or professional or technical ability. Groups of bidders can be created also in those cases where their members would be able to meet the requirements of the procuring entity alone, but they decide to form a group, for example, to ensure better performance of the contract.

If a group of bidders decides to submit a tender jointly the procuring entity may request from the members of this group to assume a specific legal form. If the tender submitted by such a group is the most advantageous and the contract is awarded to the group, the procuring entity may, however, request from it to assume a specific legal form as a condition for signing the contract, provided that this is necessary for the satisfactory performance of the contract.

In case it is necessary, justified and proportionate, procuring entities can:

- clarify how to meet economic, technical and financial requirements,
- specify peculiar conditions for the performance of a contract,
- require a specific legal form before or after the contract award.

The Protocol also uses the term “CARICOM supplier” which means an individual who is a national of a Member State or a company or other legal entity that:(a) is constituted in a Member State that is participating in the CSME in conformity with the laws of that Member State, (b) is formed for gainful purpose and (c) has its registered office and central administration in a Member State that is participating in the CSME.

Public procurement regime also uses the term “registered supplier” which means a supplier who is registered in the **suppliers’ register**. According to the Protocol, the Community should establish and maintain a Community Register of Eligible Suppliers (“the Register”). The Register should be published on the **Community Public Procurement Notice Board** (see

below for more information) and be accessible to procuring entities, regional suppliers and any interested member of the general public.

The Community's Member States are responsible, through their respective national contact points, for submitting lists of eligible national suppliers for publication, as well as for the accuracy and currency of the information contained in such national lists.

The Community should:

- ensure the elaboration of a set of common rules and minimum standards for the use of Member States in their assessments of supplier eligibility,
- ensure the availability of adequate administrative capacity to satisfactorily establish and maintain the Register.

More details concerning the Register are provided in the Bill.

Accordingly, the Register provides for the name, contact information and other particulars concerning suppliers who:

- have satisfied the prescribed minimum requirements to be considered capable of performing procurement contracts for the provision of goods, services or works, and
- are registered, under the Bill, as suppliers of goods, services or works.

Registration in the Register of a given supplier is not construed as an indicator that the supplier is suitable to participate in any particular procurement procedure. It means that the supplier, although being registered under his name in the Register still needs to fulfil certain specific requirements set by the procuring entity in a given procurement procedure.

### **3. The thresholds**

The public procurement rules, as defined by the Protocol, apply to public procurement conducted by the procuring entities of the Contracting Party to the Protocol only if a given procurement opportunity (see above for the definition) has a value equal to or greater than

the relevant thresholds (later on - “the thresholds”). The thresholds are defined in Annex A to the Protocol.

Currently, there are following thresholds:

- 150,000.00 United States dollars or its equivalent in Member State currency for the supply of goods,
- 150,000.00 United States dollars or its equivalent in Member State currency for services,
- 3,000,000.00 United States dollars or its equivalent in Member State currency for works for More Developed Countries (MDCs) of CARICOM; and
- 4,000,000 United States dollars or its equivalent in Member State currency for works for the Less Developed Countries (LDCs) of CARICOM.

**The Council for Trade and Economic Development (COTED), on the advice of the Council for Finance and Planning (COFAP) may adjust thresholds from time to time.**

For the purpose of assessing whether a given procurement opportunity is subject to the public procurement regime, the procuring entities need to **evaluate the estimated value** of a future contract in accordance with the rules described below (see section 2 in Part II).

#### **4. Exclusions**

Certain contracts are not covered by the provisions of the procurement regime (in other words, they are exempted from it). The list of exemptions from the procurement regime is included both in the main body of the text of the Protocol as well as in Annex B to the Protocol.

Accordingly, the following are excluded:

- 1. Agreements between (the Government) of a Member State and an international organisation which limits participation in public procurement opportunities due to permissible conditions and limitations stated in the agreement;**
- 2. Agreements between (the Government) of a Member State and a third country (a country which is not of the Member of the Caribbean Community) intended for the joint implementation or exploitation of a project by the parties to the agreement and financed by the third country, which limits the participation in a public procurement opportunity because of specific permissible conditions and restrictions on nationality or other eligibility of suppliers.**

Agreements entered into by any Member State with an international financing institution which limit participation in procurement due to specific conditions and or limitations stated in the agreement. This provision is founded in the fact that governments must use the procurement procedures of the international financing institution, e.g. the World Bank, as a condition of access to funds from the institution by way of grant or loan.

Agreements entered into by any Member State and a third country intended for the joint implementation or exploitation of a project by the contracting parties, and financed by the third country when it limits participation in procurement because of specific conditions and limitations of nationality and/or eligibility of suppliers, etc. From time to time, Member States may wish to take advantage of opportunities offered to them through third countries which may require the exclusive or majority employment of the third country suppliers and/or goods. For example, a Member State may wish to accept an offer from a third country to improve the Member State's distribution network for delivery of goods through the construction of an all-island throughway, but with the precondition that the prime contractor originates from or be a national of the third country.

- 3. The hiring of government employees, whether by contracts of service or contracts for service, and related employment measures;**

Traditionally employment is not considered to be a public procurement issue. The recruitment and selection process in human resources management is different from a traditional Public Procurement process. Best practice therefore excludes this

aspect of government expenditure from the scope of coverage of public procurement.

**4. Public procurement of the types specified in Annex B to the Protocol:**

a) contracts for supply of goods and delivery of services concerning:

- works of art, cultural performances, products associated with creative expression for cultural performances,
- relating to the staging of productions in support of or associated with creative expression and cultural events, including:
  - artistic coordination, direction and management;
  - management of artistic works and events;
  - management of intellectual property rights;
  - venue rental;
  - infrastructure and technical effects;
  - design and technical direction of cultural performances

b) legal advisory and legal representation;

c) contracts concerning medallions and insignias for use in national honours and national awards;

d) contracts for goods, services or works of a sensitive nature for use in or for acquisition for the purpose of national defence or national security;

e) contracts relating to or connected with the operations of diplomatic missions or consulates;

f) fiscal agency or depository services;

g) contracts related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;

h) co-sponsorship arrangements, trade and travel shows and cooperative advertising;

i) contracts for research and development of a sensitive or confidential nature;

j) contracts relating to the management of employee pension funds;

k) postal, courier and express courier services;

l) utility services such as services for the supply of electricity, telecommunications and piped water

m) contracts for immovable property or rights in relation thereto;



- n) contracts in relation to privately funded charities.

## 5. General principles of public procurement

Award of public procurement should respect certain general principles underpinning the Community procurement regime. In accordance with the FRIP, Member States are obliged to give effect to the following principles in its public procurement practices, pursuant to the provisions of procurement policy:

- a) Free entry and participation in the public procurement markets for goods, services and works;
- b) National Treatment and Most Favoured Nation Treatment;
- c) Transparency; and
- d) Procedural Fairness.

**Free entry and participation** in public procurement markets for goods, services and works mean that all technically and financially qualified suppliers who are interested in participating in a procurement opportunity should not be prevented from doing so due to discriminatory restrictions and/or other artificial barriers to entry. Use of such barriers works against the achievement of the stated objectives of the proposed regional public procurement regime as well as the CSME, and run the risk of constraining economic growth and development in the long term.

In accordance with the principle of non-discrimination, that is, national treatment and most favoured nation treatment, Member States are obliged to:

- a) ensure that its procurement laws, regulations, policies, administrative rules, guidelines, procedures and practices are not prepared, adopted or applied so as to afford, or have the effect of affording protection, or favour to, or bias against, the goods, services, works or suppliers of any other Member State;

- b) grant the goods, services, works and suppliers of any other Member State treatment that is no less favourable than that accorded by it to domestic goods, services, works and suppliers;
- c) grant the goods, services, works and suppliers of any other Member State treatment that is no less favourable than that accorded by it to third country goods, services, works and suppliers; and
- d) ensure that its procuring entities do not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of affiliation to, or ownership by, a person or persons of any other Member State.

Discriminatory practices in public procurement are forbidden because their application undermines the competitive process and thus the ability of Member States to achieve the best possible value for money outcomes. Discrimination among Member State suppliers can, in the short run, help countries achieve industrial policy objectives, however, in the long term, such actions when consistently applied, prevent governments from obtaining the best possible goods and services at the lowest possible prices, resulting in considerable monetary losses, and perhaps more importantly, robbing the protected supplier(s)/industries of the motivation to improve business systems and processes or to develop new products.

In accordance with **the principle of transparency** Member States should ensure that sufficient and relevant information is consistently available to all interested parties in any other Member State and in a timely manner through readily accessible and widely available media at reasonable or no cost. This principle should be applicable to all aspects of public procurement, including the operating environment, procurement opportunities, purchase requirements, tender evaluation criteria and award of contracts. Mechanisms and methodologies on how this principle is applied in practice will be discussed in further detail in respective sections dealing with various aspects of public procurement procedures.

In accordance with the principle of **procedural fairness** Member States should implement the necessary mechanisms to ensure the fair treatment of suppliers, including due process consideration. Fair treatment is particularly important in Public Procurement because it involves the expenditure of public funds and is therefore subject to public scrutiny. From a

regional perspective, fair treatment promotes confidence in the public procurement regime and mutual trust and respect among participants. This, in turn, should encourage participation and contribute to achieving **best value for money** outcomes. Procedural Fairness also encompasses due process considerations which are crucial to the sustained effectiveness of the regional regime. Suppliers must be confident that mechanisms permitting the timely scrutiny of procurement processes, possibilities to challenge to procurement decisions, as well as objective and independent review are readily available and accessible at reasonable or no cost.

**Protocol lists basically the same principles as mentioned above:**

- a) national treatment and most favoured nation treatment;
- b) transparency;
- c) accountability;
- d) best value for money; and
- e) procedural fairness.

The Bill requires that procuring entities of the Contracting Party treat suppliers who are nationals of another Contracting Party equally and no less favourably than the procuring entity treats suppliers who are nationals of or registered in that Contracting Party or the Contracting Party of the procuring entity and without discrimination – principle of equal treatment and non - discrimination.

Every procuring entity should treat the goods, services and works supplied by suppliers who are nationals of another Contracting Party no less favourably than the procuring entity treats: a) the domestic goods, services and works or b) the goods, services and works supplied by suppliers who are nationals of or whose office is registered in a third State – principle of National Treatment and Most Favoured Nation Treatment.

Procuring entities should act in a **transparent** and **proportionate** manner when dealing with suppliers who are nationals of another Member State. This requirement refers to two different principles of public procurement: **transparency and proportionality**.

**Principle of transparency is understood in the Bill in the same ways as in the Protocol.**

It is also given more content in the Bill through the provisions concerning:

- Publication of notices: 1. annual procurement plan, 2. procurement notice and 3. contract award notice (see section 1 in Part I and section 1 in Part IV for further details)
- Informing in due time all the participants of the procedure about decisions taken in the course of public procurement procedures (see section 6 in Part IV for further details).

One of the instruments enabling implementation of the principle of transparency is the **Community Public Procurement Notice Board (CPPNB)**. In accordance with Article 31 of the Protocol, the Community (Contracting Parties) should establish and maintain an electronic Community Public Procurement Notice Board, which should be accessible to all interested stakeholders in the Community.

**CPPNB is defined as the electronic notice board used to advertise pertinent information about public procurement.**

Accordingly, the Contracting Parties should use the Community Public Procurement Notice Board to fulfil obligations including:

- a) Supplier exchange of information to facilitate joint bidding activities;
- b) Publication of the following:
  - (i) Annual procurement plan,
  - (ii) Procurement opportunities,
  - (iii) Contract award notices,
  - (iv) Designated National and Community contact points,
  - (v) Community Suppliers Register, and
  - (vi) Community Standard Bidding Documents; and
- c) The electronic database of regional public procurement statistics.

**There are three groups of users of CPPNB:**

1. **Procuring entities** which use it to:
  - i. Create and publish public procurement opportunities;
  - ii. Publish annual procurement plans;
  - iii. Create and publish contract award notices;
  - iv. Register new users and procuring entities;
  - v. Access the Community Register of Regional Suppliers;
  - vi. Access the Community Standard Bidding Documents; and
  - vii. Access and contribute to the electronic database for Regional Public Procurement statistics.
  
2. **Registered suppliers** which use it:
  - i. To access advertisements about procurement opportunities;
  - ii. Where eligible, to participate in procurement proceedings;
  - iii. To access the CARICOM Regional Suppliers Register; and
  - iv. Submit information to the procuring entities to complete the registration process.
  
3. **Unregistered suppliers and the general public** which use it:
  - i. In order to have limited access to advertisements about procurement opportunities; and
  - ii. To have limited access and view advertisement on contract aware notices.

### **Record of the public procurement proceedings**

Another element of the transparency and accountability of the procurement proceedings is the requirement concerning recording the conduct of a given procurement procedure.

In accordance with the Protocol, procuring entities of the Contracting Parties should create and maintain records of their procurement proceedings.

Unless there are more demanding national rules on retention and/or storage, procuring entities of the Contracting Parties should ensure that procurement records, at a minimum, contain the following information and are retained for a minimum period of **five (5) years**.

A record of procurement proceedings should provide for:

- a brief description of the subject matter of the procurement – the works, goods or services to be procured;
- the names and addresses of the bidders;
- the procurement method employed (see below for the definition);
- the name and address of the supplier who submitted the successful bid;
- the date on which the procuring entity accepted the successful bid;
- the contract price;
- the actual completion cost;
- the duration of the contract;
- information regarding the qualifications of bidders;
- a summary of the evaluation and comparison of bids;
- the reasons for the rejection of any or all of the bids;
- a summary of any requests for clarification or verification of the bidding documents and any modifications thereof;
- information regarding the performance of the successful bidder on the contract; and
- information regarding complaints, resolution decisions and appeals.

In addition to the information set out above, where a procuring entity cancels (see Section 5 in Part IV) a procurement opportunity, the record of procurement proceedings should indicate the cancellation and the procuring entity's reasons for its decision to cancel the procurement opportunity.

If a procuring entity does not impose a standstill period (see below) in relation to the entry into force of a particular procurement contract, the record should set out the procuring entity's reasons for its decision not to impose a standstill period.

If a challenge or appeal is lodged pursuant to the provisions of Part VI of the Bill, the record should contain:

- (i) A copy of the application for reconsideration or review and the appeal, where applicable;
- (ii) A copy of all the decisions taken in relation to the challenge or appeal; and
- (iii) A statement of the reasons for the decisions to which subparagraph (ii) refers.

**The principle of proportionality requires** that any measure chosen is both necessary and appropriate in the light of the objectives sought. In the context of public procurement, it means that any measures applied by procuring entities should be appropriate for attaining the objective pursued by them and must not go beyond what is necessary to achieve the objective.

Examples:

- Requirements to be fulfilled by suppliers applying for a contract should be defined proportionally to the estimated value and complexity of the procurement (see section 4.5 on qualification of suppliers in Part IV); the procuring entity should not determine technical, professional or financial conditions that are excessive and disproportionate to the subject of the contract.
- Time periods for submission of tenders should be sufficiently long (see section 3 on time periods in Part IV) in order to enable submission of responsive tenders.

Procuring entities are not allowed to design a procurement opportunity with the intention of excluding the procurement from the scope of the procurement regime or to **artificially narrow or limit competition**.

Competition is considered to be **artificially narrowed** where the design of the procurement is made with intent to unduly favour or disadvantage certain suppliers.

In accordance with this principle procuring entities are obliged to follow rules concerning:

- Estimation of the value of procurement opportunity (i.e. the value of the future contract) – see section 2 in Part II for details)
- Description of the subject of the procurement in transparent and non – discriminatory manner (see below in section 3 in Part II for details)

All technically, financially and legally qualified suppliers who are nationals of a Contracting Party to the Protocol and are interested in participating in a procurement should not be prevented from participating due to discriminatory restrictions or barriers to entry. The meaning of this principle is elaborated in detailed rules concerning qualification of suppliers (see section for 4.5 in Part IV for details).

### **The principle of “value for money”**

The **best value for money** is defined as the most advantageous combination of cost, quality and sustainability to meet the requirements of the procuring entity. In the context of value for money:

- **cost** means consideration of the whole life – cycle cost (see below for the section dealing with the contract award criteria);
- **quality** means meeting a specification which is fit for purpose and sufficient to meet the contracting entity’s requirements;
- **sustainability** means economic, social and environmental benefits.

## **6. Conflict of interest in public procurement**

### **General requirements**

In accordance with the FRIP, Member States should ensure that their procurement personnel discharge their duties impartially so as to assure fair competitive access to procurement opportunities in the regional marketplace by responsible and qualified suppliers, and should conduct themselves in such a manner as to foster public confidence in the integrity of the Community Regime on Public Procurement.

Member States are obliged to ensure that their procurement personnel observe the minimum standard of ethical conduct such as:



- a) It is a breach of ethics to attempt to realize personal gain through public office by any conduct inconsistent with the proper discharge of duties;
- b) It is a breach of ethics to attempt to influence any public employee involved in public procurement activities of the Community to breach the standards of ethical conduct;
- c) It is a breach of ethics for any public officer involved in public procurement activities to participate directly or indirectly in a procurement process when the officer knows that:
  - (i) The officer or any member of the officer's immediate family has a financial interest pertaining to the procurement,
  - (ii) A business or organization in which the officer, or any member of the officer's immediate family, has a financial interest pertaining to the procurement,
  - (iii) Any other person, business or organization with whom the officer or any member of the officer's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement;
- d) It is a breach of ethics for a supplier to offer, give or agree to give any public officer or former public officer, or for any public officer or former public officer to solicit, demand, accept or agree to accept from a supplier, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a procurement, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any preceding or application, request for ruling, determination, claim or controversy, or other particular matter pertaining to any public procurement contract, subcontract, activity; and
- e) It is a breach of ethics for any public officer or former public officer knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated gain of any person.

### **Obligations of the Contracting Parties**

According to the Protocol, Contracting Parties should ensure that their procurement personnel:

- (a) Discharge their duties impartially so as to ensure that responsible and qualified suppliers have fair and competitive access to procurement opportunities in the regional marketplace; and
- (b) Conduct themselves in such a manner as to foster public confidence in the integrity of the Community Public Procurement regime.

Contracting Parties should ensure that their procurement personnel comply with the following standards of ethical conduct:

- (a) Abstain from attempting to realize personal gain from public office by conduct inconsistent with the proper discharge of duties;
- (b) Avoid direct or indirect involvement in public procurement activities where:
  - (i) The officer or any member of his immediate family has a financial interest pertaining to the procurement;
  - (ii) A business or organization in which the officer or any member of his immediate family has a financial interest pertaining to the procurement; or
  - (iii) Any other person, business or organisation with whom the officer or any member of his immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement;
- (c) Abstain from soliciting or accepting from a supplier a gratuity or offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a procurement, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy or other particular matter pertaining to any public procurement contract, sub-contract or activity;
- (d) Abstain from using confidential information for actual or anticipated personal gain or for actual or anticipated gain of any person.

Finally, according to the Bill, procuring entities should take all measures necessary to effectively prevent, identify and remedy conflicts of interest arising in the conduct of

public procurement activities so as to avoid any distortion of competition and to ensure equal treatment of all suppliers.

**Conflict of interests**, although not defined in the Protocol or the Model Bill, should be understood as any situation where staff members of a procuring entity who are involved in the conduct of procurement procedures or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

A member, an employee, an officer or a person with direct influence on the decisions of a procuring entity should:

- (a) Declare any interest that he may have in a bid submitted by a supplier; and
- (b) So far as possible, recuse himself from the procurement proceedings.

For example, persons can be excluded from participating in the evaluation panel (tender committee) of the procuring entity if:

1. They have a conflict of interest, which means that, for example, they have:
  - a significant stake in one of the economic operators that are tendering;
  - previously worked for one of the economic operators;
  - a friend or relative who works for one of the economic operators;
  - a stated preference for one of the economic operators;
2. They are not experienced enough to participate in the evaluation. However, the advantage of the independent evaluator might be his/her lack of experience.

## **7. Offsets**

**As it was mentioned in section 5 of Part I of the Manual, the public procurement regime is based on principles of free entry and participation** in public procurement markets for goods, services and works. This means that all technically and financially qualified suppliers who are interested in participating in a procurement opportunity should not be prevented from doing so due to discriminatory restrictions and/or other artificial barriers to entry.

In accordance with the principles of non-discrimination, that is, national treatment and most favoured nation treatment, Contracting Parties are obliged to:

- a) Ensure that procurement laws, regulations, policies, administrative rules, guidelines, procedures and practices are not prepared, adopted or applied so as to afford, and do not have the effect of affording, protection, or favour to, or bias against, the goods, services, works or suppliers of any other Contracting Party;
- b) Grant the goods, services, works and suppliers of any other Contracting Party treatment that is no less favourable than that accorded by it to domestic goods, services, works and suppliers;
- c) Grant the goods, services, works and suppliers of any other Contracting Party treatment that is no less favourable than that accorded by it to third country goods, services, works and suppliers; and
- d) Ensure that its procuring entities do not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of affiliation to, or ownership by, a person or persons of any other Contracting Party.

One exemption from above mentioned principles is an **offset**. "Offset" usually means an agent, element, or thing that balances, counteracts, or compensates for something else.

**An offset agreement** is an agreement between two parties whereby a supplier agrees to buy products from the party to whom it is selling, in order to win the buyer as a customer and offset the buyer's outlay. Generally, the seller is a foreign company and the buyer is a government that stipulates that the seller must then agree to buy products from companies within their country. Often, the aim of this process is to even-up a country's balance of trade. This is frequently an integral part of international defence contracts.

## **8. Definition of offsets**

In the context of Community public procurement regime "offsets" mean, according to the Protocol:

means any conditions or undertakings that encourage local development or improve a Contracting Party's balance of payments account, such as the application of margins of preference for the use of domestic content or domestic suppliers, requirements for the licensing or the transfer of technology, domestic investment requirements, counter trade and similar actions.

**In accordance with general principles, offsets are prohibited in the Community public procurement regime.**

Accordingly, Contracting Parties shall ensure that its procuring entities do not seek to impose offsets against suppliers in relation to the:

- qualification and selection of suppliers;
- evaluation of bids; or
- award of contracts.

### **Permissible offsets**

Procuring entities may apply, offsets to contracts with suppliers who are not nationals of a Contracting Party through the use of a **margin of preference** at the point of selection of a qualified bidder.

In practical terms, it means that when a **margin of preference** is applied to the price of a tender submitted by a bidder who is not a national of any of the Contracting Parties, a percentage of the price proposed by that bidder may be added for the purpose of comparison and selection of tenders (for example 10 % of the price proposed in the tender). Thus, when the margin of preference is used, tenders submitted by domestic bidders as well as bidders coming from other Contracting Parties to the Protocol may be in such a case up to 10 % more expensive than the tenders submitted by a company from third countries, and still, all other things being equal, can be chosen as the most advantageous.

## **9. Language of the procedure/documents**

Procuring entities shall ensure that the bidding (tendering documents – see below for more information) documents are formulated in the Contracting Party's official language or languages and in any language customarily used in international trade. It means also that tenders (applications) and other communication submitted by suppliers should be prepared in a language or language chosen by the procuring entity.

## **10. Confidentiality**

One of the basic principles of the public procurement regime is the principle of transparency which pertains to disclosing information about procurement processes. In accordance with the principle of transparency, procuring entities are obliged to publish or provide information regarding submitted applications (or tenders) and decisions taken about them (information about bid acceptance and contract award). At the same time, there is also need to protect some types of information in order to protect legitimate interests of the procuring entity and bidders.

According to the Protocol, unless ordered to do so by a court of competent jurisdiction, and subject to the conditions of such an order, procuring entities do not disclose information:

- (a) That prejudices legitimate commercial interests of bidders or inhibits fair competition; or
- (b) That relates to the examination, evaluation and comparison of bids, other than the summary referred to in Article 20 (2) (i).

More detailed provisions concerning protection of information and confidentiality are provided in the Bill.

**Provisions concerning protection of information for certain restrictions concerning disclosing of information.**

**What is prohibited?**

Any person who has an official duty (under the Bill) or is employed in or in connection with the administration may not disclose any information obtained during the performance of his duties under the Bill if:

- (a) Non-disclosure of such information is necessary for the protection of essential security interests of the Contracting Party; or
- (b) Disclosure of the information is –
  - (i) Is likely to prejudice the legitimate commercial interests of suppliers; or
  - (ii) Is likely to impede fair competition.

**But Disclosure of this information may be allowed, if it is ordered by the court or another state organ subject to the conditions of such an order.**

Once the official duty or employment of a person mentioned above is terminated, the person shall not, after such termination, disclose any information obtained during the performance of his duties under the Bill.

Procuring entity should not disclose information forwarded to it by a supplier which the supplier has designated as **confidential**, including technical or trade secrets and the confidential aspects of bids.

In the case procurement involves **classified information** the procuring entity should specify the measures and requirements needed to ensure the protection of the information.

Procuring entities shall treat applications for registration in the suppliers' register and submissions in relation to procurement opportunities in such a manner as to avoid the disclosure of their contents to competing suppliers or to any other person not authorised to have access that type of information.

**What is allowed?**

Procuring entities may publish or provide information regarding applications for registration and notices of acceptance of successful bid (see section 5 of Part IV) and notice of contract award (see section 6 of Part IV).

Procuring entities may:

- (a) Impose on suppliers' requirements aimed at protecting the confidential nature of information which the procuring entities make available throughout the procurement procedure; and
- (b) Demand that suppliers ensure that their subcontractors comply with the requirements aimed at protecting confidential information.

**Concluding, procuring entities have the following obligations related to protection of information in public procurement procedures.**

The procuring entity:

- Should not disclose information which the supplier has designated as confidential, including technical or trade secrets and the confidential aspects of bids;
- Should treat applications for registration in the suppliers' register and submissions in relation to procurement opportunities avoiding the disclosure of their contents to competing suppliers or to any other person not authorised to have access that type of information;
- Should impose on suppliers' requirements aimed at protecting the confidential nature of information which the procuring entities make available throughout the procurement procedure; and
- Should demand that suppliers ensure that their subcontractors comply with the requirements aimed at protecting confidential information.

## **11. Communication**

**Communication in public procurement means exchange of information between the procuring entity and the suppliers participating in public procurement or intending (considering) such participation.**



A procuring entity may use only those means of communication that are in common use by suppliers in the context of the particular procurement.

A procuring entity should put in place appropriate measures to secure the authenticity, integrity and confidentiality of every document, notification, decision or other information generated in the course of procurement proceedings.

Any document, notification, decision or other information which is produced in the course of a procurement and communicated should be in a form that provides a record of the content of the information that is for subsequent reference.

However, communication of information between suppliers and the procuring entity may be conducted by means that do not provide a record of the content of the information, but only on the condition that immediately thereafter confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is subsequently accessible.

Where a procuring entity first issues to suppliers an invitation to participate in a procurement procedure, it should inform them about:

- any requirement concerning the form of communication;
- the means to be used to communicate information by or on behalf of the procuring entity to a supplier or to any other person and by a supplier to the covered entity;
- the means to be used to satisfy all requirements for information to be in writing or for a signature; and
- the means to be used to hold any meeting of suppliers.
- any requirement as to form;
- the means to be used to communicate information –
  - by or on behalf of the procuring entity to a supplier or to any other person;
  - by a supplier to the procuring entity;
- the means to be used to satisfy all requirements under this Act for information to be in writing or for a signature; and
- the means to be used to hold any meeting of suppliers.

In the case the procurement involves **classified information**, in addition to the requirements or means referred to above, the procuring entity should specify the measures and requirements needed to ensure the protection of the information.

One form of communication between a procuring entity and suppliers is their **face-to-face meetings**. If the procuring entity conducts a meeting with suppliers, it must ensure that the only means of communication used are means that allow suppliers to fully and contemporaneously participate in the meeting.

Concluding,

procuring entities are obliged to:

- secure the authenticity, integrity and confidentiality of every document, notification, decision or other information,
- ensure that any document, notification, decision or other information generated is in a form that provides a record of the content of the information, accessible and useable for subsequent reference.

In case of classified information, specify the measures and requirements needed to ensure the protection of the information.

In case of meeting with suppliers, ensure that the only means of communication used are means that allow suppliers to fully and contemporaneously participate in the meeting.

### Self - testing questions

- 1) Give a definition of public procurement
- 2) What are the principles of public procurement regime?
- 3) What does the principle of equal treatment mean?
- 4) What is a “procuring entity”?
- 5) What is the definition of a supplier?
- 6) Is joint bidding allowed in the Community public procurement regime?
- 7) Which contracts are excluded from the Community public procurement regime?
- 8) Which are the applicable thresholds for contracts for goods, services and works?
- 9) Give some examples of application of the principle of transparency.
- 10) What is the Community Public Procurement Notice Board?
- 11) What does the principle of proportionality mean?
- 12) Why is confidentiality important?
- 13) Give some examples of information which should be included in the record from the public procurement proceedings.
- 14) What is the language of bidding documents?

## **PART II - PREPARATION OF THE PROCUREMENT PROCEDURE**

### **1. Annual Procurement Plan**

One of the elements of the transparency of public procurement processes is publication, in advance, of general information about procurement planned by the procuring entity in a given period (fiscal year). The purpose of this publication is to enable potential suppliers to prepare for the procedures which will be conducted in the (near) future.

In accordance with the Protocol, **procuring entities** of the Contracting Parties should publish, as early as possible (and as far as reasonably possible), in every fiscal year, an Annual Procurement Plan.

The Annual Procurement Plan should contain information concerning the procurement plans of procuring entities **for the relevant year**, including:

- the subject matter of intended public procurements together with volumes and values,
- the proposed dates or range dates for the publication of related invitations to bid, where such information is available.

Annual Procurement Plans **are not binding** for the procuring entities. Nevertheless, procuring entities should strive to conduct their procurement activities in accordance with published plans.

More detailed rules concerning this type of publication are provided in the Bill.

Procuring entities that plan (intend to) in a given fiscal year, to conduct procurement activities in relation to procurement contracts covered by the Protocol are obliged to publish their Annual Procurement Plans on the Community Public Procurement Notice Board as early as possible in every fiscal year.

**What are the specific requirements concerning an annual procurement plan?**

It should:

- set out the procuring entity's procurement plans for the year including the types of goods, services or works that the procuring entity may require;
- it should be valid for a period of not more than 12 months from the date on which it was published on the Notice Board;
- It should include the subject matter of the intended public procurements together with the volumes and values and proposed dates or range of dates for the publication of related invitations to bid, where such information is available;
- Procuring entities shall make every effort to conduct public procurements in accordance with its annual procurement plan.

An annual procurement plan is not binding on the procuring entity that publishes it and may be changed subsequent to publication of the plan on the Notice Board. Since it is not binding, the procuring entity is not obliged to award (all) contracts covered by the plan. Suppliers cannot be forced to conduct the procurement covered by the plan. Where a procuring entity does not conduct a procurement activity in accordance with the annual procurement plan, supplier challenge and review and dispute resolution procedures (see Section (Clause) 17 (4) of the Model Bill) do not apply. In other words, suppliers cannot complain that the procuring entity has not decided to award a contract covered by the annual procurement plan.

However, procuring entities should make every effort to conduct procurement activities in accordance with the annual procurement plan.

Concluding,

the annual plan:

- is published on the Notice Board,
- covers public procurement planned in a given fiscal year,
- is valid for 12 months,
- includes procurement covered by the Protocol (goods, services and public works),
- it is not binding,
- can be changed after publication on the CPPNB

## **2. Estimation of the value of the procurement**

### **2.1 Introduction – general principles**

As mentioned above, the public procurement regime covers contracts covered under Article 5 of the Scope of Application of the Protocol, which include, inter alia:

- (i) goods, services and works at and above the thresholds set out in Annex A
- (ii) list of goods, services and works excluded from Annex B

In accordance with one of the basic principles, procuring entities are prohibited from artificially narrowing competition in contravention of the provisions of the Model Bill.

Illegal narrowing of competition would be, for example, a case of dividing the object of public procurement into lots in such a way that the estimated values of separate lots do not exceed certain threshold and in the consequence, the procuring entity does not have to apply provisions requiring publication of a contract notice and conducting a competitive, transparent procedure.

A public procurement may not be subdivided with the effect of preventing it from falling within the scope of the procurement rules, unless the subdivision is justified by objective reasons.

The selection of the estimation method (see below) used by the procuring entity shall not be used with the intention of avoiding the application of public procurement rules.

Estimation of the value of procurement opportunity (i.e. goods, services or works to be provided) should take into account all forms of remuneration, including any premiums, fees, commissions and interest receivable. It should also include any form of renewals as explicitly set out in the procurement documents.

Where, in relation to a public procurement, a procuring entity is unable to specify a fixed contract price, an estimated contract value must be used.

The calculation of the estimated value of a public procurement opportunity should be based on the total amount payable, net of VAT, as estimated by the procuring entity.

**If the object of procurement are works requiring specific goods or services, a procuring entity should include in the estimated value of procurement:**

- (a) **The cost of the works; and**
- (b) **The total estimated value of any goods or services that are made available to the supplier by the covered entity.**

**A procuring entity should not:**

- (a) divide a public procurement opportunity; or
- (b) use a particular valuation method for estimating the value of a contract,

so as to limit competition among suppliers or to otherwise avoid its obligations under the procurement regime.

The estimated value shall be valid at the moment at which the covered entity sends the invitation to bid.

In the event the proposed procurement opportunity may result in contracts being awarded in the form of **separate lots**, the procuring entity should take account of the total estimated value of all lots. If their aggregate value is equal or exceeds the value of the relevant threshold (see below for more information about threshold) the procuring entity should apply respective public procurement rules **to each and every lot**, even if its value, in separation, does not reach that threshold.

## **2.2 Methods of estimation of the value of procurement opportunity**

What are the methods which can be used in order to estimate the value of procurement?

### **1) Procurement awarded in multiple parts**

If the procuring entity intends to conduct a procurement in multiple parts with more contracts to be awarded at the same time or over a given period to one or more suppliers, it should use as the basis for valuation:

- (a) where no similar recurring contracts were concluded during the previous 12 months, the estimated total value of similar contracts to be concluded during the 12 months subsequent to the initial contract;
- (b) the actual value of similar recurring contracts concluded over the previous 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent 12 months; or
- (c) the estimated value of recurring contracts in the 12 months subsequent to the initial contract.

**II) Procurement awarded in one single lot, total price unknown and contract for a fixed term of 12 months**

If a procuring entity intends to conduct a public procurement in a single lot, the total price of the public procurement is unknown, and the contract is a fixed-term for a term not exceeding 12 months' duration, then the basis for calculating the estimated contract value is the total estimated contract value for the duration of the contract.

**III) The contract awarded in single lot, total price unknown and contract for an undetermined duration**

If a procuring entity intends to conduct a public procurement in a single lot, the total price of the public procurement is unknown, and the contract is for an undetermined duration, then the basis for calculating the estimated contract value is the estimated monthly instalment multiplied by 36.

**Summary of the rules on estimation of the value**

1. the calculation of the estimated value should be based on the total amount payable, net of VAT, including any renewal;
2. procuring entities may not divide procurement opportunities or use a particular valuation method to limit competition;
3. the estimated value should be valid at the moment of the invitation to bid is sent;
4. in case procurement is divided into lots, the total estimate value should take into account all lots.



### 3. Description of the subject matter of public procurement

#### 3.1 General rules

**Description of the procurement matter** is a definition of what the procuring entity wishes to buy.

In order to obtain required products, services or works the procuring entity should define precisely its expectations concerning services, goods or works to be procured – e.g. their scope, size, quality, conditions of execution etc.

Rules on public procurement, in general, **do not restrict decisions of procuring entities on what to buy**. The role of those rules is, however, to ensure that when a decision is made with regard to public procurement, the procurement process is not conducted in a way which distorts the market.

#### **Why correct description of the subject matter of procurement is that important?**

Correct description enables:

- submission of tenders on level playing field and in conditions of **genuine competition**,
- submission of tenders which reflect the needs of the procuring entity and are **within the budget available**.

The correct description of the object of public procurement should include:

- (a) the minimum requirements to be met by a tender submitted in response to an invitation to tender in order it to be considered responsive;
- (b) the nature, quantity and place of delivery of the goods to be supplied;
- (c) the nature of and the location where the services are to be provided; and
- (d) the nature of and location where the works are to be effected.

It may also include: specifications, plans, drawings, designs, tests and test methods, packaging requirements, marking, labelling or conformity certification, symbols and terminology.

Description of the subject of public procurement should not have the effect of restricting the participation of suppliers. It should be:

- objective,
- functional and
- generic.

It should also set out the relevant technical, quality and performance characteristics of the subject matter.

### **What is forbidden when describing the object of public procurement?**

The description may not include:

- any requirement for or reference to a particular: trademark; trade name; patent; design; type;
- specific origin or producer

This reference, though, is only possible, when there is no sufficiently precise or intelligible way of describing the subject matter of the procurement and the procuring entity ensures that where requirements or references are used the words “*equivalent to*” precede such words.

### **3.2 Technical specifications**

Technical specifications are understood as the totality of the technical prescriptions defining the characteristics required from a work, material, product or supply that fulfils the use for which it is intended by the procuring entity. Technical specifications are an essential part of procurement regime – the whole purpose of procurement rules could be defeated if it were possible to define technical specifications in discriminatory manner.

The purpose of technical specifications is to:

- provide clear, unambiguous and standard descriptions of what is to be purchased,
- to enable evaluation of offers against pre - defined criteria,
- to promote wider competition.
- 

**Technical specifications** applied in public procurement should be:

- precise,

- clear and
- unambiguous.

They must be formulated in such a way, that all potential bidders would be able to understand and interpret them in exactly the same manner.

There are different types of technical specifications:

- manufacture, build and test specifications,
- construction specifications,
- installation specifications,
- maintenance and repair specifications,
- disposal specifications,
- user specifications.

Major elements of technical specifications include:

- description of what is required – clear description of the works, product or service,
- statement of output required, in terms of amount, quantity and time,
- the quality and performance expected, when and how it will be measured,
- delivery requirements – what is to be delivered, when required and how it is to be delivered
- any ancillary services (e.g. training, maintenance),
- applicable standards – need for testing, certification inspection.

### **How to write good technical specifications?**

Procuring entities, in order to have good technical specifications, should:

- use simple language (if, possible) and not jargon,
- define terms (acronyms),
- do not be vague but not too exact,
- do not over specify,
- do not use trade or brand names,
- do not use unnecessary standards,

- do not provide unnecessary information,
- make the technical specifications readable by non-specialists.

**Technical specifications:**

- (a) are included in the tendering (bidding) documents;
- (b) are, where possible, worded in terms of performance and functional requirements;
- (c) are based on
  - (i) regional standards; or
  - (ii) national standards or internationally recognised standards and codes, if regional standards do not exist.

In accordance with principle of non – discrimination and fairness, requirements for compliance with technical specifications are not intended to and do not have the effect of unfairly limiting competition or directing the award of the contract toward a particular supplier.

#### **4. Bidding documents**

Bidding documents is a set of documents prepared by the procuring entity with regard to a given procurement purpose which is to provide to suppliers all the information necessary to allow them to submit responsive bids.

According to the Protocol “bidding documents” means documentation containing information in respect of a procurement opportunity. It includes the invitation to bid, specific information concerning the item(s) to be procured including any technical or other specifications, conditions for supplier participation, the manner, date and time for the submission of tenders, the form and format of the tender (bid), evaluation criteria, the form of contract, the implementation period and any other relevant information.

#### **What should be the content of bidding documents?**

The bidding documents provided to suppliers should contain, as a minimum, the following information:

- (a) name and address of the procuring entity, including the date, time and place for the submission and opening of the tenders, as well as the requests for additional information;
- (b) the procurement method employed;
- (c) the language in which tenders and bidding documents should be submitted;
- (d) the bid validity period;
- (e) the purpose of the intended procurement, including the nature and quantity of the goods or services to be procured or the works to be executed and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings or any required instructions;
- (f) the procuring entity's specific requirements as conditions for a supplier's participation in the procurement, including:
  - (i) bonds or other securities, and
  - (ii) proof of fitness and propriety, legal and financial eligibility, and technical and economic or financial competence, where appropriate;
- (g) all criteria to be considered in the evaluation of bids and the awarding of the contract, including any factors, other than price, that are to be considered in the evaluation of bids, and if applicable, a clear explanation of the formula for weighing the factors used to select bids, as well as the currency for submitting bids and payment;
- (h) the terms of payment and related terms or conditions;
- (i) date set to begin and conclude delivery of the goods or works or provision of the services;
- (j) the place where laws governing the procurement and challenge procedures may be obtained;
- (k) the model contract to be signed by the supplier, if available;
- (l) any specifications and execution standards relevant to the tender; and
- (m) the applicability, as appropriate, of a standstill period (see below for explanation what this term means).

**Standard bidding documents (SBDs)** are standard forms of documents published on the Community Public Procurement Notice Board for use in public procurement proceedings.

Rationale for introduction of SBDs in the Community Public Procurement Regime is that they are an important part of the procurement process. Such documents ensure that there is commonality and predictability with regard to the general requirements in a tender process. In the circumstance of the CARICOM Region with predominantly small Member States and small suppliers, the use of SBDs assumes greater significance in providing suppliers with a level of familiarity with the obligations that would generally be expected of them, irrespective of the nature or location of the procurement opportunity, and would also prevent the unnecessary use of scarce resource to meet different terms and conditions with each procurement opportunity or within different Member States. SBDs furnish all information necessary for a prospective supplier to prepare a tender for the supply of goods, services or works. While the detail and complexity of these documents may vary with the size and nature of the proposed bid package and contract, they generally include: invitation to bid; instructions to bidders; form of bid; form of contract; conditions of contract, both general and special; specifications and drawings; relevant technical data; delivery time or schedule of completion; and any necessary appendices, such as formats for tender securities. The basis for tender evaluation and selection of the lowest evaluated tender should also be clearly outlined in the instructions to bidders and/or the specifications.

SBDs include:

- (i) the standard form and content of an invitation to bid;
- (ii) instructions to bidders;
- (iii) the standard form of bid;
- (iv) the form and conditions of a procurement contract; and
- (v) any necessary appendices, such as formats for bid securities.

SBDs are to be used by the procuring entities – on the basis that procuring entities prepare bidding documents to be applied in a given procurement procedure. SBDs are accessible from the CPPNB. SBDs can be modified or amended by the Permanent Council on request of a Contracting Party.

### Self - testing questions

- 1) What is the Annual Procurement Plan?
- 2) Why the proper estimation of the procurement value is so important?
- 3) In the case of procurement divided into lots the value of the procurement is the value of the respective lot. Is this statement true or falls?
- 4) Does the estimated value of procurement opportunity include VAT or not?
- 5) How would you define technical specifications?
- 6) Is it allowed to describe the object of procurement by referring to brand names of the goods?
- 7) What are the bidding documents?
- 8) What is the purpose of standard bidding documents? Where to find them?

## PART III - PROCUREMENT METHODS

### 1. Introduction

Procuring entities should award contracts covered by the Community public procurement regime using only methods and procedures which are made available by the relevant provisions.

**“Procurement method”** according to the Protocol means *“the method to be used to engage in public procurement”*.

**“Procurement procedure”** means the series of steps to be taken by a procuring entity when executing a procurement method as a means of engaging in public procurement.

**“Procurement proceedings”** are defined in turn as *“the initiation and conduct of the process of effecting a procurement up to the award of a procurement contract”*.

The Protocol provides for one, default **method** of public procurement: “open bidding”.

“Open bidding method” is a **procedure** where in response to the contract notice - invitation to tender (see section 1 in Part IV on contract notice) published by the procuring entity suppliers submit tenders, before the expiry of time period set by the procuring entity.

Details concerning this method are provided in **standard operating procedures**.

Conduct of the procedure when this method is used is presented in further detail in Part IV below.

The Protocol mentions also two other procurement “methods” (See Interpretation Section of the Protocol and Model Bill):

- restricted bidding and
- single source procedure.

**“Restricted bidding”** is defined as “a procurement method whereby only suppliers who are invited by the procuring entity may submit a bid”. **“Single-source procedure”** in turn, means a procurement method whereby the procuring entity invites only one supplier to submit a bid or a quotation. In both methods the procuring entity refers directly to a



concrete supplier (single source procedure) or suppliers (restricted bidding). The difference is only between number of bidders invited: one in single source and two and more in the restricted bidding.

Also, in accordance with the Model Bill the procuring entity should always use the open tender method of procurement, unless conditions for application of other methods of procurement are satisfied (the restricted tender method of procurement or the single source method of procurement).

The open bid method (“the open tender”) is the basic procurement procedure. It must be used, with the exception of those situations under which provisions allow for application of other procurement methods and the procuring entity is able to prove that the conditions for application of those procedures are satisfied.

**In open tender any interested supplier may submit a tender**, simply replying to the invitation to tender published by a contracting entity in the form of a contract notice.

In two other “methods” **only bidders selected** by a procuring entity may submit tenders. Unlike in the case of the open tender, in **the single source procurement method** the procuring entity addresses invitations to tender to a limited number of already known suppliers. More complex is the case of the restricted tender method which, depending on the circumstances, may take the form of a competitive, two stage procedure or non – competitive direct award. The provisions of the Model Bill always require from the procuring entity to seek to maximise competition to the extent practicable and make selection of the supplier in a fair and non – discriminatory manner (this requirement applies both with regard to the restricted tendering and the single source procurement). While general traits of the restricted tendering and single source procurement are presented in the Procurement Standard Operating Procedures, further details concerning conduct of those two procurement methods are left to the Contracting Parties (Member States) to decide in their national provisions. One of the ways to ensure the fair and non - discriminatory selection of suppliers to be invited to tender in the restricted tendering is to:

- i) invite unlimited number of suppliers to submit request to participate in the procedure;
- ii) assess their qualifications;

iii) select, on the basis of non – discriminatory and transparent criteria a limited number of suppliers and then invite them to submit tenders.

## 2. Conditions for application of restricted tender or single source procurement

### What are the conditions for application of restricted tender or single source procurement?

Those two procedures may be applied only exceptionally if certain conditions are satisfied.

First, **either of those two methods of procurement** may be used in the following cases:

- i) In the previous open tender method no suitable tenders were received by the procuring entity;

**Tenders are not suitable** where they are irrelevant to the contract, are manifestly incapable, (without substantial changes) of meeting the procuring entity's needs and requirements as specified in the bidding documents.

- ii) Procuring entity needs to procure **additional** goods, services or works which were:
  - (a) not included in the initial contract; and
  - (b) within the objectives of the original tender documentation,

have, through **unforeseen circumstances**, become necessary to satisfactorily complete the procurement.

Purchase of additional goods, services or works must be necessary in order to successfully complete the original procurement contract. In other words, it is not possible to conclude works or services being the object of original contract without acquiring additional goods, services or works from the supplier who is already a party to the original contract. What is more, it is necessary that a need for this additional purchase:

- was not included in the first place in the original contract, because
- it could not be foreseen (by the procuring entity).

In the case of construction contract (contract subject of which is the execution of works, there is another additional requirement that the total value of the contracts awarded for

additional construction services does not exceed fifty (50) % of the amount of the initial contract.

iii) The contract is awarded to the **winner** of a **design** or other artistic contest;

Since the Bill uses the word “winner” in singular – there is only one winner of the contest the procuring entity invites only this person/company to take part in the procedure. In such a case the procedure to be used is rather the single source procurement. Rationale for this derogation is as follows: the procurement procedure is a logical follow up of the previous procedure – artistic contest. The contract is awarded only to the specific supplier who was the winner of that contest. Conclusion of the contract is thus a reward to the person/company who won that contest.

iv) The contract is for goods purchased on a commodity market;

This derogation from the obligation to apply open tender method is available only for goods (see above for definition of goods in Part I section 1).

**A commodity market** is a physical or virtual marketplace for buying, selling and trading raw or primary products. Currently there are about 50 major commodity markets worldwide that facilitate investment trade in approximately 100 primary commodities.

Commodities are split into two types: **hard** and **soft** commodities. Hard commodities are typically natural resources that must be mined or extracted (such as gold, rubber and oil), whereas soft commodities are agricultural products or livestock (such as corn, wheat, coffee, sugar, soybeans and pork).

v) The contract is for the purchase of goods or services made available under exceptionally advantageous circumstances which only arise in the very short term.

This derogation is available for supply and services contracts. To rely on this provision, the procuring entity should be able to prove that it can obtain specific goods or services for prices significantly lower than normally available on the market and because of that running standard open tender procedure would not bring better effects. Goods or services must be available from specific a supplier or suppliers and **for a very short time** (which makes

unpractical organizing stands procurement procedure with publication of a contract notice and receipt of tenders in due time).

vi) The procurement is of an intra-governmental nature between procuring entities.

Rationale for this derogation is that procurement takes place between public entities (governments) from at least two different countries. Again, due to the nature of the transaction (the government to the government) it would be unpractical to conduct a regular open tender procedure.

When procuring entity decides to use **the restricted bidding** or **single source procurement** it should also remember about the following requirements:

- ✓ it should seek to maximise competition to the extent practicable (which may not be always the case);
- ✓ make the selection of the supplier in a fair and non-discriminatory manner (again, it is possible only if there are a few suppliers available); and
- ✓ include in the record of procurement proceedings (see section 22 (3) (c) of the Model Bill), a statement of the reasons and circumstances upon which it relies to justify the use of the chosen procurement method

Second, the **restricted bidding** may be used if:

- 1) the subject matter of the procurement, by reason of its highly complex or specialised nature, is available only from a limited number of suppliers;
- 2) the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value of the subject matter of the procurement; or
- 3) given the nature of the procurement, it is in the public interest that the procurement procedure is **conducted confidentially**.

Third, the **single source procurement** may be used by a procuring entity:

- 1) when, in respect of the subject matter of the procurement, a particular supplier:

- (a) is the only available source for the procurement activity; or
- (b) has exclusive rights to the subject matter,

such that there is no reasonable alternative or substitute and the use of any other procurement method would, therefore, not be possible;

- 2) when due to a catastrophic event, there is an extremely urgent need for the subject matter of the procurement, and engaging in any other method of procurement would be impractical because of the time involved in using those methods;
- 3) when the procuring entity has:
  - (i) procured from a particular supplier, goods, services or works which are, to the covered entity's satisfaction, effective in meeting the needs of the procuring entity; and
  - (ii) determined the need for additional supplies to be procured from the supplier for reasons of standardisation or compatibility with existing goods, service or works;
- 4) when the procuring entity has determined that:
  - (a) the subject of the procurement is of a **highly sensitive or confidential nature**;  
and
  - (b) the use of any other method of procurement is not appropriate for the protection of essential security interests of a Member State.

### Self - testing questions

- 1) What is the basic procurement method?
- 2) What is the definition of the open tendering method?
- 3) What is the single source procurement method?
- 4) What is the difference, on the one hand between the open tender and the restricted bidding and single source procurement?
- 5) What is the difference between the restricted bidding and the single source procurement?
- 6) Can you name some situations where single source procurement or restricted procurement may be used?
- 7) Which procedure would you apply if you want to award a contract to a winner of a design or artistic contest?

## **PART IV - CONDUCT OF THE OPEN TENDERING METHOD**

This part of the Manual presents in steps the conduct of the open tendering method from the publication of the invitation to tender (bid) to conclusion of a contract.

In accordance with above mentioned definition the open tendering involves a series of steps to be taken by the procuring entity and suppliers interested in bidding for a procurement opportunity.

### **1. Step 1 - Publication of information about the procurement opportunity**

Prior to commencing procurement proceedings, the procuring entity prepares **an invitation to tender** (a contract notice). A procuring entity should submit a contract notice of the procurement, in the prescribed form and manner, for publication on the Notice Board. The procuring entity checks whether the invitation is published within a certain time limit [working days from the day it was sent for publication].

### **2. Step 2 - Providing bidding documents to suppliers**

Procuring entities should provide bidding documents to each supplier who responds to the invitation to bid ensuring that the bidding documents provided contain all the information necessary to allow suppliers to submit responsive bids.

#### **Clarification (and modification, if necessary) of bidding documents**

Procuring entities should respond promptly to any reasonable request for information relating to the intended procurement, including requests for clarification, on condition that such information is not intended to, nor has the effect of giving any supplier an unfair advantage over its competitors. Such information should be provided to all suppliers who received tender documentation, along with a copy of the request for information without identifying the source of such request for information.

At any time prior to the deadline for tender submission, a procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a tenderer, modify the tender documents by issuing an addendum which should be promptly

communicated to all tenderers to which the covered entity has provided the tender documents, and which should be binding on them.

Procuring entities should afford tenderers reasonable time, consistent with the nature, complexity and the date of issuance of modification addenda, to take modifications into account in the preparation of original or amended tender submissions.

### **3. Step 3 - Submission of bids by bidders**

According to FRIP, Protocol and Model bill, the **submission, receipt and opening** of tenders are important aspects of the tender process which should be performed fairly, without discrimination and in an environment of transparency. Detailed regulatory and procedural guidelines addressing, for example, the use and security of a tender box within the context of a regional procurement process, required number of copies of tenders to be submitted, minimum content of the tender opening record, allowance for the correction of nonmaterial errors, etc., while necessary for the satisfactory functioning of the Community regime, are not appropriate for a policy document and are properly placed in subsequent documentation to this Policy, for example legislation and/or procedural manuals. Some of the issues mentioned above are discussed in this manual.

**Bids should be submitted within time periods set by the procuring entities. The Bill does not specify the minimum time periods for receipt of tenders.**

According to the Protocol (Article 16), however:

1. Member States shall ensure that all time limits applied to procurement opportunities offered by their procuring entities under the Community procurement regime are adequate to allow interested suppliers to prepare and submit tenders and, where appropriate, applications for qualification.
2. In determining time limits mentioned in paragraph 1 of this Article, Member States shall take into account the complexity of the procurement opportunity, the possibility of publication delays and the implications of cross-border transport of relevant documentation consistent with the covered entity's own reasonable needs.



3. Procuring entities should, in an open competitive procedure (open tender), provide no less than forty (40) calendar days between the date of publication of the tender and the deadline for the submission of tenders.
4. Where using a method other than an open competitive procedure (open tender), procuring entities should provide a reasonable time limit consistent with the requirements of the procurement and the objectives of this Protocol.

**Thus, the time period for receipt of tenders in the open tender method should be at least 40 (calendar) days. However, taking account of the value and complexity of the procurement the procuring entity may come to the conclusion that longer time period would be appropriate. When setting time period which appears to be too short taking account the object of procurement, even if that time period is formally compliant with the minimum legal requirements, the procuring entity risks not receiving responsive tenders.**

**Late tenders are returned to bidders unopened.**

However, procuring entities should accept later tenders in circumstances where the procuring entity can ascertain that such tenders were delayed as a result of **force majeure**.

**Force majeure** is defined in the Protocol as *“an event that is beyond the reasonable control of a party and which makes the party’s performance of its obligations impossible or so impractical as to be reasonably considered to be impossible in the circumstances”*.

This term includes, but is not limited to: war, riots, civil disorder, strikes, lockouts, industrial action (except where such strikes, lockouts or industrial action are within the power of the party invoking the *force majeure*), confiscation or any other action by Government agencies and earthquakes, fire, floods, storms or explosions

#### **4. Step 4 - Evaluation of tenders**

##### **4.1 Introduction**

The evaluation of tenders is the stage in the procurement process during which a procuring entity identifies which one of the tenders timely submitted and meeting the set requirements is the most favourable on the basis of the pre-announced award criteria. The qualified supplier whose tender has been determined to be the most favourable is awarded the contract.

The evaluation of tenders must be carried out by a suitably competent evaluation panel which may be either the relevant unit of the line organization of the procuring entity or a specifically established evaluation panel/tender committee.

The process of evaluation of tenders must be compliant with basic principles of:

- non-discrimination,
- equal treatment and
- transparency.

It should also ensure confidentiality with regard to the tender information received and evaluated.

**Non-discrimination** means that any discrimination with regard to tenderers on the basis of nationality is forbidden. During the process of evaluation of tenders, tenderers from other Member States or Contracting Parties to the Protocol must not be discriminated against in favour of national tenderers.

**Equal treatment (equality of treatment)** means that all tenders submitted within the deadline set by the procuring entity are to be treated equally. They shall be evaluated on the basis of the same terms, conditions and requirements set in the tender documents and by applying the same pre-announced award criteria.

**Transparency** means that detailed written records must be kept (normally in the form of reports and minutes of the meetings held) of all actions of the evaluation panel. All decisions taken must be sufficiently justified and documented. In this way, any discriminatory behaviour can be prevented and monitored.

Apart from any public tender opening, the process of evaluation of tenders must be conducted in private (*in camera*) and must be **confidential**. During the process of evaluation,

the tenders should remain in the premises of the procuring entity and should be kept in a safe place under lock and key when not under review by the evaluation panel. Those measures are necessary in order to avoid any leaking of information. Information concerning the process of evaluation of tenders and the award recommendations of the evaluation panel should not to be disclosed to the suppliers or to any other person who are not officially concerned with the evaluation process, **until information on the award of the contract is communicated to all bidders.**

As a general rule, a chairperson with non-voting powers is appointed to lead, co-ordinate, give guidance and control the process of evaluation of tenders by the evaluation panel. The chairperson is responsible, among other tasks, for ensuring that the process of evaluation of tenders is carried out in accordance with the general principles mentioned above and for the purpose of producing the evaluation report. A secretary to the evaluation panel, also with non-voting powers, is normally appointed for the purposes of providing support to the chairperson, carrying out all administrative tasks linked to the evaluation process, and keeping the minutes of each meeting.

The members of the evaluation panel evaluate the tenders **independently**. They may also be requested to evaluate only the parts of the tenders that relate to their specialty. The way in which the members of the evaluation panel operate depends, however, on the provisions set down in national legislation.

In principle, the evaluation panel normally has only the mandate to identify the best tender and to make recommendations as to the award of the contract. It is the authorized officer of the procuring entity who normally announces the formal and final award decision.

It is good practice for all of the evaluation panel's members, including the chairperson and secretary, to sign a **declaration of impartiality and confidentiality** or a similar kind of declaration before they start to evaluate the tenders.

By signing such a declaration, each evaluation panel member:

- explicitly declares that he is not associated in any way with any of the suppliers (or their proposed sub-contractors) that have submitted a tender;
- explicitly commits himself not to disclose any information acquired during the process of evaluation of tenders to tenderers or to other persons not officially involved in the evaluation process.

It is good practice to complete the process of evaluation of tenders as soon as possible, in accordance with the pre-established procurement plan and corresponding tender evaluation timetable, which are normally included in the tender documents.

The process of evaluation of tenders usually takes place in various stages. In general, these stages are as follows:

- receipt and opening of tenders;
- evaluation of tenders *sensu stricto*, which normally results in the recommendations of the evaluation panel to the procuring entity concerning award of a contract.

These stages are strictly linked to the procurement procedure used. To assist in the evaluation of the tenders, the evaluation panel may, at its discretion and at any time during the process of evaluation, ask tenderers for clarifications of their tenders.

#### **4.2 Receipt of tenders**

On receiving the tenders, the procuring entity must register them. Normally, a summary of tenders received is used to record the names of the tenderers as well as the exact date and time of reception of the tenders. The summary of tenders received is then annexed to the tender opening report.

The envelopes containing the tenders must remain sealed and must be kept in a safe place under lock and key until they are opened, and afterwards they must be kept in a safe place under lock and key until the contract award.

It is good practice to gather the received tenders as follows:

- timely received tenders (before the expiry of the time period for bidding), modifications to tenders received prior to the deadline;
- withdrawals of tenders received prior to the deadline;
- tenders as well as any modifications and withdrawals of tenders received after the deadline.

### 4.3 Opening of tenders

The purpose of the opening of tenders is to open the timely submitted tenders in order to start with their evaluation. Late tenders must be rejected. Normally, late tenders are returned to the tenderers concerned unopened, unless their late submission is a result of force majeure.

It is good practice to open the tenders and start the evaluation immediately after the deadline for their submission has expired. This practice aims to reduce the risk that unauthorized persons have access to the tenders received.

The opening of tenders may be either public or non-public:

- **in the case of public tender opening** all timely tenders are opened publicly in the presence of authorized persons and at the time and place indicated by the procuring entity;
- **in the case of non-public tender opening** all timely tenders are opened *in camera* in the presence of the evaluation panel members only.

In principle, it is considered to be good practice to hold a public opening of tenders because it increases the transparency of the process of evaluation of tenders.

It is good practice also not to reject tenders during the public opening session, except for tenders received after the closing date and time for their receipt.

In accordance with the principle of transparency, it must be ensured that any occurrence during the opening session is duly recorded in a written report (which is referred to in this

manual as **the tender opening report**). In particular, the rejection of any late tenders must be recorded in the tender opening report. In principle, all persons present at the opening session must sign the tender opening report, unless otherwise required by national legislation.

When a **double-envelope system** is used (this is typically the case in the procurement of consultancy services), first the envelopes containing the technical offers are opened, and only after the evaluation of the technical offers has been finalized are the envelopes opened containing the financial offers of tenderers whose tenders are found to be technically compliant. During the evaluation of the technical offers, the envelopes containing the financial offers must remain sealed and must be kept in a safe place until they are opened.

#### **4.4 Evaluation of tenders *sensu stricto***

The proper evaluation of tenders (*sensu stricto*) must begin soon after the opening of tenders has taken place.

The evaluation panel must make sure that the tenders received are complete and that they comply with all of the requirements set by the procuring entity in the bidding documents. The evaluation panel can then apply the pre-announced award criteria to evaluate the tenders. The proper application of the contract award criteria is crucial for the process of awarding public contracts – if the criteria are not applied properly, the tender process, the evaluation of tenders, and the contract award decision may be flawed.

Therefore, the evaluation panel will carry out the following activities:

- Formal compliance check;
- Technical and substantive compliance check;
- Choice of the most economically advantageous tender on the basis of the pre-announced contract award criteria;
- Recommendation for the award of the contract.

The formal compliance check consists of establishing which tenders are compliant with the procedural requirements and formalities set by the contracting authority in the tender documents.

**Examples of procedural requirements and formalities concerning submission of tenders**

- Submission of tenders within the set deadline (not later than the date and time period for receipt of tenders);
- Submission of tenders in the language(s) specified in the tendering documents;
- Submission of duly signed tenders;
- Submission of the required number of tender copies;
- Respect of the required tender validity period;
- Submission of the required tender guarantee for the correct amount, for the correct duration, with the correct wording;
- Submission of all requested documents.

It is rare that tenders comply with all of the procedural requirements and formalities set in the tender documents. Tenders often contain mistakes and omissions. Sound judgment must be used when deciding whether or not to reject a tender because it fails to comply with the set procedural requirements and formalities.

Generally speaking, non-compliance with non-fundamental procedural requirements and formalities does not constitute justification for the rejection of a tender, but it should rather lead to a request addressed at the tenderer concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit. In general terms, the correction of non-compliant tenders in such instances would not give rise to an abuse. On the contrary, it would be wasteful for a procuring entity and against the principle of effective procurement to reject a favourable tender only because it fails to meet some minor formal requirements.

**Example of non-compliance with a non-fundamental formality:** the tender is submitted in a number of copies that is fewer than the required copies.

In turn, non-compliance with **fundamental procedural requirements and formalities** in general, in accordance with the principle of equal treatment, should result in the rejection of the tenders concerned. However, when making such a decision, the procuring entity should take into account the specific circumstances of each case. For example, late tenders must be in principle rejected, unless – for instance – this is due to the force majeure.

### **Examples of non-compliance with fundamental procedural requirements and formalities**

- The tender has been submitted after the date and time limit for its receipt (unless late submission is due to force majeure);
- The validity of the tender is in question, for example:
  - The tender has not been signed;
  - The tender is not accompanied by the required tender guarantee.

In the case of single-stage procedures, such as the open tender, the assessment as to whether tenderers satisfy the set selection (qualification) criteria (see below for more information) is normally - but not mandatorily - carried out soon after the formal compliance check has been performed. Depending on national legislation, the assessment of the tenderers' qualifications may be recorded in the evaluation report itself or in a separate report (qualification report), which is attached to the evaluation report.

### **Technical and substantive compliance check**

The technical and substantive compliance check of tenders consists of identifying the tenders that are compliant with:

- the technical specifications;
- the contract conditions and other substantive requirements (for example, the currency used)



set by the procuring entity in the bidding documents.

Tenders rarely comply fully with all of the (technical) specifications and with all of the other substantive requirements of the tender documents. On the contrary, it is not unusual that tenders contain mistakes, inconsistencies and omissions.

Generally speaking, non-compliance with non-fundamental technical specifications and other non-fundamental substantive requirements would not constitute a reason for the rejection of a tender, but it would lead instead to a request sent to the tenderer concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit. In principle, the correction of non-compliant tenders in these instances would not give rise to abuse. On the contrary, it would be wasteful for a procuring entity and against the principle of effective procurement to reject an advantageous tender only because it failed to meet some minor specifications or other minor substantive requirements.

#### **Example of non-compliance with a non-fundamental substantive requirement**

- The tendered price is quoted in currency other than required in the tender documents.

**Comment:** In this case, the conversion of the quoted price should be allowed, in principle, by applying the exchange rate on the date of the deadline for submission of tenders. However, this conversion would be possible only if it is not specifically forbidden by national law or by the bidding documents themselves.

In turn, non-compliance with fundamental specifications and other fundamental substantive requirements must result in the rejection of all non-compliant tenders. It is against the principle of equal treatment to accept tenders that do not comply with such requirements. Generally speaking, if the cases of non-compliance with fundamental specifications and other fundamental substantive requirements were accepted, these tenders would not fulfil the purposes for which they had been requested.

### **Examples of non-compliance with fundamental substantive requirements**

- Failure to respond to the specifications by proposing, for example, a product that does not offer substantial equivalence in critical performance parameters or in other requirements;
- Proposal of a delivery date that is later than the mandatory maximum delivery date specified in the bidding documents;
- Refusal to bear important responsibilities and liabilities allocated in the tender documents (for example, performance guarantees and insurance coverage);
- Making exceptions or reservations to critical requirements (for example, applicable law);
- Submission of partial tenders by offering, for example, only selected items or only partial quantities of a particular item or only part of the works or services required, where this is not allowed by the tender documents;
- Deviation from the requirements that are explicitly indicated in the tender documents as leading to the rejection of tenders.

The reasons for rejecting a tender for non-compliance with specifications and other substantive requirements must be clearly and exhaustively explained and documented by the evaluation panel in the evaluation report.

### **4.5 Qualification of suppliers**

It is important for a procuring entity to ensure that when it decides to award a contract to a given supplier it will enter into a contract with a supplier that **has the ability to perform and complete the contract in question**. In other words, the procuring entity should check whether the supplier possesses the capabilities to fulfil the requirements of the procurement and the ability to execute the corresponding contract, in accordance with its terms.

Accordingly, a procuring entity may want to check, for example:

- the financial resources,

- experience,
- skills and technical resources of suppliers

and exclude from the procurement process those suppliers that do not fare well in those checks.

A procuring entity may also want **to exclude (disqualify)** from participation also suppliers that are in a specific personal situation. For example, suppliers who have not paid taxes, have been found guilty of grave professional misconduct, submitted false declarations or documents or were convicted for criminal offences.

The process of assessing suppliers against set of pre-defined criteria and taking pertinent decisions concerning result of this assessment will be referred to below as **qualification of suppliers**.

Qualification of suppliers generally comprises two distinct stages:

1. The procuring entity establishes first whether there are grounds for excluding (disqualifying) supplier from participation in a procurement procedure (related to their personal situation, such as being bankrupt (insolvent, being in arrears with payment of taxes, criminal convictions etc); and
2. Second, the procuring entity considers whether the suppliers that have not been excluded meet the required qualification criteria (for example, related to their technical and professional capacity, economic and financial standing, suitability to perform a specific activity).

This process of qualification of suppliers must be carried out by applying only objective, non-discriminatory, proportionate and transparent criteria which are set by the procuring entity in advance.

It is important to note that the qualification of suppliers and the award of the contract (see below) are two different exercises in the procedure for the award of a public contract.

**Qualification** is about determining which suppliers that are not excluded are qualified to perform the contract that is to be awarded; qualification is conducted on the basis of the qualification criteria pre-established by the procuring entity.

**Award** is about determining which tender is the most favourable in the light of the award criteria set in advance by the procuring entity (see below for more details).

In the open tender the procuring entity publishes first a contract notice inviting suppliers to submit tenders, which will include information about the suppliers' qualifications (depending on the grounds for exclusion and the qualification criteria that have been set). The qualification of suppliers is carried out once the tenders have been submitted. First, all the timely received tenders (that have not been excluded for reasons other than the qualification criteria) are evaluated against the grounds for exclusion and the set qualification criteria in order to determine whether there are grounds for excluding supplier and which suppliers are qualified to perform the contract. Second, the tenders are evaluated against the set award criteria (see below) in order to determine which supplier, amongst the qualified tenderers, has submitted the most favourable tender.

In the open tender the qualification of suppliers and award of contract are carried out one after the other or vice versa as part of the same process, even though they remain two separate exercises.

#### **4.5.1 Principles of qualification**

**Process of qualification of suppliers must respect the following general principles:**

**Equal treatment and non-discrimination:** the qualification criteria must be objective. Criteria and evidence requested from suppliers must be non-prejudicial to fair competition and non-discriminatory, especially on the grounds of nationality. In the process of qualifying suppliers procuring entities must not discriminate between national and non-national suppliers.

**Proportionality:** any measure chosen by the procuring entity must be both necessary and appropriate in the light of the objectives sought. In particular, the qualification requirements and criteria to be applied must be **proportionate to the size, nature and complexity of the contract**. Also, the evidence requested from suppliers in order to prove that they meet those requirements must be limited to that which is strictly necessary to establish whether the set qualification criteria are satisfied.

The procuring entity is forbidden to impose artificial constraints that serve to limit the opportunity to participate in procurement process, such as conditions that require previous awards of contracts by the procuring entity or previous experience in the territory of the procuring entity as prerequisite for award of a contract.

**Transparency:** to ensure a level playing field for all suppliers interested in a given public procurement opportunity, the procuring entity must disclose in advance the qualification criteria to be applied and the evidence to be submitted. Decisions concerning qualification may be based only on the conditions for participation specified in the contract notice and/or bidding documents.

All suppliers participating in a specific procurement procedure should be promptly notified of the qualification decisions of the procuring entity (i.e. whether they were qualified or not). In the case a supplier is rejected on the basis of his (lack of) qualifications, the procuring entity should within a reasonable time and at the request of such supplier communicate the reasons for its decision to the supplier concerned.

#### **Disqualification/exclusion criteria**

According to the Protocol procuring entities are allowed to disqualify from participation in a public procurement procedures (exclude) suppliers on grounds of:

- Unfair competitive advantage;
- Conflict of interest;
- Bankruptcy;
- False declarations; or
- Conviction for criminal offences.

In order to assess whether a supplier is not in the situation which should result in his exclusion (disqualification) the procuring entity may request the production of extracts from the relevant register, such as judicial records, or if there is no such document in a given country, an equivalent document issued by a competent judicial or administrative authority in the country of the supplier.

Since suppliers may be also a group of suppliers (see above for more information) the procuring entity should apply the grounds for exclusion/disqualification to each member of a

group. Thus, even if only one member of the groups falls within one or more of the grounds it results in the exclusion (disqualification) of the whole group.

#### **4.5.2 Qualification criteria**

Once the procuring entity assured itself that among bidders are no bidders who should be disqualified for the reasons mentioned above it proceeds with assessment of qualifications of suppliers in the light of “qualification criteria”.

Qualification criteria may relate to:

- Suitability to pursue the professional activity;
- Economic and financial standing of suppliers;
- Technical and professional capacity of suppliers.

#### **Suitability to pursue the professional activity**

The procuring entity is allowed to check whether suppliers are generally suitable and fit to conduct the professional activity by requiring them to submit proofs that they are enrolled on trade or professional registers in the country of their establishment.

In the case of public service contracts, if suppliers are obliged to obtain a particular authorization or to be members of particular organization in order to perform the services concerned in their country of origin, the procuring entity may require them to prove that they possess such authorizations or hold memberships of those organizations.

#### **Economic and financial standing**

As regards economic and financial standing of suppliers the procuring entity may specify requirements to be fulfilled by suppliers in order to ensure that they possess the necessary economic and financial capacity to perform the contract in question to the end. All requirements should relate to the subject matter of procurement and proportionate to its size and complexity.

The procuring entity may, for example require that tenderers have a certain **minimum yearly turnover**, including minimum yearly turnover in the area covered by the contract (for example, as regards supplies or services which are the subject of a given procurement).

Procuring entities may also require that suppliers provide information on their annual accounts, for example by showing the ratios between assets and liabilities.

Procuring entities may also require from tenderers an **appropriate level of professional risk indemnity insurance**.

All the requirements, including the minimum capacity levels set by the procuring entity should be specified in the bidding documents so suppliers interested in a given procurement opportunity are aware of all the criteria and conditions they must fulfil.

The procuring entity should also specify what kind of evidence it requires from tenderers in order to prove that they meet those requirements. In other words, the procuring entity should list all documents, certificates and other types of documents required.

The procuring entity may for example ask for:

- Statements of suppliers concerning suppliers' overall turnover, including, if appropriate, turnover in the area covered by the contract;
- Appropriate statements from the banks;
- Evidence of relevant professional risk indemnity insurance;
- The presentation of financial statements or extracts from the financial statements.

The procuring entity may require that suppliers meet minimum capacity levels with regard to economic and financial standing criteria. For example, the procuring entity may require that supplier have an x amount of [currency] as a minimum yearly turnover in the last (for example, 3 years) or x amount of [currency] as a minimum annual operating profit in the last x years. If suppliers do not meet those minimum capacity levels, they are not qualified.

**Examples of criteria relating to economic and financial standing:**

**Turnover:** the turnover may be a useful indicator for determining, among others, whether suppliers have the financial strength to cope financially with the size of the contract, have adequate financial stability, and are not overly dependent on obtaining the specific contract.

Requirements concerning minimum yearly turnover should be adequate and proportionate to the value of the contract in question. Too high requirements may constitute a barrier for

small companies. Higher yearly turnover requirement, may be justified by the special risks attached to the nature of the works, services or supplies.

**Operating profit:** the operating profit (profit before interest and taxes) is a good indicator for measuring the profitability of supplies, i.e. their ability to make a profit.

**Solvency:** the solvency of a supplier corresponds to its cash availabilities to deliver the goods, works, or services being the object of the procurement. To measure the solvency of economic operators, a procurement entity may require them to satisfy, for example, a net cash position at a certain level (cash availabilities net of short-term debts). More sophisticated ratios may also be used for this purpose. For instance, the ratio, between assets and liabilities may be taken into consideration where the procuring entity specifies the methods and criteria in the bidding documents. Such methods and criteria should be transparent, objective and non-discriminatory.

**Value of works undertaken so far by the supplier:** the total value of works undertaken by a supplier, at a particular moment, may be a useful factor in determining its economic and financial standing in relation to its obligations.

#### **Technical and/or professional ability**

As regards technical or professional ability of suppliers the procuring entity may specify requirements to be fulfilled by suppliers in order to ensure that they possess the necessary human and technical resources and experience to perform a given contract up to the quality standard expected by the procuring entity. All requirements should be related to the subject matter of procurement and proportionate to its size and complexity.

The procuring entity may require that suppliers meet minimum capacity levels with regard to technical or professional ability. For example, the procuring entity may require that suppliers applying for a given contract have successfully completed at least X number of projects of a specified X value and of the same nature as the project in question in the last X years. As regards experience of the persons providing services the procuring entity may impose a requirement that those persons have a X minimum number of professional experience as regards providing services being the object of procurement. Tenderers who do not satisfy those minimum levels of capacity are not qualified.



All the requirements, including the minimum capacity levels set by the procuring entity should be specified in the bidding documents so suppliers interested in a given procurement opportunity are aware all the criteria and conditions they must fulfil.

The procuring entity should also specify what kind of evidence it requires from tenderers in order to prove that they meet those requirements. In other words, the procuring entity should list all documents, certificates and other types of documents required.

The procuring entity may for example ask for:

- A list of works carried out in the X previous years, accompanied by certificates of satisfactory execution and outcome of the most important works;
- A list of principal deliveries effected or the main services provided over a period of X years, with the sums, dates and recipients;
- The educational and professional qualifications of the supplier or those of a company managerial staff;
- An indication of the technicians involved;
- A statement of the average annual manpower of the supplier;
- A statement of the tools, plants or technical equipment available to the supplier;
- Information whether the (part of) the contract is going to be subcontracted by the supplier.

### **Examples of criteria relating to technical and/or professional ability**

**Past experience** – procuring entities may require, in particular, that suppliers have a sufficient level of experience, as demonstrated by suitable references from contracts performed in the past. This criterion allows a procuring entity to assess the technical competence of suppliers and to foresee their capability to perform future contracts. A procuring entity may want to know if suppliers have fulfilled contracts of a similar type, scale and/or complexity and if the performance was satisfactory and as such are reliable.

Previous contract award with the same procuring entity or previous work experience in the Member State of the procuring entity cannot be used as a requirement to take part in the procurement procedure

**Availability of tools, plant and technical equipment:** a procuring entity may want to know if suppliers have available specific tools, plant and technical equipment for the performance of the contract. A procuring entity may further inquire about the details of the age and condition of the required tools, plant and technical equipment in order to establish whether they are adequate for the performance of the contract. This criterion is particularly important, for example for works contracts.

**Educational and professional qualifications of the persons who will be providing the services or carrying out the works:** this criterion allows a procuring entity to assess the technical competence and expertise of the persons who will be employed under the contract to be awarded and who will be providing the services or carrying out the works. This criterion is particularly important, for example for consultancy services.

**Compliance with Quality Assurance Standards:** this criterion allows a procuring entity to assess whether economic operators have in place systems for carrying out tasks that directly affect product quality. This criterion is particularly important for supplies, for example. An example of a quality assurance standard is ISO 9001.

#### **4.6 Selection of the most advantageous tender on the basis of award criteria**

##### **4.6.1 Introduction – general principles**

The award criteria are the criteria that constitute the basis on which a procuring entity chooses the best (the most advantageous) tender and awards a contract. These criteria must be established in advance by the procuring entity and must not be prejudicial to fair competition.

All tenders submitted within the deadline shall be evaluated in accordance with the terms, conditions and requirements of the bidding documents.

When setting and applying the award criteria a procuring entity must operate with respect to general public procurement principles and, in particular to ensure:

**Equal treatment and non-discrimination** which means that the award criteria must be non-discriminatory and must not be prejudicial to fair competition, and

**Transparency**, which means that the award criteria must be set in advance and disclosed to tenderers, to ensure that:

- tenderers can prepare their tenders in a more appropriate way, trying to best meet the stated priorities of the procuring entity;
- the evaluation of tenders is carried out by a procuring entity in a transparent and reliable way and as objectively as possible; and
- the relevant stakeholders, for example, audit bodies, review bodies, other government bodies or economic operators can monitor the process so as to prevent discriminatory or non-authorized award criteria from being used.

**The purpose of establishing and formally disclosing the award criteria to be applied is to ensure that:**

- potential tenderers can prepare their tenders in a more appropriate way, trying to best meet the priorities of a procuring entity;
- the evaluation of tenders is carried out by a procuring entity in a transparent and reliable way and as objectively as possible;
- the relevant stakeholders (for example, audit bodies, review bodies, other government bodies or suppliers) can monitor the process so as to prevent discriminatory or non-authorized award criteria from being used.

The procuring entity must announce in the contract notice or bidding documents all the criteria used to select the best tender with their relative weighting.

#### **4.6.2 Types of criteria for award of contract**

**What are the criteria for award of a contract?**

Basically, the criteria to award a contract may be:

- (i) the lowest price; or
- (ii) the best price/quality ratio (combination of price and other criteria).

When a procuring entity decides to choose the best tender on the basis of price only, the contract is awarded to the tenderer offering the lowest price for a compliant tender. The price is the only factor that is taken into consideration when choosing the best compliant tender. Tenders received are evaluated against the set specifications on the basis of a pass or fail system. No cost analysis and no quality considerations can come into play in this choice.

### **The price only criterion**

The price-only criterion has the advantage of simplicity and rapidity, but it has its limitations such as:

- It does not allow the procuring entity to take into account qualitative considerations. Apart from the quality factors built into the specifications, which must be met by all tenders, the quality of the requirement being procured is not subject to evaluation.
- It does not allow the procuring entity to take into account innovation and innovative solutions. All tenders that meet the set specifications are compliant regardless they barely meet them or surpass.
- For goods or works that have a long operating life, it does not allow the procuring entity to take into account the life-cycle costs of the object of procurement. When the lowest-price criterion is used, only the direct cost of the purchase or the initial purchase price within the set specifications can be taken into consideration.

### **The combination of the price and other criteria (the best price/quality ratio)**

When the most advantageous tender on the basis of the best price/other criteria ratio is used, a procuring entity can take into account other criteria in addition to the price, such as for example the quality, delivery time, and after-sales services. Each chosen criterion should be given a relative weighting by the procuring entity, which reflects the relative importance

that it has for the procuring entity. The purpose of the best ratio is to identify the tender that offers the **best value for money**.

The term **value for money** means the optimum combination between the various cost-related and non-cost-related criteria that together meet the procuring entity's requirements. However, the elements that constitute the optimum combination of these various criteria differ from procurement to procurement and depend on the outputs required by the procuring entity for the procurement concerned.

The concept of value for money is based on conclusion that goods, works and services are not homogeneous and that they differ in quality, durability, longevity, availability and other terms of sale. The point of seeking value for money is that procuring entities should aim to purchase the optimum combination of features that satisfy their needs. Therefore, the various qualities, such as intrinsic costs, longevity and durability, of the various products on offer are measured against their cost. It may be preferable to pay more for a product that has low maintenance costs than to pay less for a cheaper product that has a higher maintenance cost (and as a result, costs more the procuring entity over time).

The best price/other criteria ratio, as opposed to the price-only criterion, presents a series of advantages, including in particular the following:

- It allows procuring entity to take into account qualitative considerations. The best price/quality ratio is typically used when quality is important for the procuring entity.
- It allows the procuring entity to take into account innovation or innovative solutions.
- For those goods or works with a long operating life, it allows the procuring entity to take into account the life-cycle costs of the object of procurement purchased and not only the direct cost of the purchase or the initial purchase price within the set specifications.

### **What criteria may be used to determine the most advantageous tender?**

Basically, there are two broad categories of criteria:

- **Cost related** – allow the procuring entity to determine the financial cost of the acquisition of the object of the procurement as well as the cost of using and operating it;

- **Non cost related** – concern key performance requirements and adherence to specifications.

The cost-related criteria (also referred to as economic criteria) allow the procuring entity to determine the cost - in monetary terms - for the acquisition of the object of the procurement and also, for example, for using and operating it.

#### **Examples of cost-related criteria**

- **price** - the initial purchase price stated in each individual tender;
- **running costs** – costs related to the use of the object of the procurement, which may include the cost of spare parts and consumables, maintenance costs, licenses, etc;
- **costs for after-sales services** - costs related to the technical support required with regard to the object of the procurement.

In this context, it is useful to examine the concept of **life-cycle costs**.

Life-cycle costs are the costs of the goods, works or services that are being procured through the duration of their life cycle. Where a requirement is, for example, a machine, vehicle or building that has a working life over several years, there may be a need to ensure that it is cost-effective over its whole working life. This means looking not only at the lowest purchase price but taking a long - term view in order to guarantee long-term value-for-money. In these cases, in fact, it may be the case that the direct cost of purchase is only a small proportion compared to the total cost of the requirement procured through the duration of its life cycle.

**In broad terms, the life-cycle costs** comprise all costs to the procuring entity relating to the acquisition - operational life and - end of life (such as disposal) of the goods, works or services being procured. It should be noted, however, that for certain assets there are no end-of-life costs since there is no disposal but, for example, instead there may be a resale value. The type of life-cycle cost is linked to and depends on the different types of goods, services or works being procured.

#### **Example of life-cycle costs related to the construction of a school:**

- Construction costs as indicated in the tender;
- Maintenance costs (major replacement, minor replacement, redecoration, etc.);

- Operation costs (energy consumption, etc.);
- End-of-life costs (disposal, reinstatement, continued value, etc.).

The costs may be either **“one off”** or **recurrent** ones.

**“One off” costs** are paid only once with the acquisition of requirement being procured – initial price, purchase and installation costs, initial training and disposal costs.

**Recurrent costs** are paid throughout the life cycle, they include service and maintenance charges, repairs, consumables, spare parts, energy consumption. They depend on the longevity of life cycle and tend to increase with time.

**One-off costs** are those that are paid only once with the acquisition of the object of public procurement.

**Examples of one-off costs:**

- initial price;
- delivery and installation;
- acceptance;
- initial training;
- documentation;
- disposal.

**Recurrent costs** are those that are paid throughout the life cycle of the requirement being procured. They depend on its longevity and they normally increase with time (for example, the maintenance and repair costs normally increase with the ageing of the object of the procurement).

**Examples of recurrent costs:**

- retraining; service charges; maintenance and repair; consumables; spare parts; energy consumption.

With regard to life-cycle costing concerning the procurement of a specific requirement, a procuring entity should ask itself the following questions:

- What do I need now and how much will it cost me?
- What will I need to do in the future and how much will that cost me?

- How long is the 'future'?
- How do I evaluate future costs against current costs?

### **Non - cost related criteria**

- (i) **Quality** - it is the characteristics that the object of the procurement must satisfy e.g. the number of pages per minute produce by a printer or its durability;
- (ii) **Technical merit** – whether the object of the procurement is fit for purpose and how well it performs;
- (iii) **Aesthetic and functional characteristics** – how it looks and feels and how easy to use it is;
- (iv) **Delivery date** – the guaranteed time from order to delivery;
- (v) **After sale services** – what support is required and available to the procuring entity after the contract has been signed.

### **4.7 Problem of abnormally low tenders**

Public procurement should lead to the selection of the tender which, while being compliant with all requirements set by the procuring entity, is the cheapest one (if the price is the only factor taken into account) or provides for the best combination of the price and other factors related to the object of public procurement. It happens, though, especially in the current economic situation, that bidders submit increasingly competitive bids in order to secure work, keep employment and maintain their presence on the market while waiting for better times to come bring lower and lower prices. Lower prices result in significant financial benefits to procuring entities who are able to buy more for the same money or spend those savings on something else. It would be tempting to accept those extremely competitive tenders ('abnormally low tenders') but it may be the case, that such tenders are 'too good to be true'.

There are various reasons for which abnormally low tenders appear in public procurement procedures. Firstly, the submission of abnormally low tender can be the result of misunderstanding of the requirements of the procuring entity by the supplier. For example,



the supplier who did not comprehend the whole scope of procurement and did not include all the mandatory elements of the procurement submits much lower bid than other companies who took account of all requirements. In such a case the price offered seems to be very good but further thorough investigation will show that the tender is not compliant with the requirements of the procuring entity as it does not provide for all services or works required. Secondly, submission of unreasonably low tender can be a result of underestimation of the risks attached to the execution of the contract (phenomenon known in the literature as 'the winner's curse'). Thirdly, the tender can be abnormally low because of non – compliance with binding legal requirements concerning social, labour or environmental law. The bidder who does not pay wages in accordance with legal requirements or does not ensure labour conditions compliant with those regulations unfairly enjoys competitive position. Fourthly, the bidder may benefit from a subsidy and be in a position to offer the price much lower than its competitors who do not have access to this support. Fifthly, tenders may be very low also because of deliberate actions of bidders who offer extremely low offers in order to provide continued employment for a company workforce, act in order to drive competitors out of a market or bank on future amendments of the contracts and increases of their remuneration ('low balling' or 'get the foot in the door' strategy).

### **What are the risks related to choosing abnormally low tender?**

Awarding a contract to a company which offered abnormally low tender is risky for the procuring entity (and in general public interest) for a number of reasons. Firstly, the supplier who was chosen on the basis of a very low tender can, in the course of the execution of the contract, charge the contracting authority for extra costs and request increase of his remuneration. For example, he demands additional payments not included in the contract threatening the procuring entity that if he is not paid he simply will walk away from the contract. Secondly, there is a risk of default of the supplier who misunderstood the complexity of the procurement or did not take into account all risks related to it. In a case of insolvency of a supplier the contract will not be performed or only partly executed. The procuring entity will have then to repeat the procurement process wasting time and resource and risking that a new contract will be concluded on less advantageous terms.

Thirdly, there is a risk that goods or services provided will be of lower quality than they should be in accordance with terms of the contract. For example, the supplier who had proposed a very low tender can try to cheat the procuring entity by replacing materials of high quality with their cheaper substitutes or not performing all required services. Fourthly, there is a risk that binding social and labour regulations will not be correctly applied (the contractor will try to avoid paying due taxes or social charges).

In practice, the following methods are most often used for identification of abnormally low tenders:

- an analysis of the price (costs) proposed by a tenderer against the object of public procurement,
- a comparison of the tender price with the value of procurement as estimated by the procuring entity before the procedure is launched (the procuring entity assesses the level of deviation of the price from its estimations concerning cost of procurement),
- a comparison of the tender price with prices proposed in all other, compliant bids (in such as case the procuring entity assesses deviations from the mean price, checks how big is the difference between the first and the second best tender apply or apply both methods),
- combination of all or some of above mentioned methods.

In order to avoid situation when the contract is awarded to the supplier who will not be able then to perform it correctly the procuring entity should investigate tenders suspected of being abnormally low. Before it decides to reject such a tender the procuring entity should require from the tenderer concerned explanations related to proposed price.

The explanations, in particular, refer to:

- the economics of the manufacturing process, of the services provided or the construction method;

- the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
- the originality of the work, supplies or services proposed by the bidder;
- compliance with legal obligations deriving from the mandatory national law in the fields of social, labour or environmental law or international labour law provisions.

In accordance with good procurement practice the procuring entity should set a reasonable time limit for submission of explanations concerning low level of the price or the costs.

Once required information is provided the procuring entity assesses received information, by consulting tenderer.

Following the investigation, the procuring entity should take a decision concerning the tender which was suspected of being abnormally low. Only if the procuring entity, following investigation, can establish that the tender is indeed abnormally low it is entitled to reject the tender. On the other hand, if the explanations provided by the bidder, analysed in consultation with the bidder, show that the price (cost) is genuine, the tender cannot be considered as being abnormally low and cannot be excluded.

If the procuring entity decides to reject a tender on the account of it being abnormally low, it is obliged to inform a bidder about reasons for rejection of its tender.

#### **5. Step 5 - Award of contract or cancellation of the procedure**

Following evaluation of tenders, the procuring entity decides to whom should be awarded a contract.

Contract is awarded to the supplier, who:

- is not to be disqualified due to prescribed conditions,
- is qualified to provide supplies, or perform services or execute works which are the object of procurement (see in section 4.5 above),

and whose offer:

- is technically compliant with the requirements set by the procuring entity,
- was identified as the most successful (the best) in accordance with the contract award criteria set in advance by the procuring entity,
- is not abnormally low (see section 4.7).

#### **6. Step 6 Informing bidders about decisions taken in the course of the procedure**

Where in relation to a procurement opportunity that was advertised on the Notice Board, a procuring entity selects a successful bidder, the procuring entity should:

- issue a contract award notice, in the prescribed form, to all suppliers who submitted bids; and
- submit a copy of the contract award notice to the National Contact Point who shall submit or transmit same for publication on the Notice Board.

Contract award notice should:

- (a) identify the successful bid but should not automatically mean an award of contract to a particular supplier; and
- (b) where relevant, indicate the commencement of the standstill period (see below for more information on standstill).

Upon receipt of a contract award notice, a supplier whose bid was unsuccessful and wants to know the reason for the procuring entity's decision not to award him the contract should submit a request to the procuring entity to provide explanations concerning the reasons for its decision not to award him the contract.

Supplier, whose tender was not selected may then challenge the procuring entity's decision submitting application for reconsideration of the contract award decision. This application should be submitted in the following time period [within 10 working days] "standstill period".

The procuring entity should respond to this application within 10 (calendar) days from the receipt of application.

The procuring entity should not accept a successful bid or execute or perform the procurement contract if:

- the supplier who submitted the successful bid is disqualified on the prescribed grounds (see section 4.5);
- the procuring entity cancels the procurement,
- the procurement, the bid, or the supplier contravenes or otherwise is not compliant with the provisions of the Bill.

### **Cancellation of procurement opportunity (procurement procedure)**

A procuring entity may, for justifiable reasons and at any stage in the procurement process, cancel a procurement opportunity thereby rejecting all bids without incurring liability.

In the event the procurement is cancelled the procuring entity is obliged to:

- (a) promptly publish a notice of the cancellation of the procurement on the Notice Board in the same manner in which the invitation to bid (contract notice) was published;
- (b) promptly notify the suppliers who
  - (i) submitted bids; and
  - (ii) request a statement of reasons for the cancellation;
- (c) return any bids that remain unopened; and
- (d) include in the record of the procurement proceedings the decision to cancel the reasons for the decision (see section 5 in Part I on record of the procurement proceedings).

### **7. Step 7 - respecting a standstill period**

Decision to award a contract to a chosen supplier does not mean that the contract may be immediately concluded. Quite the contrary, the provisions of the procurement regime require that some time must pass between:

- the notification of the decision to award a contract
- and conclusion of a contract.

The purpose of this requirement is to give a chance to suppliers who took part in the procurement procedure and are not satisfied with decision of the procuring entity (because their tenders were not chosen) to challenge that decision (see Part V on review measures and procedure).

This time period is referred to by the public procurement regime as a **standstill period**.

Definition of the standstill period;

"standstill period" is defined in **Model Bill** as a period "of ten working days that commences on the day following the day on which a notice of successful bid is dispatched, during which time - (a) no contract may be signed with the unsuccessful bidder; and (b) an unsuccessful bidder may challenge certain decisions or actions of the procuring entity.

The first day of the standstill period is **the day following dispatch of the contract award notice** (see in section 6).

## **8. Step 8 - conclusion of a contract**

Once the standstill period expired the procuring entity should dispatch a notice of acceptance of the successful bid to the supplier who submitted the successful bid (the bid which was chosen as the best one). In the event the standstill period was not applied sending of this notice should happen promptly after identifying the successful bid.

For the purposes of the Bill, the dispatch of a notice of acceptance of the successful bid to the supplier who submitted the bid constitutes the award of contract to the supplier. The contract, which complies with the terms and conditions presented in the successful tender

enters into force when the procuring entity sends the notice of acceptance to the supplier who submitted the winning tender. This notice should be properly addressed or otherwise directed and promptly and properly transmitted to the supplier by means of the communication specified in the bidding documents.

However, the contract may not enter into force, at least at the moment this notice is dispatched, in the following cases:

- (a) the bid's validity period [i.e. the period during which the tenderer is bound by the terms and conditions proposed in his tender had expired before the notice of acceptance was dispatched;
- (b) the approval of an authority is required before the procurement contract may enter into force or
- (c) a written procurement contract is required before the procurement contract may come into force.

In the case the bidding documents require the supplier whose bid has been accepted as the successful tender to **sign a written procurement contract which confirms with the terms and conditions of the bid** before the contract may come into force, the procuring entity and the supplier should sign the procurement contract within a reasonable time after the notice is dispatched to the supplier.

In the case where for the entry of contract into force it is required that a written procurement contract is signed by both the procuring entity and the supplier, **but is not necessary to obtain approval of another authority**, the contract enters into force when it is signed by both parties to it.

If, according to the bidding documents the procurement contract is subject to **the approval of another authority**, it will not enter into force before the approval is given. The procuring entity should ensure that the approval is obtained within the estimated period of time following the dispatch of the notice of acceptance, as specified in the bidding documents.

A failure to obtain the approval within the time specified in the bidding documents does not result in the extension of:

- the bid validity period, or
- the period of effectiveness of the bid security.

Parties to the future contract – the procuring entity and the supplier - should behave loyally towards each other during the period which starts to run on the day on which the procuring entity sends the notice of acceptance to the successful bidder and ends on the day on which the procurement contract is signed. Neither of the parties should intentionally:

- (a) interfere with the conclusion of a binding contract; or
- (b) impedes or frustrates the performance of the procurement contract.

The procuring entity should also take the necessary measures to ensure that any approvals that are necessary for the contract to become valid are received before the expiry of:

- the bid validity period, as specified in the bidding documents; and
- the period of effectiveness of any bid security which may be required.

After the entry into force of a procurement contract and, if required, the provision a security for the performance of the contract by the supplier of, the procuring entity is obliged to prepare a notice of contract award promptly:

- publish on the Notice Board; and
- issue to the unsuccessful bidders.

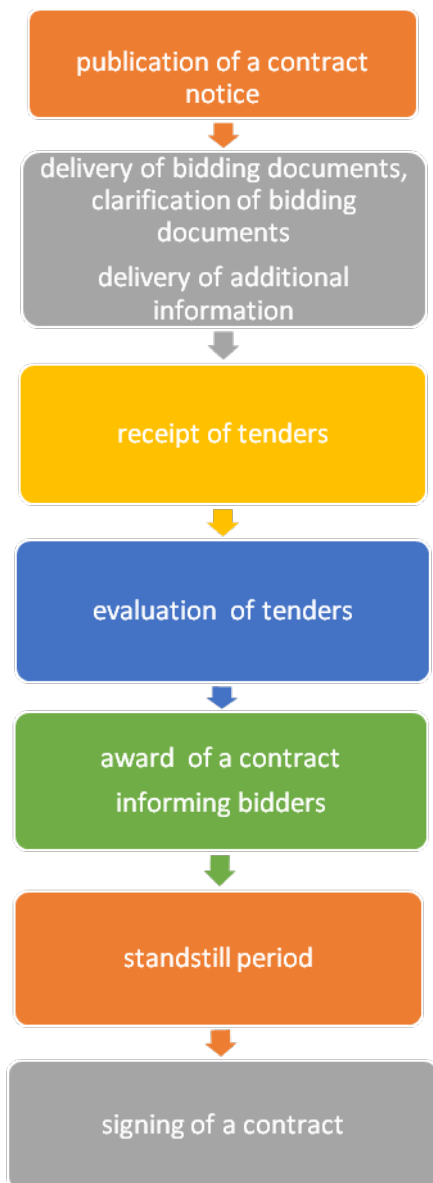
This notice should take a required form (there is a standard form of this notice). The notice must specify the name and address of the supplier/bidder with whom the procuring entity entered into the procurement contract and the contract price.

The procuring entity should not accept a successful bid or execute or perform the procurement contract if:



- the supplier who submitted the successful bid is disqualified on the prescribed grounds (see section 4.5);
- the procuring entity cancels the procurement,
- the procurement, the bid, or the supplier contravenes or otherwise is not compliant with the provisions of the Bill (Act).

## Simplified scheme of the open tender



### Self - testing questions

- 1) Can the previous experience of the supplier in the country of a procuring entity be used as qualification criterion?
- 2) Can you give some examples of situations which may result in disqualification (exclusion) of a supplier?
- 3) What is the difference between qualification of suppliers and award of a contract?
- 4) What is the purpose of qualification of suppliers?
- 5) Can you give some examples of criteria to assess the financial and economic standing of suppliers?
- 6) Can you give some examples of criteria (factors) which may be used for the selection of the most advantageous tender?
- 7) What are the limitations of the price only criterion?
- 8) Is the list of award criteria exhaustive or illustrative?
- 9) What does the concept of life cycle cost refer to?
- 10) What is the best value for money?
- 11) Can you give some examples of cost related and non – cost criteria?
- 12) What are the risks related to the award of contract to a bidder who submitted abnormally low tender?
- 13) What are the methods of identifying abnormally low tenders?
- 14) The tender which is suspected of being abnormally low should be automatically rejected. It is true or false statement?
- 15) What is the standstill period? Why it is required?

## PART V - REVIEW MEASURES AND PROCEDURES

### 1. Introduction

Extremely important element of the Community's Public Procurement regime are **measures and procedures available to aggrieved suppliers**. Key objective of those provisions is to ensure that in area of public procurement effective and rapid remedies against breach of procurement rules are in place at national level.

According to the Protocol the Community should ensure the development of common:

- non-discriminatory,
- timely,
- transparent; and
- effective

procedures that enable suppliers to challenge alleged breaches of the public procurement provisions arising in the context of procurement in which those suppliers have or have had interest.

Accordingly, participants of the procurement procedures whose interests in obtaining a contract were injured by decisions of procuring entities taken contrary to the legal provisions may challenge those decisions. Member States should provide for the independent review of those challenges submitted by suppliers.

The review may be, according to the Protocol, either at the **administrative** or **judicial** level. In the first case, challenges are reviewed by administrative bodies, in the second case by courts. In the event the application for challenge is heard by an authority other than a court, this does not prejudice the right of a supplier initiating the challenge to seek (also) judicial review. In other words, even if the application for review of decisions of procuring entities is submitted, in accordance with national provisions to administrative authorities, suppliers concerned may still request review of the challenge by a court.

It is also very important to remember, that the fact that a supplier sought a review of decision of the procuring entity should not affect possibilities of obtaining a contract in future from that procuring entity. In other words, procuring entities are forbidden to “punish” those suppliers who did not agree with the results of public procurement and decided to request that the decision of a procuring entity is reviewed by “black listing” those suppliers, treating them unfairly in subsequent procurement procedures etc. only because they dared to challenge decisions of that procuring entity.

## 2. Who is entitled to challenge procurement decisions/actions of procuring entities?

Suppliers who claim to have suffered or to be likely to suffer loss or injury due to an alleged action or decision of a procuring entity in which the supplier has or had a legal interest and who allege that the action or decision of a procuring entity does not comply with the public procurement provisions (Bill/Act) may challenge procurement decisions/actions of procuring entities.

For example, a supplier who submitted a tender in a procurement procedure and whose tender was not chosen as the most favourable (he was not awarded a contract) and who is of the opinion that the procuring entity committed errors in evaluation of his tender may challenge that decision of the procuring entity requesting re - evaluation of tenders.

A right to seek review is provided not only to actual participants of a procurement procedure -suppliers who has submitted tenders – but also to suppliers who **were deprived of a possibility to take part in the procurement procedure because of discriminatory description of the object of the procurement or other unfair or biased requirements set by the procuring entity and listed in bidding documents.** If those requirements are not consistent with general principles and provisions concerning public procurement suppliers concerned may also request modification of relevant clauses of bidding documents.

Only an interest in obtaining a particular contract is required of a supplier (and not a possibility, probability or likelihood of winning the contract) in order to have the right to submit challenge.

Suppliers may challenge the action or decision by applying to:

- the procuring entity for reconsideration of the action or decision, or

- to the independent review body or court for a review of the action or decision.

### **3. Subject of a challenge**

Any decision of the procuring entity may be challenged by a supplier who has or has had interest in a given procurement opportunity with the exception of decisions taken in the situations mentioned immediately below.

#### **What cannot be a subject of challenge?**

- **the rejection of a supplier's bid where the bid was rejected on the following grounds:**
  - (i) the supplier that submitted the bid is not qualified;
  - (ii) the supplier that submitted the bid did not accept the procuring entity's correction of an arithmetical error;
  - (iii) the supplier's bid was not responsive;
  - (iv) the supplier, directly or indirectly, gave or agreed to give an employee of the covered entity or other governmental authority a gratuity, an offer of employment or anything of service or value so as to influence an act or decision of or procedure followed by the covered entity;
  - (v) the supplier has an unfair competitive advantage; or
  - (vi) there is a conflict of interest contrary to the provisions of the Bill (Act).

### **4. General principles of review system**

The general principles listed below must be observed by procuring entities as well as review bodies.

#### **Non-discrimination**

Access to the review should be open to all suppliers without discrimination, especially on grounds of their nationality. Also, remedies and their conditions (procedural requirements such as for example time periods – deadlines for submission of applications) available to

foreign suppliers should be at least as favourable as those available to national suppliers. From the point of view of procuring entity the principle of non – discrimination means that they should treat all suppliers in the same manner, in particular with regard to its actions and duties (see below).

### **Effectiveness**

In order to ensure observance of public procurement rules remedies available to suppliers should be effective. It means that procuring entities should try to facilitate the proper conduct of all legal procedures and should always comply with decisions of review bodies.

### **Speed**

One of the aspects of the review procedures, which is especially important in the context of public procurement is speed. In practice, for procuring entities it means that that should try to ensure speed by giving priority to dealing with requests for information from suppliers and responding to those requests quickly.

### **Transparency**

Transparency in the context of remedies and review procedures means, as far as procuring entities are concerned, that maximum information is provided to suppliers through the bidding documents as well as in notifications of procurement decisions, and in particular:

- right to remedies concerning public procurement procedures,
- relevant procedural rules, in particular time periods and name(s) of person(s) receiving pre – trial complaints within the procuring entity,
- all information on how procurement decisions were reached, to the extent this information is relevant for supplier.

### **Confidentiality**

Both the procuring entities and the review bodies should respect the principle of confidentiality. It means that no information may be disclosed if disclosure of such information is likely to:

- impair the protection of essential security interests of the State;
- be contrary to law;

- impede law enforcement;
- prejudice the legitimate commercial interests of the suppliers; or
- impede fair competition.

Since disclosure of information in above cases is prohibited the review body cannot either conduct **public hearings**.

Suppliers participating procurement proceedings in which application for reconsideration was made (see below) as well governmental authorities whose interests are or may be affected by the application have right to participate in any challenge proceedings to which this application relates.

If a supplier is notified of challenge proceedings and fails to participate in the proceedings, the supplier is barred from subsequently submitting a challenge based on the subject matter of the proceedings in which he did not participate.

**Participants** of the review procedure have right to:

- be present, represented and accompanied at all hearings during the proceedings;
- be heard;
- present evidence;
- call witnesses;
- request that a hearing take place in public; and
- seek access to the record of the challenge proceedings.

## **5. First stage of the review procedure – application to the procuring entity**

The first legal remedy available to the aggrieved suppliers is an **application for reconsideration** (of a decision or action) by the procuring entity which took the decision or action which is challenged. This application is submitted to the procuring entity which adopted the decision which is challenged by the supplier.



## 5.1 Formal requirements concerning applications for reconsideration

Applications for reconsideration should satisfy certain formal requirements.

They should:

- be submitted in writing;
- be properly addressed (to the head of the procuring entity concerned);
- contain clear identification of the loss or injury suffered (or likely to be suffered) and the alleged non - compliant action or decision; and
- on time (not later than the end of time period for submission of applications – see below).

## 5.2 Time limits for submission of application

Application for reconsideration of a decision or action should be submitted in due, by the end of the period of time which depends on the type of decision and stage of the procedure when it is adopted:

- a) In the case of the invitation to bid: the application should be submitted prior to the deadline for submitting bids.
- b) As regards decisions made or actions taken by the procuring entity during the procurement proceedings to which point (a) does not apply, the application should be submitted:
  - (i) within **the standstill period** (see above) set out in the bidding documents; or
  - (ii) prior to the entry into force of the procurement contract, **if there is no standstill period applied.**

### **5.3 Procedure following receipt of applications. Obligations of procuring entities**

Following receipt of application for reconsideration the procuring entity that has received this application should promptly submit the application for publication on the Notice Board (see above).

Within 10 working days of the receipt of application the procuring entity should decide:

- whether to consider or dismiss the application;
- in the case it decided to consider the application – whether to suspend the procurement proceedings to which the application relates;
- in the case it has decided to suspend the procurement proceeding – how long the suspension should be;
- notify all the suppliers who submitted bids, proposals or quotations in the procurement proceeding to which application relate:
  - about the submission of the application,
  - about the substance of the application, and
  - on the procuring entity's decision to consider or dismiss the application;

In the case the application is being considered the procuring entity should notify all suppliers who submitted bids in the procurement proceeding in which application was submitted whether the procurement proceeding is suspended or not; if it is suspended the procuring entity should inform suppliers on how long the suspension will last.

If the application is dismissed or the procurement proceedings are suspended the procuring entity should notify all suppliers who submitted bids in the relevant procurement proceedings of the reasons of dismissal of the application or the decision to suspend the proceedings.

If the procuring entity received application which satisfied the requirements presented above (is timely, was duly delivered and contains information about the alleged breach) the procuring entity is not allowed to do anything that would bring the procurement contract concerned into force.

## 5.4 Outcome of review of application

**There are two possible outcomes of the submission of application.**

The application submitted by a supplier may be either:

- dismissed or
- considered.

In the latter case, following the examination of the application the procuring entity may either change (reverse) its decision if it agrees with the challenges submitted in the application or uphold its decision if it is not convinced by the arguments presented by the supplier who submitted the application.

## 5.5 Dismissal of application – grounds

The application should be dismissed if:

- it is manifestly without merit (it is not grounded),
- **does** not satisfy above mentioned requirements (for example, it was submitted too late, it is not in writing or does not provide information about alleged breach of the procurement rules by the procuring entity),
- the applicant does not have sufficient interest to properly bring the application.

## 5.6 Consideration of application

If the procuring entity decides to consider the application the procuring entity may reverse or uphold any action or decision taken during the procurement proceedings to which the application relates.

In accordance with the principles of rapidity and effectiveness the decision of the procuring entity concerning application it had decided to consider, should be taken no later than within the prescribed working days from the moment of receiving the application.

Any decision adopted the procuring entity concerning application it has decided to consider should be:

- in writing,
- a part of the record of procurement proceedings,
- contain the reasons for the decision,
- communicated to the applicant, other participants of the challenge proceedings and all other participants in the procurement proceedings to which the application relates.

The procurement entity may enforce the procurement contract not sooner than before the expiry of the period of [prescribed] working days after it has notified the applicant and other participants of the challenge proceedings of its decision.

## **6. Stage 2 of the review procedure - application to independent review body**

In the event the applicant is dissatisfied with the decision of the covered entity, issued in response to the application for reconsideration he may commence proceedings before the independent review body or court by submission of the application to that body or court. The applicant may also submit this application if the procuring entity failed, on time to issue a decision in response to an application.

Where proceedings are commenced in the independent review body or in the court the procuring entity is no more allowed to consider the application of the supplier.

### **6.1 Independent review body. Organization and role**

The Model Bill requires that challenges which may arise in public procurement proceeding are subject to independent review. Obviously, review of the challenge by the procuring entity which issued the decision or committed the action which was then challenged, does not satisfy the requirement of independent review. "Independence" in the context of the review means the total lack of involvement with the procuring entities concerned as well as any aspects of the procurement process carried out by those procuring entities.

For this reasons, the Bill provides for rules concerning establishment and functioning of independent review bodies.

## **6.2 Grounds for application to the independent review body**

An applicant may apply to the independent review body for a review of:

- a) a decision or action taken by the procuring entity in relation to procurement proceedings or proceedings for the reconsideration of its decision or action;
- b) a decision to revoke the registration of the applicant as a registered supplier (see above for information about “registered suppliers”);
- c) the decision concerning the classification of the applicant for the purposes of registration as a registered supplier;
- d) the procuring entity entity’s failure or refusal to issue a decision concerning the application the procuring entity decided to considered.

## **6.3 Requirements concerning application to the independent review body**

Applications to the independent review body should be in writing.

Applications should be submitted in timely manner:

- in the case of applications for review decisions or actions taken by the procuring entity prior to the selection a successful bid – should be submitted prior to the deadline for presenting submissions;
- in the case of applications for review of other decisions or actions than mentioned above and which were taken by the procuring entity during the procurement proceedings –
  - (i) should be submitted within the standstill period (see above)
  - (ii) where there is no standstill period, be submitted within [the prescribed] working days after the time at which the applicant became aware of the circumstances giving rise to the application or the time at which the applicant ought to have become aware of the circumstances giving rise to

the application, whichever is earlier, but no later than [the prescribed] working days after the entry into force of the procurement contract [or a decision to cancel the procurement]; or

- in the case applications for the review of a procuring entity' failure to issue a decision or issuing a decision with which the applicant is dissatisfied should be submitted within [prescribed] working days after the decision of the procuring entity ought to have been or was communicated to the applicant.

#### **6.4 Rights of suppliers who submitted application**

A supplier may, in writing, request that the independent review body accepts an application for review filed after the expiry of the standstill period:

- i) if the request is submitted no later than [prescribed] working days after the entry into force of the procurement contract or decision to cancel the procurement; and
- ii) where the application raises significant public interest considerations.

Where the independent review body, to whom a request was submitted pursuant is satisfied that the requirements mentioned above are met, it should:

- a) accept the application for review;
- b) no later than 3 working days after its receipt of the application, in writing, notify the applicant, procuring entity and all other participants in the procurement proceedings to which the application relates of the application and its substance;
- c) publish a notice of the application on the Notice Board.

#### **6.5 Obligations (responsibilities) of procuring entities following submission of application**

Where a procuring entity is notified about the submission by the applicant of the application to the independent review body it should make accessible to the independent review body all the documents in its possession relating to the procurement proceedings.

If the procuring entity is notified about the submission of an application, it is not allowed to do anything that is likely to bring a procurement contract in relation to which the notification was received into force.

However, the procuring entity may, at any time, request that the independent review body authorise it to conclude a procurement contract on the grounds that urgent public interest considerations so justify.

The independent review body may, upon consideration of such a request authorise the procuring entity to conclude a contract if it is satisfied that urgent public interests so justify.

In the event independent review body decides to authorise a procuring entity to enter into a procurement contract notwithstanding the existence of an application made in relation to the procurement contract, the independent review body should:

- include in the record of procurement proceedings the decision regarding the authorisation and a statement of reasons for the decision; and
- in writing, promptly communicate its decision to the covered entity, the applicant, all other participants in the challenge proceedings and to all other applicants in the procurement proceedings.

## **6.6 Suspension of the procurement procedure**

Suspension of the procurement proceedings or the performance of the procurement contract aim to protect the interests of the applicant against conclusion of a contract by the procuring entity before the adoption of a ruling by the independent review body. Accordingly, the independent review body may order the suspension of the procurement proceedings or the performance of the procurement contract, if it finds that a suspension is necessary to protect the interests of the applicant.

However, if the independent review body decides that urgent public interest considerations require the procurement proceedings or the performance of the procurement contract to continue it should not order the suspension of the procurement proceedings or the performance of the procurement contract.

### **The independent review body should:**

-promptly, after receipt of an application to suspend the procurement proceedings or the performance of the procurement contract and no later than 3 working days after its receipt of the application, notify all participants in the procurement proceedings of whether procurement proceedings or the performance of the procurement contract should be suspended.

If the independent review body decides to suspend the procurement proceedings or the performance of the procurement contract, as the case may be, the independent review body should order the suspension of the procurement proceedings or the performance of the procurement contract.

The independent review body may order that any suspension be **extended** if it finds that, under the circumstances, an **extension** is necessary to protect the interests of the applicant. Where the independent review body decides not to suspend the procurement proceedings or the performance of the procurement contract the independent review body should provide the applicant and the procuring entity reasons for its decision on whether to issue a suspension.

### **How long the suspension may last?**

The suspension should last for a period of 10 working days that can be extended. In case of urgent public interest considerations the independent body should not order the suspension of the procurement proceedings or the performance of the procurement contract.

## **6.7 Decisions of the independent review body**

Following the review of the application the independent review body should adopt one or more decision from the following:

- (a) order the procuring entity to cease:
  - (i) acting;
  - (ii) taking a decision; or



(iii) following a procedure,

that is not in compliance with the provisions of the Bill;

(b) require the procuring entity, having acted or proceeded in a manner that is not in compliance with the provisions of the Bill, to

(i) act;

(ii) take a decision; or

(iii) proceed,

in a manner that is in compliance with provisions of the Bill;

(c) overturn, in whole or in part, an act or a decision of the procuring entity,

(d) overturn the award of a procurement contract that has entered into force,

(e) revise a decision of the procuring entity,

(f) uphold a decision of the procuring entity,

(g) order that a procurement proceeding be terminated,

(h) dismiss the application,

(i) require the payment of compensation,

(j) take such other action or decision as it considers to be appropriate in the circumstances.

#### **7. Stage 3 of the review procedure - appeals against decision of the independent review body to a court**

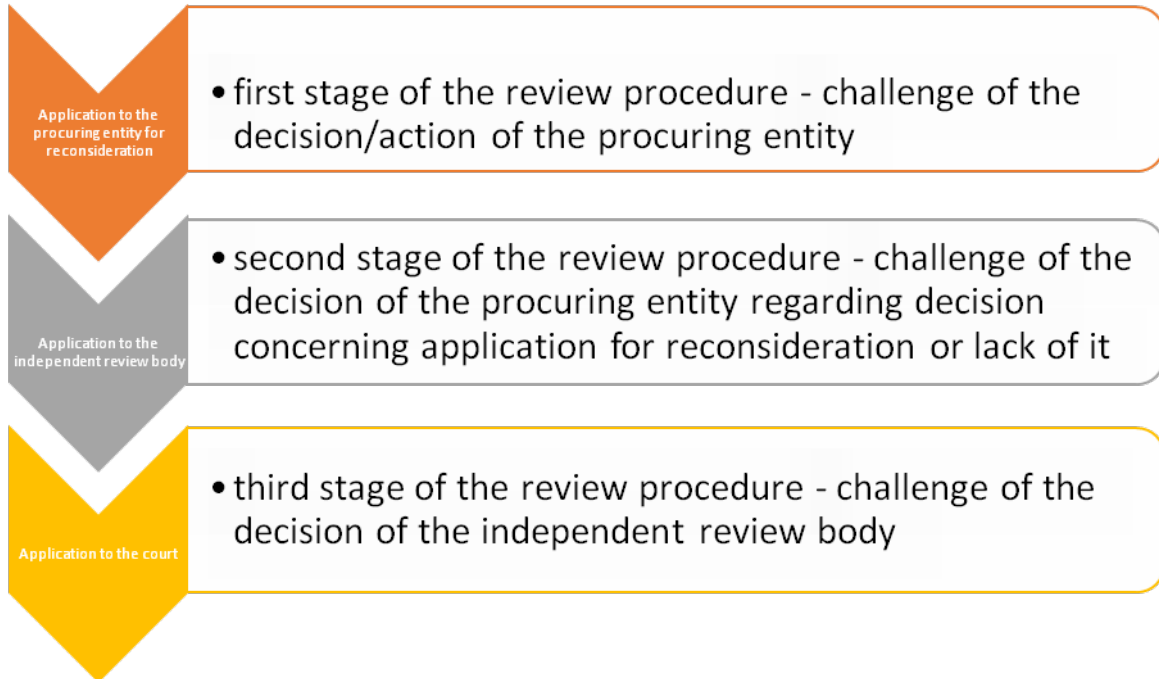
If the applicant is dissatisfied with the decision of the independent reviewed body issued in response to an application for review or the independent *review* body fails to issue a decision the applicant may appeal to the court within such time and in such manner as may be prescribed (by the relevant provisions).

The applicant may only appeal a decision of the independent review body on grounds on which an application for review may be made.

At the hearing of an appeal **the court** may then:

- dismiss the appeal and confirm the independent review body's decision;
- allow the appeal, set aside the decision of the independent review body and direct that independent review body re-conducts its interview of the matter in relation to which the application was made;
- allow the appeal and issue a decision which would replace the decision of independent review body.

## Review procedures – summary



### Self – testing questions

- 1) What is the purpose of provisions on review measures and procedures?
- 2) Who is allowed to challenge decisions of the procuring entity?
- 3) What can be a subject of challenge in public procurement proceeding?
- 4) Can you name some principles of public procurement review?
- 5) Can you name some situations where it is not possible to challenge decisions of the procuring entity?
- 5) What is the first stage of review procedure?
- 6) What are the formal requirements concerning application for reconsideration?
- 7) What does it mean “the independent review in the context of public procurement?”
- 8) What is the second stage of the review procedure?
- 9) Can the procuring entity sign a procurement contract if it was notified that appeal was submitted to the review body?
- 10) Is possible to appeal against the independent review body? If yes, to whom?