



**THE REPUBLIC OF KENYA**

# **PROCUREMENT MANUAL FOR WORKS**

First Edition  
April 2009

## Foreword

The Government of Kenya embarked on the reform of public procurement to enhance its efficiency, transparency and value for money. In 2005 the Parliament enacted the Public Procurement and Disposal Act. The Minister for Finance issued the Public Procurement and Disposal Regulations that operationalized the Act in 2006. These two legislations constitute the foundation and authority for all public procurement activities in the Republic of Kenya.

With support from the United States Agency for International Development (USAID), the PPOA developed the Public Procurement and Disposal General Manual. To supplement the general manual, PPOA and its partners are also developing sector specific procurement manuals.

In 2007 the Government of Kenya (GOK) agreed with USAID the Millennium Challenge Account Threshold Project (MCA-TP) for strengthening the public procurement system in Kenya. ARD, Inc have been contracted by USAID to carry out various activities under the MCA-TP, including the preparation of eight sector manuals, including this manual for procurement of works. This Manual has been prepared by ARD's partner in the MCA-TP, Crown Agents, in consultation with PPOA, which provided direction and guidance during its preparation and approved this final version for use by all sections of the GOK when procuring for works.

It is hoped that all PEs will find this manual very useful.



.....  
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## DEFINITIONS

The terms used in this Manual have the following meanings assigned to them.

ITEM	WORD OR TERM	DEFINITION/DESCRIPTION
1	Accounting Officer	For a public entity other than a local authority, means the person appointed by the Permanent Secretary to the Treasury as the accounting officer or, if there is no such person, the chief executive of the public officer;  or  for a local authority, the town or country clerk of the local authority.
2	Code of Ethics	A statement of the standards of practice and conduct to be followed by all Civil Servants and officials of Government owned organisations in procurement activities.
3	Evaluation Committee	A committee established by the procuring entity to undertake evaluation and ranking of tenders, proposals and quotations for procurement.
4	Procurement	The acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination
5	Procurement Officer	An officer of the Procuring Entity having formal authority to undertake procurement activity.
6	Procuring Entity (PE)	A public entity making procurement to which the Act applies. Public Entity is defined at Section 3(1) of the Act.
7	Project Manager	A technical person of or appointed by the Procuring Entity with the responsibility to manage and supervise a Works Contract during execution.
8	Public Procurement Oversight Authority (PPOA)	The overall body corporate responsible for the regulation of public procurement.
9	Request for Proposals (RFP)	The term commonly used for tender documents in the procurement of

<b>ITEM</b>	<b>WORD OR TERM</b>	<b>DEFINITION/DESCRIPTION</b>
		consultancy services
10	Request for Quotations (RFQ)	A simple procurement procedure for the purchase of low value goods, works and simple non-consultancy services.
11	Tender Opening Committee	A committee established by the Accounting Officer to conduct the opening of tenders submitted by bidders
12	Works	Works means the construction, repair, renovation or demolition of buildings, roads or other structures and include: <ul style="list-style-type: none"><li>▪ The installation of equipment and materials</li><li>▪ Site preparations; and</li><li>▪ Other incidental services</li></ul>



## ACRONYMS

1.	ARD, Inc	Associates in Rural Development Incorporated
2.	BOLT	Build, Operate, Lease and Transfer
3.	BOO	Build, Operate and Own
4.	BOOT	Build, Operate, Own and Transfer
5.	BOQ	Bill of Quantities
6.	BOT	Build, Operate and Transfer
7.	DBMF	Design, Build, Maintain and Finance
8.	DBOM	Design, Build, Operate and Maintain (usually referred to as DBO)
9.	DBOMF	Design, Build, Operate, Maintain and Finance
10.	EPC/Turnkey Contract	Engineer, Procure and Construct / Turnkey Contract
11.	ETC	Entity Tender Committee
12.	FIDIC	International Federation of Consulting Engineers
13.	GOK	Government of Kenya
14.	ICT	International Competitive Tendering
15.	IFT	Invitation for Tender
16.	ITT	Instructions to Tenderers
17.	KES	Kenyan Shillings
18.	KSh	Kenyan Shillings
19.	LS	Lump Sum
20.	MCA-TP	Millennium Challenge Account Threshold Project
21.	MFC	Model Form of Contract
22.	NCT	National Competitive Tendering
23.	NEC	New Engineering Contract
24.	PE	Procuring Entity
25.	PPOA	Public Procurement Oversight Authority
26.	PPP	Public Private Partnership
27.	RFP	Request for Proposals
28.	RFQ	Request for Quotations
29.	STD	Standard Tender Documents
30.	TRB	Tender Review Board
31.	TS	Technical Specifications

## **CHAPTER 1: INTRODUCTION**

### **1.1 INTRODUCTION**

#### **1.1.1 Introduction**

The Government of Kenya enacted the Public Procurement and Disposal Act, (Act 3) in October 2005. The Act came into effect on 1<sup>st</sup> January 2007 and Public Procurement in Kenya therefore is subject to the Act and it's implementing Regulations and Administrative Instructions. The Act and Regulations provide the general rules governing Public Procurement in Kenya.

The overall objective of the public procurement system is to provide value for money to the procuring entities and to ensure that public funds are spent in a transparent, efficient and fair manner.

This Manual incorporates policy provisions and procedures for the operation, management and reporting of works procurement in accordance with the Act.

This manual provides guidelines and step-by-step procedures to assist Procuring Entities to undertake public procurement in accordance with the law.

#### **1.1.2 Objectives of the Manual**

This Manual details the standards and procedures to be followed in the procurement of works within the public sector. These standards, policies and procedures are designed to:

- provide uniform procedures for the procurement of works;
- ensure transparency and accountability in all operations, and consistency with the guidelines of donors where necessary;
- ensure the consistent application of the provisions of the Act and Regulations; and
- promote the consistent application of best procurement practices and international standards.

#### **1.1.3 Application and Limitations of Manual**

This Manual applies to the procurement of works by all public organisations as outlined under Section 3 of the Act.

In the event that Public Sector entities have their own specialist procurement regulations and procedures manuals, which have

been subjected to formal certification and approval by the PPOA, the provisions of this Manual will apply when there is no conflict with procedures or standard documentation as detailed in the specialist manual.

Where procurement is financed by a donor the provisions of this Manual will only apply when there is no conflict with the terms of the financing agreement, the guidelines, procedures or standard documentation required by the donor. In the case of any conflict the procedures and decisions of the donor will prevail in accordance with Section 6 of the Act.

Consistent application of the provisions and procedures of the Manual throughout the public service is essential to achieve improved efficiency, transparency, uniformity of documents and decisions, and reduced costs of public procurement.

It is intended that the Manual will be subjected to continuous review by the PPOA to reflect amendments in legislation, changing needs, the commercial environment, and the adoption of new improved procedures and practices.

## **1.2 REVISIONS TO THE MANUAL**

### **1.2.1 Reasons for Revision**

A number of factors may necessitate a need for revision of this Manual including:

- providing uniform procedures for the procurement of works;
- new legislation;
- policy changes by Government or a funding body;
- introduction of new improved practices, policies or procedures;
- removal of outdated practices, policies or procedures; and
- lessons gained from practical experience.

### **1.2.2 Request for Revisions by a Procuring Entity**

Where a revision to the Manual is deemed necessary, a formal request may be submitted to PPOA in accordance with the following procedure:

- The relevant Procuring Entity shall make the request to the PPOA;

- The request shall state the purpose of the revision and provide a comprehensive justification, together with the precise changes suggested to the relevant text of the Manual;
- The PPOA will formally consider each request, seek legal and procurement practice advice and may agree to a general modification of the Manual, a specific exemption to be granted to the requesting Procuring Entity, or may reject the request giving reasons.

### **1.3 USE OF STANDARD PROCUREMENT FORMS**

To assist in the adoption and use of standard practices and procedures throughout public procuring entities, the use of Standard Procurement Forms (SPFs) is necessary. The PPOA is designing standard templates to be used for the following procedures.

#### **1.3.1 SPF 1 – Procurement Requisition Form**

This form, which initiates the procurement process, should be in accordance with the 3<sup>rd</sup> Schedule of the Regulations. This Schedule of the Act is expected to specify as a minimum the following information:

- state the objective of the works;
- establish the preliminary specifications;
- confirm budget availability;
- indicate authority for the procurement; and
- allocate a unique Procurement Number to be used for procurement tracking and monitoring.

#### **1.3.2 SPF 2 –Forms for Approval by Tender Committee**

These Forms seek the approval of the Entity Tender Committee for specific outputs and has five Sections as follows:

- Section A – Request for Approval of detailed Plans and Technical Specifications by end-user department.
- Section B – Request for Approval of Procurement Method and Tender Documents including detailed Plans and Technical Specifications,
- Section C – Request for Approval of Tender Evaluation Report and Contract Award Recommendations.

- ❑ Section D – Request for Approval of Contract Documents and Contract Signature.
- ❑ Section E – Request for Contract Amendments.

The purpose of these Forms is to standardise the format of submissions to the Tender Committee, to act as a checklist of information to be provided to the Committee, and to ensure that submissions are duly authorised in accordance with the Act. Refer to Regulation 10 for the functions and approvals by the Tender committee.

### 1.3.3 **SPF 3 – Tender Evaluation Report**

This is a standard tender evaluation report format for the procurement of works.

The purpose of this template is to standardise the preparation and improve the content of evaluation reports submitted to the Tender Committee for approval. Please refer to **Appendix 1** for a sample template.

### 1.3.4 **SPF 4 – Tender Evaluation Report (Consultant Services)**

This format has two Sections for separate Technical and Financial Evaluations to allow for “two-envelope” tendering.

The purpose of this form is to standardise the preparation and improve the content of evaluation reports submitted to the Tender Committee for approval.

### 1.3.5 **SPF 5 –Procurement Reports**

It is good practice for procuring entities to keep procurement reports in order to maintain good audit trails. It is therefore recommended that the Tender Committee submit monthly reports to the Accounting Officer.

## 1.4 **PROCUREMENT NUMBERING SYSTEM**

### 1.4.1 **Purpose:**

The purpose of the Procurement Numbering System is to ensure each requirement is given a unique identification to assist in the tracking, monitoring and audit of procurement and in the tracing and maintenance of records and files. The Procurement Number is assigned at the requisition stage and

will form the basis for document filing and management information systems.

Procurement Numbers are allocated from a register maintained by a Stores Department, or the Head of the User Department, Programme or Project as appropriate. Numbers must not be re-used, even if the original procurement is cancelled.

#### 1.4.2 Structure of the Procurement Number

The basic Procurement Number shall identify as a minimum:

- The Procuring Entity
- The Department or Project.
- The Financial Year (e.g. 2008).
- A unique Sequence Number for each requirement.

A typical procurement number should take the form of MOPW/C/ICT/W.05/2009, where:

- MOPW represents Sector, such as Ministry of Public Works
- C represents nature of works, such as Civil Works
- ICT represents procurement method
- W.05 represents serial number of the Works procurement (e.g. 5<sup>th</sup> Works procurement in the current year within the department)
- 2009 Represents year of procurement activity

It is however noted that the current procurement numbering system of the Ministry of Public Works has the form: 87/C/08/09, where:

- C represents nature of works, i.e. Civil Works
- 87 represents serial number of the Works procurement (e.g. 87<sup>th</sup> Civil Works procurement in the department)

Omissions with this numbering system include references to the Procuring Entity and procurement method as well as the lack of clarity regarding the year of procurement activity. The Ministry of Public Works and other entities may consider a modification to

their procurement numbering system to capture all relevant information.

The Public Procurement Oversight Authority will issue further detailed guidelines on the construction of procurement numbers to ensure compatibility with existing numbering systems.

#### **1.4.3 Use of Procurement Numbers**

The procurement number must appear on all correspondence and documents related to the procurement.

### **1.5 STANDARD TENDER DOCUMENTS**

Tender documents are used to communicate all the necessary requirements, information and instructions to prospective tenderers for them to be able to submit their tenders. The contents and complexity of tender documents varies with the type of procurement, method of procurement, the value and financing arrangements.

Procuring Entities should refer to the 3<sup>rd</sup> Schedule of the Regulations for the list of Standard Tender Documents which can be obtained from the PPOA website: <http://www.ppoa.go.ke>

The list of Standard Tender Documents applicable to Works as per the Schedule is:

- Standard Tender Documents for Procurement of Works (Buildings and Associated Civil Engineering Works)
- Standard Tender Documents for Procurement of Works (Roads, Water, Bridges, etc)
- Standard Tender Documents for Procurement of Works (Electrical and Mechanical Works)
- Standard Tender Documents for Procurement of Small Works
- Standard Tender Documents for Maintenance Services
- Standard Tender Documents for Design and Build (Turnkey)
- Standard Tender Documents for Supply and Installation
- Standard Tender Document for Pre-Qualification

## 1.6 FIRST PRINCIPLES OF PROCUREMENT

### 1.6.1 Procurement Definitions

- The Whole Process of Acquiring Goods and Services from a Third Party (Source: **DFID Procurement Department**)
- The acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets services or goods including livestock or any combination (Source: **Procurement Act**).
- It is the management of sustainable acquisition of goods, works and services to optimise value for money through a professional, auditable and transparent Framework (Source: **Alternative Definition**)

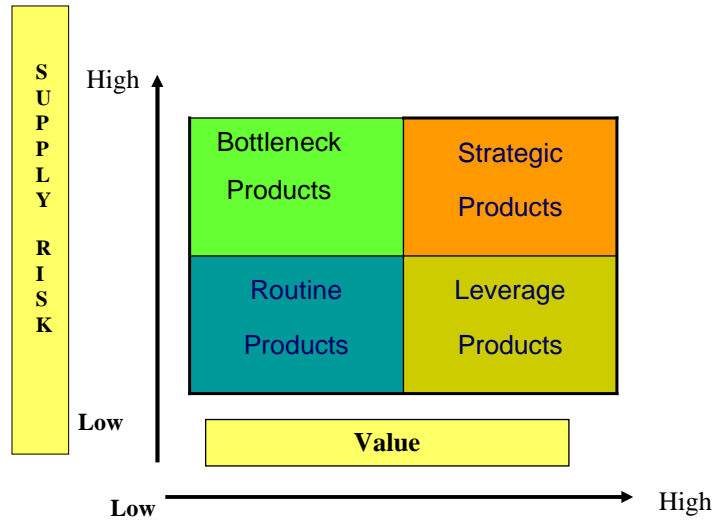
### 1.6.2 Types of Procurement (Section 29 of the Act)

- Open Tendering (**Section 50** of the Act)
  - International Competitive Tendering (ICT)
  - National Competitive Tendering (NCT)
- Alternative Procurement Procedures
  - Restricted Tendering (**Section 73** of the Act)
  - Direct Procurement (**Section 74** of the Act)
  - Request for Proposals (Consultant Services) (**Section 76** of the Act)
  - Request for Quotations (**Section 88** of the Act)
  - Low –value Procurement (**Section 90** of the Act)
  - Specially Permitted Procurements (Management or PPP Contracts) (**Section 92** of the Act)



### 1.6.3 Supplier Positioning

## Supplier Positioning (1)



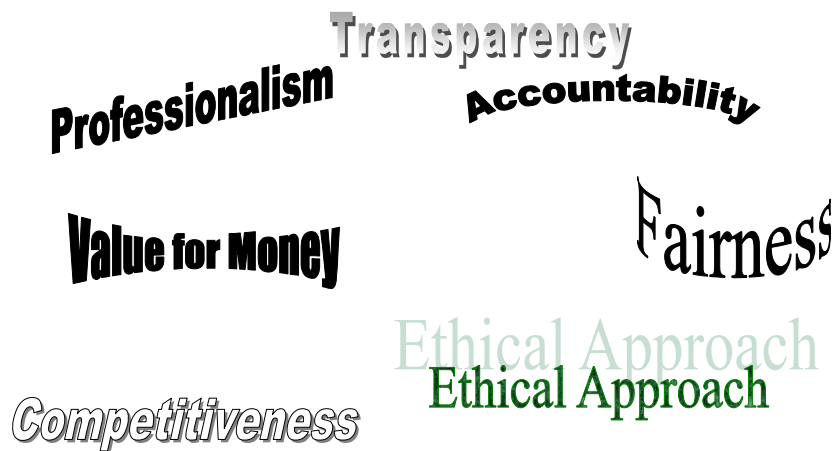
#### 1.6.4 Strategic Procurement Model

### Strategic Procurement Model



#### 1.6.5 Principles of Procurement

### Principles of Procurement



### **What is Professionalism?**

- It is the discipline whereby educated, experienced and responsible procurement officers make informed decisions regarding purchase operations.
- Enables more informed judgements about what is available in national and international markets.
- Gains knowledge of good domestic and internationally acceptable procurement practices
- Enables individuals and organisations to implement global and national business practices within the governmental procurement laws

### **What is Transparency [Section 2 (d) of the Act]?**

- Transparency means that the same rules apply to all suppliers and that these rules are publicised as the basis of procurement decisions prior to their use.
- Enables the creation of open, fair and transparent procedures
- Creates goodwill between organisations and their stakeholders

### **What is Accountability [Section 2 (d) of the Act]?**

- It is the process of holding an individual(s) or an organisation fully responsible for all aspects of the procurement process over which they exert authority.
- Strengthens the perception of transparency and fairness
- Reduces the incidence of corruption

### **What is Competitiveness [Section 2 (b) of the Act]?**

- Actively encouraging greater supplier participation in the bidding process through advertising, sourcing reviews, pre-qualification etc.
- Potential for cost savings
- Increases the potential supplier base
- Greater awareness of new developments

### **What is Fairness [Section 2 (c) of the Act]?**

- Showing consideration and impartiality in all stages of the procurement process, especially demonstrating equality in bid evaluations.
- Development of mutual trust
- Increases the potential supplier base
- Greater awareness of new developments

### **What is Ethical Approach [Section 2 (c) of the Act]?**

- Exemplary approach to all procurement processes that cannot be questioned or criticised.
- Reduction in corruption
- Embodies all procurement principles
- Enhanced profile for procurement

#### **1.6.6 Objectives of Procurement**

The Six objectives for good procurement:

- Procure the **RIGHT ITEM**
- Procure the **RIGHT QUALITY** goods, works or services from a reliable supplier;
- in the **RIGHT QUANTITY** ensuring cost effectiveness and;
- delivery at the **RIGHT TIME**;
- delivered to the **RIGHT PLACE**; and
- Paying the **RIGHT PRICE** whilst achieving the lowest possible total cost.

## **CHAPTER 2: RECORDS MANAGEMENT**

### **2.1 DOCUMENTATION/RECORDS MANAGEMENT**

#### **2.1.1 Documentary Records**

Documentary records, both in print or electronic format, are essential for efficient and effective management of activities, provide evidence in support of decisions and actions taken and provide an audit trail for verification of transparency, accountability and effectiveness. Efficient records management is essential to ensure effective storage, retrieval and use with due regard to security, integrity and confidentiality.

All officers shall ensure they obtain, retain and maintain appropriate documentation supporting the activities for which they are responsible.

Senior officers involved in approval or authorisation shall ensure that any transactions they approve or authorise are backed by appropriate supporting documentation.

The PPOA has prepared a Procurement Records Management Procedures Manual to guide Procuring Entities on complying with the law in respect of good record-keeping practices.

#### **2.1.2 Filing/Record Management System**

Procurement Units have a general responsibility for maintaining Procurement Dossiers and Contracts Registers, but each Procuring Entity must ensure that complete documentation is maintained in respect of all procurement activities and for contracts and agreements entered into.

Responsibility for the official maintenance of record files, authority to access files and co-ordination of management and follow-up actions must be clearly defined in each Procuring Entity to avoid:

- A duplicate Sequence Number for any requirement.
- Partial and incomplete records being held by several different departments and individuals;
- Unauthorised access to records; and
- Failure to take necessary action at the right time.

### 2.1.3 Procurement Unit Records Management

All documents regarding a particular procurement case shall be kept for future reference and monitoring and control purposes. The recommended filing structure for a record of procurement shall include the following documentation:

- Original Request from Originating Officer
- Correspondence with Originating Officer
- Correspondence with Suppliers/ (post-order only)
- Internal Correspondence within Procurement Unit
- Requests for Expressions of Interest
- Shortlist or Advertisement
- Tender documents and Specifications/Terms of Reference
- Correspondence with suppliers relating to Tender
- Tenders, Quotations or Pro-forma invoices received
- Tender opening records
- Record of Tender Securities and release
- Evaluation Report
- Submission to Tender Committee & relevant Minutes of decisions
- Notice of Contract Award and publication
- Contract/Purchase Order & Acknowledgement of receipt
- Delivery Documentation
- Inspection and Acceptance Reports
- After sales warranty and performance claims
- Copy of Record of Commitment of Funds (A&EI Form)
- Copy Invoices or Certificates
- Copy Payment Vouchers
- Record of Retentions and release
- Performance Security and release.

## **CHAPTER 3: PRE-QUALIFICATION OF CONTRACTORS**

Pre-qualification for works contracts should be as outlined in Regulation 23 of the Act. It is used to identify tenderers, who are qualified prior to the submission of tenders, and:

- is appropriate for large or complex works, or in other circumstances when the high costs of preparing detailed tenders could discourage competition;
- is often used for contracts to be let under turnkey, design and build, or management contracting;
- ensures that invitations to tender are extended only to those contractors who have adequate capabilities and resources;
- helps to ensure that only tenders from competent contractors are considered and eliminates disputes that may arise from rejection of lowest tenderers because the tenderers are not considered qualified;
- may be required on donor funded procurements.

### **3.1 PRE-QUALIFICATION CRITERIA**

Pre-qualification is based upon the capability and resources of prospective tenderers to perform the particular contract satisfactorily, taking into account their:

- experience and past performance on similar contracts;
- capabilities with respect to personnel, equipment, and construction facilities;
- required licensing and professional registrations; and
- commercial and financial resources.

### **3.2 ADVERTISEMENT FOR PRE-QUALIFICATION**

The invitation to pre-qualify for tender on specific contracts or groups of similar contracts shall be advertised as per regulation 23 (2) and shall contain the:

- name and address of the Procuring Entity;
- nature and location of the works to be effected;
- desired or required time for the completion of the works;
- criteria and procedures to be used to evaluate the qualifications of contractors;

- means to obtain the pre-qualification documents and the place from where they can be obtained;
- price charged by the Procuring Entity for the pre-qualification documents (which shall reflect only the cost of printing and provision to contractors);
- currency and terms of payment for the pre-qualification documents;
- language in which the pre-qualification documents are available; and
- place and deadline for the submission of applications to prequalify and the time allowed for the preparation of pre-qualification applications (which shall not be less than four weeks).

### **3.3 PRE-QUALIFICATION DOCUMENT**

A Procuring Entity shall supply a set of prequalification documents as outlined under Regulation 24 to each contractor that requests them. The pre-qualification documents shall include:

- instructions to prepare and submit prequalification applications;
- a summary of the main terms, qualifications and conditions required for the procurement contract to be entered into as a result of the procurement proceedings;
- any documentary evidence or other information that must be submitted by contractors to demonstrate their qualifications;
- the manner and place for the submission of applications to pre-qualify and the deadline for the submission, expressed as a specific date and time which allows sufficient time for contractors to prepare and submit their applications, taking into account the reasonable needs of the Procuring Entity;
- evaluation criteria; and
- any other requirement that may be established by the Procuring Entity in conformity with the Act and Regulations relating to the preparation and submission of applications to pre-qualify and to the prequalification proceedings.



### **3.4 PRE-QUALIFICATION EVALUATION**

No formal opening of submissions is required but a formal evaluation of the capabilities of each supplier is required by the (Technical) Evaluation Committee against the criteria as stated in the advertisement.

- Where a large number of contractors pass the stated qualification criteria, it may not be realistic to invite more than eight to participate in the specific tender. If so, only the best qualified contractors should be selected and invited to tender.
- Inform all applicants of the results of pre-qualification. Applicants who fail to meet the pre-qualification criteria should be briefly advised of the reasons. No further correspondence will be entered into regarding applications.
- When pre-qualification is completed, issue the Tender Document to all qualified contractors, or to an appropriate shortlist of the qualified tenderers.

### **3.5 PRE-QUALIFICATION PROCESS**

The Procuring Entity shall respond to any request by a contractor for clarification of the prequalification documents if the request is made prior to the deadline for the submission of applications to pre-qualify as per Regulation 24 (5). The response (to all bidders) by the Procuring Entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to pre-qualify.

All applicants should be notified of the results of pre-qualification. Applicants who fail to meet the pre-qualification criteria should be briefly advised of the reasons. No further correspondence should be entered into regarding applications.

### **3.6 CLASSIFICATION OF CONTRACTORS**

#### **3.6.1 Purpose of Classification**

The Classification Register is solely for the use by the Procuring Entity and other institutions which may require the services of Building and Civil Contractors for the execution of projects.

The classification exercise aims at the proper grading of contractors into categories and financial classes. The inclusion of a contractor's name in the Register is not compulsory, but it

should be noted that only contractors who are thus classified would be eligible to undertake building and civil engineering contracts awarded by Procuring Entities using the Classification Register.

The Classification Register should be maintained and updated regularly by the appropriate Technical Ministry. In Kenya, the under listed Technical Ministries are involved with the classification of Contractors:

- Ministry of Roads
- Ministry of Public Works
- Ministry of Water

### 3.6.2 Classification Process

Contractors who wish to apply to a particular PE for pre-qualification in accordance with the published Guidelines to be provided by Technical Ministries shall first satisfy themselves that they fulfil the basic minimum requirements of the Guidelines. Classification into the appropriate Categories and Classes will be required before a contractor can bid for a job from that PE.

The Guidelines would normally provide details of the registration process that may include the following:

- Purchase Application Form from the PE of interest;
- Complete the Application Form and return to the PE with the full set of specified supporting documents;
- A Technical Sub-Committee of the PE vets and processes the application and submits findings to Contractors Classification Committee for consideration;
- The Contractors Classification Committee reviews the report of the Technical Sub-Committee and forwards its recommendations to the Accounting officer for further consideration and approval.
- Successful applicants are asked to pay the prescribed license fees.
- An applicant shall be deemed qualified for classification if the applicant satisfies the prescribed minimum requirements. These may include:
  - Property
    - ❖ Movable
    - ❖ Immovable
  - Experience
    - ❖ Award Letters for Jobs Executed of similar nature
    - ❖ Corresponding payment certificates
  - Personnel

- ❖ Key Technical Staff
- ❖ Supporting Staff
- Finance
  - ❖ Fixed Assets
  - ❖ Liquid Assets

The Accounting Officer may sign the Classification Certificate for the Contractor for the appropriate Category and Class.

### 3.6.3 Classification by Ministry of Public Works in Kenya

The Ministry of Public Works categorises contractors according to the value of work and further according to whether they are General (Main) or Specialised Contractors.

#### a)Classification of General Contractors

Category	Value Limit (KSh)
A	Unlimited
B	Up to KSh 250,000,000.00
C	Up to KSh 150,000,000.00
D	Up to KSh 100,000,000.00
E	Up to KSh 50,000,000.00
F	Up to KSh 20,000,000.00
G	Up to KSh 10,000,000.00
H	Up to KSh. 5,000,000.00

#### b)Classification of Specialist Contractors

Category	Value Limit (KSh)
A	Unlimited
B	Up to KSh 50,000,000.00
C	Up to KSh 30,000,000.00
D	Up to KSh 20,000,000.00
E	Up to KSh 10,000,000.00
F	Up to KSh 4,000,000.00
G	Up to KSh 2,000,000.00
H	Up to KSh. 1,000,000.00

### 3.6.4 Criteria for Registration of Contractors

A contractor applying for registration or upgrading to a particular class will be evaluated on four basic requirements as described below.

- a) Such a firm has a certificate of registration from the Registrar of Companies either as a limited liability company, partnership or sole proprietorship. In case of a limited liability company the Memorandum and Article of Association must be certified by the Registrar of companies.
- b) At least one of the Directors or Partners must have the minimum technical qualification relevant to construction. The aggregate shareholding of the technically qualified directors(s) shall not be less than 10 per cent of the issued shares.

The following are the minimum technical qualifications which are applicable for the various types of contractors:

Item	Type of Contractor	Minimum Technical Qualification
1.	<b>Category A:</b> Building and Civil Engineering Works	Ordinary National Diploma
2.	<b>Categories B-D:</b> Building and Civil Engineering Works	KIHBT or Technical Certificate from a recognised Institution
3.	<b>Categories E-H:</b> Building and Civil Engineering Works	Govt. Trade Test Grade 1
4.	Electrical Installations	Electrician Licence C
5.	Generating Plants, Lifts and Escalators	Electrician Licence D
6.	Telecommunication (PABX, Intercoms and Telephone Wiring)	Licensed by CCK
7.	Radio Communication	Licensed by CCK
8.	Structured Cabling	Linsenced Installer by competent Authority
9.	Plumbing and Drainage	Local Authority –Drain Layers and Plumbers License
10.	Boilers, Incinerators and Pressure Vessels	Boilers Inspectors' License/Certificate under Factories Act CAP 5i4 Section 37
11.	All Other Specialist Works	Skill, Experience, Value of previous projects completed and relevant academic qualification

c) In addition the committee shall review the curriculum vitae each Director/Partner to ensure that they are persons whose professional and general conduct, in the opinion of the committee, qualify them as fit to be registered as approved contractors.

d) Pin and VAT registration certificate:

### 3.6.5 **Renewal of Classification Certificates**

Contractors are required to resubmit all application information at the end of the validity period for a reassessment of the contractor's current status. However, contractors may re-apply for a review of their classification status before the expiry of the certificate when there has been a marked change in the firm's personnel and/or equipment holding which will substantially modify the status of the contractor.

The re-assessment of contractors' application information takes into account the following considerations:

- Timeliness of project completion;
- Quality of construction;
- Working within budget;
- Site safety records; and
- Environmental impact and assessment records.

Contractors found to have rendered unsatisfactory services could have their Classification Certificates withdrawn or the Financial Class reduced.

## **CHAPTER 4: THE PROCUREMENT PROCESS FOR WORKS**

### **4.1 DEFINITION OF WORKS [SECTION 3 (1) OF THE ACT]**

Works means the construction, repair, renovation or demolition of buildings, roads or other structures and include:

- The installation of equipment and materials
- Site preparations; and
- Other incidental services

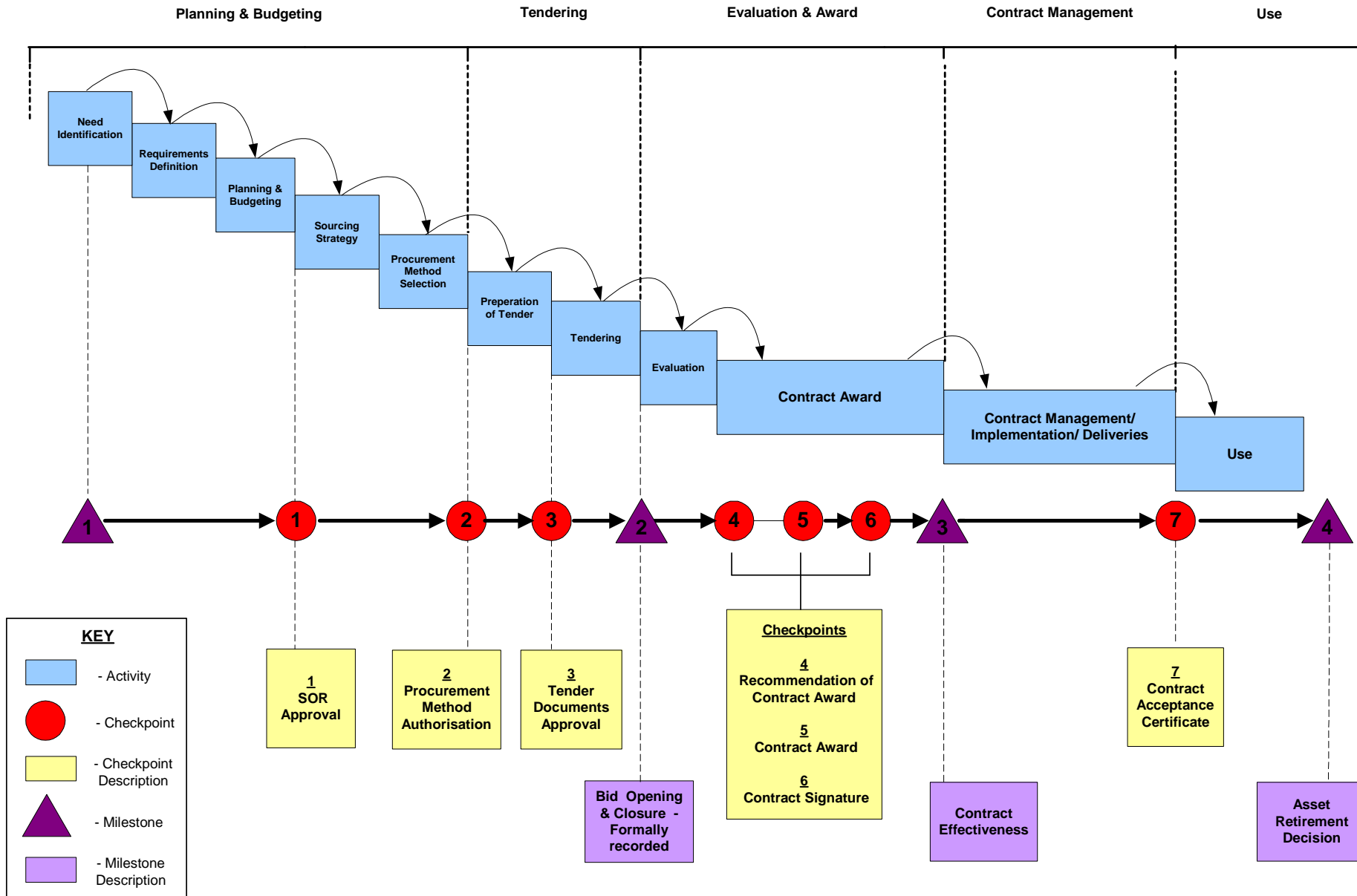
### **4.2 GENERIC PROCUREMENT PROCESS FOR WORKS**

A generic procurement process for works is presented in the figure below. The key stages of the procurement process include the following:

- Procurement Planning and Budgeting;
- Tendering Procedures;
- Tender Evaluation and Award;
- Contract Management; and
- Hand-Over and Usage.

There are a number of sub-activities under each key stage. The detailed procurement process on a step-by-step basis for the various activity stages are covered in the sections below.

Government of the Republic of Kenya –Procurement Manual for Works – First Edition  
**GENERIC PROCUREMENT PROCESS**



### **4.3 PROCUREMENT PLANNING AND BUDGETING**

#### **4.3.1 The Budget Preparation Process**

Annual budgets are prepared each year in accordance with the procedures specified by the Ministry of Finance.

The Head of Procuring Entity has responsibility for co-ordinating the preparation of the budget for the Procuring Entity, which feeds into the preparation of the Procurement Plan.

#### **4.3.2 The Procurement Plan**

Section 26 of the Act requires Procuring Entities to prepare a procurement plan for each fiscal year, and prepare quarterly updates for approval by the Tender Committee. Preparation of the Annual Procurement Plan should be completed at least 30 days before the close of each financial year in accordance with Regulation 20.

Adequate planning and prioritisation of needs by each Procuring Entity is an essential prerequisite to effective procurement for the following reasons:

- Funding for procurement is unlikely to be sufficient to meet all requirements, and scarce financial resources must be allocated to meet the priority public services before less essential needs; and
- Publication of realistic annual procurement plans allows the private sector to respond more effectively to the requirements and specifications of Government, through investment in staff and equipment, manufacture and importing of goods, and financial planning.

Structured development of procurement plans is an essential part of the annual budget preparation process and provides a ready checklist for the approval of procurements by Tender Committees and monitoring of procurement activity by the Public Procurement Oversight Authority as per section 9 (b) of the Act.



#### 4.3.3 Contents of the Procurement Plan

The procurement plan for each Procuring Entity shall include:

- a detailed breakdown of the works required;
- the source of funding;
- an indication of items or sections of the works that can be aggregated for procurement as a single package;
- an estimate of the value of each procurement package of works and the source of funding, if different from other packages;
- procurement method;
- details of any committed or planned procurement expenditure under existing multi-year contracts;
- timelines for critical stages of the delivery or implementation programme.
- monitoring of procurement plan through the comparison of actual and planned times for critical stages of the delivery.

#### 4.3.4 Head of Procuring Entity Actions

- Develop Procurement Planning software and planning templates for use by the Procuring Entity, together with detailed instructions and timetables for compilation of the Procurement Plan.
- Instruct the Procurement Unit to commence development of the Annual Procurement Plan in accordance with the Act.
- Ensure that the draft annual procurement plan is reviewed and approved by the Tender Committee and submitted to the Accounting Officer not less than one month before the commencement of the new financial year as per Regulation 20 (4).
- Include the approved annual procurement plan in the Annual Budget submission to the Ministry of Finance.
- If insufficient budget funding is available following notification of the approved Annual Budget, instruct the Procurement

Unit to trim the Procurement Plan according to service priorities.

- Obtain approval of the revised Annual Procurement Plan from the Tender Committee and forward a copy to the Public Procurement Oversight Authority.
- Ensure that quarterly updates of the procurement plan are prepared for approval by the Tender Committee, and forward a copy to the Public Procurement Oversight Authority.

#### 4.3.5 Procurement Unit Actions

- Subject to the instructions of the Head of the Procuring Entity, the Public Procurement Oversight Authority and the Ministry of Finance, commence the preparation process for the Annual Procurement Plan at least three months before the start of the next Financial Year.
- The Procurement Plan should conform to the template designed for the purpose by the Head of Procuring Entity. A sample Form of Procurement Plan is attached at **Appendix 2**.
- Issue detailed instructions to the Heads of departments, units, projects and programmes on the format and content of submissions for the Procurement Plan. The instructions should clearly indicate that work items omitted from the procurement plan may not be procured in the Financial Year without adjustments to the quantities of other approved items under the plan.
- Receive submissions, check quantities and costing, obtain clarifications and other responses to any queries, analyse and compile all submissions into a Procurement Plan for the Procuring Entity.
- Submit the draft Annual Procurement Plan through the Head of Procuring Entity to the Tender Committee for review and approval.
- Following approval of the Annual Budget, and in full consultation with Heads of departments, units, projects and programmes, trim the Procurement Plan according to service priorities.
- Compile the revised Annual Procurement Plan and submit through the Head of Procuring Entity to the Tender Committee for approval.

- Notify individual Heads of departments, units, projects and programmes of their approved procurement plans and annual procurement budgets.

#### 4.3.6 Heads of Department, Units, Projects and Programmes

Heads of departments, units, projects and programmes are required to ensure the analysis and preparation of Annual Procurement Plans for their own and subordinate areas of control.

Principal stages are as follows:

- Review previous procurement plans to determine if any planned procurements needs to be carried forward into the new financial year.
- Aggregate similar work items into suitable packages or lots and estimate the cost of each package or lot. It should however be pointed out that in accordance with section 30 of the Act, lots shall not used to avoid using a more competitive procurement method.
- Determine the procurement method to be used.
- Determine the appropriate body responsible for approval, i.e. Head of Entity, Entity Tender Committee or Tender Review Board.
- Complete the procurement template with realistic Lead Time deadlines, taking cognisance of
  - Administrative activities
  - Tendering and evaluation
  - Approvals
  - Contract documents and award
  - Contact completion.
- Respond to any queries raised by the Procurement Unit.
- Receive notification of the final approved Annual Procurement Plan and budget and use this as an essential guideline for all procurement processes undertaken in the new Financial Year.

#### 4.3.7 **Monitoring and Updating of Procurement Plan**

During project execution the original Procurement Plan should be regularly monitored and updated. The essence is to see how actual performance compares with the planned activities and to make changes in the plan if necessary.

If slippage occurs in the award or execution of one major contract, it may require rescheduling of other related contract awards and deliveries.

The purpose of monitoring is to complete the details of what has actually been executed, to note whether there are major discrepancies with what was anticipated, and make adjustments in the plans so as to give a complete picture of procurement performance.

A full revision and update of the Procurement Plan must be submitted to the Tender Committee for review and approval on a Quarterly basis throughout each Financial Year.

#### 4.3.8 **Guidelines for Determining Completion Timescales**

The guidelines provided below on the different methods of works procurement are indicative of the right sequence of events in the procurement process. However, the Procuring Entity in developing the plan should assess realistic timelines based on the complexity and circumstances of the project.

The estimated lead times provided below are illustrative of the various processes involved. However the actual lead times should be in accordance with the provisions of the Regulations where stated.

The preparation of tender documents would be started after key components such as the designs, drawings, specifications and Bill of Quantities have been completed and approved by the end user.

##### **Estimated lead times for ICT**

1.	Preparation of Tender Documents -	2-4 weeks
2.	Prior Review/ETC/TRB approval -	1-2 weeks
3.	Advert/Tender Invitation -	6-8 weeks
4.	Tender Close/Opening -	samedate
5.	Tender Evaluation and Report Submission-	2-4 wks
6.	Post Review / ETC/TRB Approval-	1-2 weeks
7.	Contract Award -	1-2 weeks
8.	Contract Signature -	2-3 weeks
9.	Mobilisation (Advance Payment) -	2-4 weeks
10.	Substantial Completion -	12-32 wks
11.	Final Acceptance -	24 weeks

**Estimated lead times for NCT**

1.	Preparation of Tender Documents	-	2-4 weeks
2.	Prior Review/ETC/TRB	-	1-2 weeks
3.	Advertising/Tender Invitation	-	2-4 weeks
4.	Tender Close/Opening	-	same date
5.	Tender Evaluation and Report Submission	-	2-4 wks
6.	Post Review /ETC/TRB approval	-	1-2 weeks
7.	Contract Award	-	1-2 weeks
8.	Contract Signature	-	1-3 weeks
9.	Mobilisation (Advance Payment)	-	2-4 weeks
10.	Substantial Completion	-	12-32 weeks
11.	Final Acceptance	-	24 weeks

**Estimated lead times – Restricted Tendering**

1.	Preparation of Tender Documents	-	2-4 weeks
2.	Prior Review/ETC/TRB	-	1-2 weeks
3.	Advertising/Tender Invitation	-	1-2 weeks
4.	Tender Close/Opening	-	same date
5.	Tender Evaluation and Report Submission	-	2-4 wks
6.	Post Review /ETC/TRB approval	-	1-2 weeks
7.	Contract Award	-	1-2 weeks
8.	Contract Signature	-	1-3 weeks
9.	Mobilisation (Advance Payment)	-	2-4 weeks
10.	Substantial Completion	-	12-32 weeks
11.	Final Acceptance	-	20 weeks

**Estimated lead times – Direct Procurement**

1.	Preparation of Tender Documents	-	2-4 weeks
2.	Prior Review/ETC/TRB	-	1-2 weeks
3.	Tender Invitation	-	1-2 weeks
4.	Tender Close/Opening	-	same date
5.	Tender Evaluation and Report Submission	-	1-2 wks
6.	Post Review /ETC/TRB approval	-	1-2 weeks
7.	Contract Award	-	1-2 weeks
8.	Contract Signature	-	1-3 weeks
9.	Mobilisation (Advance Payment)	-	2-4 weeks
10.	Substantial Completion	-	12-32 wks
11.	Final Acceptance	-	20 weeks

**Estimated lead times – Request for Quotations**

1.	Preparation of documents	-	0-1 weeks
2.	Invitation or Solicitation letter	-	0-2 weeks
3.	Tender Close/Opening	-	samedate
4.	Evaluation and Submission of Report-	-	0-1 week
5.	Award of Contract	-	0-1 week
6.	Contract Signature	-	1 week
7.	Delivery	-	1-4 weeks
8.	Inspection and Acceptance	-	0-1 weeks

## **4.4 TENDERING PROCEDURES**

### **4.4.1 Needs Identification**

The requirements for the works should be fully identified with detailed technical specifications, drawings and plans as well as the Bills of Quantities as appropriate. The Technical Department of the Procuring Entity should prepare plans, drawings, detailed specifications and a Bill of Quantities or Activity Schedule for the required works.

If the Procuring Entity does not have a recognised Technical Department for this purpose, the assistance of relevant technical ministries (e.g. the Ministry of Public Works, Roads or Water) should be solicited for this and other related tasks associated with the tendering process.

Alternatively this can be outsourced to a Procuring Agent, authorised by PPOA, in accordance with Regulations 19 (1)-(5). Regulation 19 (5) stipulates that a procuring entity shall not contract out both the procurement functions and the contract management functions to the same procuring agent. This requirement has some challenges that need to be managed properly to avoid undue delays and cost escalation. The challenges include:

- Procurements to recruit two different firms to manage the project.
  - a first process to appoint firm for procurement functions (designs, tendering and award of contract for works).
  - a second process to appoint firm for contract management functions (works supervision).
- Increased lead time for engagement of procuring agents.
- Unwillingness on the part of the contract management consultant to accept liability for poor or inappropriate designs produced by procurement functions consultant.

In practice and especially for small works, it is more practical for one the PE to engage the services of a procuring agent to assist with the designs, tendering and works supervision.

It is therefore recommended that PPOA considers a revision to the provisions of Regulation 19 (5).

### **4.4.2 Tender Document**

A Tender Document is the set of documents issued by a Procuring Entity, which establishes the works required (technical specifications, plans, bill of quantities or activity schedule), the procurement procedures to be followed, and specifies the

proposed contract conditions. It should contain all information necessary to allow the tenderer to prepare a responsive tender or quotation.

The Tender Document must contain information to:

- instruct tenderers on the procedure for submission of tenders;
- describe the works to be procured;
- inform tenderers of the criteria for evaluation of tenders; and
- define the conditions of any resulting contract.

Use of a Standard Tender Documents (STD) format, as outlined in the Third Schedule of the Regulations, is mandatory for all procurement under the Act. The procurement of works using donor funds may be subject to the required use of donor standard formats if so specified in the loan or credit agreement, in accordance with Section 6 of the Public Procurement and Disposal Act.

The latest versions of each approved STD, together with an individual User Guide to assist in preparation of the STD can be downloaded from the PPOA website, [www.ppoa.go.ke](http://www.ppoa.go.ke).

For the list of STD applicable to Works, please refer to Sections 1.5 or 7.10 of this manual.

#### 4.4.3 Preparation of Tender Documents

Upon receipt of a procurement requisition and confirmation of availability of funds, the Procuring Entity should prepare an operational schedule and proceed with procurement action to ensure completion in a timely manner.

The Tender Documents are prepared by completing the appropriate Standard Tender Document (STD) format issued by the PPOA, in accordance with the detailed instructions contained in the User Guide. The Tender Documents for Works are made up of the under listed documents.

- Invitation for Tenders (IFT)
- Instructions to Tenderers (ITT)
- Tender Data Sheet (TDS)
- Contract Agreement

- Contract Data Sheet (CDS)
- Particular Conditions of Contract (PCC)
- General Conditions of Contract (GCC)
- Detailed Technical Specifications (TS)
- Drawings
- Bill of Quantities (BOQ)
- Sample Forms
  - Form of Tender
  - Form of Tender Security
  - Form of Tender Declaration Form
  - Form of Advance Payment Guarantee
  - Form of Performance Bond
  - Form of Retention Payment Guarantee (where required)

The general guidelines with respect to the Invitation to tender are presented in the sections below.



#### 4.4.4 Invitation for Tender (IFT)

For open competitive tendering (through ICT or NCT), the advertisement must be published in sufficient time before the deadline (or closing day and time of the tender) to enable prospective tenderers to obtain the tender documents and to prepare and submit their tenders. The period allowed should be a minimum of 30 calendar days for ICT, and 21 calendar days for NCT following the date of the first advertisement, but longer periods may be necessary for more complex requirements. Refer to regulation 36 and 40 respectively.

Procuring Entities must be careful to allow adequate time between submission of the advertisement to the press and the time the advertisements are actually published.

Advertisements for National Competitive Tendering should be published:

- in the PE's website; and
- at least twice in Kenya in daily newspapers of general circulation either in 2 different newspapers or on different dates in the same newspaper. Refer to section 54 (2) of the Act.

For International Competitive Tendering, publication in international newspapers or journals is also required in addition to the requirement for NCT. Refer to section 71 (b) of the Act.

#### 4.4.5 e-Procurement

The IFT would normally specify whether or not the tender documents can be obtained, and the subsequent bids submitted, electronically. For electronic procurement, both the the Procuring Entity and potential bidders should have appropriate computer software for the transmittal and retrieval of all necessary tendering information, including drawings where necessary. Payment for the tender documents can then be made prior to the submission of tenders.

This is a new area with opportunities worth exploring. Appropriate guidelines however need to be developed to regulate the process. The PPOA with the assistance of ARD, Inc would shortly be carrying out pilot e-procurement covering selected procuring entities on <http://www.tenders.go.ke>

#### 4.4.6 Contents of the Advertisement

The information contained in the advertisement must correspond to the information in the Tender Document and in particular, the relevant information in the Tender Data Sheet. The advertisement should include as minimum, brief information on:

- the source of funding;
- the works to be procured;
- any qualification requirements for Tenderers (e.g. a requirement for a minimum level of relevant experience or turnover);
- the procedure for obtaining the Tender Document;
- the place and deadline for submission of tenders;
- the fee to be paid for the Tender Documents. (This must reflect only the cost of printing and delivery to prospective Tenderers);
- the value of any Tender Security required.

#### 4.4.7 Sale of Tender Documents for Competitive Tenders

The sale of tender documents for competitive tenders will be coordinated by the Procurement Unit or the Technical Department as appropriate. The price charged for the documents must reflect only the cost of printing, copying and distribution of the tender documents or of converting the documents into electronic form.

The Procuring Entity must ensure that tender documents are available for sale before publication of the invitation. If the stock of tender documents is exhausted, immediate action to print additional copies shall be initiated. It is an offence to deny a prospective tenderer the opportunity to purchase a tender document, and failure to provide a tender document for inspection or purchase by a potential tenderer may constitute grounds for complaint under Part VII of the Act.

**Action:**

- Prospective tenderers should be allowed to briefly inspect the Tender Document, if requested, before committing to purchase of the document.
- Record the name and address of each purchaser of the Tender Document in a register.

- Fees received from the sale of Tender Documents must be recorded and a formal receipt must be issued to the purchaser.

#### 4.4.8 Tender Clarifications

The period during which tender clarifications may be requested will be defined in the Tender Document. Requests for clarifications received after this period may be ignored unless they draw attention to a serious flaw in the Tender Document. In all cases, any response to a Tenderer must be communicated to all Tenderers who received the Tender Document, but without identifying the Tenderer who requested the clarification.

**Action:**

- Each request for clarification must be recorded, and referred immediately to the Procurement Unit to develop a response in consultation with the appropriate Technical Department.
- The Procurement Unit should also consider if the proposed response to a request for clarification will require Tenderers to undertake additional work, or make substantial modifications to their Tenders, which cannot reasonably be completed by the stated date for submission of Tenders. In this case, the Tender Committee should be consulted for approval to extend the date for submission of Tenders.
- Issue a written response to the Tenderer and notify details of the query and the response (but without identifying the source of the query) to all other Tenderers simultaneously.
- Place copies of all correspondence on tender clarifications in the Procurement record file.

#### 4.4.9 Extension of Tender Closing Date

The closing date for submission of Tenders may be extended at the discretion of the Procuring Entity for practical or justifiable reasons. The reasons may include modification to the Tender Document after issue and requests for an extension of time by Tenderers. The Procuring Entity must extend the tender closing date when less than one-third of the time allowed for the preparation of tenders remains in accordance with section 55 (3) of the Act.

**Action:**

- Ensure that there is an adequate practical justification for extending the closing date. Extensions should not be

granted, for example, where a tenderer has by his own inactivity failed to purchase the Tender Document early enough to permit submission of a responsive tender.

- Issue an addendum notifying all Tenderers of the revised date for submission of Tenders.
- Place copies of all relevant correspondence in the Procurement record file.

#### 4.4.10 Cancellation of Tender Process Before Tender Opening

A Tender process may be cancelled at any time before the deadline for receipt of Tenders with the approval of the Tender Committee. The grounds for the cancellation must have been stated in the Tender Documents.

Justifications for cancellation of tenders are:

- the need for the works has ceased to exist or changed significantly;
- insufficient funding for the works;
- significant change in the required technical details, tender conditions, conditions of contract or other details, such that the re-commencement of proceedings is necessary. This may include a delay in awarding the contract of 6 months or more;
- insufficient, or no tenders are received;
- there is evidence of collusion among Tenderers; or
- cancellation is deemed to be in the interest of national security.

#### **Action:**

- Notify all Tenderers who have purchased or received the Tender Document of the cancellation, and refund any fees paid for the purchase of Tender Document.
- Return any tenders submitted to the Tenderer unopened.
- Notify all Departments, Units and Projects involved in the works of the cancellation of tender proceedings.

#### 4.4.11 Receipt of Tenders

All Tenders shall be deposited in the designated locked tender box (or such other arrangements as stated in the Tender Document) until the Tender Opening. The Procurement Unit will co-ordinate the Tender opening proceedings.

The Tender Document will have provided clear instructions to Tenderers on the marking and sealing of Tenders and the procedures to be followed for submission.

The closing date and time for submission of Tenders must be determined in advance and stated in the Tender Document.

##### **Action:**

- Arrange placement of the tender box in a prominent place and ensure that all reception office staff and staff responsible for the receipt of tenders are fully aware of the Tender and their responsibilities for Tenders received.
- Ensure that the tender box is kept locked until the Tender Opening and that neither the Tenderers nor staff have an opportunity to tamper with the box.
- Register all tenders received by post or by courier service on receipt, stamp with the date and time of receipt, and deposit the envelope unopened in the correct tender box.
- Direct all Tenderers' representatives delivering Tenders by hand to the tender box so that they may place their envelopes directly in the tender box.
- Ensure that Tenders received which are too large to fit in the tender box are registered and securely retained in a locked room under the control of the Procurement Unit until the Tender Opening.
- Close and seal the tender box immediately following the deadline for submission of Tenders and transport the tender box to the room where the Tender Opening will take place.
- If a single tender box is used for multiple Tender procedures, or the tender box is a fixture, open the tender box immediately following the deadline for submission of Tenders and remove all Tenders required for the Tender to be opened, and transport these to the room where the Tender Opening will be held.
- Ensure that Tenders which were too large to fit in the tender box are also transported to the room where the Tender Opening will be held immediately following the deadline for submission of Tenders.

#### 4.4.12 Opening of Tenders

Tender Opening shall commence immediately after the close of the tenders (as stated in the tender document).

A tender opening committee shall comprise at least 3 persons including the Chairperson in accordance with Section 60 of the Act. They shall ensure that minutes of the tender opening proceedings are duly written.

The tender opening committee will co-ordinate the Tender Opening, ensure smooth operation of the proceedings, take a register of attendance, prepare Minutes of the opening, and advise the Chairman of the opening session on procedural issues if requested.

The Chairman of the Tender Opening Committee will control and direct the Tender Opening and not allow Tenderers' representatives to interfere with the work of the Committee. Any objections by a Tenderer to the procedures or decisions of the Tender Opening should be made in writing to the Head of the Procuring Entity.

For purposes of transparency it is not permitted for a Tender opening to be halted or postponed once the process begins.

##### **Action:**

- Ensure that Tenderers representatives are seated separately from the Tender Opening Committee and officials of the Procuring Entity, and that the name, organisation represented and contact details of all attendees are recorded in an attendance register.
- Ensure the security of documents and Tenders at all times during the Tender Opening procedure to prevent any unauthorised interference with the documents and process.
- Bring in the unopened tender box and/or all Tenders and samples received which have been removed from the tender box or could not be accommodated in the tender box.
- Open the tender box, check that the inscription on each envelope or sample inside confirms that it matches the correct Tender and complies with the wording and sealing required in the Tender documents. Stack all envelopes in clear view of the Tenderers ready for opening.
- The Chairman shall open the meeting and outline the procedures to be used for the Tender Opening.

- ❑ Any Tenders not received by the deadline for the opening of Tenders must be rejected and returned unopened to the Tenderer. Tenderers are not permitted to amend their Tender in any way during the Tender Opening or to submit any additional documents during the process.
- ❑ Check for any withdrawals or modifications submitted, and match these with the original Tender before proceeding. Withdrawn Tenders shall not be opened once the authenticity of the withdrawal notice has been confirmed.
- ❑ Open the first Tender after confirming that all conditions regarding marking and sealing of the envelope have been met and the envelope has not been tampered with. Stamp each copy of the Tender and annotate each Tender with a sequential serial number as it is opened (e.g. “1 of 7” where the total number of Tenders is 7).
- ❑ Examine the contents of the envelope and identify, stamp and number all originals and copies, and any separate sections and attachments.
- ❑ Read out the following details of each Tender from the Original copy:
  - a. the number allocated to the Tender by the Tender Opening Committee;
  - b. the name and country of the Tenderer;
  - c. any Tender modifications or withdrawals;
  - d. a brief description of the works offered if the Tender is for more than one Lot;
  - e. the currency of the Tender;
  - f. the total Tender price;
  - g. any discounts offered;
  - h. the presence or absence of any required Tender Security; and
  - i. any other appropriate information at the discretion of the Chairman.
- ❑ Pass all Tender Securities to the representative of the Procurement Unit for review, registration and safekeeping.
- ❑ Any obvious failure to provide a responsive Tender, such as the absence of Tender Security or inadequate Tender Security, shall be reported to the Meeting and recorded in the Minutes.

- ❑ The Chairman and two Members of the Committee shall initial the original of each Tender and all attachments thereto. Any corrections to prices or obvious errors and omissions shall be circled in red ink and also initialled.
- ❑ Record the details read out of each Tender in the Register of Tender Opening, ensuring that amounts are recorded in words as well as figures, and record all corrections and errors or omissions which were noted during the Tender Opening and captured in the Minutes of the Tender Opening.
- ❑ Any envelopes containing substitutions, or modifications, must be subject to the same level of scrutiny, including the reading out of critical details, such as price changes.
- ❑ Minutes of the Tender Opening shall be prepared by the Procurement Unit, signed by the Chairman of the Tender Opening Committee and made available to any Tenderer involved in the Tender who requests a copy in writing.

#### **4.4.13 Issue of Invitations to short listed contractors**

The Tender Document for a Restricted Tender must be issued to all short-listed contractors simultaneously, either by registered post, or by hand in return for a written receipt.

##### **Action:**

- ❑ Prepare the Tender Document together with a personalised Letter of Invitation for each short-listed contractor.
- ❑ Send the invitation by registered post to all short-listed contractors, or deliver by hand and obtain a written receipt.

#### **4.4.14 Issue of Requests for Quotations**

The procedure for issue of Requests for Quotations to short-listed contractors follows the same principles as for Restricted Tender above.

The Standard Tender document formats for Request for Quotations will be used for simple requirements wherever practical. For more complex requirements when the normal RFQ and Purchase Order documents are not appropriate nor provide an appropriate form of contract, the Procuring Entity may utilise appropriate formats from the other Standard Tender Documents.



#### 4.4.15 Opening of Requests for Quotations

No public opening of the quotations submitted is required, but all quotations must be opened on a predetermined date and time by the Procurement Unit to avoid the opportunity for any Contractor to become aware of the prices quoted by other contractors.

The recording of quotations and the evaluation procedures followed are similar to those for Tenders except for the following:

- Quotations will normally be submitted using the appropriate standard Request for Quotations document;
- Sealed quotations will be received directly by the Procurement Unit rather than being placed in the tender box;
- The Procurement Unit will register the receipt of each quotation and keep the envelopes secure and unopened until the date of the opening;
- Contractors will not be invited to attend the opening of quotations, but the basic procedures and formality of the Meeting must be maintained.

#### **Action:**

- Ensure that the name, organisation represented and contact details of all attendees are recorded in an attendance register.
- Ensure the security of documents at all times during the procedure to prevent any unauthorised interference with the documents.
- Bring in the unopened quotations and any samples received and check that the writing on each envelope confirms that it is for the correct RFQ.
- Open the first quotation after confirming that any conditions regarding marking and sealing of the envelope have been met and the envelope has not been tampered with. Note each quotation with a serial number in sequence as it is opened (e.g. “1 of 4” where the total number of RFQs is 4).
- Examine the contents of the envelope and identify, stamp and number all originals and copies, and any separate sections and attachments.
- Log the following details from each quotation:
  - the number allocated to the quotation by the Tender Opening Committee;

- ❑ name of the Contractor;
- ❑ brief description of the works offered if the RFQ is for more than one Lot;
- ❑ the total price quoted; and
- ❑ any other appropriate information at the discretion of the Chairman.
- ❑ Any obvious failure to provide a responsive quotation shall be noted in the Minutes. These quotations shall normally be rejected.
- ❑ The Chairman shall initial quotations and all attachments thereto. Any corrections to prices or obvious errors and omissions shall be circled in red ink and also initialled.
- ❑ Record the details of each quotation in the Register of RFQ Opening ensuring that amounts are recorded in words as well as figures, and record all corrections and errors or omissions which are noted at the time of opening.

#### 4.4.16 **Tender Evaluation**

Tender evaluation will be conducted by an Evaluation Committee in accordance with Regulation 16.

It should be noted that Tenderers frequently attempt to contact Procuring Entities during Tender evaluation, directly or indirectly, to ascertain progress of evaluation, to offer unsolicited clarifications, or to provide criticisms of their competition. Procuring Entities must evaluate Tenders solely on the basis of the information provided in the respective Tenders and no changes in the Tender price or substance of a Tender will be permitted. No circumstances shall justify meetings or consultation between the Procuring Entity (or its consultants) and Tenderers during the Tender evaluation process. All clarifications required must be sought formally in writing by the Secretary to the Evaluation Committee and not by any individual members.

##### **a) Preliminary Examination of Tenders**

The procedures for examination of tenders and clarifications must be conducted in accordance with the specific terms contained in the Tender Document used.

**Action:**

Conduct a preliminary examination to determine whether tenders are complete and comply with the basic instructions and requirements of the Tender Document, including checks that:

- the Tenderer is eligible to tender where this has not been determined prior to inviting tenders;
- all Tenderers are from eligible source countries;
- the Tender has been submitted in the correct format and there are no missing pages;
- any erasures, interlineations, additions or other changes in the Tender have been initialled by the Tenderer;
- any required Tender Security has been submitted, in the correct form and amount and valid for at least the period required;
- the Tender has been submitted without material reservations or deviations from the terms and conditions of the Tender Document;
- the Tender has been correctly signed and authorised;
- if the Tenderer is a joint venture, a copy of the joint venture has been submitted;
- the Tender is valid for at least the period required;
- all key documents and information have been submitted; and
- the Tender meets any other key requirements of the Tender Document.

If a prequalification procedure was applied, reject and exclude any Tender received from other than the pre-qualified tenderers.

The Procuring Entity may request clarifications from Tenderers concerning ambiguities or inconsistencies in the Tender. As required in the Tender Document, such requests shall be in writing, and no change in the price or scope of the originally offered works may be sought or accepted, except for the correction of arithmetic errors. The responses from Tenderers shall also be in writing.

Correct any purely arithmetical errors in tenders in accordance with the procedure stated in the Tender Document. Note that if there is any discrepancy between numbers and written figures, the written figures shall prevail. If both the quantity and the total price are indicated in the Tender form, the arithmetic should be checked and, if there is a discrepancy, the unit price shall govern. All errors in extension (multiplying the unit price by the

quantity) and totalling should be corrected and the Tenderer notified. A Tenderer cannot be permitted to retain an arithmetical error in extension or totalling and correct the unit price. Notify Tenderers of any such arithmetic corrections and request written agreement of the Tenderer to the correction. If a Tenderer does not accept the correction of an arithmetical error, his Tender must be rejected and any Tender Security may be forfeited.

Any communications between the Procuring Entity and a Tenderer during the preliminary examination of Tenders shall be made in writing.

## **b) Responsiveness of Tenders**

Following the preliminary examination of tenders, the Tender Evaluation Committee should examine the tenders to determine whether any issues arising from the preliminary examination affect the responsiveness of an individual tender, and whether each tender is substantially responsive to the technical specifications and contract conditions stated in the Tender Document.

The determination of a Tender's responsiveness is based on the contents of the Tender itself, subject to any clarifications received in the Preliminary Examination of Tenders.

A substantially responsive Tender is one that conforms to all the instructions, requirements, terms and conditions of the tender documents, without material deviation, reservation or omission in accordance with section 64 of the Act. A material deviation, reservation, or omission is one that:

- affects in any substantial way the scope, quality, or performance of the works specified in the Tender Document; or
- would limit in any substantial way, inconsistent with the Tender Documents, the rights of the Procuring Entity or the Tenderers' obligations under any resulting contract; or
- if corrected would unfairly affect the competitive position of other Tenderers presenting substantially responsive and compliant Tenders.

Any tender containing a material deviation, reservation or omission is therefore not substantially responsive, shall be rejected and may not subsequently be made responsive by the Tenderer or the Procuring Entity.

The classification of a deviation, reservation or omission as material or non-material shall be determined by the objectives and requirements of the procurement, as stated in the Tender

Document, and shall take into account the impact on key factors, such as cost, risk, time and quality.

A material deviation, reservation or omission is one that:

- limits in any substantial way the scope, quality, or performance of the Works;
- limits in any substantial way the requirements of the Bidding Documents;
- the acceptance of which would unfairly affect the competitive position of other Bidders who have submitted substantially responsive bids.

Material deviations, reservations or omissions may typically include:

- unacceptable alternative technical details, such as inferior design, materials, workmanship, specifications, standards or methodologies; or
- unacceptable counterproposals with respect to key contract terms and conditions, such as payment terms, price adjustment, liquidated damages, sub-contracting or warranty.

Non-material deviations may include:

- longer completion schedules unless this takes completion of the works past a clearly defined cut-off date stated in the Tender Document;
- minor deviations in the payment terms required;
- tenders offering goods to alternative, but equal or superior specifications and performance; and
- tenders offering the specified works but failing to price specific items within the bill of quantities or activity schedule.

The classification of deviations, reservations and omissions as material or non-material must be consistently applied to all Tenders.

Where a Tender is determined to be substantially responsive, the Procuring Entity may waive, clarify or correct any non-conformity, error or omission, which does not constitute a material deviation. Such non-conformity, error or omission should be quantified in monetary terms to the extent possible and taken into account in the financial evaluation and comparison of Tenders.

**Action:**

- Reject and exclude from further evaluation any Tender that is incomplete, unsigned, not accompanied by a Tender Security, not accompanied by essential supporting documents, or not substantially responsive to the technical specifications, contract conditions or other critical requirements stated in the Tender Document.
- Reject and exclude from further evaluation any Tender which contains material deviations, reservations or omissions, and is therefore not substantially responsive.

**c) Financial Evaluation of Tenders**

Tenders that are determined to be substantially responsive to the requirements of the Tender Document shall be subjected to financial evaluation to determine the evaluated price of each Tender, and the lowest evaluated tender.

The evaluated price for each Tender is determined by:

- taking the Tender price, as read out at the tender opening;
- correcting any arithmetic errors, in accordance with the methodology stated in the Tender Document;
- applying any non-conditional discounts offered in the Tender;
- making financial adjustments in accordance with the Tender Document for any non-material non-conformity, error or omission. Pricing of works items or features which are clearly omitted in a Tender may be based on the highest prices for corresponding items in other responsive Tenders. Note that by convention, unpriced sub-items in a bill of quantities are normally assumed to be covered in the price of the main item and no adjustment to the evaluated tender price is made in this case. Note also that no additional credits may be given for offered features that exceed the required standards or specifications;
- converting all Tenders to a single currency, using the currency and the source and date of exchange rate indicated in the Tender Document;
- applying any margin of preference indicated in the Tender Document in line with any scheme which may be in accordance with section 39 of the Act; and
- applying any price sensitive criteria declared in the tender documents in accordance with the formulae agreed before evaluation has commenced.

Tenders shall be compared by ranking them according to their evaluated price to determining the Tender with the lowest evaluated price.

#### **d) Treatment of Discounts**

Tenderers may be permitted to offer discounts to their Tenders, which shall be included in the Tender and read out at the tender opening.

Any discount offered after the deadline for submission of Tenders must not be taken into account.

Any non-conditional discounts shall be taken into account in the financial evaluation and comparison of tenders.

Any prompt payment discount included in a Tender shall become a term of the contract, if that Tender is accepted, and utilised by the Procuring Entity, if payment is made in accordance with the terms of the discount. However, prompt payment discounts must not be considered in the evaluation and comparison of tenders.

#### **4.4.17 Support for Domestic Contractors**

Section 39 (8) of the Act provides for exclusive preference to be given to citizens of Kenya where the funding is 100% from the Government of Kenya or a Kenyan body and the amounts are below the prescribed threshold. For public works the threshold below which exclusive preference shall be given to citizens of Kenya is two hundred million shillings (fifty million shillings for procurements in respect of goods and services).

In addition, the Minister of Finance is empowered under Section 39 (2) of the Act, in consideration of economic and social development factors, to prescribe preferences and/or reservations in public procurement and disposal for procurements above the prescribed threshold. **The application of margin of preference during the evaluation of tenders is a way of supporting domestic contractors with preferential margin of points.** Where a preference scheme has been so prescribed, the tender documents must state the margin of preference to be applied, where necessary, for domestic contractors.

Section 39 (8) (b) (ii) of the Act states:

A prescribed margin of preference may be given for works, goods and services where a preference may be applied depending on the percentage of shareholding of locals on a graduating scale as prescribed.

Regulation 28 (2) (b) clarifies on the provision as follows:

For the purposes of Section 39 (8) (b) (ii) of the Act, the margin of preference shall be:

- (i) 6% of the evaluated price of the tender where the percentage of shareholding of the locals is less than 25%; and
- (ii) 8% of the evaluated price of the tender where the percentage of shareholding of the locals is less than 51% but more than 25%.

The computation of evaluated bid prices and the application of the margin of preference, based on the percentage of local shareholdings, should be done on a lot-by-lot basis to allow the comparison and ranking of bid prices. The corrected tender price is factored downwards by the margin of preference to arrive at the domestic preference price.

It should however be pointed out that the domestic preference price is used solely for comparison and ranking of tenders. The applicable price for the purpose of contract award is the corrected tender price rather than the domestic preference price.

#### 4.4.18 **Post-Qualification**

Where so indicated in the tender documents, a Procuring Entity may, prior to the award of the Tender, confirm the qualifications of the tenderer who submitted the lowest evaluated responsive Tender, in order to determine whether the Tenderer is qualified to be awarded the contract. Using the criteria specified in the Tender Document, this review should include an assessment of the Tenderer's technical, financial and physical resources available to undertake the contract, including his current workload.

- If pre-qualification was conducted, the lowest evaluated responsive Tender should be recommended for the award of contract, unless the Tenderer's qualifications have since materially deteriorated, or if the Tenderer has since received additional work that reduces the available capacity.
- Where pre-qualification has not taken place, the lowest evaluated responsive Tender should be subjected to post-qualification, according to the procedures described in the Tender Document and in accordance with Regulation 51 (1).



- ❑ The post-qualification analysis involves an assessment of:
  - Technical Capabilities.
    - ❖ General Experience on similar works
    - ❖ Plant and Equipment
    - ❖ Key Personnel & Qualifications
    - ❖ Work Programme
    - ❖ Completion Period
  - Financial Capabilities
    - ❖ Annual Volume of Works
    - ❖ Access to Credit/Liquid Assets
    - ❖ Credibility of Rates
- ❑ The assessment of the credibility of rates could make reference to the Engineer's Estimate. It should however be noted that the Engineer's Estimate is a tool for planning and budgeting and not a criterion for evaluation.
- ❑ If the lowest evaluated responsive Tenderer fails post-qualification, his Tender should be rejected, and the next ranked Tenderer should then be subjected to post-qualification examination. If successful, this Tenderer should receive the award. If not, the process continues for the other Tenderers.
- ❑ The rejection of a Tender for reasons of qualification requires substantial justification, which should be clearly documented in the attachments to the Evaluation Report.
- ❑ A history of poor performance may be considered a justification for failing post-qualification if the Tenderer is unable to demonstrate that steps have been taken to resolve previous problems, unless such history was available and considered at the time of any pre-qualification.

#### **4.4.19 Evaluation Reports and Recommendations**

The Evaluation Committee will prepare an evaluation report for submission to the Tender Committee.

The evaluation report should be prepared using the standard format for the Evaluation of Goods & Works, and include:

- a summary of the Tenders received and opened;
- the results of the preliminary examination;
- the results of the technical evaluation;
- reasons why any Tenders were declared non-responsive. (Attach copies of selected pages from Tenders if necessary, to show examples of objectionable features);
- details of any non-material deviations, which were accepted and the way in which they were quantified and taken into account in the financial evaluation;
- the evaluated price of each Tender, showing any corrections or adjustments to the tender price and any conversion to a common currency;
- an explanation of:
  - i. any inconsistencies between prices and modifications to prices read out at Tender opening;
  - ii. any substantial corrections for arithmetic errors which may affect the ranking of Tenderers;
  - iii. any additions, adjustments, and priced deviations that may affect the ranking of Tenderers; and
  - iv. any cross-discounts not read out and recorded at the Tender opening.
- the ranking of the Tenders, according to their total evaluated price;
- a statement of the lowest evaluated substantially responsive tender, for each lot where applicable, clearly establishing the actual amount of the contract award;
- confirmation that the total price quoted by the lowest evaluated responsive Tender is acceptable compared with the original estimated cost of the procurement;
- the results of any post-qualification examination; and
- a recommendation to award the contract or contracts to the lowest evaluated responsive Tenderer or combination of Tenderers, or other appropriate recommendation, such as the cancellation of the procurement process.

The Evaluation Committee may recommend that all of the Tenders be rejected if:

- v. none of the Tenders are found to be responsive;

- vi. all of the Tenders are unreasonably high in price compared to the cost estimate;
- vii. none of the Tenderers are qualified; or
- viii. there is deemed to be an absence of competition, (however lack of competition is not usually decided solely on the basis of the number of Tenderers).

Attach to the evaluation report:

- copies of any correspondence with Tenderers who raised objections to the Tender or evaluation process, together with detailed responses;
- copies of any letters from Tenderers requesting clarifications, and responses by the Procuring Entity, and Tender clarifications requested by the Procuring Entity and Tenderers' responses;
- any separate evaluation report from a consultant, if one was engaged for this purpose;
- all required Tables and supporting documents.

Ensure that the Tender evaluation report is double-checked, signed and complete before submitting for approval by the Tender Committee.

The evaluation report forms a part of the record of procurement proceedings required under Regulation 51 (1).

#### 4.4.20 Review and Approval of Evaluation Report

The Tender Committee will review the evaluation report and recommendations presented in the Evaluation Report by the evaluation committee.

##### **Action:**

The Tender Committee will:

- check the accuracy of the evaluation and recommendations as submitted;
- decide whether the price increase is justified if the price of the lowest evaluated responsive Tender is higher than the original estimated cost. If the price is not acceptable, recommend that the Tender should be re-advertised, cancelled, or the quantities of work reduced;

- ❑ reject any evaluation report which contains serious inaccuracies or flaws and return to the Evaluation Committee with written comments for correction and re-submission; and
- ❑ ensure that all discussions and decisions of the Tender Committee are reported in the minutes of the meeting.

#### 4.4.21 **Extension of Tender Validity**

The duration of tender validity is specified in the Tender Document and should be confirmed in the signed Tender Form submitted by each Tenderer. If circumstances occur in which award cannot be made within the original tender validity period, extensions in writing should be requested from Tenderers, in accordance with the Tender Document.

The evaluation and award of contract should be completed within the period set for the validity of tenders. The date for expiry of tender validity must be monitored and attention drawn to this deadline not less than two weeks before the expiry date.

If, due to unforeseen circumstances, the task cannot be completed within the set period, the Procurement Unit may contact tenderers to seek their agreement to an extension of the tender validity.

Tenderers who refuse this request may withdraw from the Tender without incurring any penalty, but tenderers who agree to an extension will also be required to extend their Tender Securities for an appropriate period.

When an extension of the tender validity period is requested, tenderers shall not normally be requested or be permitted to change the quoted price or other conditions of their tenders. However, the Tender Document may provide for an appropriate price adjustment mechanism when requests for second or subsequent extensions are made, to reflect changes in the cost of inputs for the contract over the period of extension.

#### **Action by Procurement Unit:**

- ❑ Maintain a diary reminder of all tender validity dates and advise the responsible officer not less than two weeks before the expiry date so that appropriate action can be taken in time.
- ❑ Determine the additional time required to complete the evaluation and award of the specific contract. Any extension of tender validity should be for the minimum period required to complete the evaluation, to obtain the necessary approvals and to award the contract.

- ❑ Prepare an individual letter to each tenderer requesting their formal approval to an extension of the validity of tenders and an extension of their Tender Securities (where necessary) for the required period. Set a date for written responses to be received by the Procuring Entity, stressing that tenderers who do not respond in time will be considered to have withdrawn their tenders.
- ❑ Send the letter by registered post or deliver by hand to each tenderer and obtain a receipt.

Only tenderers who respond confirming their unconditional acceptance and enclosing any required extension to their Tender Security may be considered for further evaluation and award of contract.

#### **4.4.22 Standstill Period Prior to Award of Contract**

There is a mandatory standstill period of fourteen (14) full days between notification to award the contract to the recommended bidder and the award of contract as per section 68 (2) of the Act.

The standstill period is to afford unsuccessful bidders who may have grievances on the procurement process to seek an administrative review. Note that the 14 days does not include the day of notification or the day of making the contract.

#### **4.4.23 Award Notification**

Notice of the tender award shall be issued promptly to the successful Tenderer and at the same time to the unsuccessful tenderers.

The contract should not be signed until after the 14 days standstill period.

Any complaints received from unsuccessful bidders within the standstill period will be promptly investigated by the Administrative Review Board.

If no complaints are received within the standstill period, a contract award shall be made.

Failure of the successful Tenderer to confirm acceptance of the award, or to submit any required Performance Security, or to sign the contract may constitute grounds for the annulment of the award and forfeiture of the Tenderer's Tender Security. In that event, the Procuring Entity may award the contract to the next lowest evaluated Tenderer, whose offer is substantially responsive and is determined to be qualified to perform the contract satisfactorily.

Procuring Entities are required to notify the PPOA of contracts above KES 5 million for publication on their website. The Award Notification shall provide information on the contract to be awarded/signed and shall include the:

- name of the Contractor;
- description of the works;
- Contract Sum;
- duration of the contract;
- method of procurement used; and
- the source of funding.

#### 4.4.24 Award of Contract

Following approval from the Tender Committee, the contract will be awarded to the Tenderer who has submitted the lowest evaluated responsive Tender and who has been determined to be qualified to perform the contract.

**Before contacting the Tenderer, a formal commitment of the required funds against the budget of the Procuring Entity must be approved.**

**Action:**

- Prepare/update the Activity and Expenditure Initiation (A&E) Form and obtain approval of the commitment of funds against the budget of the Procuring Entity.
- Prepare copies of the contract ready for signature by each party to the contract, and include all specific details relating to the Tenderer, the Conditions of Contract, and the Tenderer's offer. A clear statement on when the contract becomes effective is also essential since certain contract clauses could be connected with this date, e.g. Mobilisation, Site Possession, Validity of Performance Security, etc. The Contract Documents would normally comprise the following:
  - o Contract Agreement
  - o Letter of Award
  - o Special Conditions of Contract (Contract Data)
  - o General Conditions of Contract
  - o Technical Specifications
  - o Drawings

- Contractor's Offer and priced Bill of Quantities
- Sample Contract Forms.
- ❑ Obtain the signature of the Head of Procuring Entity on all copies of the contract.
- ❑ Ensure that the contract is duly recorded in the Contracts Register maintained by the Procurement Unit.
- ❑ Arrange the immediate return of Tender Securities to all tenderers and the successful Supplier or Contractor as soon as the Contract becomes effective.

#### 4.4.25 **Return of Tender Security to Successful Bidder**

The Tender Security must be returned immediately to all Tenderers, as soon as it is no longer required, i.e. once the contract has been signed and all conditions for contract effectiveness have been met.

#### 4.4.26 **Nullification of Contract**

The Act stipulates conditions, which when contravened could lead the disqualification from entering into a contract for procurement; or nullified by the Procuring Entity if the contract has already been entered into. These conditions include:

- ❑ Corrupt Practice (Section 40 of the Act);
- ❑ Fraudulent Practice (Section 41);
- ❑ Collusion (Section 42)
- ❑ Conflicts of Interest (Section 43), which occurs with:
  - Conflicting Activities
  - Conflicting Assignments
  - Conflicting Relationships

## **CHAPTER 5:           PROCUREMENT METHODS AND PROCESSES**

### **5.1     INTRODUCTION**

The different procurement methods applicable to works are listed below.

- Open Tendering.
- Request for Proposals (for works consultants).
- Restricted Tendering.
- Direct Procurement or Single Sourcing.
- Low Value Procurements (Request for Quotations or Minor Works only).
- Two-Stage Tendering.
- Specially Permitted Procurements (or PPP Contracts)

The procurement methods are briefly discussed in the sections below with flow diagrams presented on the various processes.

### **5.2     CLASSES OF PROCURING ENTITIES**

As set out in Gazette Notice No. 719 of 24<sup>th</sup> January, 2007, and for the purpose of the Threshold Matrix in the First Schedule of the Public Procurement and Disposal Regulations, 2006, public procuring entities are categorised into three classes, namely:

- Class A Procuring Entities**
  - State Corporations
  - Ministries
  
- Class B Procuring Entities**
  - City Councils (NRB, MSA, KSM)
  - Co-operative Societies
  - Universities
  - Colleges
  - Judiciary
  - Commissions
  - Parliament
  - Districts
  - Provincial Hospitals
  - Semi-Autonomous Government Agencies



❑ **Class C Procuring Entities**

- Other Local Authorities (Municipal, Country, Town Councils)
- Schools
- District Hospitals
- Health Centres
- Polytechnics
- Constituency Development Fund
- Committees
- Voluntary Organizations/Institutions

The matrix of thresholds for the various Classes of Procuring Entities is provided as the First Schedule of the Regulations. The matrix for Class A Procuring Entities is reproduced as below.

Procurements carried out by Procuring Entities must be within the specified thresholds.

### Thresholds Matrix for Class A Procuring Entities

Procurement Method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	<i>responsible for procurement initiation</i>	<i>responsible for Contract award</i>	<i>responsible for signing contract</i>	<i>Verification of receipt of goods, services or works</i>
International Open tender (Section 71 of the Act)	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	The Head of the Procuring Entity or the Accounting Officer	Tender Committee	The Accounting Officer	Inspection and acceptance committee
	There is no minimum level of expenditure under this method	There is no minimum level of expenditure under this method	There is no minimum level of expenditure under this method	The head of the procuring entity or the head of the user department	Tender Committee	Tender committee	Inspection and acceptance committee
National Open tender (s 54(2) of the Act)	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	The Head of the Procuring Entity or the Accounting Officer	Tender Committee	The Accounting Officer	Inspection and acceptance committee

Procurement Method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	responsible for procurement initiation	responsible for Contract award	responsible for signing contract	Verification of receipt of goods, services or works
	When using this method the minimum expenditure that requires advertising is Kshs 6,000,000	When using this method the minimum expenditure that requires advertising is Kshs 6,000,000	When using this method the minimum expenditure that requires advertising is Kshs 3,000,000	The head of the procuring entity or the head of the user department	Tender committee	The Head of the Procuring Entity	Inspection and acceptance committee
Restricted tender Under s 73 (2)(a) of the Act	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	The Head of the Procuring Entity or the Accounting Officer	Tender committee	The Head of the Procuring Entity or the Accounting Officer	Inspection and acceptance committee
	The Minimum level of expenditure shall be Kshs. 20,000,000 above this threshold use open tender	The Maximum level of expenditure shall be Kshs. 20,000,000 above this threshold use open tender	The Maximum level of expenditure shall be Kshs. 20,000,000 above this threshold use open tender	The head of the procuring entity or the head of the user department	Tender Committee	The Head of the Procuring Entity or the Accounting Officer	Inspection and acceptance committee
Restricted tender Under s 73(2)(b) of the Act	The Maximum level of expenditure shall be Kshs. 20,000,000 above this threshold use open tender	The Maximum level of expenditure shall be Kshs. 20,000,000 above this threshold use open tender	The Maximum level of expenditure shall be Kshs. 20,000,000 above this threshold use open tender	The head of the procuring entity or the head of the user department	Tender Committee	The Head of the Procuring Entity or the Accounting Officer	Inspection and acceptance committee

Procurement Method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	responsible for procurement initiation	responsible for Contract award	responsible for signing contract	Verification of receipt of goods, services or works
	The Minimum level of expenditure shall be Kshs. 1,000,000 below this threshold use request for quotations	The Minimum level of expenditure shall be Kshs. 2,000,000 below this threshold use request for quotations	The Minimum level of expenditure shall be Kshs. 1,000,000 below this threshold use request for quotations	Head of the User Department	Tender Committee	The Head of the procuring entity or the Accounting Officer	Inspection and acceptance committee
Restricted tenders Under s 73 (2)(c) of the Act	The Maximum level of expenditure shall be Kshs. 20,000,000 above this threshold use open tender	The Maximum level of expenditure shall be Kshs. 20,000,000 above this threshold use open tender	The Maximum level of expenditure shall be Kshs. 20,000,000 above this threshold use open tender	The head of the procuring entity or the head of the user department	Tender Committee	The Head of the procuring entity or the Accounting Officer	Inspection and acceptance committee
	The Minimum level of expenditure shall be Kshs. 1,000,000 below this threshold use request for quotations	The Minimum level of expenditure shall be Kshs. 2,000,000 below this threshold use request for quotations	The Minimum level of expenditure shall be Kshs. 1,000,000 below this threshold use request for quotations	Head of the User Department	Tender Committee	The Head of the procuring entity or the Accounting Officer	Inspection and acceptance committee
Request for Proposals (s. 76(1) of the Act	This method is not applicable for procurement of goods	This method is not applicable for procurement of works	No minimum or maximum expenditure under this method provided the conditions under this section are met	Head of the User Department	Tender Committee	The Head of the procuring entity or the Accounting Officer	Inspection and acceptance committee

Procurement Method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	responsible for procurement initiation	responsible for Contract award	responsible for signing contract	Verification of receipt of goods, services or works
Direct Procurement under sections 74(2) and (3) of the Act	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	The Head of the procuring entity or the Accounting Officer	Tender Committee	The Head of the procuring entity or the Accounting Officer	Inspection and acceptance committee
				Head of the User Department initiates procurement whose expenditure is below Kshs.500,000	Procurement committee awards for procurement whose expenditure is below Kshs. 500,000	Head of the User Department initiates procurement whose expenditure is below Kshs.500,000	Inspection and acceptance committee
Request for quotations (s 88 of the Act)	Maximum level of expenditure under this method is Kshs. 1,000,000	Maximum level of expenditure under this method is Kshs. 2,000,000	Maximum level of expenditure under this method is Kshs. 1,000,000	Head of the user Department	Tender Committee	The Head of the Procuring Entity or the Accounting Officer	Inspection and acceptance committee
				Head of the User Department initiates procurement whose expenditure is below Kshs. 500,000	Procurement committee awards for procurement whose expenditure is below Kshs. 500,000	Head of the User Department initiates procurement whose expenditure is below Kshs.500,000	Inspection and acceptance committee

### **5.3 OPEN TENDERING**

Open tendering can be done either as International Competitive Tendering (ICT) or as National Competitive Tendering (NCT). Please refer to the 1<sup>st</sup> Schedule of the Regulations on open tendering.

#### **5.3.1 International Competitive Tendering (ICT)**

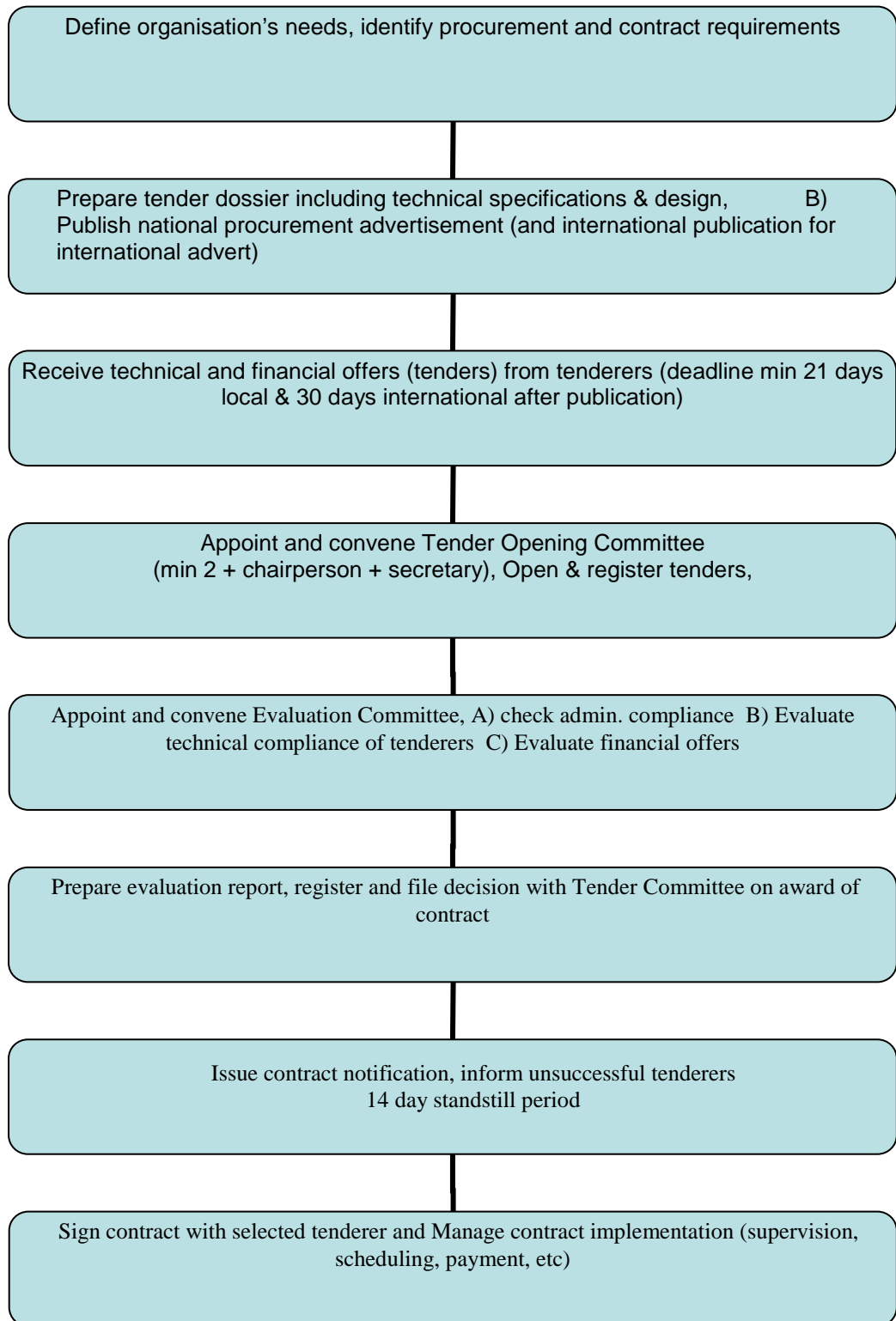
International Competitive Tendering is appropriate for high value or complex procurements, or where the works by their nature or scope, are unlikely to attract adequate local competition and it is therefore appropriate to advertise in the international media and to allow sufficient time for offers to be submitted from overseas. The Act requires the use of ICT for procurement of works as per the thresholds in the 1<sup>st</sup> Schedule of the Regulations.

#### **5.3.2 National Competitive Tendering (NCT)**

National Competitive Tendering is appropriate for lower value procurements, where the works by their nature or scope are unlikely to attract foreign competition. The Act permits the use of NCT for procurement of works as per the thresholds in the 1<sup>st</sup> Schedule of the Regulations.

The process of procurement under open tendering is presented with the flow diagram below.

## Open Tendering



## **5.4 REQUEST FOR PROPOSALS (RFP)**

RFP is the appropriate method to engage consultants to help with the works, such as civil engineers, project managers, quantity surveyors or architects. It is a form of open tendering but the Procuring Entity is allowed to take full account of quality criteria in the assessment of tenders.

The procurement of consultant services is a specialised form of procurement requiring tender procedures and documents which are very different to those for standard goods and works. Most larger contracts for consultant services are funded by a donor and the principles and procedures which follow should be read in conjunction with the guidelines of the donor (where applicable).

### **5.4.1 Special Features of Consultancy Procurement**

There are two routine/special features in the procurement and selection of consultants; namely:

- use of merit-point evaluation systems; and
- two-envelope tendering procedures.

Selecting consultants for long or complex assignments on the basis of cost alone is unlikely to achieve the required quality of services.

#### **5.4.1.1 Merit Point System**

A merit point system uses a point-scoring basis to determine the winning consultant. Points are awarded for both the technical capability and the financial cost, according to criteria specified in the Request for Proposals. The consultant with the highest combined score for both the technical and financial proposals is usually recommended for the award of contract.

Where cost is a factor in selection, technical quality for consultancy assignments is normally awarded 80% of the total points and the cost 20%. However, other combinations could be used depending on the peculiarities of the assignment (such as 70/30 or 60/40).

Merit point systems are also used to evaluate whether proposals pass a minimum technical score to proceed to a final financial evaluation (Least Cost Selection Method). The financial envelopes of all consultants whose proposals pass the minimum technical score are then opened, and the proposal with the lowest price recommended for award of contract.



#### **5.4.1.2 Two-Envelope System**

To avoid any chance of the consultant's price influencing the technical evaluation under a merit point system, financial proposals are submitted in a separate sealed envelope. The financial envelope must only be opened after the technical evaluation is completed and approved by the Tender Committee.

In the interests of transparency, a second Public Opening of the financial proposals of those consultants who have passed the technical evaluation stage is held.

#### **5.4.2 Selection Procedure for Consultants for Works**

The procedure for assessment and the selection of Consultants following a Request for Proposals is based one of the following methods:

- Quality and Cost Based Selection (QCBS) Method
- Quality Based Selection (QBS) Method
- Fixed Budget Selection (FBS) Method
- Least Cost Selection (LCS) Method
- Consultant's Qualifications Selection (CQS) Method
- Single Source Selection (SSS) Method
- Use of Individual Consultants

#### **5.4.3 Quality and Cost Based Selection (QCBS) Method**

The QCBS Method is the standard method of selection for most consultant services and uses the merit-point scoring system. The technical capabilities and experience of the Consultants and Personnel, and the quality of the proposal submitted in response to the Terms of Reference, will receive the major percentage of the total points to be awarded.

The method is used:

- When quality is paramount
- Complex or highly specialised assignments
- Where innovative solutions are required
- Where downstream impact is high
- Where variable solutions are available

- ❑ Where consultancy firms may have different cost structures

The evaluation of Proposals on the QCBS Method would normally involve two-stage process, namely:

- ❑ The Technical Proposals are evaluated first in accordance with criteria specified in the tender documents. For a Proposal to be responsive, it must score a minimum mark also specified in the tender documents.
- ❑ The Financial Proposals are evaluated next carried but only limited to the firms that obtained the minimum qualifying technical score.

The best compromise between technical quality and cost of the services is often achieved by allocating 80% of the total points to the technical features of the proposal and 20% to the financial score.

#### 5.4.4 **Quality Based Selection (QBS) Method**

Quality-Based Selection (QBS) may be suitable for complex, difficult to define, or highly specialised assignments, where the best expertise available is required without consideration of the price. In this case, only technical proposals are evaluated, with the winning bidder being invited for detailed negotiations to agree the price of the services and the contract.

QBS is suitable for the following types of assignments:

- ❑ complex or highly specialised assignments where it is difficult to define precise Terms of Reference (TOR) and the required input from the consultants, and for which the client expects the consultants to demonstrate innovation in their proposals (for example, sector studies, multi-sector feasibility studies, design of a hazardous waste plant or of an urban master plan, financial sector reforms);
- ❑ assignments that have a long term impact and in which the objective is to have the best experts available (for example, feasibility and structural engineering design of such major infrastructure as large dams, policy studies of national significance, management studies of large government agencies); and
- ❑ assignments that can be carried out in very different ways, and therefore proposals may not be directly comparable (for example, management advice, or policy studies in which the value of the services depends on the quality of the analysis).

The Request for Proposals (RFP) should not indicate the estimated budget, but may provide the estimated number of key

staff and time, specifying that this information is given as an indication only, and that consultants are free to propose their own estimates.

The RFP may require submission of a technical proposal only (without a financial proposal), or request submission of both technical and financial proposals at the same time, but in separate envelopes (two-envelope system). Only the financial envelope of the highest ranked technical proposal is opened and the rest are returned unopened to the tenderers, after negotiations with the winning consultant are successfully concluded.

If technical proposals only are invited, after evaluating the technical proposals, the Consultant with the highest ranked technical proposal will be invited to submit a detailed financial proposal.

The Procuring Entity and the Consultant should then negotiate the financial proposal and the contract.

Other aspects of the selection process are identical to those of QCBS.

#### **5.4.5 Fixed Budget Selection (FBS) Method**

Fixed Budget Selection may be used when the assignment is simple, can be clearly defined, and there is only a strictly limited budget available for the services. Consultants are invited to submit their best technical proposal within the fixed budget price and award of contract is made to the highest scoring technical proposal

This method is only appropriate when:

- the assignment is simple and can be precisely defined; and
- when the budget is fixed.

The RFP will indicate the available budget and request the consultants to provide their best technical and financial proposals in separate sealed envelopes, within the stated budget.

The TOR must be carefully prepared to ensure that the budget is sufficient for the consultants to perform all of the expected tasks.

Technical proposals will be evaluated and tenderers who pass the minimum technical score will be invited to a public opening of their financial envelopes.

Tenderers whose technical proposals fail to meet the minimum technical score will have their financial envelopes returned unopened.

Any financial proposals that exceed the indicated budget should be rejected.

The Consultant who has submitted the highest ranked technical proposal within the budget will be selected for award of contract.

#### **5.4.6 Least Cost Selection (LCS) Method**

This method is more appropriate to selection of consultants for assignments of a standard or routine nature (audits, engineering design of noncomplex works, etc.) where well-established practices and professional standards exist, and when the contract value is small.

- A minimum qualifying score for the required quality is established and stated in the RFP.
- Technical and Financial Proposals are required to be submitted in separate envelopes by the short-listed tenderers.
- Technical envelopes are opened first and evaluated. Those tenders scoring less than the minimum qualifying score are rejected. The financial envelopes of the remaining Tenderers are opened in public.

The firm with the lowest price is selected for contract award.

#### **5.4.7 Consultant's Qualification Selection (CQS) Method**

This method may be appropriate for very small assignments where the need for submission and evaluation of detailed competitive proposals is not justified.

- Expressions of interest and information on the consultants' experience and competence relevant to the assignment are requested.
- The firm with the most appropriate qualifications and references is selected.

The selected firm is invited to submit a combined technical and financial proposal, and then invited to negotiate the proposal and the contract.

#### **5.4.8 Single Source Selection (SSS) Method**

Single-source selection of consultants lacks the benefit of competition in regard to quality and cost, the selection is not transparent, and may encourage unacceptable practices.

Therefore, single-source selection should only be used in exceptional circumstances.

The justification for single-source selection must be examined carefully to ensure economy and efficiency and is subject to prior approval by the PPOA.

Single-source selection is appropriate if there is a clear advantage over competitive selection for instance:

- for tasks that are a natural continuation of previous work carried out by the Consultant;
- where rapid selection is essential (for example, in an emergency situation);
- for very low value assignments;
- when only one firm is qualified or has the necessary experience for the assignment.

#### **5.4.9 Use of Individual Consultants**

Individual consultants are normally employed on assignments when:

- teams of personnel are not required;
- additional outside (home office) professional support is not required;
- the experience and qualifications of the individual are the major requirement.

If co-ordination, administration, or collective responsibility may become difficult because of the number of individuals required, it may be advisable to employ a firm.

Individual consultants are selected on their qualifications for the assignment.

- Selection may be on the basis of references or through comparison of qualifications among those expressing interest in the assignment or approached directly by the Procuring Entity.
- Individuals must meet all relevant qualifications and be fully capable of carrying out the assignment.
- Capability is judged on academic and professional background, experience, knowledge of local conditions and culture, administrative systems, and government organisation, and language skills as appropriate.

#### 5.4.10 **Types of Consulting Contracts for Works**

There are essentially seven types of contracts for the engagement of consultants for works which are listed below.

- Consultants' Services – Time Based Contract
- Consultants' Services – Lump Sum Contract
- Small Assignments – Time Based Payments
- Small Assignments – Lump Sum Payments
- Retainer and/or Contingency Fee Contract
- Percentage Contract
- Framework (Indefinite Delivery) Contract
  - Definite-Quantity Framework Contract
  - Indefinite-Quantity Framework Contract
  - Requirements Framework Contract

#### 5.4.11 **Types of Consultants**

Consultants fall into a number of broad categories that include the following:

- Private Firms
- Public Agencies
- Specialised Agencies
- Non-governmental Organisations (NGOs)
- Procuring Agents
- Inspection Agents
- Banks
- Auditors

Not all of the above categories may be involved with works. Some provide services in the procurement of goods and services.

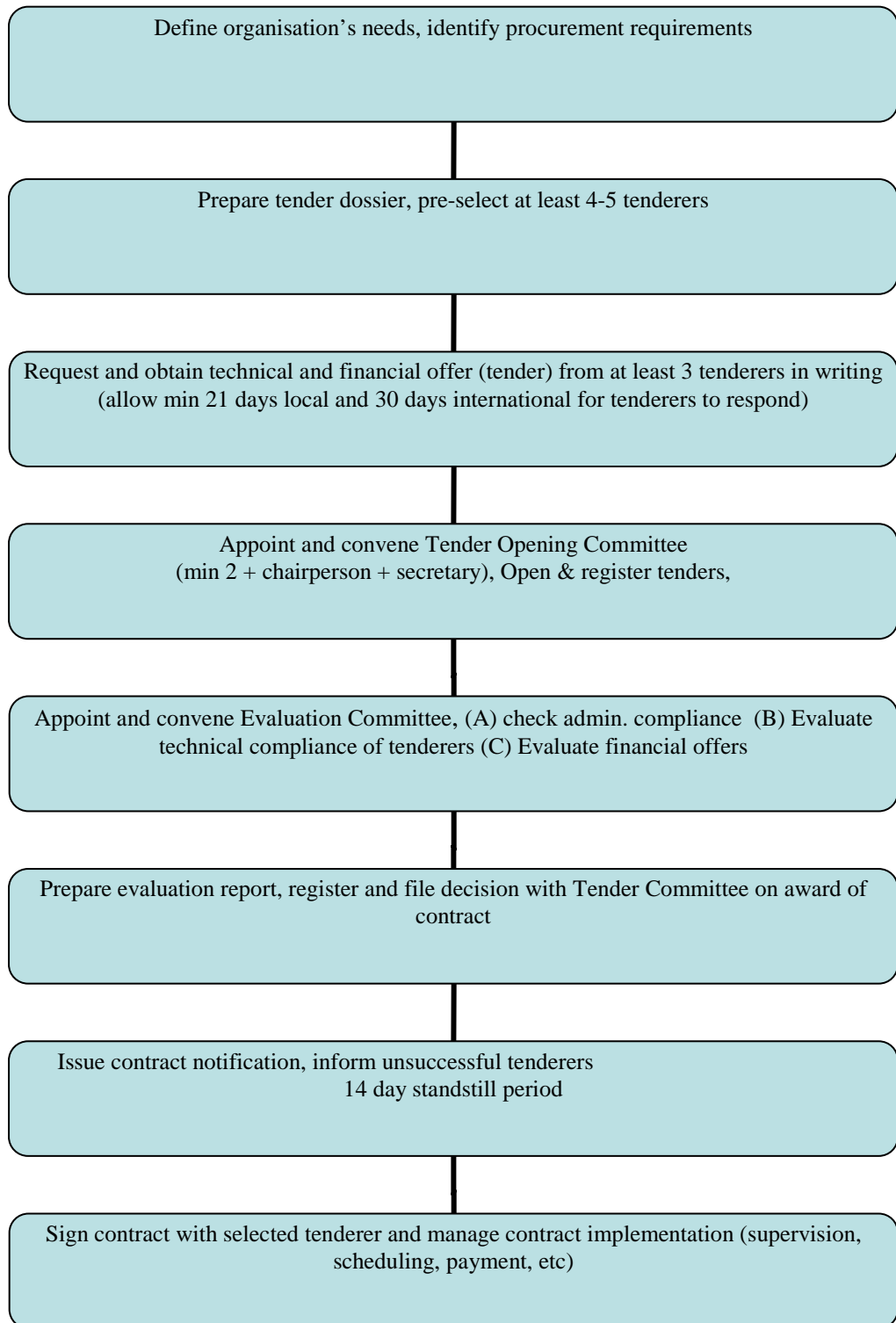
### 5.5 **RESTRICTED TENDERING**

Restricted Tendering is a tendering process by direct invitation to a shortlist of pre-qualified, pre-registered or known contractors, and is subject to a specific prior approval by the Tender Committee:

It is an appropriate method of procurement, and is only permitted to be used, where:

- the requirement is of a specialised nature or has requirements of public safety, or public security which make an open competitive tender impossible;
- due to the urgent nature of the requirement, an open competitive tender is not practical;
- the number of potential contractors is limited; or
- an open competitive tender has failed to bring an award of contract.

## Restricted Tendering





## **5.6 DIRECT PROCUREMENT**

Direct procurement from a contractor without competition is subject to a specific written approval being granted by the Tender Committee upon the submission of justification for the proposed procurement method.

Direct procurement may be appropriate when:

- the purchase is for urgently needed remedial works, provided this is restricted to the minimum requirement to meet the urgent need until a procurement by other methods can be fulfilled; or
- the works can only be provided by one source for physical, technical or policy reasons. e.g. requiring the use of proprietary techniques that are obtainable only from one source.

## **5.7 LOW-VALUE PROCUREMENT (REQUEST FOR QUOTATIONS)**

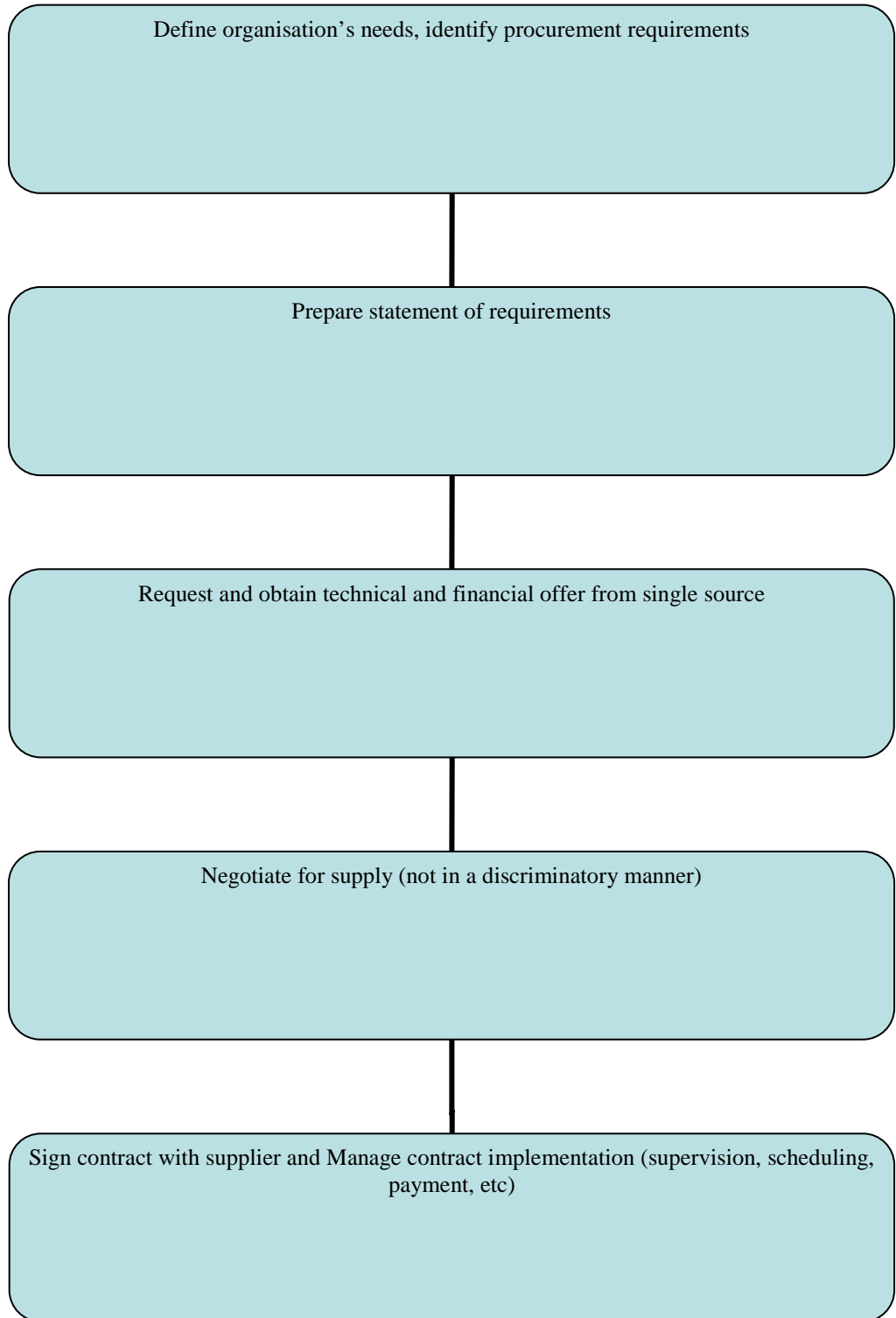
This is based on comparing price quotations obtained from several suppliers, usually at least three, to ensure competitive prices.

Request for Quotations may be used when:

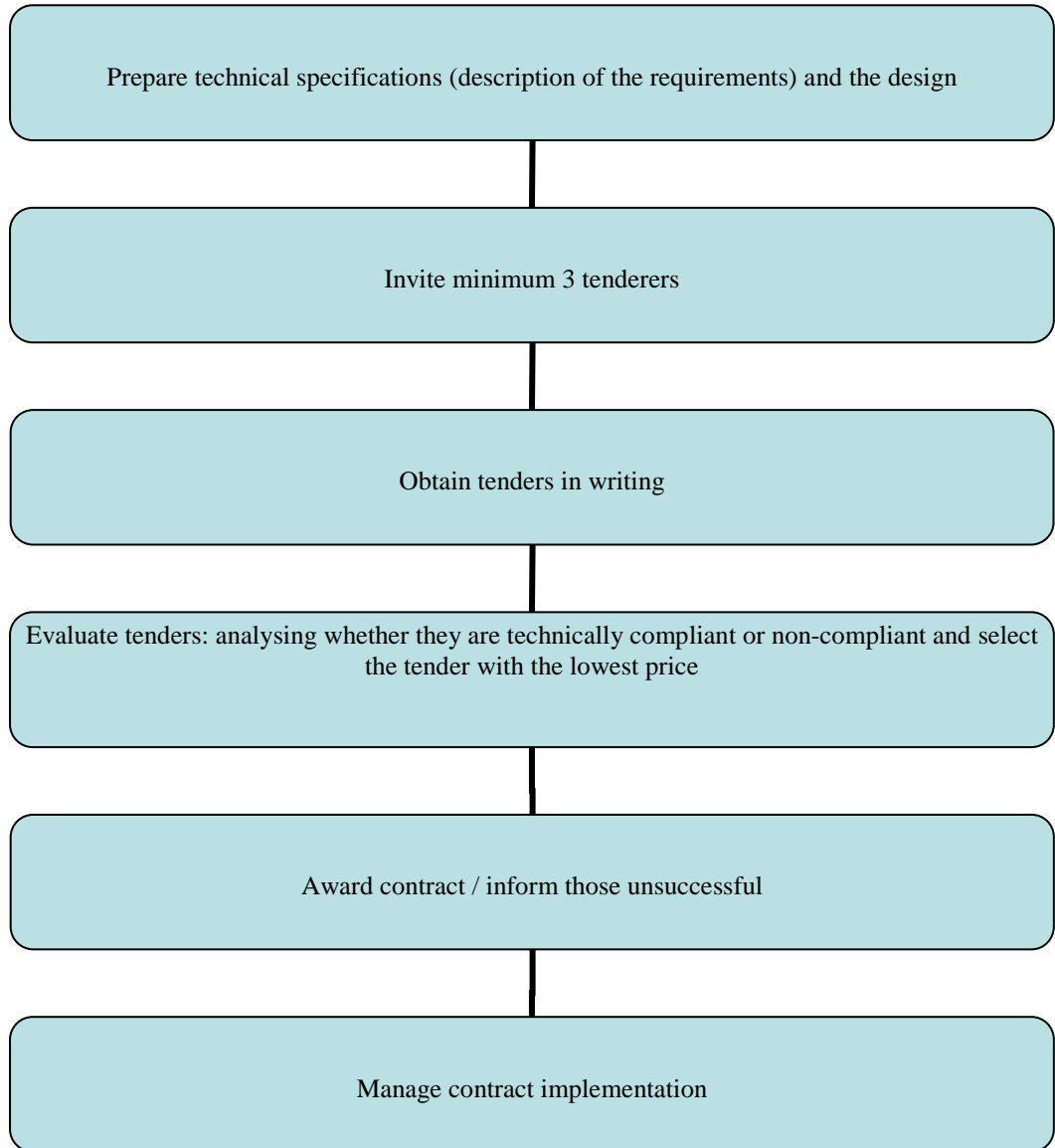
- the estimated value is less than the threshold specified in Schedule 1 of the Regulations; and
- the requirement is for widely available works activities such as redecoration, repairs, and minor alterations which do not require detailed specification and may be readily estimated by a contractor from a simple site visit.

For higher value or more complex requirements, it is recommended that a more appropriate Standard Tender Document and contract format should be used to protect the Procuring Entity.

## Direct Procurement



## Request for Quotations



## **5.8 TWO-STAGE TENDERING**

Two-stage Tendering is an infrequently used procurement process (for works) in which a Procuring Entity invites tenderers in the initial stage to contribute to the detailed specification of the works. Following review and consultations, new detailed specifications for the works are prepared and a restricted tender issued in the second stage to all participants who were not rejected in the first-stage.

It is an appropriate method of procurement when it is not feasible for the Procuring Entity to formulate detailed specifications or plans for the works, to identify their characteristics in a defined manner, or the subject of the works is subject to rapid technological advances.

### **Procedure for Two-Stage Tendering for Works**

1. Prepare Tender documents, with evaluation criteria, detailing out the Vision, Scope, General Requirements and Features of proposed works
2. Identify list of pre-qualified Contractors
3. Invite Contractors to submit the 1<sup>st</sup> Stage proposals, without tender prices, that meet the requirements of the Tender documents
4. Evaluate the proposals and select the most feasible and appealing one. Also determine the responsive bidders to be considered during the 2<sup>nd</sup> Stage of the process and reject non-responsive bidders at this stage.
5. Firm up your requirements with respect to scope, features and specifications using the selected proposal as a guide. This might require the deletion and modification of specific aspects of technical or quality characteristics of the selected proposal.
6. Develop bidding documents and detailed evaluation criteria.
7. invite only the responsive bidders to submit technical and financial proposals
8. evaluate and select the best evaluated offer.

## **5.9 SPECIALLY PERMITTED PROCUREMENT**

Section 92 of the Act allows Procuring Entities to use Specially Permitted Procurement Procedures with the approval of PPOA and these include concessioning and design competition.

Concessioning is the procurement that encourages the mobilisation of private sector resources for the purpose of public financing of projects and is commonly referred to as Management or Public-Private-Partnerships (PPP) contracts. The different types of PPP Contracts are discussed at Section 6.8 of this manual.

Design Competition is the procurement that obtains competitive bids for services which are creative in nature and require that part of the services be carried out as part of the bid to facilitate evaluation of tenders. Such services include architecture, landscaping, engineering, etc. Examples of these types of contracts are discussed at Section 6.7 of the manual.

## CHAPTER 6: TYPES OF WORKS CONTRACTS

There are ten (10) main types of Works Contracts and these include the following:

- Lump Sum (LS).
- Bill of Quantities (BOQ), Unit Rate (UR) or Ad/Re-Measurement.
- Cost Reimbursable Plus Fee (Cost Plus).
  - With Fixed Fee.
  - With Variable (or percentage) Fee.
- Target Cost (+ Incentive Fee or Bonus).
- Supply and Erect/Install.
- Design and Construct.
- Turnkey.
- Management Contracts (or Specially Permitted Contracts).
- Framework Contracts
- Labour-Intensive Contracts

Most of the above contract types have price adjustments during implementation either on account of physical contingencies or price contingencies or both. Physical Contingencies relate to increases or decreases in project scope (normally referred to as “Variation Orders”) while Price Contingencies relate to price movements due to inflation, legislation or government policy.

The different contract types are described below with brief comments on usages, advantages and disadvantages.

### 6.1 LUMP SUM CONTRACTS

Lump Sum or Fixed Sum Contracts refer to contracts where the price is determined at the onset and remains unchanged during implementation. It is suitable if the scope and schedule of the project are sufficiently defined to allow the estimating of project costs to a high degree of accuracy.

#### **When to Use:**

- Small well-defined works or buildings with short duration
- Large industrial process plant (Turnkey);

- Target Bonus Cost (+ Incentive Fee or Bonus);

**Advantages:**

- Fixed sum for budgeting
- Easy to administer
- Little or no re-measurement
- Less documentation

**Disadvantages:**

- Inflexible to changes
- High risk to Contractors, leading to high tendered prices.

## 6.2 BILL OF QUANTITIES (BOQs) CONTRACTS

The contract is based on estimated quantities of work items and agreed unit prices included in the contract document as a priced Bill of Quantities. Payment is based on measurements of work quantities executed by applying the agreed unit rates. The final contract price is therefore dependent on the total quantities of work carried out at completion.

In general this contract is suitable for construction and supply projects where there are different types of items that can be accurately identified in the contract documents. It is not unusual to combine a BOQ Contract for parts of the project with a Lump Sum Contract or other types of contracts.

**When to Use:**

- Most common to construction with short or long duration where the design has not been finalized at the tender stage.

**Advantages:**

- Equitable basis for bidding
- Facilitates bid comparison and evaluation
- Adaptable to changes
- Periodic payments follow contracts cash flow
- Normally little difference between bid price and final contract cost.

**Disadvantages:**

- Problems with unbalanced bids/unit rates
- Preparing and monitoring a detailed BOQ contract

**6.3 COST PLUS CONTRACTS**

With Cost **Plus** Contracts, the Employer agrees to pay the cost of all labour and materials plus an agreed amount to the Contractor to cover overheads and profit.

- The fee could be a fixed percentage of the cost of labour and materials (**Variable Fee**) or an agreed fixed amount (**Fixed Fee**), irrespective of the final cost of labour and materials. With Variable Fee, the incentive paid to the Contractor increases with the cost of labour and materials. It is however remains unaltered at a predetermined amount for a Fixed Fee contract.

This type of contract is favoured where the scope of the work is indeterminate or highly uncertain and the kinds of labour, materials and equipment needed are also uncertain. Under this type of contract, detailed and complete records must be kept of all time, materials and equipment used by the Contractor on the works.

**When to Use:**

- Open-ended emergency situations (earth quakes and flood disasters) - with fixed Fee
- High risk and uncertainty (tunnelling) – with variable Fee (%)

**Advantages:**

- Early mobilisation and rapid start
- Contractor assumes little or no risk

**Disadvantages:**

- Inappropriate for competitive bidding
- With fixed fee, no incentive for quality or timely work
- With % fee, no incentive to limit costs
- Additional employer staff needed to monitor costs



## 6.4 TARGET COST CONTRACTS

The Employer and Contractor would negotiate and agree on the final cost of the project, usually referred to as the “Target Cost”. A fee is agreed to be paid to the Contractor over and above the target cost.

As an incentive for economy, the contracting parties would also agree to share any savings or cost overruns in predetermined rations (say, 50-50).

**This implies payments due to the Contractor on that at: completion of a project at are:**

Target Cost	<ul style="list-style-type: none"> <li>○ The Target Cost <b>plus</b></li> <li>○ Agreed Fee</li> </ul>
20% lower than Target Cost (20% savings)	<ul style="list-style-type: none"> <li>○ The Final Cost <b>plus</b></li> <li>○ Agreed Fee <b>plus</b></li> <li>○ Bonus (say, 50% of the savings)</li> </ul>
20% higher than Target Cost (20% cost overrun)	<ul style="list-style-type: none"> <li>○ The Final Cost <b>plus</b></li> <li>○ Agreed Fee <b>minus</b></li> <li>○ Penalty (say, 50% of the cost overrun)</li> </ul>

It should however be pointed out the target cost may not necessarily be a fixed price. This implies that the target cost would normally be adjusted from time to time during contract implementation to take account of price and physical contingencies.

### When to Use:

- Essential Cost Plus + incentive fee or bonus
- For conditions of high uncertainty and Unquantifiable Risk

### Advantages:

- Savings or cost overruns shared according to final target cost
- Risk shared by both Employer and Contractor

### Disadvantages:

- Similar to disadvantages of Cost Plus Contract, namely:
- Inappropriate for competitive bidding

- With fixed fee, no incentive for quality or timely work
- With % fee, no incentive to limit costs
- Additional employer staff needed to monitor costs

## **6.5 SUPPLY & ERECT/INSTALL CONTRACTS**

These contracts involve the supply and installation of materials by the Contractor where design and supervision is provided by the Employer or an agent acting on behalf of the Employer. It is a combination of goods and works.

### **When to Use:**

- For pumping stations, transmission towers, pipelines
- For major bridges, public buildings etc

### **Advantages:**

- Part goods, part work
- Lump Sum or combination Lump Sum/Unit Rate or BOQ

### **Disadvantages:**

- Normally has quantity/price variations

## **6.6 DESIGN & CONSTRUCT CONTRACTS**

The Contractor has an expanded scope under Design and Construct Contracts. The Contractor is responsible for both the design and construction but these contracts are usually limited to simple structures such as non-complex buildings, warehouses and small projects.

### **When to Use:**

- For relatively quick erection where little time is available for normal design and tendering process by Employer
- Typically used for warehouse, storage facilities and office blocks.
- Often used where client does not have design capability.

**Advantages:**

- Part design, part works
- Single responsibility for whole contracts
- Lump Sum (LS) or combination LS/Unit Rate
- Design and build/construct
- Explores latest concepts design/construction

**Disadvantages:**

- Factory design using prefabricated members, fixed span/height of members can lead to inflexibility
- Employer often needs to check design calculations or employ consultant
- Complex bid evaluation

**6.7 TURNKEY CONTRACTS**

Turnkey Contracts are similar to Design and Construct in that the Contractor has responsibility for both design and construction. However, turnkey contracts are usually employed in more complex situations where it is usually not feasible to formulate the full project scope and detailed specifications at the onset.

- The two stage tendering process is sometimes employed for turnkey contracts. The first stage is to solicit for design concepts that aim to capture the vision of the Employer for the intended works based on initial thoughts and preliminary briefings. The Request for proposals on the design concept may be issued to a pre-qualified list of Contractors. The concept that best meets the Employer's vision is accepted and detailed technical and financial proposals are then sought on the selected concept during the second stage of the tendering process.

**When to Use:**

- Similar to Design and Build but complexity is much higher
- For complex industrial process plants
- Contractor delivers working package for specific end product
- Normally two stage bidding
- Normally LS with price adjustment for long duration.

## **6.8 MANAGEMENT OR PPP CONTRACTS**

### **6.8.1 Introduction**

Management or Public-Private-Partnerships (PPP) contracts are essentially concessionary turnkey contracts including financing by investor when the owner has limited budget or borrowing capacity. The four principal roles for the private sector in PPP schemes include:

- to provide additional capital;
- to provide alternative management and implementation skills;
- to value added to the consumer and the public at large; and
- to provide better identification of needs and optimal use of resources.

### **6.8.2 Types of PPP Contracts**

Some of the common management or PPP contracts are defined below.

- BOT- Build, Operate and Transfer
- BOO - Build, Operate and Own
- BOOT- Build, Operate, Own and Transfer
- DBFO - Design, Build, Finance and Operate
- DBOM –Design, Build, Operate and Maintain (usually referred to as DBO)
- DBOMF- Design, Build, Operate, Maintain and Finance
- BOLT – Build, Operate, Lease and Transfer

### **6.8.3 When to adopt PPP Contracts**

PPP schemes have developed in part due to financial shortages in the public sector. They are used mainly:

- for revenue earning projects (toll roads, power, water, transport, health and education)
- where the proposed tariff (revenue to investor) is attractive to the investor and offers value for money to the public.

#### **Criteria:**

- Proposed tariff (revenue to investor) is a major consideration in bid evaluation.

- Project should be economically viable for the public sector
- Project should be financially viable for the private sector
- Proposed tariff (revenue to investor) is a major consideration in bid evaluation.
- Appropriate balance of risk and reward between the public and private sectors
- Public sector must achieve value for money

#### 6.8.4 Advantages

- Brings in resources and expertise from the private sector
- Improved value for money in the procurement of public services through competition
- Improved operational and commercial performance
- Cost and risk borne by investor
- Acceleration of infrastructure provision
- Faster implementation
- Reduced whole life costs (PPP projects which require operational and maintenance service by the private sector with provides strong incentives to minimise cost over the whole life of the project, something that is inherently difficult to achieve within the constraints of public sector budgeting).
- Better risk allocation
- Better incentives to perform
- Improved quality of service
- Generation of additional revenues
- Enhanced public management

#### 6.8.5 Disadvantages

- Contracts are complex and tendering process have long lead times.
- Effective Contract management and performance monitoring systems required.
- Possible conflict between planning and environmental considerations

- ❑ Cost of re-entering the business if operator proves unsatisfactory.
- ❑ Locks public sector into long-term private sector financing and commitments.
- ❑ May not be politically acceptable

## 6.9 FRAMEWORK CONTRACTS

The PPOA issued “*The Public Procurement Guidelines for Framework Contracting (2008)*” and provides guidelines for procuring under framework contracts.

### 6.9.1 Types of Framework Contracts

There are three main types of framework contracts, namely:

- Definite-Quantity Framework Contracts.
- Indefinite-Quantity Framework Contracts.
- Requirements Framework Contracts.

**Definite-Quantity Framework Contract** provides for delivery of a definite quantity of specific goods or services for a fixed period, with deliveries or performance to be scheduled at designated locations upon order.

This may be used when:

- A definite quantity of goods or services will be required during the contract period; and
- The goods or services are regularly available or will be available after a short lead time.

**Indefinite–Quantity Framework Contract** provides an indefinite quantity, within stated limits, of goods or services during a fixed period, and may be either a delivery order framework contract or a service order framework.

- Used when the procuring entity cannot predetermine, above a specified minimum, the precise quantity of goods or services that will be required during the contract period, and it is inadvisable for the procuring entity to commit itself for more than a minimum quantity.
- The procuring entity should use an indefinite-quantity framework contract only when a recurring need is anticipated.

**Requirements Framework Contract** provides for fulfilling all actual purchase requirements of one or more public bodies for goods or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor.

- appropriate for acquiring any goods or services when a procuring entity anticipates recurring requirements but cannot predetermine the precise quantities of goods or services that the procuring entity's activities will need during a definite period.

#### 6.9.2 **Conditions for Use**

The appropriate type of indefinite-delivery framework contract may be used to:

- Acquiring goods and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award;
- Permit stocks to be maintained at minimum levels; and
- Acquires goods and services on a “when-required” basis

#### 6.9.3 **Procedure in Using Framework Contracts**

- Determine form of Contract
  - Single Award
  - Multiple Award
- Prepare Tender Documents including the Form of Agreement, selection criteria, etc.
- Contract must specify the maximum and minimum quantities under each task or delivery order.
- Determine and state value of Performance Security



## **6.10 LABOUR-INTENSIVE CONTRACTS**

### **6.10.1 Introduction**

Labour-Intensive Contracts (LIC) are simple form of contracts that have high labour inputs. The Procuring Entity (Employer) would normally enter into two contracts as follows:

- Contract with a Consulting Engineer/Procuring Agent to provide design and supervisory services.
- Contract with a selected Contractor to execute the project.

The Constructor is fully responsible to find and manage the labour, materials and plant required to execute the works. The contract normally would specify that labour intensive methods must be used, which then places the responsibility on the Contractor to recruit and train labour for most of the activities (such as to dig trenches, spread materials, compact, etc) and to price the project (at his risk) correctly to cover any additional costs. It is normally assumed that a labour-based approach will cost more than a plant-based approach, because of slower progress, etc.

### **6.10.2 Advantages**

The advantages of this approach are:

- It is simple and well understood in the Construction Industry.
- It places the responsibility and risk of project execution on the Contractor who is assumed to have all the required technical, managerial and financial skills to accept this responsibility.
- Being labour intensive it will divert a large portion of the contract value to the lower income groups. It can be specified that labour must be sourced from the neighbouring communities in which case they directly benefit from the influx of money.
- Some training and skills transfer takes place and it can be assumed that a number of the people employed as labourers may use this opportunity as a stepping stone to embark on a career in construction (steel benders, masonry, foreman, artisans).

### 6.10.3 Disadvantages

- It is generally more expensive than plant intensive contracts due to slower progress and longer construction times.
- Skills transfer and training is limited to that required to ensure the labourers understand what is required of them (e.g. to dig a trench, etc.). Higher skill levels are normally imported by the Contractor from his permanent staff. Structured training can be prescribed as part of the contract. This adds to costs.
- Trained personnel are to leave the area and follow the Contractor to wherever new projects are executed. The skills do not remain in the community and are thus not available for ongoing maintenance of the infrastructure.
- After completion of the contract and after the contractor has handed over the project, it is unlikely that the skills left behind will be sufficient to maintain the infrastructure.
- This approach cannot be used for complex construction needing specialised skills and can only be used for construction categories that lend itself to labour intensive approaches.

### 6.10.4 Applicability

- This project method can only be implemented in the case of construction types lending to labour intensive practices. This would include rural infrastructure projects (feeder roads, markets, dugouts, etc) It is obviously not suitable for sophisticated high technology construction techniques (dams, high-rise buildings, water treatment plants).
- It should only be considered for communities where there is high unemployment, suitable candidates to be trained, as well as an ongoing requirement for further construction and/or maintenance of the infrastructure.
- Availability of suitable and experienced professional staff in this method of implementation.
- Should be consistent with government policy and enjoy political support

## **CHAPTER 7: CONTRACT MANAGEMENT**

Effective management of contracts is essential to ensure that the objectives of the procurement process are achieved and that all contractual obligations and activities are completed efficiently by both parties to the contract. The Procurement Unit or the Technical Department concerned must ensure that routine monitoring of all current contracts is maintained so that swift remedial measures can be taken when problems arise, or preventative action taken when problems are foreseen.

There are many post-contract issues that need to be dealt with, monitored and resolved before the contract reaches its conclusion and these include the following:

- Contract Effectiveness;
- Appointment of a Project Manager and Supervising Engineer;
- Preparation of Interim and Final Certificates;
- Deduction of Retentions and payments to the Contractor;
- Contractual Disputes;
- Delays in Performance;
- Claims for Damages;
- Insurance Claims
- Initial and Final Acceptance of the works;
- Release of Performance Securities and Retentions;
- Contract Closure.

### **7.1 CONTRACT EFFECTIVENESS**

Although the Contract may have been signed by both parties, the legal effectiveness of the Contract may be dependent on one or more of the following conditions:

- Receipt by the Procuring Entity of the Performance Security;
- Receipt by the Procuring Entity of an Advance Payment Security;
- Receipt by the Supplier of the Advance Payment;
- Receipt by the Supplier of an acceptable Letter of Credit; or

- Mobilisation and Site possession by the Contractor.

**Actions:**

Ensure that:

- any Performance Security specified in the contract is received by the Procuring Entity;
- any Advance Payment specified in the contract is paid immediately when the Advance Payment Security is received from the Supplier or Contractor;
- any Letter of Credit required is issued promptly;
- the Contractor meets the agreed dates for mobilisation and possession of the site.

## **7.2 CONTRACT SUPERVISION AND ADMINISTRATION**

Contract supervision and administration will be undertaken by the Project Manager or Supervising Engineer in consultation with the Procurement Unit and the Technical Department.

Supervision and administration of works contracts is often a complex task relying heavily on the experience and qualifications of the Project Manager or Supervising Engineer.

Contract Management and Supervision involve five (5) main activity levels and these include:

- Time Control
- Quality Control
- Cost Control
- Finishing
- Usage, Monitoring and Evaluation

### **7.2.1 Time Control**

Time control involves the implementation and completion of the project within the agreed works programme. It requires the close monitoring and effective management of the under listed aspects of the contract.

- Works Programme
- Issue of Performance Security

- Release of Advance Payment to Contractor on receipt by Employer of a suitable Advance Payment Guarantee
- Commencement Date
- Time for Completion
- Delays and Extensions
- Management Meetings
- Management Reports
- Early Warnings

#### 7.2.2 **Quality Control**

Quality control involves the execution of the project in conformance to the technical specifications. The focus is on the under listed aspects of the contract.

- Tests
- Identifying Defects
- Correction of Defects during:
  - Construction Period
  - Defects Liability Period
  - Remedying of Uncorrected Defects

#### 7.2.3 **Cost Control**

Cost control involves the implementation and completion of the project within the contract price. Physical variations that have the tendency of increasing the contract price and extending the contract period should be kept to the barest minimum (not to exceed 15% for a Works Contract). It requires the close monitoring and effective management of the under listed aspects of the contract.

- Bill of Quantities
- Changes in Quantities/Variations
- Payment Certificates
- Timely processing, approval and payments of Certificates
- Price Adjustments
- Securities

Penalties/Compensations

**7.2.4 Finishing the Contract**

This is the stage leading to final completion and handover and issues to be managed and addressed satisfactorily include the following:

- Completion
- Taking-Over Certificate
- Operating and Maintenance Manuals
- Final Account
  - Remedying of Defects
  - Release from Performance
  - Issue of Performance Certificate
  - Return of Performance Security
  - Where Applicable
    - ❖ Termination
    - ❖ Payment upon Termination

**7.2.5 Usage, Monitoring and Evaluation**

Events to manage, monitor and evaluate include the following:

- Operations and Maintenance
- Monitoring and Evaluation
- Asset Retirement Decision
- Replacements/Disposal of Assets

**7.2.6 Basic Actions under Contract Management and Supervision**

The basic actions to be undertaken under Contract Management and Supervision are listed below.

- Maintain close supervision of the Contractor's performance, work done, materials used, and labour force on the site to ensure that potential problems are identified as early as possible.
- Notify the Contractor in writing requesting rectification of any deficiencies in workmanship, materials used, safety or environmental standards, or other required performance standards
- Hold regular site meetings with the Contractor to identify the causes of any slippage in the schedule of works.

- Receive regular progress reports from the Contractor and ensure that written records of any disputes or contract variation orders issued are maintained.
- Ensure that any significant problems, variation orders, day work claims, compensation events, cost overruns, or slippage in the timetable are brought to the attention of the Procuring Entity.
- Initiate and supervise any process for claims against insurance or the Contractor.
- Conduct detailed checks on the Contractors claims for work performed, re-measure as appropriate, and prepare Interim Payment Certificates, deducting any retention percentage specified in the Contract.
- Participate in inspections for Interim and Final Handover of the Works and prepare the Final Payment Certificate releasing retention money to the Contractor.

### **7.3 INITIAL AND FINAL TAKEOVER OF WORKS**

Initial and final takeover of works shall be certified by an Inspection and Acceptance Committee.

- on issue of an initial takeover certificate by the Inspection and Acceptance Committee, part of any retention monies held may be paid to the contractor if specified in the contract.
- following the end of the defects liability period and subject to all defects being rectified, the Inspection and Acceptance Committee will certify the final takeover of the Works and sign the Certificate of Completion.
- on issue of the final takeover certificate by the Inspection and Acceptance Committee, a Final Certificate shall be raised to authorise payment of the balance of any retention monies due to the contractor.

The Inspection and Acceptance Committee (TAC) is to be established by the Procuring Entity and its membership as per Regulation 17 (2) of the Act comprises:

- A Chairman; and
- At least two other members appointed by the Accounting Officer or the head of the Procuring Entity on the recommendation of the procurement unit.

The composition of the TAC as per the Regulations does not make reference to technical staff of the procuring entity that would be involved with the designs and supervision of works.

For accountability and effective inspection and acceptance of the works, it is recommended that membership of the TAC should include the technical staff of the procuring entity that would be involved with the designs and supervision of works.

#### **7.4 DEFECTS LIABILITY PERIOD**

During the defect liability period, the Contractor is obliged to repair/replace any defects at his/her own cost. However, if the defect is proven to be as a result of a design problem, whereby the Contractor was not involved in the design, then the Procuring Entity will bear the costs of rectification.

#### **7.5 PAYMENT FOR WORKS**

For Payment Certificates raised by the Project Manager or Supervising Engineer, the Procuring Entity will:

- Complete a Payment Voucher ensuring the deduction of any advance payments already made, retention percentages, and any contractual penalties incurred by the Supplier.
- Attach the:
  - original claim from the Contractor and the Payment Certificate issued by the Project Manager or Supervising Engineer;
  - original of any Interim or Final Inspection Report;
  - results of any analytical surveys;
  - calculation of any penalties liquidated damages if allowable under the contract;
  - copies of relevant information from the contract document, records of approval and financial authorisations.
- Record the payment in the Procurement File/Contract Register.
- Forward the Payment Voucher to the Accounts Department for processing.



## 7.6 DELAYS IN PERFORMANCE

Performance of the works should be completed by the Contractor in accordance with the time schedule prescribed in the Schedule of Requirements. Where this is not the case:

- ❑ the Contractor must notify the Procuring Entity, through the Project Manager, in writing of the conditions delaying performance, including full details of the delay, the likely duration and the cause(s).
- ❑ The Procuring Entity will immediately assess the situation in consultation with the Project Manager, and may at its discretion extend the Contractor's time for performance, with or without liquidated damages as specified in the Contract.
- ❑ If the time for performance is extended, both parties shall ratify such extension by a formal addendum to the Contract subject to approval by the Tender Committee.
- ❑ A delay by the Contractor in the performance of his obligations may render him liable to liquidated damages if specified in the contract document, except where:
  - the delay is as a result of Force Majeure;
  - there is no provision for liquidated damages in the contract;
  - an extension of time is agreed between the two parties without the application of liquidated damages.

### **Action:**

- ❑ Refer to the relevant clauses in the Conditions of Contract for the procedure to be followed to apply, calculate and claim liquidated damages.
- ❑ Update the Procurement file and Contract Register to reflect any delays in the Contractor's performance.
- ❑ Ensure that the end-user department is notified immediately of all such delays if they are not already aware.

## 7.7 RESOLUTION OF CONTRACTUAL DISPUTES

Most minor disputes may be resolved by discussion and agreement between the Project Manager and the Contractor to rectify the cause of complaint.

Any formal written complaints received from a Contractor should be fully investigated and referred to the Head of the Procuring Entity to authorise correspondence or formal negotiations with the Contractor.

Where an adjudicator is appointed under the contract, such adjudication may result in an unfavourable decision in favour of the Contractor, and should therefore be treated as a last resort once all other possibilities for agreement are exhausted

### Action:

- Examine the Contract carefully to be aware of all contract conditions relating to the Resolution of Disputes.
- Determine if the Procuring Entity is at fault or partly at fault, and if so, take appropriate action to rectify the problem.
- Invite the Contractor to a formal meeting, within 7 days of the complaint, to discuss the issues and try to agree a compromise acceptable to both parties. Ensure that accurate written Minutes are kept of any such meeting. If an agreement is reached which changes any of the conditions of the Contract, approval of the Tender Committee is required before the agreement can be implemented.
- If no initial agreement is reached and negotiations conducted by the Head of the Procuring Entity also fail, consider the use of any adjudication or arbitration services as specified in the contract.
- Prepare any necessary addendum to the Contract for signature.

## 7.8 TERMINATION OF THE CONTRACT

The parties to the contract normally have the right to terminate the contract, but to protect the Procuring Entity, advice of the Attorney General's Department and the PPOA should always be sought if the Procuring Entity is considering such action. Contracts should not be terminated without examining all possible alternatives, unless the termination is mutually agreed by all parties to the contract.

Action:

The Procuring Entity should:

- ❑ Examine the Contract carefully to be aware of all contract conditions and penalties relating to the Termination of Contract.
- ❑ Follow the advice of the Legal Officer/ Attorney General and the PPOA in the preparation of any correspondence and settlement of any contractual penalties.

## 7.9 CONTRACT AMENDMENT

Contract amendment may become necessary as a result of the application of price variations specified in the contract, re-measurement, day works, variation orders, compensation events, the resolution of disputes, additional or reduced requirements by the Procuring Entity, agreements to extend the time schedule, or from accepted increases or decreases in prices. The contract may allow the Procuring Entity to modify contract values by a pre-determined percentage when this is in the public interest and essential for the work of the Procuring Entity.

All other amendments to costs, quantities, time-periods and other terms and conditions of the contract must be approved by the Tender Committee and confirmed in a formal contract amendment or addendum.

The Procuring Entity will:

- ❑ identify and agree with the Contractor the specific clauses in the contract which need to be changed, and the new values or terms and conditions which are to apply;
- ❑ prepare a draft contract amendment document for approval by the Tender Committee together with a report justifying the reasons for the amendment,
- ❑ following approval by the Tender Committee:
  - record any change in contract value in the Commitment Register and in the Contract Register;
  - record any other contractual changes in the Procurement File;
  - obtain from the Contractor any necessary addition to the Performance Security;
  - arrange for signature of the contract amendment in four copies; and
  - distribute copies in the same way as the original contract.

### 7.10 APPLICATION OF THE PRICE ADJUSTMENT FORMULAE (PAF)

The Contract Price of a project is made up of the cost of component items, such as: cement, aggregates, steel, labour, fuel, etc. The application of the Price Adjustment Formulae (PAF) to obtain a revised Contract Price arising out of changes in legislature and/or increasing cost of materials takes the general expression as indicated below.

$$P_1 = P_0 \times F$$

where;

$P_1$  = Revised Contract Price after passage of time, (t) months

$P_0$  = Initial Contract Price at initial date, (0) months

F = Adjustment Factor

and;

$$F = x + a(A_1/A_0) + b(B_1/B_0) + c(C_1/C_0) + d(D_1/D_0) + e(E_1/E_0) + \text{etc}$$

where;

$A_0, B_0, C_0, D_0, E_0$  etc indices of the component items at the initial date as published by the appropriate National Statutory Authority.

$A_1, B_1, C_1, D_1, E_1$  etc indices of the component items at the future date as published by the appropriate National Statutory Authority.

x a constant

a, b, c, d, e, etc coefficients that reflect the relative weights or proportions of the component items in relation to the Contract Price.

the sum of “x” and the coefficients “a, b, c, d, e, etc” total **1.0**

The application of the PAF in a contract normally requires that the contracting parties agree prior to contract effectiveness on the parameters of the formulae; such as the:

- Value of the constant “x”;
- Values of the coefficients: “a, b, c, d, e, etc”;
- Source for obtaining the indices: A, B, C, D, E, etc; and
- Reference or base date for the initial indices “ $A_0, B_0, C_0, D_0,$  etc”

## 7.11 COMMON PROBLEMS IN PROCUREMENT AND MANAGEMENT OF WORKS CONTRACTS

Common problems in the procurement and management of Works Contracts include the following:

- ❑ Use of non-standard forms of contracts leading to:
  - inequitable distribution of risks
  - insufficient contract documentation
  - lack of clarity on project scope and deliverables
  - harmful contract terms and conditions
  - insufficient price breakdown
  - payment terms sometimes not commensurate with deliverables
  - high Advance Payments not well secured
  - inappropriate securities and warranties
  - ill-defined specifications
  - poor sub-contracting arrangements.
  
- ❑ Poor communication between contracting parties during project execution leading to:
  - ambiguous project status
  - poor quality and cost control
  - delays on certifications and approvals
  - unwarranted variations and cost overruns
  - disputes, conflicts and lack of trust
  
- ❑ The use of time-tested standard or model form of contracts (MFCs) will minimise or eliminate most of the above problems. MFCs include:
  - Work Bank Standard Form of Contract for Works;
  - NEC<sup>1</sup> family of contracts;
  - FIDIC<sup>2</sup> MFCs, some of which include
    - ❖ Conditions of Contract for Construction for Building and Engineering Works designed by the Employer-First Edition 1999;
    - ❖ Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, designed by the Contractor-First Edition 1999;
    - ❖ Conditions of Contract for EPC/Turnkey Projects-First Edition 1999;
    - ❖ Short Form of Contract -First Edition 1999;

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<sup>1</sup> New Engineering Contract (aka Engineering and Construction Contract) issued by the Institution of Civil Engineers

<sup>2</sup> Federation of International Consulting Engineers

- African Development Bank Standard Procurement Documents
- Standard Tender Documents of PPOA (Third Schedule of Regulations), and these include, for Works, the under listed:
  - ❖ Standard Tender Document for Procurement of Works (Buildings and associated Civil Engineering Works) (Item 1)
  - ❖ Standard Tender Document for Procurement of Works (Roads, Water, Bridges, etc) (Item 2)
  - ❖ Standard Tender Document for Procurement of Works (Electrical and Mechanical Works) (Item 3)
  - ❖ Standard Tender Document for Procurement of Small Works (Item 4)
  - ❖ Standard Tender Document for Maintenance Services (Item 33)
  - ❖ Standard Tender Document for Design & Build (Turnkey) (Item 34)
  - ❖ Standard Tender Document for Supply and Installation (Item 35)
  - ❖ Standard Tender Document for Pre-Qualification (Item 37)

#### **7.12 USE OF SUB-CONTRACTORS**

Sub-contracting accounts for a high proportion of construction problems. However, it is necessary for the main contractor to control the extent of sub-contracting and to:

- Maintain active supervision.
- Accept responsibility for the sub-contractor's work.
- Play a broad role in managing the whole construction supply chain.
- Pay sub-contractors promptly as and when Interim Payment Certificates have been honoured by the Procuring Entity.

The use of a MFC would take care of the common problems associated sub-contracting. Standard provisions in MFC that enable the procuring entity to mitigate problems associated with sub-contracting include the following:

- Any sub-contracting to be made by the Contractor must receive the prior written approval of the Employer (Procuring Entity).
- It is not permissible for the Contractor to sub-contract the whole of the works.
- Sub-contracting should not exceed 30% of the contract price.

## CHAPTER 8: PROCUREMENT REPORTING, MONITORING & EVALUATION

### 8.1 PROCUREMENT REPORTING

The routine reporting of procurement activity by all Procuring Entities is essential for procurement planning and budgeting, and for the monitoring, tracking and evaluation of procurement. This Manual has introduced the requirement for regular reports of procurement activities to be submitted to the Accounting Officer with periodic copies to the Public Procurement Oversight Authority (PPOA).

Monthly Procurement Reports shall be submitted by each Tender Committee to the Accounting Officer using Form SPF 5 within 14 days of the end of each quarter, with quarterly extracts sent to PPOA. It should be pointed out that reports to PPOA can be submitted locally to the nearest district office of PPOA where the procuring entity is not located in Nairobi.

The suggested Quarterly Report format on Form SPF 5 is in four sections as follows:

- Section A: Procurements in Process.** Report all procurements which have passed the initial stage of approval by the Tender Committee during the month.
- Section B: Contracts Signed or Procurements Cancelled.** Report all new contracts signed during the month together with any procurements which have been cancelled after receiving an initial procurement approval by the Tender Committee.
- Section C: Contracts Completed.** Report all contracts completed during the month following performance by the supplier, final payment by the Procuring Entity and the release of any performance security.
- Section D: Minor Procurements.** List individual contracts signed during the month for procurements approved by the Procurement Committee(s) as per 1<sup>st</sup> Schedule of the Regulations.

#### 8.1.1 Records in Procurements Reporting

The information to be recorded should include the following:

- Procurement Number;
- Works to be procured;
- Procurement Method approved (Open Tender, Limited Tender, Request for Quotations or Direct Procurement);
- Source of Funds (e.g. Government, World Bank, other donor);
- Approval given by the Tender Committee (e.g. procurement method, evaluation report and contract award);



- Date of Approval; and
- Estimated Contract Value.
- Contract signing date

For procurements of low value, enter the Department, Unit or Project name in “Subject of Procurement” and the total value of contracts or direct payments in the month in “Contract Cost”.

## **8.2 PROCUREMENT MONITORING AND EVALUATION**

Procurement monitoring and evaluation is a process that must be routinely conducted both by Procurement Entities and by the Public Procurement Oversight Authority to:

- ensure that procurements are within the annual procurement plan for the Procuring Entity;
- identify weaknesses and delays in the procurement process;
- compare prices against market standards;
- assess performance of Procurement Units and Committees;
- assess performance of suppliers, contractors and consultants; and
- identify any necessary remedial action.

The Public Procurement and Oversight Authority will co-ordinate and lead the monitoring and evaluation process through the methodologies described below.

### **8.2.1 Sources of Information**

Procurement monitoring and evaluation information is obtained from:

- Requests for deviation from procurement procedures submitted by Procuring Entities;
- Monthly Reports of Procurement on Form SPF 5;
- Regular meetings with stakeholders (including representatives of the Private Sector);
- Routine procurement reviews/audits of Procuring Entities;
- Reports of the Auditor General, Kenya Anti-Corruption Commission and the PEs’ Internal Audit Departments;
- Reports of specialist external procurement audits;
- Tenderer and supplier complaints made to PPOA about Procuring Entities;

- Formal complaints by tenderers referred for Administrative Review;
- Routine sampling of record of procurement proceedings for individual procurements; and
- Examination of the record of procurement proceedings for any procurement which appears to deviate from compliance with the Act and Regulations.

### 8.2.2 Action by the PPOA on Receipt of Form SPF5

The basis of the monitoring system is the Monthly Report on Form SPF5. On receipt of the Monthly Report from a Procuring Entity, the PPOA will:

- Check that procurement activity recorded is within the authority levels of the Tender Committee and in accord with the annual procurement plan;
- Check that any new procurement processes commenced are within the Procurement Plan for the Procuring Entity;
- Identify any procurement decision which appears to deviate from compliance with the Regulations, and query this with the Tender Committee;
- Inspect or call for the record of procurement proceedings where serious breaches of the Act, Regulations or Code of Ethics are suspected;
- Enter the details of each new procurement into the database, using the Procurement Number as the main index key, and update existing information as reported throughout the individual procurement process.

The database information will be used to:

- provide Procuring Entities with summary reports on procurement activity;
- compile the statistical analysis of procurement activity for the Annual Report of the PPOA;
- identify the scale and values of common user items that may benefit from the introduction of framework contracts;
- identify regular procurements of identical items by a Procuring Entity which may indicate that requirements have been split to avoid an approval threshold or a procurement procedure; and
- determine the individual and average timescales for procurement processes.

### 8.2.3 Other Monitoring and Evaluation Activities by the PPOA

- Conduct regular meetings with stakeholders (including representatives of the Private Sector) to report on procurement issues and initiatives, and to initiate investigation of complaints and proposals from stakeholders.

- Undertake periodic reviews of the procurement performance of Procuring Entities and advice on specific issues which need to be addressed.
- Review and initiate remedial action as appropriate in response to audit reports of the Auditor General, the Internal Audit Departments of the PEs, and any specialist external procurement auditors.
- Review and initial remedial action as appropriate in respect of tenderer and supplier complaints.
- Undertake a programme of routine sampling of records of procurement proceedings for individual procurements and report findings and recommendations to the Procuring Entity.
- Review procurement procedures, systems, guidelines and standard documentation on a routine basis, and make or introduce recommendations for improvement.
- Compile all findings and action into the Annual Report of the Public Procurement Oversight Authority.

#### **8.2.4 Action by the Procuring Entity**

The Tender Committee has the general responsibility to monitor procurement activity and remedy any defects before giving approval for procurement actions. The advice of the Public Procurement Oversight Authority should always be sought if the Committee is unsure of compliance with the Regulations.

The Head of Procuring Entity will ensure that all issues raised by the Public Procurement Oversight Authority are undertaken expeditiously by the Procuring Entity through the Tender Committee and Procurement Unit, and that complete records of procurement are made available for audit purposes and for inspection by the PPOA.

## **CHAPTER 9: COMPLAINTS ON THE PROCUREMENT PROCESS**

### **9.1 REVIEW OF PROCUREMENT PROCESS (SECTIONS 93-114 OF THE ACT)**

Any bidder that claims to have suffered, or that may suffer loss or injury due to a breach of a duty imposed on the Procuring Entity by the Act, may seek a review of the procurement process.

However, the following shall not be subject to a review process in accordance with Section 93 of the Act:

- the choice of a procurement method (provided this was not in breach of the Act);
- a decision by the procuring entity under Section 36 to reject all tenders, proposals or quotations;
- the limitation of procurement proceedings to National Competitive Tendering;
- where a contract has been signed (Section 68 of the Act); or
- Where an appeal is frivolous.

Complaints should be addressed to the Public Procurement Administrative Review Board (Review Board)

#### **9.1.1 Review by the Public Procurement Administrative Review Board**

A bidder entitled to seek review may submit a complaint to the Public Procurement Administrative Review Board in accordance with Part VIII of the Act and Regulation 73.

- Secretary to Review Board receives complaint
- Secretary notifies PE of pending review and suspension of procurement proceedings (Section 94)
- Review Board may dismiss request for review (Section 95) if considered:
  - Frivolous; or
  - Vexatious; or
  - Made solely for the purpose of delaying proceeding.

The parties to be invited to participate in the review process include the following (Section 96 of Act):

- aggrieved bidder
- The Procuring Entity
- successful bidder if already noticed by PE
- others parties as determined by Review Board

The review process must be conducted within 30 days after receipt of request for review (Section 97). No appeal should delay the process beyond the stipulated time period.

The Review Board could arrive at any of the under listed outcomes following the investigations (Section 98):

- annuls the decision of the Procuring Entity
- Instructs the PE to re-do specific activities
- Revise decisions of PE
- Order payment of cost

#### **9.1.2 Remedies Available to Aggrieved Parties (Section 99 of the Act)**

In the event that the aggrieved parties are not satisfied with the outcome of review conducted by the Review Board, two remedies are available, namely:

- Request the Review Board for a further administrative review
- Judicial review (Section 100 of the Act)

A decision made by the Review Board shall be final and binding on the parties unless judicial review commences within 14 days of Review Board's decision. The appeal for judicial review should be made to a High Court, and the decision of the High Court shall be final.

The High Court must declare within 30 days, otherwise the decision of the Review Board holds.

A party to the review which disobeys the decision of the Review Board or the High Court shall be in breach of the Act and any action taken by such party contrary to the decision of the Review Board or the High Court shall be null and void.

#### **9.1.3 Investigations by PPOA (Section 101 of the Act)**

The Director General of PPOA may order an investigation of procurement proceedings to determine if there is breach to:

- The Act
- The Regulations; or

Any procurement directives

The investigation would be conducted by an Investigator to be appointed by the Director General (Section 102)

Powers of the Investigator (Section 103) include:

- Access to all books and records
- Can remove or make copies of documents
- Can request information from relevant staff

The outcome of the investigation (Section 104-105) includes the following:

- Investigator to prepare and submit report to DG
- DG may take actions similar to those by Review Board as per Section 98
- Before actions, DG shall afford opportunity for representation to parties
- Parties can appeal to Review Board to review decisions of DG

**9.1.4 Interventions of Review Board on Investigations by PPOA (Section 106)**

A request can be made to the Review Board for review of the decisions taken by the DG provided such a request is made within 21 days and upon the payment of a prescribed fee. The Review Board may:

- dismiss the request if no merit
- meet within 21 days to review request

Any decision to review the request must be completed review within 21 days after receipt of request.

At the end of the review, the Review Board may (Section 111 of Act):

- confirm, vary or overturn decision of DG
- order compensation payment

Decisions of the Review Board are also subject to appeal in High Court (Sections 112-114) provided the process is initiated 14 days after the decision is made.

**ANNEXES:**

## **ANNEX 1 – SAMPLE TEMPLATE FOR TENDER EVALUATION REPORT**



## Annex 1 – Sample Template for Tender Evaluation Report

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**1 EXECUTIVE SUMMARY**

## 2 INTRODUCTION

### 2.1 Project Background and Description of Works

### 2.2 Invitation for Tender (with details of procurement Lots where applicable)

### 2.3 Submission of Tenders

### 2.3 Opening of Tenders

The records compiled at bid opening are attached as **Appendix 2** and these include the following:

- Minutes of Bid Opening Meeting.
- Records of Bids as Announced at Bid Opening.
- Records of Attendance at Bid Opening.

The level of participation and the bid prices as announced at bid opening is summarized at Table 2 below.

**Table 2 – Summary of Announced Bid Prices**

Item	Tenderer	Bid Lot and Announced Price		
		Lot 1	Lot 2	Lot 3
1.				
2.				
3.				
4.				
5.				
6.				

The six (6) tenderers submitted **xxxxx** quotations on the three works Lots.

### 3 EVALUATION APPROACH

#### 3.1 Introduction

#### 3.2 Evaluation Team

The Evaluation Team comprised the following:

Members of the Evaluation Team were made to sign a declaration form confirming that they do not have any affiliation to any of the bidders that could influence their input into the evaluation process. The form is attached as **Appendix 3**.

#### 3.3 Evaluation Criteria

The evaluation was conducted in accordance with the criteria set out in the Invitation for Bids as summarised at Table 3 below.

**Table 3 – Evaluation Criteria**

Item	Condition	Clause Ref	Requirement	Priority
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				

## **4 EXAMINATION OF TENDERS FOR RESPONSIVENESS**

### **4.1 Preliminary Examination for Responsiveness**

#### **4.1.1 Non-Substantial Deviations**

#### **4.1.2 Substantial Deviations**

### **4.2 Examination for Responsiveness on account of the Value of Bid Security**

### **4.3 Request for Clarifications and Responses from Tenderers, where necessary**

**Table 4 - Preliminary Examination for Responsiveness**

Item	Condition	Clause Ref	Requirement	Bidders												
				1	2	3	4	5	6	7	8	9	10	11	12	
1.	Delivery Period	ITB: 1.1	90 days from date of LC													
2.	<b>Documentation Required</b>															
	▪ Business Registration Certificate	ITB: 11.1 (h)	Required													
	▪ Certificate to Commence Business	ITB: 11.1 (h)	Required													
	▪ Audited Accounts for the past 3 years	ITB: 11.1 (h)	Required													
	Manufacturer's Authorisation (if bidder is not manufacturer)	ITB: 19.1 (a)	Required													
	In-Country Presence	ITB: 19.1 (b)	Required													
3.	Bid Validity	ITB: 20.1	90 days ( <b>19<sup>th</sup> August</b> )													
4.	<b>Bid Security</b>	ITB-19.1-19.4														
	▪ Source	ITB: 21.1	Commercial Bank													
	▪ Form	ITB: 21.1	Format Provided													
	▪ Value ( <b>2% of bid price</b> )	ITB: 21.2														
	▪ Validity	ITB: 21.2	28 days more ( <b>16<sup>th</sup> Sept</b> )													

**Table 5 – Responsiveness based on Value of Bid Security**

Item	Bidder	Abbreviation	Announced Bid Price	2% of Bid Price	Bid Security				Compliance
					Source	Form	Value	Validity	
1.									
2.									
3.									
4.									
5.									
6.									
7.									
8.									
9.									
10.									
11.									
12.									

**5 COMPUTATION OF EVALUATED PRICES**

**5.1 Correction of Errors**

**5.2 Concurrence of Errors**

**5.3 Evaluated Bid Prices and Ranking of Bidders**



## **6 POST QUALIFICATION ANALYSIS**

### **6.1 Introduction**

### **6.2 Technical Evaluation**

#### **6.2.1 General Experience (Similar Works Performed)**

#### **6.2.2 Plant and Equipment Holding**

#### **6.2.3 Key Personnel (Qualification and Experience)**

#### **6.2.4 Work Programme**

#### **6.2.5 Completion Period**

### **6.3 Financial Evaluation**

#### **6.3.1 Annual Volume of Construction Works**

#### **6.3.2 Access to Credit Facilities / Liquid Assets**

#### **6.3.3 Comparison of Major Rates & Credibility of Tenderer's Rates**

## **7 TENDER EVALUATION CONCLUSIONS AND RECOMMENDATIONS**

### **7.1 Conclusions**

### **7.2 Recommendations**

## **8 APPENDICES**

## **APPENDIX 1 – INVITATION FOR TENDER**

## **APPENDIX 2 – RECORDS COMPILED AT BID OPENING**

## **2.1 Minutes of Bid Opening Meeting**

## **2.2 Records of Bids as Announced at Bid Opening**

## **2.3 Records of Attendance at Bid Opening**



**APPENDIX 3– DECLARATION FORM ON NON-ASSOCIATION OF EVALUATORS WITH BIDDERS**

**APPENDIX 4 – REQUEST FOR CLARIFICATIONS AND RESPONSES RECEIVED FROM TENDERERS**

**APPENDIX 5– DETAILED TECHNICAL REQUIREMENTS, WHERE RELEVANT**

**ANNEX 2 – SAMPLE TEMPLATE FOR PROCUREMENT PLAN**

<b>Country/Organisation:</b>								
<b>Project/Programme:</b>								
<b>Loan #:</b>		<b>Basic Data</b>						
<b>Description*</b>	<b>Package Number</b>	<b>Lot Number</b>	<b>Lumpsum or Bill of Quantities</b>	<b>Procurement Method</b>	<b>Estimated Amount in KShs</b>	<b>Pre-or Post Qualification</b>	<b>Prior or Post Review</b>	<b>Plan vs. Actual</b>
Norm Duration of Proc Steps						If Prequalification		Plan
						add 7-13 wks		Actual
List of Contracts								
								Plan
								Actual
								Plan
								Actual
								Plan
								Actual
								Plan
								Actual
								Plan
								Actual
								Plan
								Actual
								Plan
								Actual
<b>Total Cost</b>					0.00			Plan
					0.00			Actual

Fill gray cells only!

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Procurement Plan Template

Plan vs. Actual	Draft Bid Documents, including specs and quantities, draft SPN		If Post-Review, No-objection Dates are not needed		Bid Evaluation		
	Prep & Submission by Ex Agency	No-objection Date	Spec Proc Notice Advert	Bidding Period	Submission Bid Eval Rpt	No-objection Date	
			On-line UNDB Gateway Nat Press	Bid Invitation Date	Bid Closing-Opening		
Plan	4 - 7 wks	1 - 1.5 wks	1.5 - 2 wks	1.5 - 2 wks	6 to	12 wks	1.5 - 3 wks
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							

Government of the Republic of Kenya – Procurement Manual for Works Draft 090424  
Procurement Plan Template

Plan vs. Actual	Contract Finalization			Contract Implementation			
	Contract Amount in US\$ '000	Date Contract Award	Date Contract Signature	Mobilization Advance Payment	Substantial Completion	Final Acceptance	Final Cost
Plan		1 wk	1.5-3 wks				
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan							
Actual							
Plan	0.00						0.00
Actual	0.00						0.00



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