

Note for Drafting Public Procurement Regulations

(March 2002)

INTRODUCTION

1. Introduction

Improving a government procurement regulatory framework calls for a number of actions intended to establish or reinforce government agencies' efficiency and credibility, as well as the active involvement of business partners.

2. Scope of the law

The procurement regulatory framework should preferably address all government contracts and not only those financed out of fiscal resources, and in particular it should encompass concessions "régies" and " affermages" and more generally the operation of public services as defined in the EU Directive 93/38 ECC, given the risk that otherwise private interests and well protected situations prevail over public interest.

3. Transparency

Transparent is best achieved by government agencies through the use of the following mechanisms: effective advertising, public bid opening, objective bid evaluation criteria, award to the lowest evaluated bidder without negotiations.

Procedural rules play an important role (as would be the case in judicial proceedings) particularly when it comes to open competitive bidding. In turn, these procedural rules impose the use of well-formulated bidding documents which will result in bid submissions that are free from qualifications. The same rules should exclude any provision or mechanism that could affect the transparency of the process. Procurement procedures other than open competitive bidding must be restricted and contained within appropriate limits.

4. Balance between public and private partners

Modern procurement regulations attempt to provide to losing bidders an effective way to submit contract award protests. More generally, private partners in government contracts are expected to be proactive in implementing competitive mechanisms and, in fact, should be the guardians of those mechanisms exactly in the same manner as government agencies. Private partners must be offered fair contract conditions. Certain institutional mechanisms have a critical role to play in the balance between partners and in the transparency of the process.

5. Exceptions and waivers

To the extent that exceptions and waivers are needed by a government agency in order to proceed in a timely manner with its procurement, procurement regulations may include specific exceptions to contract law, for example, termination for convenience. The regulations should also provide for any waiver needed in the context of international agreements.

SECTION II
DETAILED RECOMMENDATIONS

1. Procedural rules play an important role (as would be the case in judicial proceedings) particularly when it comes to open competitive bidding. Those procedures or rules are as follows:

- Effective advertisement, i.e., advertisement broad enough (using the appropriate media), giving enough time to bidders for preparing their bid; to the extent possible, bidding opportunities should also be advertised electronically;
- Public bid opening, that is, immediate opening of all the financial bids, and recording of this opening in minutes which have to be signed by all bidders in attendance;
- Award of contract without negotiations, since negotiations would lead bidders not to submit their best bid at the time of bid submission and would affect the perception of transparency, one of the main benefits deriving from public bidding.

2. These procedural rules impose the use of well-formulated bidding documents which will result in bid submissions that are free from qualifications.

- Use of non-discriminatory bid evaluation criteria, which should be disclosed and rigorously quantified in monetary terms. This allows to indisputably identify the lowest evaluated responsive bid. Quantifying bid evaluation criteria in monetary terms is the only method that leads to transparent evaluation and that allows bidders to submit an effective protest to the awarding authority;
- The review of bidders' qualification has to be conducted by examining whether the bidder does or does not meet qualification criteria and not by using a point system reflecting the bidders' qualification;
- The review of the qualification of the bidder has to be conducted separately from the evaluation of its bid;
- The award has to be made to the bidder having submitted the lowest evaluated responsive bid.

3. These rules should exclude any provision or mechanism that could affect the transparency of the process, in particular it is critical that the following mechanisms be avoided:

- Use of a two-envelope system that deprives the process from the benefits expected from public bid opening;
- Use of a point system to evaluate bids; scoring is an indirect way to express the outcome of post-qualification or of the technical analysis of the bid;
- Combining bid evaluation with the evaluation of the bidder's qualification; this creates a risk of awarding the contract to a marginally qualified bidder whose bid is low;

- Conducting a pre-selection instead of a pre-qualification, i.e., pre-qualification means that all candidates who have been determined to be qualified should be invited to bid whereas pre-selection means that the government agency is free to invite any of those candidates but does not have to invite all of them;
- Use of non-quantified bid evaluation criteria, such as the scope of the lots or the value of the products to be domestically subcontracted, as those criteria would affect the predictability of the evaluation, or use of any other form of non-quantified preference;
- Denying bidders an access to a bidding process or an award for reasons which are essentially of a bureaucratic nature;
- Requesting bid securities when there is no need for it, or mandating high bid securities;
- Restricting foreign bidders' access to government contracts except for small value contracts;
- Inviting bids on the basis of uncertain quantities (undetermined quantity contracts).

4. Procurement procedures other than open competitive bidding must be restricted and contained within appropriate limits. To that end,

- These methods have to be defined in a limitative manner by the procurement regulations;
- Every time that a specific objective to be achieved by competition allows it, those lesser competitive methods should be replaced by more transparent procurement methods: for example, two-stage bidding shall be used instead of competitive negotiations or restrictive bidding as those the latter do not provide comparable transparency benefits for the invited candidates;
- Similarly, restricted bidding is appropriate only in the following circumstances: small value contracts, and situations in which there is only a very small number of potential candidates;
- Procurement methods have to be the most appropriate for a given purpose: for example, the selection of consultants inevitably calls for use of qualitative criteria, which would not be desirable for the selection of contractors or suppliers;
- Any exception to open competitive bidding when they are called for in situations not envisaged in the procurement regulations should be granted by an agency operating independently from the contracting government agency.

5. Modern procurement regulations attempt to provide to losing bidders an effective way to submit protests pertaining to contract award.

- Such protests should be submitted to an independent entity and not simply to the supervisor of the contracting agency. Specifically, tender committees, which are the arm of the government, can only carry administrative reviews. Their membership does not allow for arbitration or quasi-arbitration of the dispute and therefore an independent

protest mechanism should be provided in order to review award disputes before the contract award is final;

- When protests are submitted before award they may lead to revisit the award of the contract; when protests are submitted after the award, their only consequence should be the bidder's entitlement to compensatory damages for the cost of bid preparation.

6. More generally, the private partner in a government contract must be proactive in implementing competitive mechanisms and, in fact, should be a guardian of those mechanisms exactly in the same manner as government agencies.

- This is achieved when bidders are eager to submit their best possible bid, in accordance with the bid evaluation criteria that had been disclosed to them (this observation does not apply to consultants' contracts, for which negotiations may be needed in order to finalize the scope of the work of the consultants and to optimize the use of resources devoted to the contracts).
- This relies on (i) the participation of bidders in bid opening, and (ii) the absence of any prospect of negotiations.

7. Private partners must be subject to fair contract conditions. Specifically:

- Procurement regulations should provide for general conditions of contracts whose repetitive views trigger a sense of predictability.
- Procurement regulations should cover guarantees and penalties without imposing on the government's private partner exceedingly severe contract sanctions or making the sanctions automatic. This would take away from the government contracting party the flexibility it needs to supervise the execution of the contract services to the best of its interest and of the final users' interests.
- Private contracting parties should be paid within the time period stipulated in the contract: through the provisions dealing with time for payment, procurement rules sometimes result in imposing on the government's private partner that it pre-finance contract services for several months, which tends to discourage the participation of companies with small liquidities but sufficient technical capability.
- When the contract is entered into with foreign suppliers, payment should be made by documentary credit which is by far the most common payment instrument used in international commercial transactions.
- When contract time for completion extends beyond the period of time for which the private contracting party can control its cost forecast, it should be entitled to an equitable price adjustment mechanism, so that he can concentrate on the technical challenges of the contract.
- Bidders should be entitled to updating their contract price on the day of contract signing since they are not responsible for the delays encountered by the government contracting party and, therefore, should not be subject to the consequences of that delay.

8. Certain institutional mechanisms have a critical role to play in the balance between partners and in the transparency of the process, both of which being among the objectives to be achieved by modern procurement regulations.

- Agencies responsible for review and control are distinct from the contracting agency which invites and evaluates bids, and awards the contract.
- Mandatory registration is a cumbersome procedure which does not reflect changes in capacity achieved by potential candidates. When mandatory registration is to be used, it is critical to conduct it rigorously and immediately respond to any request for registration or registration updating.
- The supervisory authority of the contracting agency (“autorité de tutelle”) can only reaffirm the legality of any decision contemplated or taken by the contracting agency but it should not revisit the substance of the decision.