

# **Guidelines for Potential Bidders**

**Second Edition**

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## **1 Introduction**

Public procurement covers all types of acquisitions made by or on behalf of public entities in Kenya. Approximately 30% of government expenditure (or about KShs 300 billion in 2010-11) is accounted for by public procurement. It is important that Kenyan businesses should take advantages of opportunities in this huge market.

The purpose of these guidelines is to inform potential bidders in a general manner what is required of them when doing business with procuring entities. Those bidders seeking a more detailed understanding of the public procurement system in Kenya should study the Public Procurement and Disposal Act, 2005, the Public Procurement and Disposal Regulations, 2006, the Procurement General Manual and other manuals and guidelines issued by the PPOA, which are found on the website [www.ppoa.go.ke](http://www.ppoa.go.ke).

## **2 Core principles**

Public procurement rests upon certain core principles of behaviour - the five pillars of procurement. The five pillars are:

- Accountability - to Government, Parliament, end users, the public and suppliers;
- Transparency - sufficient and relevant information should be made available to all interested parties consistently and in a timely manner through a readily accessible, widely available medium at no or reasonable cost;
- Impartiality and fair competition – all potential bidders should be treated impartially, so that they compete on a “level playing field”;
- Integrity - public servants should be honest, avoid conflict of interest and refrain from sharp practices that bring an unfair advantage to themselves or to their organisation;
- Value for Money – the optimum balance between benefits and costs on a whole life basis.

## **3 Anti- Corruption Pledge**

Potential bidders should be aware that the Government views corruption in the procurement process as a serious matter. Corruption, in accordance with the Anti Corruption and Crimes Act, is the offering, giving, receiving or soliciting of anything of value to a public official in procurement or in contract execution. The tender package will have an anti-corruption form to be signed as a mandatory requirement.

## **4 Public Procurement Oversight Authority (PPOA)**

PPOA is charged with oversight of the operation of public procurement. Its mandate includes:

- Ensuring compliance with the stipulated procurement procedures;
- Monitoring and reporting on the overall functioning of public procurement;
- Initiating public procurement policy; and
- Publication of details of all contracts awarded above KShs 5 million.

PPOA publishes a lot of useful information on its website: [www.ppoa.go.ke](http://www.ppoa.go.ke).

## **5 Procuring entities**

Procuring entities are all public entities engaged in procurement, including central government ministries, local governments, state corporations, universities, public schools and publicly-maintained or assisted colleges or other educational institutions, co-operative societies and various other prescribed entities. These public entities offer the Kenyan public many different types of services and are major consumers of works, goods and services. These requirements are supplied by numerous individuals, sole proprietorships, partnerships and major corporations in Kenya and overseas.

Supplies Branch (currently under the Ministry of Works) arranges centralized public procurement and quantity and term contracts for common user items/services, including stationery, furniture, petroleum products etc. It advertises tenders in daily newspapers for a wide range of products.

## **6 Outsourcing**

Each procuring entity decides on what to outsource, based on personnel availability. Services like cleaning, security, computer maintenance, repair and maintenance of office equipment, furniture and related facilities are commonly outsourced.

## **7 E- Procurement**

Potential bidders need to be aware that the information age is here and that they will need to be electronically connected so that they can exploit opportunities. The website [www.tenders.go.ke](http://www.tenders.go.ke) contains tender opportunities in a variety of procuring entities. A fuller system of e-procurement covering the majority of Ministries will be starting shortly.

## **8 Reservations and Preferences**

The Minister, in consideration of economic and social development factors, may prescribe preferences and/or reservations in public procurement. Where so prescribed, exclusive preference will be given to citizen of Kenya where the funding is 100% from the Government of Kenya or a Kenyan body and the amounts are below the following prescribed thresholds:

- KShs 50 Million for procurement in respect of goods or services;
- KShs 200 million for procurement in respect of works.

The prescribed margins for preference for goods will be 15% on the evaluated price of tender when the goods offered are manufactured, mined, extracted and grown in Kenya and also based on shareholding by locals as follows:-

- 6% of the evaluated tender price where shareholding of the locals is less than 20%; and
- 8% of the evaluated price of the tender price where the shareholding is less than 50% but above 20%.

The PPOA website will indicate any preference schemes in operation and details will be included in the tender documents purchased from the procuring entity if they apply to that particular requirement.

## **9 Advertisement of public procurement opportunities**

Bid opportunities are advertised in a wide range of media including the following:

- Notices may be placed on the various notice boards of Ministries, Parastatals, other procuring

entities and the provincial administration such as chiefs, Divisional Officers, District and Provincial Commissioners;

- Electronic media such as radio and television;
- Newspapers and other print media (both local and international);
- Individual Public Procuring entities' websites; and
- The special website for tender opportunities set up by the PPOA at **www.tenders.go.ke**.

The form of advertisement will depend on the size and complexity of the goods, works or services being procured.

## **10 Content of Advertisements**

The content of an advertisement will vary according to what is being procured and the method of procurement.

A typical advertisement for works will contain:

- Scope of works (a brief description of the works required);
- Basic requirements for qualification;
- Arrangements for collecting documents, including any payment required; and
- Time and place of submission of tender or quotation (this requirement must be fully observed, as any late submission will be disqualified).

## **11 Basic requirements for eligibility to tender**

The following are the general requirements for potential suppliers to public entities:

- Registration with Attorney General/incorporation certificate;
- Copy of PIN certificate and compliance with VAT (Electronic Tax Register), NSSF and NHIF and valid tax compliance certificates;
- The necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;
- Legal capacity to enter into contract;
- Not insolvent, in receivership, bankrupt or in the process of being wound up and not subject to related legal proceedings;
- Not precluded from contracting by being an employee of the procuring entity or a member of its board or committee or certain relatives of the same; and
- Not having been debarred by the Director-General PPOA from participating in procurement proceedings on account of an offence, breach of contract or other valid reason.

Other requirements may be specified for certain procurements:

- For building works, the potential bidder should be registered in either the Roads or Works Registers maintained by the Ministry of Roads or the Ministry of Public Works;

- Business Permits;
- Energy Regulation Commission registration and classification if the works include electrical installation;
- Evidence of completion of similar works in previous 2 years;
- Provision of bid security of a certain amount (maximum 2% of the contract price); and
- Audited accounts for 3 years.

## 12 Special Requirements

### a) Registration procedures for building works

Potential bidders should be aware that there are various procedures before they can supply building works, roads and housing. The Ministry of Public Works vets all building contractors through the National Registration Committee (NRC), which is chaired by the Chief Architect.

### b) Qualifications for registration as a building works supplier

Necessary qualifications are:

- Minimum technical qualifications and skills prescribed by the NRC for the category, type and class of registration being sought. At least one of the shareholders or partners must have the technical qualifications and skills set by the committee from time to time;
- Necessary experience as prescribed by the committee in the field of application;
- The applicant's professional conduct to be such that, in the opinion of the Committee, he/she is a person fit and proper to be registered; and
- The necessary plant and equipment for execution of the intended works. The applicant must show proof of ownership or availability, such as vehicle logbooks, receipts etc.

The Ministry registers firms in categories A to H for both general and specialised contractors. Category A is the highest, handling projects of over KShs 250 million in general contracts and over KShs 50 million in specialised contracts while Category H is the lowest handling contracts of KShs 5 million contracts and KShs 1 million in general and specialised contracts respectively.

To initiate the registration and classification process, local companies have to pay KShs 3,000 and foreign companies US\$200 for a manual which is then given a serial number. The manual outlines the registration process including the payments required.

### c) Temporary Registration

This can be facilitated for foreign firms incorporated overseas who are in Kenya for a specific business purpose. Conditions for such registration are in the Ministry of Public Works Registration Procedure Manual.

### d) Electrical Installations

Electrical contractors include those undertaking contracts for electrical installation, electronics, lift and escalators installation, generating plants and control panels, solar power generation and photovoltaic installations.

For electrical installation, a potential bidder has to be registered with the Energy Regulatory

Commission. The regulations governing registration are contained in The Electric Power (Electrical Installation Work) Rules 2006. The various classes of licences are as follows:

- Class C-2-lowest class of the possible licences. A holder of such licence can handle single phase supply restricted to up to 2 storey residential and commercial buildings not used as a factory or public entertainment;
- Class C-1-carries out class C-2 work and connection to a 3 phase supply at low voltage restricted to four storey building in buildings not used as a factory or public entertainment;
- Class B- As Class C-1 but without limitation to number of storeys whether used as factories or places of public entertainment and for connection to supply not exceeding medium voltage;
- Class A-1-Can handle all kinds of electrical installations including very high voltage up to 132KVA; and
- Class A-2 for specialised electrical installations.

e) **Qualifications of electrical contractor**

For a contractor to be registered as an electrical contractor he/she must be:

- A licensed electrician; or
- Have in his/her employ, a licensed electrician.

## 13 The Tendering Process

a) **Prequalification**

Prequalification may be necessary for large or complex works or projects. Prequalification is a preliminary stage of the tendering process that is designed to produce a short-list of companies that would be capable of meeting the technical standards of the works or project, without regard to price considerations at this stage. Prequalification should take into account:

- Experience and past performance on similar contracts;
- Capabilities with respect to construction and manufacturing facilities; and
- Financial position.

Tendering is then confined to companies that have been prequalified.

b) **Specifications**

Requirements for an item, works or service to be procured will be specified in the tender document. Specifications will normally be based upon Kenyan or international standards. Specifications form part of the tender documents and are the basis on which the technical evaluation is conducted. It is important that offers should adhere to all mandatory requirements; otherwise the offer may be rejected as non-conforming.

Goods must be supplied or work done in accordance with the specifications. Items which do not meet the specified quality or standards may be rejected by the procuring entity who may withhold payment until items of the required quality are supplied. The time requirements for delivery of goods or performance of services must also be met.

**c) Types of tender**

Procuring entities may produce standing lists of registered tenderers for supply of their requirements over the coming year. Those on a standing list may be offered an opportunity to tender or submit a quotation for requirements that arise during the year.

Some tender opportunities will be for framework contracts. These are contracts entered over a specified period, typically one to three years, and are used for goods and services that are required on a regular basis, such as office stationery, medical supplies, road maintenance, cleaning, guarding services etc. A framework contract may contain a Service Level Agreement, specifying the minimum standards which will have to be met for delivery of the services.

Other tender opportunities will be for the one-off supply of an item or service. Some requirements, particularly for high-value items or services, will be obtained through open tendering. All potential bidders, not only those on the standing lists, may compete for open tenders, which are advertised by the procuring entity. Open competitive bidding can be national or international depending on the goods, works or services being procured. Potential bidders are allowed a minimum of 21 days to prepare and submit their bids (30 days for international tendering).

Open tendering is the Government of Kenya's preferred method of procurement. However, alternative procurement procedures may be used in certain circumstances. These include:

- Restricted tendering, which may be used where suppliers have already been prequalified, where there are time or cost constraints, or where there are only a few known suppliers or the required goods, works or services;
- Direct procurement, which may be used where there is only one person or company that can supply the goods, works or services being procured, where there is no reasonable alternative, or in certain cases of urgent need;
- Request for proposals, which may be used for the procurement of services or a combination of goods and services that are advisory or otherwise of a predominantly intellectual nature, e.g. for consultancy services; and
- Request for quotations and low-value procurement procedures, which may be used for low-value procurements of goods, minor works or services that are readily available.

**d) Tender Document**

A tender document is a set of documents which may include the following:

- Invitation to Tenders;
- Instruction to Tenderers/Bidders;
- Bid Data Sheet;
- General Conditions of Contract;
- Special Conditions of Contract;
- Schedule of Requirements;
- Technical Specifications;
- Forms-Bid/Tender;
- Forms-Security; and
- Integrity Declaration

Bidding documents are normally in English.

**e) Completing Tender Documents**

When completing a tender document, a potential bidder should read the Instructions for Bidders, which will contain all the information on how to complete and return the tender document. Specific requirements of the tender or the bid, for example, where to place attachments or whether an omission would invalidate the bid, will be highlighted in the Bid Data Sheet.

**f) Filling Quotation Forms**

PPOA has produced a Standard Request for Quotation (RFQ) form for use by procuring entities. Potential bidders should read the instructions carefully. The RFQ form has in the first part the item descriptions, the unit of measure and the quantity required, which will have been completed by the procuring entity. The bidder will be required to fill in the unit price, any discounts offered, the brand and country of origin of the goods quoted for, and to compute the price for each item, adding tax, shipping and miscellaneous costs to arrive at the total quoted price.

**g) Submission of offers**

The time and place for submission of offers will be specified in the tender documents. Bidders must submit their offers by the bid deadline: **failure to submit your bid on time, even by only a few minutes, will lead to your bid not being considered.**

Some tender documents will specify that the technical and financial proposals be submitted in separate inner envelopes within an outer envelope. For these tenders, the technical envelope will be opened first and the technical evaluation carried out before the financial envelope is opened. If a technical proposal does not meet requirements, the financial envelope will not be opened and will be returned to the bidder.

**h) Standard Bidding Documents**

PPOA has produced and published a number of Standard Bidding Documents which will be used with suitable modifications for the procurement of different requirements. These are available on the PPOA website: **[www.ppoa.go.ke](http://www.ppoa.go.ke)**.

**i) Validity of Bids and Bid Security**

Potential bidders are required to submit bids that are valid for a period specified in the bidding documents. Procuring entities have the option to demand bid security which can be a fixed sum or a percentage of the estimated value of the contract. This is specified in the bidding documents and can be up to 2% of the contract price. Bid securities should be from a reputable bank (local or international), insurance company (approved by PPOA) or in the form of cash or letter of credit, in the amount specified in the bid document. A receipt is attached to the returned tender as proof of payment. Bid security is only valid if it extends at least thirty days after the expiry of the tender validity period. Bid security is released to unsuccessful tenderers once the contract is awarded to the successful bidder.

**j) Payment for documents**

Procuring entities may charge a fee not exceeding KShs 5,000 for a set of tender or prequalification documents. This payment covers costs for printing, copying and distribution or for converting documents into electronic format. This fee is normally paid in cash or bankers cheque.

**k) Pricing and bid validity**

Pricing should be inclusive of all duties, taxes and other levies. Most entities will require that the bid price be valid for up to 120 days after tender opening to cater for the evaluation, post tender negotiations and wider consultations when necessary.

## **l) Evaluation of tenders**

A preliminary evaluation is undertaken by an evaluation committee soon after opening tenders to ascertain that the tender has been submitted in the correct ~~format,format-~~ has been signed, and that the correct number of copies, tender security, validity and any required samples have been provided. Any tender that does not meet the requirements is rejected. Tenders are then evaluated more rigorously for technical conformity, followed by the financial evaluation which considers prices read out at tender opening, corrections for arithmetic errors, currency, discounts etc. The lowest priced conforming tender is usually awarded the contract. However, for some tenders, particularly those based on Requests for Proposals, a marking scheme may be used. Tender documents contain the evaluation criteria by which the tenders will be evaluated. The recommendation for contract award by the evaluation committee will be submitted to the tender committee for approval (procurement committee for lower-value tenders).

The procuring entity has the right to reject all tenders received and to terminate the procurement proceedings at any time without entering into a contract.

## **14 Variations and Price Adjustment**

The bidding documents shall clearly indicate whether price adjustment during the period of the contract will be allowed in the event of price changes occurring in major cost components such as labour, equipment and materials. Variation of contracts is only allowed if:

- The price variation is based on the prevailing Consumer Price Index obtained from the Central Bureau of Statistics or the monthly inflation rate issued by the Central Bank of Kenya;
- The quantity variation for goods and services does not exceed 10% of the original contract (or 15% in the case of works); The price or quantity variation is to be executed within the period of the contract; and
- The variation has been approved by the procuring entity's tender committee in writing.

## **15 Performance Bonds**

A performance bond is a financial tool used to guarantee satisfactory completion of a project by a contractor and ensures that in the event of default by the contractor, funds are available to complete the works being undertaken. Performance bonds are issued by banks as financial guarantees. Performance bonds are usually set at 10% of the contract price. For construction contracts, 50% may be released immediately on completion of the work, with the balance being released after 6 months.

## **16 Terms of payment**

### **a) Goods**

Processing of payment for goods commences after their receipt in store, verification that they meet specifications and signing of the delivery note. The standard terms of payment are 30 days from the date of invoice. The procuring entity is obliged by law to pay interest on overdue amounts, unless the contract provides otherwise.

### **b) Services**

Payment for services is also due 30 days from the date of invoice after the user has confirmed that services meet the Service Level Agreement which forms part of the service contract.

**c) Works**

In major contracts for equipment and plant which may take some considerable time to complete, provision is normally made for progress payments on milestone achievements.

Contracts for works provide in appropriate cases for mobilisation advances, advances on contractors equipment and materials, regular progress payments and reasonable retention amounts to be paid after full compliance with the contractor's obligations under the contract.

**17 Rights of Bidders**

**a) Notification of acceptance of tender**

The procuring entity will notify the successful bidder that his tender has been accepted, while at the same time notifying other bidders that their tenders were not successful. However, at least 14 days must elapse before a written contract may be entered into, to allow time for an application to be made for administrative review. If the successful bidder refuses to enter into a written contract, the entity may award the contract to the next best evaluated bidder.

**b) Unsuccessful Bidders**

A bidder has the right to request the reasons why his bid was unsuccessful. Regulation 66(2) is clear that the Procuring Entity shall, within 14 days after a request provide written reasons on why the tender, proposal or application to be prequalified was unsuccessful. Bidders may also request a summary of the evaluation report pursuant to Section 44(3) of the Act.

**c) Request for Review**

An independent Administrative Review Board is in place and any aggrieved bidder can request for review of a decision by a procuring entity. The minimum requirements for lodging a request for review include: -

- i. The complainant must be a candidate in the procurement process he/she seeks to be reviewed. A candidate is a person who has submitted a tender to the procuring entity;
- ii. The request should be made within fourteen days of the occurrence of the breach complained of or notification of award;
- iii. The applicant seeking a review must specify the breach of duty which has or may result in the applicant suffering loss or damage;
- iv. The Request for Review shall be presented in the manner of Form RB 1, which can be downloaded from the PPOA website ([www.ppoa.go.ke](http://www.ppoa.go.ke)) and is also found in the fourth schedule of the Regulations 2006;
- v. The request for review should be accompanied by such statements as the complainant considers necessary to support its request;
- vi. The complaint must be accompanied by the requisite fee. The fees for reviews are found in Part II of the Fourth Schedule to the Regulations. The fee payable upon filing a request for review depends on the value of the tender quoted by the complainant. In addition, there is an administrative fee of KShs 2,000; and
- vii. The request should be submitted to the Board Secretary in 15 bound copies and a soft copy, pages of which should be consecutively numbered.

The following matters are not subject to review:

- i. The choice of a procurement procedure;
- ii. A decision by the procuring entity to reject all tenders, proposals or quotations under Section 36 of the Act;
- iii. Where a contract is already signed in accordance with Section 68 of the Act; and
- iv. Where an appeal is considered by the Review Board to be frivolous.

Where an appeal is lodged, procurement proceedings will be suspended. The Review Board will complete its review within 30 days. A decision made by the Review Board is final and binding on the parties, unless an aggrieved party appeals to the High Court

## **18 Health & Safety**

Potential bidders should be aware that importance is attached to health and safety requirements and these may be specified in tenders.

## **19 Environment**

Potential bidders should be aware that Kenya is a signatory of the Kyoto Protocol and environmental factors may be built into the tender and evaluation of bids. Examples of such factors include but are not limited to carbon footprint, level of forest degradation, emission and spillage of toxic chemicals, crude oil spills on land or offshore, level of non-biodegradable waste, threats to biodiversity and levels of radioactive materials.



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