

## PART V - OPEN TENDERING

Part sets out requirements.

**50.** This Part sets out the requirements for open tendering.

Invitation to tender.

**51.** The procuring entity shall prepare an invitation to tender that sets out the following —

- (a) the name and address of the procuring entity;
- (b) the tender number assigned to the procurement proceedings by the procuring entity;
- (c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;
- (d) an explanation of how to obtain the tender documents, including the amount of any fee;
- (e) an explanation of where and when tenders must be submitted and where and when the tenders will be opened; and
- (f) a statement that those submitting tenders or their representatives may attend the opening of tenders.

Tender documents.

**52.(1)** The procuring entity shall prepare tender documents in accordance with this section and the regulations.

(2) The tender documents shall contain enough information to allow fair competition among those who may wish to submit tenders.

(3) The tender documents shall set out the following —

- (a) the specific requirements prepared under section 34 relating to the goods, works or services being procured and the time limit for delivery or completion;

- (b) if works are being procured, relevant drawings and bills of quantities;
- (c) the general and specific conditions to which the contract will be subject, including any requirement that performance security be provided before the contract is entered into;
- (d) the tender number assigned to the procurement proceedings by the procuring entity;
- (e) instructions for the preparation and submission of tenders including —
  - (i) the forms for tenders;
  - (ii) the number of copies to be submitted with the original tender;
  - (iii) any requirement that tender security be provided and the form and amount of any such security; and
  - (iv) any requirement that evidence be provided of the qualifications of the person submitting the tender;
- (f) an explanation of where and when tenders must be submitted, a statement that the tenders will be opened immediately after the deadline for submitting them and an explanation of where the tenders will be opened;
- (g) a statement that those submitting tenders or their representatives may attend the opening of tenders;
- (h) a statement of the period during which tenders must remain valid;
- (i) the procedures and criteria to be used to evaluate and compare the tenders;
- (j) a statement that the procuring entity may, at any time, terminate the procurement proceedings without entering into a contract; and

(k) anything else required, under this Act or the regulations, to be set out in the tender documents.

Modifications to tender documents.

**53.(1)** A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry.

(3) The procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

Advertisement.

**54.(1)** The procuring entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.

(2) If the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for national advertising, the procuring entity shall advertise, at least twice in a newspaper of general nationwide circulation which has been regularly published for at least two years before the date of issue of the advertisement, and on its website in instances where the procuring entity has a website, and the advertisement shall also be posted at any conspicuous place reserved for this purpose in the premises of the procuring entity as certified by the head of the procurement unit.

Time for preparing tenders.

**55.(1)** The time allowed for the preparation of tenders must not be less than the minimum period of time prescribed for the purpose of this subsection.

(2) For the purpose of this section, the time allowed for the preparation of tenders is the period of time between whatever steps the procuring entity takes to bring the invitation to tender to the attention of those

who may wish to submit tenders and the deadline for submitting tenders.

(3) If the tender documents are amended under section 53 when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, the procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

Provision of  
tender  
documents.

**56.(1)** The procuring entity shall provide copies of the tender documents expeditiously and in accordance with the invitation to tender.

(2) The procuring entity may charge such fees as may be prescribed for copies of the tender documents.

Tender security.

**57.(1)** A procuring entity may require that tender security be provided with tenders.

(2) The procuring entity may determine the form and amount of the tender security, subject to such requirements or limits as may be prescribed.

(3) Tender security shall be forfeited if the person submitting the tender —

- (a) withdraws the tender after the deadline for submitting tenders but before the expiry of the period during which tenders must remain valid;
- (b) rejects a correction of an arithmetic error under section 63; or
- (c) refuses to enter into a written contract as required under section 68 or fails to furnish any required performance security.

(4) The procuring entity shall immediately release any tender security if —

- (a) the procurement proceedings are terminated;
- (b) the procuring entity determines that none of the

submitted tenders is responsive; or

(c) a contract for the procurement is entered into.

Submission and  
receipt of  
tenders.

**58.(1)** A tender must be in writing, it must be signed and it must be sealed in an envelope.

(2) A tender and the envelope it is sealed in must bear the tender number assigned to the procurement proceedings by the procuring entity.

(3) A tender must be submitted before the deadline for submitting tenders and any tender received after that deadline shall be returned unopened.

(4) The procuring entity shall ensure that the place where tenders must be submitted is open and accessible and shall provide, in that place, a tender box that complies with the prescribed requirements.

(5) Each tender that is delivered shall be placed unopened in the tender box —

(a) if the tender is delivered by post, by the staff of the procuring entity immediately upon receipt;  
or

(b) if the tender is delivered otherwise than by post, by the person delivering the tender.

(6) If a tender that is delivered by post is inadvertently opened, the fact of that opening shall be recorded on the envelope by the person who opened the tender and then the tender shall be placed in the tender box.

(7) If a tender or part of a tender is too large to be placed in the tender box it shall be received in the manner set out in the tender documents or the invitation to tender or, if no such manner is set out, in the manner determined by the procuring entity.

Changes to  
tenders.

**59.(1)** Before the deadline for submitting tenders, a person who submitted a tender may change or withdraw it in accordance with the following —

- (a) the change or withdrawal must be in writing; and
- (b) the change or withdrawal must be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.

(2) After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change, the substance of the tender.

(3) The procuring entity shall not attempt to have the substance of a tender changed.

Opening of tenders.

**60.**(1) The accounting officer shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed —

- (a) the committee shall have at least three members; and
- (b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.

(2) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

(3) Those submitting tenders or their representatives may attend the opening of tenders.

(4) The tender opening committee shall assign an identification number to each tender.

(5) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register —

- (a) the name of the person submitting the tender;
- (b) the total price of the tender including any

modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and

- (c) if applicable, what has been given as tender security.

(6) The procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

(7) Each member of the tender opening committee shall —

- (a) sign each tender on one or more pages as determined by the tender opening committee; and
- (b) initial, in each tender, against the quotation of the price and any modifications or discounts.

(8) The tender opening committee shall prepare tender opening minutes which shall set out —

- (a) a record of the procedure followed in opening the tenders; and
- (b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.

(9) Each member of the tender opening committee shall sign the tender opening minutes.

Extension of  
tender validity  
period.

**61.**(1) Before the expiry of the period during which tenders must remain valid the procuring entity may extend that period.

(2) The procuring entity shall give notice of an extension under subsection (1) to each person who submitted a tender.

(3) An extension under subsection (1) is subject to such restrictions and requirements as may be prescribed.

(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn during an extension under subsection (1).

Clarifications.

**62.**(1) The procuring entity may request a clarification of a tender to assist in the evaluation and comparison of tenders.

(2) A clarification may not change the substance of the tender.

Corrections of arithmetic errors.

**63.**(1) The procuring entity may correct an arithmetic error in a tender.

(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.

(3) If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited.

Responsiveness of tenders.

**64.**(1) A tender is responsive if it conforms to all the mandatory requirements in the tender documents.

(2) The following do not affect whether a tender is responsive —

- (a) minor deviations that do not materially depart from the requirements set out in the tender documents; or
- (b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall —

- (a) be quantified to the extent possible; and
- (b) be taken into account in the evaluation and comparison of tenders.

Notification if no responsive tenders.

**65.** If the procuring entity determines that none of the submitted tenders is responsive, the procuring entity

shall notify each person who submitted a tender.

Evaluation of  
tenders.

**66.**(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) —

- (a) the criteria must, to the extent possible, be objective and quantifiable; and
- (b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.

(4) The successful tender shall be the tender with the lowest evaluated price.

(5) The procuring entity shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders.

(6) The evaluation shall be carried out within such period as may be prescribed.

Notification of  
award of  
contract.

**67.**(1) Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.

(2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.

(3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security.

Creation of contract.

**68.**(1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.

(2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.

(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.

Refusal to sign contract.

**69.**(1) If the person submitting the successful tender refuses to enter into a written contract as required under section 68, the procuring entity shall notify, under section 67(1), the person who submitted the tender that, according to the evaluation under section 66, would have been successful had the successful tender not been submitted.

(2) Section 67(2), section 68 and this section apply, with necessary modifications, with respect to the tender of the person notified under subsection (1).

(3) This section does not apply if the period during which tenders must remain valid has already expired.

Changes to contract responsibilities.

**70.** The procuring entity shall not request or require, as a condition of awarding a contract that a person who submitted a tender undertake responsibilities not set out in the tender documents.

International tendering.

**71.** If there will not be effective competition for a procurement unless foreign persons participate, the following shall apply —

- (a) the invitation to tender and the tender documents must be in English;
- (b) if the procuring entity is required to advertise the invitation to tender under section 54(2), the procuring entity shall also advertise the invitation to tender in one or more English-

language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement;

- (c) the period of time between the advertisement under paragraph (b) and the deadline for submitting tenders must be not less than the minimum period of time prescribed for the purpose of this paragraph;
- (d) the technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;
- (e) a person submitting a tender may, in quoting prices or providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used; and
- (f) any general and specific conditions to which the contract will be subject must be of a kind generally used in international tendering.