

PART VI – ALTERNATIVE PROCUREMENT PROCEDURES

Part sets out requirements.

72. This Part sets out the requirements for the procurement procedures that are alternatives to open tendering.

A – Restricted tendering

When restricted tendering may be used.

73.(1) A procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed.

(2) A procuring entity may use restricted tendering if the following conditions are satisfied -

- (a) competition for contract, because of the complex or specialised nature of the goods, works or services is limited to prequalified contractors:
- (b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; and

there is only a few known suppliers of the goods, works or services as may be prescribed in the regulations.

B – Direct procurement

When direct procurement may be used.

74.(1) A procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.

(2) A procuring entity may use direct procurement if the following are satisfied —

- (a) there is only one person who can supply the goods, works or services being procured; and
- (b) there is no reasonable alternative or substitute for the goods, works or services.

(3) A procuring entity may use direct procurement if the following are satisfied —

- (a) there is an urgent need for the goods, works or services being procured;
- (b) because of the urgency the other available methods of procurement are impractical; and
- (c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

Procedure.

75. The following shall apply with respect to direct procurement —

- (a) the procuring entity may negotiate with a person for the supply of the goods, works or services being procured;
- (b) the procuring entity shall not use direct procurement in a discriminatory manner; and
- (c) the resulting contract must be in writing and signed by both parties.

C – Request for proposals

When request for proposals may be used.

76.(1) A procuring entity may use a request for proposals for a procurement if —

- (a) the procurement is of services or a combination of goods and services; and
- (b) the services to be procured are advisory or otherwise of a predominately intellectual nature.

(2) Subject to any prescribed restrictions, a procuring entity may use a request for proposals for a procurement if the procuring entity would be allowed to use another alternative procurement procedure for that procurement under section 73, 74, 88 or 90.

Procedure.

77. Sections 78 to 86 set out the procedure for a procurement using a request for proposals.

Notice inviting

78.(1) The procuring entity shall prepare a notice

expressions of interest.

inviting interested persons to submit expressions of interest.

(2) The notice inviting expressions of interest shall set out the following —

- (a) the name and address of the procuring entity;
- (b) a brief description of the services being procured and, if applicable, the goods being procured;
- (c) the qualifications necessary to be invited to submit a proposal; and
- (d) an explanation of where and when expressions of interest must be submitted.

(3) The procuring entity shall advertise the notice inviting expressions of interest in at least two daily newspapers of nation-wide circulation.

Terms of reference.

79. The procuring entity shall prepare terms of reference that set out the following —

- (a) the specific requirements prepared under section 34 relating to the services and, if applicable, the goods being procured and the time limit for delivery or completion; and
- (b) anything else required under the regulations to be set out in the terms of reference.

Determination of qualified persons.

80. After the deadline for submitting expressions of interest the procuring entity shall examine each expression of interest to determine if the person submitting it is qualified to be invited to submit a proposal in accordance with the notice inviting expressions of interest.

Request for proposals to qualified persons.

81.(1) The procuring entity shall give each person who it determines is qualified to be invited to submit a proposal a request for proposals and a copy of the terms of reference.

(2) The request for proposals shall set out the following —

- (a) the name and address of the procuring entity;
- (b) the general and specific conditions to which the contract will be subject,
- (c) instructions for the preparation and submission of proposals which shall require that a proposal include a technical proposal and a financial proposal;
- (d) an explanation of where and when proposals must be submitted;
- (e) the procedures and criteria to be used to evaluate and compare the proposals including —
 - (i) the procedures and criteria for evaluating the technical proposals which shall include a determination of whether the proposal is responsive;
 - (ii) the procedures and criteria for evaluating the financial proposals; and
 - (iii) any other additional method of evaluation, which may include interviews or presentations, and the procedures and criteria for that additional method;
- (f) a statement giving notice of the restriction, in section 87, on entering into other contracts; and
- (g) anything else required, under this Act or the regulations to be set out in the request for proposals.

Evaluation of proposals.

82.(1) The procuring entity shall examine the proposals received in accordance with the request for proposals.

(2) For each proposal, the procuring entity shall evaluate the technical proposal to determine if it is responsive and, if it is, the procuring entity shall assign a score to the technical proposal, in accordance with the procedures and criteria set out in the request for proposals.

(3) For each proposal that is determined, under subsection (2), to be responsive, the procuring entity shall evaluate and assign a score to the financial proposal, in accordance with the procedures and criteria set out in the request for proposals.

(4) If the request for proposals provides for additional methods of evaluation, the procuring entity shall conduct such methods in accordance with the procedures and criteria set out in the request for proposals.

(5) The successful proposal shall be the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4).

Notification of
successful
proposal.

83.(1) The procuring entity shall notify the person who submitted the successful proposal that his proposal was successful.

(2) At the same time as the person who submitted the successful proposal is notified, the procuring entity shall notify all other persons who submitted proposals that their proposals were not successful.

Negotiations
with submitter of
successful
proposal.

84.(1) The procuring entity may negotiate with the person who submitted the successful proposal and may request and permit changes, subject to section 85(2).

(2) If the negotiations with the person who submitted the successful proposal do not result in a contract the procuring entity may negotiate with the

person who submitted the proposal that would have been successful had the successful proposal not been submitted and subsection (1) and this subsection apply, with necessary modifications, with respect to those negotiations.

Contract requirements.

85.(1) This section shall apply with respect to the contract resulting from a procurement by a request for proposals.

(2) The contract may not vary from the requirements of the terms of reference, the request for proposals or the terms of the successful proposal except in accordance with the following —

- (a) the contract may provide for a different price but only if there is a proportional increase or reduction in what is to be provided under the contract; and
- (b) the variations must be such that if the proposal, with those variations, was evaluated again under section 83, the proposal would still be the successful proposal.

(3) The contract must be in writing.

(4) The contract must set out either —

- (a) the maximum amount of money that can be paid under the contract; or
- (b) the maximum amount of time that can be paid for under the contract.

International competition.

86. If there will not be effective competition unless foreign persons participate, the following shall apply —

- (a) the notice inviting expressions of interest and the request for proposals must be in English;
- (b) in addition to the advertisement required under section 54(2), the procuring entity shall also advertise the notice inviting expressions of interest 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 technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;
- (d) a person submitting a proposal may, in quoting prices or providing security, use a currency that is widely used in international trade and that the request for proposals specifically allows to be used; and
- (e) any general and specific conditions to which the contract will be subject must be of a kind generally used in international trade.

Restriction on entering into certain related contracts.

87. A person who enters into a contract resulting from a procurement by a request for proposals shall not enter into any other contract for the procurement of goods or works that follows from or is related to that original contract.

D - Request for quotations

When may be used.

88. A procuring entity may use a request for quotations for a procurement if —

- (a) the procurement is for goods that are readily available and for which there is an established market; and
- (b) the estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations.

Procedure.

89.(1) This section sets out the procedure for a procurement using a request for quotations.

(2) The procuring entity shall prepare a request for quotations that sets out the following —

- (a) the name and address of the procuring entity;
- (b) the specific requirements prepared under section 34 relating to the goods being procured;
- (c) an explanation of where and when quotations must be submitted; and
- (d) anything else required under this Act or the regulations to be set out in the request for quotations.

(3) The procuring entity shall deal with the request for quotations in accordance with the following —

- (a) the procuring entity shall give the request to such persons as the procuring entity determines;
- (b) the request must be given to as many persons as necessary to ensure effective competition and must be given to at least three persons, unless that is not possible; and
- (c) the procuring entity shall give the request to each person early enough so that the person has adequate time to prepare a quotation.

(4) The successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotations.

(5) The following shall apply with respect to the contract resulting from a procurement by a request for quotations —

- (a) the procuring entity shall place a purchase order with the person submitting the successful quotation; and
- (b) the person submitting the successful quotation shall confirm the purchase order in writing.

(6) If there will not be effective competition unless foreign persons participate, the following shall apply —

- (a) the request for quotations must be in English;
- (b) 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;
- (c) a person submitting a quotation may, in quoting prices or providing security, use a currency that is widely used in international trade and that the request for quotations specifically allows to be used; and
- (d) any general and specific conditions to which the contract will be subject must be of a kind generally used in international trade.

E - Procedure for low-value procurements

When may be used.

90.(1) A procuring entity may use a low-value procurement procedure if —

- (a) the estimated value of the goods, works or services being procured are less than or equal to the prescribed maximum value for that low-value procurement procedure; and
- (b) any other prescribed conditions for the use of the low-value procurement procedure are satisfied.

(2) A regulation prescribing a maximum value for a low-value procurement procedure or prescribing conditions for the use of such a procedure may prescribe different values or conditions for different classes of public entities or different classes of goods, works or services being procured.

Procedure.

91.(1) The procedure for a low-value procurement shall be as prescribed.

(2) A regulation prescribing a low-value procurement procedure may —

- (a) prescribe different procedures for different classes of public entities or different classes of

goods, works or services being procured; or

- (b) exempt the procedure from the application of a provision of Part IV or vary the application of such a provision to the procedure.

F - Specially permitted procurement procedure

Authority may permit.

92.(1) A procuring entity may use a procurement procedure specially permitted by the Authority which may include concessioning and design competition.

(2) For the purpose of this section-

- (a) "concessioning" means a procurement that encourages the mobilization of private sector resources for the purpose of public financing, construction, operation and maintenance of development projects and may include build-own and operate, build-own-operate and transfer, build-operate and transfer or similar types of procurement procedures;
- (b) "design competition" means a procurement procedure for obtaining competitive bids for services which are creative in nature and which require that part of the services be carried as part of the bid to facilitate evaluation of the bids and such services include architecture, landscaping, engineering, urban design projects, urban and regional planning and fine arts.

(3) The procedure for specially permitted procurement shall be as prescribed

(4) In specially permitting a procedure under subsection (1), the Authority may exempt the procedure from the application of a provision of Part IV or vary the application of such a provision.