



LECTURE 3

Public Procurement Law

Introduction

- Different types of laws are applied in;
 - planning,
 - study & design,
 - procurement,
 - execution,
 - management & financing of a public Construction Projects
- The legal Framework regulates the necessary inputs to the Construction Project,
 - compulsory requirements that are necessarily to be considered in the Construction Project and
 - the liability dimension that may arise during the execution.
- The possible inputs to the Construction Project are, for example,
 - financial resources,
 - human resources,
 - land, equipment, constructional plant, constructional material and other physical inputs and the like.
- In terms of compulsory requirements the Construction Project should consider,
 - environmental requirements,
 - planning and zoning requirements,
 - safety, oversight, ethical and other requirements.

The Constitutional Framework

- According to Article 89(Economic Objectives)
 - Government shall have the duty to formulate policies which ensure all Ethiopians can benefit from the country's legacy of intellectual and material resources.
 - Government has the duty to ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them.
 - According to Article 90 (Social Objectives)
 - To the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security.
- ➔ Therefore, the Construction Project, based on the country's;
- social and economic development objectives, program and plan, is a concrete tool to achieve these broad social & economic development goals.

The Public Finance Law

- The term Public Finance may be defined as a subject that deals with the provision, custody and disbursement of the resources needed for the conduct of public or governmental functions.
 - Public expenditure, which represent the needs of the state;
 - Public revenues, which are the sources of the funds that are expended in the conduct of public business;
 - Financial administration, which deals with the determination of expenditures & incomes as well as the collecting, handling and disbursement of public funds.
 - ➔ expenditure, is regulated both by the Law of Financial Administration including Public Procurement Law;
 - ➔ revenue, is regulated by Tax Laws;
 - ➔ determination of expenditure and revenues, is regulated by the Budget Law;

Public Procurement

- Procurement is:-
 - ❖ an important administrative and financial function and,
 - ❖ process that allows a project to obtain optimal value for financial resources expended on **works, goods and services**.
- The effective and efficient use of financial resources in a;
 - ❖ **competitive and**
 - ❖ **transparent manner** through a **sound procurement process** contributes to the achievement of the operational and strategic goals of a project.

Public Procurement

- Construction Industry involves *procurement and contract management* systems in order to ensure;
 - fair competition and
 - distributions of obligations and rights among stakeholders.
- Competition helps:
 - the Project Owners' to acquire the five rights (Counterpart, Cost, Time, Quality and Quantity) s/he is entitled to
 - the Project Financiers' and Regulators' to value market principles and effective utilization of finance such that lowest qualified bids takes the project , and
 - the Project Providers' to get impartial and neutral Opportunity for business.
- Obligations and Rights help to allocate appropriate risks among contractual parties and their remedial rights. That is, their entitlements and provisions are clearly stated and agreed upon.

The Public Procurement

- Public Procurement refers to the acquisition by public bodies, such as government departments and municipalities, of the various works, goods and services
- The procurement is effected by using public funds or money.
- Procurement Planning
 - Any procurement begins with the planning decision to make the purchase.
 - This will involve, in the first place, deciding whether there is a need for the particular goods, services and works.
 - It will also involve ensuring that the purchaser has the legal power to undertake the (procurement) transaction, obtaining any relevant approvals within the government hierarchy and arranging the necessary funding.

- **The Tendering, Selection & Contract signing Phase**

- The second phase is then to choose which firm is to be the provider of the goods or services, and to conclude a contract with the selected party.

- **Contract Administration**

- This includes supervising performance to ensure that the promised works, goods and services are properly delivered, accepting performance, arranging for payment of the contractor, dealing with disputes, and various other contractual matters.

➔ *The Public Procurement, thus, focuses on the tendering, selection & signing of a contract.*

Types of procurements

- Procurement types can be classified based on the things to be procured and the way how they are procured. There are six bases for classifying procurement methods. These are;
 - Things procured (Goods, services and work)
 - Bidders' Coverage (Competitive Vs Negotiated)
 - Geographical Coverage (LCB /NCB/RCB Vs ICB)
 - Procurement Steps (Single Vs Two staged / pre or post qualification)

The Statutory Framework

- ❖ The Federal Government issued a specific legislation to regulate the Public Procurement process.
- ❖ The legislation called: “The Ethiopian Federal Government Procurement and Property Administration Proclamation No.649/2009”. It was Published on September 09, 2009

❖ Objective of the law

- ✓ to achieve better transparency, efficiency, fairness and impartiality
- ✓ to ensures greater economy and efficiency
- ✓ To obtain economic benefit and efficiency flowing from bulk purchase
- ✓ to enable the government device maximum benefit there from and
- ✓ to modernize the administration thereof,

❖ Definitions of the Key Terms

- **Goods:** means raw material, products and equipment and commodities in solid, liquid or gaseous form, marketable software and live animals as well as installation, trans- port, maintenance or similar obligations related to the supply of the goods if their value does not exceed that of the goods themselves;
- **Services:** any object of procurement other than works, goods and consultancy services: such as maintenance, security, janitorial, electricity, telecommunication and water supply services;

- **Works:** means all work associated with the
 - ✓ construction,
 - ✓ reconstruction,
 - ✓ up grading,
 - ✓ demolition,
 - ✓ repair or renovation of a building road, or structure, as well as services incidental to works, if the value of those services does not exceed that of the works themselves and includes build-own-operate, build-own-operate-transfer and build- operate-transfer contracts;
- **Consultancy Services:** means a service of an intellectual and advisory nature provided by consultants using their professional skills to
 - ✓ study,
 - ✓ design and organize specific projects,
 - ✓ advice clients,
 - ✓ conduct training and transfer knowledge;

➤ **Procurement:** mean obtaining:-

- ✓ goods,
- ✓ works,
- ✓ consultancy or other services through purchasing, hiring or obtaining by any other contractual means;

➤ **Public Body:** mean any public body, which is partly or wholly financed by the Federal Government budget, higher education institutions and public institutions of like nature;

➤ **Public Fund:** mean any monetary resource appropriated to a public body from the Federal Government treasury or aid grants and credits put at the disposal of the public bodies by foreign donors through the Federal Government or internal revenue of the public body;

➤ **Public Procurement:** mean procurement by a public body using public fund;

- **Supplier** : means a natural or juridical person under; contract with a public body to supply goods, works or services
- **Candidate** : means a natural or juridical person invited to take part in public procurement or seeking to be so invited;
- **Bidder** : means a natural or juridical person submitting a bid;
- **Bidding Documents**: means a document prepared by the public body as a basis for preparation of bids; which contains a specification of the desired object of procurement;
- **Bid Proposal**: means a document submitted by bidders to participate in a bid on the basis of the bid document prepared by a public body in respect of that procurement;

Scope of Application

- ❖ This Proclamation shall apply to all Federal Government procurement and property administration.
- ❖ Notwithstanding the provisions of sub-article (1) of this Article:
 - ✓ a different procedure of procurement and property administration may be used in the interest of national security or national defense in order to serve the interest of economy and efficiency;
 - ✓ this Proclamation *does not apply to contracts a public body enters into with another public body* for the provision of goods, works, consultancy or other services at cost.

Basic procurement rules

➤ **Procurement Plan**

- Public bodies shall have to prepare an annual procurement plan

➤ **Records of procurement**

- Public bodies shall have to maintain records and documents regarding their public procurement. Such information include:-
 - a brief description of the goods works or services to be procured;
 - Invitation to bid
 - Suppliers names & Address
 - Evaluation criteria & summary of evaluation
 - Information to suspend or cancel
 - Grounds for using procurement procedure other than open bidding

➤ **Non- discrimination**

- Candidates shall not be excluded on the basis of nationality, race or any other criteria not having to do with their qualification

➤ **Preference Margin**

- For procurement of drugs or pharmaceutical products or medical equipments 25%,
- for procurement of other products 15%,
- For construction and consultancy services 7.5%

➤ **Form of communication**

- Shall be in writing
- The agency may determine the extent of use of electronic means

➤ **Qualification of candidates**

- Basic criteria to participate in public procurement:
 - Possess professional, technical, capital qualification...
 - Have legal capacity
 - Are not insolvent or bankrupt.....
 - Register in Suppliers list
 - have renewed trade license and fulfilled their obligations to pay taxes
 - have a bank account

➤ Qualification of candidates (cont.)

- candidates shall provide such appropriate documentary evidence or other information if required
- Any requirement shall be set forth in the bid documents or other documents and shall apply equally to all candidates.
- No criteria other than provided in the documents shall be used
- Evaluation shall be based on Qualification Criteria
- ❖ A contractor or supplier shall be disqualified if
 - Information submitted contains basic error
 - Information submitted is inaccurate or incomplete

➤ Rejection of all tenders

- Procuring body may reject in whole or in part bids, proposals or quotations at any time *prior to the conclusion of procurement contract* where:
 - there is proof of error in the procurement proceeding
 - it is ascertained that the procurement has no use
 - bidders fail to meet the minimum criteria set forth in the bid document
 - re-advertising of the bid is advantageous to get better price than the offered one
 - Price offered is higher than budget allocated
 - it is proved that the bidding is not sufficiently competitive
- Upon request the procuring entity shall communicate grounds for rejection but not required to justify
- Procuring entity shall incur no liability

➤ Technical Specification

- Shall be prepared to give correct & complete Description of the object of procurement
- Create conditions of fair & open competition
- shall clearly describe the public body's requirements with respect to quality, performance, safety
- Technical specification prescribed by public bodies shall, as far as possible:
 - be in terms of performance rather than design or descriptive characteristics;
 - be based on national standards, where such exist, or otherwise on internationally recognized standards or building codes;
 - inviting open competition and devoid of any statement having the effect of restricting competition.
- Reference to particular trade mark not required unless there is no other way of describing it
- If trade mark is used the “or equivalent ” is used

Methods of Procurement

- The Procurement identifies the following methods of procurement for local & international procurement, namely,
 - For Local
 - Open Tendering;
 - Restricted Tendering;
 - Direct Procurement;
 - Request for Proposals;
 - Request for Quotation;
 - Two-stage Bidding;

For International

- ➔ Open International Tendering;
- ➔ Other International Procedure;
(Such as restricted bidding or request for proposal)

• **Conditions for use of Restricted Tendering**

- Goods, works or services are available from limited number of suppliers
- Time & cost required to examine & evaluate would disproportionate to the value of goods, works or services
- Estimated value of contract does not exceed the threshold set in directives

• **Conditions for use of direct procurement**

- Only one candidate can supply or provide the services
- For additional deliveries by the original supplier, with limits
- Additional works which cannot be separated from the original contract
- New works consisting of repetition of similar works of which the initial contract was awarded on open or restricted tender

• Conditions for use of direct procurement

- Continuation of consultancy services
 - Original contract has been satisfactorily performed
 - Leads to gains in economy & efficiency
 - Purchase of goods made under exceptionally advantageous condition
 - In very short term
 - Do not cover routine purchases
 - *Head procuring body has determined it is urgent & delay will create serious problem*
 - When the contract price does not exceed the amount stated in the directives
- ❖ It shall not be with a view to avoiding possible competition or in a manner which would constitute a means of discrimination among candidates.

- **Conditions for use of request for proposal**
 - For consultancy services or
 - Contracts for which the component of consultancy services represents more than 50% of the contract amount
- **Conditions for use of request for Quotation**
 - for the purchase of readily available goods or
 - for procurement of works or services for which there is an established market
 - the estimated value of the contract does not exceed the amount stated in directives
- **Conditions for use of two-stage tender**
 - It is not feasible to
 - formulate detailed Specification for the goods or works
 - identify characteristics of the services
 - Because of the technical character it is necessary to negotiate with suppliers
 - to enter into a contract for the purpose of research, experiment, study or development,
 - No bids were submitted or all rejected and it is unlikely that new bid will be successful

❖ Open Tendering

- It is regulated under Article 35- Article 48 of the Proclamation.
- It involves, generally, the following procedures:
 - ✓ Invitation to Bid
 - ✓ Bidding Documents
 - ✓ Provision of Bidding Documents
 - ✓ Modifications to Bidding Documents
 - ✓ Bid Security
 - ✓ Submission and Receipt of Bids
 - ✓ Opening of Bids
 - ✓ Examination and Evaluation of Bids
 - ✓ Process to be Confidential
 - ✓ Matters subject for Negotiation with the successful Bidder
 - ✓ Notification of Award and Signing of Contract
 - ✓ Contract Security
 - ✓ Advance Payment

• Advertisement

- Invitation to be published
 - ✓ in at least one national news paper of general circulation and in a national news paper
 - ✓ on a national radio and television

• Invitation to bid shall contain (minimum)

- Name & address of procuring body
- *a brief description of the goods, works or services to be procured;*
- Means & conditions for obtaining bid documents & place to obtain it
- the place and deadline for the submission of bids; and
- Place & time for opening bids

• **Contents of the bid documents**

- instructions for the preparation and submission of bids;
- Deadline and address to submit and , date, hour & place of opening
- Forms of bid & bid security
- No. of copies to be submitted with the original
- the general and specific conditions of the contract;
- Specification of requirements
- Evidence to be provided by the bidder
- the period during which the bid remains in force;
- Evaluation criteria and points given to each criteria
- a reservation to the effect that the public body may reject all bids at any time prior to the notification of award; and
- the price adjustments that may be made during contract implementation

- **Modifications to bid documents**

- At any time before deadline of submission by issuing **addendum** which becomes an integral part of the bidding documents.
- Any addendum shall be communicated
- Procuring entity may extend the deadline of submission due to modification

- **Bid Security**

- Bids must be accompanied by *bid security (deposit, bid guarantee)*
- Security will be forfeited;
 - if a bidder withdraws his bid within the validity period and
 - in case of successful bidder if he repudiates the contract or fails to furnish performance security

- **Submission of tenders**

- *At place , date & time*
- Tender shall be submitted in writing, signed and in a sealed envelope
- Receipt showing date & time tender received, where it is impossible to put the bid document in bid box due to size
- Tender received after *deadline* shall be returned unopened to the bidder

- **Opening of tenders**

- Tenders shall be opened at the time stipulated in the bid, immediately after deadline for submission
- All who submitted shall be allowed to be present
- Name and tender price shall be announced and a copy made available for any bidder on request.

- **Examination, evaluation**

- Contractors may be asked clarification to assist evaluation
- No change in the substance of the bid
- Correction of arithmetic errors
- A bid may be regarded as *responsive* if it confirms to all requirements set in the bid
- A bid may be regarded as responsive even if it contains minor deviations that do not materially alter or depart from requirement set forth in bidding documents
- Procuring body shall not award contract to the bidder who
 - does not provide evidence of qualification and fiscal and registration in suppliers list
 - does not accept arithmetic error
 - is not responsive
- Procuring body shall evaluate & compare bids that are *responsive*

- **The successful bid shall be**
 - the bid that is found to be responsive to the *technical requirements and with the lowest evaluated price*;
 - Lowest evaluated bid on the basis of factors affecting the economic value, if specified in the bid document
- **Process to be confidential**
 - After the opening of bids, information relating to the
 - examination,
 - clarification, and
 - evaluation of bids and recommendations for award must not be disclosed to bidders until the award of the contract is announced.

• Notification of award & signing

- *Prior to expiry of bid validity* notify the successful bidder that its bid has been accepted.
- Notification of award shall specify the *time* within which the *contract must be signed*
- The unsuccessful bidders shall also be informed who the successful bidder is & why they lost the bid
- Existence of contract shall be confirmed through *signature of contract document*
- *Contract shall not be signed;*
 - *prior to receipt of notice by the unsuccessful bidder &*
 - *before period specified in the directive has lapsed*

- **Contract security**

- A supplier shall provide the procuring body with *contract security to make good any default under the contract*
- The Successful bidder has to provide *performance security*;
 - within fifteen days from signing a contract,
 - in the amount of at least ten per cent of the total contract price

➤ Other procurement methods

■ **Restricted tendering procedure**

- Provisions of open tendering shall apply except that:
 - object of procurement is available only with limited suppliers and the invitation to bid shall be sent to all such suppliers;
 - the invitation to bid shall be sent to limited suppliers chosen from among those registered in suppliers list
 - Time for preparation of bid shall not be less than minimum number of days specified
 - Procuring body will decide if bid security is required

■ **Direct procurement procedure**

- Procuring body shall prepare a description of its need, quality, quantity, terms and time of delivery
- Free to negotiate with the sole candidate
- Any agreement reached shall be confirmed by contract signed by both parties
- It shall be approved by the head of the public body concerned and communicated to the negotiators.

■ Request for proposals procedure

- Addressed to several suppliers, not less than 3, not more than 7
- Invite candidates to submit expression of interest to submit proposal
- Establish evaluation criteria
- Request for proposals shall contain
 - Name & address of the procuring entity
 - Description of services required normally through TOR
 - In case of consultancy service ,reminder that candidates for such service must exclude themselves from procurement of related good & works
 - Evaluation criteria, relative weights to be given to price and other criteria
 - Place & deadline for submission
- Adequate time to prepare proposals
- The public body may negotiate with the first ranked candidate with respect to the nature, volume and organization of the services included in their proposals
- Award shall be made to the candidate whose proposal is most advantageous, determined in accordance with the criteria set in the request for proposals

■ Two-stage bidding

- First stage- proposals without tender price
 - Technical, quality, contractual terms & conditions, professional & tech. competence
- Second stage- final tenders with prices with respect to single set of specifications
 - May delete or modify any aspect specified originally
 - Any such modification shall be communicated to the suppliers
- Final bids shall be evaluated and compared
- The procuring entity may engage in negotiation with the first ranking bidder concerning any aspect of its bid, except price

■ Request for quotations

- From as many candidates as possible, at least 3
- Request shall contain requirement as to quality, quantity, terms & time of delivery
- ensure that equal opportunity is given to all candidates engaged in the business.
- Adequate time shall be given to prepare their quotations
- Purchase shall be made from the candidate who meets the requirements of the Public body

■ Open International Bidding

- whenever in national open bidding an effective competition cannot be obtained unless foreign firms are invited to bid or
- for procurements above a threshold level i.e.:-
 - For works above birr..... 50,000,000.00
 - For goods above birr10,000,000.00
 - For consultancy services above birr.....2,500,000.00
 - For services above birr..... 7,000,000.00
- A procurement may be effected by means of NCB though the above threshold is exceeded if it is ascertained that the required object of procurement is *available only locally*.
- shall respect the following procedures:
 - the invitation to bid and the bid documents shall be in the English language;
 - the invitation to bid shall be advertised in a news paper as well as on the Agency's website
 - the time allowed for submission of bids shall be sufficient
 - technical specifications of the goods, works and services shall be compatible with national requirements, and
 - conform as far as possible with international standards or standards widely used in international trade;
 - general and special conditions of contract shall be of a kind generally used in international trade.

■ Other international procedures

- public bodies may conduct procurement through international competitive bidding by means of
 - restricted tendering,
 - request for proposals,
 - request for quotation or
 - direct procurement, If
- conditions for using other methods of procurement than open bidding are satisfied, and
- it is impossible to carry out effective procurement without the participation of foreign companies,

complaint

- **General on Complaints to be lodged or appealed**
 - submit a complaint to the head of the public body or to the Board against an act the public body
 - No complaint may be lodged in respect of the following matters:
 - the selection of procurement method
 - the rejection of bids, proposals or quotations
 - Complaints may not be brought before the head of that public body or the Board after the contract has been signed with the successful bidder where
 - the contract has been signed without a complaint being filed with the public body within the time limit
 - the public body responds to the complaint lodged and a contract is signed & no further complain in time limit

• **Review by the Head of the Public Body**

- A complaint against an act or omission by the public body shall in the first instance, be submitted to the head of the public body.
- A candidate shall have to submit the complaint within five working days
- within 10 days after submission of the complaint, issue a written decision
- the candidate is entitled to submit a complaint to the **Board** within five working days from the date decision has been communicated to by the public body if :-
 - head of the public body does not issue a decision within the time stated
 - the candidate is not satisfied with the decision of the head of the public body

• **Review by the Board**

- Upon receipt of a complaint, the Board shall promptly give notice of the complaint to the public body concerned.
- The Board, unless it dismisses the complaint, may
 - prohibit the public body from acting or deciding unlawfully;
 - Annul in whole or in part, an unlawful act or decision by the public body.
- The Board shall issue its decision within 15 working days of receiving the complaint,

• Review by the Agency

- The Agency shall review and give decision on the complaint within 15 working days of receipt of such complaint.
- The decision to be rendered by the may be one of the following:
 - suspend for a definite or indefinite period the candidate ,which it finds to be at fault, from participation in any public procurement
 - give a written warning;
 - dismiss the complaint submitted by the Public body

• Other Public Laws

- Land Administration, Expropriation & Compensation
- Environmental Law
- Employment Law
- Urban Planning Law
- Building Law
- Protection of Public Utility Networks



Thank You!