

## WEBINAR

**Efficient public procurement complaints mechanism and the role of an independent review body:**

**International good practices and roadmap for Lebanon**

March 10-11, 2021

# Purpose and general requirements for an efficient complaints mechanism in public procurement

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# Scope of procurement review and remedies

- Means for access to justice for aggrieved tenderers, prospective tenderers and their representatives
- Decisions, actions or inaction by procuring entities when applying the public procurement law or other legal instruments regulating public procurement
- Decisions, actions or inaction by procuring entities when carrying out public procurement, before a contract has been signed
- Focus on individual cases, not general issues of policy and practice
- Contractual disputes dealt with by other means
- Fraud, collusion and corruption by tenderers dealt with by other means

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# Importance of procurement review

- Helps ensure that violations, including unintentional mistakes, of public procurement legislation by procuring entities can be corrected before a contract is signed
- Builds trust in the system for all stakeholders (procuring entities, business, taxpayers).
- Helps achieve value for money through transparent procedures that guarantee equal treatment and non-discrimination, support competition and minimise corruption
- Helps clarify and unify the application of the law
- Highlights what is working and what not in the system: provides evidence base for policy making, information and training

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# Why needed - reasons for complaints I

## Preparation phase:

- Time for submission too short
- Shortcomings in requirements and specifications of items to be procured, conditions and evidence of suitability (qualifications needed, grounds for exclusion), and award criteria:
  - too biased (they favour a particular company)
  - too restrictive (so high that they unduly limit competition by making only very few tenderers able to meet them)
  - too unclear, incomplete or vague (they do not allow a clear, well founded conclusion on who is fully qualified and has submitted the best tender)

# Why needed - reasons for complaints II

## Evaluation and award phase:

- Award by direct agreement, without any publication or competition, under circumstances not allowed by law
- Failure to properly apply grounds for exclusion or requirements for specific qualifications:
  - award to uneligible or unqualified tenderer
  - groundless exclusion of eligible and qualified tenderer
- Failure to properly apply technical requirements and award criteria:
  - acceptance of tender not meeting minimum requirements
  - rejection of tender duly meeting minimum requirements
  - wrong application of award criteria

# Objectives for a procurement review system

- Clear delimitation of scope (what can be complained against, when, by whom)
- Available to all tenderers and prospective tenderers, without any discrimination
- Legal certainty; consistency of decisions
- Timely review and decisions, not unduly delaying procurement
- Decisions in full consideration of technical, legal and other aspects
- Transparency on procedures, complaints made, and decisions taken
- Effective in preventing or correcting instances of unlawfulness
- Effective in helping achieve public procurement objectives
- Efficient use of limited administrative resources

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# Expected benefits

- Improved trust in the public procurement system
- Improved relations between public and private sector
- Higher participation, greater competition, better outcomes
- Little or no need for prior review or advance authorisations
- Reduction or elimination of violations and mistakes
- Uniform interpretation and better understanding of the law
- Less room for fraud and corruption
- More efficient and effective public procurement

# Normal sequence of steps to take

- 1) Prospective tenderer makes reasoned request directly to procuring entity to clarify or rectify cases of unclear, incomplete or biased tender documents or conditions
- 2) If request well founded, procuring entity corrects the matter – no need for formal complaint
- 3) **Formal complaint to (1<sup>st</sup> instance) review body**
- 4) **Decision by review body: remedies as provided by law**
- 5) Appeal to 2<sup>nd</sup> instance body against review body decision
- 6) Decision by 2<sup>nd</sup> instance body: remedies as provided by law



# International standards and requirements

- Timely, effective, transparent and non-discriminatory administrative or judicial procedure
- Available at least to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement
- Impartial and independent entity for review of complaints, separated from procuring entities and economic operators, with no conflict of roles

# WTO Government Procurement Agreement

*“Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. “*

# Review bodies

- Different models for institutional framework and enforcement due to diversity of national legal systems
- Regular courts or specialised procurement review bodies (PRBs) for first instance review
- Permanent body; members remain for their full mandate period
- Strong need to meet general objectives (cf. slide 6), in particular:
  - Rapidity
  - Knowledge and understanding of all aspects of the issues at hand
  - Impartiality
  - Effective means for enforcement
- Approach depends on characteristics of existing or prospective bodies

# WTO Government Procurement Agreement

A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:

- (a) Procuring entity responds in writing, discloses documents to the PRB
- (b) Participants have right to be heard before an opinion is given or a decision is reached;
- (c) Participants have right to be represented and accompanied;
- (d) Participants have access to all proceedings;
- (e) Participants have right to request proceedings to take place in public and to call witnesses;
- (f) Decisions or recommendations to be made in writing with a statement describing the basis for them.

# Status and independence of a PRB

## Independence of the PRB as an institution:

- Independent from the parties of procurement procedures: procuring entities and economic operators
- Functionally independent of the Government
- Adequate financial and administrative resources

## Independence of the members of the PRB:

- Independence of appointing body (cf. above)
- Clear, strong requirements for competence and eligibility
- Dismissal by appointing body, in exceptional, clearly regulated cases
- Protection from interference, pressure
- Competitive remuneration
- Absence of conflicting engagements

# Typical competences of PRBs

- Examine complaints
- Request information from the parties
- Engage external expertise, call witnesses (but normally relying on submissions by the parties)
- Three main types of decisions on complaints:
  - *dismissed* as unlawful or late or otherwise irreceivable
  - *rejected* as unfounded
  - *accepted*
- Apply remedies when a complaint is accepted

# Remedies typically available I

## Interim measures:

- suspension of implementation of any decision by the procuring entity
- suspension of the whole procedure
- provisional correction of a breach (rare case)

## Nature and purpose:

- prevent situations that can no longer be changed
- avoid the unlawful exclusion of a tenderer or a tender from evaluation

Requirement: regulations must allow effective application of interim measures (PRB must have authority, enforcement must be possible)

# Remedies typically available II

## Set-aside measures:

- removal of discriminatory or otherwise unlawful details in notices, tender documents or other documents in the procedure
- annulment of an unlawful award decision or decision to sign a contract
- positive correction of any unlawful document or contracting decision

## Nature and purpose:

- cancel, make ineffective or change an unlawful decision
- correct proven irregularities

Requirement: regulations must allow effective application of set-aside measures (PRB must have authority, enforcement must be possible)