



Public procurement –Kurdistan

Technology of construction of works of engineering

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MINISTRY OF CONSTRUCTION& HOUSING KURDISTAN REGION

پیشکش کراره :

به يه کيٲتي ئه نذازياراني كوردستان وهك به شيك له پيداويستيه كاني گوريني پله ي ئه نذازيارى له

(ريپيدراو) بو (راويژكار)

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Abstract

This document represents the Strategy of the Kurdistan Regional Government ("KRG") Governance and Transparency Initiative ("Initiative"). Our Region has undergone a significant period of transformation with many ingredients necessary to achieve strong, sustainable economic growth. We frequently describe our vision for the future as a region of Iraq that maintains peace, stability, democracy and a thriving economy. Public procurement in KRG broadly follows Iraq's national standards. Current procedures have a number of features that are not in line with generally accepted standards of good practice. These range from inadequate requirement for registration of suppliers and contractors, an absence of adequate bidding documents to insufficiently transparent bid submission, opening and evaluation procedures, and contract award procedures as well as lack of effective bid protest mechanisms and publicity on contract awards.

Procurement for public contracts follows one of several methods permitted under the Instructions for Government Contracts Execution - ٢٠٠٨. The process begins with the selection of a procurement method. Selection is dependent upon the size, complexity, and urgency of the project. The five authorized procurement methods are Public Tender, Limited Tender, Direct Invitation, Sole Bid, and Purchasing Committee.

In this paper work I clarify government procurement, also called public tendering or public procurement in Iraq with all the aspects which it is related to this subject. The main purpose of this report is to explain the condition of contracts for executing a project which includes all the laws for the work to be accepted by all the parties. The Coalition Provisional Authority's (CPA) Order N° (٨٧) of ٢٠٠٤ on Public Contracts is the last issued public procurement law that regulates government procurement procedures in the Republic of Iraq. In a period of only two years, from ٢٠٠٧-٢٠٠٨, the Government of Iraq has issued three regulations and a Contracting Guide for procurement officials to support the implementation of the procurement law. The OECD Benchmark Report analyses the government procurement regulations and practices of the Republic of Iraq. It examines the coherence of this framework with international instruments. The analytical framework of the report is based on the *OECD Principles for Integrity in Public Procurement*, that provide ١٠ guiding principles for enhancing integrity throughout the entire procurement cycle from needs assessment through tendering to contract management and payment. The analysis of the report also builds on international legal instruments and good practices including the United Nations Convention against Corruption, the Agreement on Government Procurement of the WTO, the Model Law of the United Nations Commission on International Trade Law and the European Commission Directives. The Benchmark Report acknowledges the strengths of Iraq's public procurement system. The procurement law and supporting regulations span the entire procurement cycle from pre-tender preparations, the tender and evaluation process and post-award contract management. For instance, the law and regulations stress the importance of conducting a comprehensive feasibility study before launching a specific tender. Regulations also stipulate in great detail the creation of specific committees dedicated to the reception and evaluation of bids. The contract execution phase is also covered by the regulations. As common practice in most countries, financial guarantees for procurement are required by the Iraqi regulations, inspired by international trade transaction guarantees. According to the legal framework, control and authorization procedures are also stipulated by the regulations. As an important step in managing conflict of interest, there is a ban on government and public sector employees responsible for managing the procurement tender, to participate as a potential bidder in that tender either directly or indirectly. The regulations also prohibit the disclosure of information to persons not involved in the procurement process. In order to mitigate corruption in public procurement, Iraq's anti-corruption agency, the Commission on Integrity, employs officials specifically in charge of inspecting irregularities relating to public spending through procurement. Moreover, although Iraq's developing infrastructure means that the country is not yet ready to develop an e-procurement system, there is an understanding by the government of the potential benefits of information and communications technologies in procurement.

1. General scope

Public procurement is the procurement of goods and services on behalf of a public authority; usually it starts with a contract which is letter of acceptance after agreement with lawful object between two or more parties, for construction work the contract contains of the letter of acceptance, the letter of tender, the conditions, the specifications, the drawings, the schedules.

Dozens of countries have undertaken assessment exercises of some kind and identified areas where enhancements, institutional strengthening, or new laws, policies or procedures are required. Many of these national and sub-national efforts are intended to promote legislative processes and improvements, especially the hands-on implementation of measures targeting prevention and combating corruption. Others have had a different but related focus, such as enhancing government transparency, improving procurement systems, strengthening law enforcement efforts and recovering illegally acquired assets (asset recovery, *i.e.* the confiscation of accounts, as well as the securing of misappropriated funds in global financial havens).

Numerous countries identified a diverse range of deficiencies or areas of focus for their governance, transparency and anti-corruption efforts, and created road maps for implementing and monitoring improvements, including:

- Enhancing public procurement activities, state infrastructure projects, and private sector participation;
- Creation and implementation of codes of conduct for government officials;
- Declaration of assets by government officials;
- Increasing participation of civil society;
- Ensuring citizens' adequate access to information;
- Enhancing investigative and prosecutorial capabilities;
- Strengthening legal institutions;
- Facilitating judicial reform;
- Improving government oversight;
- Improving budgetary policy, formulation, and reporting mechanisms;
- Improving financial planning instruments;
- Enhancing management of public finances;
- Increasing transparency and access to information about government budgeting and financial management;
- Improved efficiency and effectiveness of government administration;
- Strengthened internal financial controls;
- Enhancing law enforcement operations in a fair, balanced and impartial fashion;
- Raising public awareness; and
- Ensuring witness protection.

Public procurement is a government activity particularly vulnerable to corruption. Given the importance of public procurement, in economic terms (representing 10-15% of the gross domestic product and in strategic terms (procuring the goods and providing the services that administrations need), governments around the globe have grown increasingly alert to the risk of corruption in public procurement, and to the importance of preventing it by increasing transparency and accountability. After contract agreement, the letter of acceptance should be signed by the employer of the letter tender.

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To be effective, public procurement must be responsive to the demands of its stakeholders - the public, the KRG, and the private sector. Our procurement system must provide effective delivery of public services - typically, goods, civil works and services - at low cost and with appropriate levels of quality. To achieve this objective, most public procurement systems attempt to emulate the operation of the open market by requiring the conduct of competitive tendering procedures for major acquisitions, except under unique circumstances (for example, in cases of emergency). A truly competitive process will enable us to effectively utilize public funds.

Contracts for building and engineering works include:

- Contract
- Contract agreement
- Letter of acceptance
- Letter of tender
- Specifications
- Drawings
- Schedules
- Tender
- Bill of Quantities, Daywork schedules, Schedule of Payment Currencies
- Contract Data
- Party
- Employer
- Contractor
- Engineer
- Contractor's Representative
- Employer's Personnel
- Contractor's Personnel
- Subcontractor
- DB
- FIDIC
- Bank
- Borrower
- Base Date
- Commencement Date
- Time of Completion
- Tests on Completion
- Taking-over Certificate
- Tests after Completion
- Defects Notification Period
- Performance Certificate
- Day
- Accepted Contract Amount
- Contract Price
- Cost
- Final Payment Certificate
- Final Statement

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- Foreign Currency
- Interim Payment Certificate
- Local Currency
- Payment Certificate
- Provisional Sum
- Retention Money
- Statement
- Contractor's Equipment
- Goods
- Materials
- Permanent Works
- Plant
- Section
- Temporary Works
- Works
- Contractor's Documents
- Country
- Employer's Equipment
- Force Majeure
- Laws
- Performance Security
- Site
- Unforeseeable
- Variation

The Regulations for Implementing Governmental Contracts was issued by the MoPDC and approved by the CoM. in ٢٠٠٧. These regulations are intended to establish general principles for implementing the public contracts that the governmental bodies and the public sector enter into with both Iraqi and foreign companies. The regulations are also intended to lay down the implementation methods of public tender solicitations for major construction, minor works, supplies, and consultative services. It also designates the bodies, authorized to open and evaluate tenders and determine contract awards. This regulation, in conjunction with CPA Order ٨٧ – Public Contracts ٢٠٠٤, lays out in detail the ministerial dispute resolution process. These contracting procedures are characterized by transparency, predictability and fair competition. The Instructions for Government Contracts Execution was issued by the MoPDC in ٢٠٠٨ and it replaced the Regulations for Implementing Governmental Contracts – ٢٠٠٧. These new Instructions basically restate similar language as in the previous Regulation but expand the explanations in some sections. In general, it intends to set general principles for the execution of government contracts that are signed by the public sector directorates with Iraqi and foreign entities for contracts supplying public works, supplies, goods and services, and consultations. It describes the authorized contract execution methods in addition to defining entities authorized to compete for public contracts and the eligibility requirements. It lays out the procedures for tender solicitation and instructions to bidders on tender preparation and submission. General Contract Conditions are described as well as requirements for bidder bank guarantees and performance bonds.

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Procurement Reform - The Office will lead and coordinate the modernization of our procurement process, including the enhancement of transparency and public disclosure of KRG procurement.

Public procurement policy aims to achieve value for money. It is underpinned by a number of core principles, in particular the need to maximize competition in the market for the goods and services purchased by the State. Where practical and legally possible the policy should also seek to promote whole of Government objectives.

National policy aims to advance the process of procurement management reform which comprises:

- **Capacity building** which involves building organizational capacity to strategically manage procurement effort to maximize measurable savings and benefits;
- **Training and education** which seeks to develop capabilities and competencies among employees which are necessary to sustain measurable improvements in procurement performance;
- **Procurement aggregation** which aims to reduce cost through leveraging public sector demand in certain markets;
- **E-procurement** to improve efficiency through the targeted use of cost effective technologies to support various aspects of procurement effort.

Υ. National Public Procurement Law

The public procurement process in public sector organizations is heavily decentralized. Public bodies perform the function independently within a framework of national laws and national guidelines. These promote open and transparent competition as a means of achieving value for money. However, the increasing complexity and importance of purchasing decisions by public bodies is leading to a need for a more strategic focus and improved management of the public procurement process. Public procurement is defined as the acquisition, whether under formal contract or otherwise, of works, supplies and services by public bodies. It ranges from the purchase of routine supplies or services to formal tendering and placing contracts for large infrastructural projects by a wide and diverse range of contracting authorities.

Public procurement and management of public finances:

- λ. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:
 - (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
 - (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
 - (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
 - (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;
 - (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.
- Υ. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:
 - (a) Procedures for the adoption of the national budget;
 - (b) Timely reporting on revenue and expenditure;
 - (c) A system of accounting and auditing standards and related oversight;

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- (d) Effective and efficient systems of risk management and internal control; and
- (e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.

Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

Government procurement is an important economic activity involving large amounts of public money in most countries around the globe. In Iraq, government procurement plays an even more important role in supporting the reconstruction and rehabilitation of the national economy as well providing the necessary infrastructure for the development of the private sector. The principles of transparency, good management, accountability and control as well as the prevention of fraud and corruption could provide standards by which public officials set the basis for clean and accountable government procurement. In a rapidly changing context, institutions need to remain dynamic to adapt; therefore the continuous modernization of the legal and institutional frameworks for procurement is a priority for the Government of Iraq.

The key principles that must govern our procurement system include:

- A. **Rules based.** We should have a clear and adequate legal and regulatory framework in place to guide public procurement. The laws, regulations, policies, and implementing rules must promote fairness and thus discourage discrimination and favoritism. The equal treatment of bidders in the public procurement process promotes greater certainty and predictability in the awarding of contracts. This is essential to fostering healthy competition.
- B. **Competition.** Our procurement system should encourage competition in the bidding out of KRG contracts. In most cases, competition results in better quality and lower prices, both of which are desired outcomes of a well-functioning system. There will be special circumstances when this is not the case, but should be based on clear rules.
- C. **Transparency.** The public procurement process should imbue confidence among the public that the government will provide legitimate services for citizens rather than increase the private wealth of government officials and/or narrow private interests. The easiest way to accomplish this objective is to ensure transparency in decision making throughout the entire procurement process. Transparency in this situation means that parties know and understand how contracts are awarded, in both the means and the processes. This requires the public release of information sufficient for citizens to know how the procurement process is functioning.
- D. **Accountability.** Public officials should be held responsible for the proper implementation of the rules and regulations governing the procurement system. Accordingly, this requires that credible sanctioning systems be in place consistent with the rules and due process for all parties.
- E. **Economy.** A key part of the social contract between the KRG and its citizens is that we will spend our funds prudently and effectively. For public procurement, this means that we must procure goods, works and services at a reasonable cost and with reasonable quality.
- F. **Efficiency.** Time is money and time wasted is money lost. Rules and procedures should encourage the completion of the procurement process with a reasonable length of time as well as the timely delivery/implementation of the goods, services and works procured.

Consistent with these principles, the KRG procurement system will be reviewed and revised consistent with leading practices. The Office will spearhead this initiative, coordinating with relevant ministries. Full consideration will be given to the new procurement law being developed by the Iraqi Central Government. Key elements of the reform will ensure that the KRG creates and maintains a professional, reliable and predictable public procurement process that will encourage participation by a robust group of domestic and foreign companies.

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Audit Legislation

The legal basis of audits includes the following documents:

- Constitution of Iraq - ٢٠٠٥
- Board of Supreme Audit Law No. ٦- ١٩٩٠
- CPA Order ٧٧ – Board of Supreme Audit - ٢٠٠٤
- CPA Order ٥٥ – Delegation of Authority of the Iraq Commission on Public Integrity – ٢٠٠٤

The contract shall be governed by the law of the country or other jurisdiction stated in the Contract Data. The ruling language of the contract shall be that stated of the Contract Data, the language for communications shall be that stated in the Contract Data, if no language is stated there, the language for communications shall be ruling language of the contract.

⇒ **Interpretation:** In the contract, except where the context requires otherwise:

- A. words indicating one gender include all genders;
- B. words indicating the singular also include the plural and words indicating the plural also include the singular;
- C. provisions including the word “agree”, “agreed” or “agreement” require the agreement to be record in writing;
- D. “written” or “in writing” means hand-written, type-written, printed or electronically made, and resulting in a permanent record; and
- E. The word “tender” is synonymous with “bid”, and “tenderer” with “bidder” and the words “tender documents” with “bidding documents”.

The marginal words and other headings shall not be taken into consideration in the interpretation of these Conditions.

In these Conditions, provisions including the expression “Cost plus profit” require this profit to be one-twentieth (0%) of this Cost unless otherwise indicated in the Contract Data.

⇒ **Communications:**

Wherever these Conditions provide for the giving or issuing of approvals, certificates, consents, determinations, notices, requests and discharges, these communications shall be:

- A. in writing and delivered by hand (against receipt), sent by mail or courier, or transmitted using any of the agreed systems of electronic transmission as stated in the Contract Data; and
- B. Delivered, sent or transmitted to the address for the recipient’s communications as stated in the Contract Data. However:
 - i. If the recipient gives notice of another address, communications shall thereafter be delivered accordingly; and
 - ii. If the recipient has not stated otherwise when requesting an approval or consent, it may be sent to the address from which the request was issued.

Approvals, certificates, consents and determinations shall not be unreasonably withheld or delayed. When a certificate is issued to a Party, the certifier shall send a copy to the other Party. When a notice is issued to a Party, by the other Party or the Engineer, a copy shall be sent to the Engineer or the other Party, as the case may be.

⇒ **Law and Language:** The Contract shall be governed by the law of the country or other jurisdiction stated in the Contract Data.

The ruling language of the Contract shall be that stated in the Contract Data. The language for communications shall be that stated in the Contract Data. If no language is stated there, the language for communications shall be the ruling language of the Contract.

⇒ **Priority of Documents:** The documents forming the contract are to be taken as mutually explanatory of one another. For the purpose of interpretation, the priority of the documents shall be in accordance with the following sequences:

- The contract agreement
- The letter of acceptance
- The tender
- The particular conditions – part A
- The particular conditions – part B
- These general conditions
- The specifications
- The drawings, and
- The schedules and any other documents forming part of the contract

If an ambiguity or discrepancy is found in the documents, the Engineer shall issue any necessary clarification or instruction.

⇒ **Compliance with Laws:** The contractor shall, in performing the Contract, comply with applicable Laws. Unless otherwise stated in the Particular Conditions:

- the Employer shall have obtained (or shall obtain) the planning, zoning, building permit or similar permissions described in the Specifications as having been (or to be) obtained by the Employer; and the Employer shall indemnify and hold the Contractor harmless against and from the consequences of any failure to do so; and
- the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits licenses and approval, as required by the Laws in relation to the execution and completion of the Works and the remedying of any defects; and the Contractor shall indemnify and hold the Employer harmless against and from the consequences of any failure to do so, unless the Contractor is impeded to accomplish these actions and shows evidence of its diligence.

⇒ **Joint and several Liability:** If the contractor constitutes (Under applicable Laws) a joint venture, consortium or other unincorporated grouping of two or more persons:

- These persons shall be deemed to be jointly and severally liable to the Employer for the performance of the Contractor.
- These persons shall notify the Employer of their leader who shall have authority to bind the Contractor and each of these persons; and
- The Contractor shall not alter its composition or legal status without the prior consent of the Employer.

⇒ **Inspection and audit by the bank:** The Contractor shall permit the Bank and or/ persons appointed by the Bank to inspect the Site and/or the Contractor's accounts and records relating to the performance of the Contract and to have such accounts and records audited by auditors appointed by the Bank if required by the Bank.

⇒ **Care and Supply of documents:** The Specification and Drawings shall be in the custody and care of the Employer. Unless otherwise stated in the Contract, two copies of the Contract and of each subsequent Drawing shall be supplied to the Contractor, who may make or request further copies at the cost of the Contractor.

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Each of the Contractor's Documents shall be in the custody and care of the Contractor, unless and until taken over by the Employer. Unless otherwise stated in the Contract, the Contractor shall supply to the Engineer six copies of each of the Contractor's Documents. The Contractor shall keep, on the Site, a copy of the Contract, publications named in the Specification, the Contractor's Documents (if any), the Drawings and Variations and other communications given under the Contract. The Employer's Personnel shall have the right of access to all these documents at all reasonable times. If a Party becomes aware of an error or defect in a document which was prepared for use in executing the Works, the Party shall promptly give notice to the other Party of such error or defect.

⇒ **Confidential Details:** The Contractor's and the Employer's Personnel shall disclose all such confidential and other information as may be reasonably required in order to verify compliance with the Contract and allow its proper implementation.

Each of them shall treat the details of the Contract as private and confidential, except to the extent necessary to carry out their respective obligations under the Contract or to comply with applicable Laws. Each of them shall not publish or disclose any particulars of the Works prepared by the other Party without the previous agreement of the other Party. However, the Contractor shall be permitted to disclose any publicly available information, or information otherwise required to establish his qualification to compete for other projects.

⇒ **Permits, Licences or Approvals:** The Employer shall provide, at the request of the Contractor, such reasonable assistance as to allow the Contractor to obtain properly:

- (a) copies of the Laws of the Country which are relevant to the Contract but are not readily available, and
- (b) any permits, licences or approvals required by the Laws of the Country:
 - i. which the Contractor is required to obtain under Sub-Clause 1.17 [Compliance with Laws],
 - ii. for the delivery of Goods, including clearance through customs, and
 - iii. For the export of Contractor's Equipment when it is removed from the Site.

⇒ **Tender Solicitation Announcement**

As stated in Section B above, the tender solicitation is the mechanism by which the Gol communicates to prospective bidders regarding the availability of public works contracts. The Instructions for Government Contract Execution issued in 2008 by the MoPDC lays out in detail the requirements for competitive tender solicitation announcements. In addition, the MoPDC issued Official Memorandum Number 1/1/Σ1Υ, dated 10 October 2008 which modified a few sections of the Instructions. Those modifications have been inserted in the appropriate sections below that were affected

A. **Tender Solicitation Advertising**

According to Article 0, the summary content and initial required period of announcing tender solicitations is as follows:

a) Summary Solicitation Content

Tender submission address and point of contact

. Tender submission deadline date and time

. Bank Guarantee requirements

on-refundable price of tender documents

b) Public Works – The Official Memorandum Number 1/1/Σ1Υ, dated 10 October 2008 modified the Instructions for Government Contract Execution – 2008 regarding the duration of advertising solicitation announcements. According to the new guidance, public works solicitations should be advertised from 10-15 days, depending on the complexity, importance, and urgency of the required work. The advertising period begins following the final publishing date of the announcement

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c) Supply and Consultative Services – Normally, these solicitations are advertised from 10-15 days. This is dependent on the nature and requirements of the solicitation and also begin following the final publishing date of the announcement

d) Direct Invitation and Sole Bid Contracts – Also according to the new guidance referenced in Sub-Paragraph b) above, the duration period for advertising Direct Invitation and Sole Bid contracts is left to the discretion of the spending unit's contracting authority.

e) Food and Drug Supply – According to the new guidance referenced in Sub-Paragraph b; above, food and drug supply contracts are exempt from the advertising requirements.

B. Extending Tender Solicitation Advertising

The contracting authority may extend the initial advertisement period if the response to the solicitation announcement has been unsatisfactory. Extension of the advertising period requires the approval of the contracting authority chairman. The MoPDC must also be informed. The announcement must be re-advertised in the same newspapers and media as it was originally published. All participants who have submitted tenders must be notified of the advertising extension and re-advertisement of the solicitation prior to the tender submission deadline date.

Prevailing conditions with compelling reasons for extending the advertising period or choosing to re-announce the solicitation must be present and would conform to the following:

- a) No tenders were submitted during the announcement period;
- b) The minimum number of tenders was not submitted to meet the invitation requirements; and
- c) The amount of the best qualified tender exceeds the estimated cost by 10% or more.

Tender Solicitation Advertising Channels

Tender solicitation announcements are widely advertised to the public in order to provide maximum exposure and opportunity for competition. The channels in which solicitations are advertised include:

- The *Official Gazette*
- Announced three times in three newspapers of general circulation
- Ministry/Governorate Website
- Iraq Embassies and Consulates
- United Nations Development Program Website – International Tender Solicitation

Tender Solicitation Closing Date

The tender solicitation closing date and time must be specified in the solicitation document and announcement to include the submission address. The buyer can extend the closing date of the tender solicitation for the submission of the tenders by modifying the solicitation documents in accordance with Chapter 1 - Paragraph 1 of the Unified Tender Instructions. In such case, all rights and obligations required of both the buyer and the bidder must be adjusted and extended in correspondence with the new closing date.

Tender Submission Acceptance

Unless otherwise stated, bidders must deliver tenders either by hand or by mail to the tender submission address listed in the tender solicitation documents. Tenders can be sent by email only if stated in the tender solicitation and only to the email address listed in the solicitation. The bidder is responsible for ensuring that their tender is submitted to the correct address and by the designated submission deadline period. Special instructions regarding the preparation of the contents of the tender submission are described below:

١. Initial Tender Submissions

- a) The envelope containing the tender offer from the bidder must have one original document, marked on the front with the word “ORIGINAL”, and include the full name and address of the bidder.
- b) The bidder must also submit the number of copies required according to the tender solicitation and mark the pages with the word “COPY”, and include the full name and address of the bidder.
- c) If there are any differences between the original document and the copy, the original will be adopted and controlling.
- d) All envelopes must bear the warning not to be opened prior to the appointed Public Tender Opening Ceremony on the specified date.
- e) The tender documents inside the envelope must also include the tender solicitation Reference Number.
- f) Both the original and the copies of the Price List and Quantity Tables should be written in permanent ink and signed by the bidder or official authorized to sign on behalf of the bidder.
- g) Any traces of erasing or re-writing between the lines will be accepted with initialing by bidder or the official authorized to sign on behalf of the bidder.

٢. Replacement Tender Submissions

- a) Replacement tenders are acceptable providing they arrive prior to the tender submission deadline. The replacement tenders and authorization letter should be delivered in a separate envelope and marked with the word “REPLACEMENT”. Upon delivery, both the initial tender and replacement tender envelopes should be put together in one envelope and marked with the bidder’s full name and address.
- b) Requirements regarding envelopes and content markings should follow the instructions in Section H, Sub-Paragraph ١, (b) – (g) above.

٢. Public procurement national costs

Total **cost of public procurement** in Europe is estimated at about ١,٤ percent of purchasing volume. This equates to about ٥.٢ billion euro in ٢٠٠٩ terms. Businesses account for ٧٥ percent of these costs. Although the unit costs for developing a request and managing the process are higher for authorities, the fact that several bids are prepared and submitted for each tender explains the higher total costs for suppliers. The average competition uses the equivalent of ١٢٢ person days of resources; in monetary terms this equates to ٢٧.٥٥٥ euro.

Contractor payments: contractor payments being with an advance or mobilization payment, if authorized in the contract. Progress payments continue over life of the contract with reserve amounts withheld during the preliminary acceptance period and paid following the final acceptance of the project by the buyer.

١. **Advance/Mobilization Payments** Contracts may allow an advance or mobilization payment prior to the onset of the project implementation. The purpose of this payment is to provide the financial means for the contractor to purchase and transfer goods and equipment to the project site in order to begin with. The advance payment is amortized proportionally to progress payments made as project is completed.

- a) This payment cannot exceed ٢٠% of the total contract amount.
- b) The amount should be reasonably associated with the contractor’s cost of mobilization.
- c) The advance payment must be recovered at each periodic progress payment specified in the contract.
- d) Advances must be recovered within the following:
 - i. Two months prior to the end of the contract period of performance; or
 - ii. Half of the contract period of performance

٧. Contractor Progress Payments

Contractor payments are contingent upon a satisfactory Project Manager's performance Review and invoice payment approval. Payments are made monthly upon submission of the contractor's invoice of the estimated value of the work accomplished. Contractor invoices approved by the Project Manager are submitted to the Accounting Directorate spending unit for payment. The spending unit verifies the invoice, conforms that the payment is allowed under the contract, and that adequate funds remain in the project. Payment to the contractor is made by check. There are limits on the amount of a single payment that can be authorized by different officials.

Payment Authorization Tables

<i>Threshold</i>	<i>Approving Authority</i>
Up to 500 million ID	Minister or Head of Agency
Greater than 500 million ID	Minister of Finance
Great than 1 billion ID	High Contracts Committee

Payments should be made within ٣٠ days of delivery of the invoice and acceptance by the government. Copies of payment documents and the project manager's certification are placed in the official documents file for the project. The documents serve as official evidence of the project implementation historical record. These documents will be reviewed during the final acceptance review and for determining dispute resolutions, if any.

All reasonable costs and expenses resulting from the handling, investigating, asserting, defending, or settling of any claim or legal action necessary or expedient for the procuring, perfecting, retention and protection of the Contract Area, and in defending or prosecuting lawsuits involving the Contract Area or any third party claim arising out of the Petroleum Operations under the Contract, or sums paid in respect of legal services necessary for the protection of the joint interest of the GOVERNMENT and the CONTRACTOR shall be recoverable. Such expenditures shall include, without limitation, attorney's fees, court costs, arbitration costs, costs of investigation, and procurement of evidence and amounts paid in settlement or satisfaction of any such litigation and claims provided such costs are not covered elsewhere in the Annex.

There is practically no relationship between **contract value** and **procurement costs** except in the very high value range. Thus, costs are a big share of contract value for the smaller contracts. There is much difference in **cost efficiency** between countries. For example, in Germany and Norway the process cost of procurement reaches above ٤ percent of total procurement volume, while in the UK and Italy the share is less than ١ percent. It is important to note that these costs are not fully attributable to the procurement directives. Purchasers would regardless have to procure their goods and services and costs would be incurred with or without directives. For public procurement, authorities would have to follow national procurement regulations if they were not subject to the EU directives. For private sector procurement, both purchasing and sales departments also expend significant resources organizing business-to business transactions. The study first compares how different procedures and techniques perform in terms of costs and efficiency. Public authorities can select among several available types of procedure and technique. It is thus important to investigate whether there are noticeable differences in how they perform. It is also sometimes the case that not all procedures or techniques are available as an option in a particular case. The analysis herein may assist in identifying costs and benefits of such restrictions. Core features of the system such as competition and cost effectiveness also vary significantly across type of procedure, technique and contracting authority. Further understanding of the drivers of such observed differences should assist in the identification of policy variables that can be used to improve public procurement processes and outcomes.

Σ. Award procedures

Σ.1. Procedures of awarding public contracts

Contract Preparation

Contract preparation begins during the tender evaluation period so that the contract will be completed and ready for signature when the contract is awarded. Contract preparation is in accordance with the MoPDC guiding regulations Part Υ – Unified Tender Instructions. The Unified Tender Instructions standardizes contract conditions and promotes uniformity in the procedures. The use of this model contract simplifies the process of preparing a contract by providing a template to fill in the specific data as it relates to the tender solicitation specifications and according to the information specific to the winning bidder.

Contract Conditions

There are numerous contract condition and stipulations that vary widely depending on the nature of the contract. Below is a summary list of contract conditions and should not be considered the only conditions that apply or that could be found in a contract.

- Definitions
- Governing Legislation
- Risks
- Insurance
- Timeliness
- Safety
- Contract Extensions
- Approved delays
- Structural Defects
- Structural Changes
- Advance Payments
- Taxes
- Project Completion
- Final Acceptance
- Accountability
- Dispute Settlements

⇒ **Contract agreement:** The parties shall enter into a Contract Agreement in 14 days after the contractor receives the letter of acceptance, unless the Particular Conditions establish otherwise, the contract agreement shall be based upon the form annexed to the Particular Conditions . The costs of stamp duties and similar charges (if any) imposed by law in connection with entry in to the Contract Agreement shall be borne by the Employer.

⇒ **Assignment:** Neither party shall assign the whole or any part of the Contract or any benefit or interest in or under the contract. However, either Party:

- May assign the whole or any part with the prior agreement of the other Party at the sole discretion of such other Party , and
- May, as security in favour of the bank financial institution, assign its right to any moneys due, or to become due, under the Contract.

⇒ **Progress Reports:** Unless otherwise stated in the Particular Conditions, monthly progress reports shall be prepared by the Contractor and submitted to the Engineer in six copies. The first report shall cover the period up to the end of the first calendar month following the Commencement Date. Reports shall be submitted monthly thereafter, each within V days after the last day of the period to which it relates. Reporting shall continue until the Contractor has completed all work which is known to be outstanding at the completion date stated in the Taking-Over Certificate for the Works.

Each report shall include:

- charts and detailed descriptions of progress, including each stage of design (if any), Contractor's Documents, procurement, manufacture, delivery to Site, construction, erection and testing; and including these stages for work by each nominated Subcontractor (as defined in Clause 0 [Nominated Subcontractors]),
 - photographs showing the status of manufacture and of progress on the Site;
 - for the manufacture of each main item of Plant and Materials, the name of the manufacturer, manufacture location, percentage progress, and the actual or expected dates of:
 - i. commencement of manufacture,
 - ii. Contractor's inspections,
 - iii. tests, and
 - iv. shipment and arrival at the Site;
 - the details described in Sub-Clause 1.10 [Records of Contractor's Personnel and Equipment];
 - copies of quality assurance documents, test results and certificates of Materials;
 - list of notices given under Sub-Clause 1.0 [Employer's Claims] and notices given under Sub Clause 1.1 [Contractor's Claims];
 - safety statistics, including details of any hazardous incidents and activities relating to environmental aspects and public relations; and
 - Comparisons of actual and planned progress, with details of any events or circumstances which may jeopardise the completion in accordance with the Contract, and the measures being (or to be) adopted to overcome delays.
- ⇒ **Corrupt or Fraudulent Practices:** If the Employer determines that the Contractor has engaged in corrupt, fraudulent, collusive or coercive practices, in competing for or in executing the Contract, then the Employer may, after giving 15 days' notice to the Contractor, terminate the Contractor's employment under the Contract and expel him from the Site, and the provisions of Clause 10 shall apply as if such expulsion had been made under Sub-Clause 10.1 [Termination by Employer]. Should any employee of the Contractor be determined to have engaged in corrupt, fraudulent or coercive practice during the execution of the work then that employee shall be removed in accordance with Sub-Clause

For the purposes of this Sub-Clause:

- (a) "corrupt practice" means the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence the action of a public official in the procurement process or in the Contract execution;
- (b) "fraudulent practice" means a misrepresentation or omission of facts in order to influence a procurement process or the execution of the Contract;
- (c) "collusive practice" means a scheme or arrangement between two or more bidders, with or without the knowledge of the Borrower, designed to establish bid prices at artificial, non-competitive levels;
- (d) "Coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the procurement process or affect the execution of a contract.

٤.٢. Open tendering

Public Tender: Open to all interested bidders and issued publicly; bidders pay for tender and winning bidder pays for tender advertising costs incurred by Government; bid and performance bond usually required.

In an open procedure any interested service provider may submit an offer in response to the publication of the contract notice.

Tenders from bidders submitted by the submission deadline are opened and read in public. Valid tenders from eligible bidders are subjected to vigorous examination by an Analysis and Evaluation Committee. During the tender analysis and evaluation process, the spending unit develops the contract language for executing the project. The contract should be carefully prepared to provide for completion of the project according to the plans and specifications within the accepted timeframe and cost structure. Once the tender solicitation is awarded, the selection is formalized with a signed contract. The winning bidder is notified with a Letter of Acceptance which serves as the binding document until the contract is signed by both parties. Depending on the complexity of the project and the procurement rules, this can be a lengthy process, taking several months to complete. Iraqi contractors are given preference over foreign bidders by ١٠% in public works and consultation contracts and ٥% for goods and services contracts.

Public Tender Solicitations can solicit either national or international tenders which are determined according to the head of the contracting entity authority with consideration given to the contract nature and amount. This method is performed by issuing a public announcement for participation in bidding for contracts of all kinds and for those who qualify to participate in amounts no less than ٥٠,٠٠٠,٠٠٠ ID or any other amount specified by relevant entities.

Each ministry, agency not related to a ministry or province must create a Public Tender Opening Committee. This Committee is chaired by an official of at least the Director General level. It is composed of the chief of the concerned directorates including department representatives from legal, financial, and engineering. Support and administrative staff include a secretary and two reserve members.

Tender Recording

Tenders received by the tender solicitation deadline must remain sealed and kept in a secure location. On the date of the Public Tender Opening Ceremony, designated in the tender solicitation documents, all tenders received by the deadline are opened and read in public. The tenders are logged in a register where detailed information about each tender is recorded.

The register records the full name of bidder and whether the tender submitted was an unmodified initial, replacement, alternative, or cancellation. Tables of prices and discounts and performance bonds are also recorded.

The bidder and/or authorized representatives will sign the guest book.

A copy of the tender record with the date of the opening and the information regarding the session will be distributed to all the bidders who submitted tenders. It will be posted online and published in the *Official Gazette*.

Σ.Υ. Restricted tendering

In a restricted procedure there are two stages ΣV in the first stage any interested service provider may submit a request to participate in response to the publication of the contract notice. Such service provider is called a "candidate". In the second stage the contracting authority invites the submission of tenders from selected candidates. These candidates must be selected in accordance with the rules described in ¶ below.

A restricted procedure may be acceleratedΣΛ when urgency renders it impracticable to respect the normal deadlines for restricted procedures. Since this is an exception which may limit competition, it must be interpreted restrictively and limited to those cases where the contracting authority can prove the existence of objective circumstances giving rise to urgency and a real impossibility of respecting the normal deadlines for restricted procedures.

Limited Tender (I) – This tender solicitation is performed by issuing a public announcement to all interested bidders who qualify to compete for public contracts with amounts no less than 0,000,000 ID or any other specified amount. The solicitation is conducted in two stages:

- a) **First Stage** – A specialized committee evaluates the technical and financial qualifications of the bidders based on documents submitted by the bidder as verification of their eligibility. Those who qualify are referred to the Second Stage.
- b) **Second Stage** - In this stage, at least three Direct Invitations will be sent to participants who qualified in the First Stage, inviting them to submit commercial offers according to the announced public tender solicitation specifications and instructions.

Limited Tender (Y) – This method is used to achieve the best solution for solicitations of a complicated nature or in cases where there is no need to specify details of technical specifications. It is also used for services where it is not initially necessary to specify project characteristics.

As with Limited Tender (I) this tender solicitation is conducted in two stages. The process requires the same procedures as described in the First and Second Stage above in Sub-Paragraphs Υ.a and Υ.b.

Σ.Σ. Negotiated procedure with publication

The Instructions for Governmental Contract Execution – Υ••Λ, lays out the roles and responsibilities of the Tender Analysis and Evaluation Committee. It requires that the Committee must be formed by each buyer contracting entity. The purpose of the Committee is to analyze and evaluate the eligibility, technical, financial, and legal components of each tender submitted by the bidders and accepted at the Public Tender Opening Ceremony.

The Tender Analysis and Evaluation Committee is chaired by an experienced employee from the buyer's organization, with the title of manager, chief engineer or higher. Committee members are comprised of those specializing in legal and financial fields.

The Committee may seek additional assistance from other specialized experts with experience related to the needs of the tender. Approval for additional technical expertise must be authorized by the chief of the buyer's contracting office and be in alignment with the financial limitations of the budget.

→ **Main features and arrangements of negotiated procedures**

- Evaluation and number of candidates
 - The negotiated procedure with publication of a contract notice may be conducted like a restricted procedure, starting with the evaluation of the candidates followed by the evaluation of the offers.
 - In the negotiated procedure without publication of a contract notice, the contracting authority invites directly each candidate selected to submit a tender. Contrary to the negotiated procedure with publication of a contract notice, there is no first formal phase of evaluation of the candidates. They will be evaluated after having submitted an initial tender.
 - At least 3 candidates must be invited to tender, provided a sufficient number of candidates satisfy the selection criteria. In any event, the number of candidates must be high enough to ensure genuine competition. The above requirements on the number of candidates are not applicable if the contract can be awarded to one economic operator only (ex: monopoly situation, contract for additional purchase which has to be awarded to the current contractor or when a specific prior authorization is granted; see Financial rules – Part II – Art 6 and 9).
- The negotiation
 - In comparison to the restricted procedure, the negotiation itself is an additional step foreseen during the evaluation of the offers.
 - After receipt of the (initial) tenders, the contracting authority negotiates the tenders to adapt them to the requirements set out in the specifications in order to find the tender offering the best value for money, while ensuring that tenderers are treated equally.
 - The negotiation covers both the technical and the financial aspects of the tenders, but may not concern the minimum (compulsory) technical or administrative specifications in the tender documents.
 - Contracting authorities may arrange for the negotiated procedure to take place in stages in order to reduce the number of tenders to be negotiated, by applying the award criteria set out in the specifications. The contract notice or the specifications must stipulate that this option is to be used.

Negotiated procedure with publication of a contract notice

As in the restricted procedure, the contracting authority must publish a contract notice inviting expressions of interest (candidatures) and then select the candidates to be invited to negotiate on the basis of the qualification criteria set out in the contract notice. The only permitted criteria are those set out in articles 79 to 80 of the Services Directive (personal situation, professional registration, financial and economic standing, ability and technical capacity).

There are three cases in which the Services Directive allows recourse to the negotiated procedure with prior publication of a contract notice.

A. Irregular or unacceptable offers

A contracting authority may have recourse to the negotiated procedure with prior publication of a contract notice, where in an open or restricted procedure all the offers made are irregular or unacceptable having regard to the applicable national provisions that are in accordance with articles 77 to 78 of the Services Directive, insofar as the original terms of the contract are not substantially altered. The theory here is that since the original open or restricted procedure failed to produce regular acceptable tenders or requests to participate, it is necessary to close the procedure officially and start again, but this time recourse to the negotiated procedure is permitted so that the process of negotiation can be used to avoid the former irregular or unacceptable aspects of the tenders.

However, recourse to the negotiated procedure the second time round is only permitted if the contractual conditions are not substantially modified. The Commission considers that changes to the financial arrangements, the period for execution of the services, the technical specifications, etc. are substantial modifications which do not allow recourse to the negotiated procedure.

Since a new procedure is involved, a new contract notice must be published. However, the contract notice may be dispensed with provided all the parties invited to negotiate include the tenderers or candidates who, in the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the tendering procedure and satisfy the qualification criteria for selection set out in articles 79 to 80 of the Services Directive (personal situation, professional registration, financial and economic standing, ability and technical capacity). If any of these are excluded (whether or not additional parties are invited to negotiate) a contract notice must be published to enable the excluded parties to resubmit requests to participate.

B. Overall pricing not possible

The negotiated procedure, with publication of a contract notice, may be used in exceptional cases where the nature of the services or the risks involved do not permit prior overall pricing. The theory here is that tenderers would not be able to put in a fixed overall price for the services but would have to incorporate contingencies which render a straight-forward comparison of pricing impossible. An example might arise in the case of repair services where the extent of the repairs necessary would not become apparent until the work had commenced.

C. Contract conditions cannot be specified with precision

The negotiated procedure, with publication of a contract notice, may be used when the nature of the services to be procured is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures. This may arise in particular, in the case of insurance, banking and investment services falling within category no. 6 of Annex IA to the Services Directive, as well as intellectual services generally.

Σ.Ο. Competitive dialogue

The tender solicitation describes in detail all the required supporting documentation that should accompany the tender submission from the bidder. It is the responsibility of the bidder to ensure that all required documents are included with the tender submission and are prepared according to the tender solicitation instructions. Tender submissions found without the required supporting documents or those incorrectly prepared can be rejected, and the bidder not afforded the opportunity to correct the mistake even though it was unintentional.

Below is a summary checklist of elements that should be applied to the assessment of the tenders:

- a) Evaluate the skills and abilities of the bidder to meet the technical specifications of the solicitation with regard to historical performance, professional certificates, and seasoned staff.
- b) Research claims of prior successful implementation of other State contracts.
- c) Analyze the financial stability and soundness of the bidder, based on the certifications of their final accounts from a licensed, qualified accountant as required in tender solicitation documents.
- d) Evaluate the other commitments of the bidder covering the period of implementation of this current project and form an opinion as to whether the bidder can deliver this contract.
- e) Determine from the accompanying documentation, whether the bidder is competent and legally eligible to compete for State contracts.
- f) Verify that the tender is a valid offer by identifying that all required documents, stipulated in the solicitation, are included in the tender submission, are completed properly, and are signed by the bidder or authorized representative.

Submission of tenders and other supporting documentation is prohibited following the closing deadline of the tender solicitation. The Committee looks for the following:

- a. Bidder eligibility documentation such as business license
- b. Solicitation Bank Guarantee - ID and accurate amount
- c. Project implementation plan and deliverable schedule
- d. List of Goods and Delivery Schedule – Column H
- e. Price and Quantity Tables
- f. Tender prices were calculated on a uniform basis as indicated in the solicitation

Σ.Γ. Negotiated procedure without publication

Following the Public Tender Opening Ceremony, the Tender Analysis and Evaluation Committee meets to begin the work of verifying the eligibility, validity, financial soundness, legal authority, and technical components of each bidder and the tender they submitted. It is easy to imagine that this is not only a time consuming process but a critically important element of the tender solicitation process. Sound judgment and expert technical knowledge of the specifications of the solicitation are paramount in evaluating the fitness of each tender and the bidder's ability to meet the deliverables. Failure to evaluate each tender comprehensively could result in highly qualified bidders being excluded and/or sub-standard bidders being awarded contracts. Either of those results is unacceptable and could bring costly consequences. Examples of assessment forms are included in MoPDC guiding regulation, Part A – Standard Tender Assessment Forms.

Any attempt by a bidder to influence the buyer's decision during the analysis and evaluation phase in an effort to win the tender solicitation unfairly will be subject to disqualification from the competition.

⇒ **Tender Assessment Report**

The Tender Analysis and Evaluation Committee members are required to prepare and submit a Tender Assessment Report. The report would contain the following elements:

- Tender Analysis and Evaluation Committee meeting minutes;
- Findings pertaining to the financial, technical, and legal evaluation of each tender;
- Justification and explanation if the lowest tender is not chosen;
- Copies of correspondence between the Committee and bidders;
- Explanation of differences between original and amended tender prices;
- Justification for excluding tenders from consideration; and
- An Acceptance Letter prepared for signature of the minister or other authorized official to be delivered to the winning bidder.

Negotiated procedure without publication of a contract notice

A contracting authority may have recourse to the negotiated procedure without publication of a contract notice in the six cases⁹ described below.

A. Absence of tenders

The negotiated procedure may be used without publication of a contract notice in the absence of tenders or of appropriate tenders in response to an open or restricted procedure, provided that the original terms of the contract are not substantially altered. The contracting authority must first terminate the prior open or restricted procedure and inform the Official Journal accordingly.¹⁰ The theory here is that no-one was interested in responding to the open or restricted procedure, and that any offer received can be assimilated to the absence of a tender because the offer had no relevance to the procurement requirements of the contracting authority, as defined in the contract documents.

The requirement that the terms of contract must not be substantially altered when put out for negotiation is the same as in case A. with publication above.

Tenders are considered not to be appropriate when they are unacceptable or irregular in the sense explained above, and, in addition, their content has no relevance to the procurement and are, therefore, totally inadequate for the contracting authority's purposes as defined in the contract documents. For this reason, the submission of such tenders is assimilated to the absence of tenders.

B. When, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider

This is a very narrow exception and applies only in those cases where it can be said that to invite tenders or expressions of interest would be abusive because there is only one service provider who can provide the particular service.¹¹ The safest cases where the exception can be used are those where a particular service provider has the exclusive right to carry out a particular service. However, the exception does not apply if the exclusive right is licensed to other parties or can reasonably be obtained on license. Thus, for example, a sculptor would have the exclusive right to repair or remake a work of art sculpted by him, but he would not have the exclusive right to produce photographs of the work if he had already licensed other parties to produce such photographs.

The cases where, in the absence of exclusive rights, technical or artistic reasons justify recourse to a negotiated procedure are very narrow indeed. An example might be found where a local authority had already commissioned a work of art and later decided to commission a second work of art to make a "pair". In such circumstances it would be necessary to show for objective reasons that it could not be envisaged that the second work of art be provided by a different artist.

C. Where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates. In the latter case, all successful candidates must be invited to participate in the negotiations. Recourse to the negotiated procedure is permitted here because the design contest will already have been subject to publicity if the value of the contract is not less than the threshold of ECU 700,000.

D. Extreme urgency

The negotiated procedure may be used without publication of a contract notice. In so far as strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be kept. The circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.

Unforeseeable events here means events which fall outside the field of normal economic and social activity, such as floods or earthquakes which necessitate urgent services to assist the victims. It should be observed that recourse to this procedure is permitted by the Services Directive only to the extent necessary to procure services necessary to deal with the immediate urgent situation. Taking into account the minimum deadline imposed (see 5.4 below) this means for services covering a period of about one month. For services required after such period, the contracting authority has sufficient time to publish a contract notice and award a service contract in accordance with normal procedures, invoking urgency as grounds for use of shorter deadlines.

E. Additional services

The negotiated procedure may be used without publication of a contract notice for additional services not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the performance of the service described therein.

In such a case, recourse to the negotiated procedure without publication of a contract notice is permitted provided the following three conditions are satisfied:

- The contract for the new service is awarded to the service provider who supplied the original services;
- The additional services cannot be technically or economically separated from the main contract without great inconvenience for the contracting authority or such services, although separable from the performance of the original contract, are strictly necessary for its completion;
- The aggregate estimated value of contracts awarded for additional services does not exceed 0.5% of the amount of the main contract.

F. Repetition of services

The negotiated procedure may be used without publication of a contract notice for new services consisting in the repetition of similar services entrusted to the service provider to which the same contracting authority awarded an earlier contract. Four conditions must be satisfied:

- The new services must conform to a basic project for which a first contract was awarded by open or restricted procedure. Thus this condition is not satisfied if the first contract was awarded by negotiated procedure for any reason;
- When the first contract was put up for tender, notice was given that the negotiated procedure might be adopted for the procurement of additional services;
- The total estimated cost of the subsequent services must be taken into consideration in estimating the value of the contract for the purposes of determining the applicability of the Directive.
- Recourse to the negotiated procedure without a contract notice takes place within three years of the original contract.

Σ.V. Single-source procurement

A Sole Bid solicitation is used for contracts where one eligible bidder is invited to provide supplies, implement construction or manufacturing works, or supply consultation services. The Sole Bid is used only when it can be justified and according to the following procedures:

- a)** The spending unit's contracting office submits a request with justifying reasons to use the Sole Bid Method of solicitation to the Central Contracts Committee (CCC) in the General Secretariat of the CoM. The request essentially asks the Committee to authorize the Tender Analysis and Evaluation Committee to accept the Sole Bid.
- b)** If the CCC does not respond to the request within 15 days of the registered receipt date, then the Committee's approval is considered given and the process of the Sole Bid Method can proceed.

Σ.Λ. Request-for-quotations

REQUEST FOR QUOTATIONS-KRG-CONSTRUCTION

A. PRICE

The contractor shall complete all work, including furnishing all labor, material, equipment and services required under this purchase order for the following firm fixed price and within the time specified. This price shall include all labor, materials, overhead and profit.

_____ Total Price

B. SCOPE OF WORK

The character and scope of the work are set forth in the contract. The Contractor shall furnish and install all materials required by this contract. In case of differences between small and large-scale drawings, the latter will govern. Where a portion of the work is drawn in detail and the remainder of the work is indicated in outline, the parts drawn in detail shall apply also to all other portions of the work.

C. PACKAGING AND MARKING

Mark materials delivered to the site as follows:

Contracting Officer,
Consulate General Erbil
Ankawa Compound
Erbil, Iraq

D. INSPECTION AND ACCEPTANCE

The COR, or his/her authorized representatives, will inspect from time to time the services being performed and the supplies furnished to determine whether work is being performed in a satisfactory manner, and that all supplies are of acceptable quality and standards. The Contractor shall be responsible for any countermeasures or corrective action, within the scope of this contract, which may be required by the Contracting Officer as a result of such inspection.

i. Substantial Completion

- (a) "Substantial Completion" means the stage in the progress of the work as determined and certified by the Contracting Officer in writing to the Contractor, on which the work (or a portion designated by the Government) is sufficiently complete and satisfactory. Substantial completion means that the property may be occupied or used for the purpose for which it is intended, and only minor items such as touch-up, adjustments, and minor replacements or installations remain to be completed or corrected which:
 - (1) do not interfere with the intended occupancy or utilization of the work, and
 - (2) Can be completed or corrected within the time period required for final completion.
- (b) The "date of substantial completion" means the date determined by the Contracting Officer or authorized Government representative as of which substantial completion of the work has been achieved.

Use and Possession upon Substantial Completion-The Government shall have the right to take possession of and use the work upon substantial completion. Upon notice by the

Engineer: Salam Othman

Contractor that the work is substantially complete (a Request for Substantial Completion) and an inspection by the Contracting Officer or an authorized Government representative (including any required tests), the Contracting Officer shall furnish the Contractor a Certificate of Substantial Completion. The certificate will be accompanied by a Schedule of Defects listing items of work remaining to be performed, completed or corrected before final completion and acceptance. Failure of the Contracting Officer to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. The Government's possession or use upon substantial completion shall not be deemed an acceptance of any work under the contract.

ii. Final Completion and Acceptance

- a) "Final completion and acceptance" means the stage in the progress of the work as determined by the Contracting Officer and confirmed in writing to the Contractor, at which all work required under the contract has been completed in a satisfactory manner, subject to the discovery of defects after final completion, and except for items specifically excluded in the notice of final acceptance.
- b) The "date of final completion and acceptance" means the date determined by the Contracting Officer when final completion of the work has been achieved, as indicated by written notice to the Contractor.
- c) Final Inspection and Tests-The Contractor shall give the Contracting Officer at least five (5) days advance written notice of the date when the work will be fully completed and ready for final inspection and tests. Final inspection and tests will be started not later than the date specified in the notice unless the Contracting Officer determines that the work is not ready for final inspection and so informs the Contractor.
- d) Final Acceptance-If the Contracting Officer is satisfied that the work under the contract is complete (with the exception of continuing obligations), the Contracting Officer shall issue to the Contractor a notice of final acceptance and make final payment upon:
 - Satisfactory completion of all required tests,
 - a final inspection that all items by the Contracting Officer listed in the Schedule of Defects have been completed or corrected and that the work is finally complete (subject to the discovery of defects after final completion), and
 - Submittal by the Contractor of all documents and other items required upon completion of the work, including a final request for payment (Request for Final Acceptance).

E. DELIVERIES OR PERFORMANCE

The Contractor shall be required to:

- (a) commence work under this contract within 15 calendar days after the date the Contractor receives the notice to proceed,
- (b) prosecute the work diligently, and,
- (c) Complete the entire work ready for use not later than 90 Calendar days after NTP.

F. ADMINISTRATIVE DATA

(a) The Contracting Officer may designate in writing one or more Government employees, by name or position title, to take action for the Contracting Officer under this contract. Each designee shall be identified as a Contracting Officer's Representative (COR). Such designation(s) shall specify the scope and limitations of the authority so delegated; provided, that the designee shall not change the terms or conditions of the contract, unless the COR is a warranted Contracting Officer and this authority is delegated in the designation.

(b) The COR for this contract is Mr. Sarhad Basil, Facilities Supervisor.

G. SPECIAL REQUIREMENTS

Performance/Payment Protection-The Contractor shall furnish some form of payment protection as described in 02.22A-12 in the amount of 5% of the contract price.

H. CLAUSES

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Up on request, the Contracting Officer will make their full text available.

I. QUOTATION INFORMATION

١. QUALIFICATIONS OF OFFERORS

٢. SUBMISSION OF QUOTATIONS

٣. MAGNITUDE OF CONSTRUCTION PROJECT

٤. LATE QUOTATIONS. Late quotations shall be handled in accordance with FAR.

٥. ٥٢.٢٥٢-١ SOLICITATION PROVISIONS INCORPORATED BY REFERENCE(FEB ١٩٩٨)

٦. EVALUATION CRITERIA

٧. REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS OR QUOTERS

٤.٩. Electronic bidding

The Erbil Contractors' Union receives all tender announcements and information from the government or others soliciting bids for projects in the Erbil area of Iraq. They have a list of projects that are submitted to their members for bidding. Some of the ministries in the Iraq government announce their projects only through their own ministries. All of the tenders for government work and most for private work are published in the local newspapers. E-procurement definition is the term used to describe the use of electronic methods, typically over the Internet to conduct transactions between awarding authorities and suppliers. The process of e-procurement covers every stage of purchasing, from the initial identification of a requirement, through the tendering process, to the payment and potentially the contract management.

⇒ Organizational

- Many users are resistant to change, simply due to human nature and habit
- Users may believe that e-procurement will make their job more difficult or cumbersome
- Current roles will change due to the impact of e-procurement.

⇒ Economic-Legal

- Level of economic development
- Regulatory framework
- Technological scenario
- Existence of private competitor services
- General Education level

⇒ E-procurement models

- activity based model:

-Indirect Procurement System (IPS)

-Direct Procurement System (DPS)

- organization based model:

-Centralized Model

-Decentralized Model

⇒ **Definitions**

IPS: Contracting subject do not coincide with the ordering administration

DPS: Contracting subject coincides with the ordering administration

Centralized Model: Purchasing procedures are centralized

Decentralized Model: purchasing procedures depend on each administration unit.

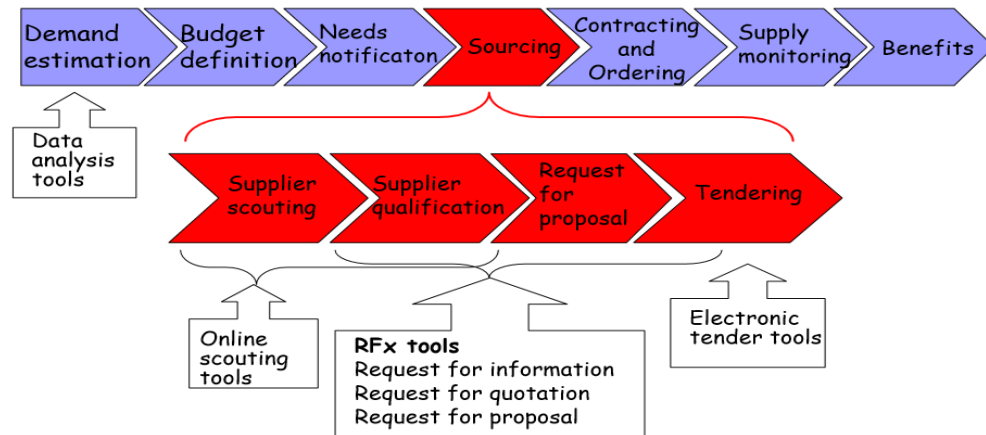
⇒ **E-procurement outcomes**

- Intermediate outcomes:

- Better services;
- Cost savings;
- Time savings.

- Final outcomes:

- Improvement of the labour productivity of the public sector;
- Economic rationality (organizational efficiency), simplification, transparency and accountability;
- GDP growth.



E-procurement process and ICT Supporting Tools

⇒ **Electronic Catalogues**

An electronic catalogue is a list of supplier products that is accessible through the internet.

Electronic catalogues can be managed in one of three ways:

- hosted and managed in house
- outsourced to a third party such as a marketplace
- Hosted and managed by the supplier.

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Advantages

- Can be quick and easy to setup for small catalogues
- Same look and feel for all catalogues makes it easier for end users
- Access to all supplier information in one place can help drive compliance
- P/Os still stored in internal system providing a record of orders and spend

Disadvantages

- Can require significant resources to maintain catalogue data
- Does not provide real time to supplier prices or availability
- Requires significant investment to setup and maintain
- End users may find it more difficult to use at first – for example in searching
- Still requires separate system to transmit PO to Supplier
- Requires additional technology investment over base FMIS functionality

⇒ Elements of E-procurement

E-procurement consists of the following general types:

- **Web-based enterprise resource planning (ERP)**. Creating and approving purchasing requisitions and placing purchase orders and receiving goods and services by using a software system based on Internet technology
- **Electronic maintenance, repair and overhaul (e-MRO)**. Similar to Web-based ERP, but goods and services ordered are non-product-related MRO supplies
- **E-sourcing**. Identifying new suppliers for a specific category of purchasing requirements using Internet technology
- **E-tendering**. Sending requests for information and prices to suppliers and receiving the responses of suppliers using Internet technology
- **E-reverse auctioning**. Using Internet technology to buy goods and services from a number of known or unknown suppliers
- **E-informing**. Gathering and distributing purchasing information from and to internal and external parties using Internet technology

⇒ Benefits from e-Procurement

By recognizing that e-procurement is not a “one size fits all” solution, and taking a measured implementation approach that focuses on tangible business benefits, agencies have been better able to focus their activities on those areas where the highest return on investment could be delivered.

Agencies that have implemented e-procurement projects have realized benefits such as:

- accelerated time to market for sourcing and procurement activities
- improved governance and probity through maintaining an electronic record of activity
- Reduction in resources associated with administration of procurement processes.

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Their success has been assisted through:

- establishing metrics to measure the potential benefits and tangible outcomes
- developing a robust business case and tracking the progress against that business case
- appointing a single point of accountability to assume responsibility for the project
- managing stakeholders in order to obtain and maintain buy-in to the project
- providing clear communication to employees, stakeholders and suppliers
- Understanding suppliers' concerns and ensuring their continued support.

Σ.1 ◊. Integrity Pacts:

Integrity Pacts will be implemented on certain government infrastructure projects in beyond. The projects selected will be high visibility projects that have a significant impact with civil society including projects in the health, education, water and power sectors. Lessons learned in these highly monitored projects will be instructive for revising procurement controls. An Integrity Pact is a monitored agreement between a government and all of the bidders for a public contract that integrity rules and anti-corruption standards will be followed throughout the bidding process and project implementation cycle. 10 A standard Integrity Pact states that neither party will pay, offer, demand or accept bribes while prohibiting collusion with competitors and other similar misconduct during the life of the contract. Integrity Pacts discourage bribery on the part of the contractors by giving them the assurance that their competitors will be bidding ethically while giving governments such as the KRG the protection and assurance of a clear, transparent framework that insulates them from unethical counterparties. The Integrity Pacts will require all bidders on government projects to have company Codes of Conduct that explicitly prohibit the use of bribes and other unethical behavior. Should a violation of the Pact be noted, sanctions such as the following will be put into place:

- the denial of the bid (if in the proposal phase) or loss of the contract (if the project is in progress),
- forfeiture of the bid security and the performance bond,
- Liability for damages to the KRG and any competing bidders, and/or
- Debarment or blacklisting to prevent the violator from doing work for the KRG for an appropriate period of time.

Should a violation be found to occur on the side of the KRG, the government official responsible shall be subject to disciplinary or criminal sanction, an independent monitoring function will be implemented to maintain the integrity of the process; civil society may participate in this function. Any monitor selected shall be independent, experienced, accountable and credible.

○. Selection of the best tender

Competition is considerable. Each public tender is estimated to receive 0, 2 offers. Open procedure and joint purchasing procurements leads to more offers. Spain and Germany are the most competitive markets receiving about 1 offers on average. Local government markets are more competitive than central government. The degree of competition in public procurement, which may be most directly peroxide by the number of bids that calls for tenders typically receive, varies dramatically between the top and the lower performing group of countries. While the top group receives an average of 5 or more bids per procurement, the bottom group receives 3 or fewer. Naturally, we would expect such large differences in degree of competition to reflect significantly in the outcomes of public procurement. One important concern for both authorities and tenderers is the length of time taken by public procurement procedures. The average time taken across all procedures is 10 days but the average difference between the top and the lower performs is approximately 10 days. This is a hugely significant difference that will inevitably impact on the efficiency and attractiveness of public procurement. In terms of person-day costs we again find a huge variation. While the overall average stands at 10 days, including both the time invested by authorities and by the winning firm, the difference between the top and the bottom performing countries is approximately 10 person-days. These differences are explained mainly by the person-day costs for authorities. Including the person-days spent by non-winning firms the difference in resource use for the economies increases to 10 person days.

⇒ Tender Evaluation and Award-KRG

- Government entity must have an opening committee and a separate evaluation committee for the tenders in accordance with the regulations.
- Opening Committee responsible for opening and recording data of sealed proposals in front of bidders.
- Opening Committee is authorized to accept bids with proposed costs above the original fixed contract cost as follows:

→ IR No. 1, 30: entity may accept and analyze a bid that does not exceed the cost estimate by 10% for contracting purposes, provided the availability of Funds allocation and that the price is within the project's total cost. The Ministry of Planning & Development Cooperation shall be notified about this matter accordingly;

→ KRG Inst. No. 1, 30: entity May accept and Analyze a bid that does Not exceed the cost estimate by 10% for contracting purposes. The KRG Council Of Ministers Shall approve this in advance.

- Evaluation Committee takes over once Opening Committee submits the proposals and recorded information.
- Evaluation Committee is authorized to utilize outside consultants and experts to perform its technical evaluation duties, with certain restrictions.
- Upon full review, the Evaluation Committee recommends a winner in its report and sends it to its contracting authority for approval and official award.
- Once the Govt. entity notifies winner of award, winner has 15 days to sign contract; the winner also has 10 days to submit all required certifications and performance bonds/guarantees.
- Evaluation Committee takes over once Opening Committee submits the proposals and recorded information.
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- Upon full review, the Evaluation Committee recommends a winner in its report and sends it to its contracting authority for approval and official award.
- Once the Govt. entity notifies winner of award, winner has 15 days to sign contract; the winner also has 10 days to submit all required certifications and performance bonds/guarantees.
- Contractor is authorized to use sub-contractors as described in its proposal, but for no more than 30% of the project.

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- Contracts should be drafted in English and Arabic or Kurdish, depending on the location of the contract; contract should also specify governing language version.
- Advance payments are authorized for contractors (usually from ٥-٢٠% with backed bank guarantee from contractor).
- Contract period extensions without penalties are authorized under certain circumstances.

⇒ Finalizing the Tender Selection

Following the analysis and evaluation of the tender submissions, the Tender Analysis and Evaluation Committee compiles a detailed table that lists all tender submissions and associated related details. This table is used in the final comparison and evaluation of the technical, financial, and legal components of all tender submission.

Minutes from the Committee meetings should include a special field that shows the final recommendations of the Committee, the names and nationalities of the top three nominated bidders for award referral, the accepted tender price and currency, and the project implementation period. The Committee's recommendations should show that the accepted tender price is within the limits of the estimated project cost. Minutes must be dated and signed by the Committee chairman and members.

⇒ Tender Referral and Award

The Tender Analysis and Evaluation Committee submit their referral recommendations to the chief of the buyer's contracting office who will determine the award according to its contracting authority and parameters of the tender solicitation.

If the decision regarding the award is outside the authority of the buyer's contracting office, then the contract will be awarded by the Central Contracts Committee in the General Secretary's Office of CoM. The decision of the Central Contracts Committee is required within ١٤ days and approval is considered obtained after that period if no answer is given.

Award decisions are considered valid from the buyer's contracting office's authorization date. The contracting office informs the winning bidder of the award and a binding contract must be signed within ١٤ days of the date of award decision. All those who submitted tenders for consideration should also be informed of the award decision.

If the winning bidder refuses to sign a binding contract within ١٤ days of the award notification, the buyer can take legal action as prescribed in Article ١٦ of the Instructions for Government Contract Execution – ٢٠٠٨.

With regard to the bank guarantees of bidders not selected or who are not expected to be awarded the tender solicitation, the buyer's contracting office can release those guarantees upon written request from the bidders, prior to the end of the bidding process, and after receiving the Committee's referral recommendation. Release of the bank guarantees requires the signature of the relevant minister or governor. Without exception, bank guarantees of the top three bidders nominated in the referral cannot be released until the final contract is signed.

⇒ Preliminary Acceptance

Upon completion of the contract, a Preliminary Acceptance Certificate (PAC) and ١٠% contractual payment can be paid but the payment cannot cause the total payments on the contract to exceed ٧٥% of the contract value. The spending unit preliminarily accepts the project contingent upon the final results of the operating period which is normally considered one year. During the preliminary acceptance period the contractor is required to repair, replace, or modify any defects in the construction according to the contract terms.

⇒ Final Acceptance

The Final Acceptance Certificate (FAC) and the final ٢٥% payment is made normally one year after PAC payment or as otherwise stated in the contract. Following the preliminary acceptance operating period, the performance of the project is evaluated to verify that it has met the standards according to the contract. The contractor must complete all required modifications to the project identified in the preliminary acceptance operations period

before the final payment will be issued. The final payment may be issued earlier if a bond worth 10% of the contract value is obtained by the contractor. This payment cannot be made until the contractor has paid all required taxes.

٦. Conclusions

The Benchmark Report acknowledges the strengths of Iraq's public procurement system. The procurement law and supporting regulations span the entire procurement cycle from pre-tender preparations, the tender and evaluation process and post-award contract management. For instance, the law and regulations stress the importance of conducting a comprehensive feasibility study before launching a specific tender. Regulations also stipulate in great detail the creation of specific committees dedicated to the reception and evaluation of bids. The contract execution phase is also covered by the regulations. As common practice in most countries, financial guarantees for procurement are required by the Iraqi regulations, inspired by international trade transaction guarantees. According to the legal framework, control and authorization procedures are also stipulated by the regulations. As an important step in managing conflict of interest, there is a ban on government and public sector employees responsible for managing the procurement tender, to participate as a potential bidder in that tender either directly or indirectly. The regulations also prohibit the disclosure of information to persons not involved in the procurement process. In order to mitigate corruption in public procurement, Iraq's anti-corruption agency, the Commission on Integrity, employs officials specifically in charge of inspecting irregularities relating to public spending through procurement. Based on its analysis, this report provides Proposals for Action to modernize Iraq's procurement system. Based on consultations with national and international stakeholders in Iraq, the Proposals focus on enhancing the transparency, integrity and accountability of the public procurement system in Iraq, and in particular:

- Making procurement procedures more open and efficient in order to increase competition;
- Setting clear rules for the evaluation of bids;
- Making contract execution more transparent;
- Ensuring effective financial guarantees and their timely reimbursement;
- Enhancing civil servants' capacities to manage the procurement process;
- Ensuring coordinated control mechanisms;
- Ensuring timely functioning of the dispute resolution system; and
- Developing specific practical tools to fight corruption in procurement.

V. Annexes

- i. CPA Order V\ – Local Governmental Powers – ٢٠٠٤
- ii. CPA Order \V – Public Contracts – ٢٠٠٤
- iii. CPA Order ٩٥ -Financial Management Law and Public Debt Law – ٢٠٠٤
- iv. Constitution of Iraq – ٢٠٠٥
- v. Law of Governorates Not Incorporated into a Region – ٢٠٠٧
- vi. General Federal Budget Law – ٢٠٠٧
- vii. Instructions for the Implementation of the General Federal Budget – ٢٠٠٧
- viii. Regulations for Implementing Governmental Contracts – ٢٠٠٧
- ix. Instructions for Government Contract Execution – ٢٠٠٧
- x. Quick Start Contracting Guide – ٢٠٠٧
- xi. Part \ - Direct Invitation – Purchase of Goods
- xii. part ٢- Direct Invitation-Minor works
- xiii. Part ٣-Unified Tender instructions
- xiv. Part \- Standard Tender Assessment Forms
- xv. RFQ # SIZ٢٥٠-١٣-Q-٠٠٠٥ Renovation for Property # S-٠١٣
- xvi. Implementing Procurement Regulation No. \ of ٢٠٠٧ As amended;
- xvii. Kurdistan Regional Government Ministry of Finance Order \)\)\, ٢٤JAN \٠ (adopts CPA \V);
- xviii. Kurdistan Regional Government Govt. Contracts Execution Instruction No. \ of ٢٠ \ \ (implements CPA \V)