

Administrative Contract Law

Lecture Note

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Important Laws for this course

- Civil Code
- Proclamation NO. 649/2009
- UNICTRAL Model Law on Public Procurement (2014)

#Philosophical and economic backgrounds of administrative contracts

- Adam Smith preached the **Concept of laissez faire Market System**
 - Complete separation between the **government and economic system** (market)
 - As per Adam Smith, the state was advised to let the market alone.
 - **Consumer is a Sovereign**
 - They believe in **Automatic Adjustment**
 - The role of the state was exponentially limited to undertake only its “**traditional**” functions.

Traditional Functions of the Gov't

- To create/ maintain internal **peace and order**
- To this end, the state should establish institutions like the **police, courts and parliaments.**
- **facilitating the market by formulating a peaceful environment** and without directly intervening in the market.

- Leaving the market alone led to market **failurity** (the **Great Depression**)
- The **Great Depression** *proved the fact that markets cannot operate by their forces alone- rather to some extent the state should regulate the market.*
- Next generation political economists devised the **WELFARE** state where we have a state which regulates the market- that provides **public services** such as:-
 - *eg education ,health, transport, water, light ,sanitation, recreation etc.*

Welfare Government System

- The **government starts to take some measures** when the market fail to regulate itself.
- Basically the state used to institutionalize its coerced force to carry out its **protection function. (Keeping the balances)**
- **When the government starts to take interact with consumers, the concept of Administrative contract came into picture.**
- To this end of utilizing its contracting capacity, government enters into a special type of contract called administrative contract.

Developmental State

- In its origin came after 2nd world war. Eg. Price cup.
- Under developmental state, development is the essence, **growth** is the basic thing.
- Under developmental state, **the interest of ruling organ may prevail over the customer.**

Generally Government may act in 3 capacity

- I) Traditional Function of the Government**
- II) Economic Interest backing the Public**
(Administrative Contract **Applies**)
- III) Involves in Economic Activities as private Trader** (Like other civil law, law of K, etc)

Common Law Legal System Vs. Civil Law legal System Views of Administrative Contracts

□ Common Law Legal System

- Administrative Contracts are just like **ordinary** K. No special Law governing administrative K.
- Equal treatment for both parties including administrative organ. No party enjoy priority.

□ Civil Law legal System Views

- Parties to Administrative K are unequal whose case are governed by special regime and adjudicated by special tribunals. Administrative tribunals in France.

Administrative Contracts and Other Forms of Contracts

- **Administrative agencies** assist government to properly take its tasks of service provision among other things.
- **Administrative agencies** use the **law of administrative contracts** to their **ends.**
- The **ends** are **public services**, the **means** administrative contracts.

Administrative contracts differs:-

- Administrative agencies favorably enjoy the presumption of acting on behalf of the public and because **public interest** that the agencies will enter into an arrangement than to the other contracting party.

Definition of administrative contracts?

- the general contract title of the civil code is applicable to this case because of Articles 1676, 3131 and Art. 1675.

Art.1675 C.C

- “A contract is an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature”.
- Administrative contracts do share all of the above elements.

The differences...

- Beyond the requirements of Art. 1675 far in to the requirements of Art.3132 which partly reads as:

“A contract shall be deemed to be an administrative contract where”

- A) It is expressly **qualified as such by the law or by the parties**; or
- B) It is connected with an activity of the **public service** and implies a **permanent participation** of the party contracting with the administrative authorities in the execution of such service.

Elements of Art.3132:

“Expressly qualified as such by the law”

- I.e. in the civil code we have such articles as Article 3207 (**Concession**) and 3244 (**contract of public works**) which expressly qualify contracts as administrative contracts.

Qualified by the parties..

- Art.3132 (1) is that parties may qualify expressly a contract as an administrative contract.
 - a contract qualified as such by the parties on face value cannot be considered as an administrative contract unless **one of the parties is an administrative authority.**
 - **3133 – B.Os (PLC or Shc) + public interest**
- ***What about a contract that involves an administrative authority but not qualified as such by the parties?***

- **René David says**

“As a French legal scholar and as I think it fit, in our classification of law, public law should be distinguished from private law. Especially it is important to separate civil law from administrative law...contracts made by public officials have this [special trait] which enable us call them administrative contracts and treat them separately from civil law.[emphasis]

- Article 2(6) of Proclamation NO. 649/2009: Public Body » mean any public body, ***which is partly or wholly financed by the Federal Government budget, higher education institutions and public institutions of like nature;***
- From this it is possible to infer that at least two things make an entity an administrative body.
 - The first is the **source of income of the entity**.
 - If the entity partly or wholly derives its income from the government, there is a possibility to consider it a public body which can enter into administrative contracts.
 - On the other hand the **purpose of the organ** makes it an administrative body.

*Art.3132 (1) Says “**Connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service**”*

□ **The object: Public service** (general interest)

According to Art 3132(1) two reasons make “any activity” a “public service”

- One of these reasons is **necessity**/ urgency
 - This necessity should be the need of the general interest. So any thing necessary and considered as such by a public community to the general interest.
- The second reason is **inadequacy on the part of the private sector.**
 - Thus a public service is any activity but which private individuals on their initiative cannot carry out among other things because of financial constraints.

❑ ***Permanent participation***

- Permanent under Art. 3132(b) imply?
 - ***continuous, uninterrupted, regular and normal participation of the contractor in the relationship and the expansion of a public service.***
 - ***Eg. Public transportation***

1.3 Formation of Administrative Contracts.

- Validity Requirement (4 of them are mandatory)
 - Consent
 - Capacity
 - Object
 - Form (Art.1724 – Written form)

Consent

- Art. 3134 -3339 – *Special Aspects of the consent is regulated.*
- Under Art. 3134, it is the contract concluded by the administrative agencies that proves the existence of consent. Meaning *mere conclusion of a contract by an administrative body implies the existence of consent on the part of the administrative body.*
- It partly reads
“..., the conclusion of a contract by the administrative authorities implies an express manifestation of will on their part”

- Under administrative contracts however may be the **insufficiency of implied consent**.
 - Ordinary contracts envisage the possibility of deriving consent from silence under exceptional circumstances.
- Administrative contracts always one has to prove the **existence of express consent**. *Nowhere therefore silence does amount to acceptance.*
- To be specific, Art.3134 (2) says:
 - *“Where an authority competent to **approve a contract** keeps silent, such silence shall not, in the absence of a formal provision, be deemed to amount to approval.”*

Expressly approval and signature

- *When it is **expressly approved and signed the K**, that A.A said to have consented to the K.*
- For Approval – Express approval is mandatory.
 - **Stamp and Signature** of the authorized person on behalf of the agency binds the latter.
 - **A.K Approving Agency – Art 3144**
 - **A. Agency Vs. Concluding Parties**
- *Applicable for : Variation and Extinction, etc.*
- ***Violation of Authorization and Approval make the contract void.***

Capacity

- Administrative contracts are made by **artificial persons** be it the **administrative agency or the contractor**
- **Capacity is all about establishment, registration or license, Financial capacity .**
- Basically any juridical or physical person that wants to conclude a contract with administrative agencies should have: **Article 28 of Procl. 649/2009**
 - Technical and professional capacity (29(4) Pr.)
 - Legal capacity
 - Financial capacity (Solvency, Credit..etc)
 - Fiscal capacity
- Art 3140

Object

- Peculiar however to administrative contracts, *administrative agencies are entitled to formulate in advance model specification, general clauses and common directives* (Art 3135) .
- Predominantly administrative contracts have objects determined by administrative agencies.

- Art 3138 (2) – *For execution and interpretation, the model contract applies if they there are **express reference to it.***
 - **Model Contract (Art 3135/6/7)**
 - **Actual (Specified) Contract**
 - *Deviation (Art 3139)*
 - *No Reference*
- Art 3170/71 – deals with **lack of object or unlawfulness of the object**

Form

- Art 1678(c) + Art.1724 + Art 26 of Proc. 649/09
- Art. .1724 says
Any contract binding the Government or a public administration shall be in Writing and registered with a court, public administration or notary.
- On top of the prescription under Art 1724, some administrative contracts should be **formed following procedures of tender. (Minute of the process of forming the K/tender)**

Art 26 of Proc. 649/09

26. Form of Communications

1) Communications between candidates and public bodies shall be in writing. Any communications not made in written form shall be subsequently referred to and confirmed in writing.

2) Subject to necessary safeguards with regard to authenticity and confidentiality, and when technical conditions so permit, the Minister may issue a directive to determine the extent by which communication by **electronic means** may be used in addition to or instead of writing.

1.3.2 Modalities of Formation.

Art 3147(1) *“Administrative contracts (may be) concluded by the procedure of allocation by tender”* (emphasis)

- As art 3147(1) makes it clear by utilizing “may be...” it is optional that such a procedure is followed.

Art 3147(2) *“They shall be concluded by such procedure, under pain of nullity, whenever the law imposes such obligation.”*

- Once the law dictates us to conclude an administrative contract by the procedure of allocation by tender we have to do it in that way the consequence of not following the ...**nullity**.

..

- To this end, AK procedure of allocation are governed by Articles 3148-3169.
- If the contract is to be concluded after allocation,
 - Art.3148 tells us that *“the allocation shall be notified to the public in the manner prescribed by administrative regulations or in default... in the manner which appears the most appropriate”*.
- **3148 (Notification)+3164+3158** – tells us that tender designed to **serve utmost public interest** + ensure **transparency**.

Notice of Allocation

- The minimum threshold of the content of the notice of allocation is available under Art. 3149
 - **what/when/where** the authority needs?
The tender + contract
- *We have other modalities of forming administrative contracts under Proclamation 649/2009*

**FDRE Procurement Law
And Guiding Principles of Public
Procurement**

Guiding Principles of Public Procurement

- The UNCITRAL Model Law on the Public Procurement contains different principles which are required to be adopted by member states. The nine principles applicable to public procurement as contained in the Model Law which form the essence of the procurement regimes are the following;
- Principle of Economy; Principle of Competitiveness; Principle of Effectiveness; Principle of Transparency; Principle of Combating of abuse; Principle of Avoidance of risk; Principle of Accountability; Principle of Fairness and equitability; and Principle of Integrity.
- It is important to keep in mind that these laws are based on the principles of a demand economy”.

1. Principle of Economy

- The principle of economy is the first principle that requires economic object of public procurement is to obtain the **best product at the best price.**
- It is generally accepted that to ensure that the lowest price is obtained the widest possible competition by potential suppliers is necessary, and *the principle of competition will therefore have a direct influence on the principle of economy.*
- Economy can also relate to the **question of the cost effectiveness** of both the process and the subject matter of the procurement.

2. Principle of Competitiveness

- It is believed that competition, as an economic principle, will ensure that suppliers will offer the best product at the best price with best technical and professional capacity.
- Many legal scholars claim this principle overlaps with the principle of economy. However, it is generally **accepted that effective competition will enhance the process**". Open tender procedures ensure effective competition.
- The principle of competition is central to the methods of procurement provided in the 'Model Law'.

3. Principle of Effectiveness

- Effectiveness can be defined as **productiveness** with relation to the **costs of the procurement process**.
- Crucially, the final goal of any procurement system is to insure that the procurement process itself is carried out efficiently.
- Thus, effectiveness at **every stage of the procurement process** must be realized and the procurement process must carry out:
 - without unnecessary or disproportionate delay or waste of resources for the purchasing entity,
 - without unreasonable cost for bidders.

4. Principle of Transparency

- Transparency is a key principle to implement system objectives of public procurements.
- Transparency in public procurement requires publication of all the '*rules of the game*' in *advance* including administrative rulings and procedures and directives relating to public procurement.
- Transparency requires public tender opening.

5. Principle of Combating of Abuse

- The principle of the combating of abuse entails that conflicts of interest, fraud and corruption must be avoided.
- This principle is supported by, and overlaps with, most of the principles referred to above, and is to an extent a function of the above principles.
- In particular, the principles of accountability, transparency and integrity assist in ensuring that abuse is combated.

6. Principle of Avoidance of risk

- Risks relating to public construction procurement can be addressed in a procurement regime by providing for at least the following:
 - The ‘ascertainment by the procuring entity the information relating to tenderers’, ‘professional and technical qualifications’, ‘competence, financial resources, equipment and other physical facilities, managerial capability, experience and reputation’ and if the tenderer has the personnel to perform the contract, its ‘legal capacity and its financial means’.
 - This principle requires the tenderers to must fulfill their **obligations to the state regarding taxes, security and similar contributions**; and to have a clean criminal record.

7. Principle of Accountability

- Accountability entails that both the government officials and parties participating in public procurement to be held **accountable for their actions in the process of procurement.**
- The principle of accountability includes the requirement of the provision of effective remedies which offer appropriate redress in the case of **unlawful actions.**
- The general public and the tenderers clearly also have an interest in holding the procuring entity and government officials accountable for the proper implementation and functioning of the public procurement system.

8. Principle of Integrity

- Integrity is referred to as an objective of public procurement in the ‘Model Law’.
- In public procurement, the “principle of integrity includes the incorporation of all of the principles referred to above as well as the proper implementation of these principles.
- Integrity in public procurement entails consistency and objectivity in the implementation of all of the applicable provisions to ensure their ability to achieve their objectives/goals.

9. Principle of Fairness and Equitability

- Fairness in the public procurement context is said to generally refer to procedural fairness. It refers sufficient access to procurement process, opportunities and rules applicable (No advantage between tenderers)
- Procedural fairness has two requirements namely *audi alteram partem* (**relationship between the organ of state and tenderers**) and *nemo iudex in sua causa* (**the tenderers in relation to each other**)
 - The first relationship requires that sufficient access to the procurement process is provided by the organ of state, that tender opportunities should be publicly available; tenderers should be familiar with all the rules applicable to the process and should be allowed sufficient participation.
 - With regard to the second relationship, organs of state should treat tenderers fairly in relation to each other, meaning that no tenderer should have an advantage above another.
- Equal treatment in the process of Evaluation – setting relevant qualification criteria for all bidders (Specification)

Identification of Procurement Needs by a Public Organization

- The 1st stage of the procurement cycle is the identification of procurement needs by the org.
- According to the Procurement Directive of the FDRE (Part III, Article 9), *a public organization must consider the following when identifying its procurement needs for the fiscal year:*
 - a) There are no unused resources internally that can be used to meet the identified need

Identification of Procurement Needs by a Public Organization – cont'd

- b) That **the need can be met by a product or service available in the market**,
i.e. it must be **possible to get every identified need from the market**
- c) That **the need does not involve** items which shall be **of no use** to the public body and **can cause the public body to incur unnecessary cost**.

An example is procuring expired drugs for the Ministry of Health instead of unexpired drugs

Identification of Procurement Needs by a Public Organization – cont'd

d) That the **identification of** procurement *needs* *has made provisions for additional need that might arise in the future.*

-especially in regard to the procurement of **goods of long term contract**

e) That the **procurement need is environmentally friendly**

Advertisement & Posting of procurements on the website of the PP&PA's Website

- Article 35 of the FDRE Public Procurement stipulates that:
 - 1) Invitation to bid shall be advertised **at least once in a national news paper of general circulation** which is published **in the language the bidding document is prepared.**
 - 2) Where the public body finds **it necessary**, it may, in addition to the medium mentioned in sub article (1) above , **advertise the bid on a national radio and television**

*Posting of procurements on the website of the PP&PA's Website –
cont'd*

- 3) The time allowed for preparation of bids shall not be less than the minimum number of days stated in Annex 3 of FDRE Public Procurement directives.
- Subject to the provision of Article 35 of the Proclamation, public organizations must disclose to the public by posting it on the website of the Public Procurement and Property Administration Agency at the same time of publication of its bid advertisement in a newspaper, any procurement the value of which corresponds to or is greater than the following:

*Posting of procurements on the website of the PP&PA's Website –
cont'd*

- a) For Works - **10,000,000 Ethiopian Birr**
- b) For Goods - **3,000,000 Ethiopian Birr**
- c) For Consultancy - **2,000,000 Ethiopian Birr**
- d) For non-consultancy – **1,000,000 Eth. Birr**
- This requirement affects also International Competitive Bidding (ICB).

Public Procurement Methods

- The following **procurement methods** are approved as per Article 33 of the FDRE Procurement Law:
 - **Open Bidding**
 - **Request for Proposals**
 - **Two stage Tendering**
 - **Restricted Tendering**
 - **Request for Quotation**
 - **Direct Procurement**

Choice of Procurement Method

- The **choice of procurement method will depend upon the threshold** stipulated in the FDRE Public Procurement Directive **or the circumstances defined** in the FDRE Public Procurement Proclamation (Act) and the FDRE Public Procurement Directive.

Choice of Procurement Methods – cont'd

- Circumstances include:
 - Urgent or emergency requirements
 - Limited number of suppliers
 - Contract extensions
 - Research, experiment, study or development purposes
 - National Security

Procurement Method 1 – Open Bidding

- Open Bidding is the most preferred procurement method. Article 33 (2) of the FDRE Procurement Proclamation stipulates as follows: “Except as otherwise provided in the Proclamation, public bodies shall use open bidding as the preferred procedure of procurement.
- The characteristics of Open Bidding (or Competitive Tendering) are as follows:

Open Bidding – cont'd

- It is a **standard high value tendering methodology** for Goods, Works & Non-consultancy services
- It is a procurement **method with maximum competition**
- It has a **formal procedure with detailed invitation** to tender documents
- **Standard tender documents are available** for drafting tender documents

Open Bidding – cont'd

- **Opportunities** are **advertised & open to all tenderers**
- It **involves Public Tender Opening**

Procurement Method - Types of Open Bidding (or Competitive Tendering)

- The principal types of open bidding or competitive tendering as procurement methods are:
 1. **International Competitive Bidding (ICB)** - Article 17 of the FDRE Public Procurement Directive
 2. **National Competitive Bidding (NCB)** - Article 16 of the FDRE Public Procurement Directive

Procurement Method - **International Competitive Bidding (ICB)**

- Characteristics are:
 - For **High Value or complex** procurement
 - The Nature of procurement **unlikely to attract enough competition locally**
 - The **Procurement threshold** stated in Article 17.2 of the FDRE Procurement Directive for ICB is as follows:

Thresholds for ICB

For Works	Above Birr 50,000,000
For Goods	Above Birr 10,000,000
For Consultancy Services	Above Birr 2,500,000
For Services	Above Birr 7,000,000

Language of Bids under ICB

- Article 16.13.1 (b) of the FDRE Procurement Directive stipulates **the language for International Competitive Bidding (ICB) is English Language.** All bids and supporting documents should, therefore, **be prepared in English Language.**
- However, bids and supporting documents of candidates prepared in a language other than that stipulated in the bidding document

Language of Bids under ICB – cont'd

shall have to be translated by a legally competent interpreter into the language stated in the bidding document and **a copy of the translation has to be submitted together with the original documents**, especially where such documents pertain to the fundamental elements of the bid (Article 16.13.2).

- If a Public Organization detects a discrepancy between the language of the original

Language of Bids under ICB – cont'd

document and the translated version, it shall reject the documents unless such discrepancy constitutes a major deviation from the requirement stated in the bidding document (Article 16.13.3 of the FDRE Public Procurement Directive).

Other Requirements of ICB

- Bidders participating in procurement of goods made by means of ICB **may be required** by the Public body **to produce manufacturers authorization**. This requirement may, however, be **waived if the bidders themselves are the manufacturers of the goods** being procured. (Article 17.3)
- For ICB, Article 17.4 also stipulates that:

Other Requirements of ICB – cont'd

- a) The bid advertisement and the bidding documents shall be prepared in English
- b) The bid advertisement shall be published in a newspaper that has wide circulation and is accessible to foreign bidders. The bid advertisement shall also be posted on the Agency's website if the value of the procurement is above the threshold stated in Article 6(5), i.e.

Other Requirements of ICB – cont

For Works	10,000,000 Ethiopian Birr
For Goods	3,000,000 Ethiopian Birr
For Consultancy	2,000,000 Ethiopian Birr
For non-consultancy	1,000,000 Ethiopian Birr

Other Requirements of ICB – cont

In order to attract a large number of bidders, the bid advertisement may also be posted in the website of the procuring public body and the embassies of various countries may be notified of the bid.

- c) Bidders must be given adequate time to prepare bid documents in response to the invitation to bid in accordance with Article 16(9) of the FPP Directive

Deadline for Submission of Bids

- Article 16.9.1 of the Public Procurement Directive stipulates that in the preparation of a bidding document, a **Public body has to set the deadline for bid submission** taking into account the following points:
 - a) The time it takes for bidders **to obtain the bidding document, to prepare responsive bids, to gather information, to analyze the information, to establish joint venture** as

Deadline for Submission of Bids – cont'd

necessary, to obtain certificate of manufacture's authorization (Article 16.4.2) including power of attorney to sign and to fulfill other pre-conditions to participate in the bid

- b) In the case of ICB, the time necessary for the submission of bid document to the designated place
- c) In the case of procurement of works in particular, the time necessary to visit the construction site and for the pre-bid meeting.

Deadline for Submission of Bids – cont'd

- Article 16.9.2 stipulates that without prejudice to Article 16.9.1 above of this directive, **the floating period should not be less than the minimum date stated** in Annex 3 of the FDRE Public Procurement Directive

Procurement Method - National Competitive Tendering

- Its characteristics are:
 - Relatively **low value**
 - Procurement **unlikely to attract foreign competition**
 - Good **justification to restrict tendering to domestic suppliers**
 - Goods **valued within thresholds** stated in 17.2 of the FDRE Procurement Directive as follows:

Thresholds for NCT

For Works	Up to Birr 50,000,000
For Goods	Up to Birr 10,000,000
For Consultancy Services	Up to Birr 2,500,000
For Services	Up to Birr 7,000,000

NCT Cont'd

- When using National Competitive Bidding (or National Competitive Tendering), public organizations must use the Standard Bidding Documents prepared by the Public Procurement and Property Administration Agency and also comply with the steps from Article 16.1 to 16.27.7 as stipulated in the FDRE Procurement Directive

Invitation to Bid (Article 16.2)

- Article 16.2 of the FDRE Public Procurement Directive states the following:
 - a) 16.2.1 states that the **invitation to bid** has to be **published at least once in a newspaper that has a nationwide circulation** to ensure participation of as many bidders as possible
 - b) 16.2.2 states that without prejudice to Article 16.2.1, a **Public Body may advertize bids at any time, as many times and by any means**

Invitation to Bid (Article 16.2) – cont'd

means of choice **other than those stated** in Article 35.2 of the Proclamation. Article 35.2 of the Proclamation states that, **where a public body finds it necessary**, it may, in addition to the medium mentioned in sub article (1) of this Article, **advertise the bid on a national radio and television.**

Language of Bids under NCT

- Article 16.13.1 (a) of the FDRE Procurement Directive stipulates the language for NCT in which only local bidders are participating should be Amharic. However, if the public body considers that using English language is more convenient to the procurement process in terms of facilitating competition, it may authorize the use of English language in the preparation of bid advertisements, bidding documents and in bid proceedings .

Submission of VAT Registration Certificate by local bidders

- Article 16.4.2(b) of the FDRE Public Procurement Directive requires Public Bodies to include in their instructions to bidders a statement that **domestic bidders submitting bids for a contract value of Birr 100,000 and above must present or produce a VAT Registration Certificate**

Submission of Business Organization Registration Certificate or Trade License by foreign bidders

- Article 16.4.2(b) of the FDRE Public Procurement Directive requires Public Bodies to include in their instructions to bidders a statement that foreign bidders submitting bids for a contract value of Birr 100,000 and above must present or produce a Business Registration Certificate or Trade License issued by the country of establishment.

Procurement Method – Request for Proposal

- A request for proposal is a **method used to procure Consultancy Services or contracts for which the component of consultancy services represents more than 50% of the amount of the contract**
- Where the estimated value of the Consultancy Services is above Birr three hundred thousand (Birr 300,000), the public organization must **first issue an invitation for Expression of Interest** in accordance with Article 22 of the FDRE Public Procurement Directive.

Expression of Interest

- A Public Organization is **obliged to issue an invitation for expression of interest** if it intends to procure a **consultancy service** with a cost **above 300,000 Birr**.
- The invitation for expression of interest must be carried out in accordance with the provisions of Article 16.2 or 16.4 (a & b) of the FDRE Public Procurement Directive which talk about invitation and instruction to bidders

Contents of an Invitation for Expression of Interest

- Article 22.1(b) stipulates that the invitation for expression of interest shall state the following:
 - the **type** of the consultancy service required
 - the **expected output**
 - the **time for completion** of the assignment
 - the **qualification required** of the consultant
 - **work experience** and any **other relevant information** as well as the list of documents

Invitation for Expression of Interest – cont'd

be submitted and **the manner, time and place**
of **submitting** such **documents**

Submission of proposals by selected consultants

- Article 22.1 (c) of the FDRE Public Procurement Directive indicates that when the expressions of interest are evaluated, not less than three (3) and not more seven (7) shall be selected on basis of their profiles and be invited to submit their proposals in accordance with the provision of Article 21 of the FDRE Public Procurement Directive

Procurement Method - Restricted Bidding (Tendering)

- It is a procurement method with **limited competition** but has the following characteristics:
 - A formal procedure with **detailed invitation to tender documents**
 - Tender documents **available to short-listed suppliers**
 - **At least five candidates must be selected in a fair manner from the organization's**

Procurement by Restricted Bidding –cont'd

suppliers list and **be invited to participate** in the procurement by restricted bidding even though the number of prospective bidders is large.

- Article 23 of the FDRE Public Procurement Directive generally explains **how procurement by Restricted Bidding should be done.**

When may Restricted Tendering be used?

- Public bodies may use restricted tendering as a method of procurement only where the following conditions are satisfied:
 - it is ascertained that the required object of procurement is available only with limited suppliers
 - the cost of procurement does not exceed the threshold specified in respect of restricted tendering in the Federal Public Procurement Directive (Article 23.3)

When to use Restricted Bidding – cont'd

- where a **repeated advertisement** of the invitation to bid **fails to attract bidders** in respect of a procurement subject to the directive to be issued by the Minister
- The Public organization **may select at least five candidates** in a fair manner **from its list of registered suppliers** who deal in the item to be procured and **ask them to submit bids** as long as the item to be procured **falls within the threshold stated** in Article 23.3 of the Procurement Directive.

Restricted Bidding – cont'd

- Article 23.2.1 of the FDRE Public Procurement Directive stipulates that the **invitation to bid should be sent directly to the address of the candidates selected.**
- Article 23.4 also stipulates that:
 - a) **Invitation to open bid** for the procurement **must have been published at least twice**, and the invitation must have attracted no bidder, or the bidder or bidders responding to the

Restricted Bidding – cont'd

second invitation to bid must have failed to meet the technical requirements set forth by the public organization for that procurement

- b) There **must have been no factor** associated with the invitation to bid, mode or amount of bid security, bidding document or any other element of the procurement process, **restraining candidates from participating in the bid**

Restricted Bidding – cont'd

- c) The public organization must have believed that **inviting suppliers engaged in the field** pertaining to the object of procurement to participate in the procurement **by restricted bidding attracts such suppliers to participate** in the procurement
- d) The public organization must, as far as possible, have established through inquiry that the suppliers engaged in the field have

Restricted Bidding – cont'd

ulterior (hidden or secret) reason for not wanting to participate in open bidding for the procurement, which is illegitimate or prejudicial to the interest of the public organization

Bidding Procedures for Restricted Bidding

- Article 23.1 also stipulates that the procurement shall be executed in accordance with the National or International Competitive Bidding Procedures specified in Articles 16 and 17 of the FDRE Public Procurement Directive

Thresholds for Restricted Bidding

- According to Article 23.3 of the FDRE Procurement Directive, the total **contract value of** a procurement made by **restricted bidding** in accordance with Article 49.2 of the FDRE Procurement Proclamation **shall not exceed** the following:

Procurement Threshold for Restricted Tendering

Works	2,000,000 Birr
Goods	500,000 Birr
Consultancy Services	300,000 Birr
Services	400,000 Birr

Procurement Method – Request for Quotation (RFQ)

- According to Article 55 of the Public Procurement Proclamation, RFQ is **appropriate when**:
 - the goods, works or technical services **are readily available and not specially produced** or provided to a particular specification of the procurement entity . E.g. Purchase of A4 Sheets & Printer Toners
 - for goods where there is an established **estimated value is less than the thresholded** market if the

RFQ – cont'd

- Article 24.2 of the Public Procurement Directive stipulates that procurement by means of RFQ can be made with the authorization of the Head of the Public Body or his authorized representative without having to obtain the approval of the Procurement Endorsing Committee if the value of the procurement falls within the following threshold:

Item	Amount
Works	250,000 Birr
Goods	100,000 Birr
Consultancy	60,000 Birr
Services	75,000 Birr

RFQ – cont'd

- Section 24.3 requires the Public body to request for quotations from at least three suppliers selected from the organization's list of suppliers. However, to ensure fairness in the selection:
 - the supplier or suppliers shall not be selected repeatedly, so that other suppliers in the suppliers list may have the opportunity of competition to sell to the public body

RFQ – cont'd

- The public body has to establish a system to prevent possible acts of connivance in offering and accepting price in the process of procurement by request for quotation and carry out price verification regularly in accordance with Article 24.8.
- Article 24.8 states that for the purpose of price verification in regard to procurements made by means of RFQ, public bodies shall

Price verification – cont'd

refer to the current price list posted on the Public Procurement and Property Administration Agency's website and to the price survey carried out by the procurement unit of the Public Body and accept the lowest price in respect of an item as the prevailing market of that item.

Contract of Purchase

- Under procurement by RFQ, a Purchase Order issued by a Public Body to a successful bidder in response to a quotation, constitutes a contract between the public body and the supplier (successful bidder).
- Article 24 of the Public Procurement Directive of the FDRE explains generally how procurement by RFQ must be done.

Procurement Method – Two-stage Bidding

- According to Article 57 of the FDRE Public Procurement Proclamation, a public body may use two-stage bidding in the following cases:
 - a) when it is **not feasible** for the public body **to formulate detailed specifications** for the goods or works and in the case of services, **to identify their characteristics** and, in order to obtain the most satisfactory solution to its procurement needs;

Two-stage Bidding – cont'd

- b) When the public body seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;
- c) where bid proceedings are initiated but no bids are submitted as a result of the nature

Two-stage Bidding – cont'd

of the object of procurement not being clearly described or **where all bids are rejected due to failure on the part of the public body** concerned to draw up a clear and complete specification;

- d) Because of the technical character of the required goods or works, or because of the nature of the consultancy or other services **it is necessary for the public body to negotiate with the suppliers.**

Purpose of the two-stage bidding

- Tenderers invited at the initial stage to contribute to detailed specification
- New detailed specification prepared and issued to selected suppliers at the second stage to submit their quotations to the public body

The Invitation to Bid & Bid Security

- Article 19.2.1 of the Federal Public Procurement Directive requires the Public Body to state in the invitation to bid that the procurement shall be carried out by means of two-stage bidding
- Article 19.2.2 also states that candidates shall not be required to furnish Bid Security during the first stage of the two-stage bidding

Second-Stage Bidding & Bid Security

- The bidding document to be proposed for the **second-stage bidding shall** as far as possible **comply with the procedure of competitive bidding specified** in Article 16 & 17 of the Federal Public Procurement Directive
- All **candidates invited** by the Public Body to participate **in the second-stage bidding shall be required to furnish bid security**

Single-Source/Direct Procurement

(Articles 51 & 52 of the Public Procurement Proclamation)

- Public bodies may use **direct procurement** only where the following conditions are satisfied:
 - a) when in **absence of competitions for technical reasons** the goods, works, consultancy or other required services **can be supplied or provided only by one candidate**;
 - b) for **additional deliveries** of goods by the original supplier which are intended either as

Single-Source/Direct Procurement – cont'd

parts of replacement for existing supplies, services or installations or as the extension of existing supplies, services or installation where a change of supplies would compel the public body to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services

Single-Source/Direct Procurement – cont'd

- c) Within limits defined in the procurement directive, when **additional works**, which have been **not included in the initial contract** have, **through unforeseeable circumstances**, become necessary since the separation of the additional works from the initial contract **would be difficult** for technical or economic reasons;
- d) within limits defined in the procurement

Single-Source/Direct Procurement – cont'd

directives, **for new works consisting of the repetition of similar works** which conform to a basic project of which an initial contract has been awarded on the basis of open or restricted bidding;

e) within limits defined in the procurement directives, **for continuation of consultant services**, where the original contract has been satisfactorily performed and the **continuation is likely to lead to gains** in economy and efficiency.

Single-Source/Direct Procurement – cont'd

- f) The head of the public body has **determined that the need is one of pressing emergency** in which **delay would create serious problems** and therefore injurious to the performance of that public body;
- g) where **situations arise in which shopping becomes necessary to meet the special procurement needs of public bodies**. The manner of implementation of this

Single-Source/Direct Procurement – cont'd

provision shall be as prescribed in the Federal Procurement Directive

- Article 25.2 of the Federal Public Procurement Directive stipulates that public bodies may procure from the same supplier, additional requirements of goods, works, consultancy or other services of the same kind as those they have procured from that supplier under a previous contract in accordance with the

Single-Source/Direct Procurement – cont'd

following stipulations, if there is any advantage to be gained from procuring such additional requirements from the same supplier:

- a) The volume of the additional requirements of goods, works or consultancy assignment **may not exceed 25% of the volume of such goods, works or consultancy assignment under the initial contract.**

Single-Source/Direct Procurement – cont'd

- b) Job order for the additional requirements must be issued **before the expiration** of the initial contract or **within six months** after the expiration of the initial contract
- c) No adjustment shall be allowed to the unit price of items included in the additional procurement.
- d) Notwithstanding the provision of Article 25.2 (c) above, if the additional requirements

Single-Source/Direct Procurement – cont'd

include inputs for which the initial contract allows price adjustment, adjustment may be made in respect of such inputs by applying the method used in calculating such adjustments in the performance of the initial contract

General characteristics of Direct Procurement

- Procurement from a supplier without competition
 - Procurement method for **sole or single source requirements**
 - For goods, works and all services
 - **Simple procurement documents** or standard tender documents **can be used to draft invitation**
 - Sole/single source identified
 - **No Public Tender Opening** required

When is direct procurement applicable?

- Appropriate when:
 - Procurement is for urgent items
 - Requirement can only be supplied by one source
 - Additional requirements for standardisation
 - Purposes of research, experiment, study or development
 - Procurement

Single Source Guidelines

- Three conditions to be satisfied include:
 - **Justification** under Article 51 & 52 of the FDRE Public Procurement Proclamation and Article 25 of the FDRE Public Procurement Directive
 - **Capacity and qualification** of proposed firm must be **undisputable**
 - **Acceptable conditions of** contract and financial proposal representing **value for money**

Unit 2

Effects of Administrative Contracts

- Extension of effect of general contract
- In principle, a contract is binding upon the parties to it as if it is a **law**. Art 1731(1) to this end prescribes as:
“The provisions of a contract lawfully formed shall be binding on the parties as though they were law”
- Art 3172(1) says “... **contracting parties shall perform their obligations in a manner provided in the contract**”.
- Read Articles 3201-3206

- Our law provides the requirement of **diligence** and the nature of the same under Art.3172 (2) and Art.3172 (3).
- To begin with, Art.3172 (3) prescribes “[The contracting parties] shall perform [their obligations] **diligently.**” – **Bona fide performance (Good Faith)**

Time of Performance

- Art 3174(1) says “***each contracting party shall perform his obligations within the time fixed by the contract.***”
- What if such time is not fixed? Well, Art. 1756(2) says “... payment may be made **forthwith.**”
“When is forthwith”? Does it mean immediately?
- It is not “immediately” in our case because Art.3174 (2) says “failing a specific provision in the contract each contracting party shall perform his obligations **within a [reasonable time].**”

What is reasonable time?

How reasonable is reasonable is reasonable
time?

- Time to finalize, Prepare,
- Complexity of the Work,
- Resource provided

- Art. 3175 reads:

“The administrative authorities may not impose unilaterally on the other contracting party a time which has not been agreed upon for the performance of his obligations unless they may under the contract fix such time by means of requisition orders”.

- *Non- performance by the administrative authorities does not entitle the other party to suspend his performance duty unless it's made impossible.*
- *The other party can't fail to perform by alleging failure of administrative authorities.*
- Exception is requisition orders in the K

Policy Considerations – Articles 3177 and 3178

Article 3177: *Exceptio non adimpleti contractus*

- The essence of this article is that the contractor may not refuse to carry out his/her obligations, simply because the administrative authority has failed to carry out its commitments.
- Because administrative authorities are into a contractual relationship representing the public, pursuing such an interest solely based on general contract provisions will jeopardize the general interest.
- Other reason is that even if there is non-performance, you can be sure that performance will be effected coz administrative authorities are backed by the public and they will never be declared bankrupt or insolvent. The party has nothing to worry about. There are no such risks in case of public agencies as they are budgeted.

...

- **Article 3178 says**

“Set off may not be invoked by a person contracting with the administrative authorities except in the case of debts other than (fiscal debts)”.

- What is a fiscal debt? Why is fiscal debt not subject to set-off? Is there any possibility of setting off debts under administrative contracts?
- Art 3178 talks of the possibility of setting off debts. But it automatically rules out set off in the case of fiscal debts. One example of fiscal debt is the debt that we owe to the state in the form of tax.
- Art.3178 accordingly bars anyone from setting off such a debt to extinguish a debt. We cannot set off the debt we are owed to against the tax that we owe to the public.
- Fiscal debts such as tax should be performed without preconditions.

Non – Performance of Administrative Contracts

- 3196 + 3198 - Notice

☐ Forced Performance

- The 1st thing that the court shall determine is whether performance is ‘of special interest to the creditor’.
- 2nd, the court shall consider whether forced performance affects the personal liberty of the debtor.
(this requirement cannot be extended to administrative authorities)
- Art.3194 (1) says “*the court may not order the administrative authorities to perform their obligations.*”

☐ Compensation (Art 3194(2) + 3190+91)

- As of prerogative, Art 3194(2) provides administrative authorities with the choice of paying damages or performing their obligations.

❑ *Termination of Administrative Contracts*

- Art.3180 which talks about “*termination of contract.*”
- Art.3180 in motion? Let us consider the full text first:
- “The administrative authorities may terminate the contract notwithstanding that the other party has committed no fault where the contract has become useless to the public service or unsuitable for its requirements”.
 - The existence of two independent conditions justifies the decision of an administrative authority to “terminate” a contract. One the contract should prove to be” useless to the public service” or the contract should “become unsuitable for its requirements.”

Termination or Invalidation or Cancellation

- The concept under Art. 3180 is susceptible to the following proliferated interpretations:
 - Taking Art. 3180 as a cancellation proviso and specially a **unilateral cancellation** proviso
 - Taking Art.3180 as a **termination proviso** at face value
 - Taking Art. 3180 as an **invalidation** clause specially when considering the Amharic version of this same Article.

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Unit 3

Concession

- *Read the Teaching Material*

Chapter 4

Contracts of Public Works

- *Read the Teaching Material*