

# Guidelines on the Procurement and Acquisition of Public Goods and Services



The Commission Against Corruption of Macao SAR



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## Part 1 - Foreword

1. In the course of maintaining daily operations and fulfilling demands, public departments and institutions are continually called upon to procure goods and/or services. In fact, the expenses of procurement usually accounts for a relatively high proportion of departmental and institutional budgets, and the amount of money used annually in this respect is considerable. As public funds are involved, particular attention must be paid to the legality, fairness and transparency of procurement procedures, and the evasion of law and corrupt practices must correspondingly be curtailed. Failing to meet this requirement would not only result in serious financial losses but greatly tarnish the reputation of the relevant department or institution and even affect its credibility.
2. Synthesizing the problems of procurement practices discovered via investigation and inspection, and taking into account the regulations of public procurement in other regions, the Commission Against Corruption has compiled the *Guidelines on the Procurement and Acquisition of Public Goods and Services* on the basis of current procurement regulations. The "Guidelines" highlights issues requiring attention in each stage of procurement, and can be used for reference by departments and institutions. These entities are invited to integrate the contents of this "Guidelines" into their own guidelines on procurement procedures according to situation and need.
3. The Commission Against Corruption will publish "Guidelines on the Professional Ethics and Conduct of Public Servants" for distribution to all departments and institutions. The procurement and acquisition guidelines can consequently be integrated into the corresponding sections and chapters of the upcoming set of guidelines.

## Part 2 - Principles of Procurement

1. The current public procurement regulations principally consist of Decree-Law no. 122/84/M, Decree-Law no.63/85/M and Decree-Law no.74/99/M. These laws may not have established standards or may be ambiguous regarding certain aspects of procurement procedure. Therefore, necessary and applicable complements have to be made according to the basic legal principles or particular provisions<sup>1</sup> of the *Code of Administrative Procedures*.
2. In addition to achieving best value for money and price competitiveness, the principles provided by the *Code of Administrative Procedures* - which includes the "Principle of Legality", "Principle of Equality and Principle of Appropriateness", "Principle of Fairness and Impartiality", "Principle of Good Faith" and "Principle of Non-Bureaucratization and Principle of Efficiency" - should also be observed throughout the procurement process to ensure that the procedure is "legal, fair and just" with high level of transparency.

<sup>1</sup> For example, provisions of Recusal System and of operations of Collegiate Bodies



## Part 3 - Attention to Each Stage of Procurement Procedure<sup>2</sup>

### 1. Stage of Preparation

- 1.1. Estimate objectively and fully the value of the item to be procured (including total value and unit value).
- 1.2. Ensure that the value-estimation data will not be divulged.
- 1.3. Decide on the procurement method in accordance with law to avoid evasion of law.
- 1.4. Avoid overlapping of personnel when assigning jobs in different procurement stages.
- 1.5. Formulate comprehensive and clear specifications of the item to be procured (e.g. the minimum quality, safety and technical requirements), with objective and scientific evaluation criteria (e.g. order of priority, factor weighting and additive/ deductive scoring system).
- 1.6. Should not designate a specific brand, place of origin, manufacturer or unique specification/feature of the item to be purchased; if such designation is necessary, should include the statement “or equivalent”.
- 1.7. Establish and keep an updated database of suppliers/contractors<sup>3</sup> to acquire the latest information of the persons-in-charge or the shareholders.

<sup>2</sup> See Appendix A for Practical Questions and Relevant Explanations Regarding Public Procurement.

<sup>3</sup> For example, by establishing a system for inputting or deleting data of suppliers and contractors in database.

## 2. Stage of Communicating with Bidders (Suppliers/Contractors)

- 2.1. Provide identical information to all bidders participating in the tender<sup>4</sup>, such as the scoring system (quality, price, timeframe for delivery, professional and technical capacity, after-sales support, supply and cost of spare and accessory parts, etc.).
- 2.2. Ensure that the bidders are allowed sufficient time for preparing tenders.
- 2.3. Respond to bidders' inquiries and provide the other bidders with the information that might be significant in the context of preparing tenders; extend the tender submission deadline when necessary.
- 2.4. Keep detailed records of the inquiries raised by bidders as well as the responses made by the department.
- 2.5. Assure the confidentiality of the contents of the tenders and the security of receipt of tenders (quotations should be submitted "in a closed way", namely, the tenders should be placed in opaque and wax-sealed envelopes<sup>5</sup>).

<sup>4</sup> For direct consultation (invitation tender) where written price enquiry is necessary, number of enquiring suppliers may exceed three and subject of enquiry can be selected at random by using computers (e.g. e-Procurement system).

<sup>5</sup> For direct consultation where written price enquiry is not necessary, and in exceptional cases where price quotation is made via fax, effective measures should be established to prevent relevant tenders from being altered or changed.

### 3. Stage of Tender Opening<sup>6</sup>

- 3.1. The tender-opening committee may comprise more than 3 members (preferably an odd number) while personnel from same subsidiary unit should not make up majority of the committee members.
- 3.2. Members of the tender-opening committee are not necessarily from the administrative/financial or technical area.
- 3.3. Should not involve members of the tender-opening committee in other stages of the procurement process (e.g. the stage of selection)<sup>7</sup>.
- 3.4. Formulate operating guidelines for the tender-opening committee (including the number of members, proportion of members from different professional areas, quorum, voting method and procedure, rights and obligations of members, recusal system, substitution mechanism and requirements of preparing and approving meeting minutes, etc). Provisions regarding the operations of collegiate bodies stated in the *Code of Administrative Procedures* can be used as reference or provisions even stricter than those in the *Code* can be formulated.
- 3.5. Keep detailed records of the whole tender-opening process.

<sup>6</sup> For direct consultation where written price enquiry is not necessary, and in exceptional cases where price quotation is made through fax, effective measures should be established to prevent relevant tenders from being altered or changed.

<sup>7</sup> Overlapping is to be avoided to ensure that procurement procedure is not controlled by same personnel, thereby reducing the influence of "human factor" in relevant stage.

#### 4. Stage of Selection<sup>8</sup>

- 4.1. The selection committee may comprise more than 3 members (preferably an odd number) while personnel from the same subsidiary unit should not make up majority of the committee members.
- 4.2. Should not involve members of the selection committee in other stages of the procurement process (e.g. the stage of tender opening)<sup>9</sup>.
- 4.3. May appoint legal professional as a member of the selection committee or to provide legal support to the committee.
- 4.4. May invite specialists to attend selection meeting to provide advice and guidance.
- 4.5. Conduct selection in strict compliance with the established evaluation method and criteria and prohibit any alteration or elimination without authorization.
- 4.6. Formulate operating guidelines for the selection committee (including the number of members, proportion of members from different professional areas, quorum, voting method and procedure, rights and obligations of members and invited attendants, recusal system, substitution mechanism and requirements of preparing and approving meeting minutes, etc). Provisions regarding the operations of collegiate bodies stated in the *Code of Administrative Procedures* can be used as reference or provisions even stricter than those in the *Code* can be formulated.
- 4.7. Keep detailed records of the whole selection process (particularly application of selection criteria, method and result of voting and outcomes of evaluation).

<sup>8</sup> Mainly for public tendering; however, after appropriate coordination, relevant guidelines are also applicable for direct consultations requiring price enquiry (invitation tender) as supplement.

<sup>9</sup> Overlapping avoided to ensure that procurement procedure is not controlled by same personnel, thereby reducing the influence of "human factor" in relevant stage.

## 5. Stage of Awarding Contract

- 5.1. May cancel the award of contract if there are "obvious signs of collusive tendering".
- 5.2. Should inform the bidders who have been granted partial award and the failed bidders of the tendering result and reasons for awarding the successful bidder (e.g. price, quality and timeframe for delivery, etc.).
- 5.3. Should include relevant legal provisions (e.g. provisions on "Means and Duration of Filing Administrative Appeal and Judicial Appeal" stated in the *Code of Administrative Procedures* and in the *Code of Administrative Litigation*) in the notifications of granting partial award or failure in bidding.

## 6. Stage of Inspection and Acceptance

- 6.1. Should conduct inspection and quality test of relevant item in strict compliance with established standards/requirements.
- 6.2. If the personnel in charge of acceptance doubts about the quality of the item provided by the successful bidder, he/she should notify his/her superior and should not sign acceptance of the item.
- 6.3. Responsibility of inspection and acceptance of the item should not be taken solely by personnel of the department using the item to be procured.
- 6.4. If the item is not delivered directly by the successful bidder (or relevant representative), the bidder should be required to assign a representative to witness the acceptance of item on site.
- 6.5. Should periodically rotate personnel in charge of acceptance of items.
- 6.6. Should establish regulations on situations and relevant approving procedures for return, replacement and/or reproduction of items, negotiations with the contractors on price reduction or increase in amount of substitution for flawed items (when the flaws do not affect the safety and usage), and re-procurement under urgency due to rejection of items; should keep detailed records of such circumstances.

## Part 4 - Obligations of Procurement Personnel

While public servants are performing procurement work, they should fulfil four types of lawful obligation, namely, impartiality, zeal, loyalty and confidentiality:

1. **Obligation of impartiality** - Procurement personnel should not accept, from the exercise of their procurement work, any money or advantages which are undue according to the law. They should treat all bidders with objectivity and impartiality. They should not abuse their power or favour any party.
2. **Obligation of zeal** - Procurement personnel should, to the best of their abilities, perform procurement work efficiently (no matter which stage of the procedure they are involved in) and be responsible for being conversant with the provisions of the law and regulations related to procurement (including internal guidelines or regulations).
3. **Obligation of loyalty** - Procurement personnel should follow the instructions of their superiors (e.g. comply with the division of labour or execution of work according to internal rules) to carry out procurement work for the public benefit.
4. **Obligation of confidentiality** - Procurement personnel should maintain the confidentiality related to internal procurement information (e.g. the department's assessed price of the item to be procured, quoted prices and technical specifications in the tenders of the bidders, etc.).

## Part 5 - Handling of "Advantages"

1. During the procurement procedure, all procurement personnel are bound by the obligation of "impartiality". In other words, procurement personnel may not accept any advantages that are not due under law. Procurement personnel should treat all bidders with objectivity and impartiality and should avoid any opportunities for unlawful requests for favouritism through advantages offering from the bidders. He should ensure his personal integrity to avoid unnecessary suspicion and misunderstanding from other bidders, thereby safeguarding the image and reputation of the procuring department.
2. What are "advantages"? They are divided into two categories termed "property advantages" and "non-property advantages". The former includes money, gifts, red packets, loans, interest, discounts, commissions, hospitality of food and drinks, transportation and accommodation, free services, etc. The latter comprises study places, job posts and kudos arising from membership of clubs or any other honours, etc.
3. Confronted by the offer of "advantages", procurement personnel should prudently consider several aspects<sup>10</sup>, especially:
  - 1) A procurement personnel should not accept advantages for himself or for another person(s) and be amenable to requests for favouritism.
  - 2) A procurement personnel should pay attention to the manner, occasion, participants (whether the offers are universal), nature and value (whether the value is reasonable and appropriate and conforms to common practices and social customs) of the offering and receiving of advantages. If the provider of the advantage has (or will have) business dealings with the procurement personnel or his department, he should not accept the offer.
  - 3) If the procurement personnel has doubts about the intention of the advantage provider (regardless of having business dealings or not) or does not know how to handle the situation, he should notify his superior.

<sup>10</sup> For details, please see *Guidelines on Public Servants' Handling of Gifts Offered During Festivals*, distributed by the Commission Against Corruption to every public department or institution.

## Part 6 - Recusal System

1. To ensure that the administrative authorities and their staff carry out administrative activities with objectivity and impartiality to avoid being influenced by personal advantages while handling relevant work, and to avoid doubts by other participants in public administrative activities about the impartiality and integrity of the relevant administrative authorities or public servant, "recusal"<sup>11</sup> serves as an effective system.
2. In fact, the above-mentioned system (for details and examples please see Appendix B) provides protection in three aspects. Taking the procurement procedure as an example: 1) From the viewpoint of procurement personnel, the system can prevent them from being suspected by bidders of having practiced favouritism or abused power, and thus the creditability of the personnel will not be called into question; 2) From the viewpoint of the procurement department/institution, internally the system can ensure that the procurement procedure is carried out in a legal, impartial and effective environment, and externally the system can help uphold the entity's image, reputation and credibility; 3) From the viewpoint of the bidders and the suppliers, the procurement department/institution and the procurement staff keeping an unbiased attitude can ensure that all bidders are treated impartially.
3. In case a procurement staff is in a situation which requires his mandatory recusal from the procedure or in one which gives rise to reasonable doubt about his impartiality and integrity, this public servant is obliged to report the relevant matter to his superior or the chairman of the collegiate body he belongs to. In addition, any interested party can apply to the superior or the chairman of the collegiate body of the relevant public servant for his recusal, i.e., to forbid the public servant from participating in the relevant procurement procedure.

<sup>11</sup> See provisions of Article 46 to Article 53 of the *Code of Administrative Procedures*.



## Part 7 - Legal Liability

1. If a procurement personnel violates his obligations in the course of his duties, disciplinary proceedings against him may be initiated, resulting in disciplinary sanctions<sup>12</sup>.
2. Criminal proceedings and disciplinary proceedings are mutually independent<sup>13</sup>. If the breach of the public servant's obligations<sup>14</sup> simultaneously violates disciplinary and criminal provisions, he shall also be subject to criminal liability.
3. Common occupational crimes committed in the procurement procedure<sup>15</sup> include passive corruption, violation of secrecy, embezzlement and abuse of power<sup>16</sup>.

<sup>12</sup> If the violation is proved, offenders are subject to disciplinary sanctions up to and including dismissal.

<sup>13</sup> See paragraph 1 of Article 287 of the *General Regulations Governing the Staff of the Public Administration of Macao*.

<sup>14</sup> Regardless of whether the breach involves seeking personal advantages or advantages for others.

<sup>15</sup> Occupational crimes refer to crimes prescribed and punishable by criminal law and committed by public servants who take advantage of their public positions or official capacity in the course of their duties (no matter whether the acts violate their official obligations or not) to seek advantages for themselves or for a third party or cause damage to the interests of the public or of a third party.

<sup>16</sup> See Appendix C for differences in the four types of occupational crimes (in terms of the characteristics and penalties of the crimes) and relevant examples.

## Part 8 - Duty to Report and Relevant Channels

1. As public servants, procurement personnel who perform their duties in the name of the public authority should aspire to secure public interests, not "letting things drift if they do not affect themselves", i.e. pretending that they do not know of the offences which have come to their knowledge in the course of their duties.
2. Under the "duty to report"<sup>17</sup>, procurement personnel who fail to report offences<sup>18</sup> which have come to their knowledge in the course of their duties or by virtue of their positions, by pretending that they do not know of it (even if it does not involve offer or acceptance of any advantage) are subject to disciplinary action<sup>19 20</sup>. If the personnel do not report for the purpose of either benefiting or prejudicing someone, they may be criminally culpable<sup>21</sup>.
3. "Ignorance of the law" is not an excuse for procurement personnel not fulfilling their duties, since this act is in breach of the "obligation of zeal" stated in Article 279 of the *General Regulations Governing the Staff of the Public Administration of Macao*<sup>22</sup>.
4. For reporting channels, procurement personnel should report any suspected offences which have come to their knowledge in the course of their duties or by virtue of their positions<sup>23</sup> either to their superiors or to institutions with authorities; departments which know of the relevant matters should also report to competent entities. If the suspected offences fall within the scope of anti-corruption or ombudsman, the relevant case should be reported to the Commission Against Corruption.

<sup>17</sup> Public servants have the duty to report offences or crimes that come to their knowledge in the course of their duties or by virtue of their position. Even if such offences come to their knowledge in their private capacity, public servants should report the offences they know of to competent entities to fulfil their civil obligations.

<sup>18</sup> For examples, in a direct consultation where a price enquiry is necessary (invitation tender), the officer who is responsible for receiving and opening the tenders discloses the quotation price of a bidder to another bidder who has offered "advantages", or in a public tender the tender opening committee accepts tenders submitted by unqualified bidders due to having accepted "advantages".

<sup>19</sup> According to the provisions of item c of paragraph 2 of Article 313 and item i of paragraph 2 of Article 314 of the *General Regulations Governing the Staff of the Public Administration of Macao*, disciplinary sanctions which include a fine or dismissal may be applied.

<sup>20</sup> According to the provision of paragraph 1 of Article 225 of the *Penal Procedure Code*, public servants should report all offences that come to their knowledge in the course of their duties or by virtue of their positions even though they may not know the identity of the offender(s).

<sup>21</sup> This may constitute the crime of prevarication as prescribed in Article 333 of the *Penal Code*.

<sup>22</sup> It is stipulated that public servants "should be particularly conversant with the laws and regulations".

<sup>23</sup> Reports should be made in writing (written record of actual circumstances). In case of urgency or in grave and serious situations, a verbal report can also be made, followed by the submission of relevant written report as soon as possible.

## Part 9 - Enquiries

If public departments or institutions have questions or enquiries about the "Guidelines", please contact the Commission Against Corruption:

Address: Alameda Dr. Carlos d'Assumpção, Edf. "Dynasty Plaza", 14 Andar, NAPE, Macau

Tel: (853) 2832 6300

Fax: (853) 2836 2336

E-mail: [ccac@ccac.org.mo](mailto:ccac@ccac.org.mo)

Appendix A

## Practical Questions and Relevant Explanations Regarding Public Procurement

### Stage of Preparation

1. In order to meet the requirement of having the most up to date and objectively assessed price, is it necessary to reassess the price for procurement on every occasion? How long should the interval between each updating of the information of the assessed price be?

A: There is no unified standard but the fluctuation rate of the market price of the article to be procured can be taken as reference. For example, for articles with big fluctuations in prices such as computers, mobile phones and other high-tech products, it is appropriate to review the assessed price prior to each procurement.

2. For procurement in which the amount of money involved is less than the legal amount for compulsory written price enquiry, is it still necessary to proceed with price enquiry in writing? How much should the procurement involve when the quotation can be accepted by fax?

A: Although the legal amount for compulsory written price enquiries is stated in the procurement regulations, written price enquiries are not prohibited for procurements involving amounts of money less than the legal amount. In addition, while procuring articles which cost less than the stated legal amount, the department should carefully consider factors including the urgency of the procurement and the price of the article(s) before deciding whether to proceed with written or faxed price enquiries or to conduct direct procurement according to the principle of appropriateness and the principle of efficiency.

3. While establishing technical specifications for the tender, can the department directly quote the instruction manual of a certain product or the information obtained through an enquiry from a certain supplier?

A: Directly quoting the instruction manual of a certain product or the information obtained through an enquiry from a certain supplier for establishing technical specifications can easily create a "monopoly" situation, eliminating competitive opportunity for other products or suppliers. To be comprehensive and objective, departments should collect information of products and suppliers from different sources and channels. Then, observing to the actual procurement needs, basic specifications or requirements can be established. This way can avoid extending favouritism to a particular supplier. When only an exclusive product from a particular supplier, i.e. sole supplier, meets the requirements of the department, current regulations on procurement also allow departments to conduct direct procurements.

4. Can tender invitation documents specify the brand of the article(s) to be procured? What will happen if tender invitation documents designating specific brands do not have the statement of "or equivalent"?

A: In situations where the brand of the item to be procured has to be specified otherwise the technical specifications of the item cannot be accurately and clearly described or illustrated, the designation of brands is permissible. However, the authorities that approve the tender should be notified of such circumstances, and the relevant tender invitation documents should also be approved by the authorities. On the other hand, to comply with the "principle of fair competition", while specifying the brands in the tender invitation documents, a description of "or equivalent" should be included (See Article 21 of Regulations on Contracting of Public Works approved by Decree-Law no.74/99/M and Article 6 of the Government Procurement Agreement formulated by the World Trade Organization). Offenders will be legally liable <sup>24</sup>.

5. If brands and models are not specified, how can the quality of the article to be procured be judged? In addition, how should departments deal with their doubts about the functions claimed in the instruction manuals of certain articles?

A: Specifying brands and models does not mean that the department can definitely procure high quality products but such practice certainly impairs the principle of fair competition. Although there is no unified mechanism for quality inspection of materials in Macao, the departments can still judge the quality of products based on their own experiences, the professional opinions of technical officers, product manuals or even information from authoritative magazines. If there are doubts about the functions of the item, the relevant bidder can be requested to conduct testing or demonstration of the relevant products for the department.

6. A department needs to procure different types of articles at the same time. If the procurement procedures are carried out separately, will this be considered an "evasion of law"?

A: In principle, separating procurement procedures for different types of articles will not be considered an "evasion of law". However, departments should consider whether the classification of the articles is reasonable and objective. For example, if a department plans to purchase adhesive tapes and pens, the procurement procedures of the two items should not be separated since both items belong to the same category of "stationery". If the articles to be procured are compatible or complementary, e.g. computers and programmes or software, computers and printers or projectors, the relevant procurements can be combined as one with a view to saving resources (manpower and finance) and such circumstances should be explained and recorded in detail.

<sup>24</sup> Officers may be subject to disciplinary action (such as being suspected of contravening the obligation of impartiality) and/or criminal liability (such as specifying a brand without stating "or equivalent" with the intention of favouring a particular supplier).

7. How can a procurement be defined as an "urgent situation", in which price enquiry can be exempted and direct granting of contracts be acceptable?

A: Only after analysis of a specific case can the procurement be defined as an "urgent situation" or not. For example, the glass curtain wall of a public organization has been broken in a storm and is in urgent need of repair for the safety of the members of the organization and the public. In such a case, a price enquiry should be exempted in favour of direct granting of contract. When activities cannot be delayed, and if a price enquiry cannot be made in advance due to time constraints, and there is an urgent need to procure indispensable items/services or to start construction works, then such situations may also be regarded as "urgent". However, it should be considered whether situations were caused by the fault of the staff, in which case they will be subject to disciplinary or even criminal liabilities.

8. Is it necessary to draw up contracts for procurements involving a small amount of money but with an implementation period of over 6 months, e.g. public aerial services, maintenance services of fax machines or subscriptions to newspapers and magazines?

A: For procurements that exceed a certain amount of money or involve implementation periods that exceed a certain length of time, it is necessary to draw up written contracts according to the provisions of the current regulations (which were established in the 80s)<sup>25</sup>. The signing of the contracts is to clearly state the rights and duties of the parties (the department and the contract awardees) in order to prevent future disputes. However, after long-term implementation, it has been found that the execution of the relevant regulations is bound by a number of objective conditions, e.g. the expenses of drawing a written contract is high (such expenses may exceed the profit or even the business volume of the supplier in the relevant procurement) or the procedures of drawing up the contract are complicated (not all departments have their own notary public, therefore setting up a written agreement may need the assistance of the Finance Services Bureau). Such factors may lead to disagreements between the department and the supplier in drawing up a written contract for the supply of the relevant article or service. However, despite the insoluble problems in drawing up a written contract, the department should still explain the reasons for not doing so and should provide a detailed written record regarding the terms of procurement agreed by the two parties, the rights and duties of the two parties and other relevant aspects in order to protect mutual interests.

<sup>25</sup> According to current regulations, when the value of the article or service to be procured exceeds MOP500,000.00, or the delivery period or implementation period exceeds 6 months, a written contract must be drawn up.

## Stage of Communication with Bidders (Suppliers/Contractors)

9. A department is temporarily unable to install a fax machine in a separate room for receiving price quotations. In such circumstances, how can the department prevent the divulgence of information about quotations?

A: The above-mentioned measure actually aims at reducing the risk of leaking information about quotations in order to prevent officers who are responsible for receiving quotations from being suspected. Departments lacking the relevant facilities can act flexibly according to actual situations. For examples, the fax machine which is used for receiving price quotations can be put somewhere with fewer people or the department can request the suppliers to fax their quotations at certain times. Computer software like Winfax can also be used for receiving quotations.

10. To abide by the principle of fairness, in what way should a department disclose its responses to the enquiry of a certain bidder so that all other bidders will be notified? Also, is it necessary to disclose every response it makes?

A: On the basis of the principle of fairness, the department should disclose the contents of its responses to the enquiries of certain bidders to keep other bidders informed of the same subject matter. However, the scope of disclosure is limited to only the information which may affect the bidders' preparation of their tenders (e.g. information about the product model, technical specification, project duration, etc.) Not all the requested information and responses of the department have to be made public (e.g. grammatical mistakes that do not affect the actual meaning of the tender documents, including wrongly used words, missing words or incorrect punctuation marks.) Regarding the media for disclosing such information, in addition to notifying known bidders about relevant information, the department may even consider announcing relevant enquiries and responses through easily accessible public places<sup>26</sup>, departmental website or newspapers.

<sup>26</sup> For example, the notice board of the document receiving/dispatching unit or of the procurement unit.



11. In the tender opening process, if the department allows bidders to look at the tenders and relevant documents of the other bidders, will the department have contravened the principle of confidentiality?

A: According to Decree-Law No. 63/85/M (Paragraph 3 of Article 30) and Decree-Law No. 74/99/M (Paragraph 4 of Article 84), if a bidder intends to search for evidence for his plans to raise an objection to the department's decision on acceptance or rejection of bidders, he has the right to refer to his own tender or tenders of the other bidders and the attached documents. However, it should be emphasised that the referral to documents is only a verification of the formality, i.e. to check whether documents submitted by bidders are complete and conform to other formal requirements <sup>27</sup>.

12. According to the provision of paragraph 1 of Article 25 of the Decree-Law No. 63/85/M, "the committee shall consist of three members". It seems that it is not clearly stated that "the number of the committee may exceed three". How should one interpret the relevant regulation?

A: In fact, the relevant provision only states the minimum number of members of the committee, and it does not mean that the number of members of the committee cannot exceed three. Therefore, if the department has enough manpower, the committee can be made up of more than three members (preferably an odd number, especially for public tenders involving large amounts of money or of great importance). With more members in the committee, the tender opening work can be shared, and the risk of the final decision of the committee being influenced by an individual member can be reduced.

<sup>27</sup> However, long-winded reading and recording of information should be discouraged.




13. How do the functions of the tender-opening committee and those of the selection committee differ and what is the importance of preventing the overlapping of members of the two committees?

A: The former is responsible for verifying whether the bidders meet the requirements for joining the tender and whether all the submitted tenders have all the documents as required in the tender invitations. The latter, on the other hand, is responsible for evaluating the tenders accepted after the tender opening process, and factors like the tenders' technical specifications, price quotations and project duration will be assessed according to the criteria set. In addition, to have a clear division of labour in each stage and to avoid confusing and complementary roles, the overlapping of members of the two committees should be prevented in order to reduce the risk of the procurement procedure being controlled by a small number of people. For example, **A** is simultaneously a member of the tender-opening committee and a member of the selection committee. In the tender opening process, **A** has to voice his thoughts about whether the tender submitted by a credible bidder conforms to requirements, and **A** may consider the matter from the point of view of a selection committee member and thus overlook certain objective criteria for assessing the formal requirements of the tender, which may lead to influencing the final decision of the tender-opening committee and accepting some tenders which otherwise could not enter the selection stage. Therefore, the overlapping of members of the two committees may lead to unfairness in the procurement procedure.

14. How can departments with relatively few staff members conform to the requirements of "no overlapping of members of the tender-opening committee and the selection committee" and "maintaining administrative efficiency" at the same time?

A: Staff other than administrative/financial personnel can also be members of the tender-opening committee. In addition, personnel with professional or technical experience do not necessarily sit on the selection committee. They may just provide technical support and professional opinions to the committee (e.g. attend the meeting as an observer or submit an opinion report to the committee). In this way, the staffing arrangement can be more flexible.



15. Although the department has requested many suppliers for quotations (for "direct consultation inviting price enquiries"), some suppliers seldom provide quotations, resulting in only certain suppliers winning the contracts. Can such a situation be deemed to have contravened the principle of fairness?

A: Above all, the underlying reasons for suppliers' reluctance to quote price should first be identified. It must be determined whether suppliers withhold quotations due to limitations of human resources, technical or financial capabilities, or because they actually do not belong to the relevant professional areas and thus cannot provide price quotations. If an individual supplier's failing to provide a quotation without reasonable explanation does not seriously affect the department in its selection, it can still follow the general procedures to select an appropriate supplier after the department has recorded the relevant circumstances in detail.

For those who do not provide quotations and fail to give reasonable explanations, the department may consider not including them in the price enquiries in the following procurement (direct consultation). If such circumstances occur repeatedly, the department may even eliminate such suppliers from its list of suppliers. The advantages of setting up a database of suppliers with relevant addition/deletion mechanisms are evident in this case.

In practice, if procurement involves professional technical items, situations of "de facto monopoly" may arise. In such a situation, after explaining the reasons in detail and obtaining the approval of the superior, the department can directly negotiate with the relevant supplier and make the purchase without holding a public tender or price enquiries.

In addition, according to the provisions of the law, local suppliers should be given priority in procurement. However, this does not mean that local suppliers can take advantage of the relevant provisions to extort unreasonable profits. If the department deems it unsuitable to purchase the items from local suppliers after considering factors like differences in price and efficiency, the department, with adequate justifications, can recommend that the superior procure the items from a foreign supplier.

## Stage of Selection and Awarding Contracts

16. If a particular bidder offers conditions that are "better than the established technical specifications", can the department award the contract accordingly?

A: Yes, but the department must indicate in the tender invitation documents that the technical specifications therein are basic technical requirements only. In other words, a bidder's offer of a similar but superior item will achieve a higher grade. On the contrary, if there are no such indications, the department cannot, without consideration of price, give a higher grade or even award the contract because of the bidder's offer of better conditions.

17. Can a department award contracts based on the fact that a particular bidder had provided "before-sales service" (technique), e.g. product information, instead of following the "established selection criteria"?

A: A department must conform to the principles of fairness and impartiality in the course of selection. In fact, if the department had enquired other bidders, it is possible that other interested bidders would have also offered "before-sales service". Therefore, this should not be adopted as a selection criterion.

18. If a supplier's quotation exceeds the upper limit on the amount that needs no written price enquiries, is it a must that a department should initiate written price enquiries to proceed with the procurement procedure?

A: If the aforementioned situation only involves very few suppliers and the quotations of most of the other suppliers do not exceed the upper limit - in other words, there are still a certain number of suppliers for the department to select - the department may proceed with the procurement with the original method (non-written price enquiries). However, if several suppliers' quotations are found to have exceeded the upper limit by a considerable amount, then the department should initiate a prompt review. If it is confirmed that the situation has arisen from the deviation of the internal assessed price from the market price, the department should proceed with the procurement after changing to written price enquiries. The department should keep detailed records in any such circumstances.

19. In a "direct consultation which requires price enquiries" (also called "invitation tender"), all the quotations of the bidders exceed the department's reasonably assessed price, and the quotations even reach the minimum legal amount for a public tender. How should the department handle this situation?

- A: If the quotations of bidders are found to have unreasonably exceeded the assessed price, the department can decide to grant no award in consideration of public interest. Moreover, if obvious collusive tendering is found to exist among bidders, the department should not grant the award according to the current regulations on procurement. When quotations of all the bidders reach the minimum legal amount for public tendering, the department should adopt the public tendering method according to regulations and initiate the procurement process.

## Stage of Inspection and Acceptance

20. In the stage of inspection and acceptance, how should the department handle situations that "the approved suppliers cannot provide the designated models of products specified in the tender invitation documents"?

- A: The department should determine whether the inability to provide the designated models of products is the fault of the approved supplier. If the failure to deliver the designated product is caused by unforeseeable events not attributable to the approved supplier, e.g. the manufacturer suddenly ceases operations, or the products of the manufacturer or contractor fail to be delivered due to natural disasters, wars or other force majeure factors, the department can accept other models of the products of which the quality should not be inferior to that of the designated model on the basis of the principle of good faith. However, the department should check the most updated market price of the model offered since its price may be lower than that of the designated model even if the model offered is the newest. In this case, the department may request the approved supplier for a discount.

If the failure to deliver the designated models of goods is the fault of the approved supplier (e.g. the approved supplier placed his order late and consequently the products could not be delivered to the department on time), the department has the absolute right to refuse acceptance of products not of the designated model, or of any other substitute products whose functions and qualities do not meet the established criteria. The department can also take urgent steps to undertake a separate procurement. Regarding the administrative expenses caused by the urgent procurement, the department can recover the costs in accordance with the provisions of the civil laws regarding responsibilities inherent in contracts.

21. A department has implemented the job rotation system of the inspection and acceptance personnel, and the newly rotated personnel may not be familiar with the specifications and technical requirements of the item. In such a case, how should the inspection and acceptance personnel be arranged?

A: The department can arrange personnel for inspection and acceptance according to the actual situation. If the acceptance simply involves checking the quantity of the articles, the department can assign general personnel to carry out the acceptance. If the acceptance involves inspection of the articles' technical specifications, in view of the quality of the articles, the rights of the personnel and the training of the staff, the department can allow senior personnel to guide the new staff in carrying out the acceptance, i.e., allow experienced and new personnel to form acceptance groups or allow technical staff to assist non-technical staff in carrying out the acceptance.


22. If the approved supplier provides flawed articles, how should the department set the standard for price reduction?

A: There is no unified standard, but it should be noted that the 'flaws' should not affect the functions or technical and safety standards of the item (e.g. the department has procured a desk, and the legs of the desk have been scraped during transportation). Under such circumstances, the department should raise his request for price reduction and formulate the range of discount in accordance with the principle of good faith and the principle of appropriateness. If an agreement cannot be reached, judiciary measures may be taken to resolve the issue.

## Protection of Impartiality

23. If an ex-employee of the department joins the tender, how should the personnel recuse themselves from the procedure?

A: Even if ex-employees are involved, the tender should still be handled in accordance with the relevant regulations of the *Code of Administrative Procedure* regarding the recusal system. In other words, the department should first determine whether the personnel of the department have any relationship with the ex-employee that requires mandatory recusal. If so - for example, lineal relative by blood or judiciary litigation - the superior should declare that the relevant personnel must recuse themselves from the procedure. If the relationship between the personnel of the department and the ex-employee may cast reasonable doubts about the impartiality of the department officer (e.g. they had debt disputes before or are old family friends), the superior has the right to decide whether the relevant personnel can continue to participate in the tender after weighing the advantages and disadvantages (analyzing the degree of the conflict of interest and the influence of recusing the relevant personnel from taking part in the tendering procedure).



24. Are personnel who provide technical opinions in the selection stage of the procurement (not members of the selection committee) also bound by the recusal system?

A: Although such personnel have no voting rights, they actually do take part in the selection procedure, and their professional opinion will affect the final decision of the members of the selection committee (especially members who are not specialized in respective area). Therefore, such technical personnel should also be bound by the recusal system.

25. If a staff does not know the occupational background of a friend and is concerned that it may have conflicts of interest with his own procurement responsibilities, how should he deal with the hospitality of food and drinks offered by his friend?

A: Actually, the staff does not need to worry overmuch about such matters. However, the staff should still pay attention to his association with his friends. If a friend offers unreasonably lavish or frequent hospitality, the staff should consider whether the friend has any ulterior motive and avoid accepting such treats. If the staff starts to have business dealings with that friend after accepting the friend's offer, the staff should report the circumstances to his superior. Since the existence of friendship may cast doubts about the impartiality if the relevant staff participates in the procedure, the staff should recuse himself from the procedure.

## Appendix B

## Recusal System

	Mandatory Recusal	Self-Recusal	Requested Recusal
De facto Pre-requisite	<p>The law specifies 8 situations in which public servants<sup>28</sup> are legally impeded from participating in administrative procedures or in acts or contracts of public or private law of the Administration. These situations are <sup>29</sup>:</p> <ol style="list-style-type: none"> <li>When a public servant, himself or as an agent or a negotiorum gestor of another person, has interest in the relevant procedure, act or contract;</li> <li>When a public servant's spouse, any lineal relative by blood or affinity, collateral relative up to and including the second degree by blood or affinity, or anyone living in common economy with the public servant, whether himself or as an agent of another person, has interest in the relevant procedure, act or contract;</li> <li>When a public servant, himself or as an agent of another person, has interest in a similar question or when such a situation happens to the person included in b) above;</li> <li>When a public servant has participated in the procedure as an expert or a mandatary, or has given opinion on the question to be solved;</li> <li>When a public servant's spouse, lineal relative by blood or affinity, collateral relative up to and including the second degree by blood or affinity, or anyone living in common economy with the public servant, has acted as an expert or a mandatary in the relevant procedure;</li> <li>When an interested person or his spouse has taken legal action against a public servant himself, his spouse or his lineal relative by blood;</li> <li>When the appeal is against the decision made by a public servant himself or any person stated in b) above, or when anyone of them has participated in the making of the decision;</li> <li>When the case involves an individual who is a member of an association of economic or similar interests, to which a public servant also belongs.</li> </ol>	<p>In circumstances that give rise to reasonable doubt about the impartiality and the integrity of a public servant, the grounds for self-recusal or requested recusal may be formed. The law prescribes 4 examples of such circumstances <sup>30</sup>:</p> <ol style="list-style-type: none"> <li>When a public servant's lineal relative by blood or affinity, collateral relative up to and including the third degree by blood or affinity, or person for whom a public servant or his spouse acts as a guardian or a curator, whether himself or as an agent of another person, has interest in the relevant procedure;</li> <li>When a public servant, his spouse or any of his lineal relatives by blood or affinity is a creditor or a debtor of a natural or a legal person who has direct interest in the relevant procedure, act or contract;</li> <li>When a public servant, his spouse or his lineal relative by blood or affinity has accepted gifts from an interested person either before or after the commencement of procedure;</li> <li>When a public servant or his spouse has a hostile or an intimate relationship with a person who has direct interest in the procedure, act or contract.</li> </ol>	

<sup>28</sup> Public servants here refer to holders of public office or staff of the public administration.

<sup>29</sup> See paragraph 1 of Article 46 of the *Code of Administrative Procedure*.

<sup>30</sup> See paragraph 1 and paragraph 2 of Article 50 of the *Code of Administrative Procedure*.

## Appendix B (cont')

	Mandatory Recusal		Self-Recusal	Requested Recusal
Petitioner	Initiated by public servant himself	Initiated by a third party	Initiated by public servant himself	Initiated by a third party
	When a public servant finds himself in a situation requiring mandatory recusal, he is obliged to notify immediately (in writing or by written record <sup>31</sup> ) his superior or the president of the collegiate body <sup>32</sup> .	Any interested person <sup>33</sup> who has knowledge that a public servant is in a situation requiring mandatory recusal can request the Administration, in writing and with the respective reasons specified, to declare the public servant's recusal <sup>34</sup> .	A public servant should ask for recusal from participating in the respective procedure (request to be made orally, but the superior or president of the collegiate body can decide if the request should be in writing).	Any interested person who considers that a public servant's relationship with himself or with another person may impair the impartiality of the public servant can object, in writing and with respective reasons specified, to the public servant's participation in the procedure.
Superior or president of the collegiate body	Once the cause for mandatory recusal is verified <sup>35</sup> , recusal should be declared and the situation be recorded in accordance with the law <sup>36</sup> .		When it is verified that the circumstances may give rise to reasonable doubt about the impartiality and integrity of a public servant (e.g. participation of a third degree collateral relative by blood, such as uncle and nephew; someone with debt disputes or old family friend), recusal of the public servant is to be declared (with the respective reasons recorded), thus impeding him or her from participating in the relevant procedure. When the existing relationship (e.g. ordinary friends), is not considered as a legitimate reason to cast doubt on the impartiality of a public servant, it can be decided that the referred personnel continues his participation in the procedure (with the respective reasons recorded).	
Examples	If member A of the tender-opening committee for a public tender and bidder B have sister-in-law affinity relationship (i.e., B is A's collateral relative up to and including the second degree by affinity), A should, after learning of B's tender submission, take the initiative to notify his or her superior of the relevant facts so that the superior can declare the recusal according to law and terminate A's participation in the relevant tendering procedure.		Member A of the selection committee for a public tender is in an intimate relationship with bidder B, A should take the initiative in requesting recusal and ask the superior to excuse him or her from participating in the relevant tendering procedure.	Resident A partook in the tender and was awarded the contract. However, he came to know that the inspection personnel is the driver with whom he had disputed over a traffic accident. A is worried that he may receive unfair treatment and therefore, he requests B's superior in writing to rescue B to ensure a fair inspection.

<sup>31</sup> For example, meeting minutes.

<sup>32</sup> According to paragraph 2 of Article 53 of the *Code of Administrative Procedure*, if a public servant who is in the situation of mandatory recusal does not notify the superior or the president of the collegiate body, it constitutes a serious disciplinary offence.

<sup>33</sup> Refers to anyone whose interests may be impaired due to favouritism practised by a public servant.

<sup>34</sup> See paragraph 2 of Article 47 of the *Code of Administrative Procedure*.

<sup>35</sup> According to paragraph 2 of Article 46 of the *Code of Administrative Procedure*, if a public servant's participation involves merely task processing, particularly the act of issuing certificates, it is not to be considered as a case of mandatory recusal.

<sup>36</sup> See paragraph 3 and paragraph 4 of Article 47 of the *Code of Administrative Procedure*.



## Appendix C

## Common Occupational Crimes Regarding Procurement

	Characteristics of Crime	Penalty	Example
<p><b>Passive Corruption</b></p> <p>(Article 337 to Article 338 of the <i>Penal Code</i>)</p>	A public servant who, personally or through an intermediary, with consent or ratification, solicits or accepts for himself or for a third party an undue advantage or a promise of such an advantage, whether in property or not, as a reward for acting or refraining from acting contrary (or not contrary) to his official duties.	Up to 8 years' imprisonment.	Officer <i>A</i> participating in selection of public tenders accepts advantages offered by bidder <i>B</i> and assists the bidder to obtain the contract for supplying goods or services.
<p><b>Violation of Secrecy</b></p> <p>(Article 348 of the <i>Penal Code</i>)</p>	A public servant who, without being duly authorised, discloses secrets acquired or confided to him in the course of his duties or provided to him by virtue of his position, with the intent to seek benefit for himself or for another person, or with the knowledge of causing damage to the public interest or to a third party.	Up to 3 years' imprisonment or fine.	An office clerk discloses the assessed price of the department which came to his knowledge by virtue of his position to an invited bidder who is a relative of the clerk.
<p><b>Embezzlement</b></p> <p>(Article 340 of the <i>Penal Code</i>)</p>	A public servant who, for his benefit or the benefit of another person, illegitimately appropriates public or private money or any movable property entrusted to him, in his possession or to which he has access by virtue of his position.	Up to 8 years' imprisonment.	A public servant takes possession of items procured by the department.
<p><b>Abuse of Power</b></p> <p>(Article 347 of the <i>Penal Code</i>)</p>	A public servant who, in cases other than those prescribed in Articles 337 to 346 of the <i>Penal Code</i> , abuses his powers or violates the duties inherent in his functions, with the intent to seek illegitimate benefit for himself or for a third party or to cause damage to another person.	Up to 3 years' imprisonment or fine.	Tender selection officer <i>A</i> and bidder <i>B</i> have been friends since childhood, and <i>A</i> unreasonably increases <i>B</i> 's scores in the selection stage to increase <i>B</i> 's chances of winning the contract.

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