

Inform Practice Note #5

May 2007
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Evaluating Tender Offers

cidb's Inform Practice notes provide guidance and clarity in achieving client objectives in construction procurement and delivery. Practice notes inform clients and practitioners on how to embrace best practice and how to deal with issues that may arise. They are aligned with, but do not replace regulation.

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Synopsis:

The cidb Standard Conditions of Tender establishes a tenderer's obligations in submitting a tender and the employer's undertakings in soliciting and evaluating tender offers. They as such establish the rules governing the process of offer and acceptance. This practice note sets out the manner in which tender offers are to be evaluated in accordance with these Standard Conditions of Tender when using a competitive selection procedure.

Note: This practice note sets out the activities that are associated with the evaluation of tender offers in a competitive selection process. In doing so it establishes the linkages between activities and the relevant clauses contained in the cidb Standard Conditions of Tender. Detailed guidance relating to certain activities and sub-activities are included in the end notes provided after the description of the activities. References to these end notes are provided in shaded boxes alongside the sub-activities to which they apply.

Practice Note #12 deals with the evaluation of tenders in a competitive negotiation process.

The **Construction Industry Development Regulations** define “construction procurement” as “procurement in the construction industry, including the invitation, award and management of contracts”.

The **Standard for Uniformity in Construction Procurement** engenders a culture of consistency and predictability within procurement processes through the adoption of uniform procurement documentation, procedures and practices.

Constitution of the Republic of South Africa (Act 108 of 1996)

PROCUREMENT

217. (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

Conditions of tender establish the tenderer’s obligations in submitting a tender and the employer’s undertakings in administering the tender process and evaluating tender offers.

Conditions of contract describe the risks, liabilities and obligations of the contracting parties and the procedures for the administration of the contract.

Conditions of tender deal with the process of awarding a tender and fall away once a contract is entered into.

Conditions of contract only apply once a contract is entered into. It is for this reason that conditions of tender must be separated from conditions of contract.

1. cidb prescripts

Construction procurement in the public sector, apart from being regulated in terms of general legislation governing public procurement, is also regulated through the following cidb prescripts which have been issued in terms of the Construction Industry Development Board Act of 2000:

- cidb Code of Conduct for the Parties engaged in Construction Procurement; and
- cidb Standard for Uniformity in Construction Procurement.

These prescripts are applicable to all organs of state i.e. all national and provincial departments, constitutional institutions, public entities, municipalities and municipal entities.

The Code of Conduct establishes standards of behaviour between the parties in procurement that are consistent with a procurement system that is fair, equitable, transparent, competitive and cost effective.

The Standard for Uniformity establishes minimum requirements that:

- Promote cost efficiencies through the adoption of a uniform structure for procurement documents and standard component documents and generic and uniform solicitation procedures;
- Provide transparent, fair and equitable procurement methods and procedures in critical areas in the solicitation process;
- Ensure that the forms of contract that are used are fair and equitable to the parties to a contract; and
- Enable risk, responsibilities and obligations to be clearly identified.

2. cidb Standard Conditions of Tender

The cidb Standard Conditions of Tender contained in the Standard for Uniformity in Construction Procurement standardise the procurement processes, methods and procedures from the time that tenders are invited to the time that a contract is awarded. They are generic in nature and are made project specific through choices that are made in developing the Tender Data associated with a specific project.

Conditions of tender are by definition the document that establishes a tenderer’s obligations in submitting a tender and the employer’s undertakings in soliciting and evaluating tender offers. They as such establish the rules from the time a tender is advertised to the time that a contract is awarded and require employers to conduct the process of offer and acceptance in terms of a set of standard procedures.

The cidb Standard Conditions of Tender are based on a procurement system that satisfies the following system

Requirement	Qualitative interpretation of goal
Fair	The process of offer and acceptance is conducted impartially without bias, providing simultaneous and timely access to participating parties to the same information. Terms and conditions for performing the work do not unfairly prejudice the interests of the parties.
Equitable	The only grounds for not awarding a contract to a tenderer who satisfies all requirements are restrictions from doing business with the organisation, lack of capability or capacity, legal impediments and conflicts of interest.
Transparent	The procurement process and criteria upon which decisions are to be made are publicised. Decisions (award and intermediate) are made publicly available together with reasons for those decisions. It is possible to verify that criteria were applied. The requirements of procurement documents are presented in a clear, unambiguous, comprehensive and understandable manner.
Competitive	The system provides for appropriate levels of competition to ensure cost effective and best value outcomes.
Cost effective	The processes, procedures and methods are standardised with sufficient flexibility to attain best value outcomes in respect of quality, timing and price, and least resources to effectively manage and control procurement processes.

Note: cidb Best Practice Guideline #A1: The procurement cycle outlines the procurement activities and sub-activities associated with the procurement cycle. It also identifies the logical points in the process where controls should be introduced. Employers must mandate persons within their organisations to assume responsibility for exercising control at the identified control points.

In a **two envelope system**, tenderers submit a technical proposal in one envelope and a financial proposal in another envelope. The financial envelope is only opened after the technical submission has been evaluated and found to be acceptable to the employer.

Employer’s undertakings

- Clause F.3.4 – Opening of tender submissions Tenderer’s obligations
- Clause F.2.13 – submitting a tender offer

3. Activities associated with evaluating tender offers in terms of a competitive selection procedure

3.1 Open and record tender offers received

*Where two-envelope system is **not** used*

- 1) Open tender offers immediately after the closing time for receipt of tender submissions in the presence of tenderers’ agents and announce and record pertinent data, if:
 - Submitted in sealed envelopes;
 - Annotated with the required particulars; and
 - Placed in the nominated tender box or delivered to the specified place for receipt of tender submissions.
- 2) Make available name, price and preferences claimed to interested parties who request such information.

Where two-envelope system is used

- 1) Open the technical proposal in the presence of tenderers’ agents and announce the name of each tenderer. Evaluate the quality of the technical proposals.
- 2) Open the financial proposals of tenderers, who score above the minimum number of points for quality stated in the Tender Data, and announce the score in the presence of tenderers’ agents. Return unopened any financial proposals received from those tenderers who failed to achieve the minimum number of points for quality.

The employer's undertakings

- Clause F.3.5 – Two envelope system

Employer's undertakings

- Clause F.3.3 – Return late tenders
- Clause F.3.8 – Test for responsiveness

General

- Clause F.1.5 – The employer's right to accept or reject any tender offer

Tenderer's obligation

- Clause F.2.14 – Information and data to be completed in all respects

Tenderer's obligation

- Clause F.2.13 – Submitting a tender offer

Employer's undertakings

- Clause F.3.8 – Test for responsiveness
F.3.8.1 b) Determine, after opening and before detailed evaluation, whether each tender offer properly received has been properly and fully completed and signed.

Tenderer's obligations

- Clause F.2.13 – Submitting a tender offer
F.2.13.2 Return all returnable documents to the employer after completing them in their entirety, either electronically (if they were issued in electronic format) or by writing in legibly in non-erasable ink.

Tenderer's obligations

- Clause F.2.14 – Information and data to be completed in all respects
- F.2.14 Accept that tender offers, which do not provide all the data or information requested completely and in the form required, may be regarded by the employer as non-responsive.

- 3) Return tenders unopened that:
 - Are received late;
 - Are submitted by a method other than the method prescribed in the Tender Data;
 - Have been withdrawn in accordance with the procedure provided in Clause F.2.16.3; or
 - Where only one tender submission is received and the employer decides to call for fresh tender submissions.
- 4) Consider declaring as non responsive tender offers not received in the form required i.e. tenders which are submitted in a format or on forms other than those prescribed in the tender documents.
- 5) Reject all tender offers submitted by telegraph, telex, facsimile or e-mail, unless stated otherwise in the Tender Data.

3.2 Determine whether or not tender offers are complete

- 1) Compare each tender submission against the List of Returnable Documents contained in the procurement document (document T2.1) and identify schedules and component documents that have not been returned or are incomplete.

Note: The List of Returnable Documents records everything the employer requires a tenderer to submit with his tender submission.

- 2) Request tenderers to complete incomplete documents only if such information does not change or affect their competitive position, within a reasonable period of time, so that their tenders are capable of being evaluated.

Note: Tenderers may not provide additional information that is integral to the tender offer i.e. amend their financial offer (methods 1 to 4), preferences claimed (Method 2 or 4) or quality offered (method 3 or 4).

- 3) Record what is incomplete in each tender offer i.e. what is incomplete regarding the financial offer, quality offered or preference claimed.
- 4) Confirm that tenderers took any addenda that were issued into account in their submission.

Tenderer's obligations

- Clause F.2.18 – Provide other material

Tenderer's obligations

- Clause F.2.1 – Acknowledge addenda

Tenderer's obligations

- **End note 2** Clause F.2.1 – Eligibility
- **End note 3** Clause F.2.7 – Clarification meeting
- Clause F.2.10 – Pricing the tender offer
- Clause F.2.11 – Alterations to documents
- **End note 4** Clause F.2.12 – Alternative tender offers
- Clause F.2.13.1 – Submitting a tender offer
- Clause F.2.13.4 – Submitting a tender offer
- Clause F.2.19 – Inspections, tests and analysis
- **End note 5** Clause F.2.20 – Submit securities, bonds, policies etc.
- Clause F.2.23 - Certificates

Employer's undertakings

- Clause F.3.8 – Test for responsiveness A material deviation or qualification is one which, in the employer's opinion, would:
 - a) Detrimentially affect the scope, quality, or performance of the works, services or supply identified in the scope of work,
 - b) Significantly change the employer's or the tenderer's risks and responsibilities under the contract, or
 - c) Affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.

FORM OF OFFER AND ACCEPTANCE

Offer

.....
Signed (tenderer)

Acceptance

.....
Signed (employer)

Schedule of deviations

3.3 Determine whether or not tender offers are responsive

- 1) Confirm compliance with all the requirements of the Standard Conditions of Tender, i.e. that:
 - Eligibility criteria are complied with;
 - There are no material changes in the capabilities of a prequalified tendering entity, if applicable;
 - The tenderer attended compulsory site/clarification meetings, if any;
 - The tenderer has observed pricing instructions;
 - Alterations, if any, comply with instructions;
 - Conditions attached to alternative tender offers where alternative tenders have been submitted;
 - The tender offer covers the scope of work contained in the procurement document, and, where applicable, meets the performance or functional requirements of the specifications or is equivalent in performance to that specified;
 - The tenderer has signed the Form of Offer and Acceptance;
 - Access to premises for inspections, tests and analysis as provided for in the Tender Data was provided;
 - Each organisation has only submitted one tender;
 - The securities, bonds, guarantees, policies and certificates of insurance required at tender stage have been submitted; and
 - The certificates identified in the Tender Data have been submitted.
- 2) Identify areas on non-compliance with the terms, conditions and scope of work and determine if any deviation is material using the test for material deviation provided in clause F.3.8.
- 3) Review all qualifications made to the offer and determine if any of them are material using the test for material qualification provided in clause F.3.8.
- 4) Declare tender offers non-responsive and reject them as such should they:
 - fail to comply with the requirements of 1) above;
 - fail to provide additional information that is requested by the due date (see clause F.2.18);

Note: Clause F.2.2.17 requires tenderers to clarify aspects of their tender after submission and clause F.2.18 requires tenderers to provide additional material relating to the evaluation of tender offers if called upon to do so.

End note 6

End note 7

- not have a signed and completed the form of offer and acceptance; or
 - contain material deviations or qualifications.
- 5) Record reasons for declaring a tender to be non-responsive.

3.4 Evaluate tender offers

- 1) Identify parameters included in the Returnable Documents that have a bearing on the financial offer and quantify their impact on the financial offer, e.g. life cycle costs, contract period, requirement for price escalation etc.
- 2) Reduce all tender offers to a common base i.e. to comparative offers.
- 3) Judge the reasonableness of financial offers and reject all tender offers with unrealistic financial offers.

End note 8

End note 9

National Treasury

SCM 2 of 2006: Prohibition of the use of cost estimates as benchmarks

A bid is regarded as being acceptable if:

- a) The bidder completed and signed all the prescribed bid forms to enable the principal to evaluate the submitted bid;
- b) The bidder submitted the required tax clearance certificate and other clearance/registration forms as prescribed by various Act and/or in the bid documentation; and
- c) The bidder has the necessary capacity and ability to execute the contract.

Bids should only be looked over in accordance with the evaluation criteria stipulated in the bid document. When any bid is passed over or is regarded as non-responsive, the reason for passing over such bid must be defensible in a court of law. Examples in this regard include negative banking reports, non-submission of tax clearance certificates, not having the necessary capacity and/or capability and being listed on the Register for Tender Defaulters.

Deviation by more than a predetermined percentage from the cost estimates of the project/commodity cannot be regarded as a justifiable reason for the rejection of a bid and has, therefore not been approved by the National Treasury as an evaluation norm or criteria.

Employer's undertakings

- Clause F.3.11 – Evaluation of tender offers

Clause F.3.11 – Evaluation of tender offers provides for 4 evaluation methods:

- Method 1:** Financial offer
- Method 2:** Financial offer and preferences
- Method 3:** Financial offer and quality
- Method 4:** Financial offer, quality and preferences

The tender data states which method is applicable for a given tender.

- 4) Confirm that tenderers are eligible for the preferences claimed in the preference schedule or the reasonableness of any tendered contract participation goal (or both) (no preferences may be granted to tenderers who submit incomplete claims for preferences).
- 5) Score the financial offer of all responsive tender offers received to two decimal points using the appropriate formulae.
- 6) Score quality for each of the categories stated in the Tender Data and calculate the total score for quality and record score (score incomplete quality submissions as far as they may be scored).
- 7) Eliminate tender offers that do not score the minimum number of points for quality stated in the Tender Data (see F.3.11.1).
- 8) Award tender evaluation points for the category of preference or in proportion to the tendered contract participation goal to each eligible tenderer (or both), in the manner described in the relevant Preferencing Schedule.
- 9) Total tender evaluation points in accordance with requirements in the Tender Data and rank tenderers from highest to lowest score.

Employer's undertakings

- Clause F.3.7 – Grounds for rejection and disqualification

End note 10

A tenderer can be rejected on technical grounds, for not having the capability and capacity to undertake the work or failing to satisfy legal requirements. There are no other grounds for declining a tender apart for conflicts of interest unacceptable commercial risk or for a breach of the standard conditions of tender.

End note 11

Employer's undertakings

- Clause F3.13 – Acceptance of tender offer

Employer's undertakings

- Clause F.3.9 – Arithmetical errors, omissions and discrepancies

End note 12

3.5 Determine if there are any grounds for disqualification

Determine whether or not the highest ranked or scoring tenderer has engaged in corrupt or fraudulent practices and if so, instantly disqualify him or her.

- **Corrupt practice** means the offering, giving, receiving or soliciting of anything of value to influence the action of the employer or his staff or agents in the tender process; and
- **Fraudulent practice** means the misrepresentation of the facts in order to influence the tender process or the award of a contract arising from a tender offer to the detriment of the employer, including collusive practices intended to establish prices at artificial levels

3.6 Determine acceptability of preferred tenderer

- 1) Confirm that the highest ranked or scoring tenderer (preferred tenderer):
 - Is not under any restrictions, or has principals who are under any restrictions from participating in public sector procurement;
 - Can demonstrate that he or she possesses the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel to perform the contract;
 - Has legal capacity to enter into a contract;
 - Is not insolvent, in receivership, bankrupt or being wound up, or has its affairs administered by a court or a judicial officer, has suspended its business activities, or is subject to legal procedures in respect of any of the foregoing;
 - Satisfies legal requirements; and
 - Does not have conflicts of interest which may impact on his or her ability to perform the contract in the best interests of the employer.
- 2) Review bill of quantities or pricing schedules of the preferred tenderer, if any, for arithmetical errors, omissions and discrepancies in accordance with the provisions of clause F.3.9 and, if relevant, clarify if tendered or corrected price is to apply. **See inform practice note #2: Correcting arithmetical errors in tenders for further guidance.** (Repeat actions from activity 3.5 onwards if competitive position changes as a result of arithmetical corrections).
- 3) Perform a risk analysis on the preferred tenderer to ascertain if any of the following might present an unacceptable commercial risk to the employer:
 - Unduly high or unduly low tendered rates or amounts in the tender offer;

Note: The reasonableness of the total price tendered is dealt with in 3.4 (see end note 9). The risk analysis in 3.3 and 3.6 relates to individual tendered rates and cost parameters such as those contained in the NEC3 Engineering and Construction Contract's Schedule of Cost Components.

End note 13

Employer's undertakings

- Clause F.3.10 – Clarification of a tender offer

Employer's undertakings

- Clause F.3.11 – Evaluation of tender offers

End note 14

A tender evaluation report should as a minimum contain:

- a) The contract number and description,
- b) An outline of the procurement strategy that was adopted, i.e. the targeting, contracting and pricing strategy and the procurement procedure, as relevant,
- c) The tender validity expiry date and the tender closing date,
- d) The date of advertisement and the place where advertised,
- e) The method of tender evaluation (method 1, 2, 3 or 4),
- f) The number of tenders received and the number of responsive tenders,
- g) The name of the recommended tenderer and key aspects of the recommended tenderer's offer,
- h) The cost estimate (budget) prepared ahead of the tender,
- i) The parameters used for scoring tenderers and the score assigned to each tenderer in respect of each component of the evaluation that is evaluated, and
- j) The reasons for rejecting or overlooking a tenderer.

See cidb Best Practice Guideline A3: Evaluating tender offers for further information

Clause F.2.16 Tender offer validity

Clause F.2.16 holds tender offers valid for acceptance for a period stated in the tender data. The employer is free to request the tenderer to extend the validity period should this be necessary. The tenderer is not, however obliged to extend the validity period. It is unfair to hold a tenderer for lengthy periods without providing them with an opportunity to withdraw their tender or extend the validity of the tender with or without provisions for price escalation.

The financial value of the tender offer of any tenderer extending the validity period of his tender offer subject to price escalation may require that the financial offers of all tender offers received be brought back to a common basis and be re-evaluated in terms of clause F.3.11.

- Contract data provided by the tenderer; or
 - The contents of the tender returnables which are to be included in the contract.
- 4) Approach tenderer to amend any part of the tender submission that presents an unacceptable commercial risk, if relevant.
 - 5) Clarify any matter that could give rise to ambiguity in a contract arising from the tender offer.
 - 6) Recommend highest ranked tenderer, or the tenderer with the most evaluation points for the award of the contract or if found to be unsatisfactory, undertake an analysis on the next highest ranked tenderer and so on until such time as a tenderer satisfies the risk assessment.

3.7 Prepare a tender evaluation report

Prepare tender evaluation reports, preferably using the following headings and appropriate forms:

- Section 1: Summary
- Section 2: An overview of the tender evaluation process
- Section 3: Tender evaluation forms
- Section 4: Reasons for the elimination of tenderers
- Section 5: Recommendations for the award of the tender

3.8 Confirm the recommendation contained in the tender evaluation report

Submit tender evaluation report to persons identified in the employer's procurement policy for their confirmation of the recommendation for the award of the contract.

Clause F.3.4 – Opening of tender submissions

Clause F.2.1 – Eligibility

Clause F.2.7 – Clarification meeting

Clause F.2.12 – Alternative tender offers

End notes

End note # 1: Where tenders are not opened in public, this sub-clause should be replaced in the Tender Data with wording to the effect that the total of prices, preferences claimed and time for completion (if any) for the main tender offers received will be published and made available to tenderers. Measures will need to be put in place to ensure that late tenders are not received or tender submissions are tampered with or changed after the closing time for tenders. Such tender submissions should be opened not more than one week after the closing time for tenders, in the presence of not less than two persons representing the employer and one other person who is independent of the employer, named in the procurement documents.

Where contracts are not awarded in totality to a single tenderer, the recording of the total of prices is not required. Where defined portions of contracts may be awarded to multiple tenderers and such portions can be readily totalled in the tender submission, these totals should be recorded.

End note #2: Failure to satisfy eligibility criteria is a breach of the conditions of tender and as such results in instant disqualification.

End note #3: Employers should obtain the names and addresses of all who attend compulsory clarification meetings so that any clarifications or addenda may be simultaneously sent to all prospective tenderers. Measures need to be put in place to accurately record the names and contact particulars of all potential tenderers who drew tender documents where no compulsory meeting is held. Should this not be done, it will be impossible for the employer to issue addenda in terms of clause F.3.2.

Minutes of any such clarification meetings should be taken, recording all requests for clarification received and responses thereto, without identifying the sources of the requests. The minutes of such meetings should be promptly distributed to those attending the meetings and, if necessary, to all tenderers who draw procurement documents.

End note #4: Clause F.2.12 establishes requirements for the submission of alternative tenders to ensure that the acceptance of such tenders does not compromise the competitive process. The criteria upon which an alternative offer is to be based needs to be indicated in the Tender Data. Alternatively, the criteria that such an offer needs to satisfy in order to be accepted by the employer needs to be stated.

The Tender Data should, where relevant, indicate what needs to be submitted with the alternative tender offer and any allowances

Clause F.2.20 – Submit securities, bonds, policies etc.

Clause F.2.17 – Clarification of tender offer

Clause F.2.18 – Provide other material

that the tender should make in the alternative offer to cover the employer's cost in evaluating such proposals. For example, in the case of an alternative bridge design, tenderers might be required to submit calculations, drawings and all other pertinent technical information as well as modified or proposed pricing data including an amount to cover the employer's cost of confirming the acceptability of the detailed design before it is constructed.

End note #5: Clause F.2.20 permits employers to obtain all the required securities, bonds, guarantees, policies and certificates of insurance identified in the contract data prior to the formation of the contract should this be necessary. This clause permits the employer to require that such documentation be finalised and submitted prior to the formation of the contract. Many standard forms of contract establish requirements for finalising and submitting such documentation within a specified time period after the commencement date of the contract. Failure to do so constitutes a breach of the contract.

End note #6: Clause F.2.17 obligates tenderers to clarify aspects of their tenders, when requested to do so, and to make any amendments to the tender without changing the competitive position of tenderers. The employer should manage the clarification procedure in such a way so as not to give any tenderer an unfair advantage over other tenderers. Tenderers may not use clarification requests as an opportunity to gain an advantage over other tenderers by revising or enhancing their tender offers.

End note #7: Clause F.2.18 allows the calling for additional material relating to the evaluation of tenders after the closing time for submissions. All information which is integral to the tender offer should be submitted with the tender submission, failing which the tender may in terms of clause F.3.8 be declared as being non-responsive and as such be rejected.

Those responsible for compiling procurement documents should clearly identify in the List of Returnable Documents which of the returnable schedules will form part of the contract that may be entered into.

The additional material that is requested should only be requested from shortlisted or preferred tenderers to confirm that they have the capacity to enter into a contract with the employer, to demonstrate that they have the necessary capabilities and capacity to perform the contract or to confirm the acceptability of the product offered and to provide clarity on what is actually offered. Accordingly such additional material may include a breakdown of prices, priced bills of quantities, joint venture agreements, samples and any documentation which demonstrates that the tenderer has the capacity and capability to perform the contract.

End note 8: A comparative offer is defined as the tenderer's financial offer after the factors of non-firm prices, all unconditional discounts and any other tendered parameters that will affect the value of the financial offer have been taken into consideration. A discount which is dependent on the employer adhering to the contractual obligations, e.g. to pay on time, should be regarded as an unconditional discount.

In very low value tenders, tenderers may tender with or without VAT depending upon whether or not they are VAT vendors. In such circumstances, VAT should be removed from the tender offer so that financial offers can be evaluated on a comparative basis as a price advantage cannot be afforded to tenderers who are not VAT vendors.

Where whole life costs are taken into account in the evaluation of tenders, objective criteria must be used to reduce offers to a comparative basis. For example, if a drill twist is purchased to drill holes in a wooden sleeper, tenderers should be requested to submit three samples for testing. In such circumstances, tender offers should be based on the tendered amount divided by the average number of holes a drill twist can drill before it no longer performs its intended function, i.e. cost per hole.

End note 9: A tendered sum may be regarded as being unduly low should it be considered to compromise the ability of a contractor to complete the contract i.e. it presents an unacceptable commercial risk to the employer or the tenderer has insufficient financial capability to perform the contract. A professional estimate or the average price tendered may be used as an indicator (benchmark of market prices) of this, but not as an absolute criterion by which a tender offer may be overlooked. Any decision reached in this regard should be established on a case-by-case basis. An analysis of the fundamental components of project e.g. equipment, materials, labour and supervision may indicate that it is highly improbable that the work can be executed for the tendered amount. Alternatively, the tenderer may have to be called upon to demonstrate his or her ability to complete the contract for the sum tendered in terms of clause F.2.18.

Before rejecting a tender on the grounds that it is abnormally low, the employer should request in writing details of the constituent elements of the tender which it considers relevant, including:

- a) The economics of the construction method, the manufacturing process or the services provided;
- b) The technical solutions chosen or any exceptionally favourable conditions (or both) available to the tenderer for the execution of the work or the provision of the supplies or services;
- c) The originality of the work, supplies or services proposed by the tenderer;
- d) Compliance with the statutory provisions such as those relating to the employment of labour, health and safety etc.

Employer's undertakings

- Clause F.3.7 – Grounds for rejection and disqualification

The employer should verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

End note 10: Clause F.3.7 permits tender submissions to be rejected and tenderers to be disqualified should there be a reasonable suspicion or evidence that a respondent has, or has attempted to, improperly influence the tender processing or has engaged in corrupt or fraudulent practices.

End note 11: Professional service providers are required to provide professional, objective and impartial advice and at all times hold the employer's interests paramount, without any consideration for future work and strictly avoid conflicts with other assignments or their own corporate interests. Conflicts of interest accordingly might arise from prior or current obligations to other employers. In such cases, such tenderers should not be awarded a contract that would be in conflict with their prior or current obligations to other clients, or that may place them in a position of not being able to carry out the assignment in the best interest of the employer.

Conflicts of interest accordingly might arise where a professional service provider responsible for the preparation of procurement documents for an employer submits a tender. If, for reasons acceptable to the employer, it is not desirable to debar a professional service provider who has participated in the development of the scope of work and other such documentation associated with a particular tender, the employer should state in the Tender Data that such a professional service provider is a potential tenderer and that all the information which was made available to and the advice provided by that professional service provider which is relevant to the tender will equally be made available to all potential tenderers upon request, if not already included in the scope of work. The employer should in such circumstances review the outputs of the professional service provider and be satisfied that the procurement document is objective and unbiased having regard to the role and recommendations of that professional service provider.

Conflicts of interest might also arise where a contractor provides supplies or engineering and construction works to a particular project and is then called upon to provide professional services relating to that project.

End note 12: Tenderers may be called upon to tender lump sum tenders with or without bills of quantities (clause F.2.18 enables employers to request that tenderers only submit the tendered sum with their tender submissions and complete bills of quantities only if called upon to do so prior to the award of the contract). Whenever tenderers are required to complete bills of quantities as part of their tender submission, arithmetic errors need to be corrected.

Employer's undertakings

- Clause F.3.9 – Arithmetical errors

Clause F.3.9 deals with the handling of arithmetic errors during the evaluation of tenders and sets out how the employer is to make such corrections when establishing the competitive position of tenderers. It:

- Requires that the price submitted (i.e. the offer), which is made known to interested parties at the opening of tenders, be used as the basis for establishing the competitive position of tenderers in the interests of transparency;
- Streamlines the evaluation process as each and every tender submitted does not have to be checked for arithmetic correctness;
- Removes the responsibility placed on the employer to manage the process of the arithmetic scrutiny of tendered amounts without compromising the integrity of the process;
- Enables employers to request that tenderers only submit the tendered sum with their tender submissions and complete bills of quantities only if called upon to do so prior to the award of the contract; and
- Requires tenderers to take full responsibility for correctly calculating their tender sums.

Allowing the competitive position of tenderers to be determined on the basis of the correction of errors of all tenders received by the employer has the potential to undermine transparency in the procurement process.

This clause requires the employer to notify the most competitive tenderer of any arithmetic errors and to get clarity on what the tender offer is – the sum tendered or the corrected amount. This affords the tenderer the opportunity to comment on the impact of the error on his or her ability to perform the contract in the event of a serious omission or error. If the tenderer elects to be bound by the corrected amount and this changes the competitive position of the tenderer, the procedure will need to be repeated with the highest ranked tender or tenderer with the highest number following the re-evaluation of submissions in terms of F.3.11.

There are two issues that need to be addressed in the evaluation of tenders - what is offered by the tenderer and what is accepted by the employer. Clause F.3.9 merely determines what is offered by the tenderer. What still needs to be addressed is “what is accepted by the employer?”

End note 13: Clause F.3.11 requires that the tenderer with the highest number of tender evaluation points (or highest ranked tender if price only is considered) be recommended for the award of the contract, unless there are compelling and justifiable reasons not to do so. Such reasons may include non-compliance with legislative requirements, a lack of demonstrated capability or capacity to perform the contract, conflicts of interest or the tender offer presents an unacceptable commercial risk to the employer.

Further information may be found in the following documentation contained in the cidb website (see www.cidb.org.za):

- cidb Best Practice Guideline A3: Evaluating tender offers
- cidb Inform Practice Note #2: Correcting arithmetical errors in tenders

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Unduly high rates may expose the employer to disproportionate increases in construction costs should quantities increase or should the rates contained in the bills of quantities serve as the basis for determination of variation orders. On the other hand, unduly low rates may cause the contractor to fail to complete the works. This exposes the employer to considerable risk and increased project costs should the contractor fail to complete the contract. Professional judgement is required to assess these risks.

End note: 14 Clauses F.2.17 and F.3.10 deal with the clarification of tender offers after the submission of the tender. Clause F.2.17 does not preclude the negotiation of the final terms of the contract with a preferred tenderer following a competitive selection process, should the employer elect to do so.

The tenderer may be approached to amend any part of his tender submission that might, in the opinion of the employer, present an unacceptable commercial risk, provided that such negotiations do not affect the competitive position of the tenderer. Failure to make unacceptable commercial risks acceptable to the organisation might be sufficient grounds for the organisation to reject the tender.

In the event that it is determined that an unacceptable commercial risk to the organisation is present and cannot be made acceptable, a risk analysis should be conducted on the next highest ranked tenderer or the tenderer scoring the highest points after the points have been recalculated, based on the most favourable comparative offer remaining in contention for the award of the contract. The process must be repeated until a tenderer who satisfies the risk analysis is identified.

In a competitive selection process the negotiation of the final contract with the preferred tenderer (i.e. the tenderer with the highest number of tender evaluation points or highest ranked tender) must be confined to the final terms of the contract and must not under any circumstances lead to a change in the competitive position of tenderers. Any of the rates may be amended and adjusted in order to manage commercial risk provided that the tendered sum is not increased. There are two exceptions to this, namely where:

- a) It is believed that the total of prices is considered to be excessive; or
- b) The total of prices is above the budget available for the project and the scope of work needs to be trimmed to reduce the total of prices; or

Where it is believed that the tendered sum is excessive, the employer may request the tenderer to adjust his tendered sum downward. Should a tenderer not elect to do so, the employer may consider the cancellation of the tender, revise the scope of work and call for fresh tenders.