

KNOWLEDGE CENTRE

Evaluation**EV:1**

Relevant Facts or Questions Asked

A Supplier sought guidance as follows:

- I. Clarification is required concerning the procedures and guidelines for addressing potential bias within tender specifications and the overall bid evaluation process. I just want to ensure that all submissions are treated fairly, transparently, and in full compliance with the applicable procurement regulations.
- II. Specifically, we would appreciate guidance on:
 - The appropriate steps to identify and mitigate bias in tender documents
 - Measures to ensure impartiality during the evaluation of bids
 - Relevant provisions within the procurement framework that address allegations of favouritism or unfair treatment.

Advice

Governing Principles

1. The Public Procurement Act, 2015 (as amended) (the Act”) establishes that public procurement must be conducted in a manner that promotes fair and open competition, ensures equal treatment of bidders, secures value for money, and maintains transparency and accountability.

2. Regulation 19(3) of the Public Procurement Regulations 2018 outlines that all qualification criteria specific to the requirement of the particular public procurement shall –
 - (a) be applied equally to all bidders subject to the application of any special and differential treatment measure;
 - (b) be specified in any pre-qualification and bidding documents;
 - (c) in relation to the capacity to perform the procurement contract be limited to criteria designed to demonstrate that a bidder possesses the necessary capacity, including professional and technical qualifications and competence, financial resources, equipment and other physical facilities, managerial capability and experience.
 - (d) not be unduly restrictive or designed to reduce competition; and
 - (e) be determined taking into account the subject, size, complexity and technical requirements of the goods, works or services that are the subject of the procurement contract.

Addressing Bias in Tender Specifications

3. In accordance with section 31 of the Act, a procuring entity shall not establish requirements that discriminate against or among any persons, firms, or entities, or otherwise restrict participation in procurement proceedings, except as expressly permitted under the Act.
4. Bias in solicitation documents most commonly arises where technical specifications are overly restrictive, qualification requirements are disproportionate, or the structure of the requirements favours a particular supplier, whether intentionally or otherwise. These types of biases, where proven, would contravene Regulation 19(3).
5. Procuring entities are therefore required to ensure that specifications are framed in a neutral and performance-based manner, describing the functional or operational requirements of the procurement rather than referencing specific brands, products, or suppliers, unless objectively justified.

6. Qualification and participation requirements must be proportionate to the nature, complexity, and risk of the procurement. Requirements that are excessive or not directly relevant to the subject matter may have the effect of restricting competition and may therefore be inconsistent with section 31 of the Act.
7. Further, pursuant to section 34(3) of the Act, bidding documents are required to clearly set out all relevant requirements, including the description of the procurement, the manner of submission of bids, and the criteria that will be applied in the evaluation of bids.
8. As a matter of good governance, procuring entities should ensure that tender documents are subject to appropriate internal review mechanisms prior to issuance, including technical and procurement oversight where applicable.

Ensuring Impartiality in Bid Evaluation

9. Pursuant to section 35 of the Act, a procuring entity is required to evaluate bids using only the criteria and procedures disclosed in the bidding documents and to apply those criteria strictly as stated.
10. Accordingly, evaluation processes must be conducted in a manner that is objective, consistent, and free from external influence. No new or undisclosed criteria may be introduced at the evaluation stage, and all bids must be assessed using the same methodology.
11. The determination of the successful bid must be based solely on the prescribed evaluation framework, whether on the basis of the lowest evaluated price or the most advantageous bid, as provided for under section 38 of the Act.
12. In assessing bids, procuring entities are required to apply the standard of responsiveness set out in section 36 of the Act, whereby a bid may be regarded

as responsive if it conforms to the requirements of the bidding documents, notwithstanding minor deviations that do not materially affect the substance of the bid.

13. Further, pursuant to section 42 of the Act, a procuring entity shall exclude a bidder from procurement proceedings where that bidder has a conflict of interest or an unfair competitive advantage that is likely to impair the integrity of the procurement process.

14. The confidentiality of the evaluation process must also be preserved. In accordance with section 46 of the Act, information relating to the examination and evaluation of bids must not be disclosed where such disclosure would prejudice legitimate commercial interests or impede fair competition.

Mechanisms for Addressing Allegations of Bias or Unfair Treatment

15. In terms of the options available to the procuring entity, where there is evidence that the evaluation conducted is not in keeping with the published evaluation criteria, any recommendation made by the evaluation committee should be rejected and the evaluation committee should be directed to re-evaluate the procurement in accordance with the published criteria. In circumstances where the breach is such that the entire procurement process is compromised and cannot be saved, sections 41(1)(b) and 44(1)(d) allows for the cancellation of a procurement in circumstances where “the procurement, the bid or the bidder contravenes or is otherwise not compliant with the provisions of [t]he Act or regulations made [t]hereunder”.

16. On the other hand, in terms of options available to a bidder, the Act provides a structured mechanism for addressing allegations of bias or non-compliance in procurement proceedings. Pursuant to section 48 of the Act, an aggrieved bidder may apply to the procuring entity for reconsideration of any action or decision that is alleged to be inconsistent with the Act. Such applications must

be submitted prior to the deadline for submission of bids in relation to the terms of the tender, or during the standstill period in relation to evaluation outcomes.

17. The procuring entity is required to consider the application and issue a reasoned decision within the prescribed timeframe, and such a decision forms part of the official record of procurement proceedings.

18. Where the bidder is dissatisfied with the outcome of the reconsideration, the matter may be referred to the Procurement Review Board pursuant to section 51 of the Act, which has the authority to review the proceedings and take corrective action, including overturning decisions, directing compliance, or awarding compensation where appropriate.

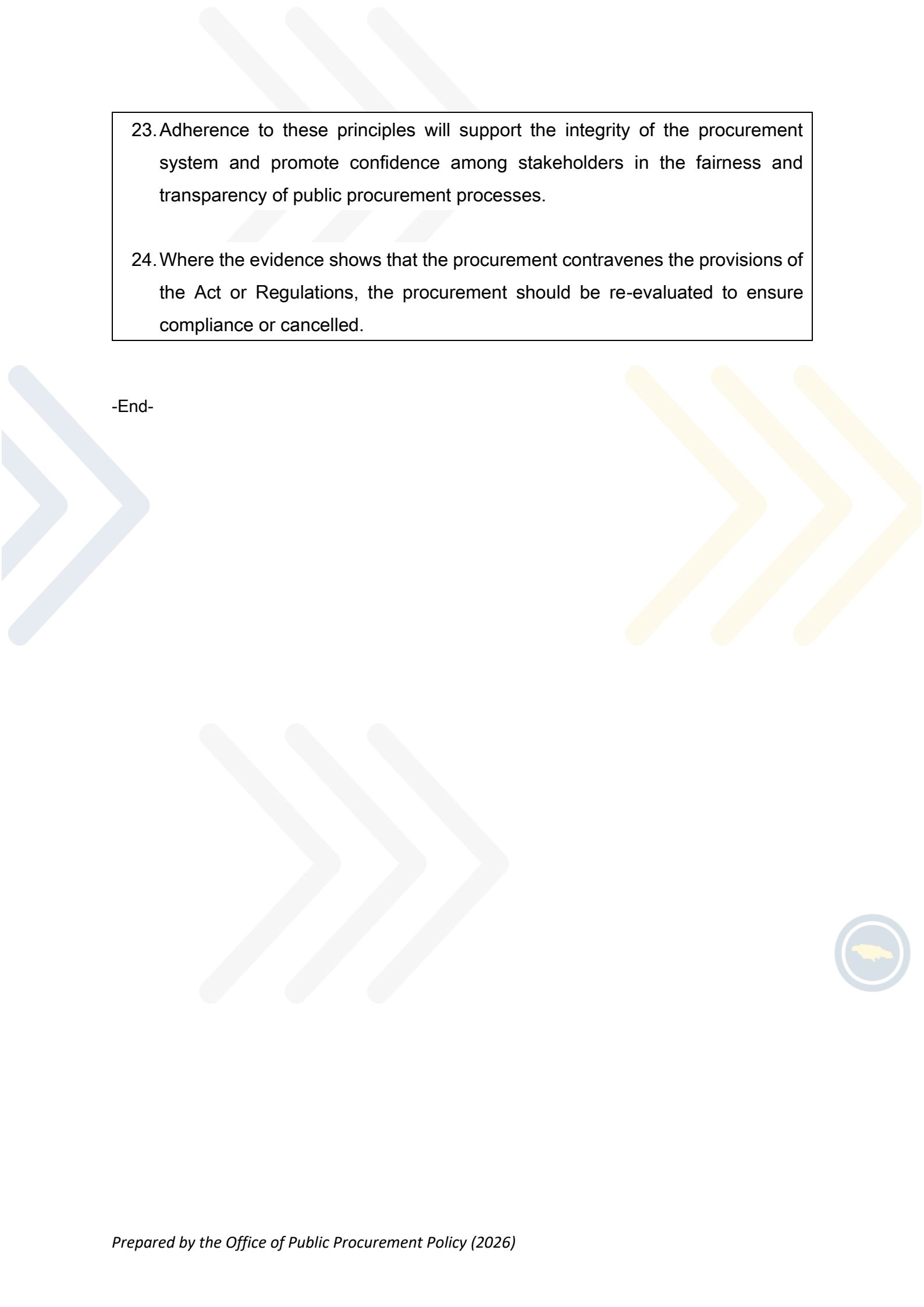
19. Additionally, in accordance with section 44 of the Act, the standstill period provides bidders with an opportunity to review the outcome of the evaluation and to challenge the decision prior to the award of a procurement contract.

20. The Act further establishes offences and civil liability in respect of conduct that seeks to improperly influence procurement proceedings or otherwise undermine their integrity, including acts of corruption, fraud, or misrepresentation, as provided under sections 54 and 56 of the Act.

Conclusion

21. Procuring entities are required to ensure that procurement proceedings are conducted in a manner that is fair, transparent, and consistent with the requirements of the Act and applicable regulations.

22. This requires that tender specifications are neutral and proportionate, that evaluation processes are strictly aligned with disclosed criteria, and that appropriate mechanisms are respected for the review and resolution of any complaints or concerns raised by participants.



23. Adherence to these principles will support the integrity of the procurement system and promote confidence among stakeholders in the fairness and transparency of public procurement processes.

24. Where the evidence shows that the procurement contravenes the provisions of the Act or Regulations, the procurement should be re-evaluated to ensure compliance or cancelled.

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