

# Key Judicial Skills and Competencies

A Handbook for Members  
of Procurement Review Tribunals



**European Bank**  
for Reconstruction and Development

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# I Foreword

Creating an investor-friendly, transparent and predictable legal environment in the countries where the European Bank for Reconstruction and Development (EBRD) operates, is a long-standing initiative of the EBRD. The EBRD is investing in changing people's lives and environment in more than 30 countries, from the Southern and Eastern Mediterranean, to Central and Eastern Europe, to Central Asia. A robust and stable legal environment, including effective dispute resolution framework, is key for investor trust in the economy and development of fair business climate.

Legal reform activities, unique dimension of the EBRD's work, are carried out by the designated Legal Transition Programme (LTP). The LTP is comprised of a group of lawyers carrying out policy advice work, each with a specific area of expertise. The LTP focuses on the development of legal rules, institutions and culture that are a prerequisite of a vibrant market-oriented economy.

The LTP is working in a number of areas most relevant to the EBRD's investment activities and in which the Bank has accumulated experience. These include inter alia strengthening dispute resolution through courts, other mechanisms and promoting sound public procurement policies in the EBRD region. For this reason improving judicial capacity to deal effectively with commercial matters, including complaints and disputes arising from public procurement, is one of the principal aspects of the LTP activities.

Public procurement constitutes a major government economic activity and lack of transparent, effective and efficient public procurement framework, is an issue of concern particularly for countries in transition. To address this issue, the LTP has assumed an active role in developing expertise and promoting the use of international best practices among transition countries.

The development of the present handbook ("Key Judicial Skills and Competencies: A Handbook for Members of Procurement Review Tribunals") was determined by the need to improve the efficiency of public procurement review in the countries where the EBRD operates, and in particular to enhance the capacity of relevant national public procurement review bodies. The case of the handbook was born in 2010, when the EBRD conducted a regional public procurement sector assessment throughout 29 countries where it was operating at that time. The findings of the regional assessment revealed numerous issues related in particular to efficiency and effectiveness of review and remedies procedures. One specific conclusion drawn from the assessments was that while idea of a dedicated public procurement review body is not new in the EBRD region, officials appointed to serve as review body members did not possess the required levels of judicial skills and competencies for administrative tribunal. Thus, enhancing capacity of review bodies is one of the most effective ways to improve the quality of national public procurement systems.

The principal aim of this handbook is to provide officials of procurement review tribunals with advice, guidance and steer regarding their decision-making process in public procurement review cases. The handbook is targeted towards relevant officials/commissioners of public procurement review bodies organised as administrative tribunals, who have considerable procurement knowledge but did not undertake judicial training. It focuses on procedural aspects of procurement complaints, instruments of proceedings, as well as key judicial skills and competencies which should be applied by tribunal members in their day-to-day work. The handbook provides



general advice and practical tips and recommendations, in addition to presenting several case studies and examples to illustrate key points and lessons learnt. Moreover, the handbook discusses the facts and evidence the tribunal review officials should focus on, as well as the rights and obligations of the tribunal officials and participants to the review proceedings. The handbook would help relevant officials to better understand the underlying principles of procedural fairness and other key concepts for procurement review proceedings.

The handbook is based on standards for review of public procurement promoted by UNCITRAL Model Law on Public Procurement and the EU Remedies Directive and best practice of judicial and quasi-judicial public procurement review authorities in different countries, including European countries as well as common law countries, such as Australia, New Zealand, Canada and the USA. Although the practice of quasi-judicial and judicial authorities in common law countries may seem to be very different from the practice of authorities from civil law countries, due to their different legal systems, the basic and underlying principles of administrative procedure and skills, that should be applied in the decision-making process, are also relevant. These skills, approaches to the decision-making process and principles, applied in administrative procedure, are to a great extent common to both legal systems. Relevant officials are encouraged to review and study the contents of this handbook and apply the approaches, processes, and methods suggested in it when undertaking public procurement review.

This handbook was prepared within the framework of the LTP capacity building technical cooperation projects, conducted for the EBRD by White & Case, Bratislava, Slovak Republic with contributions from the Austria's Federal Procurement Agency and Poland's National Chamber of Appeal. The handbook was funded by the EBRD Slovak Republic Technical Cooperation Fund.

## II Acronyms

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<b>CE</b>	Conformité Européenne [European Conformity]
<b>COE</b>	Council of Europe
<b>DHB</b>	District Health Board
<b>EBRD</b>	European Bank for Reconstruction and Development
<b>EC</b>	European Commission
<b>ECHR</b>	European Convention on Human Rights
<b>ECJ</b>	European Court of Justice
<b>EGC</b>	European General Court
<b>EU</b>	European Union
<b>GPA</b>	Agreement on Government Procurement
<b>LTP</b>	Legal Transition Programme
<b>LTT</b>	Legal Transition Team
<b>MoD</b>	Ministry of Defence
<b>OECD</b>	Organisation for Economic Co-Operation and Development
<b>SEMED</b>	Southern and Eastern Mediterranean region
<b>USA</b>	United States of America



## III Definitions

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### Administrative tribunal

Tribunals established by the State.

### Body

A body governed by public law means anybody: established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; having legal responsibility; and financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law.

### Business secrets

Include technical information and operational information which is not known to the public, which is capable of bringing economic benefits to the owner of rights, which has practical applicability and which the owner of rights has taken measures to keep secret.

### Concessions

Contracts where the consideration for the works or services to be carried out consists either solely in the right to exploit the work or service, or in this right to exploit together with payment.

### Conflict of interest - actual

A conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.

### Conflict of interest - apparent

Where it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case.

### Conflict of interest - potential

Where a public official has private interests which are such that a conflict of interest would arise if the official would become involved in the relevant (i.e. conflicting) official responsibilities in the future.

### Contracting authority

Means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

### Discretion

A right to act in certain circumstances and within given limits and principles on the basis of one's judgement and conscience.

### E-Procurement

The use of information technology (especially the Internet) by contracting authorities in conducting their procurement relationships with suppliers for the procurement of works, goods and consultancy services required by the public sector.



### Interim measures

When a Court receives an application, it may decide that a Contracting Entity should take certain measures provisionally while it continues its examination of the case.

### Interim order

An order issued pending further directions.

### Legal relevance

The quality of offered evidence whose probative value outweighs its prejudicial effect.

### Logical relevance

The relationship between offered evidence and a fact in issue that suggests such evidence makes the issue more or less public.

### Procedural fairness

The right of a party to be heard and to present arguments to the review proceedings.

### Process economy

Those activities, actions, and operations that involve the production and sale of goods and services which affect the production and development and management of material wealth.

### Public procurement

The process whereby public sector organisations acquire goods, services and works from third parties.

### Public procurement review

Procedures that are intended to guarantee effective remedies for complaints in public procurement.

### State capture

The efforts of firms to shape the laws, policies and regulations of the state to their own advantage by providing illicit private gains to public officials.

### Tribunal

A body outside the hierarchy of the courts with administrative or judicial functions.

### Tribunal member

Member of administrative body in charge of handling public procurement complaints and applying remedies.

### Utilities

A public utility is an entity that furnishes an everyday necessity to the public at large. Public utilities provide water, electricity, natural gas, telephone service and other essentials and may be publicly or privately owned.



## Chapter 1

# Introduction

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## 1.1 Overview

For a number of years the EBRD's Legal Transition Team (LTT) has worked towards improving the capacity of all stakeholders to deal effectively with commercial law matters in the countries where the Bank operates. The EBRD undertakes this important work through its Legal Transition Programme (LTP). The LTP has assumed an active role in developing expertise and promoting the use of new methods and techniques in legal reform in order to share with transition countries international best practice and the requirements of international investors.

One of the primary aims of the LTT - the Bank's dedicated commercial law reform unit - is to assist the countries where the EBRD operates with effective transition to market economies. The LTP, through LTP initiatives, achieves this aim by improving the business climate in the countries where the Bank operates. One of the LTP's objectives is to improve the capacity of all stakeholders to deal effectively with commercial law matters. The rationale for this objective is that predictable, transparent and efficient resolution of trade disputes is critical for the enhancement of democracy, development of market-based economies, creation of a sound investment climate and promotion of economic development and growth - the guiding principles of social and economic transition.

As public procurement legal framework regulates the interaction between public sector purchasers and the market, public procurement legal framework should determine how government's purchasing power is exercised over private, public and third sector enterprises. As public procurement constitutes a major economic activity for all governments, public procurement regulation is an essential supplement to public finance legislation and an essential component of a country's commercial laws.



In some cases disputes of a commercial nature are not heard by courts, but are heard by specialised bodies. This is often the case where specialised review tribunals or review bodies are established to be responsible for hearing complaints and passing decisions related to public procurement.

However, the efficacy and capacity of public procurement tribunals and review bodies within transition countries have been debated and called into question by a number of observers and commentators. This handbook seeks to encourage officials of public procurement tribunals and review bodies of transition countries to examine efficacy regarding the hearing of complaints related to public procurement, and to assess capacity for efficiently undertaking and enforcing national review and remedies procedures.

## 1.2 Public procurement assessment

The Bank conducted its first assessment of the public procurement sector throughout the countries where the EBRD operated in 2010. Following an extension of the Bank's mandate in 2012, the EBRD completed a second public procurement law assessment within four countries where it operates in the Southern and Eastern Mediterranean region. The findings of both assessments highlighted

numerous issues with regards to public procurement processes and in particular review and remedies procedures.

Both assessments were managed by the LTT and delivered as part of the wider LTP. In addition, both assessments aimed to provide a comprehensive benchmark of the public procurement sector from a review of the extensiveness of national public procurement legislation ('law on the books'), combined with a survey of the effectiveness of local public procurement practice ('law in practice'). Appraisal of the efficiency of legal regulation of public procurement processes and the efficacy of review and remedies procedures were included in the review of 'law on the books' and the survey of 'law in practice'.

This appraisal was undertaken to identify elements of law and practice that reduce the efficiency of public procurement, and included legal analysis of a typical review and remedies case resulting from prohibited behaviour of a contracting authority.

### 1.3 Enforcing compliance

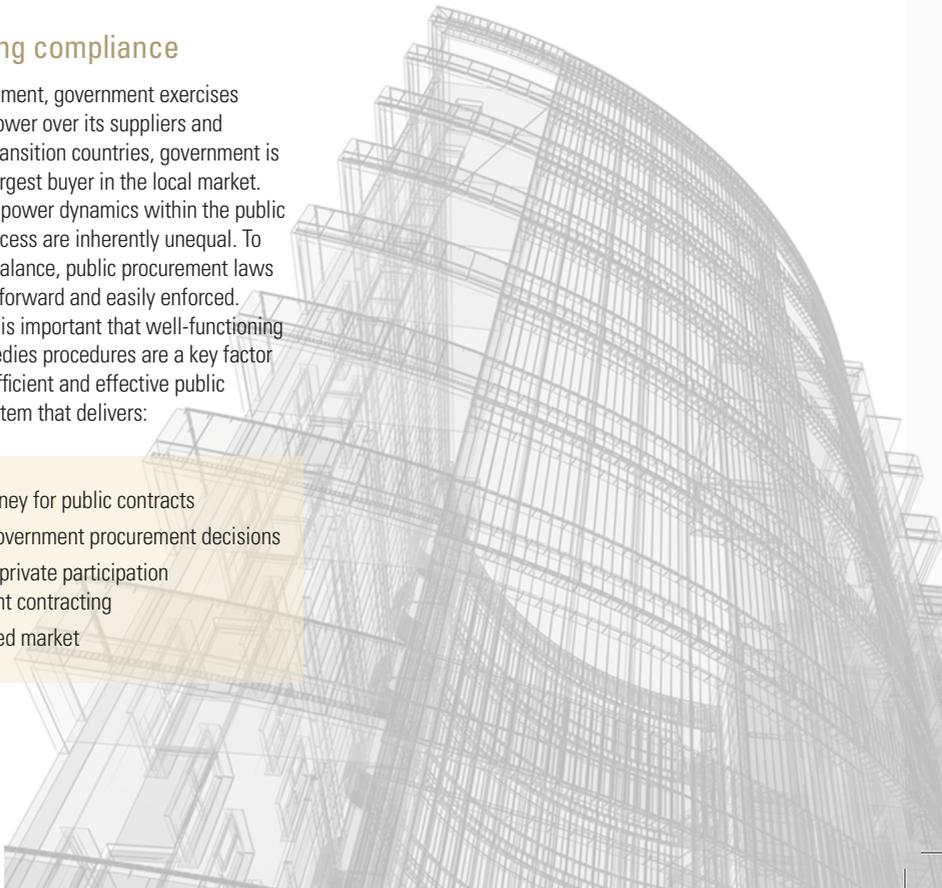
In public procurement, government exercises its purchasing power over its suppliers and contractors. In transition countries, government is frequently the largest buyer in the local market. Accordingly, the power dynamics within the public procurement process are inherently unequal. To address this imbalance, public procurement laws must be straightforward and easily enforced. Consequently, it is important that well-functioning review and remedies procedures are a key factor in ensuring an efficient and effective public procurement system that delivers:

- Value for money for public contracts
- Legality of government procurement decisions
- Widespread private participation in government contracting
- An undistorted market

Enforceability in public procurement, as defined by the EBRD's Core Principles has two principal dimensions, namely:

- Assessing compliance with public procurement rules. This involves reviewing, monitoring and auditing how the system works in practice.
- Applying necessary corrective measures. This includes remedial actions.

Historically, governments addressed the challenge of public procurement enforcement through general fiscal administration, which involved monitoring and auditing procedures. In cases when a serious malfunction of a public entity's procurement officer was post-factum identified through audit, legislation allowed the aggrieved contractor to submit a compensation claim to a civil court. Previously, there were no enforcement procedures available to address problems while the procurement was in progress.



Most recently, governments are making greater use of corrective measures before public contracts are signed. Policy-makers recognise the benefits this can bring in terms of fair competition and value for money. The LTT through the LTP supports these efforts, and is convinced that a dedicated enforcement mechanism - including robust remedial actions - should be a central feature of every public procurement system.

## 1.4 Remedies bodies

The concept of remedies refers to legal measures which can rectify the alleged defects or irregularities in a public procurement process while it is still taking place. Remedies enable the integrity of the public tender to be maintained and should be distinguished from compensation. Compensation is where the irregularity in the public procurement process is not remedied, but is awarded to the aggrieved party once the tender process has finished in lieu of rectification of the irregularity. Most recently, compensation is viewed more as a remedy of last resort, an acknowledgement that the public procurement system did not operate correctly. From a supplier perspective, such remedies are often viewed as suboptimal as the awarded quantum of compensation tends to be modest compared with the value of the majority of public contracts.

Therefore, a remedies system which offers the possibility of halting or undoing the procurement process would be welcomed but will come at a cost. National regulators must take this into account as any review of public procurement and its associated remedial actions can slow down the procurement process and as a consequence raise the administrative burden. Put differently, if the circumstances in which remedies are available are cast too wide, the 'cost' may not be worth it. A minor infraction of the public procurement rules may not deserve interruption or cancellation of the process. In such cases the review and remedies system would become inefficient, open to abuse and criticised. Conversely, if access to review and remedies is too narrowly confined, and serious non-compliance leads only to potential compensation, the credibility of the remedies system will be challenged and the satisfaction of users diminished. Therefore, the challenge for governments' is to strike a balance between effective remedies and the efficiencies derived from allowing the public procurement process to proceed swiftly to its conclusion.

## 1.5 Obstructions to efficient and effective review and remedies procedures

Although both the EBRD and SEMED assessments identified support for the fundamental requirements for public procurement review and remedies procedures, detailed analysis from the LTT identified several areas for concern regarding the functioning of remedies bodies throughout both transition regions. In particular, the analysis revealed that the quality - efficiency and efficacy - of review and remedies procedures was a distinct problem in numerous countries of operation. In addition, the impartiality of several remedies bodies across both regions is in-doubt and as a consequence called into question. A further problem identified in both assessments is that contracting entities receive more favourable treatment than private sector suppliers from tribunals. This treatment is evident regarding the decision-making process itself, and public procurement review decisions in particular.

One major conclusion drawn from both assessments is that public procurement review officials do not possess the required levels of key judicial skills and competencies to effectively and efficiently undertake to international standards public procurement review tribunals. A further conclusion drawn was that most officials are flawed at bringing an independent and objective mindset to disputes between contracting entities and private sector suppliers. Moreover, both assessments also identified evidence of a direct hierarchy interference from government administrations. This unhealthy interference negatively influences the proper functioning and efficacy of the decision-making process crucial to the equitable discharge of a review and remedies body's official duties.

## 1.6 Handbook

The purpose of this handbook is to provide officials of procurement review tribunals with guidance regarding their decision-making process when undertaking review cases and writing decisions. The handbook focuses on the procedural phases of the review tribunal, the instruments of the proceedings, and key judicial skills and competencies which should be applied by commissioners and inspectors in their day-to-day tribunal work.

The handbook provides general advice, practical tips, recommendations and case studies, which should assist officials to better understand the underlying principles of procurement review proceedings. In addition, the handbook identifies the facts and evidence on which tribunal review officials should focus, and the rights and obligations of the tribunal and participants to the proceedings.



The handbook is based on best practices of quasi-judicial and judicial authorities in different countries including European countries as well as common law countries, specifically Australia, New Zealand, Canada and the United States of America (USA). Although the practice of quasi-judicial and judicial authorities in common law countries may seem to be very different from the practice of authorities from civil law countries - due to their different legal systems - the basic and underlying principles of administrative procedure and skills which decision makers should apply in the decision making process are very relevant. These skills and approaches to the decision-making process, and the principles applied in the administrative procedure are common to both legal systems.

Commissioners and inspectors should digest the contents of this handbook and apply the approaches, processes, methods, and interpretations suggested when undertaking review proceedings. However, the advice and recommendations presented are not exhaustive and do not represent the only possible alternatives available. Therefore, commissioners and inspectors should underpin the advice and recommendations presented and use their own judgment, knowledge, common sense, and experience when deciding decisions on tribunal cases.

## 1.7 Structure

The handbook is presented in 8 chapters.

**This chapter** served as an introduction to the handbook and sets the scene for what follows.

**Chapter 2** discusses the main principles of procedural fairness and oral hearings, and describes procedural fairness rules and their application to review proceedings.

**Chapter 3** highlights issues regarding the types of conflict of interest that can arise for tribunal members, and proposes actions which may be taken in order to avoid or mitigate them. Several case studies are presented and provide practical insight into the day-to-day dealings with issues concerning conflicts of interest.

**Chapter 4** addresses the types of evidence a tribunal may use in practice, and discusses the procedures and methods of obtaining evidence including burden of proof, evidence assessment, admissibility and weight of evidence.

**Chapter 5** examines the protection of confidential information and the methods used to determine information as confidential and in particular the use of the confidentiality test. Types of confidential and non-confidential information, access to and the security of confidential information are considered. Finally, several case studies apply the application of the confidentiality test to a number of practical public procurement scenarios.

**Chapter 6** concentrates on the types of remedies that are available to tribunals. A description of the purpose of individual remedies and situations in which particular remedies are employed is explored.

**Chapter 7** reviews situations in which tribunal members may apply discretion, and the factors and basic steps to be considered when exercising discretion.

Finally, **chapter 8** introduces several approaches to decision writing. The structure of the decision, the use of headings, writing styles and methods for the revision of draft decisions is deliberated.



## Chapter 2

# Procedural Fairness and Oral Hearings

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## 2.1 Overview

The application of procedural fairness should be of utmost importance to all tribunal members in the execution of their duties. The principles of procedural fairness ensure that all parties to the proceedings have a credible opportunity to persuade members of the tribunal of their respective position and secure their desired outcome regarding the case in question. Therefore, the application of the principles of procedural fairness is the foundation on which all public procurement review tribunals should be based. This chapter discusses the principles of procedural fairness and their individual application to tribunal review proceedings. The chapter commences by defining and discussing procedural fairness, listing and examining the key categories of rights regarding procedural fairness and by extension oral hearings. Each of these key categories of rights is examined in detail with scenarios provided to root procedural fairness categories in the context of public procurement review proceedings. Broadly, procurement procedures have one aim - the conclusion of a contract. Procurement procedures are pre-contractual proceedings understood as 'civil rights and obligations' in Article 6 of the European Convention on Human Rights (the "ECHR").<sup>1,2</sup> The ECHR is part of the legal framework dealing with disputes concerning procurement procedures, and is discussed in general terms throughout this chapter in relation to procedural fairness and oral hearings, and specific terms regarding the rights covered by procedural fairness.

## 2.2 What is procedural fairness?

Procedural fairness (or the right to a fair trial) can be defined as the right of a party to be heard and to present arguments to the review proceedings. Principles of procedural fairness in the review procedures should ensure that both the complainant and the contracting authority have a genuine and equal opportunity to influence the tribunal.

A tribunal is an administrative body to which procedural fairness obligations apply. As the tribunal decides on the rights and obligations of the parties to the review proceedings, it is important to recognise that the tribunal members perform a quasi-judicial role, and therefore the tribunal members should see themselves as independent decision makers rather than just administrators of the public procurement review process. Article 6 of the ECHR requires a tribunal to be independent, impartial and established by law. This implies the respective position and attitude of the tribunal and its members.

## 2.3 Which rights does procedural fairness cover?

The ECHR and its relevant case law are considered as the leading standard for procedural rights of parties to legal proceedings. Article 6 of the ECHR states that *"everyone is entitled to a fair and public hearing within a*

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1 ECJ Judgement of 14 February 2008, *Varec* (C-450/06, ECR 2008, p. I-581) paragraph 44 ff.

2 Article 2 paragraph 8 Remedies Directive, Article 2 paragraph 9 Utilities Remedies Directive, and Article 56 paragraph 9 Defence Directive provide that it must be possible to reach judicial review or a court or a tribunal in the meaning of Article 267 TFEU, which presumes that the subject of the case is a civil right

*reasonable time by an independent and impartial tribunal established by law*”<sup>3</sup> The case law relevant to Article 6 of the ECHR defines procedural fairness as a combination of the following rights:

- The right to a public hearing. This includes the right to an oral hearing if there are no exceptional circumstances.
- The right to be heard within a reasonable time.
- The right to be heard by an independent and impartial tribunal.
- The right to a fair hearing. This includes: the right of access to a court, the right to be present at the proceedings, the right to a principle of equality of arms, the right to adversarial proceedings and the right to a reasoned decision.<sup>4</sup>

The following 11 sub-sections discuss individually these rights of procedural fairness.

### 2.3.1 Right to be heard – oral hearing

In addition to having a duty of fairness to the complainant, the tribunal must also ensure that the contracting authority and other persons who may be affected by the decision, for example the tenderer who submitted the best tender, is given an adequate opportunity to present their case at an oral hearing. This includes the right to give oral and written statements at the oral hearing.

In the public procurement context, the oral hearing usually consists of the complainant’s submission of written material to the tribunal and contracting authority. Following the receipt of the complaint, the contracting authority should provide the tribunal with its statement, which should address the subject of the complaint. In addition, the contracting authority shall submit the procurement to the tribunal. The written hearing provides the complainant with the right to receive and comment on the response of the contracting authority to its complaint within a specified period. The same right applies to the other parties of the procedure. For example, the tenderer appointed to be awarded the contract who already has a legally protected position.

Many public procurement tribunals do not provide the complainant with the right to comment on the contracting authority’s statement. This is mainly due to process economy and the significance of the timeliness in the procurement process. However, some states – for example Austria and Germany – provide for oral hearings which allows the complainant to challenge all of the contracting authority’s statements before the tribunal. The holding of a public hearing at a higher instance can alleviate the lack of a public hearing in front of a tribunal. Oral hearings provide a better option for both parties to address the other party’s position. In the light of Article 6 of the ECHR, oral hearings are obligatory unless certain exceptional circumstances occur. These exceptional circumstances include:

- The tribunal decides in first and last instance. The tribunal only decides on legal matters without any complexity, or on technical matters without any complexity.
- In the second instance the oral hearing could be omitted. The oral hearing may omitted if the facts are clear and there has already been an oral hearing in first instance.
- The parties do not demand an oral hearing if they know about their rights.

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<sup>3</sup> Based on established case law to ECHR, administrative proceedings fall under Article 6 regime.

<sup>4</sup> Prepared on the basis of *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights*, Human Rights Handbook No. 3, 2006.

- The tribunal rejects the application because it does not meet formal requirements that cannot be corrected. For example, the application was submitted late.
- The decision is procedural. For example, the case requires the appointment of an expert.

An oral hearing must be open to the public. A public hearing is an essential feature of the right to a fair trial. The public can only be excluded from the hearing in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

### 2.3.2 Right to be informed

Each party should have the right to be informed on the hearings to be held, and informed about the development of the proceedings in order to adequately prepare its argument or to have access to files to enable familiarisation with the other party's statement. To prepare for the oral hearing, parties may copy parts of the procurement file, or be provided with parts of the procurement file by the tribunal. The tribunal may not have to invite the parties to view the files. The parties shall have the right to ask to see the files in adequate time before the oral hearing, allowing the time and opportunity to prepare for the oral hearing.

The complainant shall be allowed to comment and respond to the contracting authority's statement, which may include new information or evidence. The same right should apply to all parties of the review procedure in order to allow each party to defend its rights effectively. The respect for the right to be informed will be observed if the tribunal:

- Holds an oral hearing with the presence of all parties who have an interest in the outcomes of the review
- Holds an oral hearing at least in the presence of both the complainant and the contracting authority
- Provides both parties with the right to access the review proceedings file

If the oral hearing is held the complainant and the contracting authority should have the right to attend the whole hearing to provide an opportunity to respond to all evidence and arguments brought by the other party. The tribunal may end the review procedure after the oral hearing if its outcome(s) suggest that there will be no new arguments or evidence.

### 2.3.3 Right to representation

The complainant and the contracting authority have the right to present their case, or to have their case presented in the review proceedings by a lawyer or another representative of their choice. However, it is subject to national legislation to determine who is entitled to act as a representative. The tribunal may not impose any restrictions on the parties' right to representation unless otherwise provided by law. The duty to appear with a legal representative might be restrictive but may be justified in complex cases. In general, public procurement usually deals with large sums of money and resources, and often requires the treatment of complex legal questions. Therefore, it is possible that representation by legal advisors will be required.



### 2.3.4 Right to present and challenge evidence

The purpose of the right to call evidence is to establish the facts of the case. Only after the facts are clear is it possible to determine how the law will apply to these facts. A corollary of the right to call evidence is that the tribunal should have an appropriate mechanism by which a party can use to require other persons, who have relevant information, to provide it to the party or tribunal.<sup>5</sup> This expresses the principle that the party who 'owns' the evidence shall be obliged to present it to the tribunal, if it is necessary to prove the facts of the case.

The parties are entitled to present any evidence that can prove their case in the review proceedings. This is the tribunal's responsibility to assess and evaluate any evidence that is submitted by the parties and to decide if it helps to establish the basic facts of the case, or if additional evidence is required.

Each party should also have the right to challenge the evidence submitted by the other party and respond to the evidence which is unfavourable to its claims. In the review proceedings the contracting authority is provided with the complaint, and therefore has a reasonable understanding of the complainant's arguments and can challenge the complainant's position. Conversely, the complainant is only provided with the tender documentation or the contracting authority's decision – which forms the basis for its complaint. However, as the contracting authority can present new arguments in its response to the complaint, the complainant is deprived of its full right to challenge the evidence of the contracting authority unless it has the right to respond to these arguments and demand the presentation of all evidence. The public procurement laws of some EU Member States limit the complainant's right to challenge the contracting authority's response. Such a limitation may be in conflict with Article 6 of the ECHR.

### 2.3.5 Right to a reasoned decision

All parties have a right to be informed about the reasons for the tribunal's decision. Stating the reasons for the decision requires summarising the results of the investigation procedure, the arguments for determining the evaluation of the evidence, the facts assumed by the tribunal, and the considerations of the legal issues which have been relevant for the decision.

Therefore, the tribunal should base its decision solely on facts which have been proven by evidence presented by the parties or requested by the tribunal or available within the public domain. For example, technical norms, market practice, information available on the internet, basic information about a particular industry etc... The applicable law shall be mentioned explicitly and the facts subsumed under the legal provisions in order to find legal conclusions. The parties should be able to understand on which grounds the tribunal made the decision. Legal literature suggests that a well reasoned decision minimizes the risk that the decision will be challenged at a later date in a higher court.

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<sup>5</sup> *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p. 46.*

## 2.3.6 Right to applicable law

Tribunal members have to follow the applicable law and apply it consistently in every single case. This is the primary duty of tribunal members. The tribunal must apply the law in compliance with the basic public procurement principles which includes:

- Equal treatment of tenderers
- Non-discrimination of tenderers
- Transparency of procurement procedures
- Effectiveness and economy of the procurement

In addition, the review procedures must be fast, effective and adequate. The tribunal should also consider the general intent of public procurement which aims to enhance value-for-money achieved for the public purse, promote open and effective competition, accountability, and due process of law.

However, a tribunal should not commence the review proceedings if the required fee has not been paid, the submitted documents are incomplete, or if another technical deficiency in the complaint does not allow the tribunal to do so. Best practice in some states provide the complainant with the right to be informed by the tribunal that such deficiencies exist, and be provided with the opportunity to correct such deficiencies within a specified time.<sup>6</sup> Because of the time limits to bring in a complaint, not all deficiencies can be corrected. Complainants should be provided with the right to a decision in all cases, be it in the merits of the case or on formal issues only.

If the tribunal declares the complaint as inadmissible due to non-compliance with the formal requirements, the tribunal shall pass its decision to the complainant and indicate its right to appeal the decision. At the same time, the tribunal shall pass the decision to the contracting authority and all other parties of the review procedure in order to continue the contract award procedure.

Different rules apply if the complaint cannot meet the basic legal requirements. For example, if the complaint was filed after the lapse of the review period, or the complainant was not entitled to file the complaint. In such scenarios, the tribunal is entitled to dismiss the complaint as non-admissible.

## 2.3.7 Right to equal treatment

Article 14 of the ECHR provides for equal treatment of parties, and protects the parties against discrimination. Discrimination occurs when states treat persons differently in equivalent situations without providing an objective and reasonable justification. However, the right not to be discriminated against under Article 14 the ECHR in the enjoyment of the rights guaranteed under the ECHR is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.<sup>7</sup>

Therefore, the tribunal should not only treat the parties equally if the nature of the case is similar, but also to provide both parties in the review proceedings with the same rights. The tribunal should also differentiate among parties whose situation is significantly different when deciding on the merits of the complaint or applying procedural rules against the parties to the same proceedings.

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<sup>6</sup> For example Austria.

<sup>7</sup> ECHR court case – *Thlimmenos v. Greece*, Judgment of 6 April 2000, para. 44.

## Example

Two tenderers' challenge the same decision of the contracting authority in the same procurement procedure independent from each other. The tribunal needs to assess the situation of each complainant separately based on the applicable evidence and position of the respective complainant. This is because it is possible that the first complainant may have issued an admissible complaint and having a good chance to win. Whereas the second complainant evidently has not even submitted an eligible tender. Therefore, these complaints shall be assessed differently.

### 2.3.8 Right to be heard by an independent and impartial review body

Each party is entitled to a hearing by an independent and impartial tribunal, which may be a court. Courts are considered as independent and impartial. If the procurement review body is not a court, it must comply with the requirements of independency and impartiality. A tribunal is considered independent if there is no other entity that can order it how to decide a case, and the members of tribunal are free to decide a case according to their own opinion. However, a tribunal is not impartial if its members have a conflict of interest in the reviewed matter, or have preferences for one of the parties. In such cases, the organisational rules of the tribunal must provide that the person(s) concerned must not participate in the procedure and the decision.

A tribunal will meet the ECHR test for an independent tribunal where the court considers the following:

- The manner of appointment of its members
- The duration of their office
- The existence of guarantees against outside pressures
- The question whether the body presents an appearance of independence<sup>8</sup>

A tribunal is not independent if the government is party to the proceedings and a representative of the government is the hierarchical supervisor of the rapporteur of the tribunal.<sup>9</sup> Appointment by the administration itself does not violate the Article 6 of the ECHR.<sup>10</sup> However, Article 6 of the ECHR is violated if the appointment has the intention to influence of the outcome of the procedure.<sup>11</sup>

Tribunal members should be appointed for a fixed term or lifetime. If members are appointed for a period of six years they are seen as being sufficiently independent.<sup>12</sup> Decisions of the tribunal must be binding, and can only be altered or reversed by judicial authorities.<sup>13</sup> Guidelines are acceptable provided they are not instructions on how to decide certain cases.<sup>14</sup>

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8 *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights, in Nuala Mole, Catharina Harby, Human Rights Handbook No. 3, 2006, p. 30.*

9 *ECHR court case – Sramek v. Austria, Judgment of 22 October 1984.*

10 *ECHR court case – Campbell and Fell v. the United Kingdom, Judgment of 28 June 1984, para. 79.*

11 *Commission – Zand v. Austria, Decision of 16 May 1977, 15 DR 70, para. 77.*

12 *ECHR court case – Le Compte, Van Leuven and De Meyere v. Belgium, Judgment of 23 June 1981.*

13 *Commission – Van de Hurk v. the Netherlands, judgement of 8 April 1994, and Findlay v. the United Kingdom, judgement of 25 February 1997, para. 77.*

14 *Commission – Campbell and Fell v. the United Kingdom, 28 June 1984, para. 79; Sovtransavto Holdings v. Ukraine, judgement of 25 July 2002.*

### 2.3.9 Right to a tribunal established by law

The parties have the right to access a tribunal which has been established by law. Therefore, an ad hoc tribunal or an arbitral court, where the members are appointed by agreement of the parties does not satisfy Article 6 of the ECHR. Establishment by law includes both the establishment itself but also the appointment of members of the tribunal, the constitution of the deciding organs [chambers or senates], and the assignment of the cases. The parties can determine in advance which tribunal, and if applicable which organ of the tribunal will decide their case.

### 2.3.10 Decision within a reasonable time

Article 6 of the ECHR demands the tribunal to decide within a reasonable time on its judgement. The purpose is to put an end to the insecurity as a rapid decision serves legal certainty. The applicant and the contracting authority have an interest that the tribunal decides their case in such time that it still makes sense to continue the procurement procedure. The specifics of procurement procedures demands fast and effective review procedures as stopping the review procedure for too long makes it obsolete. This is because budgets and prices cannot be kept for too long as they become out of date and inaccurate. Therefore, it is also one of the principles of the European remedies directives that Member States ensure that review procedures are led rapidly.<sup>15</sup>

### 2.3.11 Public pronouncement of the judgement

Article 6 of the ECHR states that a tribunal shall pronounce its judgements publicly. This does not necessarily mean the judgement has to be read out in court. It is sufficient if the judgement is made available to the public through other methods. For example, by depositing the judgement in the court registry, or by publishing the judgement on the internet.<sup>16</sup> All judgements must be published in order to replace the public reading in court.<sup>17</sup>

## 2.4 Summary

In this chapter the focus has been to introduce to members of procurement review tribunals the principles of procedural fairness and to discuss their individual application to procurement review proceedings. It is worth noting that the principles of procedural fairness ensures both the complainant and the contracting authority have a credible opportunity to persuade members of the tribunal during the (oral) hearing of their complaint and defence respectively. Article 6 of the ECHR - in addition to requiring a tribunal to be independent, impartial and established by law - seeks to ensure everyone is entitled to a fair and public hearing within a reasonable time frame, and enjoys procedural fairness in its broadest sense.

The case law underpinning Article 6 of the ECHR advocates that procedural fairness in the context of public procurement review tribunals is a combination of a number of rights. These rights include: the right to a public (oral) hearing; the right to be informed on the hearings to be held; the right to legal (other) representation; the right to present and challenge evidence to establish the facts of the case; the right to be informed about the reasons for the tribunal's decision; the right to have tribunal members apply applicable law consistently;

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<sup>15</sup> See e.g. ECJ judgement of 12 February 2004, *Grossmann Air (C-230/02, ECR 2004, p. I-1829)* paragraph 36.

<sup>16</sup> Austria, e.g. publishes all judgements of review bodies in the internet ([www.bva.gv.at](http://www.bva.gv.at); [ris.bka.gv.at/Verg/](http://ris.bka.gv.at/Verg/)).

<sup>17</sup> ECHR court case *Werner v. Austria*, Judgement of 24 November 1997; ECHR court case *Szucs v. Austria*, judgement of 24 November 1997; ECHR court case *Campbell and Fell v. The United Kingdom*, judgement of 28 June 1984.

the right to the equal treatment of parties - provided by Article 14 of the ECHR; the right to be heard by an independent and impartial review tribunal - which may be a court; the right to access a tribunal established by law; the right that the tribunal decides within a reasonable time on its judgement; and, the right that the tribunal shall pronounce its judgements publicly.

Shifting from the opening topic of procedural fairness, and having gained a sense of the rights and obligations of all parties to the review proceedings, a key issue for members of tribunal review tribunals concerns conflict of interest - the subject of the next chapter.



# Conflicts of interest

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## 3.1 Overview

The previous chapter outlined a starting point for review tribunals and points to the need for members of procurement review tribunals to consider their position as independent decision makers and the influences which may lean on their ability to make unbiased decisions. A core requirement of administrative justice is the requirement for tribunal members to be impartial and not influenced or swayed in their decision making process. Given this requirement, an underpinning principle of justice requires the impartiality of decision makers which ensures that decisions are based on objective criteria and are free from the influences of internal and external conflict. Consequently, this chapter seeks to highlight a number of issues regarding conflicts of interest. Several categories of conflicts of interest are listed and explained in both their broadest and deepest sense, with the chapter providing guidance on the identification and disclosure of conflicts of interest. Importantly for tribunal members, actions are proposed which should be assessed and taken where necessary in order to avoid or mitigate identified conflicts of interest. Several detailed case studies are presented to provide practical insight into the day-to-day dealings with issues concerning conflicts of interest. The chapter commences by stressing the importance of impartiality, proceeding to define conflicts of interest in the context of public procurement.

## 3.2 Impartiality and conflicts of interest policy

A central requirement of administrative justice is the impartiality of the decision maker. Impartiality is a principle of justice holding that decisions should be based on objective criteria rather than bias, prejudice, or the preference of one person over another for improper reasons.<sup>18</sup> Impartiality is a fundamental principle of all judicial, quasi-judicial and administrative institutions, and the obligation to be impartial can be found in many codes of ethics for public servants and judges around the world.<sup>19</sup> To obtain the quality of a tribunal as required by Article 6 of the ECHR, impartiality of tribunal members is one of the fundamental requirements.

Conflicts of interest<sup>20</sup> may occur when there is a predisposition not to approach a case with an impartial mind, and there is a danger that the tribunal member might unfairly regard the case with favour (or disfavour) to a party that is subject to the review proceedings. In general, tribunal members have professional roles and personal interests. Sometimes, conflicts of interest cannot be avoided and can arise without anyone being at fault. Therefore, as suggested by the OECD Guidelines, it is necessary to set a clear conflict of interest policy and approach that will cover the following issues:

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<sup>18</sup> <http://en.wikipedia.org/wiki/Impartiality>.

<sup>19</sup> See e.g., *Guidance for Promoting Judicial Independence and Impartiality prepared by USAID, January 2002*, [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacm007.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf), see e.g. also *Model Code of Conduct for Public Officials, Recommendation No. R (2000)10*, adopted by the Committee of Ministers of the Council of Europe Available at [http://www.coe.int/t/dghl/monitoring/greco/documents/Rec\(2000\)10\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Rec(2000)10_EN.pdf). *Codes of Ethics of OECD countries can be found at OECD webpage*. [http://www.oecd.org/document/12/0,3343,en\\_2649\\_34135\\_35532108\\_1\\_1\\_1\\_37447,00.html](http://www.oecd.org/document/12/0,3343,en_2649_34135_35532108_1_1_1_37447,00.html). Other sources for the codes of conduct of CEE and EE countries can be found in the work of Jolanta Palidaukaite, Ph.D., *Codes of Conduct for Public Servants in Eastern and Central European Countries, Comparative Perspective, or European principles for public administration/SIGMA papers Nr. 27* available at <http://www.oecd.org/dataoecd/26/30/36972467.pdf>.

<sup>20</sup> For the purpose of this guide, we use the term "conflict of interest" to also cover bias. "Bias" is a common legal description of some types of conflicts of interest, especially those situations that involve predetermination.

- Definition of the general features of conflict of interest situations
- Identification of specific occurrences of unacceptable conflict of interest situations
- Leadership and commitment to the implementation of a conflict of interest policy
- Awareness that assists with compliance and anticipation of at-risk areas for prevention
- Disclosure of a conflict of interest as soon as it arises
- Partnership with other stakeholders
- Identification of actions necessary to avoid any effects of a conflict of interest and to meet their mandatory obligations<sup>21</sup>

### 3.3 What is a conflict of interest?

The OECD in its Guidelines for managing conflicts of interest in the public service (2005), defines a conflict of interest as *“a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.”*<sup>22</sup>

Therefore, a conflict of interest is not only the situation where there is an unacceptable conflict between an official's interests as a private citizen and his or her duty as a public official, but also those situations where there is an apparent conflict of interest or a potential conflict of interest. The distinguishing element is whether the effect on the exercise of the duties has occurred or could have occurred, or in fact the effect has not occurred, is not occurring, or cannot occur. Several different types of conflicts of interests can be distinguished.

- Actual conflict of interest - a situation in which the private interests of a tribunal member affect, have affected or might have affected the performance of his or her duties and responsibilities as a tribunal member in an incorrect way.
- Apparent conflict of interest - a situation in which the private interests of a tribunal member, prima facie or by their form, seem to affect, have affected or might affect the performance of his or her duties and responsibilities as a tribunal member in an incorrect way. However, in fact, the effect has not occurred, is not occurring and cannot occur.
- Potential conflict of interest - a situation in which the private interests of a tribunal member might in the future cause an actual or apparent conflict of interest to appear, if the official were to be included in certain duties or responsibilities.

The OECD Guidelines also distinguish between actual, apparent and potential conflicts of interest and state that *“an apparent conflict can be said to exist where it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case. A potential conflict of interest arises where a public official has private interests which are such that a conflict of interest would arise*

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<sup>21</sup> OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service (2003), p. 4 available at <http://www.oecd.org/dataoecd/17/23/33967052.pdf>, p. 6, or [www.oecd.org/gov/ethics/conflictsofinterest](http://www.oecd.org/gov/ethics/conflictsofinterest).

<sup>22</sup> See OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service (2003), p. 4. See also OECD/SIGMA Conflict of Interest Policies and Practices in Nine EU Member States: A comparative Review (2005), Sigma papers No. 36 available at [http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=gov/sigma\(2006\)1/REV1&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=gov/sigma(2006)1/REV1&doclanguage=en) and <http://dx.doi.org/10.1787/5kml60r7g5zq-en>.

*if the official would become involved in the relevant (i.e., conflicting) official responsibilities in the future”<sup>23</sup>*

Moreover, case-by-case conflicts of interest and continuing conflicts of interest can be recognised. The OECD Managing Conflict of Interest in the Public Sector Toolkit ('OECD Toolkit') suggests several tools for identifying actual conflicts of interest, apparent conflicts of interest, and potential conflicts of interest.<sup>24</sup>

### 3.3.1 Actual conflict of interest

An actual conflict of interests occurs where the private interest of the tribunal member is of such a quality (e.g. due to a relationship to one of the parties to the proceedings) or quantity (e.g. profits that can be gained by the tribunal member), that it is reasonable to believe that this private interest could improperly influence the decision-making of the tribunal member. An actual conflict of interest is inadmissible and must be avoided. Otherwise, a decision affected by the conflict of private interest of a tribunal member could be challenged before a court.

### 3.3.2 Apparent conflict of interest

As suggested in the OECD Toolkit, an apparent conflict of interest can be as damaging as an actual conflict of interest. Therefore, an apparent conflict of interest should be treated as an actual conflict of interest until all doubts regarding personal interests are known.<sup>25</sup>

### 3.3.3 Potential conflict of interest

As the definition of potential conflict of interest suggests, a personal interest of a tribunal member exists. However, because he or she is not involved in the decision-making process, this conflict of interest is not an issue. The conflict of interest would become an issue if the tribunal member's role changes and he or she becomes involved in the matter.

## 3.4 What is a private interest?

A key term that determines a conflict of interest is 'private interest'. An 'interest' in this context means anything which can have an impact on an individual or group. The term 'private interest' includes not only a tribunal member's personal, professional, or business interests, but also the personal, professional, or business interests of individuals or groups with whom they are closely associated. This can include relatives, friends or even rivals and enemies.<sup>26</sup> These interests may conform with, contain, be based on, or come from the following:

- Property rights and obligations of any kind of nature
- Every other juridical civil relationship
- Gifts, promises, favours, preferential treatment
- Negotiations for future employment during the exercise of the official's function
- Negotiations for any other form of future relationship with a private interest for the official after leaving his or her position

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<sup>23</sup> OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service (2003), p. 4.

<sup>24</sup> OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service Toolkit (2005), p. 23-25.

<sup>25</sup> OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service Toolkit (2005), p. 23-25.

<sup>26</sup> *In whose interests? Preventing and managing conflicts of interest in the APS*, Australian Public Service Commission, 2009, p. 2.  
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- Engagements in private activity for the purpose of profit or any kind of activity that creates income, as well as engagements in profit-making and non-profit organisations, syndicates or professional, political or state organisations and every other organisation
- Relationships
  - Within a family or among individuals who live together
    - in a community
    - ethnic
    - religious
    - recognised [relationships] of friendship or enmity
- Prior engagements from which the interests mentioned in the above letters of this article have arisen or could arise

The above definition of private interests gives clear guidance on situations in which conflicts of private interests exist. Therefore, these guidelines are in line with the recommendations contained in the OECD Guidelines.<sup>27</sup>

### 3.4.1 Types of private interest

Private interest can be divided into four<sup>28</sup> categories.

1. Personal interests include being in a family relationship with the complainant's or contracting authority's representative involved in the procurement in question. Having a personal relationship with the complainant's representatives or the contracting authority's representatives involved in the procurement in question.

All of the types of private interests apply to tribunal members if their relative or close friend has one of these private interests, or if such a relative or close friend could be personally affected by a decision of the tribunal.

2. Political interests include holding another public office which also applies to a relative or close friend if the tribunal member may not hold another public office. Holding or expressing strong political or personal views that may indicate prejudice or predetermination for or against a person or issue.

3. Financial interests include being an employee, advisor, director, or partner of another business or organisation. Having a professional or legal obligation to the complainant or the contracting authority. Owning assets which may be directly or indirectly influenced by the decision, e.g. ownership of land, shares in a company or other investments. Having a promise of future employment, or receiving a gift, hospitality or other benefit from the complainant or the contracting authority or from someone related to the complainant or the contracting authority.

4. Social interests include being a member of a club, society or association. Being a member of a particular religious or ethnic group. Deciding on a matter which deals with the tribunal member's town or village of residence.

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<sup>27</sup> OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service (2003), p. 7.

<sup>28</sup> Examples used in *Managing conflicts of interest: Guidance for public entities, Controller and Auditor General, New Zealand, 2007*, p. 6-7, have been adjusted to the tribunal's situation.

### 3.4.1.1 Personal interests

One of the most problematic issues is to assess what constitutes a personal relationship. That is, which relationships must be taken into account in deciding on the existence of a conflict of interest. Personal relationships can include the following.

Family members. If the decision should have an effect on immediate family members who are the spouse or dependent children of the deciding tribunal member, this would obviously constitute a conflict of interest for the tribunal member and therefore he or she should abstain from deciding that matter.

Relatives. In general, regarding relatives the situation is a bit different. Generally, it will depend on the closeness of the relationship and the degree to which the tribunal's decision or activity could affect them directly or significantly. A relationship could be close, because of the directness of the blood or marriage link, or because of the amount of association. There are no clear rules as these questions involve matters of degree. However, it is wise not to participate if relatives are seriously affected.<sup>29</sup>

Friends and other associates. Similar qualifications apply to friends and other associates. It is unrealistic to expect a member or official to have absolutely no connection with or knowledge of the person concerned. Simply knowing someone or having worked with them or having had official dealings with them will not usually create any problem. However, a longstanding close, or very recent association or dealing might. If the tribunal's decision or activity affects an organisation that a relative or friend is employed by or through, it may be prudent to take into account the nature of their position. It will make a difference whether they are a senior executive or owner, or a junior staff member who is not personally involved in the matter and whom the decision will not personally affect.<sup>30</sup>

### 3.4.1.2 Political interests and political activities

There are no firm rules about the extent to which a tribunal member may appropriately maintain links with groups and activities outside the tribunal. Public interest should take priority in any potential conflict with private activities, and a tribunal member should consider how a third party would view his or her behaviour and how the activity or association might tarnish the integrity of the tribunal.

The overriding principle could be that 'a public office holder should not participate in a political activity, where it may reasonably be seen to be incompatible with the public office holder's duty or impair his or her ability to discharge his or her duties in a politically impartial fashion or cast doubt on the integrity or impartiality of the office.'<sup>31</sup> In the event that the tribunal member is a member or a strong supporter of a political party, his or her political views must remain separate from his or her decision making process as it is an important feature of professionalism and impartiality of the tribunal member. However, it shall not matter if the contracting authority is under the control of his or her 'favourite' party, and as a consequence cause a preferential treatment, or for the competing party cause a negative treatment.

In general public officials should not be engaged in an outside activity that impedes the performance of their official duty, or asks for his commitment, mental or physical, so as to make difficult the performance of his duties, or is a continuation of this duty that infringes in any manner the image of the employee of the public administration. In case of doubt about the qualification of an activity as permissible or not, the tribunal member should consult with the tribunal head. Therefore, tribunal members may get involved in political

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<sup>29</sup> *Managing conflicts of interest: Guidance for public entities, Controller and Auditor General, New Zealand, 2007, p. 19.*

<sup>30</sup> *Managing conflicts of interest: Guidance for public entities, Controller and Auditor General, New Zealand, 2007, p. 19.*

<sup>31</sup> *Information Handbook for Employment Insurance Board of Referees, Employment Insurance Appeals Division, 2010, p. 16.*

activities only as long as it does not impede performance of their duty. Several activities if kept to a permissible extent could be allowed and thus would not create a conflict of interest issue, including:

- Membership of a political party
- Contributing funds to a political party
- Attending political party events, displaying campaign materials, or expressing political views in a public setting<sup>32</sup>

### 3.4.1.3 Social interests – association with community and other organisations

Membership in organisations by active and knowledgeable tribunal members is clearly of benefit to a tribunal. Nevertheless, a tribunal member needs to be aware of the potential problems that membership in such organisations may create. The impartiality of a decision may be doubtful where a tribunal member has expressed his or her views as a member of a non-governmental organisation, and such a matter subsequently comes before the tribunal.<sup>33</sup>

Membership of an organisation might not be the issue. In some circumstances, support for an organisation could be equally compromising, particularly regarding public comments or written statements. Donations to a particular organisation might also be of concern; even anonymous donations could breach the principle. In assessing the character of their involvement, tribunal members should think about how 'a reasonable well-informed observer' might react if such an interest or involvement were made public. Therefore, if the tribunal member provides donations to organisations and these organisations are involved in the review proceedings, he or she should refuse to participate as his or her donations to the organisation in question could give a rise to a conflict of interest.

While tribunal members may belong to a committee or advisory body, which deals with law reform or other legal issues, they should be mindful of any involvement that may include advising on issues which are controversial or inconsistent with their tribunal role. The expression of a conflicting view could diminish respect for such a member and the authority of the tribunal.<sup>34</sup>

### 3.4.1.4 Gifts

For any tribunal member it is prohibited to seek or accept, directly or indirectly any gifts, favours, promises, or preferential treatment given because of his or her position if it could create a conflict of interest. A tribunal member to whom a gift, favour, promise, or preferential treatment is offered should:

- Refuse it and return it to the offeror in any case. If it is impossible to return the offer officially surrender it to the tribunal head or to the nearest superior institution.
- Try to identify the person who offered it and his or her motives and interests.
- Immediately inform the tribunal head or the nearest superior institution about the gift, favour, promise or preferential treatment offered or given, the identification of the individual who offered it, and the circumstances as well as the possible reasons for this event and its relation to his or her duties as a tribunal member.

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<sup>32</sup> *Information Handbook for Employment Insurance Board of Referees, Employment Insurance Appeals Division, 2010, p. 16.*

<sup>33</sup> *Administrative Review Council, Commonwealth of Australia, Guide to Standards of Conduct of Tribunal Members, 2009, p. 30. Copyright Commonwealth of Australia reproduced by permission.*

<sup>34</sup> *Administrative Review Council, Commonwealth of Australia, Guide to Standards of Conduct of Tribunal Members, 2009, p. 31. Copyright Commonwealth of Australia reproduced by permission.*

- If offering is penalised inform the competent authorities including all relevant facts. For example who offered what, for which purpose, in order to enable prosecution authorities to start prosecution.
- Continue the exercise of duty normally, especially regarding the problem for which the gift, favour, promise, or preferential treatment was offered, and continually keep superiors informed about every possible development.
- If the offer is related to the commission of a criminal offence, report it to the organs competent for criminal prosecution.

The OECD guidelines allow for acceptance of certain gifts under special circumstance. For example, gifts in accordance with social customs such as birthdays or festivals, or gifts in recognition of services.<sup>35</sup> Other best practices state that a tribunal member should not accept gifts of any kind where this could reasonably be perceived to compromise the impartiality of the public official.<sup>36</sup> Consequently, the tribunal member should consider:

- The nature and value of the gift
- The person giving the gift and his or her relationship with the tribunal, and the context in which the gift is being given.

This materiality approach has been also adopted by the OECD in its Guidelines and suggests the use of the following checklist when deciding on the acceptance of the gift.

- |          |            |  |
|----------|------------|--|
| <b>G</b> | enuine     | Is this gift genuine and in appreciation for something I have done in my role as a public official, and not requested or encouraged by me?   |
| <b>I</b> | ndependent | If I accept this gift would a reasonable person have any doubt that I could be independent in doing my job in the future, especially if the person responsible for this gift is involved or affected by a decision I might make? |
| <b>F</b> | ree        | If I accept this gift would I feel free of any obligation to do something in return for the person responsible for the gift or for his or her family or friends or associates?   |
| <b>T</b> | ransparent | Am I prepared to declare this gift and its source transparently to my organisation and its clients, to my professional colleagues, and to the media and the public in general? <sup>37</sup>                                     |

The tribunal member should only continue to deal with the case if he or she can answer all of the above questions in the affirmative. Otherwise the tribunal member should refrain from the case and cause his or her substitution.

### 3.5 Prejudice and predetermination

Tribunal members are entitled to have their own personal views. Indeed tribunal members may

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<sup>35</sup> *OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service Toolkit (2005)*, p. 45.

<sup>36</sup> *Administrative Review Council, Commonwealth of Australia, Guide to Standards of Conduct of Tribunal Members, 2009*, p. 34. Copyright Commonwealth of Australia reproduced by permission.

<sup>37</sup> *OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service Toolkit (2005)*, p. 43.

often be expected to use their own particular opinions or ideas in carrying out their work. However, having strong views about a matter can create a risk of prejudice or predetermination. Tribunal members might be regarded as being involved in a conflict of interest (biased) if their behaviour or beliefs indicate (especially but not necessarily when expressed in a public statement) that they have made up their mind about a matter before it came to be heard or deliberated. Put differently, tribunal members have a 'closed mind' or 'fixed position' and are not willing to consider all relevant information and arguments.<sup>38</sup> Such types of prejudice and predetermination would violate their obligation to be impartial in their decision making process, and thus would give rise to a conflict of interest.

General personal factors such as a tribunal member's ethnicity, religion, national origin, age, political or philosophical leanings, wealth, or professional background will generally not constitute predetermination unless it gives rise to a strongly held personal belief that directly relates to the matter being considered. Only then should it be considered as a conflict of interest.<sup>39</sup>

### 3.6 Dealing with conflicts of interest

The tribunal member has the duty to resolve a conflict of interest due to his or her private interests or other conflicting interests as soon as possible after he or she becomes aware of it. If the tribunal member is uncertain about the existence of a conflict of interest he or she should consult with the tribunal head. There are two aspects to dealing with particular situations. Firstly, identifying and disclosing the conflict of interest which is primarily the responsibility of the tribunal member, and registering or declaring in writing a potential conflict of interest to the tribunal head. Secondly, deciding which action, if any, is necessary to best avoid or mitigate any effects of the conflict of interest. This is the responsibility of the tribunal.

In all situations when a tribunal member recognises a conflict of interest, he or she should inform the tribunal head and try to resolve the issue promptly. This is not only necessary to protect the impartiality of the tribunal but also protects the tribunal member from personal problems.

#### 3.6.1 How to identify a conflict of interest?

It is important to focus on the overlap between the two interests. Put differently, whether the member's other interest has something to do with the particular matter that is being considered by the tribunal.

Therefore, it is better to err on the side of openness when deciding whether the tribunal member should disclose potential conflicts of interest. However, many situations are not clear-cut. If a tribunal member is uncertain about whether or not something constitutes a conflict of interest, it is safer and more transparent to disclose the interest to the tribunal head, and according to advice of the tribunal head to disclose to the remaining tribunal members at the board meeting.

The matter is then out in the open and the expertise of other tribunal members can be used to judge whether the situation constitutes a conflict of interest, and whether it is serious enough to warrant further action.<sup>40</sup> The tribunal member concerned should not participate in a decision on his or her potential conflicts of interest.

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<sup>38</sup> *Managing conflicts of interest: Guidance for public entities, Controller and Auditor General, New Zealand, 2007, p. 20.*

<sup>39</sup> *Managing conflicts of interest: Guidance for public entities, Controller and Auditor General, New Zealand, 2007, p. 20.*

<sup>40</sup> *Managing conflicts of interest: Guidance for public entities, Controller and Auditor General, New Zealand, 2007, p. 27-28.*

### 3.6.2 How to disclose a conflict of interest?

In the exercise of his or her public duties or competencies, on the basis of his knowledge and in good faith, every official should be obliged to make a self declaration in advance on a case -by-case basis of the existence of his or her private interests that might become a cause for the emergence of a conflict of interest. The official should complete a case-by-case declaration of private interests, whenever this is requested by their superior or by a superior institution. As a rule the declaration should be requested and made in advance.

In cases of conflicts of interests, a tribunal member should be obliged to disclose the conflict of interests in advance and inform the tribunal head immediately who shall decide in this respect and exclude the tribunal member from the decision-making process.

If the tribunal member is aware of the fact that a colleague or the tribunal head has an interest, he or she is obliged to inform the tribunal head or the superior authority if the tribunal head is involved.

If a matter in which a tribunal member has an interest arises at a formal meeting, the tribunal member should declare at the meeting that he or she has an interest in the matter before the matter is discussed. This declaration should be recorded in the minutes of the meeting. In other situations the matter should be raised and discussed with the relevant person as soon as the potential for a conflict of interest is identified.<sup>41</sup> The tribunal member should refrain from dealing with the matter immediately.

If the parties in the review proceeding file a request for the exclusion of the tribunal member, the tribunal head shall decide on this matter. In the event that the parties request the exclusion of the tribunal head, this request will be evaluated by the tribunal, which will be presided over by the deputy tribunal head.

### 3.6.3 How to avoid or mitigate conflicts of interests?

The principle of the impartiality of a tribunal requires that tribunal members should be excluded from participation in review proceedings whenever they have a private interest in the decision. For example, a tribunal member may be personally concerned or may be a relative of a person to be affected by review proceedings. In such a case it is appropriate for the tribunal member to maintain his or her position but not to participate in any decision making process on the matters affecting him or her. This can be done by abstaining from voting on decisions, withdrawing from discussions of relevant proposals and plans, and not receiving documents and other information related to his or her private interest.

As there is a statutory prohibition from participating in a review proceeding if a conflict of interest exists, there are no alternative sanctions available and the prohibition to participate is the sole remedy. However, in the event of future legislative changes or specific types of private interest that would not sanction a tribunal member's conflict of interest with automatic exclusion from participation, the tribunal may have the right to determine the appropriate next steps and to direct the affected member accordingly. When deciding on appropriate steps the tribunal member should carefully assess the seriousness of the conflict of interest, and the mitigation options available.

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<sup>41</sup> *Managing conflicts of interest: Guidance for public entities, Controller and Auditor General, New Zealand, 2007, p. 28.*

The mitigation options available include:

- Taking no action
- Enquiring as to whether all affected parties (contracting authority and complainant) will consent to the member's involvement
- Seeking a formal exemption (if such legal power applies) to allow participation in the decision making
- Imposing additional oversight or review over the tribunal member
- Withdrawal from discussion or voting on a particular item of business at a meeting
- Exclusion from a committee or working group dealing with the issue
- Re-assigning certain tasks or duties to another person
- Agreement or order of the tribunal head not to do something
- Withholding certain confidential information, or placing restrictions on access to information
- Transferring the tribunal member temporarily or permanently to another position or project
- Relinquishing the private interest<sup>42</sup>

If a conflict of interests arises, the tribunal member should refrain from dealing with the matter, because even slight impressions of a distortion of the impartiality to third parties may damage the credibility of the tribunal.

### 3.6.4 Legal impact of not-dealing with conflict of interest

In the event that the tribunal does not address properly the conflict of interest issue and the tribunal's decision is adopted in the context of an actual or apparent conflict of interest, such a decision may be challenged in court. If the existence of the conflict of interest is proven, the court would declare the decision as invalid. Therefore the decision would have no legal effect.

### 3.6.5 Appointment and employment after leaving office

The OECD Toolkit<sup>43</sup> recommends that for a two-year period of time after leaving the tribunal, the former tribunal member should not represent any person or organisation in a conflict or commercial relationship with the public administration for the duty that he or she has performed or is in continuation.

## 3.7 Austrian example

In Austria the relevant provisions for review authorities are found in the General Administrative Procedure Act 1991. The Act orders that in exercising their duties, administrative officers shall abstain to exercise their office and cause to have appointed a substitute. The relevant cases are:

1. In matters in which they themselves, one of their relatives or a person under their guardianship is involved. The law defines relatives as the spouse, the relatives in straight line and relatives of second, third and fourth degree in the collateral line, the in-laws in straight line and the in-laws of second degree in the collateral line, the adoptive parents and adoptive children and foster parents and foster children, persons living together in partnership for life as well as children and grandchildren of one of these persons

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<sup>42</sup> The list of options was prepared based on – *Managing conflicts of interest: Guidance for public entities, Controller and Auditor General, New Zealand, 2007, p. 31. A similar list of options for the resolution of conflict of interest issues can be found in – OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service (2003), p. 8.*

<sup>43</sup> *OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service Toolkit (2005), p. 41.*

in relation to the other person, as well as the registered partner. The capacity of a person as relative founded on marriage continues even if the marriage has ceased to exist.

2. In matters in which they were or still are appointed representative of a party.
3. If there are any other important reasons resulting in doubts as being fully unbiased.
4. In an appeals proceeding if they had been involved in issuing the ruling appealed against or the preliminary decision on appeal.

Cases 1, 2 and 4 cause the administrative officer to cease dealing with the matter immediately without any further inquiries. The officer simply has to notify his superior and pass the file to his or her deputy. Case 3 requires further inquiries which should be undertaken with a superior. The officer has to indicate the conflict of interests on his own effort as soon as it is recognised. By these provisions Austria seeks to provide the impartiality of decision makers. If an administrative officer violates this provision and ignores a conflict of interest, their decision can be set aside just out of this reason, and disciplinary measures can be taken.

### 3.8 Case Studies

The following case studies seek to illustrate how conflicts of interest can arise, and how these conflicts of interest can be managed in practice. The case studies presented should not be seen as prescriptive for any given situation, as they seek to illustrate examples of situations not prescriptive rules for managing solutions. In practice, sometimes a slight difference in context or detail can be critical and can require a completely different handling of the situation and require tribunal members to exercise their own skill and judgment in managing a specific conflict of interest.

#### Case study 1

##### **Family connection to a complainant**<sup>44</sup>

###### **Situation**

A is a member of the procurement review tribunal. A deals with a complaint against the decision of a district health board (DHB). The DHB contracts out functions to a number of private sector providers. The complaint was submitted by an unsuccessful tendering company whose managing director and significant shareholder is A's brother-in-law.

###### **Issues**

A conflict of interest exists in this situation. However, it is not a financial conflict of interest because A is not involved with the complainant and is not financially dependent on his brother-in-law. However, the family connection to the complainant is reasonably close, and the decision to be made by the tribunal directly relates to the complainant. A is likely to have feelings of loyalty towards his brother-in-law, or at least this would be a likely perception that gives the decision an air of partiality.

###### **Resolution**

Once he learns about the complaint being filed with the tribunal, A should inform the tribunal head about his personal connection to the complainant immediately. The tribunal head should exclude A from participation in any evaluation, analysis and decision making regarding the case. It may also be prudent

<sup>44</sup> Case study was adjusted for the purpose of this chapter based on the case study stated in – *Managing conflicts of interest: Guidance for public entities, Controller and Auditor General, New Zealand, 2007, p. 34-35.*

to take steps to ensure that A does not have any access to documents and information related to the challenged DHB tender, especially to confidential information submitted by the complainant's competitors. The fact that A's relative has the important role of the complainant is relevant to the assessment of this situation. The answer might be different if the relative was in a much more distant position within the unsuccessful tendering company and not personally involved in the complainant's tender. The answer might also be different if the complainant was a large company and the relative was distant whom A had met on only a small number of occasions. Assessing the closeness of a personal connection to someone or the appearance of such closeness requires careful judgment.

## **Case Study 2**

### **Personal connection to a complainant**<sup>45</sup>

#### **Situation**

E, a tribunal member, is assigned to a complaint related to construction work procured by a government department. This complaint challenges a tender award to the firm Constructions SA.

E has extensive personal knowledge regarding Constructions SA, as E used that firm to build her own house last year. In addition, E is currently using Constructions SA to carry out structural alterations on other properties in her ownership. Because of this E knows the directors of Constructions SA well and has high regard for their work.

#### **Issues**

This situation may create a conflict of interest as E is expected to be impartial and to undertake a professional assessment of the complaint. However, E could be regarded as being too close to one of the tenderers.

#### **Resolution**

In this case it is probably unwise for E to play a role in the decision on the complaint, and E should be replaced. This is because E's dealings with the firm are recent and significant.

The risk is that if the complaint is rejected, E's personal connections to Constructions SA might allow someone to allege that the tribunal's decision was tainted by favouritism.

These situations are not always clear-cut. In small or specialised industries people often have some degree of personal knowledge or previous dealings with other people or companies about which they have to make decisions. However, this is not necessarily wrong as in many cases these connections might be judged too remote or insignificant. For example, in this case the response would probably be different if the firm's private work for E had been a single, minor contract carried out several years previous.

In addition, careful judgment would also be necessary if the complainant or company to be affected by the complaint were run by a friend or acquaintance of E. For example, it might be improper for

<sup>45</sup> The case study was adjusted for the purpose of this chapter on the basis of the case study stated in – *Managing conflicts of interest: Guidance for public entities, Controller and Auditor General, New Zealand, 2007, p. 41-42.*

E to be involved in assessing complaints if the firm in question is run by a very good friend whom E has known for many years and who attended her wedding. A similar rule would apply if E had a close friend at the contracting authority, who was responsible for the procurement. By contrast, there might not be any problem if E simply knows the person in a casual way through membership of the same sports club. Further careful judgments might be necessary if E had worked for the firm in question. For instance, the situation might be problematic if E had been a full-time employee of the firm within the last year. Conversely, it might not be an issue if E had worked for the firm several years previous.

### **Case study 3**

#### **Personal connection to the attorney of a party of the review procedure**<sup>46</sup>

##### **Situation**

A is a member of the tribunal. She lives with B who works as an attorney specialising in public procurements. A has to deal with a complaint by C. After informing the contracting authority A is informed that B's law firm will represent the contracting authority.

##### **Issues**

Even if B does not deal with the case, B has some interest to win the case. B might try to influence A during the tribunal and on deciding the case. A might be under pressure because A does not want to work against her life partner and spoil their relationship.

##### **Resolution**

A has to inform the tribunal head about this conflict of interest. The tribunal head shall exclude A from deciding the case because of this potential personal conflict.

### **Case study 4**

#### **Social connection to a complainant or the contracting authority**

##### **Situation**

On occasions, and often on their own time, most senior officials of tribunals attend lunches or dinners with a wide range of people with social and commercial interests including representatives of schools, churches, property developers and consultants, or with representatives of contracting authorities. This is understood to be part of the general activities of senior officials and there is no fee or other money involved. This activity has never been seen as a problem for tribunals. Two tribunal members attended one recent occasion which was reported in a newspaper as a lunch hosted by a prominent local construction company. The lunch occurred a week before the tribunal decided in favour of the complaint submitted by the construction company.

##### **Issues**

While some social contact between tribunal members and representatives of the private sector or contracting authorities sector is inevitable, and may often be desirable, the provision and timing of the lunch is likely to raise suspicions about the integrity of the tribunal members involved in the decision making process, and the

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<sup>46</sup> This example is taken from the practice of the Bundesvergabebamt and adapted.

integrity of the entire review proceedings at the tribunal. The lunch also creates - at minimum - an apparent conflict of interest for the tribunal members. In this example it is irrelevant whether the lunch occurred during the free time of the tribunal members as they cannot claim to be present at the lunch in a private capacity.

### **Resolution**

The tribunal must be able to demonstrate that the review proceeding was free of improper or corrupt influences. If the tribunal cannot demonstrate the proceeding was free of improper or corrupt influences this situation may be an example of a form of 'state capture' where a favourable official decision was obtained by a covert influence through corrupt methods. Consequently, this case should be investigated.<sup>47</sup>

Therefore, tribunal members should always carefully consider any participation at social events where the complainants or the contracting authorities may be present. Moreover, the tribunals need to analyse whether such participation could be seen as improper influence at subsequent tribunal decisions in the review proceedings.

## **Case study 5**

### **Personal interest**

#### **Situation**

A computer company has donated old computers to a school, which is attended by the nephew of the tribunal member's good friend. Moreover, the computer company offers internships to selected students of the school through a very competitive process. The tribunal member is aware of this fact as he discussed this opportunity with his friend over dinner. The friend is confident that his nephew will get the internship as he is one of the best students.

The computer company has filed a complaint with the tribunal. The computer company is unaware of the relationship between one of the internships applicants and the tribunal member. However, it could learn about it. The case is complex and a slight change in the interpretation of tender conditions could lead to either loss or victory for the complainant.

#### **Issues**

The tribunal member has a certain remote personal interest in the case, as he knows very well the uncle of a student applying for internship with the company. Given the relationship with the uncle, a case could be made that he would like to help his friend by securing the internship for his nephew in exchange for a decision in favour of the computer company.

#### **Resolution**

The tribunal member should disclose this background to the tribunal head. The issues are that the relationship between the tribunal member and the nephew, who could be the person profiting from the decision in favour of the computer company is remote. In addition, the complainant – the computer company – is not aware of the relationship between one of the internship applicants and the tribunal member. Moreover, the nephew in question does not need to be 'coerced or pushed'

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<sup>47</sup> The case study was adjusted for the purpose of this chapter on the basis of the case study stated in – OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service Toolkit (2005), p. 85.

into applying for the internship. Taking into account the issues mentioned, such a tribunal member could participate in the decision-making process.

## **Case study 6**

### **Political interest**

#### **Situation**

A tribunal member is a regular member of a political party. The contracting authority's head is a member of the same political party. Both the head of the contracting authority and the tribunal member are aware of this fact. The complainant is also aware of the fact that the contracting authority's head and the tribunal member are members of the same political party.

#### **Issues**

The tribunal member might have a political interest in this case.

#### **Resolution**

If the tribunal member's behaviour indicates that he holds strong political views and is loyal to his political party - which he has also demonstrated in public - the tribunal member could be considered biased and the tribunal head should ask him to abstain from voting in the matter so as not to create an atmosphere of political preferences. This holds particularly true in cases where the complaint suggests that the contracting authority – the Ministry – has not followed the rules of procurement and any negative news could impact the election preferences for the political party to which the contracting authority's head is a member.

Conversely, if the tribunal member is only a regular party member with no public profile in support of the party, and there is no indication that his political orientation can have a preference over the impartial application of the law, there should be no grounds for abstaining the tribunal member from the decision making process in the review proceedings.

## **3.9 Summary**

A core requirement of administrative justice is the requirement for tribunal members to be impartial and not influenced or swayed in their decision making process by external or internal influences. Given this requirement, an underpinning principle of justice is the impartiality of decision makers. This ensures that tribunal review decisions are based on objective criteria rather than bias, prejudice, or the preference by tribunal members of one party to the proceedings over another for improper reasons. Mindful of this, in the undertaking of procurement review proceedings an actual conflict of interest can occur when a tribunal member does not to approach the case in question with an impartial mind, and the subsequent danger that the member might unfairly regard the case with favour to a party subject to the proceedings.

In situations such as this the private interests of a tribunal member affect, have affected or might affect the performance of his or her duties and responsibilities in an incorrect manner. For this reason procurement review tribunals must establish, publish and disseminate to their members a conflict of interest policy which clearly covers issues with regard to the general features of conflict of interest situations, identification of specific occurrences of unacceptable conflict of interest situations, disclosure of conflicts of interest, and identification of actions necessary to avoid any effects of a conflict of interest. In addition to an actual conflict of interest, two further classifications of conflicts of interest can occur. These include an apparent conflict of

interest - where private interests seem to affect, have affected or might affect the performance of a tribunal members responsibilities in an incorrect manner; and potential conflict of interest - where the private interests might in the future cause an actual or apparent conflict of interest to appear. In the context of procurement review tribunals private interest means anything that can have an impact on an individual or group and includes a member's personal, political, professional, financial and social interests; it also includes the personal, political, professional, financial and social interests of individuals or groups with whom they are closely associated.

Although the chapter is rich in assisting tribunal members identify conflicts of interest, it also provides a bridge and acknowledges that all tribunal members are entitled to have their own personal views. Indeed, tribunal members may be expected to use their own opinions or ideas in carrying out their work. However, while having or taking a general interest in a subject or topic should be welcomed and embraced, having strong views or deep rooted opinions on a particular matter may be considered wholly different and can create a risk of prejudice or predetermination.

If a conflict of interest does exist, it is up to the tribunal member to resolve this conflict as soon as it is practical. In cases such as this, the tribunal member is obliged to inform the tribunal head and make best endeavours to resolve the issue promptly. If the tribunal member is uncertain about the existence of a conflict of interest, advice should be taken from the tribunal head. If it is decided there is a conflict of interest, a decision on what action, if any, it is necessary to avoid or mitigate any effects of the conflict of interest should be taken - this is the responsibility of the tribunal. It is essential that the tribunal assesses the mitigation options available and implements swiftly the appropriate option and actions to negate the identified conflict of interest.

It is essential that tribunals deal effectively with every identified conflict of interest, and put in place plans to alleviate apparent or potential conflicts of interest as the legal impact of not-dealing with a conflict of interest can be far-reaching. Notwithstanding the potential for additional cost and legal expense, the decision of the tribunal can be challenged in a court of law, which may declare its decision as invalid. This would also place uncertainty over previous decisions and cast doubt over the future of the tribunal. It is important to reinforce that a conflict of interest can arise at any stage, and it would be erroneous to suggest that conflicts of interest can only be identified at the start of the proceedings. It is not unusual for conflicts of interest to be identified during the collection and analysis of evidence or the undertaking of the procurement review procedure, and it is the subject of evidence and procedure that the following chapter addresses.

## Chapter 4

# Evidence and Procedure

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### 4.1 Overview

The discussion in the previous two chapters reinforced to procurement review tribunal members the importance of observing procedure and establishing a clear and impartial structure for undertaking public procurement review procedures, with the output to provide parties to the procedure with a reasoned decision derived from facts. This chapter seeks to build on this preamble and examines the analytical and exploratory nature of the tribunal. Put differently, the sourcing, evaluation and analysis of evidence derived from facts. Therefore, this chapter introduces and addresses the types of evidence the tribunal may use in practice. Given that documentary evidence represents the core evidence on which a tribunal renders a decision, several sections of the chapter discuss in detail this pivotal type of evidence. In addition, this chapter also discusses the methods for gathering, obtaining and assessing the relevance of evidence. Finally, the disclosure, value and admissibility of evidence receives robust treatment. To place the subject matter into context, the chapter commences with an introduction into the investigative character of the review proceedings, and the role and nature of evidence in procurement review tribunals.

### 4.2 Investigative character of the review proceedings

The nature of the review proceedings requires a tribunal to be more active and to apply an investigative approach. This approach requires the tribunal to gather and evaluate all relevant tender documentation, not only the contracting authority's response and the complainant's complaint. Evaluation of the complete tender documentation and a request if required for other evidence is necessary for the tribunal's decision. This is because different findings may lead to cancellation of the complete tender, or cancellation of the qualification criteria or contract conditions. It should be noted that the applicant may never be able to obtain all necessary information, as full access to the tender documentation may not be possible. Therefore, the tribunal must gather evidence wherever necessary, and in particular from the contracting authority.

### 4.3 Role and nature of evidence

As in any other proceedings, evidence plays a crucial role in the public procurement review procedure. Evidence is fact obtained in a lawful manner serving to support or object the claims or counterclaims of the parties engaged in a lawsuit. Evidence makes clear or ascertains the truth of the very fact or point in issue. If a tribunal makes a decision without having considered all the necessary evidence, its decision could be quashed by the review court due to a breach of the fundamental principle that a tribunal's decision must be based on evidence submitted by the parties and otherwise admissible evidence. In other words the evidence must be tendered to, or validly admitted by the tribunal.<sup>48</sup>

To make a decision based on evidence means to use reliable information that tends to logically show the existence or non-existence of facts relevant to the issue to be determined. Evidence can be defined as an instrument that a party uses in proceedings to support and prove its statement or to rebut the other party's statement. Evidence is further used to objectively establish the facts of the case to which the law will be applied.

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<sup>48</sup> Patrice Garant and Philippe Garant; *The Tribunal Proceedings Relating to Employment Insurance, 2001, Chapter 3.1.*  
[http://www.ae-ei.gc.ca/eng/board/tribunal/chapter\\_3-1.shtml](http://www.ae-ei.gc.ca/eng/board/tribunal/chapter_3-1.shtml)

## 4.4 Types of evidence

Evidence can be divided into the following main categories: documentary, testimonial or circumstantial. However, evidence can also be categorised as expert evidence, physical evidence, representative evidence, confessions etc... Evidence can be further divided into direct or indirect evidence, and may be primary (best evidence), or secondary. Direct evidence includes writings, material evidence (tender documentation), and is directly and closely linked to what one desires to demonstrate. Indirect evidence includes testimony and writings etc... and may be used to infer what one desires to demonstrate. The common types of indirect evidence include hearsay, circumstantial evidence, similar fact evidence and factual presumptions. Circumstantial evidence involves the use of clues of time, place, or people to infer a fact or occurrence. Similar fact evidence involves presenting facts or situations that are comparable to the disputed fact.<sup>49</sup> Evidence which will be presented to a tribunal in the review proceedings will mainly consist of documentary evidence such as written statements, tender documentation including photographs and technical documents, minutes from meetings and expert opinions, e-mails and recordings of meetings. Oral testimonies may also become evidence should the tribunal decide to question the parties, witnesses, or experts in the oral hearing. In addition, everything discovered by the tribunal members themselves will be considered as evidence.

Evidence known publicly and evidence known by the tribunal because of its function usually do not have to be verified but must be disclosed to the parties. It is important to note that legal grounds are no evidence. Laws, by-laws, and court decisions do not prove the facts but should be known, as they usually are published. Evidence known by the tribunal because of its function includes: ministerial orders, general acts of the public administration, any reference to the decisions of the Constitutional Court, ECHR, decisions by the Supreme Court setting a unified position in court practice, or a precedent decision of the tribunal. Given the fact that documentary evidence represents the core evidence based on which a tribunal shall render its decision the following sections will discuss this type of evidence in greater detail.

### 4.4.1 Written statements

There are two main sources of written statements which form the basis for tribunal decisions. Firstly, the documentation submitted by the complainant which usually consists of the complaint and all of its relevant annexes as provided by the complainant. Secondly, the documentation submitted by the contracting authority, which at least consists of the tender documentation and the contracting authority's response to the complaint. Other information which is publicly available and may be obtained by the tribunal includes the contract notice as published by the contracting authority and the bids of the complainant and other tenderers.

The tender documentation is the most important evidence that can be gathered in the review procedure, as it demonstrates what the contracting authority did whilst undertaking the procurement procedure. If the documentation is incomplete or important steps were not documented, it is evident that the procurement procedure was not led in a transparent way, and the application may be solely granted out of that reason. In practice the contracting authority may refuse to provide the tender documentation in time. Should this be the case and the statutory period for the tribunal decision regarding the complaint is about to pass, the tribunal is entitled to decide solely on the basis of the complaint and evidence submitted in the proceeding. However, the decision must be well-founded and the facts of the case are derived from the evidence available.

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<sup>49</sup> Patrice Garant and Philippe Garant; *The Tribunal Proceedings Relating to Employment Insurance, 2001, Chapter 3.4.*  
[http://www.ae-ei.gc.ca/eng/board/tribunal/chapter\\_3-4.shtml](http://www.ae-ei.gc.ca/eng/board/tribunal/chapter_3-4.shtml)

In order to get the relevant evidence, the tribunal shall cooperate with the public administration and source the necessary information from the contracting authority in relation to a specific tender procedure.<sup>50</sup> Furthermore, the tribunal is also entitled to request explanations and information from any central or local public authority, and to obtain any document or evidence of relevance for the review proceedings. In order to get the relevant evidence on time, the tribunal shall impose deadlines on the public authorities with possible administrative sanctions (penalties) imposed if the public authorities fail to respond on time.

### Example

According to Article 346 all procurement procedures are excluded from the scope of the TFEU, and therefore from the scope of the procurement directives if it is necessary to protect essential national security interests. It is up to the member state to prove the national security interests to the tribunal. In one particular case the Ministry of Defence (MoD) led a procurement procedure to adapt army helicopters to fit new security standards without applying the procurement legislation. More specifically, the MoD undertook the procurement procedure without publishing a note. In the review procedure, the MoD did not prove the essential national security interests of the case. Therefore, the review authority solely decided this question on the grounds of the application and refused to grant the exception from the application of the procurement law.

## 4.4.2 Expert opinions

Both the complainant and the contracting authority are allowed to submit an expert opinion or appoint its expert. In addition, the tribunal may appoint its own expert. This is the most favourable way to get an expert opinion, as the expert will not be influenced by one of the parties. It should be noted that it is unlikely that any party will pay an expert, if it does not benefit from the opinion of the expert. Therefore, a privately appointed expert usually will find the solutions its client seeks.

In general, experts have some specialised knowledge and their purpose is to provide the tribunal with impartial assistance on special, mostly technical or business matters. Their un-contradicted opinion cannot be disregarded arbitrarily, and the tribunal should accept their opinion on matters regarding their specialist knowledge. Although experts testify to facts that they have observed, the opinions expressed by experts can carry considerable weight.

If there are official lists of experts, the tribunal should appoint one of these experts. The tribunal must decide *ex-officio* whether an expert is needed in order to evaluate evidence or to establish facts. An expert is generally appointed where the tribunal is unable to evaluate evidence or to establish facts due to the scientific, legal, or technical nature of the case. The tribunal must appoint the expert or experts using its list of selected experts based on their area of expertise. The expert should refrain from giving an opinion if there is a conflict of interest. The tribunal should propose an expert to the parties who shall provide statements as to whether or not they agree with the expert. The selected expert may be challenged due to a conflict of interest by the complainant, the contracting authority, or any other party of the review procedure. If this is the case, it is the tribunal's responsibility to decide if it rejects the challenge or if the conflict of interest exists and a new expert should be selected. If the tribunal decides to reject the challenge its decision is based on the opinion of this expert may be reversed.

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<sup>50</sup> Article 9 of the Instruction on the Functioning and Organisation of the Public Procurement Commission, Council of Ministers Decision No. 184.

The tribunal shall ask the parties to submit questions for the expert. In addition, the tribunal shall consult with the experts as well as the parties the determination of tests, examinations, and other methods and procedures to be used by the experts. Finally, the tribunal shall officially appoint the expert and select the questions that will be addressed to the expert, submit documents and other evidences (samples) already gathered, determine which techniques and procedures the expert(s) will apply, regulate any other aspect of the tests, examinations, and research the expert will make, and determine whether the expert will respond orally or in writing.

The tribunal's expert must be impartial and independent from the parties and from other influence. If the advice does not appear reasonable, the tribunal must reject the advice, appoint another expert, or if applicable adopt the findings of the parties' expert. Should the tribunal reject the advice of the expert, it shall provide sufficient reasons for non-acceptance of the experts opinion. The tribunal may also order experts to confer with each other in order to clarify any issues, and to make endeavours to reach the same conclusion. Expert evidence usually consists of a factual component and an opinion evidence. The factual component can be evaluated by examining the expert's research and the reasonableness of its inferences and conclusions. Therefore the expert has to disclose all of the sources used. The opinion component can be evaluated by considering the factual basis for the opinion, the expert's evaluations, area of expertise and objectivity.<sup>51</sup>

In the context of tribunals the ordinary rules of admissibility and relevance apply. The tribunal must consider the nature and purpose of the expert testimony, the qualifications and objectivity of the expert, the scope and seriousness of their research, and the relationship between the opinions proposed and the evidence submitted.<sup>52</sup> When evaluating the expert's evidence, the tribunal should keep in mind that each party will always try to find an expert that shares its opinion for which it is paying.

#### 4.4.3 Witnesses

In some cases witnesses can be helpful. Witnesses should be questioned in an oral hearing attended by all parties to the complaint. All parties of the procedure shall have the opportunity to question witnesses following questions by the tribunal.

##### Examples

1. It proved useful to question a site manager on his professional experience as the award criteria gave points for professional experience. The complainant claimed that the best bidder has received too many points for this particular award criterion. After examining the appointed site manager in an oral hearing it transpired that the site manager did not have the level of professional experience as the tender document claimed. Consequently, the best tenderer appointed for the award of the contract has received too many points for this criterion, and the decision of the tribunal was to set aside the contract award decision.
2. In another case the contracting authority had rejected the applicant's tender because it was not submitted within the published timeframe. The applicant claimed that the tender was submitted in good time. During the subsequent investigation it was pertinent to question the head of the

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<sup>51</sup> *Decision Making: Evidence, Facts and Findings, Best-practice guide 3, Administrative Review Council, August 2007. p. 9. Copyright Commonwealth of Australia reproduced by permission.*

<sup>52</sup> *Patrice Garant and Philippe Garant; The Tribunal Proceedings Relating to Employment Insurance, 2001, Chapter 3.7.2.2. [http://www.ae-ei.gc.ca/eng/board/tribunal/chapter\\_3-7-2.shtml](http://www.ae-ei.gc.ca/eng/board/tribunal/chapter_3-7-2.shtml)*

mailroom which revealed that the applicant submitted the tender within the published timeframe, but the tender was not delivered to the responsible department promptly.

## 4.5 Relevance of evidence

Even if otherwise admissible evidence must be relevant to be admitted in the proceedings. Evidence is relevant if it pertains directly or indirectly to a fact or issue to be determined and moves the inquiry forward. Evidence must tend to make more or less probable the existence or non-existence of a fact or situation that must be proved.<sup>53</sup>

Relevance is a matter for the tribunal to decide. The tribunal must consider the extent of its jurisdiction, the object of the proceedings and the powers granted by the law. The tribunal requires and examines all the necessary evidence to take the final decision, using for this purpose all the evidence methods allowed by law. Refusal to admit relevant evidence is a violation of the principles of natural justice<sup>54</sup> and against Article 6 ECHR.<sup>55</sup>

There is no precise definition of relevance. For this reason relevance is occasionally confused with weight. Facts that are not relevant have no real connection to the issues and tend to give rise to confusion, unduly prolong the debate, or prejudice the opposing party. This is what some members of the legal profession call logical relevance. Whereas insufficient probative value is called legal relevance. For the purpose of this handbook it is best to limit the use of the term 'relevance' to situations in which the tribunal is excluding evidence because it is unrelated to the issues to be determined.<sup>56</sup> The difference between logical relevance and legal relevance should be understood, and these two terms should be distinguished.

Evidence is considered relevant if it is helpful in determining the answers to the issues that must be addressed in a decision. More specifically, to prove the facts which base the decision. Therefore, evidence is relevant if it tends to prove or disprove a matter, or if it can reasonably and fairly influence the tribunal member's belief about such a matter.<sup>57</sup> The tribunal should not focus on evidence that does not solve the issues at hand.

Therefore, the key task before searching for and evaluating evidence is to establish the issues of the complaint which need to be proved. The issues need to be specific. Instead of focusing on general questions such as 'the legality of the procurement method', the tribunal should focus on the details and ask questions related to the facts of the case. As such, the questions will determine the legal frame and the legal prerequisites can be determined. Moreover, the facts to be proved will become clear, and a search made for the required evidence.

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53 Patrice Garant and Philippe Garant; *The Tribunal Proceedings Relating to Employment Insurance, 2001, Chapter 3.5.*  
[http://www.ae-ei.gc.ca/eng/board/tribunal/chapter\\_3-5.shtml](http://www.ae-ei.gc.ca/eng/board/tribunal/chapter_3-5.shtml)

54 Patrice Garant and Philippe Garant; *The Tribunal Proceedings Relating to Employment Insurance, 2001, Chapter 3.5.*  
[http://www.ae-ei.gc.ca/eng/board/tribunal/chapter\\_3-5.shtml](http://www.ae-ei.gc.ca/eng/board/tribunal/chapter_3-5.shtml)

55 ECHR court case –*Dombo Beheer BV v. The Netherlands*, judgement of 27 October 1993.

56 Patrice Garant and Philippe Garant; *The Tribunal Proceedings Relating to Employment Insurance, 2001, Chapter 3.5.*  
[http://www.ae-ei.gc.ca/eng/board/tribunal/chapter\\_3-5.shtml](http://www.ae-ei.gc.ca/eng/board/tribunal/chapter_3-5.shtml)

57 *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p. 105.*

## Examples

1. *“May a restricted procedure be announced with a 10-day notice for a tender submission?”*  
The tribunal has to find evidence on the type of procurement procedure actually led and the time limit for the submission of tenders. The question can be answered by looking at the note published and the tender documentation.
2. *“Must the tender notice be published?”*  
The tribunal has to find out the type of procurement procedure and the estimated value of the contract. In addition, the tribunal may have to find out about exemptions of the duty to apply procurement rules. For example, technical exclusiveness which the contracting authority will have to prove.
3. *“What is the relevant technical criterion for the provision of security services?”*  
The tribunal has to examine the contract documents and possibly the laws and side-laws concerning security services.
4. *“What are the formal criteria that must be met by the submitted documents?”*  
The contracting authority will have to assess the tender documents in the light of the law and in the light of the tender documents. Therefore, the evidence will be the tender documents.

## 4.6 Obtaining evidence

Before rendering a decision the tribunal must clearly establish the facts of the case. As the tribunal has an investigative role in the review procedure, it may not decide solely on the evidence submitted by the parties. The tribunal must take an active role in obtaining evidence if the situation requires. The tribunal may obtain evidence through various sources including the complainant, the contracting authority, and/or its own efforts.

### 4.6.1 Evidence obtained from the complainant

The tribunal shall render its decision based on information and evidence contained in the complaint.

The complainant should provide all grounds for challenging the contracting authority's decision, in its objection addressed to the contracting authority. Nevertheless, should the complainant support its complaint with any new information that could not be included in the objection, this should be considered by the tribunal. However, the inclusion of any new information may have an adverse effect on the process economy of the public procurement review. The predictability of the system can be harmed if the contracting authority could have decided in favour of the complainant should it be aware of this new information. It can frustrate the contracting authority in the decision making process if its decision is revised, and not based on its error but because of new information. The subject of the review procedure is the reconsideration of the original decision of the contracting authority, not the review of the reasonableness of the action of the contracting authority.<sup>58</sup> However, the tribunal should only assess that new information which could not be provided by the complainant earlier in the objection proceedings due to objective grounds. The complainant can never have full information about the complete procurement procedure, which will include the other tenders submitted. This can be crucial in cases when it is claimed that other tenders should have been rejected. Therefore, the tribunal cannot expect the complainant to provide full information, but to gather part of the information from the contracting authority.

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<sup>58</sup> Administrative Review Council, *Better Decisions: review of Commonwealth Merits Review Tribunals, Report 39, 1995, p. 42.*  
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The most common evidence to be obtained from the complainant is the bid submitted in the tender and other tender documentation. In addition, the complainant may also submit expert statements, descriptions of market practice for a particular sector or industry. Moreover, the complainant can also submit technical studies, and information from previous procurements for similar tender subjects or legal analyses of relevant procurement law provisions. Furthermore, the complainant can also submit documentation submitted with objections addressed to the contracting authority, and the contracting authority's response to the objection. The exception in this instance are complaints regarding procurements purchasing concession contracts. The complainant could also ask the tribunal to secure certain evidence from a third party; however, this must be a public authority. However, in cases where the complainant doesn't have ability, right, or power to obtain the evidence, or has faced refusal from the public authority, the tribunal should make endeavours to secure such documentation. However, the tribunal should only undertake this if it believes such evidence would be relevant to the case.

#### **4.6.2 Evidence obtained from the contracting authority**

When the complaint is filed with the tribunal and the contracting authority, the contracting authority shall provide the tribunal with the complete tender documentation. This material provides the initial basis for the tribunal's reconsideration of the merits of the complainant's case.<sup>59</sup>

Upon request of the tribunal the contracting authority must provide the tribunal with the complete tender documentation and its response to the complaint. The extent of the documentation that must be provided by the contracting authority to the tribunal can only be reduced by order of the tribunal. It is important that the contracting authority includes in the material provided to the tribunal any information on which it has relied in making the decision that is the subject of the review. Similar to the complainant, the contracting authority may submit other documentary evidence supporting its arguments.

#### **4.6.3 Evidence obtained by the tribunal**

In addition to the evidence submitted by the parties to the review proceedings, the tribunal should effectively obtain evidence (if possible) from its eProcurement platform. The platform will provide the tribunal members with access to all tender documents produced by tender participants, as well as evaluation decisions and recommendations of the contracting authority.

Upon evaluation of the evidence submitted by the complainant and the contracting authority, the tribunal may need additional information in order to decide on the merits of the complaint and to establish the facts of the complaint. In such cases the tribunal may request expert statements or statements from the state or local public authorities in order to qualify aspects of the tender. Of particular interest will be the economic and technical criteria or conditions.

The tribunal should avoid obtaining evidence through private meetings with one party, without the other party being present. However, in certain cases which require a deeper investigation or in complex procurement procedures, it may be practical to obtain documentary evidence through visits to the premises of the contracting authority. For example, if the contracting authority refuses to submit the requested documents. The written minutes as well as the original documents taken from such visits should be made available to the complainant. Importantly, the tribunal should use a copy only in those cases when it is impossible to take

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*59 Administrative Review Council, Better Decisions: review of Commonwealth Merits Review Tribunals, Report 39, 1995, p. 39. Copyright Commonwealth of Australia reproduced by permission.*

the originals, and should always keep in mind the rule of transparency when obtaining evidence. As explained previously, the tribunal is entitled to request explanations and information from any central or local public authority, and to obtain any document or evidence connected with the administrative investigation. When obtaining evidence the admissibility of such evidence should always be kept in mind.

## 4.7 Disclosure of evidence

In general, parties have a right to access the tribunal's files in the review procedures with the exception of confidential information. Article 6 of the ECHR demands that all evidence is disclosed and all parties have the right to give statements on / against the disclosed evidence. On the other hand, Article 8 of the ECHR protects commercial secrets which may be kept undisclosed by the court.<sup>60</sup>

However, the tribunal has an obligation to disclose to the parties the evidence which it has gathered through its own search, or which was provided to the tribunal by the other parties if it intends to derive facts from it and to base its decision on it following evaluation. The tribunal may pre-select which documents to disclose in full or in excerpts. In the event that the tribunal decides to disclose evidence, it must protect sensitive information which may not be disclosed to the parties. Sensitive information can include personal data, state secrets, and commercial secrets either provided by the complainant or the contracting authority. As evidence with personal data and state secrets are not used frequently in the practice of the review proceedings, the tribunal members should mainly focus on the protection of commercial secrets, which qualify as confidential information.

## 4.8 Weight or probative value

Evidence should be analysed closely and evaluated to determine whether there is conflict in relation to a material fact. It is important to check where evidence originates from, where it claims to come from (authenticity), and whether it testifies what it is supposed to testify (accuracy). As a rule evidence obtained from the complainant, evidence submitted by the contracting authority, and evidence gathered from other sources should be treated equally, fairly and transparently. Assessment of the weight of evidence involves the application of logic, common sense, and experience.

Once the tribunal has gathered evidence it has to derive the facts of the case from the evidence gathered. The question to be decided is whether based on logical evidence the tribunal is reasonably satisfied that a particular fact is more likely than not to be true.<sup>61</sup> If a particular fact has a significant impact on the final decision, additional evidence may be required to prove the fact. Weight of evidence should be determined in the light of all of the circumstances and evidence of the case. The tribunal must evaluate the evidence which was obtained from the complainant, the contracting authority, and its own search. It follows from the character of the review procedure that the parties' statements will be contradictory, and therefore the tribunal will need to weigh the evidence in order to decide which facts to accept.

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<sup>60</sup> ECJ Judgement of 14 February 2008, *Varec* (C-450/06, ECR 2008, p. I-581).

<sup>61</sup> *Decision Making: Evidence, Facts and Findings, Best-practice guide 3, Administrative Review Council, August 2007. p. 7-8. Copyright Commonwealth of Australia reproduced by permission.*

## Example

The complainant claims that the qualification criteria are discriminatory. The contracting authority claims that the qualification criteria meet the legal requirements and such qualification is necessary for the supply of goods or services. If the complainant submits a market analysis or expert opinion showing that only one or two market participants meet the required qualification criteria, while other entities providing the tendered services can provide such services without meeting such criteria. At the same time the contracting authority solely attempts to rebut such evidence by its statement, the evidence of the first party should be given more weight.

However, it has to be kept in mind that market analyses may also be biased. Therefore, the tribunal will have to take into account a number of factors when weighing the evidence. These factors include market analysis and the qualification and reputation of the author of the market analysis, facts and research on which the market analysis is based, the definition of the market, and its applicability to the industry in question etc... While assessing evidence the tribunal must respect the basic procurement principles such as transparency, non-discrimination, proportionality, equality of treatment and the duty to protect the proper application of procurement law. Other factors that will need to be considered include:

- The date of the evidence. Is the evidence applicable and relevant? For example, evidence on a previous market practice in the industry.
- The source of the evidence. Complainant, contracting authority, third party.
- The qualifications or expertise of the source of the evidence, knowledge of the subject matter. The background of the person providing the evidence and how relevant is this evidence. For example, a statement from a state authority or professor in a particular field.
- The reputation of the author. Previous dealings with the author and his or her position in the market.
- The potential bias of the author. Relationship with the parties
- Information on which the document is based. Does the document reflect the relevant case information? Is the information up to date? Is the information complete or is some relevant information missing?
- The consistency of the document with other reliable evidence in the case. Does the document fit with facts which have been already established by the tribunal?
- The source of the author's information. References etc...
- The opportunity to examine. Can the tribunal address questions to the author in order to verify some information or findings?
- The 'tone' of the document. Is the document impartial?
- The extent to which the document is based opinion. Are there any facts or it is just an opinion?
- The extent to which the document is based on observable facts. Can the facts be verified? For example, if the contracting authority says that it is non-discriminatory, such a statement should rely on facts.
- The purpose for which the document was prepared. Is it a statement which has already existed before the dispute arose or is it a document prepared solely for the purpose of the review proceedings?
- Comparison of the document to a known genuine document. Or, comparison with other existing documents on a similar subject.<sup>62</sup>

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<sup>62</sup> *Weighting Evidence, Legal Services, Immigration and Refugee Board, 2003, Chapter 5.1. Adjusted for the purpose of this handbook.*

## 4.9 Admissibility of evidence

The issue of whether evidence is admissible or relevant can be regarded as one of natural justice. Each party should have an equal opportunity to present evidence, and the tribunal cannot refuse to admit the evidence of a party in order to punish that party for a delay.<sup>63</sup> If a tribunal admits one party's evidence, it must always allow the other party to submit relevant evidence to contradict the evidence submitted.<sup>64</sup> In such cases, admissibility is often confused with relevance. Not all evidence that is relevant is also admissible. However, the tribunal may consider evidence that is not only relevant but also reliable and there is no reason why it would be unfair to put it before the tribunal. Put differently, the information must be admissible. In short, admissibility is determined by the rules of evidence.<sup>65</sup>

In the public procurement review procedure, the issue of admissibility of evidence may occur with respect to hearsay evidence. Hearsay, which can be understood as a statement of facts or events based on a report or record that a person heard, read or saw on TV.<sup>66</sup> For example, an alleged manipulation of the qualification criteria by the contracting authority to fit one particular tenderer - this will be relevant to the case. The tribunal must assess this allegation carefully posing all questions listed in the previous chapter. Moreover, evidence may be thrown out if it was unlawfully or improperly obtained. Whether or not evidence obtained unlawfully or improperly may be used is a question of national legislation.

## 4.10 Burden of proof

Fact-finding is the role of the parties and the tribunal must ground its decisions based on the facts presented by the parties – the complainant and the contracting authority. It is for the parties to allege the facts and to prove such facts as the parties carry the burden of proof. However, this only requires the parties to submit the relevant evidence to the tribunal, which shall base its decision on such evidence.

At a theoretical level distinctions exist between first facts, secondly evidence or proofs and, thirdly law. The facts can be considered as human behaviours, social events, or natural phenomenon for which the law provides legal consequences. Each party must pose the facts on which its claims or defences are founded. The party has to provide evidence for these facts or state where evidence can be obtained. This demonstrates what is a 'fact', as distinct from evidence or proof. Any rule of law must take as its premise a fact or a complex of facts.

In general, in administrative proceedings the complainant should be able to prove its case. The complainant not only has the obligation to present the facts on which it grounds its claim, but it is also obliged to prove the facts which support its claim. On the other hand, if the contracting authority disagrees with the position of the complainant it should prove that its position is right. Therefore, the burden of proof can be shifted between parties. The party which has access to the evidence, bears the burden to present this evidence to the tribunal. The tribunal can oblige the party to present this evidence.

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63 *Patrice Garant and Philippe Garant; The Tribunal Proceedings Relating to Employment Insurance, 2001, Chapter 3.* [http://www.ae-ei.gc.ca/eng/board/tribunal/chapter\\_3.shtml](http://www.ae-ei.gc.ca/eng/board/tribunal/chapter_3.shtml).

64 *Patrice Garant and Philippe Garant; The Tribunal Proceedings Relating to Employment Insurance, 2001, Chapter 3.* [http://www.ae-ei.gc.ca/eng/board/tribunal/chapter\\_3.shtml](http://www.ae-ei.gc.ca/eng/board/tribunal/chapter_3.shtml).

65 *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p. 105.*

66 *Patrice Garant and Philippe Garant; The Tribunal Proceedings Relating to Employment Insurance, 2001, Chapter 3.3.6.* [http://www.ae-ei.gc.ca/eng/board/tribunal/chapter\\_3-3-6.shtml](http://www.ae-ei.gc.ca/eng/board/tribunal/chapter_3-3-6.shtml)

In practice, this means that although it is the tribunal's responsibility to establish whether the tender conditions have been discriminatory or the procedural rules have been violated, it is the complainant who must provide evidence to support its claim. This may be especially true where the complainant claims that the market practice proves that the contracting authority's tender conditions violate the procurement rules. On the other hand, formal violations such as the submission of the tender documentation in the requested format or the failure to submit the proper documentation is less burdensome for additional evidence and is more based on an evaluation of the formal evidence, procurement rules and tender conditions. Regarding cases of a technical nature the tribunal may have to ask an expert on its own to find the necessary facts.

### Examples

1. *One award criterion seems to refer to a provision in the contract documents that does not exist.*

The tribunal shall simply ask the contracting authority where to locate the provision.

2. *The complainant claims that the best tender contains prices which are too low. The contract is a works contract.*

The tribunal should consult with an expert whether the prices offered are too low.

3. *The contracting authority rejected the complainant's tender. The contracting authority informed the complainant about the rejection together with the note that it intends to award the contract to another tenderer. The complainant only wants the tribunal to set aside the rejection. The complainant only discovers that he forgot to apply for the setting aside of the contract award decision after the time for such a complaint passed. The complainant applies for restitution in integrum and claims a mistake of the secretary who sent the wrong document. The right document had existed. The complainant claims that he did not only send the application on paper but also scanned the document and sent electronically.*

The tribunal views the pdf-document and finds that it was not produced by a scanner but by a text processor. Therefore, at the time the complainant brought in the original applicant, the document containing the right applications hasn't existed yet.

4. *The contracting authority runs a procurement procedure for military camouflage. Together with the tenders, the tenderers had to submit a sample of their military camouflage. The contracting authority rejected the complainant's tender because the sample melted at a lower temperature than the contract documents specified. The relevant temperature was 40° C.*

The tribunal simply put the sample upon a relevant heat source to see that the camouflage did not melt at a lower temperature than specified.

## 4.11 Summary

The primary output of every procurement review tribunal is to provide to the complainant, the contracting entity and any other party to the procedure with a reasoned decision. The accepted method of making a decision is to draw a robust conclusion from the presented evidence derived from facts. In noting that a conclusion must be drawn from evidence this requires a tribunal to be proactive in its pursuit in gathering and

evaluating all available evidence. It is crucial the tribunal identifies the types of evidence available and from which sources this evidence can be requested and secured.

Evidence can be broadly divided into documentary, testimonial, or circumstantial. Specifically, evidence which will be presented to a tribunal in the review proceedings will mainly consist of documentary evidence such as written statements and documents which support the preparation and submission of the tender. Testimony is also beneficial should the tribunal decide if there is merit to directly question the parties, witnesses or experts in the oral hearing. In addition, evidence can also be direct, which includes writings and material evidence supporting the tender and is linked to what a party to the proceedings wishes to demonstrate to members of the tribunal. Conversely, evidence can be indirect and in the context of tribunals primarily consist of testimony and written evidence, and is used to infer what a party to the proceedings wishes to demonstrate. Indirect evidence includes hearsay and circumstantial evidence - the use of clues of time, place, or people to infer a fact or occurrence, similar fact evidence - and involves presenting facts or situations that are comparable to the disputed fact, and factual presumptions.

Moreover, although in some cases evidence is plentiful and is considered by the parties to the proceedings to be of merit to proving their case, the evidence must be relevant to be admitted to the proceedings and a matter of relevance solely for the tribunal to decide. In other words, all evidence must be considered by the tribunal to be directly or indirectly pertinent to a fact or issue to be determined and one which will advance the enquiry to a logical conclusion. However, relevance should not be confused with admissibility - not all evidence that is relevant is also admissible. The issue for tribunals of whether evidence is admissible or relevant can be regarded as one of natural justice. If a tribunal admits one party's evidence, it must always allow the other party to submit relevant evidence to contradict the evidence submitted. Put differently, admissibility is determined by the rules of evidence.

As the tribunal is an investigative body, it must establish the facts of the case and may not solely decide on the evidence submitted. Accordingly, first-rate tribunals will take an active role in obtaining evidence through the sources available which can include the complainant, the contracting authority, and through its own efforts. Fact-finding is the role of the parties and the tribunal must ground its decisions based on the facts presented by the parties. It is important to bear in mind that it is for the parties to allege the facts of the case and to prove such facts as the parties carry the burden of proof. In general, the complainant must be able to prove its case, and has the obligation to present and prove the facts on which the claim is grounded. Conversely, if the contracting authority disagrees with this position it should provide that its position is right - therefore the burden of proof can shift between parties. Therefore, in some complex procurement review tribunal cases there is large volume of evidence which needs to be analysed and evaluated to determine any conflicts in relation to a material fact.

Parties to the proceedings have a right to access the tribunal's files in the review procedures - with the exception of confidential information - and the tribunal has an obligation to disclose to the parties the evidence pertaining to the case if it intends to derive facts and base its decision on this evidence. In opposition to this requirement, the tribunal must also protect information which is deemed to be sensitive in nature. The tension between these two views can be highlighted through Article 6 of the ECHR which demands that all evidence is disclosed, with all parties having the right to give statements on / against the disclosed evidence. Conversely, Article 8 of the ECHR protects commercial secrets which may be kept undisclosed by the court. These conflicting views have historically caused friction and hostility between the parties to the proceedings and with the tribunal, and it is to the protection and disclosure of confidential information that we turn our attention to in the following chapter.

## Chapter 5

# Protecting Confidential Information

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## 5.1 Overview

The protection of confidential information and the methods used to determine information as confidential is a key requirement of every contracting authority and public procurement review tribunal. This chapter examines the protection of confidential information and the methods used to determine information as confidential - in particular the use of the confidentiality test. In addition, the types of confidential and non-confidential information, access to and the security of confidential information are examined in detail. To emphasise the challenge tribunal members face in determining information as confidential several case studies apply the application of the confidentiality test to a number of practical public procurement scenarios. To place this topic into context the chapter commences by examining the role of a tribunal in protecting confidential information. This chapter addresses the protection of confidential information in the review proceedings, the ways to determine information as confidential, the confidentiality test, basic types of confidential and non-confidential information in public procurement, access to confidential information, and the physical security of confidential information. In addition, the chapter presents several case studies regarding the application of the confidentiality test in practice.

## 5.2 Confidential information

In the procurement review procedure, the parties are obliged to give all types of information to the tribunal. It is the tribunal's responsibility to protect confidential information. This may include information on individuals, public interest, or sensitive information which is related to the commercial interests of the contracting authorities or tenderers, specifically when its disclosure could endanger competition. This chapter addresses how tribunals should treat commercially sensitive information, which must be protected by the tribunal either because the law requires it or because they were designated as confidential (**confidential information**) by any of the parties involved in the proceedings.

A tribunal's duty to protect confidential information means that while handling complaints and analysing tender documentation, including without limitation submitted tenders and information produced by the contracting authority and other documentary evidence, the tribunal must be able to determine which information is confidential and treat such information accordingly. In other words the tribunal must not disclose confidential information, it must provide physical security of the documents, or limit access to the confidential documents by other parties. The following examples demonstrate what may happen if the tribunal fails to protect confidential information.

### Examples

1. If the tribunal fails to protect confidential information, the role of the contracting authority as purchaser could be compromised. Suppliers could withhold sensitive information to the detriment of the purchasing process, or the contracting authority's ability to negotiate effectively to secure best value for money could be frustrated.<sup>67</sup>

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<sup>67</sup> Freedom of Information Act (Civil Procurement) Policy and Guidance, Office of Government Commerce, 2008, p. 9.

2. In addition, if the tribunal fails to protect confidential information economic operators could obtain information about the business practices of competitors in the same market. This in turn could disturb fair competition.
3. Moreover, when the tribunal has to review a negotiated procedure, it shall keep the names of the tenderers secret until the contracting authority issues the contract award decision. This should avoid agreements between tenderers which are disadvantageous to the contracting authority. Otherwise, the contracting authority cannot continue the procedure without running the risk that it cannot reach the best possible result during negotiations.

Protection of confidential information may become an issue with respect to drafting of decisions and their publication on the tribunal's webpage. When drafting a decision the tribunal member should keep in mind which information provided to the tribunal can be disclosed to third parties, and therefore can appear in the decision. The case could be that certain information can appear in the version of the decision to be delivered to the parties to the review proceedings but will have to be deleted in the version to be published on the internet. This can be in cases where parties agree to disclose confidential information to the other party to the proceedings but not to a third party. The tribunal should observe that the principle of a fair trial demands that all information basing the facts of the case must be disclosed to the parties. This does not imply that all the information will or should be disclosed to the public.

Confidential information in the review procedure context may include information:

- Used by the tenderers to prepare a submission. For example, information about a secure infrastructure.
- Calculation of tenders. For example, prices in positions of the specifications of a works contract.
- Included as part of a submission. For example, details of an original business methodology.
- Contained in a contract. For example, the specifications for a secure facility classified for national security reasons.<sup>68</sup>

## 5.3 What information is confidential?

Information can have the status of being confidential if it is:

- Required by the law
- Determined as such by the tribunal
- Determined by the contracting authority, tenderer, or complainant<sup>69</sup>

### 5.3.1 Confidential information – required by law

Some states have incorporated into law an obligation for tribunals to protect information sensitive in nature for public authorities, as its disclosure could be contrary to the public interest.<sup>70</sup> Information which is designated by law as confidential may be information classified as 'state secrets' or 'personal data'.

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<sup>68</sup> *Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 8. Copyright Commonwealth of Australia reproduced by permission.*

<sup>69</sup> *Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 8. Copyright Commonwealth of Australia reproduced by permission.*

<sup>70</sup> *In Austria e.g. there are a law and a regulation providing, which information shall be classified. It defines different levels of protection of this information together with measures to protect this information.*

### 5.3.1.1 State secrets

Legislation can set out categories of information that can be classified as state secrets, and can require information to be classified as state secrets. However, this information must be classified in accordance with the law out of national security reasons. Interests concerning national security include: independence, territorial integrity, constitutional order, and foreign relations. A national regulation may provide for different levels of protection of information. For example, 'restricted', 'confidential', 'secret' or 'top secret'. The tribunal must regard the security rules defined for the respective information. However, there are categories of information that should not be classified for reasons of important public interests.

These reasons include:

- Hiding a violation of law, ineffectiveness or mistakes of the administration
- Depriving a person, organisation or institution of the right to know
- Hindering or delaying the giving of information that does not require protection in the interest of national security

### 5.3.1.2 Personal data

Tribunal members can refer to the personal data protection law when dealing with certain 'sensitive data' in the review proceedings. The law defines sensitive data as any piece of information related to a natural person in relation to their racial or ethnic origin, political opinions, trade union membership, religious or philosophical beliefs, criminal prosecution, and data concerning their health and sexual life. Personal data has to be treated in accordance with the laws dealing with personal data. Given the fact that decisions of the tribunal are published, the personal data contained in the decision must be omitted in the published version of the decision.

## 5.3.2 Confidential information – determined by the tribunal

When the tribunal analyses the case documents which will include information given by the contracting authority and tenders, the tribunal may discover that some information is confidential although it has not been designated as such by any party involved. To determine confidentiality, the tribunal should undertake a confidentiality test.

## 5.3.3 Confidential information – designated by third parties

The complainant, the contracting authority, or every other party of the review procedure will usually designate their commercial secrets as confidential information. Commercial secrets fall within the scope of Article 8 of the ECHR, which makes non-disclosure easier in the light of Article 6 of the ECHR as it is possible to balance two fundamental rights on the same level.

Information which is required to be disclosed by law or relates to a violation of law(s), good business practices and principles of business ethics, will not be regarded as a commercial secret. Disclosure may be legitimate if it is intended to protect the public interest. Other main categories of confidential information will include intellectual property rights; for example, copyrights, patents, and licenses. Protection of fair competition may require protecting commercial secrets, because one party to the review procedure which is an economic operator, may attempt to obtain information about a competitor trading in the same market and gain a commercial / competitive advantage.

The tribunal must assess on a case-by-case basis whether the designation of the information as confidential by the contracting authority or complainant is justified. When deciding on the confidentiality of the information,

the tribunal should not be influenced by decisions on confidentiality in other review procedures.<sup>71</sup> Even if the contracting authority classifies the information as confidential, the tribunal should have the right to come to a different conclusion. It is important for the tribunal to determine which information is confidential. For this reason, the tribunal should undertake a confidentiality test.

### 5.3.4 Confidentiality test

A confidentiality test consists of the following four criteria based on the legal principles which must be met in order to determine that a tenderer's or a contracting authority's commercial information is confidential.

#### **Criterion 1: The information to be protected must be specifically identified**

The tribunal must consider which specific information (if any) is legitimately protected from disclosure. A request for the inclusion of a provision in a contract that states that all information is confidential does not pass this test.

#### **Examples**

1. Individual items of information such as pricing must be separately considered. These items will usually be regarded as confidential.

In addition, the information in question should be consistently identified as confidential. Information that was already disclosed as a part of the tender documentation, or information that is publicly accessible (trade registers), cannot be classified as confidential in the review procedure. Conversely, even the estimated value of the contract may be protected from disclosure tenderers will still have to prepare their tenders and negotiate with the contracting authority.

2. The contracting authority procures for an electronic system for centralising communication within the university. The system shall be able to deal with all types of communication including telephony, e-mail, and telefax. The system shall include a telephone book and a plug in for Microsoft Outlook to enable the user make phone calls using that telephone book. The tender documents contain a list of hardware and software used by the contracting authority in order to give information on the technical resources available and in order to specify on which systems the plug in must be implemented.<sup>72</sup> The tribunal cannot disclose the information on the hardware and software of the contracting authority because it was already published in the contract documents.

#### **Criterion 2: The information must be commercially 'sensitive' and not generally known or ascertainable**

The specific information must be commercially 'sensitive', and it must not already be in the public domain. A request by a party to maintain the confidentiality of commercial information would need to demonstrate that there is an objective basis for the request, and demonstrate that the information is sensitive. This may concern construction plans for machines or other technical secrets which the tenderer only discloses to the contracting authority.

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<sup>71</sup> *Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 9.*  
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<sup>72</sup> Taken from a recent case of Bundesvergabamt (BVA 22. 1. 2013, N/0114-BVA/07/2012-24).

### Example

The tenderer submits technical plans for the parts to be supplied. The product was developed by the tenderer which owns the patents. This information is commercially secret.

### **Criterion 3: Disclosure would cause significant detriment to the owner of the information or another party**

A party seeking confidentiality would normally have to identify a real risk of damage to its commercial interests due to disclosure, causing unreasonable detriment.

### Example

The disclosure of Internet price lists would not harm the owner. However, the disclosure of pricing information that reveals a tenderer's profit margins may be detrimental. Conversely, it might be necessary to disclose this information if abnormally low prices are the subject of the review procedure.

### **Criterion 4: The information was provided under the understanding that it would remain confidential**

This criterion requires consideration of the circumstances in which the information was provided. In addition, the criterion requires that there was a determination of whether there was a mutual, expressed, or implied understanding that confidentiality would be maintained. The terms included in the request documentation and in the draft contracts will impact on the consideration of circumstances.

### Example

A request for the tender and draft contract documents which includes specific confidentiality provisions would support an assertion by a tenderer that the contracting authority agreed to accept information on the understanding that it would remain confidential.

For example, technical documentation detailing a specific production method, or the draft concept of a computer programme is submitted under the assumption that it will be treated as confidential information.<sup>73</sup>

## 5.4 Examples of confidential information

Categories of information that may meet the requirements of the confidentiality test include:

- Internal costing information or information about profit margins
- Proprietary information such as information about how a particular technical or business solution is to be provided
- Pricing structures / price breakdowns where this information would reveal whether a complainant was making a profit or loss on the supply of a particular good or service
- Information obtained from suppliers and not generally available like future product information, research plans, financial details
- Financial models for complex work, and detailed models of how a cash flow for both the authority and supplier would be managed over the life of the contract

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<sup>73</sup> All four criteria were taken from – *Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 10. Copyright Commonwealth of Australia reproduced by permission. They were adapted for the purposes of this handbook.*

- Artistic, literary or cultural secrets including photo shoots, historic manuscripts, or secret indigenous culture
- Intellectual property including trade secrets and other intellectual property matters where they relate to a potential supplier's competitive position<sup>74</sup>

Other categories of information that may meet the requirements of the confidentiality test include: trade secrets and other commercially sensitive information that is not commonly known or ascertainable on the market, information that provides a commercial advantage whose disclosure would harm the tenderer's or the contracting authority's commercial interest and is protected by a tenderer, and information that would be seen as commercial secrets and therefore could qualify as commercially sensitive information. Tenderers may also seek protection of other commercial information. For example, a tenderer's plan for future investments, intellectual property rights, and commercially sensitive information held by the state.

For intellectual property or other commercially sensitive information that belong to the state, the contracting authority should consider whether this information should be treated as confidential in a particular procurement. If the contracting authority fails to undertake this assessment, it is the tribunal's responsibility to protect this information by determining it as confidential.

## 5.5 Information considered as non-confidential

If the opening of tenders is open to tenderers and the public, information read cannot be treated as confidential.<sup>75</sup> Examples of commercial information that would generally not be considered as confidential include:

- Information that can be obtained from widely available sources
- Performance and financial guarantees
- Indemnities
- The overall price
- Rebates, liquidated damages and service credits
- Performance measures
- Clauses which describe how intellectual property rights are to be treated
- Payment arrangements<sup>76</sup>

However, the tribunal should not treat these examples as being non-confidential without performing a confidentiality test.

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<sup>74</sup> *Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 11 (Copyright Commonwealth of Australia reproduced by permission) and Freedom of Information Act (Civil Procurement) Policy and Guidance, Office of Government Commerce, 2008, p. 28-30, adapted.*

<sup>75</sup> *If there is information contained in the tenders, which is assessed applying the contract award criteria, under aspects of transparency, it should be read at the opening of tenders.*

<sup>76</sup> *Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 11 (Copyright Commonwealth of Australia reproduced by permission) and Freedom of Information Act (Civil Procurement) Policy and Guidance, Office of Government Commerce, 2008, p. 28-30.*

## 5.6 How to designate information as confidential?

In recent practice, if complainants and contracting authorities did not classify certain documents and information as confidential, a dispute arose whether the tribunal may disclose these documents and this information. Therefore, it would be advisable for the tribunal to be prepared for a request to treat documents or information as confidential and to compile general guidance on the designation of what constitutes confidential information for parties to the proceedings.

For example, the tribunal could advise parties to the proceedings that if they wish to label certain information as confidential, the party in question must submit two versions of their submissions to the tribunal - a confidential version and a non-confidential version. The confidential version should contain all of the information - including confidential information - and be labelled 'Confidential'. The non-confidential version should have the confidential information excluded and labelled 'Non-Confidential'. The confidential version should clearly identify all confidential parts of the document. This can be achieved by using shading, boldface characters, or square brackets etc... The tribunal should consider preparing and publishing examples for tenderers to digest and follow.

Moreover, the tribunal could refuse to assign the confidentiality status completely or in part if the information does not meet the confidentiality test. If the tribunal decides not to designate confidentiality status, the party providing the information should be given an opportunity to provide an acceptable explanation of why the designation is appropriate, or to withdraw the document. If an adequate explanation is provided, the information should be treated as confidential in the tribunal's administrative case file. If the justification is not sufficient and the information or document is not withdrawn by the party, such information could be made part of the administrative record.

However, it is most likely that the confidential information and its designation as confidential would already be provided to the contracting authority with the complainant's objection, or in its bid filing. If the contracting authority respects the confidentiality, the tribunal should also respect it and act accordingly to protect confidentiality unless this information is crucial for the outcomes of the review procedure.

## 5.7 Access to confidential information

Pursuant to confidential information requirements, confidential information should not be disclosed to third parties other than tribunal members unless an expressed permission from the owner or the person designated by law has been obtained. However, this rule does not extend to persons who by operation of law have a duty to keep the information confidential, and to cases where disclosure is required by law. The expressed permission of the owner of the information to disclosure would obviously give a green light to the tribunal.

This tool could be practical, particularly in cases where certain information must be disclosed to an expert. If the tribunal appoints an expert, this person becomes an organ of the tribunal. Therefore, the expert should be entitled to see all documents and have access to all information contained in the files of the tribunal – even confidential information. Being an organ of the tribunal, the expert should be obliged to keep the information confidential by procedural law. If the expert is not obliged to keep information confidential by law a disclosure agreement is advisable. If the review procedure has an investigative character, it is the duty of the tribunal to decide which information shall be disclosed to the parties. In such cases the tribunal should use the confidentiality test, and weigh confidentiality against the rights derived from the principles of fair trial mentioned in the first chapter.

Therefore, confidential information should be visibly distinguished from other documents in the file and should be sealed in an envelope, or should be shaded or otherwise identified in the document. In addition, if the

tribunal is requested to provide access to confidential information, such a request should be denied unless the person is covered by one of the exemptions mentioned previously. Moreover, no person or organisation should have access to the procurement file unless a member of the tribunal decides which parts of the file can be disclosed. Furthermore, confidential information should not be contained in the tribunal's decision. The decision may refer to the confidential information but its content should not be disclosed. However, the non-disclosure of this information might violate the principle of a fair trial in the meaning of Article 6 of the ECHR. This topic will be discussed further and in more depth in the case studies presented towards the end of this chapter.

In some jurisdictions, access to confidential information can be granted to a legal counsel to the parties to the proceedings. This person should be the subject to a professional confidentiality obligation, and who is not in a business or legal relationship with the parties (other than provision of particular legal services), as there is a limited likelihood that the counsel could use this information for their or another party's benefit. However, the use of this right may be seen as limited as the legal counsel would not be allowed to disclose the information to his or her client, and would be only allowed to rely on such information in his or her arguments. It is important to note that this might disturb the trust between a legal counsel and his or her client. For this reason, most jurisdictions only provide the legal counsel with the same information as the client.

## 5.8 Information security

The physical security of documents is important, to ensure that no information is leaked. A lack of confidence in security could deter tenderers or reduce the detail or volume of information tenderers include in their bids. Both of these outcomes will negatively impact contracting authorities.<sup>77</sup>

If the tribunal does not have measures in place for the security and storage of submissions, this can create a variety of problems. Documents can be misplaced, requiring the companies involved to supply extra copies and bring into question the tribunal's processes and professionalism. Another issues arise if various copies are made of commercial-in-confidence documents and no secure area or file is created. Therefore, it can become impossible to keep track of the documents and their location. To avoid this situation, the tribunal should establish clear physical security measures for the handling of documents related to the review proceeding. The following rules should be observed and applied:

- Two separate case files – public and protected – should be kept in the review proceedings. No confidential information should be located in the public files,<sup>78</sup> or if there is only one case file, the confidential documents should be sealed in an envelope. If there are different parties entitled to see different parts of the confidential documents, several envelopes should be used.
- Access to the documents should be limited, with access provided to authorised staff only.
- The tribunal should ensure that documents or copies of documents are not removed from its premises.<sup>79</sup>
- Records of access to documents with confidential information should be in place.

Introduction of electronic security measures and documented processes and strategies for electronic storage and communication should be considered. The tribunal should ensure that it has control over the electronic

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<sup>77</sup> *Guidance on Ethics and Probity in Government Procurement, Financial Management Guidance No. 4, Commonwealth of Australia, 2005, p. 21. Copyright Commonwealth of Australia reproduced by permission.*

<sup>78</sup> *Guideline, Designation, Protection, Use and Transmission of Confidential Information, Canadian International Trade Tribunal, 2006, p. 4.*

<sup>79</sup> *Guidance on Ethics and Probity in Government Procurement, Financial Management Guidance No. 4, Commonwealth of Australia, 2005, p. 21. Copyright Commonwealth of Australia reproduced by permission.*

delivery of submissions, and the protection of data stored on networks, including the segregation of hard drives, the storing of confidential information and the allocation of secure passwords to those authorised to access this information.<sup>80</sup> A more strict approach to the electronic transmission of documents is to prohibit sending any confidential information by facsimile or e-mail. E-mail should only be used to transmit public documents. These are documents that do not include any third-party confidential information.<sup>81</sup> To reach a higher level of security, the tribunal should consider storing electronic information on storage media that are not connected to the internet or a local area network. To maintain the highest level of physical security, the data should be stored on a storage medium separate from a computer and kept in a secured place. In addition, methods of encrypting data can be taken into account. Under the highest level of protection, information must not be stored electronically but only on paper, which must be kept in a place which is secured at the highest level.<sup>82</sup>

While holding office or being employed in public service, tribunal members should be under a mandatory obligation not to knowingly disclose, or allow to be disclosed confidential information that comes into their possession to any other person in any manner that is calculated or likely to be made available for the use of any business competitor or rival of a person to whose business or affairs the information relates. This mandatory obligation should continue to bind tribunal members after they no longer hold office or are employed by the tribunal.<sup>83</sup>

## 5.9 Confidentiality in public procurement under EU law

### 5.9.1 General procurement rules

EU substantive public procurement rules are covered by Directive 2004/18/EC (“**Utilities Directive**”)<sup>84</sup> and Directive 2004/18/EC (“**General Directive**”)<sup>85</sup> (jointly “**the Procurement Directives**”). The Procurement Directives provide only general regulation for confidentiality claims. Article 6 of the General Directive and Article 13(2) of the Utilities Directive state:

*“Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 35(4) [Article 43 Utilities Directive] and 41 [Article 49 Utilities Directive], and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.”*

Based on these provisions from the Procurement Directives, the contracting authorities should keep the confidentiality of information designated so by the economic operators (tender participants). Conversely, the reference to national law implies that the information may be disclosed when disclosure is otherwise required by

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80 *Guidance on Ethics and Probity in Government Procurement, Financial Management Guidance No. 4, Commonwealth of Australia, 2005, p. 21. Copyright Commonwealth of Australia reproduced by permission.*

81 *Guideline, Designation, Protection, Use and Transmission of Confidential Information, Canadian International Trade Tribunal, 2006, p. 4-5.*

82 *See e.g. Austrian laws on protection of information.*

83 *Guideline, Designation, Protection, Use and Transmission of Confidential Information, Canadian International Trade Tribunal, 2006, p. 6.*

84 *Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.*

85 *Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.*

national law. For example, local disclosure duties in Member States. In addition to the general regulation, the Procurement Directives contains express provisions on confidentiality which deal with specific aspects of the procurement. These include:

### 5.9.1.1 Protection of confidential information submitted by contracting authorities.

*Article 13(1) of the Utilities Directive states: “In the context of provision of technical specifications to interested economic operators, of qualification and selection of economic operators and of award of contracts, contracting entities may impose requirements with a view to protecting the confidential nature of information which they make available.”*

### 5.9.1.2 Protection of sensitive information submitted by economic operators in the course of competitive dialogue.

Article 29(3) of the General Directive and Article 13(2) of the Utilities Directive states: *“Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.”*

### 5.9.1.3 Protection of sensitive information in the context of a framework agreement procedure.

Article 35(4) of the General Directive states: *“Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where release of such information would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.”*

## 5.9.2 EU case law on confidentiality in public procurement

In general, the Procurement Directives do not provide robust guidelines on handling confidentiality claims. Therefore, the case law of European courts is of particular importance. The leading European Court of Justice (“ECJ”) case that deals with the confidentiality claims in the context of public procurement is *Varec v Belgium*.<sup>86</sup>

### **Varec v Belgium: the case facts**

- A. The Belgian State (as the contracting authority) initiated a contract award procedure in respect of the supply of track links for ‘Leopard’ tanks. Two tenderers submitted bids, Varec and Diehl. Upon evaluation of the tenders, the Belgian State decided to award the contract to Diehl as it considered that Varec’s bid did not meet the technical criteria.
- B. Varec appealed the contract award decision and requested that the file delivered to the review body (the Conseil d’État) is supplemented by Diehl’s tender. The Belgian State added Diehl’s tender to the file but failed to provide some documents that had been returned to Diehl in accordance with its request.

<sup>86</sup> ECJ Judgment of 14 February 2008, *Varec* (C-450/06, ECR 2008 p. I-581).

According to the Belgian State, should this information be needed it would be necessary to request it directly from Diehl. The Belgian State also observed that Varec and Diehl are in dispute about the intellectual property rights to the plans in question.

- C. Diehl informed the review body that the version of its tender that was submitted by the Belgian State contained confidential data and information, and it objected that such information should not be made available to third parties – including Varec – that would be able to peruse those confidential data and information relating to commercial secrets included in the tender. According to Diehl certain annexes to its tender contained specific data concerning the detailed revisions of the relevant manufacturing plans and also its industrial process.
- D. The review body was of the opinion that the award decision should be annulled on the ground that “*in the absence of the defendant’s [the Belgian State] cooperation in the sound administration of justice and fair proceedings, the only possible sanction is the annulment of the administrative measure whose lawfulness is not established where documents are excluded from inter parties proceedings.*”
- E. The Belgian State challenged that conclusion and requested the review body to rule on the issues of confidentiality of Diehl’s tender documents containing information related to its commercial secrets.
- F. The review body decided to stay the proceedings and referred the following questions to the ECJ for preliminary ruling ‘Article 1(1) of [Directive 89/665], read with Article 15(2) of [Directive 93/36] and Article 6 of [Directive 2004/18], be interpreted as meaning that the authority responsible for the appeal procedures provided for in that article must ensure confidentiality and observance of the commercial secrets contained in the files communicated to it by the parties to the case, including the contracting authority, whilst at the same time being entitled to apprise itself of such information and take it into consideration?’

### **Varec v Belgium: ECJ analysis**

- A. The ECJ first analysed the application of the General Directive for the case. However, as it was not in force at the time of the tender it had to apply provisions of Directive 89/665. As this directive did not expressly govern the protection of confidential information, it was necessary for the ECJ to refer to that directive’s general provisions, and in particular Article 1 (1).
- B. The ECJ stated that the principal objective of the Community rules in the field of public procurement is the opening-up of public procurement to undistorted competition in all Member States. In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures, which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.
- C. The court observed that contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them. Accordingly, Article 15 (2) of Directive 93/36 [replaced by the General Directive] provides that the contracting authorities are obliged to respect fully the confidential nature of any information furnished by the suppliers.
- D. In the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender, Directive 93/36 gives the contracting authorities the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.

- E. Effectiveness would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant. In such circumstances, the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets.
- F. In a review, the body responsible for the review procedure assumes the obligations laid down by Directive 93/36 with regard to the contracting authority's respect for the confidentiality of information. The 'effective review' requirement therefore imposes on that body an obligation to take the measures necessary to guarantee the effectiveness of those provisions. It follows that in a review procedure in relation to the award of public contracts, the body responsible for that review procedure must be able to decide that the information in the file relating to such an award should not be communicated to the parties or their lawyers, if this is necessary in order to ensure the protection of fair competition or of the legitimate interests of the economic operators that is required by Community law.
- G. The European Court of Human Rights has consistently held that the adversarial nature of proceedings is one of the factors which enables their fairness to be assessed, but it may be balanced against other rights and interests. The adversarial principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court. However, in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest (see *Rowe and Davis v The United Kingdom* [GC] no 28901/95, §61, ECHR 2000-II, and *V v Finland* no 40412/98, §75, ECHR 2007-...).
- H. The maintenance of fair competition in the context of contract award procedures is an important public interest. It follows that in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information related to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.
- I. The principle of the protection of confidential information and business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection, and the rights of defence of the parties to the dispute (see, by analogy, *Case C-438/04 Mobistar* [2006] ECR I-6675, paragraph 40), and in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.
- J. Having regard to the extremely serious damage which could result from improper communication of certain information to a competitor, the review body must, before communicating that information to a party to the dispute, give the economic operator concerned an opportunity to plead that the information is confidential or a business secret (see, by analogy, *AKZO Chemie and AKZO Chemie UK v Commission*, paragraph 29).
- K. Therefore, the ECJ response to the preliminary ruling was that "*Article 1(1) of Directive 89/665, read in conjunction with Article 15(2) of Directive 93/36, must be interpreted as meaning that the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such*

*information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial”.*

Consequently, the ECJ appears to place greater value on the right to protection of confidential information and commercial secrets, than the right of disclosure in these circumstances. The judgment provides some comfort for potential bidders for public contracts that their confidential information should be safeguarded in the event that the award of the contract is challenged.<sup>87</sup> It also follows from the *Varec v Belgium* decision that:

- The review body should have access to all information, including information designated by tenderers as confidential and trade secret
- Third parties (including complainants) should not be given access to information disclosure of which could impede fair competition
- Deprivation of access of complainant to confidential information of other tenderers does not violate the right to a fair trial as such exemption is justified by a public interest being the protection of competition
- The review body must before communicating sensitive information to a party to the dispute, give the economic operator concerned an opportunity to plead that the information is confidential or a commercial secret
- The review body must ensure that confidentiality and business secrecy are safeguarded, and in particular by the contracting authority
- The review body must decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, and in the case of review to ensure that the proceedings as a whole accords with the right to a fair trial

## 5.10 Case studies<sup>88</sup>

The following case studies assess the application of the confidential test to situations in which the tenderer or the contracting authority has designated some of its commercial information as confidential. When applying the confidential test all four criteria must be met in order to determine if such commercial information is to be deemed confidential.

- Criterion 1:** The information to be protected must be specifically identified.
- Criterion 2:** The information must be commercially sensitive and not generally known or ascertainable.
- Criterion 3:** Disclosure would cause unreasonable detriment to the owner of the information or another party.
- Criterion 4:** The information was provided under an understanding that it would remain confidential.

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<sup>87</sup> *Confidentiality or disclosure—who is a better mate for competition and fair play?*, McDermott Will & Emery, March 31, 2008, <http://www.lexology.com/library/detail.aspx?g=469b2c4c-5093-4047-9112-387866f131f3>

<sup>88</sup> All case studies are adopted from – *Guidance on Confidentiality in Procurement*, Financial Management Guidance No. 3, Commonwealth of Australia, 2007. Copyright Commonwealth of Australia reproduced by permission.

## **Case study 1**

### **Business/Delivery Methodology**

In its submission a tenderer has designated as confidential the specification of how it delivers its services. The tenderer claims that the methodology has been developed using its 'smart' (original or innovative) solution and disclosure is likely to result in competitors adopting the methodology. This will diminish its commercial value and adversely affect the tenderer's competitive position in the market. Only the tenderer and a small number of its employees know the methodology. In the approach to the market, tenderers were invited to specify what, if any, information they sought to protect as confidential.

#### **Criterion One – Met**

The information specifically identified information comprising on the service delivery methodology for the services.

#### **Criterion Two – Met**

The information has the quality of confidentiality as it is known only to a small number of employees and the continued non-disclosure of the 'smart' methodology provides the tenderer with a competitive advantage.

#### **Criterion Three – Met**

Disclosure of the information is likely to adversely impact the tenderer's commercial interests, as its competitors would be able to compete for work either using or adapting the methodology. This would remove the tenderer's competitive advantage in this area.

#### **Criterion Four – Met**

Since the contracting authority has invited tenderers to specify what information is to be kept confidential and the service delivery methodology has been specified, it appears that the information on the methodology was provided on the understanding that it would be kept confidential.<sup>89</sup>

## **Case study 2**

### **Service level measures**

Service based contracts often contain measures to reward good service delivery and to reduce payments for poor service delivery. The measures set the levels for a reward and reduction regime.

A tenderer requests that service level measures should be treated as confidential on the basis that disclosure would enable competitors to estimate its cost structure and therefore damage its commercial interests. The service level measures have been specifically developed for the proposed contract and are not known to anyone except the tenderer and the contracting authority. The contracting authority has not made any representations, either in the tender documentation, or verbally to the effect that the service level measures would be treated as confidential.

#### **Criterion One – Met**

The information identified as confidential is specific in so far as it includes the service level measures in the contract.

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<sup>89</sup> *Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 31. Copyright Commonwealth of Australia reproduced by permission.*

### **Criterion Two – Not met**

Although the information is not widely known, the tenderer's pricing structure could not be estimated by reference to these measures alone. The relevant clause merely sets targets for the tenderer.

### **Criterion Three – Not met**

Disclosure of the service level measures is unlikely to cause unreasonable detriment to the tenderer, taking into account the conclusions in the previous point.

### **Criterion Four – Not met**

A mutual understanding of confidentiality of the service level measures does not exist at this point.

While the service level measures in this simplified example would not be confidential based on the above assessment, the tribunal should be conscious that the quantum of financial penalties or rewards raises similar issues to those applicable to pricing information.<sup>90</sup> The question of confidentiality can only arise if the service level and penalties are not defined in the tender documents.

## **Case study 3**

### **Pricing information**

Each request for confidentiality of pricing information should be considered on its merits.

In general, the fact that disclosing pricing information would make life more difficult for the supplier is not a sufficient reason. For example, a tenderer may claim confidentiality on the basis that it does not want its competitors to know its prices. However, potentially the transparency of such information could lead to increased competition and better value for money outcomes for the contracting authority. On the other hand, it could disturb competition as it gave competitors the possibility to adapt their pricing according to the disclosed pricing.

The following examples focus on assessing whether individual elements of a pricing methodology would be confidential. The tribunal should note that although a specific element may be assessed as not meeting the confidentiality criteria, the complete methodology might nevertheless warrant protection if it meets the test for confidentiality. This is because it provides sufficient information to make a reasonable estimate of a tenderer's profit margin.

### **Case study 3.1**

#### **Total price**

In contract negotiations, a tenderer of human resource services asks a contracting authority to maintain the total price of a proposed contract as confidential on the basis that the release of such information would enable its competitors to estimate future bids by the organisation.

In previous discussions with the tenderer, the contracting authority indicated that pursuant to the applicable law the contracting authority is required to report the contract price. The request for the tender also highlighted this requirement. This problem cannot arise in an open procedure where prices are read at the opening of tenders.

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*90 Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 31. Copyright Commonwealth of Australia reproduced by permission.*

Assessment of the information against the confidentiality criteria:

**Criterion One – Met**

The information identified as confidential is specific, being the total price of the contract.

**Criterion Two – Not met**

The total price does not have the quality of confidentiality after a contract is signed. Despite the tenderer's claim, the information is not commercially sensitive in a contract, because it does not provide sufficient detail to enable competitors in the market to determine the tenderer's cost structures and profit margins.

**Criterion Three – Not met**

Disclosure of the total price would not damage the tenderer's commercial interests given the issues raised in the previous point. In relation to the tenderer's claims, future bids by the organisation would need to address the statement of requirements, which may involve the provision of different services, service levels, and possibly the use of different service delivery methods. Accordingly, the disclosure of the total price in this case is unlikely to provide sufficient information for the tenderer's competitors to determine the likely price of future bids by the tenderer.

**Criterion Four – Not met**

An understanding of confidentiality does not exist between the contracting authority and the tenderer at this point.<sup>91</sup>

Based on this assessment should such information be present in the documentation in the review procedure the tribunal would not be obliged to treat it as commercially sensitive and keep it confidential.

**Case study 3.2**

**Price of individual items or groups of items**

While prices for individual items or groups of items of property or services would not generally be confidential, there may be exceptions. Confidentiality would not be appropriate if the pricing information is generally known. However, if individual prices for items forming part of the contractual requirements disclose the underlying costs and profit on that item or other commercially sensitive information such as special discounts (see below), a tenderer may legitimately claim that the information is confidential. A simple example of a case where a unit price would not be confidential is where a tenderer has advertised the price that will be charged in a catalogue.

**Criterion One – Met**

The information identified as confidential is specific information.

**Criterion Two – Not met**

The information on the price of the item is publicly advertised, and as such non-disclosure would not provide the tenderer with any ongoing benefit.

**Criterion Three – Not met**

Disclosure of the information is unlikely to adversely affect the commercial interests of the tenderer, as the price is already publicly available.

**Criterion Four – Not met**

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<sup>91</sup> *Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 32-33. Copyright Commonwealth of Australia reproduced by permission.*

In the absence of any explicit agreement that the unit price would be maintained as confidential, there would not be a mutual understanding of confidentiality.<sup>92</sup>

Based on this analysis, should such information be present in the documentation in the review procedure the tribunal would not be obliged to treat it as commercially sensitive and keep it confidential.

### **Case study 3.3**

#### **Discounts**

A tenderer may claim confidentiality of pricing information for reasons other than those discussed previously. For example, a tenderer may be providing the contracting authority with a considerable discount.

The tenderer may properly seek confidentiality of the discount information, if it can establish that it would suffer unreasonable detriment if the level of discount offered were disclosed. For example, the tenderer may be able to demonstrate that its financial interests would be prejudiced if its other customers were to know of and seek similar levels of discount as those available to the contracting authority, or that disclosure of discount information would enable competitors to determine the actual cost of the property or services. As discounts may or may not be confidential - depending on the circumstances - tribunal members should consider requests to maintain confidentiality of such information on a case-by-case basis.<sup>93</sup>

### **Case study 4**

#### **Technical secrets**

The non-disclosure of information which bases the decision of the tribunal can object to the principle of a fair trial. To illustrate this scenario the confidentiality test shall be applied to the facts of the ECJ case 'Varec v Belgium'<sup>94</sup> previously presented, discussed and analysed.

#### **Criterion One – Met**

The information identified as confidential is identified as being separately requested from one tenderer.

#### **Criterion Two – Met**

The information is sensitive, as it consists of construction plans and descriptions of production methods developed and used by one manufacturer only. These construction plans and descriptions of production methods are the development of the tenderer solely and only used by this tenderer. Consequently, this tenderer owns the intellectual property rights on the construction plans and the methods of production.

#### **Criterion Three – Met**

Disclosure of the information might not only affect the position in the review procedure, but might influence the dispute about the intellectual property rights to the plans in question.

#### **Criterion Four – Met**

The specification provided for confidentiality, and the tenderer Diehl requested to have the plans returned.

*92 Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 33-34. Copyright Commonwealth of Australia reproduced by permission.*

*93 Guidance on Confidentiality in Procurement, Financial Management Guidance No. 3, Commonwealth of Australia, 2007, p. 34. Copyright Commonwealth of Australia reproduced by permission.*

*94 ECJ Judgment of 14 February 2008, Varec (C-450/06, ECR 2008 p. I-581).*

The confidentiality criteria are met. The information is confidential. However, there is still the conflict between the right to protect confidential information and the right of a fair trial.

## 5.11 Summary

Every contracting authority and public procurement review tribunal is obliged to treat certain information as confidential, and specifically information submitted by tenderers and information designated as being confidential. EU procurement directives restrict the disclosure of information if its dissemination would prejudice the legitimate commercial interests of public or private undertakings, or prejudice fair competition between suppliers.

This specifically includes technical or trade secrets and confidential aspects of the tenderers enterprise.<sup>95</sup> With regard to national security, notwithstanding that the EU Defence Directive presents a framework for the treatment of classified information, it is up to the Member States to decide which information is classified for security reasons as national security is the responsibility of each Member States.

By extension, although procurement review tribunals have an obligation to make information and evidence available to the parties to the procedure, the role of the procurement review tribunal is not to pass information to other tenderers or third parties not entitled to examine it as part of the public procurement review procedure. Providing other parties with the opportunity to examine the tenders of competitors may invite certain tenderers - with little chance of winning the contract - to bring applications for review to a tribunal in order to obtain confidential information from their competitors tenders.

Therefore, the protection of information - including information deemed as confidential - is an important part of the tendering process in general, and the public procurement review procedure specifically. A further obligation of a procurement review tribunal is to enforce the rights of economic operators engaged in the public procurement process derived from procurement legislation. Public procurement review tribunals achieve this obligation through the implementation of remedies - the subject of the following chapter.

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<sup>95</sup> Article 6 of the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134 of 30.4.2004, p. 114.

# Approach to Remedies

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## 6.1 Overview

Commencing with an application to a tribunal from an economic operator seeking legal protection, remedies endeavour to enforce the individual rights of economic operators derived from procurement legislation, with the primary purpose to amend the decision of the contracting authority which breaches procurement legislation in order to complete the procurement procedure in a lawful manner. This chapter concentrates on the types of remedies that are available to tribunals, and the remedies that are available to review bodies in EU Member States in particular. A description of the purpose of individual remedies, and situations in which particular remedies are employed is explored in details. The chapter commences by listing and explaining the types of remedies available to procurement review tribunals with examples used throughout to illustrate key points and observations.

## 6.2 Types of remedies

Minimum requirements for remedies can be found in the GPA<sup>96</sup> and in EU remedies directives. The EU remedies directives contain the concept that a candidate or tenderer can act against any decision of the contracting authority where a decision is any setting of the contracting authority gaining a minimum publicity. In order to enforce subjective rights tenderers can use different types of remedies. Article 20 paragraph 7 of the GPA and Article 2(1) of the European Remedies Directive contain interim measures which aim to correct the alleged infringement or prevent further damage to the interests concerned. In addition, Article 20 paragraph 7 of the GPA contains an assessment and a possibility for a decision on the justification of the challenge, and a correction of the breach of the GPA or a compensation of the damage suffered. Furthermore, Article 2(1) of the European Remedies Directive provides for the setting aside of decisions taken unlawfully and awarding damages. Therefore, the GPA and the European Remedies Directive briefly have three types of remedies in common: interim measures, reviews and damages. After the contract has been concluded the Remedies Directive provide for the ineffectiveness of the contract and alternative penalties for those cases where the contract is not completely declared ineffective. As the EU remedies directives intended to implement the GPA within the EU, and as these types of remedies are more extensive, these are presented in more details. EU remedies include:

- Interim measures
- Setting aside of decisions of the contracting authority
- Ineffectiveness of the contract
- Alternative penalties
- Damages<sup>97</sup>

Procurement remedies allow tribunals to correct deficiencies in the behaviour of contracting authorities. Although a tribunal cannot 'step into the shoes' of the contracting authority and decide who wins the tender or select the relevant contract award procedure, the tribunal is entitled to reject any contracting authority's

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<sup>96</sup> *Agreement on Government Procurement.*

<sup>97</sup> *Articles 2(1), 2d and 2f Remedies Directive. Articles 2(1), 2d and 2f of the Remedy Directive; Articles 2(1), 2d and 2f of the Utilities Remedies Directive; Articles 56(1), 60 and 62 of the Defence Directive.*

act which violates procurement law, and therefore indirectly influences the conduct of the procurement procedure. To properly execute their role, tribunal members should be aware of their specific position regarding first level decision makers and contracting authorities, which affects the way they should approach remedies. The tribunal is no super-contracting authority which can make the decisions of a contracting authority. By setting aside decisions, the tribunal can force a contracting authority to meet new decisions in a lawful way, and correct the procurement procedure. However, the issue regarding which type of remedy is best suited to correct the breach depends on the procurement procedure.

### Examples

1. When contract documents are contested, it will be necessary to order interim measures to avoid tenderers submitting tenders on the grounds that the contract documents are of uncertain legality. Consequently, the contract documents should be set aside in part or completely.
2. When the decision about the rejection of a tender is acted against, it might be necessary to keep the procurement in a state which will allow the tenderer to further participate in the procurement. If the decision about the rejection of the tender is found unlawful, it shall be set aside.
3. If the contract award decision is contested, it will be necessary to stop the contracting authority awarding the contract so as to make it possible to set aside the decision.
4. If an economic operator discovers that a contracting authority concluded a contract without the prior publication of a contract notice, the tribunal or court will be required to declare the contract ineffective as there is no decision which the tribunal or court could set aside.

## 6.3 Interim measures

The necessity of ordering interim measures depends on the national review system. If an application for setting aside a decision has an automatic suspensive effect on the procurement procedure, interim measures are not necessary as the procurement procedure is kept in a state that there cannot be any damage until the review authority has decided on the case. Conversely, such a system has the disadvantage that the contracting authority cannot correct infringements by itself. This can shorten the review procedure in cases where there are evident mistakes.

### 6.3.1 What are interim measures?

Interim measures have several purposes and include:

- Preventing damages until the review authority has decided on the review
- Preventing contracting authorities from creating unchangeable facts<sup>98</sup>
- Ensuring effectiveness of the review procedure

However, interim measures are no remedy. Interim measures actually enforce the rights of the applicant, but serve to maintain the effectiveness of the review procedure. Article 2 (1) of the Remedy Directive<sup>99</sup> characterises the procedure with the aim of ordering interim measures as interlocutory procedures. Therefore,

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<sup>98</sup> For example, awarding the contract before the review authority has decided on the lawfulness of the decision contested, and as a consequence make it impossible to set aside the decision.

<sup>99</sup> Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

interim measures do not have the purpose to meet a final decision.<sup>100</sup> Interim measures are provisional measures used by the review body to correct an alleged infringement of procurement law, or prevent further damage to the concerned interest - for example, the complainant's interest.

Under the Remedy Directive, the review body issues interim measures before it issues a final decision on the merits of the case. A review body issues interim measures if they are necessary to protect the applicant's interests immediately.

### Example

A contracting authority plans to move to the second stage of an award procedure. However, it fails to evaluate the submitted tenders for qualification for the second stage properly, and the resultant complaint does not automatically trigger suspension of the procedure. The contracting authority notified the complainant that it would not invite the complainant to submit a tender. In addition, the contracting authority did not invite other tenderers to submit second-stage tenders. The review body should forbid the contracting authority inviting other tenderers to submit tenders. If the contracting authority has already invited other tenderers to submit second-stage tenders, the review body should issue interim measures which should forbid the contracting authority opening the tenders, and suspend the period to submit tenders. Otherwise, the commencement of the second stage would be irreversible and the only remedy at a later stage would be the cancellation of the tender.

It is still possible to take into account the prospects of success of the substantive claim. As an effect, the review body can reject the application for interim measures if the applicant already submitted a substantial claim, and it is clear that this claim has no prospect of success.<sup>101</sup> However, when deciding on considering interim measures tribunal members should ask the following questions:

- What is the illegality claimed?
- Which decision is contested?
- What is the damage that threatens the applicant, or has this threat already occurred?
- What are the prospects of success of the substantive claim?
- What are the interests of the applicant in ordering interim measures?
- What are the interests of the contracting authority in continuing the procurement procedure?
- What are the interests of other candidates or tenderers in ordering or not ordering interim measures?
- What are the public interests? Would the public interest be harmed if interim measures were ordered?
- What would happen if the tribunal ordered interim measures?
- What impact would interim measures have on the contracting authority, other tenderers and the complainant?
- Is the result of the contracting authority's action subject to the complaint irreversible?
- Will anyone incur any damages if interim measures are ordered, or the procurement procedure is continued? If yes, what is the likely extent of such damages?

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<sup>100</sup> *Judgement of the ECJ of 9 December 2010, Combinatie Spijker Infrabouw/De Jonge Konstruktie and others (C-568/08, ECR 2010 p. I-12655) paragraph 61.*

<sup>101</sup> *ECJ Judgement of 9 April 2003, CS Austria (C-424/01, ECR 2003, p. I-3249) paragraph 29.*

It is useful to demand such information from the applicant. If possible, this information should be demanded through a provision in a procedural law. Each party should at least state its interests, and the damages threatening or already occurred. If the parties do not, the review body should ask them to do so setting a short time limit.

Such analysis may not always be straightforward or even possible according to the information available to the tribunal. Although the tribunal is not obliged to decide on the interim order of 'continuation', the tribunal may use its discretion if it is advisable to carry out such analysis to avoid the negative economic impact of suspension and delay on the contracting authority and tenderers.

While applying its discretion, the tribunal should base its decision on basic procurement principles, and the principles of fast and effective remedies. However, the tribunal should keep in mind that the interests of the contracting authority and public interests might differ, as the award of the contract to the best tender is of public interest also. Moreover, the applicant has subjective rights derived from procurement legislation, which can only be enforced by means of a complaint against the contested decision. Therefore, the tribunal has to balance all interests in order to decide whether or not to order interim measures.

### 6.3.2 What interim measures can be ordered?

Under Article 2 (1) Remedies Directives the following interim measures can be ordered:

- Any measure suitable to correct the alleged infringement or to avoid the damage threatening. For example, suspension of the implementation of any decision taken by the contracting authority, or suspension of the entire contract award procedure.<sup>102</sup>
- The issuance of an interim measure shall not be subject to a prior complainant's request to set-aside the contracting authority's decision. It must be possible to apply for the interim measure before bringing in an action to set aside a decision.<sup>103</sup>
- The interim measure itself should be adequate, necessary, and suitable to correct the alleged infringement or to avoid the damage threatening. The interim measure should be the least burdening measure for the contracting authority. The contracting authority should be able to act in the procurement procedure as far as possible, and be restricted as little as possible. Which interim measure is necessary will depend on the state of the procurement procedure.

The following examples illustrate the impact of interim measures.

#### Examples

1. If the applicant acts against the contract documents and wants the tribunal to set aside the contract documents, it will be necessary to allow the applicant to submit a tender based on corrected tender documents. Therefore, the contracting authority must not open the received tenders, and the period to submit tenders must be suspended.
2. If the contracting authority notified the applicant that it would not be inviting the applicant to submit

<sup>102</sup> Article 2(1)a of the Remedy Directive; Article 2(1)a of the Utilities Remedies Directive; Article 56(1)a of the Defence Directive; Public Procurement Training for IPA Beneficiaries, Module F, Sigma, 2010, p. 11.

<sup>103</sup> Judgements of the ECJ of 19 June 1996, Commission/Greece (C-236/95, ECR 1996, p. I-4459) paragraph 11, and of 15 May 2003, Commission/Spain (C-214/00, ECR 2003, p. I-4667) paragraph 98.

a tender in a two-stage procedure, where the number of tenderers in the second stage is restricted, it will be necessary to prohibit the contracting authority from inviting any candidate to submit a tender.

3. If the applicant's tender was rejected and no contract award notice was issued, no interim measures are necessary because the tenderer can still participate in the procurement procedure. If the decision to reject the applicant's tender is set aside, the applicant can act against the contract award decision if it is issued before the review procedure is finished.
4. If the contracting authority issued a contract award notice and the next step of the contracting authority would be to award the contract, it is necessary to forbid awarding the contract.

### 6.3.3 What is the procedure?

The procedure for interim measures is not regulated under the Remedy Directive, as the purpose of the directive is to set up minimum requirements for remedies. However, it is necessary that there must be a standstill period to give a tenderer time to apply for interim measures.<sup>104</sup> Since the aim of interim measures is to provide a quick provisional solution to a dispute,<sup>105</sup> the time limits are usually tight. For the same reason procedural rules – for example concerning evidence that needs to be submitted by the complainant or obtained by the review body on the irreversibility of the contracting authority's action – should be light.<sup>106</sup>

The conditions for interim measure awards include the following:

- A prima facie case should exist indicating that there is a breach
- It should be demonstrated that the potential harm to the tenderer, if the interim measure is not granted, is irreparable or at least serious
- There should be no other interests overriding the private interest of the applicant to obtain the measure<sup>107</sup>

In general, there is no time to hold an oral hearing before ordering interim measures. Article 6 of the ECHR does not demand an oral hearing because the procedure does not decide the merits of the case. The same is the case for other procedural guaranties. Therefore, it is not necessary that there is an exchange of opinions, that the tribunal uses other than written evidences, and that the rules on evidence are applicable.<sup>108</sup> However, it is possible that the preliminary judgement differs from the final decision.

## 6.4 Set-aside

### 6.4.1 What is a set-aside remedy?

A set-aside remedy cancels or renders ineffective a contracting authority's decision taken unlawfully or otherwise corrects an unlawful decision.

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<sup>104</sup> *Judgement of 3 April 2004, Commission/Spain (C-444/06, ECR 2008, p. I-2045) paragraph 39.*

<sup>105</sup> *ECJ Judgement of 9 December 2010, Combinatie Spijker Infrabouw/De Jonge Konstruktie and others (C-568/08, ECR 2010, p. I-12.655) paragraph 61.*

<sup>106</sup> *Public Procurement Training for IPA Beneficiaries, Module F, Sigma, 2010, p. 10.*

<sup>107</sup> *The Effectiveness of Bidder Remedies for Enforcing the EC Public Procurement Rules: a Case Study of the Public Works Sector in the United Kingdom and Greece, Despina Pachnou, PhD Theses, 2003, p. 72.*

<sup>108</sup> *ECJ Judgement of 9 December 2010, Combinatie Spijker Infrabouw/De Jonge Konstruktie and others (C-568/08, ECR 2010, p. I-12.655) paragraph 59.*

Under EU law, the complainant must apply for a set-aside remedy. If the review body or the tribunal concludes that the contracting authority has violated the procurement rules the tribunal has the discretion to choose from the available set-aside measures. However, the complainant may not apply for a set-aside remedy after the conclusion of the contract awarded by the contracting authority.

A decision is any setting of the contracting authority that gains a minimum of publicity, which means that it is published or otherwise has left the domain of the contracting authority.<sup>109</sup> All decisions subject to the procurement legislation can be contested.<sup>110</sup> In one particular case the ECJ decided that an economic operator may even contest the decision, whether or not to publish a contract notice or lead a formal procurement procedure.<sup>111</sup>

## 6.4.2 What set-aside measures can be ordered?

Under EU law, the tribunal may order the following set-aside measures:

- Removal of discriminatory technical, economic or financial specifications in the contract notice, tender documents or any other document relating to the contract award procedure
- Annulment of an unlawful contracting authority decision or cancellation of a contract award procedure
- Positive correction of any unlawful document or contracting authority decision<sup>112 113</sup>

These set-aside remedies should allow a tribunal to exercise some – albeit limited – control over the contracting authority’s use of its discretion. For example, whether the contracting authority misused its discretion in selecting a tender procedure, disqualification of the tenderer or contract specification. This role is consistent with the aim of the Remedy Directive, which is to allow review bodies to determine whether a contracting authority’s decisions are well-founded and supported by evidence. However, the role is not to ‘re-decide’ a contracting authorities decision, which is within the scope of the contracting authority’s discretion.

The review of reasonableness is particularly important in the context of procedures. Reasonableness is where the contract is awarded to the most economically advantageous tender. In such a case the discretion of the contracting authority is wide, since it decides and applies the criteria constituting an advantageous offer, and therefore has increased the probability of abuse of discretion. However, such a review must be limited to a ‘reasonableness’ test, as otherwise the review might lead to speculative litigation aimed at convincing the review body to second-guess the decision of the contracting authority.<sup>114</sup> Before choosing one of the set-aside remedies, the tribunal members should answer the following questions:

- Has the contracting authority violated public procurement law?
- How severe is the violation? Does the violation materially affect basic public procurement law principles and/or decrease the possibility of tenderers from successfully participating in the contract award procedure?

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109 ECJ Judgement of 11 January 2005, *Stadt Halle* (C-26/03, ECR 2005, p. I-1) paragraph 39.

110 ECJ Judgment of 19 June 2003, *GAT* (C-315/01, ECR 2003 p. I-6351) paragraph 52.

111 ECJ Judgement of 11 January 2005, *Stadt Halle* (C-26/03, ECR 2005, p. I-1) paragraph 33.

112 For example an order to cancel the whole tender if it violates the procurement rules, to amend or delete an unlawful clause in the tender documents, or to reinstate a complainant that has been unlawfully excluded.

113 Article 2(1)b of the Remedy Directive; Article 2(1)b of the Utilities Remedies Directive; Article 56(1)b of the Defence Directive; *Public Procurement Training for IPA Beneficiaries, Module F, Sigma, 2010, p. 13.*

114 *Public Procurement Training for IPA Beneficiaries, Module F, Sigma, 2010, p. 14.*

- Does the violation have essential influence on the outcomes of the procurement procedure? Is it possible that another tenderer will be awarded with the contract?
- How can such violation be remedied in order to provide tenderers with the possibility of successfully participating in the contract award procedure? Which decision must be adopted by the tribunal in order to remove the violation?

In addition, the tribunal must take into account the type of violation and the procurement stage at which the violation occurred. A violation discovered in the early stages of the procurement can be remedied. For example, cancelling the contracting authority's decision and/or the issuance of instructions to the contracting authority to change the tender documentation or to re-evaluate or re-consider the contracting authority's previous decision in accordance with the tribunal findings. Frequently, violations that are discovered later in the procurement cannot be remedied through a 'return' to a previous procurement stage. These violations can only be remedied by the cancellation of the whole contract award procedure.

### 6.4.3 What is the procedure?

The procedure for set-aside measures depends on national legislation. National legislation sets out the filing rules, deadlines, and notifications to the contracting authority and other candidates or tenderers. Legislation may provide that a complainant files a complaint with the contracting authority, and if the contracting authority does not provide an adequate remedy, the complainant files the complaint afterwards with the review body. A standstill period must inhibit the contracting authority from immediately awarding the contract. Legislation may also provide that the complainant files the complaint with the review body immediately. In the latter case, national legislation may provide that the complainant notifies the contracting authority regarding the filing of a complaint.

The complainant shall specify the set-aside measure which it requests in the complaint. It is a matter of national legislation whether the tribunal is bound by such a request, or may order the set-aside measure which it considers appropriate in the given case.

### 6.4.4 When should the set-aside remedy be used?

In terms of the lawfulness of the award procedure, set-aside is a useful remedy as it can correct an infringement provided that the tribunal uses its powers reasonably.<sup>115</sup> Set-aside remedies protect complainants' rights, if they can demonstrate the violation of procurement rules by the contracting authority. Set-aside remedies are the strongest remedy because they intervene in the procurement procedure and allow correction. Therefore, set-aside remedies help to find the best tender according to the specifications, which is in the public interest. By undertaking this course of action, the contracting authority avoids paying damages at a later date.

#### 6.4.4.1 Cancellation of the contract award procedure

A tribunal should decide on the cancellation of the contract award procedure when other milder measures cannot correct the public procurement law violation, and when it is the only reasonable option for remedying the irregularities in the tender. This mainly applies to a situation in which from the beginning the contract award procedure is affected by the violation of the public procurement law.

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115 *Public Procurement Training for IPA Beneficiaries, Module F, Sigma, 2010, p. 14.*

## Examples

1. The wrong procedure is selected.
2. An improper procurement method is selected.
3. Unreasonable qualification criteria are selected.
4. It is not possible to return the procedure to its previous stage. For example, a return from the award stage to the qualification stage.
5. After submitting tenders it is found that the contract documents violate procurement rules or are unclear. For example, there is an unclear description of the subject of the tender, the pricing background, and the criteria for the tender award. As a consequence the tenderers cannot submit appropriate bids.
6. It is not possible to evaluate tenders in accordance with public procurement principles and therefore award the contract in accordance with the law.
7. In a so called negotiated procedure the contracting authority wants all tenderers to negotiate how the contract will be divided amongst them.

### **6.4.4.2 Instructions to the contracting authority**

Instructions to correct a breach of public procurement law should apply in a situation where the tribunal has successfully proved that the contracting authority has violated the law. The breach of law is not so material that it would require cancellation of the contracting authority's decision, or the contract award procedure, and only the contracting authority can adequately provide a remedy.

## Examples

1. The tribunal instructs the contracting authority to extend the deadline for the tender submission. This is due to the late provision of the technical specifications for the contract, which prevented the tenderers from having sufficient time to prepare adequate tenders. The extension may be necessary if the real time for the bid preparation is shorter than the period stated in the public procurement law, or a period which may be reasonable for such bid preparation.
2. The contracting authority rejected the complainant's tender because it did not take into account all documents submitted with the tender to proof eligibility of the tender. The tribunal only has to set aside the decision of rejection and the complainant will be able to participate in the procurement.
3. The tribunal instructs the contracting authority to re-assess the tenders, because the contracting authority did not check the low prices submitted in an appropriate procedure. If the contracting authority already issued a contract award decision, the tribunal has to set-aside this contract award decision because the contracting authority otherwise could award the contract.

In practice, 'instructions' are rarely used as a sole remedy and are often accompanied by another set-aside remedy. This is mainly the cancellation of the contracting authority's decision, which in most cases is necessary before the contracting authority can meet the decision again following the instructions. Otherwise, the contracting authority would have to take back the decision.

### 6.4.4.3 Cancellation of the contracting authority's decision

In the event of the violation of public procurement law, the most typical remedy is the tribunal's decision to cancel the contracting authority's decision, or to remove the tender specifications. Such a decision is generally connected with the 'instruction' remedy – to change the tender documentation in a specified way. However, the review body is not the contracting authority, therefore changes in the tender documentation can only be made by the contracting authority.

Several remedies may be applied by the tribunal upon cancellation of the contracting authority's decision, or removal of the tender specifications. These include:

- To set new qualification criteria and repeat that part of the procurement as of the announcement of the new criteria
- Publish a new note
- Re-evaluate the applications to participate in the procurement procedure if there were any mistakes<sup>116</sup>
- Evaluate the complainant's bid - if the contracting authority's failure to do so has violated procurement law
- Enable all tenderers to submit new bids in order to remedy the prior public procurement law violation
- Enable all tenderers that have already submitted bids to adjust the bids in an additional period as determined by the contracting authority
- Properly define the tender subject and repeat the contract award procedure from that stage
- Return the contract award procedure to a stage before the bid submission and allow tenderers to prepare bids on the basis of the adjusted tender documentation which is 'product neutral'<sup>117</sup>
- Re-evaluate the submitted bids while respecting the tribunal's legal guidance on how to evaluate them in a particular contract award procedure
- Repeat the bid evaluation if the evaluation is defective and the bid evaluation documentation is unreasonable<sup>118</sup>
- Enable the complainant - whose bid was lawfully rejected - to challenge the evaluation of the bids from other tenderers which also should have been rejected and therefore preventing the other tenders from being entitled to receive the contract award<sup>119</sup>

The review body should always be aware that changing the subject matter of the contract or qualification criteria may result in attracting different economic operators, which makes it necessary to re-start the procurement procedure from the beginning and therefore the procedure should be cancelled.<sup>120</sup> Regarding the contract award criteria, any change causes the cancellation of the procurement procedure.<sup>121</sup>

## 6.5 Standstill period

According to the Remedies Directives, the complaint does not stop the procurement procedure. Therefore,

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116 For example, certificates of works executed in order to qualify for the submission of tenders in a restricted procedure.

117 i.e., not discriminatory regarding the type or conditions of goods or services that shall be the subject of the procurement.

118 Unclear, insufficient explanations, lacking grounds for the contracting authority's decision.

119 But see ECJ Judgement of 19 June 2003, *Hackermüller* (C-249/01, ECR 2003, p. I-6319). The tribunal may reject the complaint, if the complainant's tender has been rejected lawfully and there cannot be any harm to his interests.

120 ECJ Judgement of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, ECR 2008, I-4401) paragraph 34.

121 ECJ Judgement of 4 December 2003, *EVN and Wienstrom* (C-448/01, ECR 2003, I-14.527) paragraph 94.

if there were no standstill period, the contracting authority may conclude a contract with the successful tenderer prior to the filing of the objection. The purpose of the standstill period is to give tenderers time to check the legality of the decision, and to file a complaint.<sup>122</sup> Therefore, the standstill period is a result of the principle of effective remedies.

To provide tenderers with an effective remedy to challenge all contracting authorities' award decisions, the Remedy Directive introduced a standstill period between the contract award decision and the conclusion of the contract with the successful tenderer.<sup>123</sup> The contracting authority must not conclude the contract in the standstill period. Pursuant to the Remedy Directive, EU Member States may refrain from providing a standstill period under certain conditions which include:

- If the procurement directives<sup>124</sup> do not require the prior publication of a contract notice
- If there is only one tenderer left in the tender at the award stage
- In the case of a contract based on a framework agreement or a specific contract based on a dynamic purchasing system
- If the standstill period will be at least ten days<sup>125</sup> from the passing of the contract award decision

## 6.6 Ineffectiveness of the contract

The purpose of declaring a contract ineffective is to sanction severe breaches of fundamental procurement rules. Declaration of the contract as ineffective shall inhibit the contracting authority and the contractor from benefiting from illegal behaviour and bring the contract back on the market. However, circumstances may change in the time between the illegal conclusion of the contract, and the cancellation of the contract. Consequently, it will be unclear if the contracting authority still has the necessary budget for a new procurement procedure, or if it still needs the outcome of the procurement, or if its plans have changed. Therefore, there is no guarantee that the contract will be returned to the market in the short-run.

### 6.6.1 What is ineffectiveness of the contract?

In EU Member States, the ineffectiveness of a contract is vested with courts or review bodies. Depending on the national law the court or review body may order:

- The retroactive cancellation of all contractual obligations
- The prospective cancellation of all contractual obligations and limit the scope of the cancellation to those obligations which have yet to be performed

In the event of a prospective cancellation, the review body shall be obliged to impose fines on the contracting authority.<sup>126</sup>

### 6.6.2 Who can seek ineffectiveness?

Any person who could have an interest in obtaining a particular contract and who has been harmed or

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122 ECJ Judgement of 28 October 1999, *Alcatel Austria and others* (C-81/98, ECR 1999, I-7.671) paragraph 40.

123 Article 2a of the Remedy Directive; Article 2a of the Utilities Remedies Directive; Article 60 of the Defence Directive.

124 Directives 2004/17/EC, 2004/18/EC and 2009/81/EC sets substantive procurement rules for public contracting authorities, contracts in the field of utilities and contracts concerning defence and security.

125 The time limit of ten days has originally been defined by Article XX (5) of the GPA.

126 Article 2d of the Remedy Directive; Article 2d of the Utility Remedy Directive; Article 60 of the Defence Directive.

risks being harmed by the infringement, can seek ineffectiveness. It is sufficient that the person seeking ineffectiveness has been deprived from the chance to participate in a procurement procedure following procurement rules. It is not necessary to determine that this person would have won the contract.

## 6.6.3 When shall a court or a review body declare a contract ineffective?

### 6.6.3.1 General rule

The EU Remedies Directives provide three cases when a contract shall be declared ineffective. These include:

1. A failure to publish the contract notice. The contract was awarded directly without the prior publication of a contract notice where the procurement rules require tender notification.
2. A failure to comply with the standstill periods. The contract was awarded in violation of the standstill period if this infringement:
  - Deprived the tenderer from applying for a review of the possibility of pursuing pre-contractual remedies, namely interim measures or setting-aside of the contracting authority's decision after seeking review with the contracting authority
  - Was the infringement of substantive remedy rules, not procurement rules, by the contracting authority by awarding the contract before the review body has decided on an application for ordering interim measures, and therefore inhibited the review body from ordering interim measures
  - Affected the chances of the tenderer to apply for a review to obtain the contract by awarding the contract in the standstill period
3. A failure to comply with the procedural rules. The contract was awarded in violation of rules applicable to a framework agreement or a dynamic purchasing system and the value of the framework agreement or of the dynamic purchasing system is above the applicable value threshold as stated in the procurement rules.

Ineffectiveness of contracts shall only apply in cases where the contracting authority breaches fundamental principles of procurement procedures. It is clear that a procurement procedure without the necessary transparency or conclusion of a contract in the standstill period is a breach of fundamental principles.

Awarding a contract based on a framework agreement or a dynamic purchasing system against procurement rules is less of a breach of fundamental principles of public procurement, as it may simply be the wrong sum of points used in the assessment of the tenders.

### 6.6.3.2 Exception

A review body does not have the right to declare a contract ineffective, if there are overriding reasons of general interest that require the contract to remain in place. However, such discretion may only be used under exceptional circumstances.<sup>127</sup> For example, interests of the contracting authority have to be distinguished from reasons of general interest. Purely financial reasons can only be taken into account if they would lead to disproportionate consequences. In defence or security procurement, interests of national security can justify to refrain from declaring a contract ineffective. Consequently, a review body has to perform a case-by-case assessment.

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<sup>127</sup> Article 2d(3) of the Remedy Directive; Article 2d(3) of the Utilities Remedy Directive; Article 60(3) of the Defence Directive.

## 6.6.4 Impact of ineffectiveness

As a general principle, the review body or a court has to cancel a contract retroactive. The contracting authority and the contractor shall be set to the position as if they had never concluded the contract. In some situations, this can have an adverse impact because works, supplies, or services cannot be returned.

### Examples

1. The contracting authority concluded a contract for cleaning services in a procurement procedure without a prior publication of a contract notice. The services are performed for some time before the contract is cancelled retroactive. Problems arise when paying for the services already performed because there is now no appointed price.
2. The contracting authority awards a contract for building a house in a procurement procedure without a prior publication of a contract notice. After the cellar has been finished, the contract is cancelled retroactive. The contracting authority has to continue the works and start a new procurement procedure. Consequently, there is no contract and no liabilities for the cellar and no prices fixed. For the continuation of the works, another economic operator will have to build on the cellar in question, which the economic operator did not build and for which the economic operator will not be liable, and where the economic operator cannot rely on any other liabilities. This might make it difficult to find an economic operator to complete the contract in general, and without the raising of prices.
3. Following an accident which ruined its wheel loader, a contracting authority bought a new wheel loader which was specially adapted to work with slag from a facility to burn community waste. The wheel loader is necessary to keep the community service running. The contracting authority took so long for this purchase that it could have performed an accelerated procurement procedure. If the contract was cancelled retroactive the community services could not be performed.<sup>128</sup>
4. The main association of social insurances procured a framework agreement for computer software to gather data on the use of medicaments. The association selected three companies producing software for doctors without a procurement procedure. If the contract were cancelled retroactive, the services already performed should be returned, which in this case would be hard to achieve. Therefore, the contract was cancelled to the extent that it was not yet performed. However, the contracting authority continued awarding contracts based on the framework agreement which was now not in existence.<sup>129</sup>

Therefore, it may be useful to cancel the contract prospective either defined by the amount not yet performed, or by a time. In these cases, the contracting authority and the contractor already benefited from this illegal behaviour, and as such they should face sanctions.

## 6.6.5 Alternative penalties

If the contract is not cancelled retroactively, alternative penalties shall be imposed on the contracting authority.<sup>130</sup> Alternative penalties must be 'effective, proportionate and dissuasive'. Alternative penalties are somehow similar to penalties in the field of cartel law, as they are not intended to bear the charge of guilt in the meaning of criminal law, but are ordered on the grounds of a severe breach of procurement principles.

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128 *Vergabekontrollsenat Wien Decision of 26 May 2011, VKS-2573/11.*

129 *Bundesvergabeamt Decisions of 13 May 2011, F/0002, F/0007, F/0008, F/0009-BVA/13/2011-69 and of 29 December 2011, F/0011-BVA/13/2011-37.*

130 *Article 2e of the Remedy Directive, Article 2e of the Utilities Remedy Directive; Article 61 of the Defence Directive.*

Alternative penalties include ordering the contracting authority to pay a fine considering aspects of the single case. For example, considering the severity of the breach of the procurement rules, and the benefits gained or the duration of the breach. However, the fine must not be paid to the same body the contracting authority belongs because this would only be a transfer from one budgetary post to another budgetary post and would not be dissuasive. Therefore, the payment would have to be made to another body independent of the contracting authority. In Austrian practice the payment is made to funds for social purposes, or for the purpose of business development.

## 6.7 Damages

Under the Remedy Directive, local law may provide damages because the decision of the contracting authority was unlawful.<sup>131</sup> Within the EU it is up to the Member State to determine the body entitled to award damages to an economic operator harmed by a violation of procurement rules.

In general, the role of the review body is limited to the confirmation of the violation of the public procurement law by the contracting authority. The review body only ascertains the unlawfulness of the actions of the contracting authority. The review body does not decide on the amount of the compensation and is not obligated to establish the damages incurred by the complainant. It is the role of the court to ultimately decide on the amount of damages. In order to claim damages, the complainant would have to prove to the court that there was a breach of public procurement law, that it has suffered harm and there is a causal link between the breach and suffered harm. The breach would be established based on a decision of the review body. Therefore, the complainant would 'only' have to prove that it has suffered harm due to such violation.

The amount claimed may be the costs of preparing a bid or of participating in an award procedure, or lost earnings by not being awarded with the contract. The claimant has to choose for which it will file a claim. The Utilities Remedies Directive provides that for a claim for the costs of preparing a bid or participating in the procurement procedure, it is sufficient to prove the infringement and that the complainant had a real chance to win the contract.<sup>132</sup> If the claim demands lost earnings, the claimant has to prove that he would have won the contract if the contracting authority had led the procurement procedure lawfully. It is hard to prove that the claimant would have won the contract, because the claimant will always suffer from imperfect information on the complete procurement procedure.

This remedy is not used very often because it is difficult to grant compensation.<sup>133</sup> Conversely, the successful award of damage claims can serve as an effective deterrent to the violation of procurement law by contracting entities. In some cases, even those economic operators who won numbers of procedures in front of different courts hesitate in bringing claims for damages.<sup>134</sup>

## 6.8 Summary

The singular purpose of remedies is to enforce the individual rights of economic operators derived from procurement legislation. Remedies commence with an application from an economic operator seeking legal protection. However, because of the nature of procurement procedures, economic operators must be quick in seeking the employment of remedies from a tribunal. The primary purpose of remedies is to change

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131 Article 2(1)(c) of the Remedy Directive; Article 2(1)(d) of the Utilities Remedy Directive; Article 56(1) of the Defence Directive.

132 Article 2(7) of the Utilities Remedy Directive.

133 *Public Procurement Training for IPA Beneficiaries, Module F, Sigma, 2010, p. 19.*

134 See e.g. the proceedings belonging to the ECJ Judgement of 28 October 1999, *Alcatel Austria and others* (C-81/98, ECR 1999, I-7.671).

the decision of a contracting authority which breaches procurement legislation in order to complete the procurement procedure in a lawful manner.

Types of EU remedies include: interim measures - preliminary rulings that aim to correct the alleged infringement or prevent further damage to the interests concerned; setting aside decisions - which aim to correct the procurement procedure by setting aside a decision of the contracting authority; ineffectiveness of the contract - the retroactive cancellation of the contract where cases of severe breaches of procurement rules have been identified; alternative penalties - ordered on the grounds of a severe breach of procurement principles; and, damages - obtained after the contract is concluded if the contracting authority severely breached procurement rules.

However, if a state wants to institute objective control over its public procurement procedures, other means should be used. For example, an entity may be entitled to check procurement procedures *ex officio* or review the complaint of a party interested in the contract, and implement prosecution remedies in the event that it discovers irregularities. In addition, there may be *ex post* control performed by a court of auditors.<sup>135</sup>

Moreover, states may entitle professional associations to bring in remedies against contract documents which favour their members. The decision of the tribunal to order remedies is a powerful outcome of the public procurement review tribunal. Consequently, before considering the options available the tribunal must use its powers of applying discretion and its right to decide and act before ordering remedies - the application of discretion receives robust treatment in the following chapter.

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<sup>135</sup> *Ex post control by a court of auditors in all Member States.*

## Chapter 7

# Discretion

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## 7.1 Overview

Discretion has been granted to procurement review tribunals so that members can use a degree of latitude choosing from several legally admissible decisions the one which is most appropriate to the case in question. Tribunal members have the power to decide and act according to their judgement or choice as the act of applying the law to the facts of the case has not in all cases provided the right answer. This chapter reviews the situations in which tribunal members may apply discretion, and examines the factors and basic steps to be considered when exercising discretion. On a general theoretical basis the chapter illustrates the basic principles and rules on how to apply discretion, and the use of discretion under the Council of Europe (CoE) Recommendations. Both these principles and recommendations reflect detailed best practice guidelines developed in common law countries. To emphasise the principles and recommendations numerous practical examples are layered throughout the chapter which seek to illustrate the functional steps to be considered when exercising discretion, and how to determine the issues of a complaint. The examples also seek to assist the tribunal members decide on whether to hold an oral hearing, on making decisions regarding requesting evidence, or choosing a remedy. The chapter commences by placing the topic of discretion into context within the public procurement review landscape.

## 7.2 What is discretion?

Discretion is the power or right to decide or act according to one's own judgement, or choice.<sup>136</sup> In Recommendation No. R (80) 2 Concerning the Exercise of Discretionary Powers by Administrative Authorities (the "**Recommendation**"), the CoE defines 'discretion' as a power which leaves a tribunal some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate. In the implementation of these principles the requirements of good and efficient administration, as well as the interests of third parties and major public interests should be taken into account.<sup>137</sup>

## 7.3 How to apply discretion

If a tribunal member is granted discretion, just applying the law to the facts will often not provide the right answer. It may also be necessary to determine which of several possible applications of the law is the most fair and reasonable under the circumstances of the particular case.<sup>138</sup> Discretion must be exercised reasonably, in good faith and on proper grounds. Discretion must not be exercised for improper purpose or based on irrelevant considerations such as personal beliefs or values.<sup>139</sup>

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<sup>136</sup> <http://dictionary.reference.com/browse/discretion>.

<sup>137</sup> Recommendation No. R (80) 2 Concerning the Exercise of Discretionary Powers by Administrative Authorities, adopted by the Committee of Ministers on 11 March 1980, the Council of Europe; <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2009056&SecMode=1&DocId=667512&Usage=2>.

<sup>138</sup> A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p 53.

<sup>139</sup> B. McLachlin, Rules and Discretion in the Governance of Canada, 56 Sask L. Rev., 1992, p. 174.

## 7.3.1 Recommendation

The CoE Recommendation sets basic principles which shall be respected by the tribunal when exercising discretionary powers. The main principles of the Recommendation require that the tribunal:

### 7.3.1.1 Does not pursue a purpose other than that for which the power has been conferred (purpose of the discretionary power)

This principle underlines that the tribunal on which a discretionary power has been conferred should observe as a principal purpose the only purpose or one of the purposes for which this power was created. However, if the decision is such as to produce secondary effects that are not in conformity with the purposes for which the discretionary power has been conferred, these secondary effects should not enter into consideration when the lawfulness of the decision is assessed.<sup>140</sup>

### 7.3.1.2 Observes objectivity and impartiality, taking into account only the factors relevant to the particular case (objectivity and impartiality)

Objectivity and impartiality in the exercise of a discretionary power include the obligation placed on a tribunal to consider all the factors relevant to the particular case, and only those 'factors' giving to each of them its due weight. No factor should be unduly taken into account or disregarded and any improper consideration which has no relation to the decision to be taken should be avoided.

The term 'factors' shall include both the facts and the legal basis for the decision. 'Relevant factors' comprise the facts, considerations and legal basis, which it is incumbent upon the tribunal to take into account in the specific case.

The tribunal should endeavour to acquaint itself, and if necessary of its own accord, with the factors which it deems relevant in the particular case. For example, with the aid of pertinent documents, information from the parties concerned or third parties, and expert opinions.<sup>141</sup>

### 7.3.1.3 Observes the principle of equality before the law by avoiding unfair discrimination (equality before the law)

The purpose of this principle is to prevent unfair discrimination by ensuring that persons in the same de facto or de jure situations enjoy similar treatment where the exercise of a given discretionary power is concerned.

If a distinction in treatment is based on reasonable grounds whereby it can be objectively justified having regard to the purpose to be pursued, there is no infringement of the principle of equality before the law. There is unfair discrimination only where the distinctive treatment has no reasonable justification having regard to the purpose and consequences of the measure envisaged.

This principle does not exclude the possibility that a tribunal will change its course of conduct for reasons of general interest, or because former practice has been found illegal or inappropriate.<sup>142</sup>

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140 Recommendation No. R (80) 2 Concerning the Exercise of Discretionary Powers by Administrative Authorities, adopted by the Committee of Ministers on 11 March 1980, the Council of Europe, paragraph 17.

141 Recommendation No. R (80) 2 Concerning the Exercise of Discretionary Powers by Administrative Authorities, adopted by the Committee of Ministers on 11 March 1980, the Council of Europe, paragraph 19-21.

142 Recommendation No. R (80) 2 Concerning the Exercise of Discretionary Powers by Administrative Authorities, adopted by the Committee of Ministers on 11 March 1980, the Council of Europe, paragraphs 22-23.

### **7.3.1.4 Maintains a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues (proportionality)**

This principle applies specifically where a decision taken in the exercise of a discretionary power adversely affects the rights, liberties or interests of an individual. Its aim is to ensure a reasonable balance between the interests at stake. For example, public interest and the private interests of individuals. This principle underlines that a tribunal on which discretion is conferred, should not place on the individual any burdens, which would be excessive with regard to the purpose to be pursued.<sup>143</sup>

### **7.3.1.5 Takes its decision within a time which is reasonable having regard to the matter at stake (reasonable time)**

The aim of this principle is to protect the parties from the tribunal arbitrariness with respect to the time. One of the principles of procurement reviews is that reviews have to be undertaken without delay. As the procurement review deals with pre-contractual decisions, it is necessary to decide fast, otherwise the procurement procedure cannot be continued reasonably after its end.

### **7.3.1.6 Applies any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case (consistency)**

This principle highlights the importance of consistency in administrative practice. The principal lies within the scope of the general principle of equality and is intended to promote predictability and certainty. However, this principal also underlines the need for an individual examination of the particular circumstances of each case.<sup>144</sup>

## **7.3.2 General recommendations for tribunals**

A number of rules are recommended for the day-to-day use of discretion. These include:

- Respect the purpose of the law
- Consider only relevant factors
- Provide logical arguments for the use of discretion
- Achieve consistency
- Ignore personal prejudices
- Choose one of the options
- Consider each option
- Lawfulness prevails over consistency
- Discuss with your colleagues

The following nine sections discuss and explain each of these rules in sequence.

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<sup>143</sup> Recommendation No. R (80) 2 Concerning the Exercise of Discretionary Powers by Administrative Authorities, adopted by the Committee of Ministers on 11 March 1980, the Council of Europe, paragraphs 24.

<sup>144</sup> Recommendation No. R (80) 2 Concerning the Exercise of Discretionary Powers by Administrative Authorities, adopted by the Committee of Ministers on 11 March 1980, the Council of Europe, paragraph 30.

### 7.3.2.1 Respect the purpose of the law

Discretion must be exercised within the boundaries of the law. Decisions must be both consistent with the wording of the law and its purpose and intent.<sup>145</sup> When applying discretion under public procurement law, the tribunal decisions must respect basic procurement principles. These procurement principles include:

#### 7.3.2.1.1 Equality of treatment

Identical situations should be treated in the same way or different situations treated differently.

##### Example

If two tenderers submit identical documents for qualification to the second stage of a restricted procedure, both documents must be accepted if the tender criteria are met, or both documents must be rejected if the tender criteria are not met. If the tribunal concludes that both tenderers should be excluded due to their failure to provide adequate documents, the tribunal must cancel the contracting authority's decision on the evaluation of the qualification of the tender and order a new evaluation.

If the contracting authority failed to properly evaluate the complainant's documents and therefore the tenderer did not advance to the second stage of a restricted procedure, the tribunal must order the contracting authority to include the tenderer in the second stage of the restricted procedure or, if the contracting authority provided for a restricted number of tenderers in the second stage repeat the selection of tenderers.

#### 7.3.2.1.2 Non-discrimination

Tenderers must not be discriminated against due to nationality.<sup>146</sup> The discrimination may be direct by explicitly excluding tenderers of other nationalities, or indirect by setting up conditions which only nationals can fulfil, or claiming that there is no interest of tenderers of other nationalities in concluding the contract.<sup>147</sup> Even a potential discrimination of tenderers from other nationalities is relevant.<sup>148</sup>

##### Example

The contracting authority must not limit tenders to tenderers from a particular town or region. If this is the case, the tribunal must cancel the discriminatory tender, contract condition, or the whole tender if the cancellation of the discriminatory condition is not possible.

The contracting authority requires the use to the greatest possible extent of national materials, consumer goods, labour and equipment. The review body will have to cancel this provision or cancel the procurement procedure if the cancellation of the discriminatory condition is not possible.<sup>149</sup>

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<sup>145</sup> *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p 53.*

<sup>146</sup> *ECJ Judgement of 21 July 2005, Co.Na.Me. (C-231/03, ECR 2005, p. I-7.287) paragraph 19.*

<sup>147</sup> *ECJ Judgement of 13 November 2007, Commission/Ireland (C-507/03, ECR 2007, p. I-9.777) paragraph 31.*

<sup>148</sup> *ECJ Judgement of 13 October 2005, Parking Brixen (C-458/03, ECR 2005, p. I-8.585) paragraph 55.*

<sup>149</sup> *ECJ Judgement of 22 June 1993, Commission/Denmark (C-243/89, ECR 1993 p. I-3.353).*

### 7.3.2.1.3 Transparency

Ensuring for the benefit of any potential tenderer, a degree of advertising that is sufficient to enable the opening of the services market to competition and the review of the impartiality of procurement procedures.<sup>150</sup>

Transparency is a secondary principle derived from primary principles. For example, equal treatment,<sup>151</sup> non-discrimination<sup>152</sup> or principles of the TFEU<sup>153</sup> with the purpose of giving tenderers the possibility to see whether these principles are kept.<sup>154</sup> The purpose of transparency is to protect tenderers from arbitrariness of the contracting authority.<sup>155</sup>

The principle of transparency does not only include the obligation to publish a tender notice<sup>156</sup> but to publish selection<sup>157</sup> and award criteria<sup>158</sup> in advance. “*The principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract*”.<sup>159</sup> The contracting authority also has to give reasons for its decisions.<sup>160</sup>

#### Examples

Information on announced tenders must be accessible for all tenderers depending on the procurement procedure, and must contain all of the relevant requirements. If the contracting authority violates this obligation the tribunal must cancel the whole tender.

The contracting authority demands that the product to be supplied bears a CE-marking showing compliance with the Directive concerning medical devices. One tender is rejected because doctors say that it is insufficient although it bears the CE-marking. The tribunal has to set-aside the decision on rejecting the respective tender because the product satisfies the requirements of the specifications.<sup>161</sup>

### 7.3.2.1.4 Proportionality

Requirements chosen for tender qualification must be appropriate for the tender object. In evaluating the

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150 ECJ Judgement of 7 December 2000, *Telaustria* (C-324/98, ECR 2000, p. I-10.745), paragraph 62.

151 ECJ Judgement of 29 March 2012, *SAG Slowensko* (C-599/10, not yet published in the ECR) paragraph 25.

152 ECJ Judgement of 22 April 2010, *Commission/Spain* (C-423/07, ECR 2010, p. I-3.429) paragraph 75.

153 ECJ Judgement of 9 September 2010, *Engelmann* (C-64/08, ECR 2010 p. I-8.219) paragraph 49.

154 ECJ Judgement of 18 November 1999, *Unitron Scandinavia and 3-S* (C-275/98, ECR 1999, p. I-8.291) paragraph 31;

155 ECJ Judgement of 10 February 1982, *Transporoute* (76/81, ECR 1982, p. 417).

156 ECJ Judgement of 6 April 2006, *ANAV* (C-410/04, ECR 2006, p. I- 3.303) paragraph 22.

157 ECJ Judgement of 18 October 2001, *SIAC Construction* (C-19/00, ECR 2001, p. I-7.725) paragraph 21 and 43.

158 ECJ Judgements of 20 September 1988, *Beentjes* (31/87, ECR 1988, p. 4.635) paragraphs 31 and 36; of 26 September 2000, *Commission/France* (C-225/98, ECR 2000, p. I-7.445) paragraph 51; and of 17 September 2002, *Concordia Bus Finland* (C-513/99, ECR 2002, p. I-7.213) paragraph 62.

159 ECJ Judgement of 10 May 2012, *Commission/Netherlands* (C-368/10, not yet published in the ECR) paragraph 109.

160 ECJ Judgements of 18 June 2002, *HI* (C-92/00, ECR 2002, p. I-5.553) paragraph 45 and of 11 January 2005, *Stadt Halle* (C-26/03, ECR 2005, p. I-1) paragraph 39.

161 ECJ Judgement of 14 June 2007, *Medipac – Kazantzidis* (C-6/05, ECR 2007 p. I-4.557).

proportionality of tender qualification criteria, the tribunal must analyse their appropriateness for the particular tender and not their general suitability.

### **Example**

A tender for the provision of cleaning services may not require as qualification criteria a reference with a value which significantly exceeds the value of the tender. If the tribunal finds that the qualification criteria violates the principle of proportionality, it must either cancel such criterion, or cancel the whole tender if the existence of such criterion could significantly affect the number of tender participants.

While applying the basic principles, the tribunal shall consider the type of contract award procedure, the mode of publishing the contract award procedure notice, the qualification and selection criteria, the type of works, services or goods to be provided under the contract award procedure, and the materiality of the alleged public procurement law violation.

### **7.3.2.2 Consider only relevant factors**

In making choices the tribunal members must consider only relevant factors. In other words, those factors that are consistent with the purpose and wording of the statute. Tribunal members should not take into account inappropriate or irrelevant factors.<sup>162 163</sup> While reviewing the complaints, the tribunal must address the facts of the particular procurement procedure. The tribunal should not take into account any information from previous dealings with the contracting authority or complainant. Stakeholders should be aware of parties of the review procedure who try to add irrelevant factors in order to distract from the relevant factors.

### **7.3.2.3 Provide logical arguments for the use of discretion**

The tribunal should also base its decisions on material that can be logically demonstrated and give reasons for its decision.<sup>164</sup> In a situation where it is appropriate for the tribunal to decide between the cancellation of the whole tender, and the cancellation of one or two tender requirements, the tribunal must provide evidence and/or arguments that led to its decision. Such reasons should be clear and reasonable, and be given transparently.

### **7.3.2.4 Be consistent**

Similar cases should be treated in the same way. There should be no discrimination between persons based on irrelevant considerations.<sup>165</sup> The tribunal should follow its previous practice if earlier decisions were rendered in accordance with the law.

### **Example**

If the tribunal decides on the reinstatement of an excluded tenderer to the tender, those grounds for the reinstatement of the tenderer should apply to all tenderers who filed complaints on similar grounds

<sup>162</sup> *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p 53.*

<sup>163</sup> *B. McLachlin, Rules and Discretion in the Governance of Canada, 56 Sask L. Rev., 1992, p. 173.*

<sup>164</sup> *Exercising discretion, Guiding Development – Practice Notes, New South Wales, 2001, p. 3.*

<sup>165</sup> *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p 53.*

in different procurement procedures. This applies if the tribunal annulled the contracting authority's decision on the exclusion of the tenderer from the tender due to its 'alleged' failure to meet the qualification criteria.

### 7.3.2.5 Ignore personal prejudices

Discretion must be exercised in good faith. It is bad faith when a tribunal member ignores the limits set out above for improper purposes. For example, if a tribunal member exercise of discretion is influenced by outside pressure or personal feelings towards a party, his or her choice is made not only on the basis of an irrelevant factor but in bad faith.<sup>166</sup> While reviewing complaints, the tribunal must address the facts of the particular procurement procedure.

### 7.3.2.6 Choose one of the options

The possibility to use discretion must not be ignored. The tribunal member is required to select one of the available options.<sup>167</sup>

### 7.3.2.7 Consider each option

A tribunal member must consider all factors that are relevant in deciding which option to choose from within the discretion. The tribunal member must not restrict his or her discretion. As long as the law provides the tribunal with a choice, a tribunal member must never refuse to consider each of these choices.<sup>168</sup>

### 7.3.2.8 Lawfulness prevails over consistency

Other options must also be considered even if it leads to a situation in which the tribunal is not consistent in its decisions. For example, because in the past the tribunal was more focused on one of the options and had not really considered other available options.

Moreover, the tribunal should be consistent in its approach to dealing with a contracting authority that fails to provide tender documentation for review on time. However, should specific factors come into play - for example the contracting authority has expressly declined to provide documentation to the tribunal - it could choose another option if the law provides for this.

### 7.3.2.9 Discuss with your colleagues

Even though each case is assigned to an individual tribunal member, the internal decision making process should include discussions with all tribunal members before a final decision on the merits is reached. It is advisable for the tribunal members to consult among themselves regarding the options in order to assess different options in line with the purpose of the statute, and the purpose of the particular section that needs to be addressed.

## 7.4 Steps to be considered when exercising discretion<sup>169</sup>

**1. Determine that the tribunal has the power.** Check the relevant legislation to ensure that the tribunal member has the power to act or to make the decision.

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<sup>166</sup> *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p 53.*

<sup>167</sup> *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p 54.*

<sup>168</sup> *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p 54.*

<sup>169</sup> *Adjusted to the purpose of this handbook on the basis of Exercise of Discretion in Administrative Decision-Making, Ombudsman Western Australia, 2009, p. 4.*

2. **Follow statutory and administrative procedures.** It is important that tribunal members who are responsible for exercising discretion, follow statutory and administrative procedures. For example, there may be pre-conditions to the exercise of discretion, such as a request for complaint evidence or discussion among the tribunal members at the board meeting.
3. **Gather information and establish facts.** Before exercising discretion, it is necessary to gather information and establish the facts. Some facts might be submitted with a complaint, others might be obtained through inquiries or investigation.
4. **Evaluate the evidence.** It is important to evaluate and weigh the evidence to determine the relevant considerations and key facts. A key fact is something whose presence or absence can affect the decision. The evidence must be relevant to the questions before the tribunal and accurate so that any material facts can be established. When evaluating the evidence, the tribunal member must ignore irrelevant considerations.
5. **Consider the standard of proof to be applied.** The tribunal must be aware that the parties to the review proceeding must prove the facts which present the basis for their claims.
6. **Act reasonably, fairly and without conflict of interest.** Tribunal members must act reasonably in their action or decision making process. They need to act impartially and must not handle matters, which constitute an actual or apparent conflict of interest.
7. **Observe the rules of procedural fairness.** Before acting or deciding, the tribunal member may be required to provide procedural fairness to anyone who is likely to be adversely affected by the outcome.
8. **Consider the merits of the case and make a judgment.** Although policies, previous decisions, and court decisions may exist to guide the tribunal member, it is still important to consider the complaint on its merits and to make a judgment about the matter under consideration.
9. **Provide reasons for the decision.** Tribunal members must provide reasons for their decisions.
10. **Create and maintain records.** It is vital that records be created and maintained about the issues that were taken into account in the process and the weight given to the evidence and the reasons for the decisions.

## 7.5 Discretion in practical situations

A tribunal is usually granted discretion in a number of principal situations including:

- Decision on the **interim order**
- Determination of the **issues** of a complaint
- Decision on whether **oral hearings** will be held
- Decision on request for an **evidence** from an expert or a local or a state authority
- Decision on the **remedy** for a public procurement law violation<sup>170</sup>

### 7.5.1 Issue of an interim order

The tribunal may issue an interim order. The tribunal must take into account several aspects before deciding whether to issue an interim order. These include:

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<sup>170</sup> For example, to cancel the contract award procedure, bid evaluation, contract conditions or qualification criteria.

- Balance of interests
- Measures that are necessary and appropriate
- The decision about the time necessary

### 7.5.1.1 Balance of interests

#### 7.5.1.1.1 Harms or Damages Threatening

Which harms or which damages to the complainant are threatening, which need an interim order to withhold them until the tribunal decides the case?

#### Examples

1. The contracting authority issued a contract award decision. After the standstill period has passed, the contracting authority can award the contract. The complainant does not have suspensive effect on the procurement procedure. The complainant faces the harm that it might lose the contract. Therefore it is necessary to keep the contracting authority from awarding the contract. Otherwise, the review procedure might become ineffective, because the tribunal is not competent to set-aside the contract award decision after the award of the contract. Consequently, the tribunal will at least forbid the contracting authority to conclude the contract.
2. The contracting authority issued a decision on the rejection of the tenderer's bid. No contract award decision has been issued to-date. The complainant does not face the harm that it might lose the contract, as the contracting authority will still have to issue a contract award decision, which it will have to send to the complainant and against which the complainant will have the chance to act against. Therefore, it is not necessary to issue interim measures at that stage of the procurement procedure.

#### 7.5.1.1.2 Prospects of success of the complaint

Does it appear that the complainant will not succeed in the complaint. The tribunal must make a pre-evaluation of the complaint to see if the complainant can succeed on its merits. If there is no chance that the complaint will succeed, the tribunal should not issue an interim order.

#### Example

The contracting authority wanted to buy equipment for hospitals. The applicant offered used products instead of new ones. The contracting authority rejected his tender. The applicant applied for interim measures. If there is a provision in the contract documents demanding new products instead of used ones - which the applicant offered - and variants without a tender satisfying the specifications are not allowed, the complaint has no chance to win. The tribunal can consider this circumstance when it decides about interim measures.<sup>171</sup>

#### 7.5.1.1.3 Interests of the parties

The tribunal shall determine the interests of the parties. For example:

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<sup>171</sup> See ECJ Judgement of 9 April 2003, *CS Austria* (C-424/01, ECR 2003, p. 3.249).

- What are the interests of the complainant in issuing interim measures?
- What are the interests of the contracting authority in continuing the procurement procedure?
- What are the interests of the other parties in issuing interim measures or in refraining from doing so?
- Are there any public interests concerned, whereas public interests are different from the interests of the contracting authority?

The tribunal shall balance these interests and the prospects of success of the complaint in order to find whether it will order interim measures. If the tribunal finds that it will not order interim measures it can omit steps 2 and 3 when exercising discretion.

### Examples

1. The contracting authority issued a contract award decision in favour of B. The complainant A has an interest in winning the contract. The complainant brings in a complaint and combines it with an application for interim measures. The complaint's complaint seems to be founded. There are no special public interests in concluding the contract quickly, but there is a public interest in finding the best tender according to the specifications of the contract and according to the law. Therefore, the interests of the complainant in ordering interim measures prevail the interests of the contracting authority in awarding the contract. The tribunal should forbid the contracting authority to award the contract.
2. The contracting authority starts a procurement procedure by sending the contract documents to the candidates. One candidate finds that the contract documents contain discriminatory provisions. Therefore, the candidate complains at the review body and demands interim measures. His interests are participating in a lawful procurement procedure. The candidate wants to submit a tender on the grounds of lawful contract documents. However, the time to submit tenders is running and will end before the tribunal can decide. The candidate definitely has an interest in ordering interim measures, which give him the chance to submit a tender on the grounds of lawful contract documents. As the candidate's complaint sounds well founded, the tribunal should order interim measures, because the interests of the applicant in participation in a lawful procurement procedure prevail the interests of the contracting authority in continuing the procurement procedure. The measures are to forbid the contracting authority to open tenders and suspend the time to submit tenders. This solution does not demand the complainant to submit a tender on the grounds of contract documents, which the complainant finds discriminatory. After the end of the review procedure, the complainant will still have time to submit a tender.
3. The contracting authority procures for vaccinations because it expects a pandemic. One tenderer finds the contract documents discriminatory and acts against them. The contracting authority answers the tenderer's application for interim measures with the urgency to start vaccinations in order to protect the population from the epidemic threatening. If the threat of the epidemic is well founded, the tribunal should not order interim measures, because there is the public interest of the protection of life and health of the public, and this interest prevails the interest of the complainant.

#### **7.5.1.2 Measures necessary and appropriate**

The tribunal has to find the measure which is necessary to avoid the harm or damage to occur. The tribunal can order everything that helps to reach this aim. However, this measure should be appropriate to the individual situation, which depends on the stage of the procurement procedure and the position of the tenderer. The measure should be the least burdening for the contracting authority.

## Examples

1. The complainant complains against the contract award decision. The next step of the contracting authority would be to conclude the contract. The appropriate measure is to forbid the contracting authority concluding the contract.
2. The applicant wants to have the tender documents reviewed. The time to submit tenders will end before the tribunal will have decided. The necessary measure is to forbid the contracting authority to open the tenders and to suspend the time to submit tenders in way that it will continue after the end of the review procedure.
3. The applicant turns against the decision of the contracting authority not to invite him to submit a tender in the second stage of a negotiated procedure. To keep his chances in participating open and to give all tenderers the same time to prepare their tenders, the tribunal must prohibit the contracting authority from inviting tenderers to submit tenders. The necessary measure is to forbid the contracting authority to invite candidates to submit tenders. This will be the least burdening measure, because it is the only measure securing the aim, and it still gives the contracting authority the chance to review and reverse its decision.

### 7.5.1.3 Time

The time for which the tribunal orders interim measures must be determined in the order. The time should be sufficient to cover the review procedure. Therefore, the time should be either fixed with the period in which the tribunal will have to decide in the case, or simply given until the end of the review procedure.

## 7.5.2 Determination of the issues of a complaint

Determination of the issues is the most important part of the decision making process, as it determines which factors will be crucial for the tribunal in the review. In other words, 'issues' represent the real substance of the dispute between the complainant and the contracting authority. The tribunal will have to discover what the dispute is regarding. Although the tribunal does not exercise discretion following the definition in the Recommendation, as the tribunal is not choosing from several options available when establishing issues of the complaint, the tribunal should apply some of the principles applicable to per se discretion.

In the complaint and in the response to the complaint, the parties will state what they consider as the issues in the review proceedings. The determination of the issues of the complaint is the tribunal's right, and the tribunal's review is not restricted only to the issues raised in the complaint. However, the tribunal is limited by the circumstances of the particular contract award procedure, and by procurement legislation. The tribunal will need to assess what is relevant in order to decide on the complaint. The tribunal will need to evaluate carefully whether the actions and the decisions of the contracting authorities challenged in the complaint violate the procurement legislation, or whether the procurement procedures failed the procurement legislation in some other respects not mentioned in the complaint. In any case, the tribunal should clearly justify its conclusion. Such assessment must not be arbitrary and must be applied consistently in all review proceedings.

### 7.5.3 Decision on oral hearings

According to Article 6 of the ECHR, the tribunal should hold oral hearings. However, oral hearings are not always necessary and can be omitted in certain cases. In determining whether to hold an oral hearing the tribunal should consider the following:

- The principle of a **fair trial**. This usually requires an oral hearing.
- The **complexity** of the case. If information provided by the case file is sufficient for deciding on the case, the tribunal may decide that oral hearing can be omitted.

- The **type** of decision. If the decision is on procedural aspects only, like appointing an external expert, an oral hearing is not necessary.
- Ascertain if the oral hearing is necessary to **hear** the parties.
- What can the tribunal **gain** through examining the parties orally? Oral examinations should be compared with the traditional submission of evidence in writing.
- Is it necessary to hear **witnesses**?
- Did an expert submit his **expertise** and will he have to defend it in front of the parties?
- Is there an impact on the **procedural deadlines** which must be respected by the tribunal? Or, does it seem to be more important to safeguard the protection of the principle of a fair trial than to lead a fast procedure?

The reasons for not holding an oral hearing in a particular case should be clearly formulated, and they should take into account all aspects which are relevant.

### 7.5.4 Decision on request for evidence

The tribunal should always consider, whether the standard of proof has been met and whether a well reasoned and fair decision can be issued based on the facts available to the tribunal. It is the role of national legislation to provide standards of proof. However, the tribunal could rely on the general doctrine used in most civil and common law countries which provides basically for two standard of proofs:

- **Superiority of the evidence.** The greater weight of evidence, not necessarily established by the greater number of witnesses, testifying to a fact but by evidence that has the most convincing force.
- **Clear and convincing evidence.** Evidence indicating that the thing to be proved is highly probable or probably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials but less than evidence beyond a reasonable doubt - the normal in criminal trials.

As stems from the above, the tribunal may request any evidence including an expert statement or any information or document from authorities or the parties of the review procedure. However, the tribunal should keep in mind the relevance of the evidence as well as the time and the costs related with obtaining the evidence when deciding whether and what evidence is to be requested.

If the tribunal has to answer questions which require special knowledge which the tribunal members do not have, it will have to consult with an expert. The tribunal will have to examine persons involved in the procurement procedure as witnesses, if questions arise which only the expert can answer. If the tenderers had to submit samples and the quality of the samples submitted is in question, the tribunal will have to check these samples.

Even if gathering additional evidence will add time and costs to the procedure, the tribunal should ask for it as it helps improve the quality of the decision and often this is the only way to find the facts necessary for the decision.

Before appointing an expert, the tribunal should hear the parties. The parties should have the chance to give a statement on the expert and the questions the tribunal will ask. Nevertheless, it is up to the tribunal to decide whether it will need an expert.

## Examples

1. The contracting authority wants to find an economic operator who dredges rivers. Only two tenders arrive. One of the tenders is from a group of tenderers who control more than 90% of the relevant market. In order to discover if they could fulfil the contract alone or in smaller groups, the contracting authority needs the opinion of an expert who knows and understands the business and the relevant market.
2. The complainant claims that the tender, which was proposed to win the contract, has abnormally low prices. As none of the members of the tribunal has the necessary knowledge of the market, an expert will have to be consulted to check the prices tendered.
3. The complainant claims that the references named in the best tender cannot be correct, and the person did not perform all the tasks named. The easiest way to find out is to examine that person as a witness.

### 7.5.5 Decision on the remedy

Upon evaluation of the evidence, establishment of the facts of the case, the tribunal shall decide on the merits of the complaint. The tribunal has no discretion to decide if the public procurement law was violated, and if the established facts clearly prove this case.

The tribunal does have discretion interpreting contract documents. However, the tribunal has some discretion to decide on the type of the applicable remedy. The tribunal has to take into account several elements when it decides on an individual remedy to be applied. The key elements are the decisions of the contracting authority acted against, the stage of the procurement procedure affected by the alleged violation of the procurement legislation, and the gravity of the violation. Beside the question of lawfulness, the tribunal will have to ask the question of the relevance of the violation of the law for the result of the procurement procedure.

## Example

The complainant was ranked third in the procurement procedure. The complainant claimed that the tenders ranked first and second should have been rejected. The contracting authority made an error assessing the tenders. The tender ranked second should have been rejected but the tender ranked first fulfilled the requirements of the tender documents.

Even if the contracting authority violated the procurement legislation by not rejecting the tender ranked second, this illegality does not have any effect on the results of the procurement procedure as the tender to be awarded will remain and the contracting authority will conclude the contract with the tenderer proposed.

### 7.6 Summary

Tribunal members have the power to decide and act according to their judgement or choice with regard to the case in question. This discretion is granted as historically the act of applying the law to the facts of the case has not in all circumstances provided the right answer. Therefore, discretion is being granted to procurement review tribunals so that a degree of latitude can be used, enabling tribunal members to choose from several legally admissible decisions the one which is most appropriate. In addition, in the implementation of these principles it may also be necessary to determine which of several possible applications of the law is the most fair and reasonable under the particular circumstances of a case in question.

When a tribunal is exercising its discretionary powers in considering a recommendation, it must take into account and respect a range of principles before drawing conclusions and making a recommendation. These range of principles are granted to make certain that a tribunal: does not pursue a purpose other than that for which the power has been conferred; observes objectivity and impartiality - taking into account only the factors relevant to the particular case; observes the principle of equality before the law by avoiding unfair discrimination; maintains a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues; takes its decision within a reasonable time having regard to the matter at stake; and, applies any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

In addition, several general recommendations have been suggested for a tribunal to refer and use on a day-to-day basis in the undertaking of its duties. Members of procurement review tribunals are recommended to: respect the purpose of the statute; consider only relevant factors when making choices; provide logical arguments for the use of discretion; be consistent with similar cases treated the same way; ignore personal prejudices; consider each of the options available and choose one option; and, discuss with colleagues before a final decision is reached.

Moreover, the tribunal should consider several logical steps when exercising discretion. The purpose of these steps is to provide a checklist for tribunal members to follow when exercising discretion. These steps commence with encouraging the tribunal to check the relevant legislation to ensure that the tribunal has the power to act or make the decision in question, and to follow the published statutory and administrative procedures. The tribunal should also source relevant information, establish the facts of the case, and analyse and evaluate the evidence gathered and the key facts identified.

The tribunal must also consider the standard proof to be applied, and act reasonable and fairly and without conflict of interest whilst observing the rules of procedural fairness. Additionally, the tribunal should consider the merits of the case and make a judgement providing reasons for its decision. The creation and maintenance of records regarding the issues taken into account in the process, and the weight given to the evidence and the reasons for the decision are vital elements in the process.

Furthermore, each and every tribunal is granted discretion in a number of principal situations. These situations include: the decision on whether to issue an interim order; determination regarding the issues of a complaint; the decision on whether to hold an oral hearing; the decision to request evidence from an expert or a local or state authority; and, the decision on the remedy for a public procurement law violation - for example, to cancel the contract award procedure, bid evaluation, contract conditions or qualification criteria.

Several aspects must be taken into account before deciding on whether to issue an interim order. These include balancing the interests of the parties to the procedure, ascertaining the measures that are necessary and appropriate to avoid any harm or damage to occur, and determining the time for which the tribunal will order interim measures and publish the interim order. The determination of the issues of a complaint is the most important part of the decision making process, as it determines which factors will be crucial for the tribunal in the review. Put differently, the 'issues' in question represent the real substance of the dispute between the complainant and the contracting authority.

In determining on whether to hold an oral hearing the tribunal should consider the principle of fair trade, the complexity of the case, and if it truly necessary to hear the parties. In deciding on whether to request

evidence from an expert or a local or a state authority the tribunal should consider whether the standard of proof has been met and whether a well reasoned and fair decision can be issued based on the available facts.

Having reviewed the necessary steps a tribunal should consider when undertaking the process to reach a decision, the next challenge for tribunal members will be to prepare the decision. The decision needs to be prepared in a format enabling it to be presented and published to the wider public to critique. The significant matter of writing decisions is the subject of the next chapter.



## Chapter 8

# Writing Decisions

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## 8.1 Overview

The drafting and writing of the decision is arguably the most important task of the procurement review tribunal. The publication of the decision highlights to the wider public the robustness of the procurement review tribunal and the analytical skills of its members, which enabled a fair conclusion to be drawn from the presented evidence and key facts based on reason and logic. This chapter introduces several different approaches to drafting and writing decisions. In addition to the basic structure of a decision, the members of procurement review tribunals responsible for drafting and publishing the decision need to be conscious of the need to adopt a recognised structure, be aware of the incorporation of alternative headings and different writing styles, and the methods for the revision of draft decisions. These individual areas are examined in detail throughout this chapter, with examples provided to illustrate key points. The chapter commences by providing an outline of how to approach writing the decision, and progresses to present several types of recognised structures for decisions.

## 8.2 How to approach writing decisions?

Writing a decision should be done under the guidance and steer of a responsible member of the tribunal. It is up to the tribunal member whether additional staff are required. The extent of participation of additional staff can vary from research and preliminary legal analysis, to preparation of the first draft of the decision. The extent of involvement may depend on the complexity of the case and the workloads of the tribunal member and staff.

Before beginning to write the decision, the author(s) should think about what the decision is to say, and how this should be said. Moreover, the extent of the decision and the audience to whom the decision is addressed should also be considered. Firstly, the complaint and all other statements given during the review procedure, including the results of an oral hearing, should be considered and summarised.

Secondly, the material facts should be ordered, and the issues to be decided identified together with the applicable law. Finally, a conclusion needs to be reached. However, this does not mean that the tribunal members may not change their mind about the issues of applicable remedy. Importantly, the preparation for writing is necessary to provide a basis which will serve as the outline or first basis for the decision.

In order to organise their thoughts, the author(s) should prepare an outline of important facts, issues, and points. The best time to prepare this outline is at the first review of the complaint and tender documentation from the contracting authority. The outline should bring the material of the decision into a logical order and should address the following key points:

- The issue or issues in the review procedure
- The findings of the facts in respect of identified issues based upon available evidence
- The determination of the law that applies to the facts
- The application of the law to the facts to reach the decision<sup>172</sup>

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172 *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p. 152.*

## 8.3 How should the decision be structured?

According to the principles of the ECHR, the tribunal must provide reasons for its decision and these reasons must be clear and include an explanation of the legal and factual basis for the decision. However, since the purpose of this handbook is to provide tribunal members with examples of best practice, different decision structures are presented and described. The three recommended decision structures and their individual headings presented are examples of decision writing practice of procurement review bodies in other countries. These decision structures are considered clear, concise and excellent examples of structures for procurement review bodies to digest.

### Example 1

#### A recommended structure for a full-dress decision of a public procurement review body in civil law countries.

- introduction<sup>173</sup>
- identification of the issues to be decided<sup>174</sup>
- description of the material facts of the case
- summary of applicable law
- analysis<sup>175</sup>
- instructions

### Example 2

#### The structure used by the ECJ and the European General Court (EGC).

- keywords
- parties of the procedure and other participants
- composition of the jury
- introduction
- applicable law
- facts of the procedure
- questions submitted or the claim<sup>176</sup>.
- admissibility
- analysis
- verdict

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173 This should include the identification of the parties, the administrative body, the subject matter of the proceedings, the procedural posture of the case and the decision.

174 Although there are not many countries which have a specific section on issues, its incorporation in the decisions makes it easier for the parties to the case and other tenderers and contracting authorities to know what is the case about.

175 The application law to the facts of the case and resolution of the issues.

176 This will depend on the type of procedure.

### **Example 3**

#### **A recommended structure from Bundesvergabeamt, Austria.**

- keywords<sup>177</sup>
- deciding body<sup>178</sup>
- names and the roles of the parties of the procedure
- subject of the procedure
- verdict
- summary - of the complaint and all other statements given during the review procedure
- summary - of the result of the oral hearing
- facts of the procedure<sup>179</sup>
- analysis<sup>180</sup>

These decision structures are intended to provide members of tribunals ideas on how to structure their own decisions. All structures consist of the same elements, although they vary in their order. In the following subsections all of these individual structure headings / elements will be discussed in details.

### **8.3.1 Introduction**

The purpose of the introduction is to guide the reader. The introduction should briefly describe the case, the challenged tender procedure, and the legal subject matter. In addition, the introduction should describe the decision, which will state the violation by the contracting authority's act, if the complaint is confirmed, or the absence of a violation claimed by the complainant, as the tribunal specifies the challenges, and therefore a confirmation of the contracting authority's act.

The introduction should further cover the procedural and jurisdictional status and composition of the tribunal, the parties involved and the issues to be decided, unless they are so complex that they are better treated in a separate section.<sup>181</sup> The introduction should serve as the case or complaint summary.

The decision writer is not in the position to write an introduction until he or she knows the conclusion. Sometimes the author will not know what the issues are, how many issues are to be examined, or how the issues should be resolved until the decision writer has drafted a legal analysis for each issue.<sup>182</sup> The final version of the introduction is best written after the decision is complete, when the tribunal member has determined the issues, conclusions, and supporting analysis.<sup>183</sup>

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177 Including the title attributed to the contract and the decision acted against.

178 Including the names of its members.

179 These should be derived from the evidence including arguments, and why and how the facts given were derived

180 This should consist of: admissibility; legal issues of the complaint - which may be structured into several points if several legal questions have to be answered; decision on costs each structured in a summary of applicable law, application of the law to the case, resolution of the issues.

181 Edward Berry, *Writing Reasons, A Handbook for Judges*, E-M Press, 2007, p. 31.

182 J.C. Raymond, *The Architecture of Argument, The Judicial Review: Journal of the Judicial Commission of New South Wales*, 7, 2004, p. 49.

183 *Judicial Writing Manual*, Federal Judicial Center, 1991, p. 10.

## **A typical introduction.**

“Pursuant to Section [...] of Act No. [...] on Public Procurement, as amended, the review tribunal, acting in its proceedings commenced on [...] 2011, with respect to Complaint No. [...], filed by [...] with respect to the procurement on “Provision of financial services for the municipality [...]” having its object the cancellation of the decision of the contracting authority on evaluation of the tender due to breach of non-discrimination principle, has decided:

- to accept Complaint No. [...] filed by [...] with respect to the procurement on “Provision of financial services for the municipality [...]”;
- to order the contracting authority to cancel its decision on the evaluation of the tender due to its violation of the non-discrimination principle, which prohibits the application of selective criteria to different tenderers. “

**or**

“Pursuant to Section [...] of Act No. [...] on Public Procurement, as amended, the review tribunal, acting in its proceedings commenced on [...] 2011, with respect to Complaint No. [...], filed by [...] with respect to the procurement on “Supply of laptops, desktops and monitors for the state agency [...]” having its object the cancellation of the tender requirement due to its restrictive character which violates the procurement principle of proportionality, has decided:

- to accept Complaint No. [...] filed by [...] with respect to the procurement on “Supply of laptops, desktops and monitors for the state agency [...]”;
- to order the contracting authority to cancel the requirement for a single manufacturer of laptops, desktops and monitors as such requirement is unsubstantiated and overly restrictive due to the contracting authority’s failure to demonstrate a reasonable basis for the requirement and to set new technical requirements that will correspond to the legitimate needs of the contracting authority. “

**or**

“Pursuant to Section [...] of Act No. [...] on Public Procurement, as amended, the review tribunal, acting in its proceedings commenced on [...] 2011, with respect to Complaint No. [...], filed by [...] with respect to the procurement on “Construction services for the ministry [...]” having its object the cancellation of the contracting authority decision on rejection of the complainant bid due to alleged low price, has decided:

- to accept Complaint No. [...] filed by [...] with respect to the procurement on “Construction services for the ministry [...]”;
- to reject the complaint which claimed that the contracting authority failed to reasonably evaluate complainant’s low fixed price due to the fact that pursuant to the tender documentation the contracting authority has a right to reject a complainant’s proposal where its price was “unreasonably” low which fact suggests that tenderer failed to comprehend the complexity and risks of the program. , and the record reflects that the contracting authority considered the complainant’s low price and raised the matter with the complainant during discussions.”

**or taken from the European Court of Justice**

“JUDGMENT OF THE COURT ([...] Chamber)

[Date]

(Public procurement – Directive 2004/18/EC – Contract award procedures – Restricted call for tenders – Assessment of the tender – Requests by the contracting authority for clarification of the tender – Conditions)

In Case C-[...],

REFERENCE for a preliminary ruling under Article [...] from the [Court] ([Member State]), made by decision of [...], received at the Court on [...], in the proceedings

[...],

[...],

v

[...],

intervening party:

[...],

THE COURT (Fourth Chamber),

composed of [...] (Rapporteur), President of the Chamber, [...], [...], [...] and [...], Judges,

Advocate General: [...],

Registrar: [...], Administrator,

having regard to the written procedure and further to the hearing on 14 December 2011,  
after considering the observations submitted on behalf of:

- [...], [...], by [...], [...] and [...], avocats,
- [...], by [...] and [...], avocats,
- [...], by [...], acting as Agent,
- [...], by [...] and [...], avocats,
- the [...] Government, by [...], acting as Agent,
- the European Commission, by [...] and [...], acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,  
gives the following

### **Judgment**

1. This reference for a preliminary ruling concerns the interpretation of Articles [...], [...] and [...] of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).
2. The reference has been made in proceedings between the [...] (Public Procurement Office; ‘[...]’) and undertakings which were unsuccessful in a call for tenders launched during 2007 by [...] (‘[...]’), a commercial undertaking wholly controlled by the [...] State, with a view to the supply of services relating to toll collection on motorways and certain roads.”

or taken from the European General Court

“JUDGMENT OF THE GENERAL COURT (...) Chamber)

[Date]

(Public service contracts – Tendering procedure – Provision of information technology services – Selection of the tenderer as second contractor in the cascade procedure – Action for annulment – Grounds for exclusion from the tendering procedure – Conflict of interests – Obligation to state the reasons on which the decision is based – Manifest error of assessment – Equal treatment – Non-contractual liability)

In Case T-...,  
**[...]**, established in [...], represented by [...] and [...], lawyers,

applicant,

v

**European Commission**, represented initially by [...] and [...], acting as Agents, assisted by [...], lawyer, and subsequently by [...], assisted by [...] and [...], lawyers,

defendant,

APPLICATION for (i) annulment of the Commission decisions of 17 October 2008 selecting the applicant's tender as second contractor in the cascade for Lots 2 and 3 under the call for tenders launched in the field of 'Statistical Information Technologies', concerning advisory and development services relating to the format for the exchange of statistical data and metadata ([...]) (OJ [...]), and of all further related decisions, including the decisions awarding the contract to other tenderers, and (ii) damages,

THE GENERAL COURT (Eighth Chamber),  
composed of [...], President, [...] and [...] (Rapporteur), Judges,  
Registrar: [...],  
having regard to the written procedure and further to the hearing on [...],  
gives the following

### **Judgment**

Stating a summary of the issues raised in the complaint may seem impractical if the issues are too numerous or complex. In such cases, it is advisable either to avoid a summary of the issues in the introduction and address them in the description of issues section, or simply use some keywords of the issues and describe them in more details in the issues section. When writing an introduction the author should:

- avoid excessive details about dates, times, places and procedural matters
- avoid stating issues in lengthy sentences
- avoid quoting the text of the complaint or other legal phrases
- keep the introduction brief
- state the decision clearly and visually distinguishable

### 8.3.2 Description of the issues

The determination of the issues to be decided is the most important part of the decision making process. How the issues are formulated determines the material facts and governing legal principles. The tribunal members are not required to consider issues stated in the complaint if some or all of them are not material to the outcome, or adhere to the legal qualification suggested by the complainant.<sup>184</sup> Tribunal members are free to describe the issues as seen, even if this differs from the description of the issues in the complaint. It is the tribunal member's responsibility to decide on the issues and adjust the analysis accordingly. Importantly, the tribunal should state reasons why it considers relevant issues different from the claimant.

The first step is to determine the decision or action that is being disputed by the complainant, the grounds for that decision or action, and the reasons for the dispute.<sup>185</sup> Unless each disputed issue is clearly separated from the other, the decision will not be clear and convincing. However, the decision may address not only issues raised by the complainant, but also the issues that are dispositive and important according to the tribunal.

Issues which the tribunal believes are not necessary to be addressed but which were seriously urged by the complainant, should be discussed only to the necessary extent in order to prove that they were considered.<sup>186</sup> The following 3 examples are cases where certain issues could be omitted.

#### Examples

1. The complainant was excluded from the tender due to the late filing of the tender. Therefore, its tender was not considered by the contracting authority. The complainant files a complaint with the tribunal providing a number of reasons to support the consideration of its tender. As long as the procurement law does not provide the option to extend the deadline for tender submission, the tribunal shall only address the issue of the late tender filing. Addressing any other issue would make the decision less persuasive.
2. The complainant was excluded from the tender due to its failure to meet the qualification criteria. The complainant claims that the contracting authority has not evaluated its document properly and that the qualification criteria are discriminatory. As the period for challenging the qualification criteria has already passed, the tribunal should only address the manner in which the contracting authority has evaluated the qualification documents submitted by the complainant but not the criteria itself.
3. The complainant was not invited to negotiate in the second stage of a negotiated procedure after submitting a tender. The contract documents provided for the option of the contracting authority to negotiate only with one tenderer. The contracting authority passed the contract award decision to the tenderers. The claimant wants the tribunal to set aside the contract award decision and objects to not being invited to negotiate the specifications of the contract, and the technical solution offered in the best tender. The tribunal should not deal with the technical specifications of the contract. This is because the time to act against them has passed.

The next step is to identify the applicable law that governs the dispute, and direct how the dispute should be

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<sup>184</sup> *Judicial Writing Manual, Federal Judicial Center, 1991, p. 14.*

<sup>185</sup> *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p. 152.*

<sup>186</sup> *Judicial Writing Manual, Federal Judicial Center, 1991, p. 17.*

resolved.<sup>187</sup> In most countries, there is only one law governing public procurements.

The statement of issues may come before or after the statement of facts. Stating the issues first will make the statement of facts more meaningful to the reader, and help assist the reader digest the material facts.<sup>188</sup> The statement of issues should not be confused with the quoting parties' contentions, and the tribunal should avoid reproducing lengthy statements of the parties.<sup>189</sup> The following 5 examples present the issues to be considered.

### Examples

1. The tribunal must decide if the description of the tender subject, as provided by the contracting authority, is sufficient for the tenderers to adequately assess the extent of work that will be needed for the performance of the contract. If the description of the tender is not sufficient, the tribunal must cancel the entire tender.
2. The tribunal must decide if the technical specifications for the provision of services as stated in the contract notice violate the technical norms, and therefore may not form part of the tender conditions. If the violation is proven, the relevant criterion needs to be set aside.
3. The tribunal must decide if it is proper to use the negotiated procedure without publication as a procurement method in the tender for the provision of services with a value over € 100,000. If not, the entire tender must be cancelled.
4. The tribunal must decide if the failure to state reasonable grounds in the contracting authority's decision on its rejection of the complainant's bid, renders the contracting authority's decision unreviewable. If yes, the contracting authority's decision on non-acceptance of the complainant's bid must be cancelled, and the contracting authority must re-evaluate the complainant's bid.
5. The tribunal must decide if the tenderer whom the contracting authority intends to award the contract meets the qualification criteria. If not, the tribunal has to set aside the contract award decision.

### 8.3.3 Description of the material facts

The description of the material facts shall describe all necessary facts which are important for the decision. As the decision should be published and may affect the future behaviour of tenderers and contracting authorities, the decision should provide a sufficient description of the case so that any third party can understand the nature of the tender and the complaint.

A precise definition of the issues will reduce the amount of facts that need to be described in the decision, as it will only focus on the relevant facts related to the issues at hand. Therefore, only the facts that are necessary in order to reach the decision should be included, with irrelevant facts omitted from the decision. The author should not get trapped by the structure used by the parties, and should develop their own structure. Usually it is helpful to keep the chronology of the procurement procedure as a basic line. Sometimes it is helpful to copy parts of the tender documents, decisions of the contracting authority,

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<sup>187</sup> *A Manual for Ontario Adjudicators, Society for Ontario Adjudicators and Regulators, 2000, p. 153.*

<sup>188</sup> *Judicial Writing Manual, Federal Judicial Center, 1991, p. 10.*

<sup>189</sup> *Judicial Writing Manual, Federal Judicial Center, 1991, p. 11.*

letters, or e-mails, especially if the interpretation and understanding make it necessary to read the exact wording from these documents.

The author(s) should state and prove which evidence leads to the facts stated, and set out why the facts were concluded from the evidence available. This is especially important if there is contradicting evidence which can only be used once.

### 8.3.4 Summary of applicable law

There is no need to have a specific section on the law. Most tribunals state the law which was applied for the determination of their jurisdiction, and the basis for their decision in the analysis section. However, some tribunals have a separate section on law. In this section tribunals evaluate whether the complaint has met the legal criteria for admissibility, which is useful if the legislation on the admissibility of complaints sets up high formal requirements, and the tribunal frequently decides on formalities like keeping time limits<sup>190</sup>. This section should also deal with questions of law. These questions can be wide ranging and include whether the tribunal has jurisdiction over the complaint, and if the formal requirements the complaint has to fulfil have been met.

### 8.3.5 Analysis – application of law

#### 8.3.5.1 Analysis in general

Analysis is the main part of the decision, and it must demonstrate that the tribunal's decision is based on reason and logic. The presented analysis should persuade the parties of the correctness of the tribunal's conclusions by the power of reasoning, not through argument or persuasion. Although the decision does not have to address every argument of the parties, the analysis must be sufficient to demonstrate to the losing party that the main arguments of its position were fully considered.<sup>191</sup>

It is up to the tribunal to decide on the order to address the issues. The tribunal should only address the issues which are relevant for the case, and which have been identified in the introduction (the first part of the decision). If there are multiple issues it is advisable to arrange the issues in a sequence that makes sense.<sup>192</sup> In general, the decision must first address the issue of the jurisdiction and admissibility of the complaint. For example, whether the tribunal may decide on the complaint, whether the complaint is within its jurisdiction, whether the prior request with the contracting authority was filed, the time limit for filing the review, and the necessary requirements to be met in order to accept the complaint etc...

If necessary, the tribunal may also refer to its previous decisions which may be relevant for the case in question. Since the tribunal's decision-making process is not precedence-based, the tribunal should only use such reference in support of an argument already presented in the decision. On the other hand, it is helpful if a tribunal answers the same legal questions the same way, and demonstrates this by referring to previous decisions.<sup>193</sup> These decisions in-turn should be used as guidelines by economic operators and contracting authorities.

#### 8.3.5.2 Preparing the analysis

The tribunal should create its own structure for drafting the decision. If the structure of the decision follows the arguments of the complainant and contracting authority as a basis, the decision may become unclear, and

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190 See e.g. ECJ Judgment of 23 December 2009, *Commission / Ireland* (C-455/08, ECR 2009 p. I-225) and ECJ Judgment of 28 January 2010, *Uniplex (UK)* (C-406/08, ECR 2010 p. I-817).

191 *Judicial Writing Manual*, Federal Judicial Center, 1991, p. 16.

192 J.C. Raymond, *The Architecture of Argument, The Judicial Review: Journal of the Judicial Commission of New South Wales*, 7, 2004, p. 46.

193 *For the necessity to decide the same questions the same way under the requirements of the principle of a fair trial.*

the decision and tribunal's arguments may be lost. One solution to this problem is to take control over the case by creating a logical framework for the issues, and giving space to the arguments of the parties within that framework.<sup>194</sup> Importantly, the tribunal must take care that it deals with all arguments insofar as they are an issue to be addressed.

### 8.3.5.3 Structuring the analysis

It will be helpful to adopt a clear structure when organising the analysis of each issue. For example:

1. Present the argument(s) of the complainant.
2. Present the argument(s) of the contracting authority.
3. Present the arguments of other parties of the procedure.
4. Present the conclusion(s)

The arguments of the parties will only need to be given in brief, as the tribunal's conclusion is the most important part of the analysis structure. However, it is important that the parties have to be able to see that the tribunal dealt with their respective arguments fairly and robustly. In general, the structure of arguments presented in decisions is as follows:

1. One party says X.
2. The other party says Y.
3. The tribunal says X (or Y, or possibly Z).<sup>195</sup>

#### Example

Complainant: The decision on rejecting his tender is wrong. The contracting authority should have asked him to explain the prices in his tender.

Contracting authority: It was not necessary to ask the complainant because the prices were abnormally low, differed from the prices of the other tenders too much, and the complainant could never explain them.

Conclusion: It is not the duty of the tribunal to assess tenders. The difference of prices between the complainant's tender and the next tender is so high that it gives reasons to suspect abnormally low prices. However, the contracting authority should have gone through a contradictory procedure to assess abnormally low prices. The claim that the prices in the complainant's tender are abnormally low cannot be decided based on the documents of the procurement procedure, but the contracting authority has to assess them in a contradictory procedure.

The tribunal does not necessarily have to repeat the arguments of the parties if it gives a brief summary of the complaint, and the statements submitted by the parties of the procedure. It is satisfying to deal with the issue and answer what the tribunal defined as a relevant issue.

Drawing a conclusion must not be confused with stating the facts. If there are different views of the parties on evidence and facts, the tribunal has to solve these views in that context by dealing with the arguments of the

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<sup>194</sup> Edward Berry, *Writing Reasons, A Handbook for Judges*, E-M Press, 2007, p. 53.

<sup>195</sup> J.C. Raymond, *The Architecture of Argument, The Judicial Review: Journal of the Judicial Commission of New South Wales*, 7, 2004, p. 45.

parties before stating the facts of the decision. The author should fully understand that the facts underpin the conclusion, but are not their subject.

The conclusion is a central part of the decision, as the tribunal is not bound to the opinion of any party but has to find its own solution. The conclusion must be based on the facts stated, and subsumed by the facts under the applicable law. The only criterion for the conclusion is that it must be derived from the facts, and the application of the law using the rules of logic.

Moreover, the conclusion must be well reasoned. If the tribunal uses its power of discretion, the reasons for coming to a decision must be set out clearly. Therefore, it is not important to follow the arguments of the parties, because their role in the procedure is to convince the tribunal of their respective opinion and defend their respective position. The tribunal member should always keep in mind that convincing the tribunal is the only task of the complaint and all other statements given. As a result, tribunal members are not intended to give an objective opinion but to promote the subjective position.

Therefore, the tribunal must regard the opinions of the parties but must draw its own conclusions. These will be based on the facts and derived through application of the law. When the tribunal draws a conclusion it will be helpful to follow these steps when presenting the conclusion. The tribunal should:

- state the law applicable to the issue
- state the facts relevant for the issue
- conclude how the law applies to the facts

## 8.4 Style and revision

### 8.4.1 Conciseness

Good decisions can be questions of time. Although it may sound contradictory well thought through decisions usually are shorter than hastily written decisions, which can include much ballast and many sentences which add no value or benefit for the decision. To avoid this outcome, care should be taken when drafting the decision. Several revisions of the draft decision can be required in order to produce a more concise decision.

However, conciseness is not the same as brevity. Brevity is concerned about saving words, whereas conciseness is about making every word count. In some cases readers need more words to understand a difficult concept or to accept a difficult decision.<sup>196</sup> Tips on how to write concisely include:

- Cut the evidence and facts. Include only evidence that is relevant for the legal problem which is the subject of the complaint.
- Use quotations when a brief reference or paraphrase is not adequate. Rules on quotation use include when the exact words of the document in question are essential - especially applicable law and wordings of the contract documents - and when a paraphrase would be less clear and concise than the original.

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<sup>196</sup> Edward Berry, *Writing Reasons, A Handbook for Judges*, E-M Press, 2007, p. 66.

- Do not state the obvious.
- Avoid multiple citations.
- Avoid explaining and supporting well-known legal principles. Only refer to legal principles if necessary, and refer to further descriptions or judgements.
- Avoid amplifying easy arguments.
- Avoid repetition.
- Avoid passive voice.
- Avoid double negatives.
- Avoid legal jargon.
- Break long sentences into smaller sentences which will be easier to digest.
- Revise with conciseness, ever mindful of the issues, facts, quotations, arguments where the length of these units depends upon the issues in the case. The crucial question in undertaking a revision exercise is to identify what text can be cut without sacrificing or diluting the argument<sup>197</sup>

The tribunal member may not always like the outcome of a case, but he or she is still obliged to write the decision in accordance with the facts and law.

## 8.4.2 Paragraphs

A paragraph should present a single idea. The thoughts within the paragraph must be unified and coherent internally, and must be joined effectively to the preceding and succeeding paragraphs. Paragraphs must enable development.<sup>198</sup> Importantly, the point of the paragraph must be stated first to inform the reader of its content. The following section of a procurement review decision illustrates one approach to the division of text into paragraphs.

### Examples

1. 'Although a contracting authority has the discretion to determine its needs and the best method to accommodate them, the contracting authority may include restrictive requirements only to the extent that they are necessary to satisfy its legitimate needs. The adequacy of the contracting authority's justification is ascertained by examining whether the contracting authority's explanation is reasonable. That is, whether the explanation can withstand logical scrutiny'.
2. 'With respect to the requirement for a single manufacturer for the computers and monitors, the contracting authority states that it has a legitimate need to standardise its information technology requirements. Specifically, the contracting authority states that standardisation will lower the contracting authority's operational costs and will provide a common environment, generally seen as a best practice'.
3. 'The complainant disputes the contracting authority's assertion that standardising computers and monitors to one manufacturer results in lower costs or other tangible benefits to the contracting authority. The complainant asserts that this requirement achieves nothing more than administrative convenience for the contracting authority'.

197 Following Edward Berry, *Writing Reasons, A Handbook for Judges*, E-M Press, 2007, p. 66-68.

198 Edward Berry, *Writing Reasons, A Handbook for Judges*, E-M Press, 2007, p. 76.

4. 'The tribunal finds that the record does not contain analysis or documentation supporting the contracting authority's justification for its standardisation requirement. In support of this requirement, the contracting authority has provided a statement from an information technology project manager. The project manager does not, however, identify any analysis or studies that were performed to determine that this standardisation requirement was necessary to obtain the asserted benefits. Without some documentation or explanation in the record to show that the restriction on competition will achieve the alleged benefits, the tribunal is unable to find that the contracting authority's asserted justification for this restriction is reasonable.'<sup>199</sup>

### 8.4.3 Use of headings

If a decision is only two or three pages long it may not need any headings. In longer texts headings are extremely helpful, particularly to readers who read tribunal decisions quickly.<sup>200</sup> If the decision is to be published, headers help in finding the necessary information quickly and allow using the merits of the decision in the future.

There are two types of headings: generic headings, and specific headings. Generic headings, which might appear in any kind of decision and presented in the following example include: introduction, issues, facts and evidence, law, analysis, and conclusions. These headings make it possible for a reader to identify a specific section of interest and give the decision structure. However, these headings are vague as they do not provide the reader with specific information on a particular case. Therefore, the most useful headings are those that are specific to the decision at hand. These can be achieved by combining case specific headings with generic headings.<sup>201</sup>

#### Example

Typical headings in the decision of a procurement case which deals with the evaluation of the bid.

1. **Introduction** (if you decide to have introduction section)
2. **Issues** (if you decide to have issues section)
3. **Facts**
4. **Law** (if you decide to have a law section)
  - Tribunal jurisdiction
  - Admissibility of the complaint
5. **Analysis** (or Reasoning)
  - Criteria for bid admissibility
  - Criteria for low tender
  - Principle of non-discrimination of tenderers

Specific headings may be even more precise and refer to particular sections of law or to specific facts of the case.

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<sup>199</sup> GAO decision in *NCS Technologies, Inc.*, dated November 8, 2010. The selected parts of the decision are adjusted for the needs of this handbook.

<sup>200</sup> J.C. Raymond, *The Architecture of Argument, The Judicial Review: Journal of the Judicial Commission of New South Wales*, 7, 2004, p. 47.

<sup>201</sup> Edward Berry, *Writing Reasons, A Handbook for Judges*, E-M Press, 2007, p. 47.

## 8.4.4 Steps for revisions

Once the first draft of the decision is written, it will be necessary to review the decision in order to determine that the decision meets the basic criteria for good decision writing. The following revision stages may be helpful to achieve that goal. In practice, many judges and tribunal members revise decisions at least two or three times before they have reached a final decision which meets all of the criteria.

### Revision stage one

Think of your audience. Is the decision convincing for the contracting authority and the complainant? Is it sufficiently clear for other tenderers or contracting authorities who may face similar problems?

### Revision stage two

Read the introduction. Ask the following questions:

- Have I identified the parties?
- Have I identified the nature of the case?
- Have I stated the issue or issues?

If these questions are answered in the negative, more analysis and drafting is required.

### Revision stage three

Read the entire decision quickly, with the issue(s) in mind. Then ask yourself whether the sections in the decision are presented in the most effective order. For example:

- Is the overall structure clear?
- Is the order of arguments logical and persuasive?
- What are the most effective headings for the issues?
- Is a separate section on evidence necessary?
- Does the structure tie the evidence directly to the issues?

### Revision stage four

The issues have been stated and the decision structured, now any text that does not add to the decision can be **omitted**. Points to observe include:

- Have I included more facts than necessary?
- Have I focused too much on side issues?
- Have I written too much about the obvious?
- Have I quoted too much?
- Have I adopted a point-first or context-first approach to paragraphs?

### Revision stage five

Re-write the decision as necessary. Focus on the clarity of the issues, the organisation of the argument and the conciseness of the argument.

### Revision stage six

Clean up the language. During this stage the author should focus on aspects of writing which should be

avoided when writing a decision. For example, when an unusually long sentence is discovered, take a further look and rewrite the sentence if needed.<sup>202</sup>

### **Revision stage seven**

Finally, undertake a spell check when the revision is complete.

## **8.5. Summary**

Every decision should be drafted and published under the guidance of the tribunal as a whole, or a nominated member of the tribunal. To produce a decision which accurately reflects the tribunal and the meticulous work carried out by the tribunal members in reaching a decision, it is essential that a robust methodology be used to draft, approve and publish the decision. It is imperative that before beginning to write the decision, the author should think about what is to be said in the decision and how this is to be said. In organising their thoughts, the author(s) should prepare an outline of important facts, issues and points and should include: the primary issue or issues in the review procedure; the findings of the facts in respect of the identified issues based upon available evidence; the determination of the law that applies to the facts; and, the application of the law to the facts that enabled a decision to be reached.

Several structures were offered for consideration with the intention to give members of tribunals firm ideas on how to structure their own decisions. Although they vary in order all structures consist of similar elements which are centred around a golden thread linking the following headings: introduction - which guides the reader and identifies the parties to the proceedings, subject matter - the procedural posture of the case and the decision; identification of the issues to be decided - informing the material facts of the case and the governing legal principles; description of the material facts of the case - the decision should provide a sufficient description of the case so that any third party can understand the nature of the tender and the complaint; summary of applicable law - evaluation of whether the complaint has met the legal criteria for admissibility; analysis - demonstration that the tribunal's decision is based on reason and logic and should persuade the parties of the correctness of the tribunal's conclusions by the power of reasoning; and, instructions - any additional information the tribunal wishes to impart to the reader.

The tribunal should always bear in mind style of writing during the drafting of the decision. Conciseness is very important when writing decisions and every word should be made to count. Therefore, the decisions should undergo several drafts each of which should be reviewed and revised with conciseness the primary goal. The person(s) reviewing the draft(s) decision should be ever mindful of the issues, facts, quotations and arguments where the length of these units depends upon the issues in the case. The crucial aspect of undertaking a review is to identify what text can be cut without sacrificing or diluting the primary argument of the case. The author and the members of the procurement review tribunal may not always like the outcome of a case, but they are obliged to write the decision in accordance with the facts and the law. Once the decision is at the final draft stage it will be necessary to review the decision in order to determine that the decision meets the basic criteria for good decision writing and that the decision says what it set out to say. In practice, many judges and tribunal members revise decisions at least two or three times before they have reached a final decision which meets all of the criteria before publishing.

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202 *Adjusted based on advice stated in Edward Berry, Writing Reasons, A Handbook for Judges, E-M Press, 2007, p. 150-152.*

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