

Government Contracts



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The Asia Foundation

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Law School

Introduction to the Laws of Timor-Leste

Government Contracts

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Preface to the Series: *Introduction to the Laws of Timor-Leste*

Timor-Leste has enjoyed a decade of formal independence. The country's democratic institutions have grown during this period. But, as thoughtful Timorese are quick to point out, much remains to be done. Building viable and professional state institutions takes time. And growing the human resource capacity within those institutions is always a major challenge to new states.

The capacity building imperative in Timor-Leste is both striking and compelling. Establishing state agencies in the first instance is relatively much easier than filling those agencies with effective professionals that uphold their duties and responsibilities. Building the capacity of a pool of Timorese who hold, or may hold, positions within legal and other state institutions is crucial. Likewise, building an educated understanding and awareness of the obligations and responsibilities of key actors within legal institutions, and government institutions more broadly, contributes to setting demands and expectations for performance among the polity. Encouraging professionalized capacity within state institutions, on the one hand, and thoughtful and calibrated demands for performance by citizens, on the other hand, are essential dynamics for the development of the rule of law and a democratic state in Timor-Leste. Institutions of higher learning, such as universities and professional training centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This paper is part of the *Introduction to the Laws of Timor-Leste* series of papers produced by the Timor-Leste Legal Education Project (TLLEP). This series seeks to critically engage the reader in thinking about the laws and legal institutions of Timor-Leste, and is based on a model of educational writing first introduced in TLLEP's *Introduction to Professional Responsibility in Timor-Leste* textbook, published in 2011. Founded in March of 2010, TLLEP is a partnership between The Asia Foundation and Stanford Law School. Working with local actors in the Timor legal sector, the project's goal is to positively contribute to the development of domestic legal education and training in Timor-Leste. USAID provided funding for this series through its Timor-Leste Access to Justice Program.

The authors of the legal working papers focused on writing in clear, concise prose, and on using hypothetical legal situations, discussion questions, and current events. Through this style of writing and pedagogy, the aim is to make these texts accessible to the largest possible audience. The texts are designed to be broadly accessible to experienced Timorese lawyers and judges, government officials, members of civil society, Timorese students in law, and the international community. They cover topics ranging from constitutional law to inheritance law to the Petroleum Fund Law.

These working papers represent the dedicated efforts of many individuals. Stanford Law School students authored the texts and subjected each working paper to an extensive editing process. The primary authors for this series were Peter Broderick, Daniel Cassman, Margaret Hagan, Brian Hoffman, Lexi Shechtel, and Anne Johnson Veldhuis, all Class of 2013, Jessica Fox, Hamida Owusu, and Samuel Saunders (all Class of 2014) edited the series under the guidance of Stanford Rule of Law Fellow Megan Karsh ('09). The students benefitted from the substantial and extensive guidance provided by Brazilian lawyer Dennys Antonialli (LLM '11) and Geoffrey Swenson ('09), TLLEP's former in-country director and legal advisor to the Asia Foundation's Dili office.

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The program has also received extensive support from Kerry Brogan, previous Country Representative Silas Everett, current Country Representative Susan Marx, Juliao de Deus Fatima, and a host of other Asia Foundation staff. USAID Timor-Leste provided vital financial and programmatic support to the program. We especially thank USAID Director Rick Scott and USAID staff Ana Guterres and Peter Cloutier. The US Embassy in Dili, especially Ambassador Hans Klemm and Ambassador Judith Fergin, have been incredibly supportive. I would be remiss if I did not thank the former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, for their unwavering support of this project.

Finally, this series of papers simply would not have been possible without the many thoughtful and critical insights from Timorese judges, educators and lawyers, and those who work within Timorese institutions. Prosecutor General Ana Pessoa, Public Defender General Sergio de Jesus Hornai, and President of Court of Appeals Cláudio Ximenes were extremely gracious in clarifying issues related to their respective organizations and offering constructive suggestions. The textbooks received vital input from National University of Timor-Leste (UNTL) faculty and staff throughout the drafting and review process including comments from Rector Aurelio Guterres, Law Deans Tome Xavier Geronimo and Maria Angela Carrascalão, Professor Benjamin Corte Real, and Vasco da Cruz of the Portuguese Corporation. Feedback from UNTL students themselves on draft text was immensely helpful for the final text. The Judicial Training Center (CFJ) has also been a source of wisdom throughout the drafting process, particularly CFJ Director Marcelina Tilman, Erika Macedo, and Bernardo Fernandes. The text benefited as well from the contributions of Charlie Scheiner and La'o Hamutuk, the staff of the Ministry of Justice Legislation Unit, AALT Executive Director Maria Veronika, Judge Maria Netercia, Judge Jacinta Coreia, JSMP Executive Director, Luis de Oliveira, JSMP Legal Research Unit Coordinator, Roberto da Costa, ECM director Lino Lopes, and Sahe Da Siliva. We are also grateful to Gualdinho da Silva, President of the National Petroleum Authority, for two wonderfully engaging meetings.

In addition to this series and the already-published texts on professional responsibility, constitutional rights, and contracts, TLLEP has plans to complete the first edition of a new textbook in 2013 entitled *An Introduction to Criminal Law in Timor-Leste*. All texts are updated as the legal landscape changes. The most recent versions of all published texts are always available for download online free of charge on TLLEP's website: www.tllep.law.stanford.edu.

To the students, educators, legal and government professionals that use this book, we sincerely hope that it sparks study and debate about the future of Timor-Leste and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in ensuring the country's future is bright.

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CHAPTER OBJECTIVES

- To learn the government entities that participate in contracts and procurement
- To understand the basic steps in government contracting
- To learn how to appeal a contract decision

CHAPTER OVERVIEW

- Government contracts are framed in the principles of legality, good faith, and proportionality.
- Decentralization of government procurement has led to a large number of government agencies and members who may contract and procure goods efficiently from within their own departments.
- The amount of the contract will determine who approves it.
- Public Officials must be careful to avoid conflicts of interest as they evaluate and approve contracts.
- The government follows a competitive contract process designed to promote openness and transparency.
- Contracts will be awarded by a jury and reviewed by a signing authority to ensure that the process is given adequate scrutiny and review.
- The contract award decision will be published before being formally signed. Competitors have the right to a recheck if they are dissatisfied with the contract award decision.

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I. Parties and Procedures in Government Contracts

SECTION OBJECTIVES

- To understand the roles and responsibilities of various government bodies in forming a government contract.
- To be aware of situations where a conflict of interest may arise between a government agent and an entity competing for a contract.
- To understand the different types of procurement procedures and when they may be used.

Government contracts are an important tool for any country. Through government contracts a country can expand and build its infrastructure, provide critical services to the general population, and help grow the economy. Understanding them will be important to your future career whether you work for the government or a private employer.

Understanding government contracts is important because of how much money is spent through contracts. The government needs to get a contract for almost any major expenditures and projects. A development program, construction of a road or hospital, or a supply purchase are all government expenditures that must conform with the laws you will learn about in this Chapter.

Without the procedures outlined in this Chapter, there would be no way to monitor these government expenditures. In Timor-Leste, with a large amount of money in the petroleum fund, it is important that government spending be monitored and controlled in a way that promotes fairness and transparency. The procedures force the government to conduct a thorough and open contracting process. This not only ensures that the public knows where its money is being spent, but also forces the government to thoughtfully make contracts. By forcing the government to follow these procedures, the law ensures that the government will get the best deal it can. The law also makes sure that the contract is fully outlined and the company who wins the bid is able to complete it. It also provides a balancing mechanism, ensuring that anybody interested can get the documents to bid on a contract. When properly applied, the law should prevent any secret or unfair contracts.

How do you want the government to spend your money? The government's money really belongs to all Timorese citizens. Without these laws money can be spent with little accountability. It is important this money not be wasted or used ineffectively, because the money

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the government spends now is an investment in your future. Irresponsible government spending can lead to a weak economy in the future.

As you read this Chapter, think about these principles of government contract and how the law ensures that they are enforced:

Legal Regime of Public Contracts

Article 5: Principles of legality, good faith and proportionality

- (1) When entering into a public contract, public and private authorities shall act in conformity with the law.
- (2) The Parties shall fulfill the demands of authenticity and principles of good faith and proportionality.
- (3) The contracts shall include clear, precise and fair clauses.

Public Procurement Law

Article 4: The principles of legality and equality

- (3) In every procedure it shall be ensured that the highest possible number of interested parties is consulted or, at least, the minimum number imposed by law.

Article 5: The principles of public interest, impartiality and confidentiality

- (1) In preparing all the procedure and as long as this one lasts, the Public Service shall look for the maximum satisfaction of the collective needs with which the law entrusts and charges it.

Article 9: The accountability principle

The parties to the procedure, entities, employees, people on contract and economic agents may be civilly, financially and disciplinarily held responsible, in terms of law, for actions infringing the provisions of this statute, without detriment to the criminal sanctions to which they are liable.

Reading Focus - principles of government contracts

The principles of government contracts help frame the laws and procedures that govern government contracts and procurement. They are guiding principles that provide focus and meaning to the agencies charged with spending government money. The principles do not specifically command a government agency to a specific action, but they set the tone for

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procurement and for those seeking to enforce the law. Keep the principles of government contracts in mind as you read this Chapter.

1. Participants and Parties in Government Procurement

A government official must approve all contracts designed to procure a good or service. In an attempt to streamline the government contracting process, the Public Procurement Regime decentralized government contracting by giving an increased number of people the authority to launch procurement procedures.

Public Procurement Law

Article 15: Entities competent for authorizing procurement procedures

- (1) The following entities are competent for authorizing a procurement procedure to be launched:
 - a. The Prime Minister, for contracts with a value of at least US\$1.000.000;
 - b. The Minister of Planning and Finance;
 - c. The leaders of the State organs of power, ministers and secretaries of State, in terms of the respective organic laws;
 - d. The leading people specially appointed and authorized by the leaders of respective State organs of power and by ministers and secretaries of State;
 - e. The heads of autonomous services, the public entities and other bodies with administrative and financial autonomy;
 - f. The other legal entities with a State share higher than 50 percent, which although having no corporate nature, mainly pursue public purposes;
 - g. All of the remaining public organs and services under the State budget control or being above all financed by it.

Many people are authorized to initiate a public contract. The head of nearly any government organization may request and often approve a government contract. While this streamlines the contracting process and allows agencies to provide for their own needs, they are not given free reign over contracting.

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Contracts still need to be approved of by somebody in the government. The dollar amount and type of the contract will determine which government official or agency may approve the contract. In general, as the size of a government contract increases, a higher and higher member of the government will have to personally approve it. So, the larger a contract is, the more scrutiny it should receive at higher levels of government. Below is a chart adapted from Appendix 2 to the Public Procurement regime explaining which government entities must approve which particular contract. It may be helpful to refer back to this chart as you read more about the government entities themselves.

The entity that launches the procurement procedure	Organs that ratify public contracts, award and sign contracts	
The Procurement Service under request of the interested Public Service	Contracts Committee will review all contracts with a value of at least US\$200.000	The Prime Minister, for contracts with a value of at least US\$1.000.000; The Minister and Plan and Finance for contracts with a value of at least US\$500.000, after consulting the Prime Minister and the Minister in charge for the sector in question; The Procurement Service, provided with a power delegation from the Minister of Plan and Finance, for contracts with a value from US\$200.000 to less than US\$500.000, after consulting the Minister in charge of the sector in questions.
	The Procurement Service provided with a power delegation from the Minister of Planning and Finance.	
Government members and leaders of the remaining State organs of power, for contracts with a value of not higher than US\$10.000	Leaders of the remaining State organs of power, ministers and secretaries of State	

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Heads of autonomous services and competent public entities, for contracts not exceeding US\$10.000	The heads of autonomous services, the public entities and other bodies with administrative and financial autonomy, including companies with mixed capital
Leading people specially appointed and authorized, for contracts not exceeding US\$5.000	The leading people specially appointed and authorized by the leaders of the State organs of power and by the Government members, including all the remaining public organs and services not mentioned previously.

Minister of Planning and Finance

The Minister of Planning and Finance plays a major role in government contracts and procurement. According to Article 16 of the Public Procurement Law, it is the Minister of Planning and Finance's role to oversee and execute the government's procurement policy. The Minister is also in charge of the Procurement Service and works with the Contracts Committee to evaluate government procurement procedures and policy.

Procurement Service

The Procurement Service of the Ministry of Plan and Finance is the department in charge of advising the Minister on public procurement and managing procurement operations. According to Article 18, the Procurement Service may also assist the government departments in executing and procuring contracts. The **Procurement Service** will also maintain a file of sellers and numerous other records used in contracting. **Public Services** that are able to procure goods and contracts on their own are required by Article 20 to submit summaries of their procurement activities to the Procurement Service.

Contracts Committee

The **Contracts Committee** also assesses procurement operations and contracts. The Legal Regime of Public Contracts, Article 12, authorizes the composition of the Contracts Committee. The Committee is composed of five "experts with renowned professional experience," appointed by the Prime Minister for a two year period. They are responsible for reviewing all public contracts whose value exceeds \$200.000 USD. The Committee has various other responsibilities. For example, Article 13 requires that they report on various aspects of public contracts to the Minister of Plan and Finance; recommending procurement policies and rules, and issuing opinions on complaints and appeals to procurement process.

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Reading Focus - Contracts Committee

What is the purpose of the Contracts Committee? They serve primarily as body that does not rule on specific contracts. Rather, they ratify another party's decision or make recommendations. Although the Prime Minister appoints them, they serve for two years and can only be removed for justifiable reasons. They are like a semi-autonomous government contract gatekeeper. Because they review large contracts before those contracts go to the Prime Minister, Ministers, or Secretaries of State for approval, they are the body that is able to scrutinize a contract in depth when other government officials may feel political pressure or time constraints. As such, they serve an important purpose in vetting contracts, preventing corruption and ensuring that public funds are properly spent.

Reading Focus: differences between the Contracts Committee and Procurement Service

The difference between the Contracts Committee and Procurement Service is one of function, role, and authority. The Contracts Committee reviews contracts procured by the Procurement Service. They are also a small body of members who meet and deliberate on contracts, as opposed to being full time employees of the Procurement Service who also serve bureaucratic and functions.

Public Procurement Law

Article 27: On the essential requirements

- (1) In order to take part in procurement procedures, competitors shall be able to prove that they fulfill the following essential requirements:
 - a. To have the business ability, the reliability, the experience and the reputation enough to ensure compliance with the contract;
 - b. To have the legal capacity to enter into a contract;
 - c. To have observed all the legal requirements demanded in the Democratic Republic of East Timor to intervene in a procurement operation;
 - d. To dispose of enough financial resources for the execution of the contract;

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e. To have at their disposal a staff wearing such professional and technical qualifications and skills able to ensure the contract fulfillment;

f. To have fulfilled their obligations relation to the payment of taxes and social security contributions, in case of awarded bidders based in East Timor;

...

Article 28: On the specific requirements

- (1) The Public Service may lay down any other specific requirement in terms of qualifications to be met by the competitors, which shall be pointed out in the pre-qualification documents or in the competition ones or in such documents soliciting quotations.

Competitors

Companies competing for public contracts must be able to prove that they are fit to participate in a public procurement process. The Public Service initiating the procurement process may request to see requirements such as an adequate staff, business reliability, and financial resources as proof of their fitness. The financial resources will be important because the Public Service may request a bid security of up to 10 percent of the contract from a competing entity during the procurement process. Certain situations will disqualify competitors from participating in a procurement process, such as owing taxes or employing executives who have been convicted of a criminal offense related to business behavior.

2. Conflicts of Interest and Government Offences Related to Contracts

A conflict of interest occurs when a government official is overseeing or participating in a government procurement procedure and one of their relatives or business associates is competing for that same government contract. This is a conflict of interest because the government official may be more inclined to give the contract to their friend or family member. Also, a bidder who knows a government official may gain an unfair advantage because they might learn more about the contract and how bids will be judged. A conflict of interest does not mean that either party is necessarily behaving illegally or improperly. A conflict of interest exists when there is even the potential that the process could be tainted.

According to Article 32 of the Public Procurement Law, relatives or business associates of anyone competing for a government contract may not represent or advise the government in

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any decisions about the contract. There is great potential for corruption and misuse of public funds in awarding government contracts. For example, if a public official is evaluating a competitive contract that their brother is competing for, their judgment may be clouded as they approve the contract or evaluate the company's qualifications.

Public Procurement Law

Article 32: On the conflict of interest

- (2) The Public Services, in intervening in procurement procedures, cannot be represented or in any way assisted by the following persons:
 - a) Blood relatives up to the second-degree, husband or wife and those who keep a business relationship with one of the competitors;
 - b) Those who have been partners or associates of any one of the competitors in the last three years before the competition opening date.
- (3) The Public Serve cannot award the contract to blood relatives up to the second-degree or partners and associates of consultants that have taken part in the procedure on any basis.

Administrative Offences Under the Legal Regime of Public Procurement and the Legal Regime of Public Contracts

Article 3: Administrative Offences

Any action or omission which is contrary to the rules established in the Legal Regime of Public Procurement, in the special legal regimes covering that matter, and in the Legal Regime of Public Contracts and in their additional standards shall constitute an administrative offence.

Article 4: Measures applicable to public officials and Public Administration agents

When a public official or Public Administration agent is detected as a possible offender under the Legal Regime of Public Procurement or under the Legal Regime of Public Contracts, the authority which is aware of this conduct shall inform the competent authorities in order to conduct enquiries or to initiate disciplinary proceedings with a view to determining liabilities, in accordance with the terms set out in the Statute of Public Officials.

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Article 7: Conducts of a criminal nature

- (1) When an offensive conduct has been detected which is also of a criminal nature, it shall be up to the head of the public service, who initiated the public procurement procedure or who signed the contract, to request the intervention of the competent body.
- (3) In the event there are grounds to suspect the involvement of a public official in offensive conduct as in section 1 above, such a fact shall be notified to the head of the public service department to which the official belongs.

Reading Focus - Conflicts of Interest

A public official who violates the law and participates in a contracting procedure in which they have a conflict of interest can be held liable both administratively and criminally. They may even be investigated by the Anti-Corruption Commission and prosecuted.

Offences of this nature are very serious because they jeopardize the integrity of the government and cast doubt on the entire system of government procurement. They are so serious that persons who suspect a violation of the law have a duty to immediately inform the authorities in writing and include any proof they have that a law was violated. Both the government official and an entity bidding on a contract can commit an offense. If a bidding competitor violates the process, they may be declared ineligible to compete for public contracts either permanently, or for up to one year.

3. Types of Procedures for Bidding on Government Contracts

Reading Focus

The choice of procurement procedure is the beginning of the process of obtaining a government contract and will dictate the steps of the bidding process and what companies may bid on the contract. The type of procedure used for the government contract will depend largely on the dollar amount of the contract. There are several important different procedures.

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As you read this section, think about how the choice of procedure might affect the future contract. Notice that preference to Timorese citizens is given in the national open procedure. Also notice that although procedures may be mandatory in some circumstances, in many cases the Public Service may determine which procedure to follow. This has important implications for the contracting process and the company ultimately awarded the contract.

Article 47 of the Public Procurement Law authorizes **open procedures**, which allow bids from any party. Open procedures are preferred. However, in certain circumstances the Public Service may utilize different types of bidding and procurement procedures.

Pre-qualification procedures are a process whereby the government pre-certifies parties based on their qualifications for the contract before they are allowed to bid on the contract. Article 40 states that pre-qualification is available "whenever the technical complexity or the high amount of money involved recommends a previous assessment of the competitor's financial, commercial and technical capacities."

Public Procurement Law

Article 49: On the compulsory pre-qualification

- (1) The pre-qualification procedure shall compulsorily take place in the following cases:
 - a) Procurement operations relating to equipments specifically designed, industry facilities, specialized services, contract with immediate delivery, design and building contracts or management contracts.
 - b) Works of an amount higher than US\$250.000;
 - c) Other cases provided by law.

The government must follow special procedures when it starts a pre-qualification for a contract. According to Article 48 they must first publish a pre-qualification notice inviting parties to take part in the process. Article 50, Section 2 says that the notice must be careful not to solicit information concerning price bids, design specifications, or "other information susceptible to impede the competitor's participation on equal terms." Qualified entities interested in bidding

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must then prove their qualifications to the Public Service. Should they meet the requirements, they will be allowed to continue in the second, competitive bidding stage of the procurement process.

Other types of bidding procedures include the **national open procedure**, which is used "to raise the participation, as preferential competitors, of East Timorese individuals and companies . . . whose capital is held by Timorese citizens . . ." and is required for contracts with a value of up to US\$ 100.000, according to Article 38 of the Public Procurement Law.

The **international open procedure** is required for building contracts greater than US\$ 1.000.000; contracts for goods or technical services valued at higher than US\$250.000; and consulting services greater than US\$200.000. Article 39 says that the international procedure "shall be used as a way to encourage participation of competitors all over the world."

A **restricted procedure** may be used when the government contract is for low value works, goods or services where analyzing a large number of bids would be a significant cost. Article 41 allows the restricted procedure to be used for certain registered suppliers that meet specific needs or criteria. For example, a restricted procedure might be used to solicit bids if the government needs goods in one area of the country only. They may limit bids for the contract to suppliers in that region only.

Negotiated Procedure is a two-part process that may be used when the government does not know the technical and contractual requirements that it will require to fulfill their contract. Article 42 sets out the two-part process for the negotiated procedure. In the first stage the Public Service solicits plans, designs, and technical studies for the proposal, but they do not accept quotations. After reviewing this information the Public Service proceeds with an invitation for the final technical bids, including quotations. Because of the technical nature of the bids, the government may accept bids only from registered suppliers that meet qualifications.

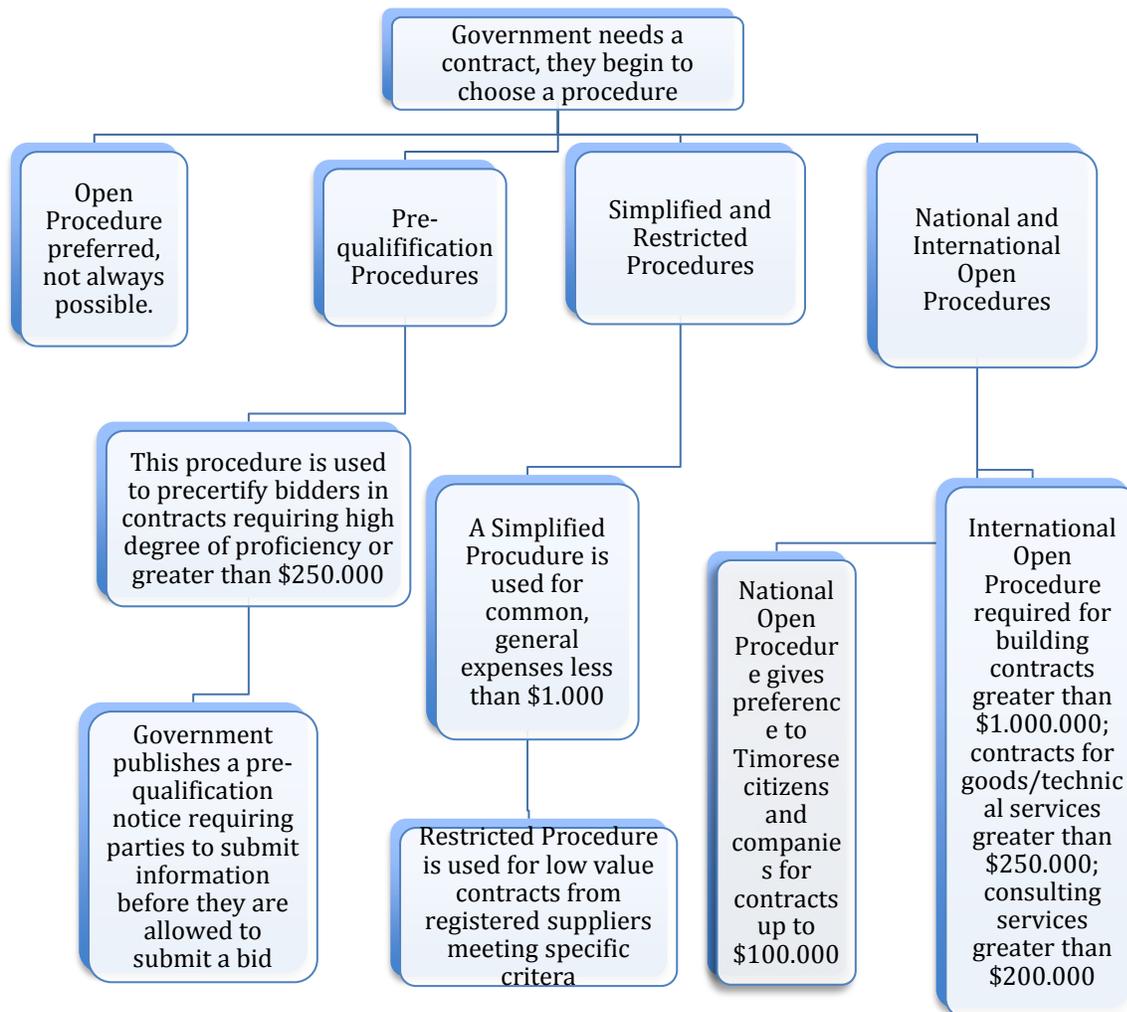
Other procedures include the **simplified procedure** that may be used for common, general expenses. The simplified procedure makes it substantially easier for the government to obtain basic goods and services without going through a lengthy and costly procurement process. This ensures that the government can function smoothly by not going through a full procedure for common expenses that do not cost more than US\$1.000.

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Public Procurement Law

Article 45: On the simplified procedure

- (1) Common expenses, namely those concerning the purchase of consumables, water supply, power supply, telecommunications and, in general, every periodic expense previously registered as State Budget items which do not imply a procedure launching or the awarding of a new contract or amendments to existing contracts, shall be deemed as following simplified procurement procedures in terms of the present statute, without detriment to their adequacy and dependence to the set Government policy.



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4. Summary

Most government agencies or bodies have the authority to start the procurement process. If the contract is large, it will likely be reviewed by the Contracts Committee and approved by a senior agent of the government - such as the Prime Minister or a secretary of State. A government official may not be involved in a procurement process where a competitor for the contract is owned in part by a relative or business associate of the government official. There are various procedures the government may choose to initiate the contract. The choice is important because it signals what type of contract they are seeking and how large it will be.

Questions

João works for the Public Procurement Service and is helping to procure a contract to provide fuel for the government.

1. The fuel contract is for US\$600,000 and is awarded to company X and signed by the Minister of Planning and Finance. Did the government properly follow procedure?
2. The Minister of Planning and Finance's daughter is a part owner of company X. What should the Minister do?

Answers

1. The Contracts Committee should have reviewed the contract before the Minister of Planning and Finance signed it. The Contracts Committee reviews all contracts with a value of at least US\$200,000.
2. The Minister should recuse himself from any review, ratification, or signing of the contract. Instead, either João or the Contracts Committee should extensively review the contract and the procurement process and find an alternative government official to ratify the contract, such as the Prime Minister.

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II. STEPS IN GOVERNMENT CONTRACTING

SECTION OBJECTIVES

- To understand the procedures in government contracts
- To know when a company can request a recheck and an appeal of a contracts award

The previous section introduced the major players and basic types of procedures the government may use in procurement and securing contracts. This section will flesh out the procedural components of government contracting. It is important to understand and follow procedure, whether you eventually practice as a government lawyer, procurement specialist, or represent an entity looking to contract for the government

The basic stages of government contracting are listed in the legislative box below:

Public Procurement Regime
Chapter 3
Steps Concerning Procurement Procedures with a Competitive Nature

Article 56: On the stages of competitive procedures

(1) The competitive procurement procedures have the following common stages:

- a) Opening and publication;
- b) Preliminary conference;
- c) Receiving of bids;
- d) Public ceremony for the opening of bids envelopes by the incharged committee;
- e) Exclusion or admission of competitors made by the jury;
- f) Assessment, selection and classification of competitors made by the jury;
- g) Publication of the intention of awarding the contract;
- h) Dealing for recheck requests to be lodged by the competitors;
- i) Contract signing

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1. Opening of Bidding Procedures, Publication, Notice, and Competition Documents

Article 57 of the Public Procurement Law says that the competition opening is the procedural "stage in which the Public Service calls, by means of a notice, all potential suppliers to take part in the procurement operation." Publication requirements for notices depend on the type of procurement procedure used and are dictated by Article 61. Notices for procurement through the **national open procedure** "shall be published in at least one newspaper with countrywide circulation and of Portuguese or Tetum expression." Notices for procurement through an **international open procedure** "shall be published in at least two newspapers with international coverage and an undisputable reputation and of English expression or any other expression used in international trade, as well as in one newspaper with countrywide circulation and of Portuguese or Tetum expression." These publication requirements are the minimum that is required. The Public Service may do more, such as publishing in additional newspapers, magazines, or the internet.

Notices for pre-qualification procedures must be published in the same manner as the national open procedure and international open procedure. At that stage, the notice being published is a call for competitors to seek pre-qualification by submitting the documents required by the Public Service to prove their competence in that area. According to Article 60, once competitors have been pre-qualified, the Public Service will then invite bids from them alone.

The notice must explain the information that will be used in evaluating bids. Appendix 5 to the Public Procurement Law controls what the opening notice must contain. The opening notice must clearly contain at a minimum the contact information for the Public Service launching the procedure, the type of competition, and an address and schedule where competitors may obtain the full **competition documents**. The **competition documents** must include instructions for preparing and submitting the bids, among other information:

Public Procurement Regime
APPENDIX 6
COMPETITION DOCUMENTS FOR BIDS SUBMISSION

The competition documents for bids submission, referred to in article 62 of this statute, shall at least include the following information:

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- A) The instructions for preparing and submitting bids;
- B) The features of goods or services which make the object of the procedure, concerning the following minimum information:
 - 1) Quantity;
 - 2) Demanded requirements in terms of quality;
 - 3) Design specifications and other requirements demanded for the delivery and presentation of plans and other technical documents in case they will be necessary;
 - 4) Descriptive models regarding the technical features of goods or services to be purchased;
 - 5) Methods for analyzing the quality of these ones, in order to determine their adequacy to the required specifications;
 - 6) Packaging;
 - 7) Brands or other signs and symbols;
 - 8) Price bids, which shall be sent within a separate envelope;
 - 9) Date and place predicted for the obligations fulfillment;
 - 10) Methods and procedure for assessing competitor's qualification, according to what is foreseen under the present compilation and in the applicable rules and procedure;
 - 11) Conditions for securing bid validity in regard to the drawer and in connection with the security's nature, modality, amount and validity period as well as with the way to satisfy it;
 - 12) Conditions for securing contract performance in regard to the drawer and in connection with the security's nature, modality, amount and validity period as well as with the way to satisfy it;
 - 13) Any other information data on the competition whose publication, according to the Public Service, might be useful;
 - 14) A summary of the main terms and conditions necessary for the contract to be made which are not included in the pre-qualification procedures, if it is the case;

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- 15) Any documentary evidence and other information which the competitors shall submit in order to prove their qualifications and that they meet the requirements demanded in this statute, in case a pre-qualification procedure has not taken place;

...

2. Preliminary Conference

The Public Service must carry out an open, preliminary conference "in order to clarify all details regarding the procedure under way." Article 63 also states that this conference must be open. The date and time of the conference are established in the competition documents. The preliminary conference may have been included in procurement procedures as a means of ensuring that the Public Service evaluate the procedure already underway to ensure that it is functioning properly. This is supported by the language in Article 63, Section 5 that reads "if need be, the preliminary conference may include a visit to the place where the good shall be provided, the work executed or the service rendered." The preliminary conference is an opportunity for greater oversight of large projects and a requirement government evaluation. Because the conference is open, competitors may ask questions and clarify any concerns they may have about the government's proposed project.

The preliminary conference is a means to evaluate the procurement process in present time. The opportunity to be heard in public is valuable for citizens and companies competing in the process. It also serves an important role in increasing government transparency. Because the preliminary conference may give rise to changes in the competition documents or procurement procedure, it helps ensure that the government is proceeding correctly in the contracting process.

3. Receiving of Bids, Securities, and Opening in a Public Ceremony

Bids must be submitted according to the **competition documents**. Article 66, Section 3 requires that bids be registered upon receipt, with the date, time, and a reference number recorded on the outside of the envelope on which they were submitted. The competition documents will also specify the validity period of the bid, which shall be the time during which the Public Service will compare the bids to each other before awarding the contract. In order to ensure serious, financially stable bidders, Article 72 requires that competitors also submit a security when they submit their bid.

The Public Service may demand a **bid security** of up to ten percent of the bid amount. Competitors who are not awarded a contract will be immediately returned their security. The

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competitor who is awarded the contract may see their security held until they submit an execution security. Further, a competitor may lose their bid security if they withdraw their bid during its validity period or after being awarded the contract. This helps ensure that the company entering the bid has solid financial backing and only serious bidders participate in the competition.

Although the bid security is only ten percent of the value of the bid, the Public Service may demand a **contract performance guarantee** from the winning competitor for a value of up to fifteen percent of the contract. For example, the competitor may submit a bid security and roll it into their contract performance guarantee after being awarded the contract. The contract performance guarantee may be more money, so the winning bidder may then have to increase the security. The Legal Regime of Public Contracts, Article 33, authorizes a bid security because they reduce government time and effort spent on the process if only serious bidders compete.

Public Procurement Law

Article 77: On the opening committee

- (1) The Public Service that launches the pre-qualification or the competition procedure shall appoint a committee in charge of the envelopes opening.
- (2) This committee shall be composed of at least three employees of the Public Service, one among them having to be appointed as its chairman.

Article 78: Public Ceremony for the envelopes opening

- (1) On the date set in the pre-qualification documents or in the competition ones and in a public ceremony, the incharged committee shall open the bids envelopes.
- (2) This public ceremony may be attended by any interested people, but they shall not be allowed to speak.
- (3) As for the pre-qualification procedures, the ceremony starts with the reading of the procedure's identification, then the envelopes are opened and at last the competitors list is written down, so that everybody can watch it.
- (4) As for the open procedure, the ceremony starts with the reading of the procedure's identification, then the envelopes are opened, soon thereafter the competitors list is written down together with the tendered quotations, so that everybody can watch it, and read out, and finally a certified copy of that list is made in order to be delivered to the jury.

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Reading Focus - Procedures for opening bids

The bids will be opened publicly on the date set in the competition documents, by a committee of three employees of the Public service. The ceremony is open to the public, but the public is not allowed to speak. This suggests that the ceremony is to ensure the fair and honest opening and receiving of bids. This is reinforced by language saying that the list of competitors to be written down upon the opening of bids shall be written down together "so that everybody can watch it," an elaborate procedure for a simple task of opening bids.

4. Competition's Jury and Publication of Intent to Award Contract

Article 79 of the Public Procurement Law ensures that the competition will be judged by a jury of three members appointed by the Public Service. The Public Service will appoint a chairman, deputy, and a substitute member. The jury will then evaluate the competitors based on the requirements in either the pre-qualification documents or competition documents, depending on what procedure they are judging. The jury will assess and classify the competitors and propose a competitor to award the contract.

Public Procurement Law

Article 86: On the assessment and selection in competition procedures

- (1) The jury assesses and classifies the competitors according to the requirements demanded in the competition documents and obeying, as far as possible, to the following analysis order:
 - a) Professional qualifications;
 - b) Technical capacities and experience;
 - c) Financial capacity.
- (2) Then, the jury assesses the bids, observing the following order:
 - a) The deadline for delivering goods, executing works or rendering services;
 - b) The quality of goods, works, or services;

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- c) The preference margin applicable to national competitors or favoring those bids involving local products;
- d) Technical specifications and approvals, if demanded;
- e) Other elements demanded in the competition documents, namely the explaining note for the wanted price or the presentation of the model or prototype for the product to be provided;
- f) The total price and the payment conditions.

Remember that the Contracts Committee must ratify all contracts greater than US\$200.000. If an authority higher than the Contracts Committee must also ratify the award, it will continue to them. If the Contracts Committee rejects the jury's decision, they may send it back to them with instructions for re-analysis. However, the Public Service does not have to award the contract. Article 88 says that they are "entitled to refuse all submitted bids at any moment before the contract award." Neither do they have to justify the decision. This ensures that the Public Service does not have to award a contract if none of the competitors are qualified or within the government's budget.

Once the decision to award the contract to a competitor has been ratified, the Public Service will publish the decision and briefly explain the reasons behind their decision according to Article 89. If the competitor awarded the bid does not execute the contract by providing the **contract execution security**, Article 90 says that they may forfeit their bid and the Public Service may either select another bid to accept or refuse all bids.

5. Right to Recheck and Appeal

Competitors have the right to request both a **recheck** and an **appeal** of the outcome of the procurement procedure under Article 96 and 101.

Public Procurement Regime

Article 96: On the right to a recheck

(1) The competitors that consider themselves affected during the course of the procurement procedure have the right to ask the Public Service for a recheck of their situation for the following reasons:

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- a) Non-fulfillment of the rules laid down in the present decree or in its complementary regulations;
 - b) Non-fulfillment of the terms and conditions states in the pre-qualification or competition documents;
 - c) Non-compliance with a decision adopted by the jury susceptible to have infringed the existing legal rules.
- (2) In the cases referred to in the previous number, paragraphs a) and b), the request for a recheck shall be lodged within five days from the fact that has given rise thereto.
- (3) In case of no. 1, paragraph c), the deadline to request a recheck shall be set in the pre-qualification or competition documents and shall be advertised in the award decision notice.

According to Article 97, the Public Service that launched the procurement procedure will conduct the recheck. They have five days from receipt of the recheck to rule it admissible so long as it was submitted within the time frame. According to Article 99, until a decision is reached, there can be no awarding of a contract, opening of bids, or negotiating. They may suspend the procurement procedure for five days after the recheck request was received, and may do so for a maximum of another five days. Article 100 requires that after the "case has been analyzed, the . . . authority shall decide, within a 12-day deadline, whether it accepts or refuses the lodged recheck request."

If the competitor is not satisfied with the answer they receive from their recheck request, Article 101 gives them the right to **appeal** to a higher authority within five days after the decision of their recheck request. The entity that will hear the appeal depends on who issued the first decision. Article 102 authorizes Ministers, Secretaries of State, and other leaders of State organs of power to decide appeals to decisions made by those under their authority. Article 102 also authorizes the Prime Minister to decide appeals to decisions made by the Ministers, Secretaries of State, and leaders of the remaining State organs of power. If the contract is one that requires the Contract Committee's approval, then they will be the body to judge the appeal. Article 103 requires that the appeal must be decided on within five days of analyzing the case.

4. Summary

A government procurement procedure begins with the opening of the procurement process and the publication of either the pre-qualification process or the call for bids. The Public

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Service running the procurement procedure must then hold a preliminary conference. The preliminary conference is open to the public and may eventually lead to modifications in the terms of the competition or contract if competitors or the public raises concerns. When the bids are received, they must be opened in a ceremony open to the public. This ensures that bids are made public and may serve to increase government transparency. The competition jury then meets, assesses the competitors and decides whom to award to the contract to based on their classification of the competitors. The intention to award the contract to a competitor must be published and no recheck requests made before the contract can be signed. If a competitor believes that the jury made an error in awarding the contract, they may request a recheck. If they have any proof of the error it should be included in their recheck request. If the jury does not overturn their decision even after the recheck, the competitor may appeal to a higher authority.

Questions

1. Jorge's company was competing in a competitive procurement process for a large government contract. The jury publishes their decision to award the contract to another company with far less professional qualifications than Jorge's. What should Jorge do?
2. Jorge sees a notice published for a competitive government contract in the newspaper. The advertisement doesn't say where and when he can obtain the full competition documents. What should Jorge do?

Answers

1. Jorge should request that the jury recheck the results of the competition within five days. Professional qualification is one of the most important factors that the jury weighs in awarding a contract. If Jorge is clearly more qualified and there are no other dramatic differences in the competitors or their bids, the jury may have made a mistake or the winning company may have misrepresented themselves to the jury.
2. Jorge should contact the Public Service who listed the advertisement. Because notices of a procurement procedure must contain the necessary information for interested entities to obtain the contact information, they may wish to republish the notice.

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III. REVIEW

SECTION OBJECTIVES

- To review the entities and procedures that govern government contracts
- To review the conflicts of interest that a government official may encounter
- To review the government contracting procedures that both competitors and the government must follow

Government contracts are an important part of a nation's growing economy. Efficient procurement and contracting is an integral part of the government's ability to serve the people and meet their needs. Decentralization of government contracting allows various Public Services to independently enter into smaller contracts.

The Procurement Service serves both an oversight and a supportive role. They keep records and monitor the Public Service's procurement, but they may also run a procurement procedure should the Public Service request it. The Contracts Committee provides an oversight and advisory role. They review all contracts greater than US\$200,000 and advise the Minister of Planning and Finance on contract policy. In general, the larger the government contract, the higher up the authority who must review and sign it.

The government must observe a strict procedure for competitive contracts. Following procedure is important because it ensures that all parties know what will come next in the process. This enables both the Public Service and companies to operate more efficiently and with certainty. It allows for better planning and a more transparent process.

The government must publish a notice for the competitive procurement process. They must also have a public preliminary conference and a public ceremony for the opening of bids. Both of these steps help ensure an open, transparent process. At the public ceremony for the opening of bids, the government official reads out loud the competitor and bid amount. Therefore everybody knows what the various competitors each bid.

A jury evaluates bids based on set criteria. Their decision awarding the contract to a competitor must be published, similar to the notice of the competition, before they formally sign

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the contract. Competitors have the right to recheck of the jury's decision should they disagree with it. They may also appeal the recheck decision.

The totality of the government contracting regime is designed to promote efficiency and accountability. Both the government and competitors know the rules, there are measures built in for transparency, but certain measures that give the government flexibility, such as simplified contracts, remain.

Questions

Carla works for the Procurement Service. The Minister of Planning and Finance has asked the Procurement Service to begin the contracting procedure to build a new hospital.

1. Carla reaches out to several builders she knows personally and encourages them to submit bids. She draws up competition documents and sends them to the builders. Carla received their bids, opens them, and sends them to the jury. What mistakes did she make?
2. Carla voids the last procurement process and initiates a new one. She publishes the notice for a pre-qualification procedure and the process proceeds normally. The jury awards the contract to Company Y and sends it to the Minister of Planning and Finance. Company Y is owned by the Minister of Planning and Finance's friend with whom he ran a business for years before leaving it last year to become the Minister. What mistakes were made?

Answers

1. Carla made several mistakes. First, Carla should have published a notice in the paper that let anyone who was interested contact her for competition documents. Any interested party can bid on a project. At the very least they can make a bid for pre-qualification. Also, because this is a large building contract, the competitors should go through pre-qualification before being allowed to bid. Carla also should not have opened up the bids outside of the public opening ceremony.
2. The jury should not have sent the contract award to the Minister of Planning and Finance. First, the contract award should have gone to the Contracts Committee for ratification. Second, if anyone was aware that the Minister's former business associate ran Company Y, they should have reported this fact. The Minister should recues himself immediately and ask another Minister or the Prime Minister to review and sign the contract instead.

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SOURCES CONSULTED

Public Procurement Regime, Law No. 10/2005 (21 November 2005).

Legal Regime of Public Contracts, Law No. 11/2005.

Administrative Offences Under the Legal Regime of Public Procurement and the Legal Regime of Public Contracts, Law No. 12/2005 (5 October 2005).

GLOSSARY

Bid: A competing company's offer to fulfill a contract at a specified price.

Bid security: A financial guarantee made by a bidding company that will be forfeited if it withdraws its bid or cannot fulfill the contract if awarded.

Competition documents: Documents prepared by the government specifying what is required to fulfill the contract. These are used by the bidders to prepare their bid.

Contracts Committee: Composed of five experts, appointed by the Prime Minister for a two year period, in charge of reviewing and advising other governmental officials on certain contracts.

Contract performance guarantee: A financial guarantee made by the winning company that will be forfeited if it does not complete the contract.

Conflict of interest: when a government official is overseeing or participating in a government procurement procedure and one of their relatives or business associates is competing for that same government contract.

International open procedure: A procedure that invites all bidders from around the world.

National open procedure: A procedure that invites all bidders but favors Timorese bidders.

Negotiated procedure: A procedure where the government talks directly with a potential bidder instead of using detailed competition documents.

Open procedures: Procedures allowing bids from any party.

Preliminary conference: An open meeting where the competition documents are presented and potential bidders can ask questions.

Pre-qualification procedures a process whereby the government pre-certifies parties based on their qualifications for the contract before they are allowed to bid on the contract.

Procurement Service: the department within the Ministry of Plan and Finance in charge of advising the Minister on public procurement and managing procurement operations.

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Public Services: Government agencies that wish to contract with private companies.

Recheck: Provided by law, the right of losing bidders to request a review by the public service that awarded the contract.

Restricted procedure: A procedure limiting bidders to those that fit specific criteria.

Simplified procedure: A procedure used for routine contracts that it less burdensome.