

**REVIEW AND ANALYSIS  
OF THE EGYPTIAN TENDER LAW  
AND ITS EXECUTIVE REGULATIONS**

**Prepared for:**

Governorate of Alexandria, Egypt  
Governorate of Cairo, Egypt  
Governorate of Qalyoubiya, Egypt  
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## ACRONYMS

EEPP	Egyptian Environmental Policy Program
GOE	Government of Egypt
MoF	Minister of Finance
USAID	United States Agency for International Development

## **SECTION 1**

### **INTRODUCTION**

The Governorates of Alexandria and Cairo have entered into contracts with private companies to provide solid waste management and cleaning services. The Governorate of Qalyoubiya will soon do the same. The Solid Waste Technical Assistance Project, a component of the USAID-funded Egyptian Environmental Policy Program (EEPP), is assisting the governorates in successful implementation of their privatization programs. This support is provided by a team of specialists under the direction of Abt Associates Inc.

One condition for success of solid waste management privatization in the governorates is the existence of tender laws and regulations that allow fair competition for contracting government services.

### **PURPOSE**

The purpose of this report is to review and analyze the existing tender laws and regulations in Egypt and identify if changes are necessary to facilitate privatization of solid waste management in the governorates.

### **SCOPE**

The laws and regulations that are the subject of this report are those dealing specifically with procurement.

### **STRUCTURE**

This report is divided into 4 sections.

- Section 1, Introduction
- Section 2, Review of the Tender Law and Its Executive Regulations
- Section 3, Analysis of the Law and Its Regulations
- Section 4, Recommendations

## SECTION 2

### REVIEW OF THE TENDER LAW AND ITS EXECUTIVE REGULATIONS

The Tender Law, Law 89 of 1998 (Law 89/1998), and its executive regulations, issued by the Ministry of Finance in 1998 (MoF 1367/1998), govern all procurement of goods and services. Upon its enactment, it replaced the former tender law (Law 9 of 1983) as well as the law on implementation of works (Law 147 of 1962). The law governs procurement by all administrative units, including governorates and local authorities. It is the applicable law for procurement of solid waste management services by governorates.

Law 89/1998 generally requires administrative units to procure goods and services through tender or competitive negotiation,<sup>1</sup> although in extraordinary cases procurement is allowed via direct agreement<sup>2</sup> (Figure 1). Both tender and competitive negotiation require the administrative unit to use similar procedures to develop specifications, receive offers, and evaluate technical offers. The procedures are slightly more complex for a tender, but the major difference between the two types of procurement is the methodology for selecting a winner.

The procedures for both tender and competitive negotiation require that only technically acceptable offers be eligible for contract award. The methodology for selecting the winner of a tender process is to select the lowest priced technically acceptable offer. The methodology for selecting the winner of a competitive negotiation is to arrive at the best conditions and lowest price through negotiation with all of the technically acceptable bidders.

Whether the procurement is through tender or competitive negotiation, it must be conducted using the principles of:<sup>3</sup>

- Open Announcement.
- Free Competition.
- Equal Opportunity.
- Equitable Evaluation.

The competent authority<sup>4</sup> can choose which procurement method he or she wants to use, but once he or she makes a decision to procure via tender, the procedure cannot be changed into a competitive negotiation.<sup>5</sup>

Law 89/1998 and its executive regulations establish the conditions and procedures for the use of each type of procurement. The following sections of this report describe those conditions and procedures.

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<sup>1</sup> Law 89/1998, Article 1.

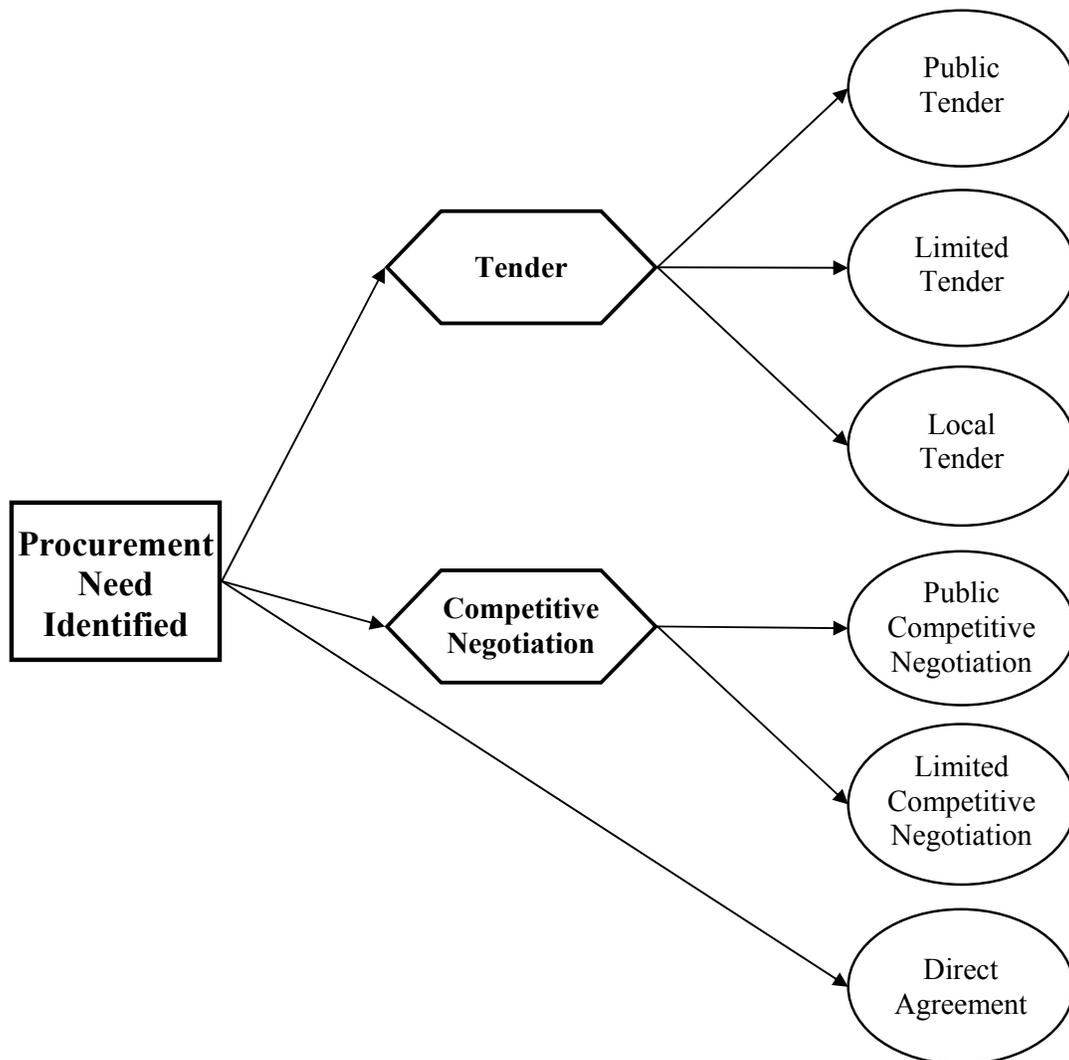
<sup>2</sup> Law 89/1998, Article 7.

<sup>3</sup> Law 89/1998, Article 2.

<sup>4</sup> The “competent authority” is the decision maker in the administrative unit that is procuring the goods or services. Article 2 of the preamble to Law 89/1998 defines “competent authority” as the minister, a person vested with the minister’s powers, the governor, or the chairperson of the authority and allows the competent authority to delegate the authorities of Law 89/1998 only to his or her direct subordinate employee.

<sup>5</sup> Law 89/1998, Article 1.

**Figure 1. Procurement Procedures Authorized by Law 89 of 1998**



### **GENERAL PROCEDURES FOR PROCUREMENT BY TENDER AND COMPETITIVE NEGOTIATION**

Several of the procedures for tenders and competitive negotiations are the same. This is particularly true in regard to the procedures for developing specifications, submitting offers, tracking the process, bonding, contracting, and cancellation. These similarities are detailed in this section of the report.

#### **Development of Specifications**

Law 89/1998 requires the administrative unit to develop accurate and detailed technical specifications prior to launching a tender or competitive negotiation.<sup>6</sup> The executive regulations require the administrative unit to establish a Technical Committee composed of

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<sup>6</sup> Law 89/1998, Article 9.

members with experience in the field of the proposed procurement to develop specifications.<sup>7</sup> The committee submits its results to the administrative unit, which uses them to prepare a book of conditions containing the technical documents for the procurement, including:<sup>8</sup>

- General and special conditions and technical specifications.
- Lists of goods and services.
- All technical annexes.

The administrative unit must make the book of conditions available for sale to prospective bidders. If the competent authority decides to invite offers from foreign entities, the administrative unit must translate the book of conditions into English.<sup>9</sup> The translation must include text stating that in case of contradiction or confusion between the two languages, the Arabic text will prevail.

### **Submittal Requirements**

Responses to an announcement of procurement by tender or competitive negotiation must be submitted in two sealed envelopes.<sup>10</sup> One envelope must contain the technical offer and the other the financial offer. The technical offer envelope must include the bid bond, either in the form of a receipt for cash payment to the financial office of the administrative unit, a certified check, or a letter of guarantee issued by an approved local bank.<sup>11</sup> The technical offer envelope must also contain the technical information required by the administrative unit, including:<sup>12</sup>

- All technical data about the submitted offer.
- The method and schedule for performing the work.
- A list of the sources and types of materials, equipment, and spare parts that the contractor will use to perform the work and copies of the manufacturers' catalogues for the same.
- Documents affirming the existence of an accredited maintenance and service center for the proposed equipment.
- Names, titles, and experience of the management personnel who will supervise performance of the work.
- Full data on any subcontractors to be used for performance of the work.
- Documentation of:
  - Enrollment in necessary registers (e.g., Commercial Register, Industrial Register, and Importers Register).

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<sup>7</sup> MoF 1367/1998, Article 3.

<sup>8</sup> MoF 1367/1998, Article 7.

<sup>9</sup> MoF 1367/1998, Article 7.

<sup>10</sup> Law 89/1998, Article 10; MoF 1367/1998, Article 8.

<sup>11</sup> MoF 1367/1998, Article 70.

<sup>12</sup> MoF 1367/1998, Article 8.

- Membership in the Egyptian Federation of Construction and Building Contractors.
- Registration with the Sales Tax Department.
- Tax Card.
- Evidence of legal establishment, such as articles of incorporation.

Committees established by the competent authority must open and assess the technical offer envelopes before opening the financial envelopes. The result of the technical assessment is identification of the technically accepted offers. The opening of the financial offer envelopes is confined to only the technically acceptable offers.<sup>13</sup> The financial offer envelope is required to contain:<sup>14</sup>

- Price lists.
- Method of settlement.
- Value of maintenance and spare parts.
- Operating requirements.
- Other elements affecting the financial value of the offer.

### **Process Tracking**

The Purchasing Department in the administrative unit is required to establish necessary registers and forms to track the procurement process from announcement through evaluation and contract signing.<sup>15</sup> Among other things, the registers record:

- The respondents to a procurement announcement.
- The minutes of the envelope opening sessions.
- The decisions of the committee that performs the technical review.
- Notification of offer acceptance.

### **Bonds**

In addition to establishing the technical specifications, the Technical Committee is required to estimate the costs of the contract and propose the amount of the bid bond.<sup>16</sup> Each response to a tender or a competitive negotiation must be accompanied by a bid bond in the amount established by the competent authority, but not to exceed 2 percent of the estimated value of the contract.<sup>17</sup>

The administrative unit is required to return the bid bond to bidders that submitted unacceptable offers within 7 business days after the expiration of the period of validity for the offer.<sup>18</sup> In the case of the accepted offer, the administrative unit must return the bid bond

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<sup>13</sup> Law 89/1998, Article 10.

<sup>14</sup> MoF 1367/1998, Article 8.

<sup>15</sup> MoF 1367/1998, Articles 6 and 11.

<sup>16</sup> MoF 1367/1998, Article MoF 1367/1998, Article 7.4.

<sup>17</sup> Law 89/1998, Article 17.

<sup>18</sup> MoF 1367/1998, Article 72.

before it collects the performance bond. If the submitter of an offer withdrew the offer prior to the date on which the technical offer envelopes were opened, it forfeits the amount of the bid bond to the competent authority.<sup>19</sup>

Once a bidder is selected to provide a procurement, it is required to provide a performance bond of 5 percent of the value of the contract.<sup>20</sup> The bond must be provided within 10 days of notification of acceptance for a domestic contractor or 20 days for a foreign contractor (although the competent authority can extend these deadlines by 10 days). It may be provided via a cash payment to the financial department of the administrative unit, a certified check, or a letter of guarantee.<sup>21</sup>

The administrative unit holds the performance bond until full execution of the contract.<sup>22</sup> In the case of a letter of guarantee, the letter must be valid from the date of issuance until 3 months after the end of the contract implementation period, unless otherwise agreed to by the contractor and the competent authority.<sup>23</sup> If the contractor with the accepted offer does not provide the performance bond within the time limit, the administrative unit may cancel the contract.<sup>24</sup> In that case, it can offer a contract to the bidder with the next lowest-cost, technically acceptable offer.

## **Contracting**

Once an offer has been accepted by the competent authority, the Purchasing Department in the administrative unit makes arrangements with the contractor to secure the performance bond.<sup>25</sup> At the same time, the implementing department in the administrative unit and the financial department will develop and sign a contract or a declaration with the contractor reflecting the requirements of the book of conditions and the financial offer of the contractor.

The administrative unit must draft a contract if the value of the procurement exceeds LE 50,000.<sup>26</sup> If the value is less than this amount, then a declaration issued by the contractor containing all the required guarantees will be sufficient. There is no standard government contract. Each administrative unit uses its own form of contract; however, the contract must conform to the provisions of Law 89/1998 and its executive regulations. A lawyer from the State Council must review and revise the contract to guarantee that it complies with the provisions of the law and that it is in the interest of the state.

The administrative unit must draft three copies of the contract, one each for:

- The financial department with all the submitted offers attached.
- The contractor.
- The implementing department in the administrative unit.

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<sup>19</sup> MoF 1367/1998, Article 60.

<sup>20</sup> Law 89/1998, Article 18.

<sup>21</sup> MoF 1367/1998, Article 70.

<sup>22</sup> MoF 1367/1998, Article 71.

<sup>23</sup> MoF 1367/1998, Article 70.

<sup>24</sup> Law 89/1998, Article 21.

<sup>25</sup> MoF 1367/1998, Article 31.

<sup>26</sup> MoF 1367/1998, Article 32.

Each copy of the contract must include the value of the performance bond, its kind, and the date of its delivery.

### **Cancellation of a Tender or Competitive Negotiation**

A tender or competitive negotiation may be cancelled by the competent authority before he or she issues a final decision if to do so is for the public welfare, or for any of the following reasons:<sup>27</sup>

- If only one offer is submitted, or after the elimination of the technically unacceptable offers, only one offer remains.
- If all or most of the offers include technical or financial reservations.
- If the amount of the lowest offer exceeds the estimated value.

In these cases, the cancellation shall be decided by a substantiated decision from the competent authority upon the recommendation of the committee conducting the technical review. However, the competent authority can accept a sole offer upon the recommendation of the review committee, if the following conditions are fulfilled:

- The pressing need for the procurement does not allow for re-announcement.
- No benefit is expected from a re-announcement.
- The sole offer meets the specification in the book of conditions and is suitable in price.

In case of cancellation before the due date for opening the envelopes, the price of the book of conditions and specifications will be refunded to the buyers upon their request providing that they return the book and its annexes to the administrative unit.<sup>28</sup> If the cancellation is after the due date for opening the envelopes, then the price of the book of conditions and specifications will only be refunded to the buyers who submitted an offer, upon their request and provided they return the book of conditions to the administrative unit. However, if the cancellation of the procurement was due to the non-compliance to the terms and specifications, then the price of the book of conditions will not be refunded.

In the cases where the competent authority decides to cancel a procurement and re-announce it with the same terms and conditions, then the price of the new book of conditions will not be collected from the bidders who bought the original book of conditions.

## **TENDER**

Tender is a process through which the administrative unit advertises its procurement needs with detailed technical specifications and selects the lowest-cost bidder that meets its specifications. The specifications fully identify the good or service required. The bidders respond to the specifications, and those who meet or exceed the specifications are considered

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<sup>27</sup> MoF 1367/1998, Article 29.

<sup>28</sup> MoF 1367/1998, Article 30.

to be technically acceptable. A committee appointed by the competent authority opens the financial offer envelopes of the technically acceptable offers and awards the procurement to the bidder with the least-cost technically acceptable offer. For tenders submitted for goods and services that can be supplied locally, Egyptian bidders are considered to be the least-cost bidder if their price does not exceed 15 percent of the value of the least-cost foreign bidder.<sup>29</sup>

The law identifies three types of tenders:

- Public Tender.
- Limited Tender.
- Local Tender.

The procedures differ for each type of tender and are described below.

### **Public Tender**

Public Tender is applicable in cases where advertisement will be completely and offers will be solicited from all qualified bidders, foreign and domestic.

#### **Announcement and Schedules--**

The administrative unit is required to announce a Public Tender twice, at an appropriate time in one or two mass circulation daily newspapers.<sup>30</sup> The announcement must contain:

- The name of the administrative to which the offers are to be submitted.
- The deadline for submission.
- A description of the goods or services to be supplied.
- The amount of the bid bond.
- The percentage of the performance bond.
- The price of the book of conditions and its annexes.
- Any other data that the administrative unit considers necessary.

If the administrative unit wants to solicit foreign offers, it must issue the announcement in Egypt and abroad in both Arabic and English.

The competent authority is responsible for setting the deadline for receiving responses to the announcement for Public Tenders (the offers). The deadline must be at least 30 days from the date of the first announcement in the newspapers.<sup>31</sup> If necessary, the competent authority can reduce the response period, but not to less than 20 days.

All offers must be valid for a period of up to 3 months after the opening of the technical offer envelopes. However, the competent authority can extend the period of validity if the level of complexity of the tender requires a longer period for technical review.<sup>32</sup>

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<sup>29</sup> Law 89/1998, Article 16.

<sup>30</sup> MoF 1367/1998, Article 12.

<sup>31</sup> MoF 1367/1998, Article 14.

<sup>32</sup> MoF 1367/1998, Article 14.

## **Committees and Review--**

In addition to the Technical Committee, the competent authority must establish two other committees to initiate and complete a Public Tender.<sup>33</sup>

- Tender Envelopes Opening Committee.
- Decision Committee.

The Tender Envelopes Opening Committee is responsible for opening and recording the tender envelopes. It is chaired by a senior official and composed of a legal member, a technical member, a financial member, and the Director of the Purchasing Department or his delegate.<sup>34</sup> The committee opens the technical offer envelopes on the day of the deadline for submittals.<sup>35</sup> Each bidder submitting an offer may send a representative to attend the committee session at which the envelopes are opened.<sup>36</sup> In addition to opening the technical offer envelopes, the committee:<sup>37</sup>

- Checks the contents for required items.
- Reads aloud the name of each bidder submitting an offer, the amount and kind of the bid bond, and the contents of the envelope.
- Removes the bid bond and delivers it to the Accounting Department representative in attendance at the session.
- Signs, without opening, the financial offer envelopes.
- Makes the necessary records.

After the Tender Envelopes Opening Committee opens and records the technical offer envelopes, it submits them to the Decision Committee.

The Decision Committee is responsible for reviewing and evaluating the technical offers to identify those that are technically acceptable.<sup>38</sup> The committee is chaired by a senior official and is composed of members with relevant technical, legal, and financial expertise.<sup>39</sup> The committee may establish sub-committees as needed.<sup>40</sup> If the value of the contract will exceed LE 250,000, the Decision Committee must also have a member from the Ministry of Finance, and if the value exceeds LE 500,000, the committee must also have a member from the Consultancy Department of the State Council.<sup>41</sup> The committee submits a report to the competent authority conveying its recommendations for technically acceptable offers, including the reasons for its recommendations.<sup>42</sup>

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<sup>33</sup> Law 89/1998, Article 12.

<sup>34</sup> MoF 1367/1998, Article 15.

<sup>35</sup> MoF 1367/1998, Article 16.

<sup>36</sup> MoF 1367/1998, Article 67.

<sup>37</sup> MoF 1367/1998, Article 17.

<sup>38</sup> MoF 1367/1998, Article 23.

<sup>39</sup> MoF 1367/1998, Article 22.

<sup>40</sup> Law 89/1998, Article 13.

<sup>41</sup> Law 89/1998, Article 12; MoF 1367/1998, Article 22.

<sup>42</sup> MoF 1367/1998, Articles 23 and 24.

The competent authority, after receiving the recommendations of the Decision Committee, determines which offers are technically acceptable. The Purchasing Department of the administrative unit is required to notify each bidder that makes an offer, informing it of whether or not its offer has been determined to be technically acceptable. If an offer is not acceptable, the bidder must be informed of the reasons for its exclusion.<sup>43</sup>

The Tender Envelopes Opening Committee reconvenes after the competent authority has identified the technically acceptable offers and the Purchasing Department has notified the bidders of their status. The committee opens, reports, and records the contents of the financial offer envelopes for the technically acceptable offers. Representatives from each bidder that submitted a technically acceptable offer may attend the committee session at which the financial offer envelopes are opened.<sup>44</sup>

Once the financial offer envelopes have been opened, one or more responsible officials verify the financial offers.<sup>45</sup> They are then submitted to the Decision Committee, which reviews the offers and makes its recommendation to the competent authority for award to the least-cost offer.<sup>46</sup> Based on the recommendations of the Decision Committee, the competent authority selects a bidder with which to contract.

### **Limited Tender**

Limited Tender is applicable in cases where the nature of the contract requires restricting the participants in the tender to certain suppliers, contractors, consultants, technicians, or experts, whether foreign or domestic, provided that they have the technical and financial qualifications to fulfill the requirements of the work.<sup>47</sup> The procedures for a Limited Tender are the same as for a Public Tender except for the means of announcement and the schedule for responding.

To announce a Limited Tender, the competent authority must send invitations via registered mail or another suitable means to the largest number of suppliers, contractors, consultants, technicians, or experts working in the field pertaining to the tender.<sup>48</sup> The invitations must be sent at least 15 days prior to the deadline for opening the technical offer envelopes.

### **Local Tender**

Local Tender is applicable in cases where the value of the contract does not exceed LE 200,000 and participation will be restricted to local suppliers and contractors.<sup>49</sup> Local suppliers and contractors are defined as those who perform their business in the territory of the Governorate in which the contract will be executed. The procedures for a Local Tender are the same as for a Public Tender except for its announcement, schedule for responding, and the number and membership of committees involved in the process.

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<sup>43</sup> MoF 1367/1998, Article 25.

<sup>44</sup> MoF 1367/1998, Articles 25 and 67.

<sup>45</sup> MoF 1367/1998, Article 27.

<sup>46</sup> MoF 1367/1998, Article 28.

<sup>47</sup> Law 89/1998, Article 3; MoF 1367/1998, Article 34.

<sup>48</sup> MoF 1367/1998, Article 35.

<sup>49</sup> Law 89/1998, Article 4.

To announce a Local Tender, the competent authority must send invitations via registered mail or another suitable means to the largest number of local suppliers and contractors, working in the field pertaining to the tender.<sup>50</sup> The invitations must be sent at least 10 days prior to the deadline for opening the technical offer envelopes. However, in urgent cases the invitations can be delivered by a special courier at least 48 hours before the deadline for opening the technical offer envelopes.

The Decision Committee for a Local Tender does not require membership from the Ministry of Finance or the Consultancy Department of the State Council. If the contract will not exceed LE 50,000, the competent authority can forego the use of both a Tender Envelopes Opening Committee and a Decision Committee, and can instead appoint one committee to oversee both the opening of envelopes and the review and assessment of offers.<sup>51</sup> The committee must be chaired by a responsible official and have two other members whose position and experiences are related to the subject of the tender.

## **COMPETITIVE NEGOTIATION**

Competitive negotiation (“momarsa” in Arabic, sometimes translated as “practice” in English) is a process through which the administrative unit advertises its procurement needs with detailed technical specifications, identifies those bidders who have submitted technically acceptable offers, and then publicly negotiates with those bidders to select a contractor who will deliver the best service at the lowest cost.

The law identifies two types of competitive negotiations:

- Public Competitive Negotiation
- Limited Competitive Negotiation

The procedures differ for each type of competitive negotiation and are described in the following sections of this report.

### **Public Competitive Negotiation**

Public Competitive Negotiation is applicable in cases where advertisement will be completely and offers will be solicited from all qualified bidders, foreign and domestic.

#### **Announcement and Schedules--**

The administrative unit is required to announce a Public Competitive Negotiation in the same manner as a Public Tender, with the exception that the competent authority is allowed to reduce the minimum response period to 10 days from the date of the first announcement if such a reduction is necessary due to the urgency of the procurement.<sup>52</sup>

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<sup>50</sup> MoF 1367/1998, Article 37.

<sup>51</sup> MoF 1367/1998, Article 39.

<sup>52</sup> MoF 1367/1998, Article 42.

## **Committees and Review--**

In addition to the Technical Committee, the competent authority must establish a Competitive Negotiation Committee to oversee the procurement process. The committee is chaired by a responsible official and is composed of members with relevant technical, legal, and financial expertise.<sup>53</sup> If the contract will be with an internal contractor and its value will exceed LE 250,000, the committee must also have a member from the Ministry of Finance, and if the value exceeds LE 500,000, the committee must have a member from the Consultancy Department of the State Council.<sup>54</sup> For contracts with external contractors, the Ministry of Finance and the Consultancy Department of the State Council must be represented on the committee if the value of the contract exceeds LE 1,000,000.

The Competitive Negotiation Committee serves the functions of both the Tender Envelopes Opening Committee and the Decision Committee required for a Public Tender. The committee opens the technical offer envelopes at a committee session to which each bidder submitting an offer may send a representative.<sup>55</sup> The committee follows the same procedures for opening the technical offer envelopes as prescribed for the Tender Envelopes Opening Committee in a Public Tender.

After the Competitive Negotiation Committee opens and records the technical offer envelopes, it conducts the technical review of each offer to ensure that it meets the specifications developed by the Technical Committee and approved by the administrative unit.<sup>56</sup> The committee submits a report to the competent authority conveying its recommendations for refusal or acceptance of each offer and the reasons for its recommendations.

The competent authority, after receiving the recommendations of the Competitive Negotiation Committee, determines which offers are technically acceptable. The Purchasing Department of the administrative unit is required to notify each bidder whether or not its offer has been determined to be technically acceptable and include in its notification the reasons for its decision. The Purchasing Department then notifies the bidders with technically acceptable offers of the time and place for the opening of the financial offer envelopes.<sup>57</sup> Each bidder with a technically acceptable offer is allowed to have a delegate at the opening of the financial offer envelopes.

The Competitive Negotiation Committee reconvenes after the competent authority has identified the bidders with technically acceptable offers and the Purchasing Department has sent notifications. The committee opens, reports, and records the contents of the financial offer envelopes. The committee then negotiates with the bidders in a session to arrive at an offer that achieves the best technical conditions at the lowest cost.<sup>58</sup>

Once the committee has negotiated a final offer, it submits a report to the competent authority recommending that the negotiated offer be accepted. The report must be signed by all of the committee members. The competent authority then makes his or her decision regarding which offer to accept and the administrative unit enters into the contracting procedures.

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<sup>53</sup> MoF 1367/1998, Article 40.

<sup>54</sup> Law 89/1998, Article 6; MoF 1367/1998, Article 40.

<sup>55</sup> MoF 1367/1998, Articles 42 and 67.

<sup>56</sup> MoF 1367/1998, Article 43.

<sup>57</sup> MoF 1367/1998, Article 44.

<sup>58</sup> MoF 1367/1998, Article 44.

## **Limited Competitive Negotiation**

Contracting through Limited Competitive Negotiation is permitted where the desired goods or services are:<sup>59</sup>

- Neither manufactured, imported, nor available except from specific entities or persons.
- Of a special nature that dictates procurement from their manufacturing location.
- Of a technical nature that requires the use of specific technicians, specialists, or experts.
- Related to matters of national security that require confidential procurement.

The procedures for a Limited Competitive Negotiation are the same as for a Public Competitive Negotiation except for the means of announcement and schedule for responding.

To announce a Limited Competitive Negotiation, the competent authority must send invitations via registered mail or another suitable means to the largest number of suppliers, contractors, consultants, technicians, or experts working in the field pertaining to the procurement.<sup>60</sup> If the procurement is urgent, the competent authority can send invitations via a special courier, 5 days prior to the deadline for opening the technical offer envelopes.

## **DIRECT AGREEMENT**

Law 89/1998 allows contracting via Direct Agreement in cases of extreme emergency where time does not permit using the tender or competitive negotiation procedures.<sup>61</sup> Whenever Direct Agreement is used, the competent authority must substantiate his or her reasons.<sup>62</sup> The authority to decide to use Direct Agreement varies with the type and value of the contract, as shown in Table 1.

**Table 1. Authority for Authorizing the Use of Use of Direct Agreement**

<b>Type of Contract</b>	<b>Value of Contract (LE)</b>	<b>Authority</b>
Goods, Services, Studies, Technical Works, Transportation	≤50,000	Chief Executive of the Authority or Administration
Construction	≤100,000	
Goods, Services, Studies, Technical Works, Transportation	≤100,000	Minister or Governor
Construction	≤300,000	
Goods, Services, Studies, Technical Works, Transportation	>100,000 and in dire need	Prime Minister
Construction	>300,000 and in dire need	

Source: Law 89/1998, Article 7.

<sup>59</sup> Law 89/1998, Article 5.

<sup>60</sup> MoF 1367/1998, Article 47.

<sup>61</sup> Law 89/1998, Article 7.

<sup>62</sup> MoF 1367/1998, Article 50.

In all cases, Direct Agreement can only be used once in the same financial year for the same good or service, unless the total value of all of the contracts for that good or service do not exceed the limits as shown in Table 1.<sup>63</sup>

Direct Agreement does not require public or limited announcement. The competent authority is only required to identify those individuals in its organization who have experience in the field of the procurement and who will be responsible for concluding a contract to provide the desired goods and services.<sup>64</sup> These individuals will represent the competent authority in identifying a potential contractor and negotiating a contract to ensure that the administrative unit receives the goods and services as specified and at market prices. These individuals submit the proposed contract to the competent authority, who is responsible for approving it.<sup>65</sup> The Purchasing Department of the administrative unit is required to maintain a register of all Direct Agreements.<sup>66</sup>

A bid bond is not required for a Direct Agreement, as there is no bidding. However, a 5 percent performance bond may be required by the competent authority, if the authority believes that delivery of the goods or services requires, by its nature, the contractor's warranty of soundness.<sup>67</sup> The administrative unit retains the performance bond until the end of the warranty period, as agreed to with the contractor.

## **CONTRACT PERFORMANCE AND TERMINATION**

Law 89/1998 and its executive regulations address contract performance and termination as well as procurement procedures. If a contractor delays implementation of a contract, the law and its executive regulations allow the competent authority to extend the deadline for implementation and charge the contractor a delay fine.<sup>68</sup> The fine is charged at a rate of 1 percent of the value of the contract for each week or portion of a week that the implementation is delayed.<sup>69</sup> The fine cannot exceed 3 percent of the value of the contract if the contract is for goods, services, studies, or technical works, or 10 percent of the value of the contract if it is for construction.<sup>70</sup> The competent authority can implement the delay fine as soon as the delay occurs, without notifying the contractor.

The competent authority can exempt a contractor from the delay fine (after taking the opinion of the Consultancy Department of the State Council) if the contractor shows that the delay was due to reasons beyond its control or if the delay did not cause any damage.<sup>71</sup> The implementation of the delay fine does not prevent the administrative unit from seeking full compensation for its losses due to the delay.

An administrative unit can revoke a contract immediately if:<sup>72</sup>

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<sup>63</sup> MoF 1367/1998, Article 51.

<sup>64</sup> MoF 1367/1998, Article 50.

<sup>65</sup> MoF 1367/1998, Article 52.

<sup>66</sup> MoF 1367/1998, Article 6.

<sup>67</sup> MoF 1367/1998, Article 50.

<sup>68</sup> Law 89/1998, Article 23; MoF 1367/1998, Article 83.

<sup>69</sup> MoF 1367/1998, Article 83.

<sup>70</sup> Law 89/1998, Article 23.

<sup>71</sup> Law 89/1998, Article 23; MoF 1367/1998, Article 83.

<sup>72</sup> Law 89/1998, Article 24.

- It has proof that the contractor used (either itself or through a third party) fraud or manipulation when dealing with the administrative unit.
- The contractor has been declared bankrupt or insolvent.

The administrative unit may also terminate the contract if the contractor does not comply with any of the terms and conditions of the contract and does not correct the noncompliance within 15 days of notification by the competent authority.<sup>73</sup>

The competent authority must issue a decree to revoke or terminate a contract. The contractor must be notified of this decree by a confirmed registered letter.<sup>74</sup> If the contract is revoked or terminated due to the actions of the contractor, the administrative unit retains the performance bond as well as any goods or services delivered by the contractor prior to termination.<sup>75</sup> The administrative unit also is entitled to deduct from any outstanding payments to the contractor the full cost of the losses it will incur as a result of the contractor's nonperformance.<sup>76</sup> If the outstanding payments are not sufficient to cover the losses, the administrative unit has the right to make the deduction from payments due to the contractor from another administrative unit, as well as maintaining its rights to pursue legal action against the contractor.

If a dispute arises between the two parties during performance or termination of the contract, they may agree to settle the dispute through arbitration, after receiving the approval of the competent Minister.<sup>77</sup> If the parties agree to arbitration, they must continue to meet their contractual obligations during the period of arbitration.

In case of allegation by the contractor that the administrative unit failed to fulfill its contractual obligations, the contractor has the right to take legal action to claim compensation for the damages.<sup>78</sup> Alternatively, the contractor and the administrative unit can agree to resolve their dispute via arbitration according to the procedures prescribed in the Arbitration Law (Law 27 of 1994, as amended by Law 9 of 1997).

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<sup>73</sup> Law 89/1998, Article 25; MoF 1367/1998, Articles 75 and 84.

<sup>74</sup> Law 89/1998, Article 25.

<sup>75</sup> Law 89/1998, Article 26; MoF 1367/1998, Article 84.

<sup>76</sup> Law 89/1998, Article 26.

<sup>77</sup> Law 89/1998, Article 42.

<sup>78</sup> Law 89/1998, Article 23.

## SECTION 3

### ANALYSIS OF THE LAW AND ITS REGULATIONS

The Egyptian Parliament adopted Law 89/1998 to make governmental procurement more fair and transparent by subjecting it to the principals of:

- Open Announcement.
- Free Competition.
- Equal Opportunity.
- Equitable Evaluation.

The principal of open announcement means that the administrative unit that intends to conclude a contract will make an invitation to the public. This principal is reflected in the executive regulations by requiring administrative units to announce public tenders and competitive negotiations in the newspaper and to announce limited or local tenders or competitive negotiations to the largest number of potential contactors working in the field pertaining to the procurement. The use of this principal encourages wide competition among perspective contractors, which in turn reduces the price of contracting to the government.

The principal of free competition means that the administrative unit will announce potential competition to all contractors who are working in the activity of the desired procurement, to make sure there is a real competition. It does not mean that the administrative unit cannot put restrictions on the competition to protect public welfare, such as excluding contractors who have used unfair practices in the past.

The principal of equal opportunity requires the administrative unit to provide sufficient chances for all potential contractors to present data, documents, and information during the technical evaluation stage. According to this principal, each bidder may present its technical offer and have it reviewed by the administrative unit without prejudice. The administrative unit may not distinguish or put signs on certain offers in order that they may be distinguished from others.

The principal of equitable evaluation means that the administrative unit will use the same criteria to evaluate each offer from a pre-qualified contractor. The administrative unit may not exonerate any contractor of some conditions and/or may not add, change, or delete some conditions especially for one or more of the contractors. In addition, the authority may not exclude any offer from a pre-qualified contractor by a private decision.

Law 89/1998 also gave local administrative units and competent authorities the ability to be flexible in the use of the procurement procedures, as long as they met the principals of transparency. Article 12, paragraph 2 of the executive regulations for Law 89/1998 authorizes the administrative unit to add to the book of conditions of the tender other data not stipulated in the law, but that the unit regards as necessary. Article 14, paragraph 1 of the executive regulations authorizes the competent authority to reduce the period for submitting offers according to the circumstances of the tender. Paragraph 2 of the same article authorizes the competent authority to increase the period for the validity of tenders in cases of necessity.

The most important stage in the procurement process is the evaluation of the technical offers to make sure that they conform to the specifications and conditions in the book of conditions. Law 89/1998 improves the quality of the review as well as its transparency. The law requires that the evaluation be done by a committee composed of individuals with experience in the relevant field. The committee is granted broad authority to require the bidders to submit additional data, documents, and/or information in order to most effectively execute its task. To improve the evaluation of technical offers, Article 23 of the executive regulations for Law 89/1998 grants the committee that evaluates the technical offers the right to form subcommittees among its members having relevant experiences to study specific aspects of the offers. The subcommittees must submit their reports to the full committee. The recommendations of the full committee must be presented to the competent authority in writing, and the administrative unit must announce its reasons for accepting or rejecting each offer on a notice board appropriated for this purpose.<sup>79</sup>

In implementing Law 89/1998 the government has made clear its preference for the use of competitive bidding procedures. The Prime Minister issued a periodical decree in August 2001 that contained instructions to every competent authority to comply with the conditions of the law, particularly in contracting through the Direct Agreement. The Ministry of Finance issued periodical Decree Number 79 of 2001 with instructions to every competent authority to execute Law 89/1998 in a correct way, particularly when contracting through Direct Agreement. The decree also directed the authorities to provide the General Secretariat of the Cabinet of Ministers with a report every three months about the contracts that had been concluded through the Direct Agreement. Both of these decrees have the effect of restricting the use of Direct Agreement and encouraging the use of tenders and competitive negotiations for procurement.

In 1998, the Prime Minister issued Decree Number 3549 in which he granted the Governmental Follow-up Office in the Ministry of Finance the right to handle complaints related to the violation of the provisions of Law 89/1998 and its executive regulations. The decree requires the Governmental Follow-up Office to receive complaints signed by the applicant or its legal representative stating the name and address of the applicant and the subject of the complaint. The office is required to consider each complaint in the light of the documents submitted by the applicant. It is authorized to consult with experts in the subject of the complaints.

The Supreme Administrative Court, in Appeal Number 159 for year 6 judicial dated November 24, 1962, ruled that the primary governmental procurement procedure should be the tender process and that the competitive negotiation process should be an exception in specific cases according to the conditions stated in the law. The ruling stated that the tender process best safeguards public welfare, provided it is pursued with complete confidentiality and in conformance with the principle of equitable evaluation. This ruling established the basic principal that the tender procedure is the preferred procedure of governmental procurement and that other forms of procurement should be used only when exceptional conditions require their use and when accompanied by a decree from the competent authority stating the reasons for not using the tender process.

Clearly, Law 89/1998 has improved the competitive nature of governmental procurement in Egypt, but more improvements could still be made. For instance, although Article 1 of the law states that Public Tender and Public Competitive Negotiation are the preferred

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<sup>79</sup> MoF 1367/1998, Article 25.

procurement procedures, the law does not clearly indicate in which cases the administrative unit should use the tender process and in which cases it can resort to the competitive negotiation process.

Article 7 of Law 89/1998 authorizes the Prime Minister, in case of dire need, to allow Direct Agreement instead of tender or competitive negotiation, without any ceiling on the value of the contract. Article 8 of the law states that the Prime Minister, in cases of necessity and for considerations he evaluates, may authorize an administrative unit to contract through Limited Tender, Local Tender, Limited Competitive Negotiation, or Direct Agreement according to the terms, conditions, and rules that he determines. These two articles give the Prime Minister extraordinary authority to bypass the competitive process, and in the case of Article 8, to authorize an administrative units to contract by any way the Prime Minister desires and according to his own terms and conditions.

Article 18 of Law 89/1998 states that the contractor whose offer has been accepted shall provide a performance bond equal to 5 percent of the value of the tender within 10 days (20 days for a foreign contractor) of having been informed of the acceptance of the offer. Article 21 of the law states that if the contractor whose offer has been accepted does not provide the performance bond within the determined time-limit, the administrative unit may cancel the contract or replace the contractor with the one that had the next best offer.

These articles oblige the contractor with the accepted offer to provide the performance bond before signing the contract and before having a legal relation with the administrative unit. In addition, the period granted to the successful contractor to fulfill this obligation is short, particularly if the contract is for many years and of a high value, which is often the case for solid waste management contracts.

Article 7 of the executive regulations for Law 89/1998 states that each administrative unit shall prepare a book containing the technical documents for the procurement, including the general and special conditions, technical specifications, lists of goods and services, and all technical annexes. Article 7, however, does not require that a draft contract be included in the book of conditions. A draft contract presents the potential bidders with exact information about the terms of the contract, and thus improves the potential contractors knowledge of what is being requested as well as the transparency of the request for proposals.

The requirement that the contract be reviewed and revised by the Advisory and Legislation Department in the State Council has posed problems for privatization of solid waste management, particularly because of the timing of the review. In Alexandria, the review of the solid waste management contract occurred after the contract was negotiated and signed by the Governor and the contractor. The review by the State Council delayed implementation of the contract and the resulting changes in the contract caused confusion and dispute for the two parties.

## SECTION 4

### RECOMMENDATIONS

Although Law 89/1998 has improved governmental procurement in Egypt, there are some changes that could be made to improve the competitiveness of the procurement process. The areas that need improvement are discussed in the previous section of this report. Following are recommendations that if implemented would address those issues.

- The law should be amended to include definitions of “tender” and “competitive negotiation” and to describe in which cases the administrative unit should use the tender process and in which cases it can resort to the competitive negotiation process.
- The law should be amended to include clarifications – even if they are simplified – of “cases of dire need” in Article 7 and “cases of necessity” in Article 8 and give some examples of such cases. These amendments would clarify when the Prime Minister can exercise his authority to direct governmental procurement.
- Article 8 should also be amended to remove the statement that the Prime Minister can direct contracting to be done according the other terms, conditions, and rules that he determines. The Prime Minister should have authority to direct an administrative unit to use a particular type of procurement in cases of necessity, but the subsequent procurement should be within the rules and conditions determined by the law, not those determined by the Prime Minister.
- Article 18 of the law should be amended to require the contractor whose offer has been accepted to provide the performance bond at the signing of the contract with the administrative unit. Prior to signing the contract, there is no legal relation between the two parties.
- Article 7 of the executive regulations for Law 89/1998 should be amended to require that a draft contract be included in the book of conditions.
- Review of the contract by the Advisory and Legislation Department in the State Council should take place before signing the contract. The State Council should review and revise the draft contract included in the book of conditions to facilitate subsequent review and revision of the final contract.