

Business contracts and Tenders

A business contract is a legally binding agreement between two parties for an exchange of services that are of value. For a contract to be valid, an offer must be made and accepted. Using a contract in business dealings helps ensure an agreement is acted on, insofar as a broken contract could result in a lawsuit or out-of-court settlement and the payment of damages caused by the breach. The best way to avoid a dispute or potential litigation, however, is to craft a solid agreement in which you're confident you've negotiated the best terms for your business.

A business contract is a legally binding agreement between two or more parties to do or not to do certain things. *For example, a business contract could be for the sale of goods or supply of services at a certain price.* There are many different types of contracts including:

- the sale and purchase of a business agreement
- partnership agreements;
- leases of business premises;
- leases of plant and equipment; and
- Employment agreements.

The process for creating a contract generally includes information exchange, discussion, negotiation and agreements (signatures).

What are the essential elements of a contract?

To be legally binding a contract must contain four essential elements. These four elements are:

1. **An offer**
2. **acceptance;**
3. **Intention of legal consequences and considerations.**
4. **Contractual capacity**

The four essential elements of a contract can be briefly explained as follows; a contract is formed when one party makes an offer and that offer is accepted by another party for an exchange of some benefit or something of value by the parties (this is the consideration element). The intention of the parties is that they are legally bound by the contract. The persons entering a contract must also be legally qualified to do so. They must be of the acceptable age – majority age i.e. above 18 years; they must be mentally sane and should not be intoxicated by alcohol or any other drug, in other words, they must be of sober mind. That is the contractual capacity.

When can a contract be invalid?

Even if the four essential elements are present a contract could be invalid if:

- It is an illegal contract. Examples of illegal contracts are an agreement to commit a crime and an agreement that breaches legislation, such as unconscionable conduct under the Competition and Consumer Act 2010.
- The person or entity lacks the capacity to enter into the contract. Examples of persons lacking capacity are minors and bankrupts.

- The contract involves misleading or deceptive conduct, mistake, duress, undue influence, unconscionable conduct or other categories that at law can cause the contract to be avoided.

Can a contract be verbal or written?

Contracts can be verbal or written, provided they contain the four essential elements of a contract. However, a verbal contract is much more difficult to prove. Most types of contract such as those for buying or selling real estate and credit must be in writing.

A written agreement is recommended as it:

- becomes your proof of what was agreed upon;
- prevents ambiguity or misunderstanding;
- prevents either party forgetting or changing the terms later; and
- makes the parties focus on the essential issues and come to a definite agreement.

Unless you're a lawyer, nobody expects you to write your own contracts. However, as a business owner you're expected to be able to read a contract and understand what it means before signing.

What general matters are covered in a contract?

Some of the general matters that a business contract can cover include but are not limited to:

- parties to the contract
- date of the contract
- definitions used in the contract
- description of the goods and services that your business will provide or receive
- payment amount and details of payment dates
- interest on late payments
- delivery dates of goods and performance dates for services
- insurance provisions
- guarantee provisions
- termination dates of the contract
- renewal terms
- damages for breach of contract
- termination conditions
- Any other special conditions.

As the owner of a small business, you will often need to create business contracts as your company grows.

When to Use Business Contracts

A business contract is often used for:

- Hiring or being employed as an independent contractor
- Buying or providing services or goods
- Leases and real estate

- Selling your business
- Partnerships and joint ventures
- Franchising
- Confidentiality agreements
- Noncompeting agreements

A contract often involves paying for services, but non-monetary contracts are just as valid.

Oral Business Contracts

An oral contract is a spoken agreement that is as valid as a written contract. For example, if you have a promise that a job will be complete for monetary or other compensation, you have created an oral contract.

Oral contracts are legally enforceable, although they are frequently subject to misinterpretation and they can be difficult to prove in court because they often come down to one person's word against the other. Moreover, some types of contracts must be in writing, for example, contracts for the purchase or sale of any interest in real property.

Written Business Contracts

Written contracts are produced on paper or electronically. Legally, a written business contract is easier to uphold than an oral contract because there is a reference for the agreement.

With a written contract, it's "easier to prove ... the terms between the parties and eliminate arguments over who said what," says Jack Cummins of Chicago-based Cummins & Associates, which represents small businesses. He adds that it's often easier for businesses to recognize potential points of contention in the language because the agreement is detailed in writing.

Whether your small business is providing or offering services, you should consider using a written business contract and including specific details about the agreement.

Business Contract Items

A business contract should be labeled "contract" or "agreement" at the top. These are some items it can include:

- Date of contract
- Names of parties involved
- Details of services that your company will provide or receive
- Payment amounts
- Payment due dates. Note that payments do not need to be made in a lump sum at the end of the project. You can make or receive incremental payments for specific services rendered once they are completed.
- Interest on late payments
- Deadlines for services due. This is also called a "time is of the essence" clause. You will probably want to use this phrase in your contract if you have a timeline for a project.
- Expiration dates for the contract, such as a lease expiry
- Renewal terms, if applicable

- Damages for breach of contract. Also called "liquidated damages," this clause can specify amounts to be paid if services are incomplete or deadlines are missed. A court can also award damages if a contract is breached, even if damages and amounts were not included in the agreement.
- Termination conditions
- Signatures

E-Contracts and Signatures

Electronic contracts and signatures are valid under the Electronic Signatures in Global and International Commerce Act, which was signed into law in 2000.

There is e-contract software that provides an "I agree" check box, or you can send and receive written contracts online and have the parties sign electronically. If you make an agreement over e-mail by simply writing "sounds good," there could be a question as to whether the agreement is legally binding, Cummins says.

While e-contracts and e-signatures are valid, many businesses prefer to have written signatures on contracts because e-signatures can be subject to legal challenge, he adds.

Business Contract Tips

Here are some hints to make your contract as clear, concise and thorough as possible:

Be Specific

Contracts don't require legal jargon. The best contracts are clear, specific and focused, with wording that is simple and concise to avoid any confusion. For example, if you're planning an event and you need 150 tables delivered by a certain date, you may want to specify not only the date but the time of delivery.

It's better to specify the hour rather than using a more general time frame, such as "in the morning." That way, all parties are clear on what is to be done and by when.

"By forcing the parties to get more specific at the beginning of the relationship, it helps avoid arguments later on," Cummins says.

Clarify Questions

Never assume that the party you're doing business with knows your conditions. Always make your requirements clear. If you're not drafting the contract, outline your conditions for your business before you begin negotiating.

Know the Laws

State and local regulations as well as federal laws may be relevant to your contract. Be sure to check the codes and regulations that apply to your agreement to ensure that your contract complies with the law. For example, if

you are leasing a property your city may have rental codes that you'll need to follow. Research laws online, check with your local chamber of commerce and consider consulting a lawyer.

Read the Fine Print

Review all contracts thoroughly so that you understand the agreement. "I assumed" or "I didn't know" arguments may not hold up in court, particularly if the points in question are clarified in a written agreement.

Negotiate and Consult an Attorney

Negotiating is a crucial skill for getting what you want out of a contract. Know the points you are willing to be flexible on in a contract before you begin negotiations. Cummins says that small businesses often make the mistake of consulting their lawyers only after they've signed the agreement and have problems with it.

"Get your lawyer's advice before you sign contracts," he advises. "Over the course of the business, this practice will save you many headaches and significant legal fees."

Tendering Procedure

What is a tender?

An offer of money; the act by which one individual offers someone who is holding a claim or demand against him or her the amount of money that the offeror regards and admits is due, in order to satisfy the claim or demand, in the absence of any contingency or stipulation attached to the offer.

The two essential characteristics of tender are an unconditional offer to perform, together with manifested ability to do so, and the production of the subject matter of tender. The term is generally used in reference to an offer to pay money; however, it may properly be used in reference to an offer of other kinds of property.

1. Process is determined: the organization requesting the tender will determine the type of tender that will be used, as well as what will be involved in the tender process.
2. Request for tender is prepared: the request for tender outlines what is required, the contractual requirements and how you should respond.
3. Tenders are invited: the value, complexity and business category determine how tenders are invited.
4. Suppliers respond: you should first obtain all relevant documentation. Then:
 - a. Attend any pre tender briefing sessions being conducted
 - b. Clarify any uncertainties
 - c. Plan your response
 - d. Prepare your response
 - e. Submit your response in the right format, on time and at the right location

5. Evaluation and selection: each tender will be checked for compliance, and if compliant, then evaluated against the criteria specified in the tender documentation. The tender that offers best value for money will win the business.

6. Notification and debriefing: when a contract has been awarded, the successful tenderer will be advised in writing of the outcome. Unsuccessful tenderers are also advised and offered a debriefing interview.

7. Contracts established and managed: generally a formal agreement will be required between the successful tenderer and the relevant agency.

Seeking Tender Opportunities

Open tendering

An open tendering process is an invitation to tender by public advertisement. There are no restrictions placed on who can submit a tender, however, suppliers are required to submit all required information and are evaluated against the stated selection criteria.

Select tendering

A select tender is only open to a select number of suppliers. The suppliers may be a short list sourced from an open tender or be a compilation of businesses that the organisation has worked with previously.

Multi-stage tendering

Multi-stage tendering is used when there are a large number of respondents. At each stage in the process, the suppliers are culled to those who are most suited to the specific contract requirements.

Invited tendering

An organisation contacts a select number of suppliers directly and requests them to perform the contract. It is generally used for specialist work, emergency situations or for low value, low risk and off the shelf options. Tenders can be issued through:

- Expressions of interest (EOI) - used to shortlist potential suppliers before seeking detailed offers.
- Request for information (RFI) - used in the planning stage to assist in defining the project, however, not used to select suppliers.
- Request for proposal (RFP) - used where the project requirements have been defined, but an innovative or flexible solution is needed.
- Request for quotation (RFQ) - invites businesses to provide a quote for the provision of specific goods or services.
- Request for tender (RFT) - an invitation to tender by public advertisement open to all suppliers.

Your ability to identify opportunities in the competitive tender market is a crucial part of achieving entrepreneurial success. There are a number of sources that you can monitor to find out about current and future tendering opportunities. Organizations generally only accept project tenders for a limited amount of time so you need to be prepared to capitalize on opportunities as they become available.

The first step is to identify organizations and government agencies likely to need your products and services. Once you know who those agencies and organizations are, you can work out when, where and how they are most likely to make purchasing decisions. By monitoring a list of target organizations, you can be prepared to tailor an offer that will suit the requirements of tenders as they become available. You should contact organizations regularly to find out if there are any future tender opportunities likely to open up. Government agencies and departments often provide a list of future tenders on their websites.

You can also research available tenders by visiting the websites of the specific organizations or government departments that you are interested in working with. This will allow you to target opportunities within certain industries or with particular

Tendering Outcome

Once tenders have been submitted and received, they are then evaluated. This process involves an assessment of tenders against the criteria referred to in the Request for Tender or invitation documents, as well as an analysis of the strengths and weaknesses of the submitted tenders.

Each tender will initially be assessed to determine if it complies with all requirements of the tender document, i.e.

- Complies with any conditions of participation.
- Tender has been lodged on time.
- Documents are signed as required.
- Tender meets all mandatory requirements.

If the tender does not meet this initial check, it is deemed as non-compliant and will be excluded from further consideration.

Should your tender pass the initial compliance check then it will proceed to be considered against the tender selection criteria.

The selection criteria that your tender will be evaluated on may include:

- The technical merit of your proposal,
- The capability of your business to fulfill the requirement including: technical and management competence, financial viability and relevant experience,
- The relevant skills, experience and availability of key personnel,
- Quality assurance requirements, and
- The risks or constraints associated with your offer.^[1]

It is therefore important for you as a tenderer to ensure that you adhere to requirements and meet all criteria in order to increase your chances of winning the tender. Failing to meet such criteria may result in your tender submission being deemed ineligible, and your tender may not be considered further during evaluation.

Many organizations, including Government agencies, also assess tenders based on 'value for money'.

Of course price is an area of evaluation, but this does not necessarily mean that the cheapest price will win the tender. The costs and benefits of your tender will be assessing other factors such as:-

- Fitness for purpose
- Maintenance and running costs
- Risks
- Warranty
- Quality, Environmental and safety considerations
- Energy conservation
- Disposal Value

- Capacity of the supplier
- Wider benefits to the customer
- Creating strategic partnerships
- Payments terms

Once the evaluation process is complete, a tenderer will be selected, and notified of their successful tender. Other tenderers will also be notified of their unsuccessful submission.

Successful Tenders

In order for your tender submission to be successfully selected in the evaluation process, it needs to meet all the requirements and criteria outlined in the invitation or Request for Tender documents, provide the best offer and best value for money, as well as demonstrate what sets you apart from your competitors.

Once the evaluation process is completed and a tender submission is selected, the successful tenderer will be notified of the outcome and awarded a contract. Terms and conditions of the contract are usually outlined in the invitation or Request for Tender documents, as well as incorporating specifications from your tender submission. In certain circumstances, some final negotiations may occur before the contract is signed and finalized.

As a contract is a legally binding document, it is important to have a thorough understanding of the terms of the contract before signing. Ensure that you fully understand your rights and responsibilities, as well as those of the organisation you are dealing with, and that you are willing and able to comply with the requirements of the contract. You may wish to seek legal advice before signing a contract.

If your tender submission was in response to a Request for Tender by a government agency, you should know that these agencies usually publish information on the outcome of the tender process. Successful tenders and details of contracts are usually published on government tendering websites. However, note that private and confidential information such as proprietary and intellectual property details should not be published

Unsuccessful Tenders

Once the tendering evaluation process has been completed, tenderers will be notified of whether their tender submission has been successful or not. If you are unsuccessful, you may be provided with a debriefing of your submission. Alternatively, you may be able to request a debriefing.

It is a good idea to make full use of the tender debriefing as it will assist you in preparing more competitive tenders in the future. You can gain valuable feedback on the strengths and weaknesses of your submission, any areas that may need improvement, as well as how to enhance your tender submissions. It also provides you with an opportunity to ask questions and address any concerns. Debriefings will help improve your chances of winning future tenders.

If, for any reason, you have any complaints or grievances with the tender process or evaluation process, it is a good idea to raise these concerns informally at first. A good opportunity to do this is during the debriefing. It may just be a matter of a misunderstanding of how the tender process works or it may have been caused by poor communication. The debriefing will give you the opportunity to ask questions, raise your complaint, and possibly resolve the issue. Further, the debriefing may provide information on how to process and follow up a complaint, as the organisation may have procedures for reviewing tender process.

If action is not taken on your complaint, or if the actions taken are not satisfactory in your opinion, then you may wish to lodge a formal complaint to the organisation, or refer the matter to an external body such as an Ombudsman or Commission to address your formal complaint and commence an independent review of the tender process.

Managing the Contract

Once you have been notified that your tender is successful and have been awarded the contract, it is important to meet all requirements and manage the contract effectively.

It is important to maintain ongoing and open communications and dialogue with the contracting organisation, so that you can build a strong and sustainable working relationship. By building a relationship and having open communication channels, the chances of conflict or misunderstanding is reduced. Further, if any issues were to arise, it is easier to work through these amicably. For example, if changes need to be made to the contract, or you require an extension to meet the requirements, a strong working relationship will help make such negotiations and discussions an easier and simpler process.

In order to build a positive reputation, it is important to adhere to the contract conditions. By delivering your products and services on time, meeting all requirements, and performing to a high standard, you will build an image as a reputable, capable and trustworthy organisation. This will enhance your reputation in the market, as well as increase your chances of continuing business with the contracting organisation. If they believe that you are reliable, then they are more likely to keep your business in mind when future prospects and opportunities arise.

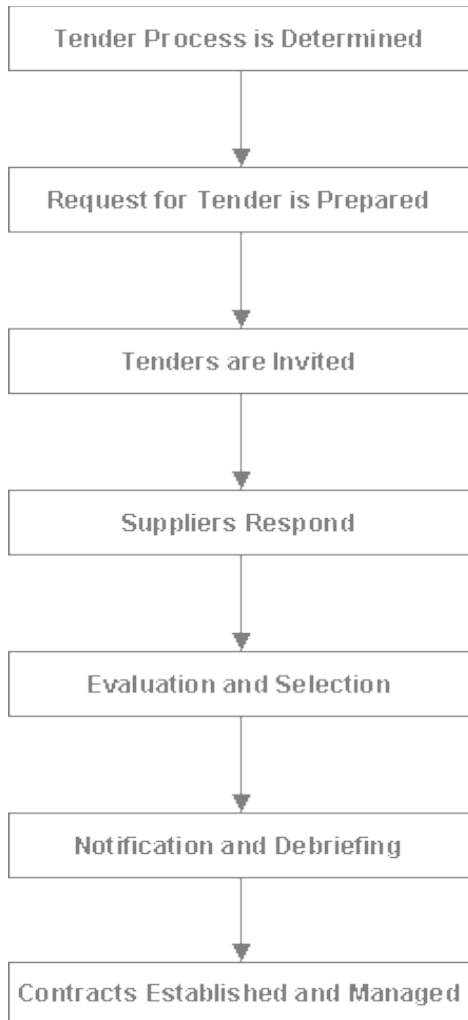
Organizations are more willing to work and contract with other organizations that they trust and are familiar with. If they are confident with using the services of your business, then they are more likely to choose you over other competitors.

Further, by being a dependable business and meeting all requirements, then there is less chances for conflicts or disputes to arise, and you are less likely to face issues such as non-payment, part-payment or termination of contract due to dissatisfaction by the other contracting party.

Note that a contract is a binding document, so you are obligated to legally comply with the terms and conditions stated, and meet your responsibilities within the contract. The same goes for the other contracting party. They are also bound by the terms of the contract and are required to uphold their obligations.

Tender Process: What are the tender purchasing steps?

Once it has been determined that a purchase is required, and the funding has been approved, the seven main steps in the tender purchasing process are:



Tender process is determined

The dollar value of the purchase, and its business category, determine when a tender process is used. To review how this decision is made refer to how purchasing works.

Request for Tender is prepared

The Request for Tender outlines what is required, the contractual requirements and how you should respond. The Request for Tender is usually comprised of:

- Conditions of Tender which may include:
 - o an explanation of the evaluation criteria to be used to evaluate tenders;
 - o information on any relevant government policies;
 - o closing time, date and place of lodgment;
 - o the Conditions for Participation (mandatory requirements);
 - o the point in the purchasing cycle when a debriefing interview will be available; and
 - o guidance on the formal purchasing complaint process.
- A specification that describes the product, service or works required. The specification should be clear, accurate and complete.
- Conditions of Contract.
- Tender Response Schedules.

See understanding the tender documentation for further information.

Tenders are invited

The value, complexity and business category determine how tenders are invited. How purchasing works explains the rules and guidelines for when, where and how tenders are invited.

In some cases you will need to be pre-qualified to be able to respond to the Request to Tender. See the pre-qualification section to see when this is required and how to register.

Suppliers respond

You should first obtain all relevant documentation. Then:

1. attend any pre tender briefing sessions being conducted;
2. clarify any uncertainties;
3. plan your response;
4. prepare your response; and
5. submit your response in the right format, on time and at the right location.

To find out more see Planning your Tender Response.

Evaluation and selection

Tenders are usually evaluated by a tender evaluation committee. Each tender will be checked for compliance with any Conditions for Participation and if compliant, then evaluated against the criteria specified in the tender documentation. The tender that offers best value for money will win the business. Remember, value for money does not necessarily mean the lowest price. For more information, refer to How Tenders are Evaluated.

Notification and debriefing

When a contract has been awarded, the successful tenderer will be advised in writing of the outcome. Unsuccessful tenderers are also advised and offered a debriefing interview.

Contracts established and managed

Generally, a formal agreement will be required between the successful tenderer and the relevant government agency. The contract comprises all information provided to and by the successful tenderer. These include:

- Conditions of Tender;
- specifications, including any plans and other attachments;
- the tender response; and
- Standard Conditions of Contract.

For more information see establishing a contract.

The contract will outline the responsibilities of the contractor and the government agency. For further information on what these responsibilities include, see managing the contract. Payment will be made at the completion of the contract or as outlined in the payment schedule.

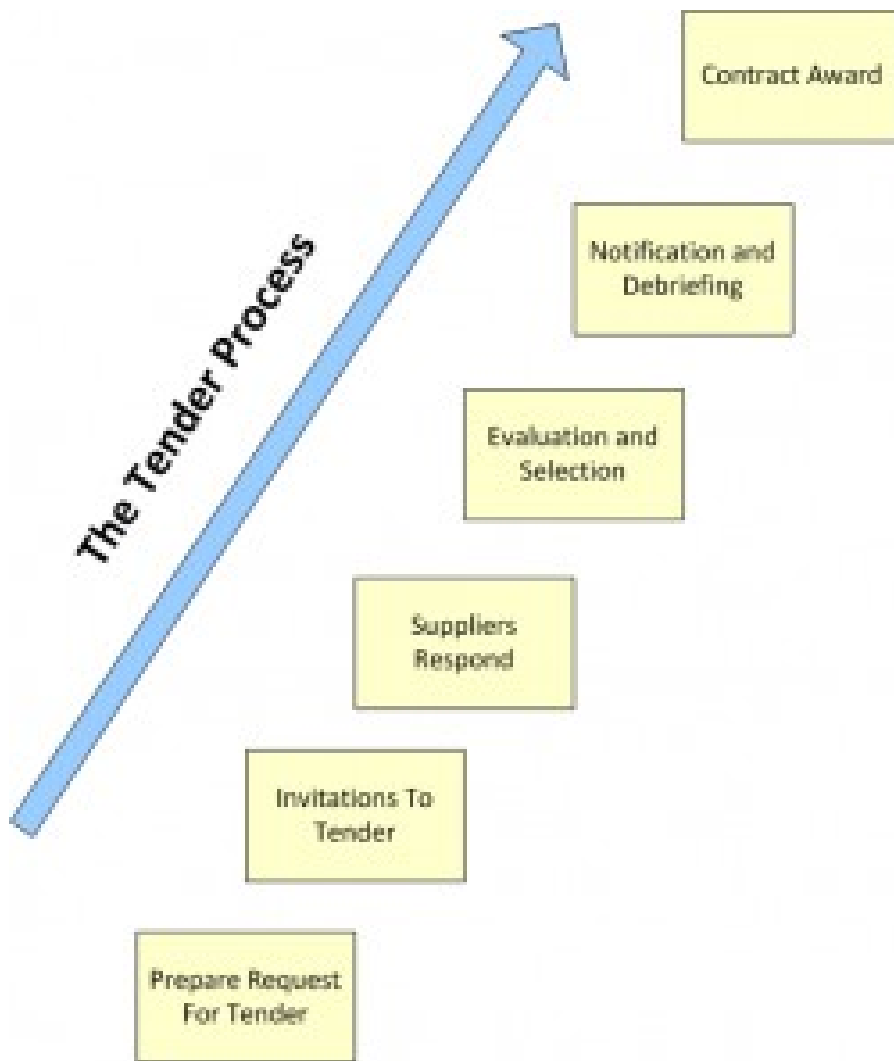
The Kenya Tender Process

It is important to understand the process if you are to take advantage of the system. It is very easy to work within the set guidelines, so do not let them phase you.

First and foremost, we need to have a clear understanding of what Tendering is all about. Tender is defined as (see investopedia) *the process whereby governments and financial institutions invite bids for large projects that must be submitted within a finite deadline.*

Tendering is meant to encourage competition on the open market, promote innovative solutions, foster open and honest contract awards, and not to say the least reduce risk to the procuring entity.

The tendering process is inherently fair and encourages competition. The business owner who understands the process already has the winning advantage.



In simple terms, the procuring entity (usually the government, public body or large private company) will identify that it needs a certain service or product to be delivered in a predefined period. As such, within the business, the organisation will determine the requirement, identify the finding and prioritize against the business need.

The commercial or financial team will then declare to the public that they intend to contract out to a suitable supplier. This is called the Invitation To Tender (ITT). In Kenya, large scale contracts are Gazzetted and listed in the Public Procurement and Oversight Agency publications. Have a look at a recent Tender Notice

Companies and potential suppliers would then review the ITT. If they feel they can meet the requirement, then they purchase the Tender Documentation (usually KSh 2 - 5000) from the procuring entity. At this point, these suppliers then prepare their proposal also known as the Response to Tender. During this part of the process, the suppliers are likely to have many questions. These are usually covered during an open session held by the procuring entity where all potential suppliers are invited. The proposal should be split into 2 parts: the technical solution and financial.

Before the declared tender closing date, all suppliers must ensure that they submit their bids. Bids are not accepted after the closing date.

Submit your proposal on time. Otherwise you will not be considered!

The Procuring Entity usually has a committee ready to open the tenders. This is a crucial stage, and the first part to ensure that the process is fair and transparent. It is at this stage that the initial sift takes place. Proposals that do not meet the prerequisite qualifications, information or expertise are eliminated.

The remaining proposals are then reviewed on their technical merit, and scored accordingly. When this process is completed, there is usually a supplier (or 2) that would have a lead. The next part is to review the financial submission. At this point, the committee look at the technical solution and financial submission to determine which proposal will deliver the greatest value for money!

Once the committee agree on the winner, usually termed as a recommendation, they pass this on the commercial, legal and financial teams to deal with the negotiation.

When finalized between the supplier and procuring entity, the contract award is offered, and this is then recorded for public knowledge.

This process as defined is known as the One Stage Process.

In Kenya, we tend to follow a 2 Stage Process. This first stage tends to determine suppliers who are capable of meeting the customer's need. The next stage determines which supplier with associated solution would meet the need of the customer by providing greatest value for money.

How to win government tenders

The following are **common mistakes** made when tendering:

1. Always *provide all of the information* requested by in the tender application. Do not forget things like your tax clearance certificate and shareholding certificates. Note: outdated tax clearance certificates are also not allowed.
2. It is important that the calculations of tender prices are correct.
3. Often, tenderers misinterpret the scope of the work. If you are unsure of anything in the tender *ASK!*
4. Always *SIGN* your bid document. Unsigned documents are unresponsive and will therefore be disqualified.
5. If you are an HDI, remember to claim your points. Points unclaimed are points lost!
6. Make sure that you drop the tender into the right box, before the closing time. By law, *no late bids will be accepted*, not even 1 second past the closing time.
7. If *samples* are requested, sufficient amounts must be supplied to enable the item to be evaluated under the appropriate technical or clinical conditions. Ensure that any requirements related to compliance with SABS specifications are met.

Tips from the procurement officials:

1. Always read through the bid documents carefully.
2. Complete the document in full.
3. Do a proper cost analysis when calculating your bid prices. Bids calculated too high or too low are considered unresponsive.
4. Inquire about the bid and obtain all the relevant information before completing the tender document.
5. Feel free to ask why you were unsuccessful so that you may learn from mistakes made.
6. Make sure that you are able to meet all the requirements within the specified time and are able to honor your offer in the event that your bid is successful.
7. Do not make any misrepresentations or false statements in your bid documentation. It is a legal document and therefore enforceable by law.
8. Quality services and products will improve your track record and good standing with the department. Poor delivery creates a negative impression not only for your business but for all small businesses in general.

HOW TO COMPLETE A TENDER OR BID

Each tender or bid advert indicates where you can collect the documents you will need to fill in to submit your tender, and where they should be submitted. The advert also indicates a closing date. This is a very firm deadline - no late tenders can be accepted.

HOW TENDERS OR BIDS ARE AWARDED

- The bidder obtaining the highest number of points will be awarded the contract.
- Preference points shall be calculated after prices have been brought to a comparative basis.
- Points scored will be rounded off to 2 decimal places.
- In the event of equal points scored, the bid will be awarded to the bidder scoring the highest number of points for specified goals.

What this means in practice, is the following. After the closing date, an elementary check is done on all the tenders submitted to see if they comply with the formal requirements. For example, if you have not indicated a price, your tender will be disqualified.

Smaller mistakes or omissions may or may not disqualify you from the tender process; this is a question of interpretation of the tender rules. For example, if the rules say "may disqualify" rather than "must disqualify" for a specific mistake, it is up to the official doing the check to decide whether the mistake is important enough to this tender to disqualify you.

The next phase looks at compliance of the product or services with the specifications, and price. Those which do not comply with the specifications are removed from the list, while all the tenders which comply with the specifications are listed in order of price. Those that fall in the lowest price group are then considered in a lowest price tender list.

It is in this phase that the preference points come into play. All the preference points claimed by those on the list of lowest price tenders are first verified. Then the formula is applied to determine who of those on the lowest price list with verifiable points come out with the best result on points, and therefore who should be awarded the contract.

In other words, preference points only come into play after the most expensive tenders have first been excluded. This is to ensure that the most expensive options do not win solely on points, and also to speed up the process, as only those on the lowest price list have their preference points verified.

The Tender Bulletin shows who has won previous tenders, listing the price and other factors taken into account in awarding the tender.