



DRAFT

Complaint Handling | Dispute Resolution Procedure: Logistics Management Division (**LMD**)

Before a new complaint handling procedure can be effective, it must be communicated to those internal and external entities that come in contact with LMD. Communicating this policy will take place through the following channels:

- Public Posting at LMD facility
- LMD website posting
- Introduced at each meeting with suppliers beginning 18 August 2011 and continuing indefinitely
- Publication in suitable press

## 1. Introduction of an integrated complaint procedure

This document outlines the procedures in place for:

- Request for Clarifications not amounting to a complaint,
- Complaints and
- Dispute Resolution.

In this procedure clarifications and complaints may be made at three different stages of the procurement process:

- (i) on publication of the contract notice,
- (ii) on the provision of the tender documents, and
- (iii) on the contract award decision. Because a restricted complaint procedure is suitable at all three stages, we therefore use a restricted procedure as an example of how an integrated complaint procedure may be introduced into the system.

The proposed procedure is outlined below.

### 1.1. *Request for Clarification (RfC) not amounting to a complaint*

LMD as a Public Entity is required to publish a contract notice in a local newspaper if the Procurement is under Nepali Procurement Regulations and on dgMarket/UNDB Online if the World Bank Guidelines apply. Candidates are able to file an RfC if they perceive the contract notice as containing unclear selection criteria. In the notice, the LMD will set a time limit (10 days) for submitting an RfC about the notice to the relevant contracting authority. Normally, a Pre-Bid

Conference is held for each procurement and that is the proper forum in which these RfC will be addressed.

1.2. *Complaint by bidding contractor on publication of the contract notice*

Candidates are able to file a Complaint if they perceive the contract notice as containing discriminatory, subjective or unclear selection criteria. In the notice, the LMD will set a time limit (10 days) for submitting a complaint about the notice to the relevant contracting authority.

To register a Request for Clarification or a Complaint, the candidate must post a letter or send an email to [tender.issues@dohslmd.gov.np](mailto:tender.issues@dohslmd.gov.np) with the following information;

- Reference to specific document on which the request is being registered
- Nature of the RfC/complaint
- Desired resolution
- Potential impact if problem is not rectified
- Contact information

NOTE: No RfC/complaints will be registered or responded to unless the above requested information is included in its entirety.

Upon receipt, the RfC/complaint will be registered by the Office of the Director of the Logistics Management Division and a notice (email or post), confirming receipt will be issued within 5 business days of receipt of complaint. Responses to RfC will be provided to *all* Suppliers who have purchased the Bid Documents or who have expressed an interest in the case of Consultants' Services.

If a complaint is submitted within this time period, LMD is required to consider the complaint submitted. First, LMD must attempt to find an informal solution. If this fails, LMD will issue a written, reasoned decision within 20 days from receipt. In the event that LMD agrees to re-tender the contract or amend the tender documents LMD will publish its decision in order to comply with the principle of equality.

1.3. *Complaint by bidding contractor on provision of the tender documents*

Candidates who participate in the bidding process will obtain a series of bidding documents from LMD directly, or, in the case of e-bidding, from the LMD website. In either situation, the bidding documents may become the subject of complaints by the bidding contractors. An integrated complaint process similar to the complaint process described above for the publication of the contract notice applies. Complaints may be made only about issues that could not have been the subject of a complaint or judicial review proceedings at an earlier stage.

If the Logistics Management Division amends the tender documents as a result of its decision on a complaint, LMD must send this information to all prospective candidates at least six days before the deadline for the tender submission. The complaint procedure does not prevent the selected candidates from asking questions of the Logistics Management Division.

#### 1.4. *Complaint by bidding contractor on award of the contract*

Finally, when the contract is awarded, LMD allows the parties to register a complaint about the final decision as long as complaints are received within 10 days of contract award.

Bidding contractors that have not yet been definitively excluded may complain to the contracting authority within this time limit. Complaints may be made only about issues that could not have been the subject of a complaint or judicial review proceedings at an earlier stage.

After the written decision is issued, a ten-day standstill period is in effect. LMD will not enter into a contract before the end of that period to allow for the plaintiff to offer a response. During this period the complainant is able to challenge the decision (or the lack thereof). The reason for this standstill period is that the contracting authority's decision about the complaint must be "capable of being subject of judicial review, so as to guarantee an adequate review".

## **2. SETTLEMENT OF DISPUTES**

### 2.1 *Amicable Settlement*

If either Party [LMD, public entity or supplier] objects to any action or inaction of the other, the objecting Party may file a written Notice of Dispute to the other Party providing in detail the basis of the dispute. For complaints generated from perceived actions by LMD, the Logistics Management Division, upon receipt of the Notice of Dispute will consider it and respond in writing within 14 days after receipt. If that Party fails to respond within 14 days, or the dispute cannot be amicably settled within 14 days following the response of that Party, Clause 2.2 and 2.3 *Dispute Resolution* shall apply.

Dispute settlement falls into two categories:

- Contracts entered into under World Bank Guidelines and
- Contracts entered into under Nepali Regulations

## 2.2 *Dispute Resolution – Contract Under World Bank Guidelines*

Disputes shall be settled by arbitration in accordance with the following provisions:

2.2.1. Selection of Arbitrators. Each dispute submitted by a Party to arbitration shall be heard by a sole arbitrator or an arbitration panel composed of three arbitrators, in accordance with the following provisions:

- (a) Where the Parties agree that the dispute concerns a technical matter, they may agree to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty (30) days after receipt by the other Party of the proposal of a name for such an appointment by the Party who initiated the proceedings, either Party may apply to the Organisation named in the Contract for a list of not fewer than five nominees and, on receipt of such list, the Parties shall alternately strike names there from, and the last remaining nominee on the list shall be the sole arbitrator for the matter in dispute. If the last remaining nominee has not been determined in this manner within sixty (60) days of the date of the list, the same professional body as mentioned in the Contract shall appoint, upon the request of either Party and from such list or otherwise, a sole arbitrator for the matter in dispute.
- (b) Where the Parties do not agree that the dispute concerns a technical matter, the Client and the Candidate (supplier, contractor or Consultant) shall each appoint one arbitrator chosen from among the EDP Technical Committee, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the arbitrators named by the Parties do not succeed in appointing a third arbitrator within thirty (30) days after the latter of the two arbitrators named by the Parties has been appointed, the third arbitrator shall, at the request of either Party, be appointed by the Agency defined in the Contract.

(c) If, in a dispute subject to Clause 2.2 1.(b), one Party fails to appoint its arbitrator within thirty (30) days after the other Party has appointed its arbitrator, the Party which has named an arbitrator may apply to the the Agency defined in the Contract to appoint a sole arbitrator for the matter in dispute, and the arbitrator appointed pursuant to such application shall be the sole arbitrator for that dispute.

- i. Rules of Procedure. Except as stated herein, arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law (UNCITRAL) as in force on the date of this Contract.
- ii. Substitute Arbitrators. If for any reason an arbitrator is unable to perform his function, a substitute shall be appointed in the same manner as the original arbitrator.
- iii. Nationality and Qualifications of Arbitrators. The sole arbitrator or the third arbitrator appointed pursuant to paragraphs (a) through (c) of Clause SC 8.2 1 hereof shall be an internationally recognized legal or technical expert with extensive experience in relation to the matter in dispute and shall not be a national of the Candidate's home country or of the home country of any of their Members or Parties or of the Government's country. For the purposes of this Clause, "home country" means any of:
  - (a) the country of incorporation of the Candidate or of any of their Members or Parties; or
  - (b) the country in which the Candidate's or any of their Members' or Parties' principal place of business is located; or
  - (c) the country of nationality of a majority of the Candidate's or of any Members' or Parties' shareholders; or
  - (d) the country of nationality of the Sub-Contractor (consultant or supplier) concerned, where the dispute involves a subcontract.

(d).. Miscellaneous. In any arbitration proceeding hereunder:

- i. proceedings shall, unless otherwise agreed by the Parties, be held in the country specified in the Contract;
- ii. the *English* language shall be the official language for all purposes; and

- iii the decision of the sole arbitrator or of a majority of the arbitrators (or of the third arbitrator if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction, and the Parties hereby waive any objections to or claims of immunity in respect of such enforcement.

### *2.3 Dispute Resolution - Contract under Nepali Regulations*

Disputes shall be settled by arbitration in accordance with the following provisions:

2.3.1 Selection of Arbitrators. Each dispute submitted by a Party to arbitration shall be heard by a sole arbitrator or an arbitration panel composed of three arbitrators, in accordance with the following provisions:

- (a) Where the Parties agree that the dispute concerns a technical matter, they may agree to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty (30) days after receipt by the other Party of the proposal of a name for such an appointment by the Party who initiated the proceedings, either Party may apply to the Nepal Council for Arbitration (NEPCA) and the rules of procedure as prescribed by the Nepal Arbitration Act 2055 as currently in force shall be used.
- (b) Where the Parties do not agree that the dispute concerns a technical matter, the Client and the Consultant shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the arbitrators named by the Parties do not succeed in appointing a third arbitrator within thirty (30) days after the latter of the two arbitrators named by the Parties has been appointed, the third arbitrator shall, at the request of either Party, be appointed by the Nepal Council of Arbitration (NEPCA).

- (c) If, in a dispute subject to Clause SC 8.2 1.(b), one Party fails to appoint its arbitrator within thirty (30) days after the other Party has appointed its arbitrator, the Party which has named an arbitrator may apply to Nepal Council of Arbitration (NEPCA) to appoint a sole arbitrator for the matter in dispute, and the arbitrator appointed pursuant to such application shall be the sole arbitrator for that dispute.
- (d) Rules of Procedure. Except as stated herein, arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration the Nepal Arbitration Act 2055 as in force on the date of this Contract.
- (e) Substitute Arbitrators. If for any reason an arbitrator is unable to perform his function, a substitute shall be appointed in the same manner as the original arbitrator.
- (f). Nationality and Qualifications of Arbitrators. The sole arbitrator or the third arbitrator appointed pursuant to paragraphs (a) through (c) of Clause SC 8.2 1 hereof shall be a recognized legal or technical expert with extensive experience in relation to the matter in dispute
- (g|). Miscellaneous. In any arbitration proceeding hereunder:
  - (i) proceedings shall, unless otherwise agreed by the Parties, be held in Nepal;
  - (ii) the English language shall be the official language for all purposes; and
  - (iii) the decision of the sole arbitrator or of a majority of the arbitrators (or of the third arbitrator if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction, and the Parties hereby waive any objections to or claims of immunity in respect of such enforcement.