

CO1B: Ensure healthy competition through equal treatment of all operators within the scope of public procurement

REGULATORY FUNCTION: COMPETITION		CO1B
OBJECTIVE CO1 Water and sanitation service legislation and regulations are aligned with public competition policies	ACTION CARD CO1B <h2 style="margin: 0;">ENSURE HEALTHY COMPETITION THROUGH EQUAL TREATMENT OF ALL OPERATORS WITHIN THE SCOPE OF PUBLIC PROCUREMENT</h2>	
COST: Medium FREQUENCY: Regular TARGET GROUPS: Regulators, service operators, procurement institutions, anti-monopoly institutions, media agencies		
DESCRIPTION Once rules and conditions are defined, it is important to apply them through appropriate procurement procedures and related protocols. When procuring, regulators must be always guided by their main principles of non-discrimination, equality, and transparency, to achieve fair competition in the WASH sector. The main objective of regulators is a market where consumer interests are met, so regulators analyses operators' propositions against predefined standards in terms of the quality of service and tariffs. Most importantly, this procedure, being a virtual benchmarking exercise, allows regulators to encourage and promote innovation and technical progress to increase the efficiency of competing operators.		
EXPECTED OUTCOMES <ul style="list-style-type: none"> Procurement processes are transparent, and allocation of contracts to operators is undertaken without discrimination. All operators feel equal in terms of new market acquisition. Consumers enjoy more choices in the WASH services they purchase. 		
EXAMPLE 1: KENYA In Kenya , under its Water Act 2002, the regulator WASREB (Water Services Regulatory Board) is specified under Article 26, that is dedicated to water supply in bulk, with pro-competition rules for both consumers and operators. <ul style="list-style-type: none"> (9) It shall be a general condition of the license and any service provision agreement that water service needs of the service providers along the bulk water network are met to the agreed proportions, and the water in bulk supplier shall not, for the whole period of the agreement, retain, use or supply water in bulk to another new service provider, unless such alternative provision has been agreed upon between the water in bulk supplier and first service provider. (10) The Regulatory Board shall only approve a supply of water in bulk agreement upon confirmation that the water in bulk supplier has a valid extraction permit giving it abstraction rights commensurate with its water sale requirements from the Water Resources Management Authority. (11) Notwithstanding the foregoing provisions, in the interest of the public and where technically and economically feasible, the Regulatory Board may order the licensee to either supply water in bulk to another license area or enter into a service provision agreement with an agent who shall supply water in bulk to third parties within its area of supply. 		
EXAMPLE 2: CHILE In Chile, the provision of utilities associated with producing and distributing drinking water and collecting and disposing of wastewater may be carried out within a system of open market competition, by virtue of a concession granted by a Public Works Ministry decree upon the recommendation of the Superintendency of Sanitary Services (SISS). These concessions are granted upon the request of a potential concessionaire, which submits the required documentation set forth in the general regulations. In order to guarantee adequate competition, there is a regulated concessions award process that determines that the SISS examine compliance with general application requirements, and in the event that they are validated, order the applicant to simultaneously publish a summary of the concession terms in the Official Gazette and in a newspaper in circulation within the region of the requested concession. Within 60 days of the publications, all other parties wishing to apply are to submit their petitions in accordance with the same regulatory requirements.		

The SISS verifies that these additional applications comply with legal requirements in order to begin the concession-granting process. However, in the event that the SISS should make observations on the additional applications, the interested parties shall have a period of ten (10) days to correct or remediate them, ensuring the possibility of equitable competition among interested providers.

Lastly, within a period of 120 days as of the publication of the summary of terms for the requested concession, the SISS shall inform the Public Works Ministry of the applications submitted and make a recommendation to award the concession to the applicant that complies with the required technical conditions and offers the lowest tariff for service provision.

EXAMPLE 3: PARAGUAY

The General Law on the Regulatory and Tariff Framework for Drinking Water and Sanitary Sewerage Provision in the Republic of Paraguay indicates that the Sanitary Service Regulator (ERSSAN) is empowered and obliged to approve the terms and conditions of the bid or the call for quotations for the concession or service permit, as well as the terms and conditions of the concession contract or permit.

Additionally, the General Law determines the requirements that should be complied with for granting service provision concessions, which include the requirement that the concessionaire selection process be conducted by means of a national or international public tender with the following stages:

- Prequalification of bidding groups.
- Qualification of technical and financial proposals.
- Awarding of the concession to the lowest service tariff quotation, or that with the broadest coverage or investment level, according to the bidding terms and conditions and on the basis of fixed parameters.

Pursuant to the foregoing, the regulatory decree of this General Law details and elaborates on ERSSAN functions, indicating that the regulator is responsible for verifying legal and regulatory compliance of such instruments, ensuring a transparent and equitable competition. In that sense, the regulator's observations are restricted to specifying where there may be a regulatory conflict in the documents submitted for approval. Lastly, ERSSAN has thirty (30) days as from the submission of the full documentation to issue an opinion regarding approval.

LINKS

Kenya: https://wasreb.go.ke/downloads/SUPPLEMENT_183_WATER_RULES.pdf

Chile: Regulation on sanitation concessions related to the production and distribution of drinking water and the collection and disposal of wastewater, and on rules governing the quality of assistance provided to users of these services. Decree No. 1199 of 2005: <https://www.bcn.cl/leychile/navegar?idNorma=243794&idParte=0>

Paraguay: General Law and Regulatory Decree No. 18880 of 2002:
https://erssan.gov.py/application/files/7515/8741/1529/Marco_Regulatorio.pdf and
https://erssan.gov.py/application/files/4716/6514/3615/Decreto_Reglamentario_N_18880.pdf

INTERNAL CAPACITIES NEEDED AND THE ROLE OF PARTNERS

Regulators' staff must be trained on a range of procurement and administrative abilities to understand how to conduct open and transparent procurement procedures. Such capacity building can be supported by development partners, while other sector actors such as agencies in charge of public procurement, related ministries, and consumer associations could take an active role through providing substantive inputs and lessons learned. They can also help regulators to determine their procurement procedures and protocols along with other similar national examples.