

TU DELFT REGULATIONS ON COMPLAINT-HANDLING IN PROCUREMENT PROCEDURES

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PART 1: Delft University of Technology (abbreviated to: TU Delft) as the contracting authority¹

I. Introduction

Why the need for complaint-handling procedures in public procurement procedures?

Within the context of procurement procedures, dissatisfaction may emerge between TU Delft and businesses regarding the way in which parties are treated. This may result in a complaint. Where a business has a complaint about TU Delft, the latter can be expected to make efforts to handle the complaint. In accordance with title 9.1 of the General Administrative Law Act (*Algemene wet bestuursrecht* (hereinafter: 'the Awb' – see the box on p. 3), contracting authorities that are also administrative authorities must handle a complaint appropriately and with care. Where TU Delft has a complaint about the actions of a business in a procurement procedure, that business may also be expected to show a willingness to investigate its own conduct and reach a solution.

The explanatory memorandum to the Public Procurement Act 2012 announced plans to work with contracting authorities and businesses to develop standardised complaints regulations to help ensure that complaints can be handled quickly and with care. This resulted in the standard for complaint-handling by contracting authorities and businesses. The TU Delft complaints regulations are based on that standard for complaint-handling.

The application of these complaints regulations can enable complaints to be solved in mutual consultation rather than being unnecessarily brought before the courts. Misunderstandings, unintended errors and unjustified requirements within the procurement procedure can be remedied, without the need for escalation. Effective handling of complaints gives businesses a sense that their case has been heard and their complaint addressed without the need for legal recourse. This is in the interest of all parties involved. Even if a complaint does not result in any correction, rapid, easily accessible means of handling complaints can prove useful. Both TU Delft and businesses can learn something from this and apply this knowledge in practice in future procurement procedures. For example, the application of the standard for complaint-handling can contribute to the further professionalisation of contracting authorities – including TU Delft – and businesses.

Sections II and III deal with the situation in which a business wishes to raise a complaint about TU Delft. Section IV describes the scenario in which TU Delft wishes to raise a complaint about a business.

¹ The complaint-handling regulations for TU Delft and businesses are based on the standard for complaint-handling in public procurement procedures (*klachtenafhandeling bij aanbesteden*) drawn up by the Dutch Ministry of Economic Affairs as policy to accompany the entry into force of the Public Procurement Act 2012 (*Aanbestedingswet 2012*).

II. Complaints from businesses about TU Delft as the contracting authority

1. What can the parties expect from each other?

Both TU Delft and the business are expected to act in a professional manner. Therefore, they shall deal with each other on a basis of mutual respect and understanding of each other's positions and responsibilities. Both parties can also be expected to have knowledge of the procurement process and be aware of the rights and responsibilities that arise from it.

The application of this standard for complaint-handling means that TU Delft shall take receipt of complaints that have been submitted and handle them with urgency. If TU Delft rejects a complaint, it shall provide proper reasons for this. The business shall make efforts to notify its complaint in good time and refrain from abusing these complaint regulations. The business should bear in mind that TU Delft is dealing not only with the complainant, but also with all other businesses that are involved in the procurement procedure or may be involved in similar procedures at a later stage.

The submission of a complaint will not bring the procurement procedure to a halt. However, TU Delft is at liberty to decide to suspend the procedure. Whether or not a business has already submitted a complaint, it can at any time turn to the courts to settle the issue in interim relief proceedings. As a rule, the handling of the submitted complaint shall then be suspended pending the judgement of the court.

2. What constitutes a complaint and what can be complained about?

A complaint takes the form of a written notification to TU Delft from a business that has an interest in the procurement procedure, in which the business provides a substantiated indication of which aspects of the procedure (or part thereof) it does not agree with. Sector organisations and complaints departments may also submit complaints on behalf of their affiliated businesses.

Complaints may suggest that a specific action or failure to act on the part of TU Delft in a specific procurement procedure is at odds with statutory provisions or other regulations that apply to that procedure. Complaints may also be made concerning actions by TU Delft that breach one or more of the principles of transparency, non-discrimination, equal treatment and proportionality that apply for procurement procedures.

The business shall formulate its complaint in precise terms. The complaint must be recognisable as such. The business shall then submit its complaint to the TU Delft complaints desk.

Difference between a complaint and a question

A complaint is an expression of dissatisfaction that constitutes a correction or rejection. In order to prevent misunderstandings, a complaint must be clearly referred to as such. A question is a request to obtain further information; it is neutral in character and intended to achieve clarification.

Complaints relate to aspects of procurement procedures that are covered by the Public Procurement Act 2012. The procurement procedure may be European or Dutch. Dutch procurement procedures also include multiple private procurement procedures. Complaints cannot concern TU Delft's procurement policy in general.

Procurement complaints and the Awb complaints procedure

This standard for complaint-handling does not affect the ability enshrined in the Awb for anyone to submit a complaint to contracting authorities that are also administrative authorities in the sense of that Act.

Title 9.1 (Complaint-handling by an administrative authority) of the Awb stipulates that anyone may complain to an administrative authority about the actions of that authority or people who work for it. This includes actions relating to procurement procedures.

From the complainant's perspective, the Awb's scope of application is wider than that of the standard for complaint-handling. An example of this is that the Awb stipulates a maximum period of six weeks for handling the complaint. Complaints concerning procurement procedures could and, in all reasonableness, often *should* be handled more rapidly so that businesses find out promptly whether a solution can be achieved. A further example is that the standard for complaint-handling does not cover complaints from people who have no interest in securing the contract. These complaints may, however, be covered by the Awb. In which case, TU Delft must deal with the complaint pursuant to the regulations of the Awb.

3. When can a complaint be submitted and when must TU Delft respond to it?

The business would be well advised to submit its complaint at an early stage. The way in which this should be done is described under III.3.

TU Delft shall begin handling the complaint as soon as possible and initiate an investigation into whether or not the complaint is well-founded without delay. TU Delft shall with due urgency reach a decision on the complaint and take any measures in response to that decision, taking account of the interests of the complainant and other parties involved in the procurement process.

4. Who can submit a complaint?

Only businesses that have an interest in securing a specific public contract are entitled to submit a complaint. This includes:

- interested businesses;
- (potential) tenderers and applicants;
- subcontractors of (potential) tenderers and applicants;
- sector organisations and sector-related business advice centres.

Subcontractors can submit a complaint insofar as it does not concern the relationship between the main contractor and subcontractor. Anonymous complaints are not permitted. However, a sector organisation may take the initiative in submitting as complaints objections to a specific procurement procedure that one or several businesses in the sector may have.

III. The procedure for submitting a complaint

1. The complaints desk

The business shall submit its complaint to the complaints desk. The TU Delft Procurement Complaints Desk (*'Klachtenmeldpunt Aanbestedingen'*) is made up of:

- the director of Legal Services;
- the manager of Procurement;
- if necessary, supplemented by a lawyer from Legal Services or a project manager from Procurement.

The complaint shall be handled by people not directly involved in the procurement procedure to which the complaint relates. The basic principle is a complaint handling process that is rapid and easy to access.

2. Announcement of the complaints desk

For every procurement procedure, TU Delft shall include in the documentation a reference to where businesses can submit a complaint, together with details of the complaints procedure that applies after a complaint has been submitted to the complaints desk. It is ultimately up to TU Delft to determine how to respond to the substance of complaint. Once the complaint has been assessed, TU Delft shall advise the complainant as soon as possible and in an appropriate manner what it has decided (that the complaint is justified, not justified or only partially justified) and what action it intends to take in response to the complaint.

3. Before submitting a complaint

Not every question from a business in a procurement procedure necessarily leads to a complaint and not every complaint results in the application of the standard for complaint-handling.

Questions and requests intended to result in clarification of aspects of the procurement procedure should be submitted by the business to TU Delft in good time in order for a response to be included in the Information Notice. The same also applies to a request to make a non-material change to the business's procurement documentation.

If the business disagrees with the response in the Information Notice (or, if applicable, in individual notifications), it can submit a complaint to TU Delft. The same also applies in the event of no response. A business can also submit a complaint from the outset. If the business sends a message to the complaints desk, it can be assumed that this concerns a complaint.

Handling of procurement complaints and information notices

Questions concerning procurement procedures should be submitted in good time in order to be answered in the relevant Information Notice(s). The Information Notice must be published at least six days before the submission deadline.

TU Delft may choose to notify applicants of a complaint before publishing the notice if the complaint will result in changes to the procurement procedure. TU Delft may also choose to address the complaint in the notice.

If this results in a change to the procurement procedure that does not qualify as a material change, the deadline for submission of tenders may be extended. The Information Notice is the instrument intended to notify all tenderers of changes simultaneously (whether or not the deadline is extended). TU Delft may also consider whether the business has a justified commercial interest in confidentiality, in which case a written response that is not included in the notice would be appropriate, or whether the complaint can be addressed in a way that is visible to all the businesses.

4. The steps in the complaints procedure

- a. The business submits its complaint in writing to the complaints desk by e-mailing procurement@tudelft.nl. In this written complaint, the business shall make it clear that it concerns a complaint, what the complaint is about and how it feels the issue should be resolved. The complaint should also include the date, name and address of the business and the description of the procurement procedure in question.
- b. The complaints desk shall immediately confirm receipt of the complaint. This confirmation shall indicate that, in principle, TU Delft assumes that the business opts for processing by means of the standard for complaint-handling in procurement procedures, unless the business indicates that it insists on the complaints procedure pursuant to title 9.1 of the Awb.
- c. The complaints desk shall then investigate whether the complaint is justified, possibly on the basis of additional information provided by the business and TU Delft. The complaints desk shall begin this investigation as soon as possible and pursue it with urgency, taking account of the schedule of the procurement procedure. The complaints desk shall issue a recommendation to TU Delft. This recommendation has serious significance, but is not binding for TU Delft.
- d. If, following the complaints desk's investigation, TU Delft concludes that the complaint is justified or partially justified and that it will take corrective and/or preventive measures, TU Delft shall notify the business of this in writing as soon as possible. Other (potential) tenderers/applicants shall also be notified of this. Depending on the phase in the procurement procedure, TU Delft may notify these measures to the parties involved in the procurement procedure at the same time as the complainant. This is to prevent parties receiving preferential treatment.
- e. If, after the investigation, TU Delft concludes that the complaint is not justified, it shall issue a substantiated rejection of the complaint and notify the business of this.
- f. At the request of the business or the contracting authority, the complaints desk can suggest that the complaint be submitted to the Committee of Procurement Experts (*Commissie van Aanbestedingsexperts*) for mediation or advice before TU Delft takes any decision.
- g. Once TU Delft has informed the business how it will address the complaint, or if TU Delft fails to respond to the complaint within a reasonable period, the complainant can submit the complaint to the Committee of Procurement Experts. For information on this, see part 2 of this document 'Committee of Procurement Experts' under 8.
- h. The submission of a complaint will not automatically result in the suspension of the procurement procedure, unless TU Delft decides to do this.

Step	Business	Action by TU Delft	Agreement with response
1	Normal procedure for asking questions	Information Notice	No, either step 2 or 4
2	Submission of complaint to TU Delft Procurement Complaints Desk	Information Notice or notification to complainant only	No, either step 3 or 4
3	Complaint to Committee of Procurement Experts	Information Notice or notification to complainant only	No, step 4
4	Interim relief proceedings in court	Defence at court hearing	-

Complaints desk: Submission method

- send the complaint by e-mail to: procurement@tudelft.nl;
- in the e-mail header, the subject must include the name of the procurement procedure and publication number;
- the complaint must be substantiated and as concise as possible;
- if necessary, additional documents may be appended, if clearly referenced.

IV. Complaint by TU Delft about a business

In the event that TU Delft has a complaint about the actions of a business in relation to a procurement procedure, TU Delft can raise this with the business.

The business shall immediately confirm receipt of the complaint. The business shall study the complaint with due urgency and provide TU Delft with a substantiated response to the complaint.

PART 2: Committee of Procurement Experts²

1. Introduction

The Committee of Procurement Experts³ (hereinafter: the Committee) can help ensure that the handling of complaints is rapid, careful and easy to access. The Committee can mediate and give advice concerning a complaint at the request of a business or the contracting authority. The Committee is an independent body that includes experts with a background in procurement practice. The experts must be capable of issuing well-substantiated, balanced and useful advice to businesses and contracting authorities. The result is serious and significant and cannot simply be dismissed by the contracting authority or the business.

The context within which the Committee operates is defined in part by the limitations that bringing a complaint before the Committee does not constitute an additional legal recourse and that advice issued by the Committee is not binding. The Committee does not have the authority to bring a procurement procedure to a halt.

Not binding, but of a significant and serious nature

If the complaint is brought to court, the court is not obliged to follow and may depart from the Committee's advice. The advice can also not be implemented against the wishes of one of the parties.

However, the advice is of a significant and serious nature. The advice is a considered judgement from an expert and competent authority within public procurement practice. If one of the parties involved brings the matter to court in interim relief proceedings, this advice can also be put to the court. In which case, the parties will need to take account of the fact that the court can include this advice in reaching its own judgement.

2. Purpose, duties and powers of the Committee of Procurement Experts

The purpose of the Committee is to contribute to improving dialogue between parties and preventing recourse to the courts. It is also intended to further improve the professionalism of procurement practice and bring about a learning effect in businesses and contracting authorities.

The duties of the Committee are to mediate and advise on complaints submitted to it.

The Committee has the power to decide whether or not it wishes to handle complaints submitted to it. In this, the Committee will be guided by the purposes for its existence outlined above. If the Committee decides not to process a complaint submitted to it, it will provide reasons for this.

² Part 2 is an unamended version of the standard for complaint-handling in public procurement (*klachtafhandeling bij aanbesteden*). This was compiled by the group established for this purpose by the Ministry of Economic Affairs. Bringing a complaint before the Committee of Procurement Experts can be compared to lodging an appeal. See sections 6 and 7 regarding the relationship between the TU Delft complaints desk procedure with that of the Committee of Procurement Experts.

³ <http://www.commissievanaanbestedingsexperts.nl/indienen-klacht/procedure>

The Committee is at liberty to suspend processing of a complaint if it is being dealt with by the courts.

The Committee can also handle complaints between a business and a contracting authority if the contracting authority has not introduced the standard for complaint-handling.

3. Structure of the Committee of Procurement Experts

The Committee consists of a chair and vice-chair, supported by several experts. The chair is the public face of the Committee. The vice-chair deputises for the chair in his/her absence. The chair can also delegate tasks to the vice-chair. The chair and vice-chair are appointed by the Minister of Economic Affairs.

The chair compiles the list of experts. This list shall include a balance of the following groups:

- academics, (former) judges and (former) lawyers;
- people from the contracting authorities world (government authorities);
- people from the business world.

The Committee can handle complaints individually or as a group. Individual handling is done by the chair, the vice-chair or one expert. Group handling is done by three people.

The chair decides whether the complaint will be handled individually or as a group and appoint the person(s) to do so. In the case of group handling, the chair shall ensure that there is balance within the committee.

The chair shall draw up regulations governing the further structure and working method of the Committee.

4. Conditions

The chair, the vice-chair and the experts must have expertise in public procurement procedures and/or purchasing as well as authority and support within the world of contracting authorities and businesses. The Committee must ensure it has the necessary knowledge and expertise at its disposal.

The independence and impartiality of committee members must be safeguarded by means of the regulations (including by means of a general assessment on appointment to the Committee and for every new case). Any appearance of partiality must be avoided.

5. Support of the Committee and role of the secretariat

The Committee of Procurement Experts is supported by a secretariat. The secretariat shall (initially) be facilitated by the PIANOo Procurement Expertise Centre (*Expertisecentrum Aanbesteden PIANOo*). The secretariat shall consist of people with an understanding of procurement practice.

6. What complaints can be brought before the Committee?

Complaints are written notifications. Businesses can bring complaints before the Committee if they have an interest in a procurement process. In its complaint, a business must provide reasons as to why it does not agree with the procurement process or part thereof. Sector organisations and complaints departments can submit complaints on behalf of their affiliated businesses. Contracting authorities can also submit complaints to the Committee. These are written notifications concerning procurement procedures, or parts thereof, in which contracting authorities indicate with reasons that they do not agree with the actions of a business.

Complaints relate to aspects of procurement procedures that are covered by the Public Procurement Act 2012. The procurement procedures may be European or Dutch. Dutch procurement procedures also include multiple private procurement procedures.

Complaints cannot concern the contracting authority's procurement policy in general.

Complaints can, however, suggest that a specific action or failure to act on the part of the contracting authority in a specific procurement procedure is at odds with statutory provisions or other regulations that apply to that procedure.

Complaints can also be made concerning actions by the contracting authority that breach one or more of the principles of transparency, non-discrimination, equal treatment and proportionality that apply to procurement procedures. In principle, a business is asked to submit its complaint to the contracting authority in the first instance and only bring it before the Committee of Procurement Experts if the contracting authority has either decided on the complaint or failed to reach a decision within a reasonable period.

Submit the complaint to the contracting authority first and only afterwards to the Committee

The reasons for this are twofold:

1. Contracting authorities must have the opportunity to respond to complaints and settle them in a way that is acceptable to both parties before they are brought before an external body;
2. The Committee of Procurement Experts can only be effective if it is able to work quickly and efficiently. In the opinion of the group compiling these regulations, this ability would be limited if it were confronted with an unfiltered flow of complaints, where the potential defence of the party against which the complaint has been brought is unknown.

Contracting authorities who have a complaint regarding businesses are asked to follow the steps in the same sequence. If a contracting authority has not set up a complaints desk, or the contracting authority or business has failed to handle the complaint and reach a decision on it within a reasonable period, the complaint can be submitted to the Committee for mediation or advice. The Committee is free to decline to handle a complaint brought before it. If the chair decides, on behalf of the Committee, not to handle a complaint, the Committee shall notify the complainant and counterparty of this in writing as soon as possible.

7. Procedure for submitting a complaint to the Committee

Route to the Committee:

- a. If a complainant is not satisfied with the result of the contracting authority's or business's handling of a complaint, it can bring that complaint before the Committee.
- b. The complainant can only bring its complaint before the Committee if the contracting authority or the business has already reached a decision on it, or if the contracting authority or the business has failed to reach a decision within a reasonable period.
- c. A complaints desk can also take the initiative to bring the complaint before the Committee (as stipulated in the standard for complaint-handling under III, 4 f).
- d. The complainant must submit its complaint in writing, for example by e-mail, to the Committee's secretariat. In this written complaint, the complainant shall make it clear what the complaint is about and how it feels the issue should be solved. The complaint should also include the date, name and address of the complainant and counterparty and a description of the procurement procedure in question.
- e. The Committee's secretariat shall record the complaint and confirm receipt.
- f. The submission of a complaint does not suspend the procurement procedure.
- g. The chair shall decide whether or not to process the complaint. If the complaint is not to be processed, both parties shall be notified of this in writing as soon as possible. In this notification, the Committee shall also give the reason(s) for not processing the complaint.
- h. The parties shall notify the Committee immediately if the subject matter of the complaint brought before the Committee goes before the courts.

8. Method of handling a complaint by the Committee

Following receipt of a complaint, the secretariat shall consider whether sufficient information has been provided in the documents submitted with the complaint in order to assess it effectively. The secretariat has the authority to request additional documentation from the business and/or contracting authority concerned. If these documents are confidential or commercially-sensitive, they shall be handled accordingly.

If a complaint has been accepted for handling, the chair shall decide whether the parties should be advised to attempt to reach an amicable solution first.

If a complaint cannot be solved amicably, the Committee shall compile its advice, with the support of the secretariat. Before the Committee issues its advice, both parties shall be given the opportunity to present their cases.

The complaint shall be handled confidentially and documents submitted shall not be made public. The Committee can stipulate additional rules concerning the handling of complaints and issuing of advice in a set of regulations.

9. The Committee's advice

The Committee's advice is not binding. The parties are free to take recourse to the courts at any time, but must inform the Committee as soon as they proceed to do so. The Committee's written advice shall be notified to both the complainant and the counterparty.

The advice shall be made public – in anonymised form – once the procurement procedure has been completed and the contract has been definitively awarded.

With the agreement of the parties, the advice:

- can be made public, mentioning the names of the parties involved;
- can be made public during the procurement procedure itself (mentioning the names of the parties or in anonymised form).

The advice shall be published on a website. It may be abbreviated.

10. Evaluation

The regulations shall be evaluated five years after the date of entry into force. Where possible, this evaluation shall run in parallel with the evaluation and/or interim amendment of the Public Procurement Act 2012.

This shall include an assessment of the level of satisfaction of contracting authorities and businesses with the complaints regulations. As far as possible, an assessment will also be made of whether the objectives initially envisaged for the complaints regulations have been achieved.