CHALLENGE PROCEEDINGS- Procuring Entities

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OVERVIEW

- Who are we at the Office of Procurement Regulation?
- Objectives of the Act
- What are Challenge Proceedings?
- Who hears and determines Challenge Proceedings?
- What are the governing Laws and Rules for Challenge Proceedings?
- What can be Challenged?
- What are the timeframes for submitting an Application for Review?
- The Standstill Period
- The 20-day Process for Challenge Proceedings
- Things to Remember
- Can the Decision of the Hearing Panel be Appealed?

WHO ARE WE AT THE OFFICE OF PROCUREMENT REGULATION?

The Office of Procurement Regulation (the Office) is a body corporate established pursuant to an Act of Parliament, namely the *Public Procurement and Disposal of Public Property Act, 2015*, as amended (the Act). The Act aims to provide for public procurement, and for the retention and disposal of public property.

OBJECTIVES OF THE ACT

TO PROMOTE

The principles of accountability, integrity, transparency and value for money

Efficiency, fairness, equity and public confidence

Local industry development, sustainable procurement and sustainable development in public procurement and the disposal of public property

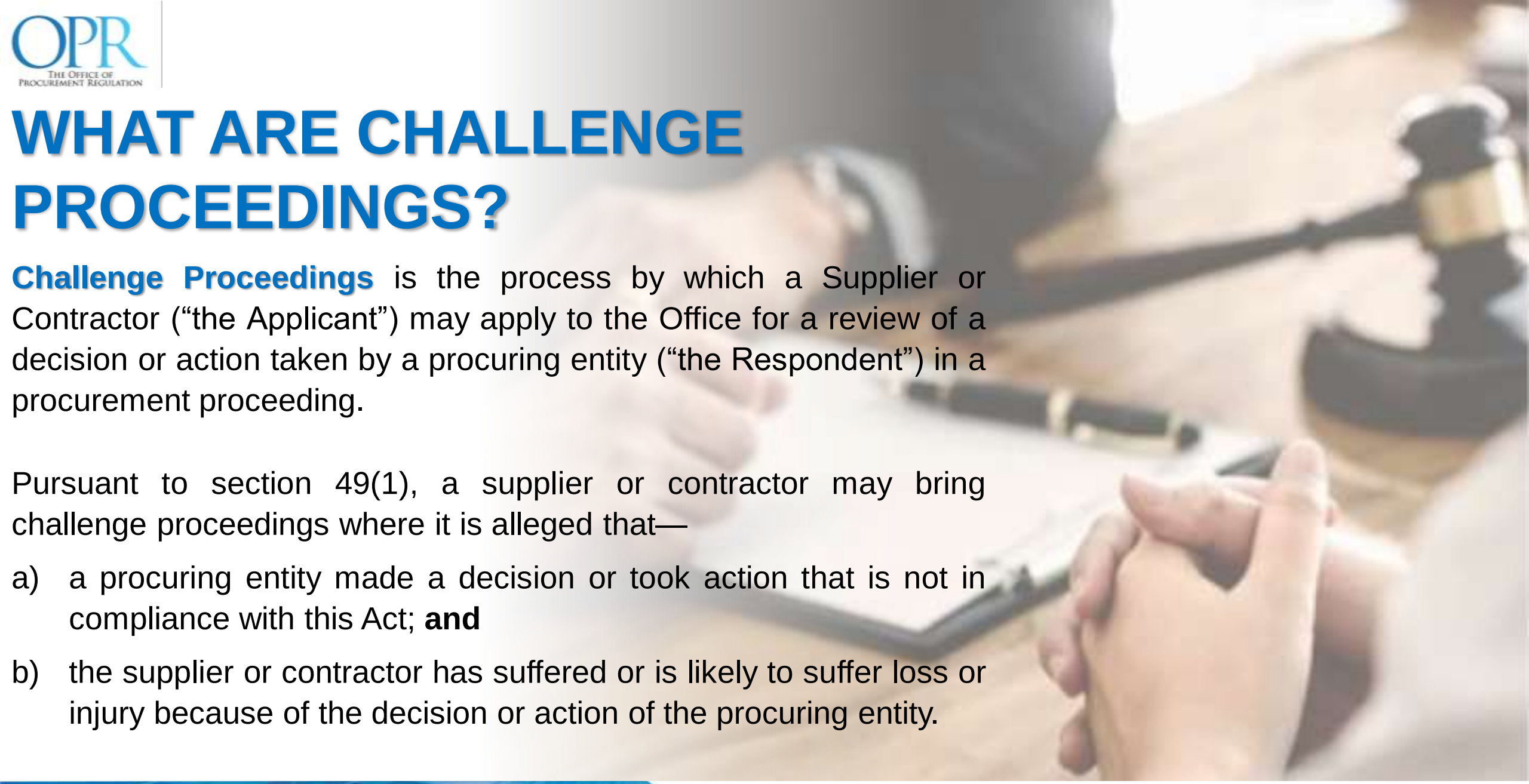
WHAT ARE CHALLENGE PROCEEDINGS?

Challenge Proceedings is the process by which a Supplier or Contractor ("the Applicant") may apply to the Office for a review of a decision or action taken by a procuring entity ("the Respondent") in a procurement proceeding.

Pursuant to section 49(1), a supplier or contractor may bring challenge proceedings where it is alleged that—

a) a procuring entity made a decision or took action that is not in compliance with this Act; **and**

b) the supplier or contractor has suffered or is likely to suffer loss or injury because of the decision or action of the procuring entity.



WHO HEARS AND DETERMINES CHALLENGE PROCEEDINGS?

The Hearing Panel hears and determines Challenge Proceedings. The Panel is selected by the Office for their competence in the specific area(s) of dispute. The Panel comprises of Board members and Management of the Office of no less than three (3) and no more than five (5) members.

One of these members will be appointed to chair the hearing.

WHAT ARE THE GOVERNING LAWS AND RULES FOR CHALLENGE PROCEEDINGS?

The procedure is governed by:

- Part V of The Public Procurement and Disposal of Public Property Act 2015, as amended
- The Public Procurement and Disposal of Public Property (Challenge Proceedings) Regulations 2021
- The Hearing Rules and Procedure for Part V Challenge Proceedings
- The Electronic Filing and Hearing Rules for Part V Challenge Proceedings

WHO CAN INITIATE CHALLENGE PROCEEDINGS?

A **supplier or contractor** who has suffered or is likely to suffer loss or injury because of the decision or action taken by a procuring entity.

Pursuant to **section 50(1)** of the Act, a supplier or contractor may apply by way of an Application for Review to the Office for review of a decision or an action taken by a procuring entity in the procurement proceedings.

WHAT CAN BE CHALLENGED?

A decision or an action taken by a procuring entity during a procurement proceeding that is not in compliance with the Act.

These can relate to:

- Terms of pre-qualification OR decisions or actions taken in pre-qualification proceedings
- Terms of pre-selection OR decisions or actions taken in pre-selection proceedings
- Terms of solicitation
- Other decisions or actions taken in procurement proceedings

WHAT ARE THE TIMEFRAMES FOR SUBMITTING AN APPLICATION FOR REVIEW?

The timeframe within which an application for review must be filed by a supplier or contractor with the Office depends on the subject matter of the challenge- section 50(2).

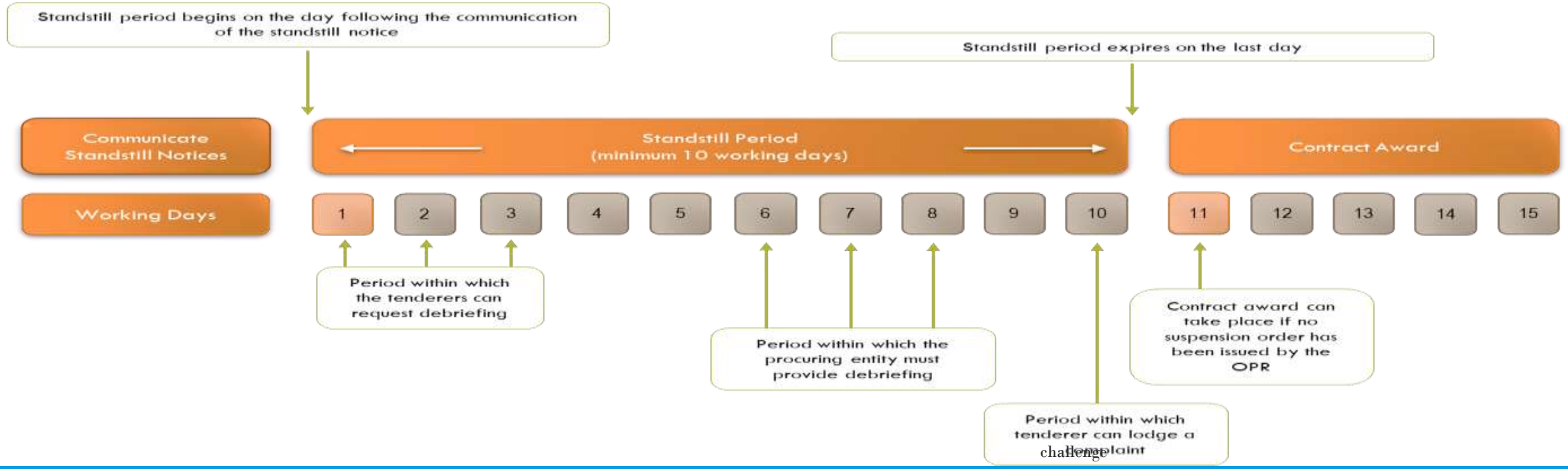
Where the Challenge relates to the terms of pre-qualification, pre-selection, solicitation, or decisions or actions taken by a procuring entity in pre-qualification or pre-selection proceedings, the **deadline to file this Challenge is before the deadline for presenting submissions.**

Timeframes cont'd

Where the Challenge relates to other decisions or actions taken by a procuring entity in procurement proceedings the deadline to file this challenge depends on **whether or not** a standstill period was applied.

If a **standstill period was applied**, the **deadline to file this Challenge is within the standstill period**

If a **standstill period was <u>not</u> applied**, the **deadline to file this Challenge is within seven (7) working days after the publication of the notice of the decision or action that was taken by the procuring entity.**



THE STANDSTILL PERIOD

THE 20 DAY PROCESS FOR CHALLENGE PROCEEDINGS-OVERVIEW

DAYS 1-3

- Application for Review (AFR) Submitted
- Procuring Entity Notified of Review
- Publication of Notice of AFR

DAYS 4-6

- Decision on Suspension
- Reply by Respondent
- Request for Authorisation
- Notice of appointment of representatives

DAYS 8-9

- Notice of Case Management Conference (CMC)
- Application for leave to call Expert Witnesses

DAY 11

- CMC
- Notice for Interpreter
- Notice for Accommodation

DAYS 12-13

- Notice of CMC directions and Hearing date
- Qualifications of Interpreter Witness Statements, Expert Evidence, Skeletal Submissions

DAYS 15-16

- Hearing
- Application for costs

DAY 20

- Decision
- Suspension Lifted

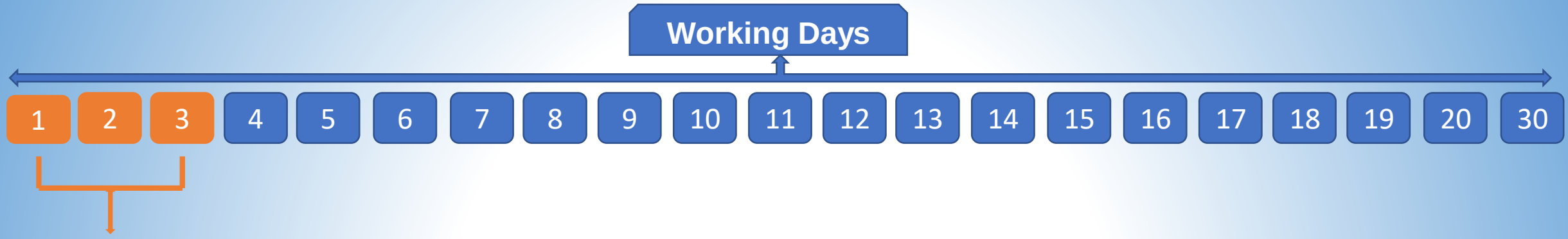
DAY 30

- Written Reasons
- Record of Hearing

General Points to Note

- For the purposes of this presentation, only the days requiring action by the Parties involved and the mains actions of the Office are highlighted in the 20 Challenge Proceedings process
- On days not specifically highlighted in the following slides:
  - the Office will continue its internal preparations and deliberations for the successful completion of the Challenge Proceedings process within the statutorily mandated 20 day period
  - The Parties can continue with their internal preparations for the advancement of their respective case

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN



Supplier or contractor (the Applicant) initiates Challenge process.

File and Serve completed (Form 8)- AFR, via email to challenge@opr.org.tt

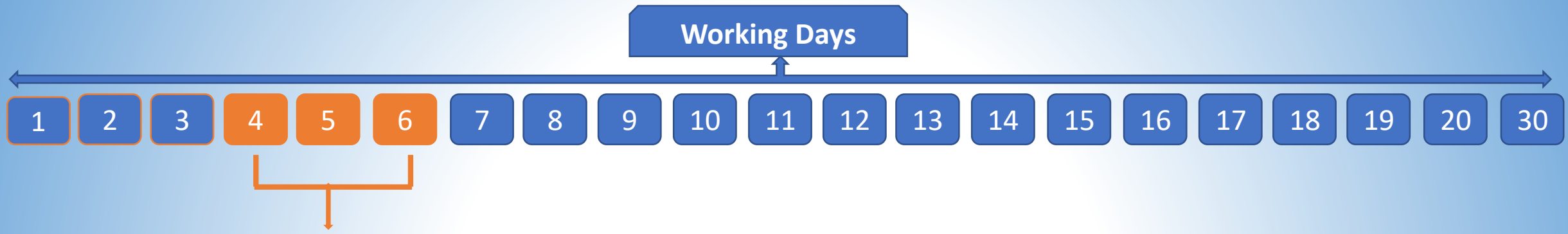
Publication of Notice of AFR within 3 days of receipt.

The Office will publish a Notice of the AFR in 2 daily newspapers and on its website

Notification to PE (the Respondent).

The PE will be notified directly by the Office of the AFR.

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN



Receipt of Notification of Decision on Suspension pursuant to section 50 (4) (b) of Act.

Receipt of dismissal decision with reasons- Reg 4.

Respondent must file and serve its Reply (Form 9) with all supporting documents and may include therein a Request for Authorization and a Notice of Appointment of Representative (Form 2)- Reg. 9

Application to Participate (Form 10)- section 51(1) of Act

Form 9: Reply – Rule 6.6

..... (Name of Respondent)	..... (Name of Representative)
..... (Name of Organisation)	..... (Name of Organisation, if any)
..... (Mailing Address)	..... (Mailing Address)
..... (Business Address, if different)	..... (Business Address, if different)
..... (Phone)	..... (Phone)
..... (Email)	..... (Email)

REPUBLIC OF TRINIDAD AND TOBAGO

BEFORE THE OFFICE OF PROCUREMENT REGULATION

CP

In the matter of .....

(Name of Applicant-Supplier/Contractor)

AND

.....

(Name of Respondent-Procuring Entity)

REPLY

1. The Respondent, ...(full name), of .....(full address) having been provided a copy of the Application for Review filed by ....(name of the Applicant) of ....(full address of Applicant) hereby replies to the facts and matters raised therein.

2. (a) The reply to the facts concerning the decision(s)/action(s) being reviewed is as follows:
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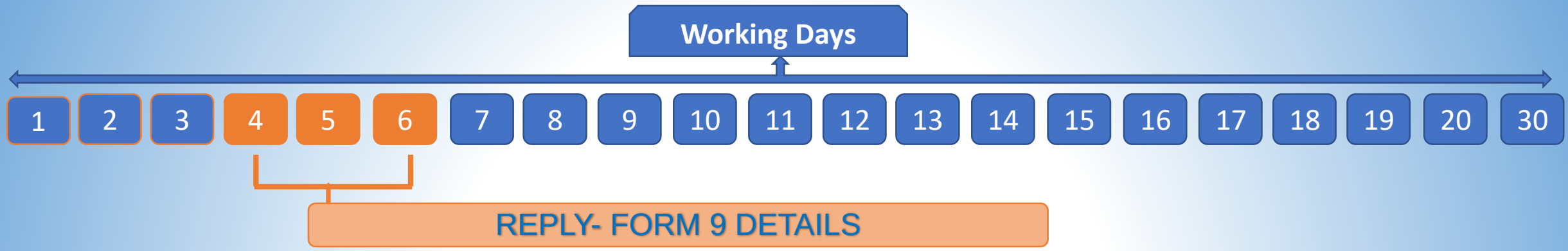
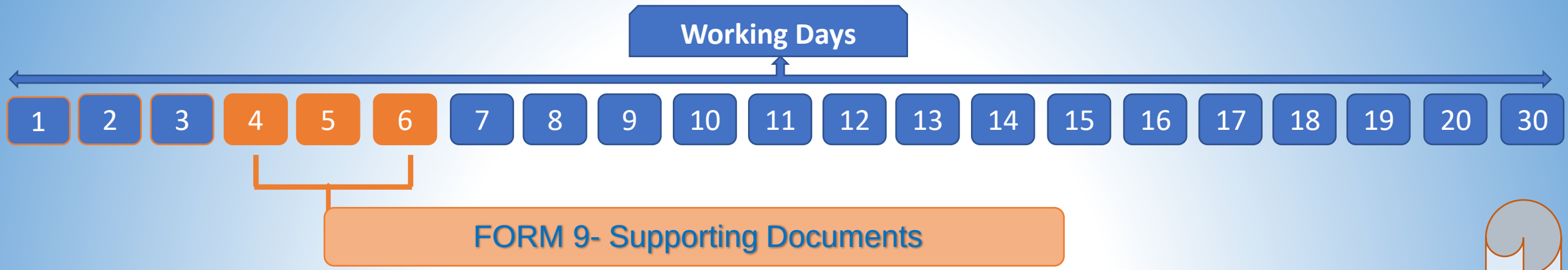
CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN



- ✓ Email address of the NPO and/or Representative
- ✓ Reply to the facts concerning each decision or action being challenged
- ✓ Verification or other response to the information provided by the Applicant
- ✓ Reply to each ground of review itemised in the AFR
- ✓ Any matters relevant to the remedies being sought by the Applicant
- ✓ The witnesses to be presented in support of the PE's Reply at the Hearing of the matter
- ✓ The efforts taken to resolve the issue directly with the Applicant
- ✓ Signed by the Accounting Officer or equivalent- Reg. 9(1)(a)

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN



FORM 9- Supporting Documents

- ✓ Invitation to bid
- ✓ Request for proposal/quotation
- ✓ Invitation for pre-qualification or pre-selection
- ✓ Notice of Intention of Award issued by the procuring entity
- ✓ Bid submitted by the Applicant
- ✓ Request for Clarification received from the Applicant and response
- ✓ Correspondence between the Applicant and the PE in relation to efforts taken to resolve the issue directly with the PE
- ✓ Emails, correspondence or other documents relevant to the decision or action being challenged

NOTE: Failure to attach any relevant documents can result in the inability of the Respondent to rely on these at the Hearing-Reg. 14(1)

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN

Working Days

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 30

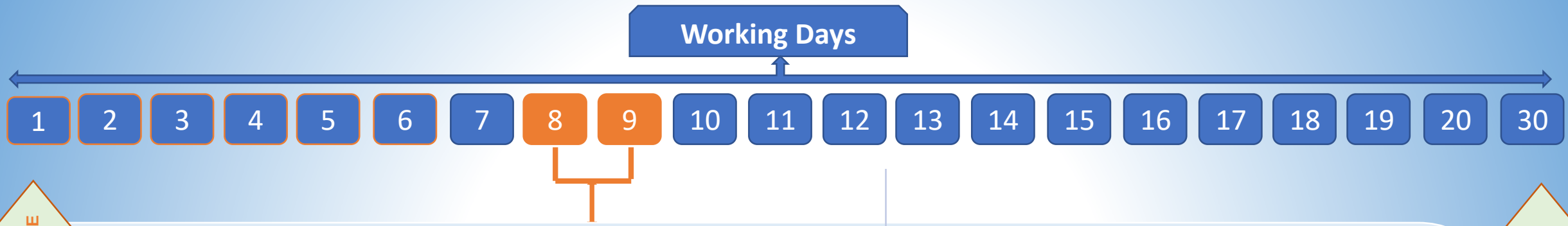
FORM 9- FAILURE TO SUBMIT REPLY

Where the Respondent fails to submit a reply within the stipulated timeframe, the Hearing Panel can:

- Proceed to deliberate on the AFR on the basis of the evidence before it as if such proceedings had been conducted in the presence of all parties (Reg 9(4)) ;and
- Make any other decision or order it considers appropriate in the circumstances, in accordance with section 50(10) of the Act

The Respondent shall be bound by any decision of the Office- Reg. 9(2)

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN



DETAILS OF NOTICE OF CASE MANAGEMENT CONFERENCE

- **Receipt of Notice of Case Management Conference stating:**

✓ the date, time, place and purpose of the CMC
✓ whether Parties are required to attend in person
✓ that they may be represented by a Representative who has the authority to make agreements and give undertakings on their behalf
✓ a statement that if a Party does not attend (themselves or via a Representative), the presiding member of the Hearing Panel may proceed in their absence
✓ a statement that binding orders would be made by the Hearing Panel with respect to the conduct of the Challenge Proceedings

ADDITIONAL ACTIONS

- **Receipt of Decision on Authorisation Request**
- **Receipt of decision on Joinder of Interested Parties**
- **Deadline for filing of Application to call Expert Witness**

Form 11: Application for leave to call expert evidence -Rule 9.14

..... (Name of Applicant/Respondent)	..... (Name of Representative)
..... (Name of Organisation)	..... (Name of Organisation, if any)
..... (Mailing Address)	..... (Mailing Address)
..... (Business Address, if different)	..... (Business Address, if different)
..... (Phone)	..... (Phone)
..... (Email)	..... (Email)

REPUBLIC OF TRINIDAD AND TOBAGO

BEFORE THE OFFICE OF PROCUREMENT REGULATION

CP

In the matter of .....

(Name of Applicant-Supplier/Contractor)

AND

.....

(Name of Respondent-Procuring Entity)

APPLICATION FOR LEAVE TO CALL EXPERT EVIDENCE

1. The Applicant/ Respondent, ... (full name Applicant/ Respondent) of .... (full address of Applicant/ Respondent) hereby applies for leave to call the expert evidence listed at paragraph 2 on the grounds set out in paragraph 3.

2. The particulars of the expert(s) for which leave is sought to call in the above-named Challenge Proceedings are as follows:-

   Expert 1
   Name of expert
   .....
   Address of expert
   .....
   .....
   Qualifications
   .....

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.....
Issue on which the expert will provide evidence
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Substance of the expert's evidence
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List of documents, if any, to which the expert will refer

i. .....
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ii. .....
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iii. .....
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iv. .....
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Expert 2
Name of expert
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Address of expert
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Qualifications

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Issue on which the expert will provide evidence
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Substance of the expert's evidence
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List of documents, if any, to which the expert will refer

i. .....
.....

ii. .....
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iii. .....
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iv. .....
.....

Expert 3
Name of expert
.....
Address of expert
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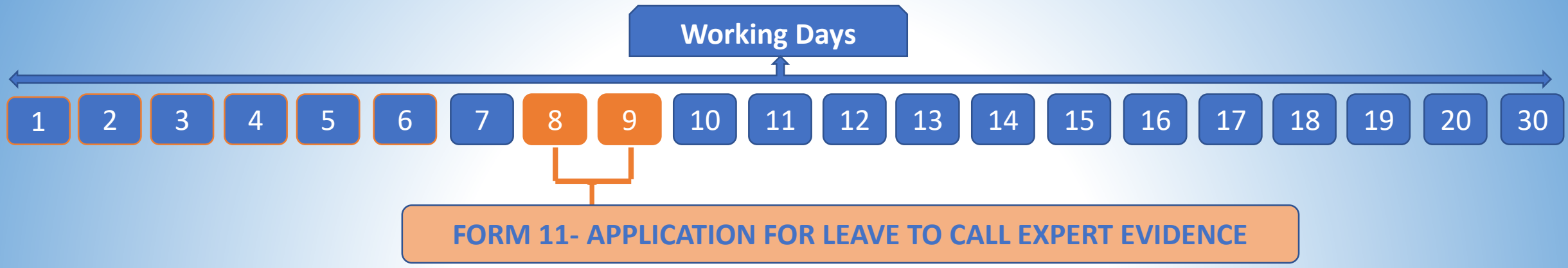
.....

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN

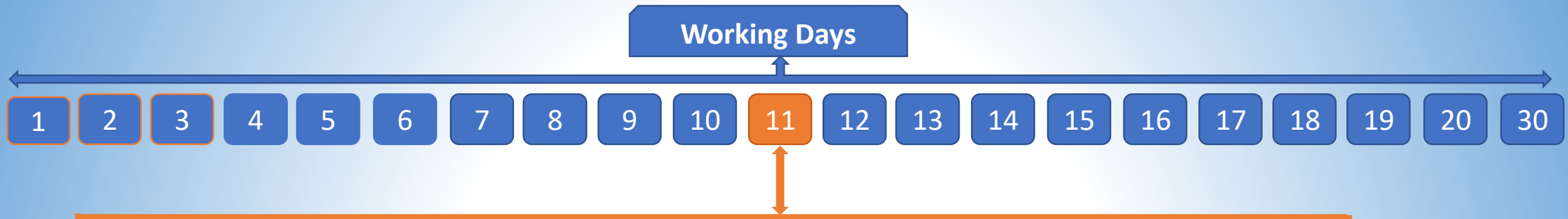


FORM 11- APPLICATION FOR LEAVE TO CALL EXPERT EVIDENCE

Details that must be provided include:

- Name, address and qualifications of proposed expert
- Issue on which the expert will provide evidence
- Substance (summary of the relevant points) of the expert's evidence
- List of documents to which the expert will refer
- Grounds for this application for leave (permission) to call expert witness.

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN

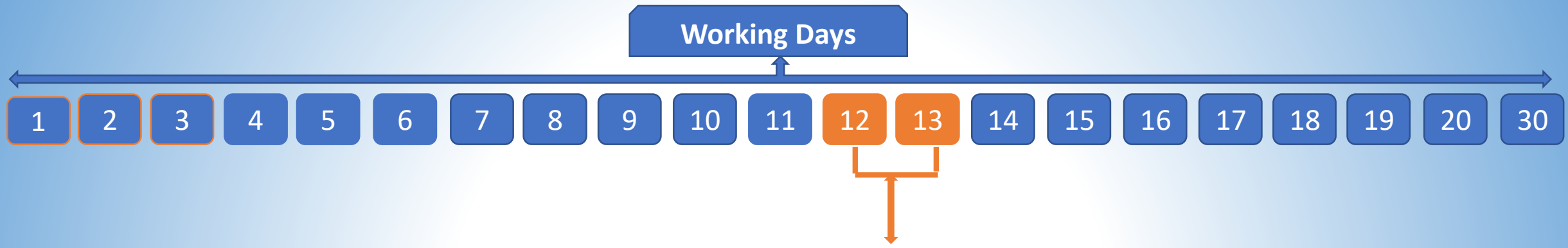


Attendance at CMC by Parties/ Representatives during which the Hearing Panel can give directions/ make orders with respect to the Proceedings and hear and determine preliminary matters.

Parties must inform Office if the assistance of an interpreter is required **(Form 6)**. Arrangements to retain and utilise the services of an Interpreter is to be borne by the notifying Party.

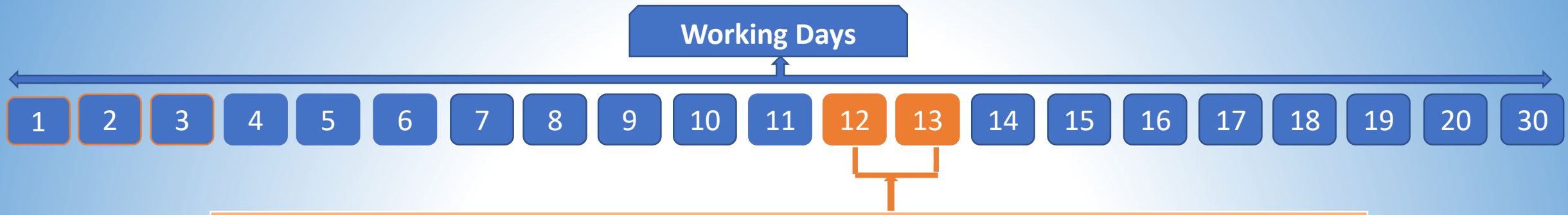
Parties must inform the Office if accommodation is required for differently abled persons to attend the Hearing **(Form 7).**

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN



- The Office would provide Notice of the directions/orders made at the CMC as well as provide the date, time and place of the Hearing to all the Parties.
- The Party requiring the assistance of an Interpreter must submit the qualifications of the chosen Interpreter to the Office.
- All Parties must file and serve their respective witness statements, expert evidence (if applicable) and skeletal submissions.

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN

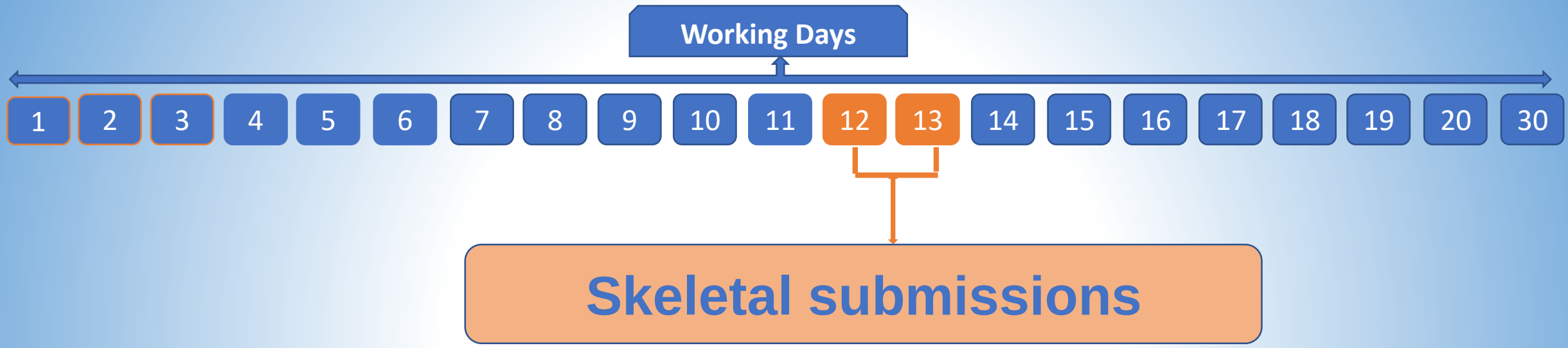


WITNESS STATEMENTS

Details that must be provided include:

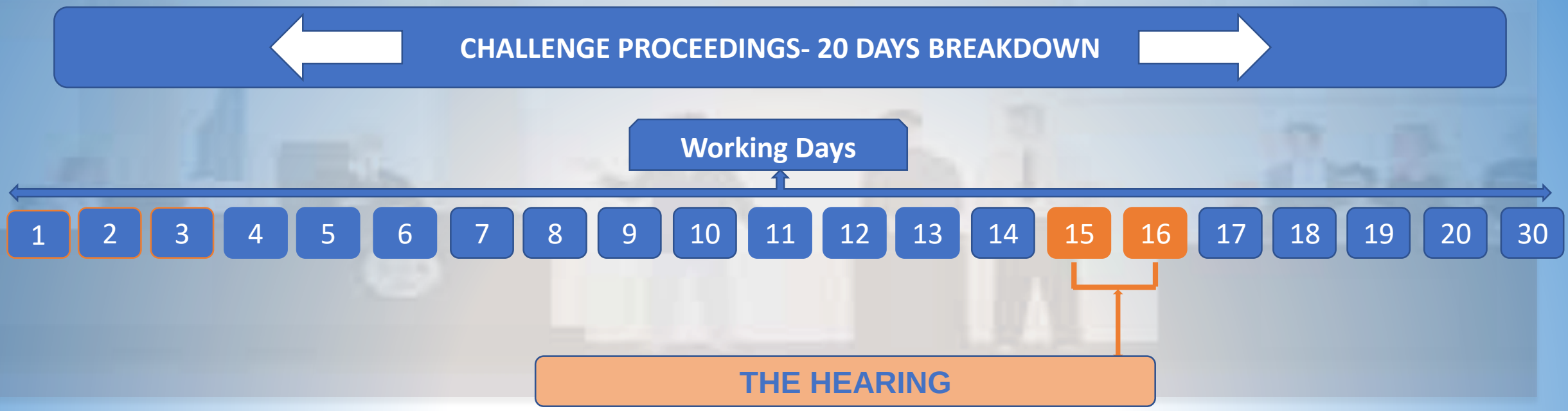
Account of the facts in support of the claims contained in the Reply	Supporting documents referred to by the witness	Statement that the matters set out are within the witness' own knowledge except where otherwise indicated	Statement that the contents are true and correct

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN



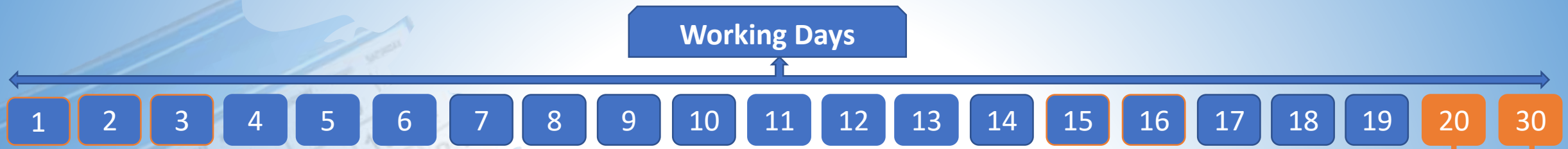
Details that must be provided include:

- Summary of arguments in support of the responses in the Reply in relation to the allegations that:
  - the procuring entity made a decision or took action that is not in compliance with the Act; and
  - the supplier or contractor has suffered or is likely to suffer loss or injury because of the decision or action of the procuring entity



- All Parties **must** attend the Hearing
- The Hearing Panel **can** continue with the Hearing in a Party's absence where it is satisfied that the notification of the Hearing was received and the Party is absent without good cause.
- Each Party will present its case and call witnesses who can be questioned by the other Parties and the Hearing Panel.
- Each Party will make oral closing submissions to the Hearing Panel.
- The Applicant can make an **Application for Costs (Form 15).** If such an application is made, the Respondent will be given an opportunity to make representations on same.

CHALLENGE PROCEEDINGS- 20 DAYS BREAKDOWN



Decision

The Office will inform the Parties of its Decision. Any order for suspension in force will be lifted at this time.

Note that written reasons for the Decision will be provided no later than 30 days after the Decision.

Record of Hearing

Parties can apply for the **Record of the Hearing (Form 16)** which will be in the form of an electronic copy.

THINGS TO REMEMBER

- ✓ When an AFR is filed via challenge@opr.org.tt, a Case Reference Number will be assigned. **Every submission of Forms or correspondence thereafter must include the Case Reference Number in the subject line**.
- ✓ **Confirmation of Service** (Form 1)- must be submitted when the filed version of documents (bearing the Office's stamp) is served on all other Parties.
  - Where there was personal service - a copy of the endorsed document must be attached
  - Where there was electronic service– a copy of the email showing the electronically delivered document must be attached

CAN THE DECISION OF THE HEARING PANEL BE APPEALED?

The **Public Procurement Review Board (PPRB)** is an independent Board that reviews the Hearing Panel's order with respect to suspension or final decision: **sections 51A- L**

The parties or any other person who has an interest in the order or decision may request a review

Appeal of decision cont'd

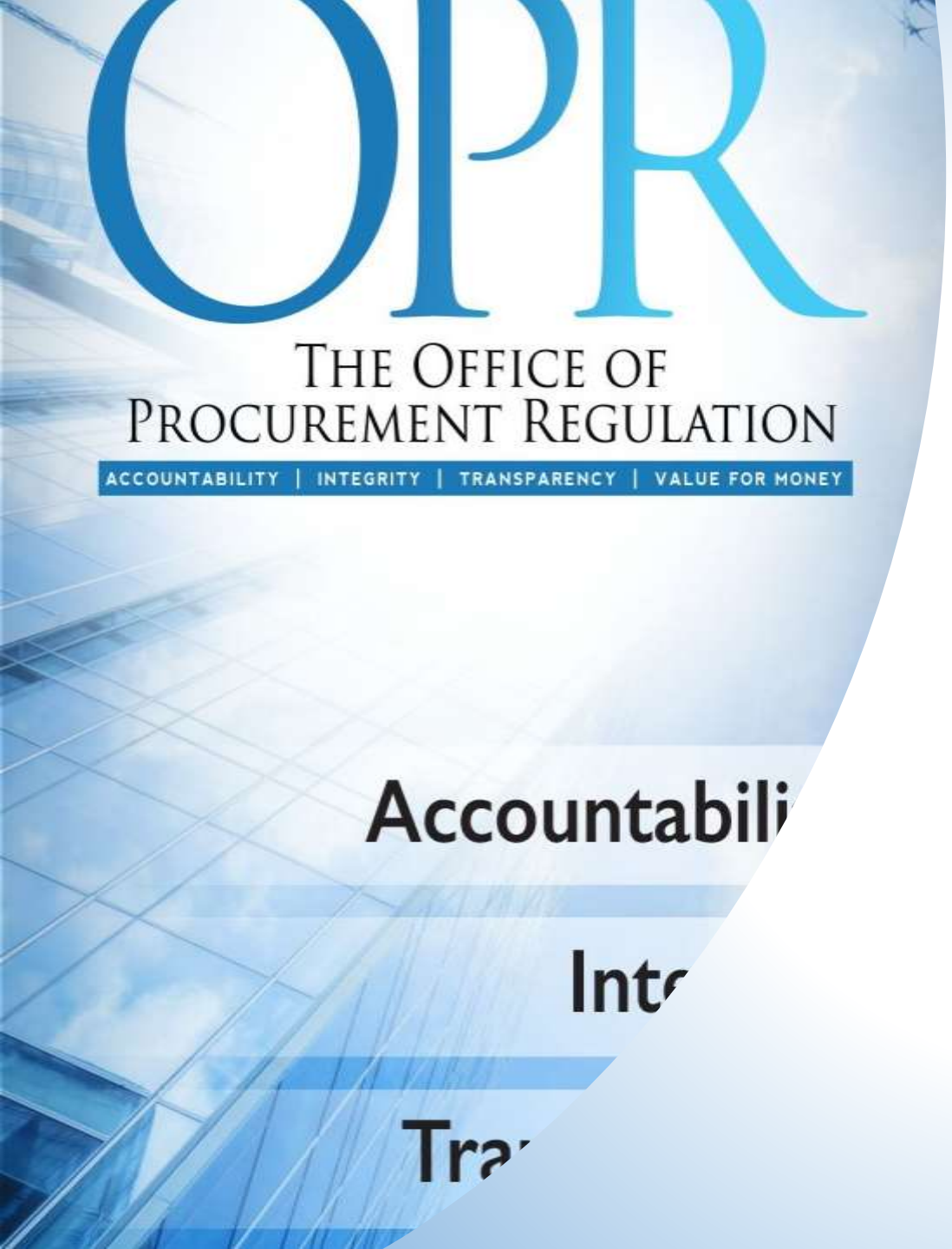
A request for review by the PPRB must be made within 21 days of receiving the order or decision.

Within 21 days of receiving a request for review, the PPRB shall convene to conduct a review. The review must be completed within 28 days.

Following the completion of a review, the PPRB may:

- confirm, vary or overturn the decision of the Hearing Panel; and
- order the payment of costs as between parties to the review.

A party may subsequently appeal against the decision of the PPRB to the High Court within 28 days of the delivery of the decision.



Thank you for your kind attention!

I would be happy to answer any questions.

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Website: www.oprtt.org