

**THE PROCUREMENT BILL, 2010**

**(Bill No. of 2010)**

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**(To be presented by the Minister of Finance)**

**MEMORANDUM OF OBJECTS AND REASONS**

The objects of this Bill are to provide for –

- (a) the regulation and control of practices in respect of public procurement;
- (b) the establishment of the Agency and other public procurement institutions; and,
- (c) matters connected with or incidental to the foregoing.

J. M. DLAMINI

*ATTORNEY-GENERAL*

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A BILL

Entitled

An Act to provide for the regulation and control of practices in respect of public procurement.

ENACTED by the King and the Parliament of Swaziland.

## ARRANGEMENT OF SECTIONS

### PART 1

#### PRELIMINARY

1.Short Title and Commencement _____	6
2.Interpretation _____	6
3.Purpose and Objectives _____	10
4.Application _____	10
5.International Obligations _____	11
6.Deviations _____	11
7.Public Accessibility _____	11
8.Introduction of Information and Communication Technology _____	12

### PART II

#### SWAZILAND PUBLIC PROCUREMENT REGULATORY AGENCY

9.Establishment of the Swaziland Public Procurement Regulatory Agency _____	12
10.Functions of the Agency _____	12
11.Powers of the Agency _____	14
12.Cooperation with oversight authorities _____	15
13.Establishment and Composition of Board of Directors of the Agency _____	15
14.Termination of Office of Board Members _____	16
15.Meetings of the Board _____	17
16.Committees of the Board _____	18
17.Disclosure of Interest _____	18
18.Appointment and Functions of Executive Director _____	19
19.Staff of the Agency _____	19
20.Funds of the Agency _____	20
21.Accounts and Audit _____	20
22.Annual Management Plan and Budget _____	20
23.Annual Report _____	21

### PART III

#### TENDER BOARDS AND PROCUREMENT AUTHORISATIONS

24.Approvals Authorities and Procurement Authorisations _____	21
25.Establishment and Composition of Swaziland Government Tender Board _____	22
26.Sub-Committees of the Government Tender Board _____	23
27.Establishment of Entity Tender Boards and Levels of Authority _____	24
28.Composition and Appointment of Entity Tender Boards _____	25
29.Meetings of Tender Boards _____	25
30.Disclosure of Interest _____	27

### PART IV

#### TECHNICAL SECRETARIAT AND RESPONSIBILITIES FOR PROCUREMENT

31.Responsibility for Procurement Activities _____	28
32.Establishment of the Technical Secretariat _____	28
33.Functions of the Technical Secretariat _____	29
34.Functions of Procuring Entities _____	29
35.Entity Procurement Units _____	30
36.Functions of Requesting Entities _____	31
37.Procurement of Common Use Items _____	31

### PART V

#### PROCUREMENT PRINCIPLES, METHODS AND RULES

38.Procurement Principles _____	33
39.Non Discrimination and Measures to Promote Swazi Companies _____	33
40.Supplier Eligibility _____	33
41.Supplier Qualifications _____	34
42.Procurement Methods and Process _____	35
43.Procedures for procurement of infrastructure on the basis of private financing and for award of concessions _____	35
44.General Procurement Rules _____	35

45.Contract Award Procedures _____	36
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## PART VI

### ADMINISTRATIVE REVIEW AND SUSPENSION OF TENDERERS AND SUPPLIERS

46.Right to Review _____	37
47.Review by Procuring Entity _____	37
48.Right to Administrative Review _____	38
49.Administrative Review Procedures _____	38
50.Constitution of an Independent Review Committee _____	39
51.Administrative Review by Independent Review Committee _____	40
52.Remedies by Independent Review Committee _____	41
53.Notification to other Bidders _____	41
54.Prohibition on contract award during review proceedings _____	42
55.Suspension of Tenderers and Suppliers _____	42
56.Grounds for Suspension _____	43
57.Appeal against Suspension _____	44
58. Legal representation _____	44

## PART VII

### CODES OF CONDUCT, OFFENCES AND PENALTIES

59.Codes of Conduct _____	46
60.Conduct of Public Officers and Politicians involved in Procurement _____	46
61.Conduct of Tenderers and Suppliers _____	47
62.Offences _____	47
63.Penalties _____	48
64.Protection from Prosecution _____	48

**PART VIII**  
**MISCELLANEOUS**

	<b>49</b>
65.Public Procurement Regulations _____	49
66.Public Procurement Manuals, Circulars and Instructions _____	49

## PART I

### PRELIMINARY

#### *Short title and commencement*

1. (1) This Act may be cited as the Public Procurement Act, 2010, and shall come into force on such date as the Minister may, by Notice published in the Gazette, determine.  
(2) The Minister may designate different dates for the coming into force of different parts or provisions of this Act.

#### *Interpretation*

2. In this Act, unless the context otherwise requires-
  - “Agency” means the Swaziland Public Procurement Regulatory Agency established by section 9;
  - “approvals authority” means the body or individual with authority to grant prior authorisation of certain key steps in the procurement process in accordance with section 24 and the levels of authority specified in public procurement regulations;
  - “Board” means the Board of Directors of the Agency established by section 13;
  - “category A public enterprise” has the meaning ascribed to it in the Public Enterprises (Control and Monitoring) Act, 1989;
  - “Cabinet” means the Cabinet of Ministers established in terms of section 66 of the Constitution of the Kingdom of Swaziland Act, 2005;
  - “Chief Executive Officer” means the Chief Executive Officer of a public enterprise;
  - “Citizen Service Provider” means a natural person or incorporated company wholly owned by and controlled by persons who are citizens of Swaziland by dissent in terms of section 41 of the Constitution of the Kingdom of Swaziland Act, 2005;
  - “close relative” means a parent, a spouse, a child, a sibling, or a parent, child or sibling of a spouse;

“coercive practice” means harming or threatening to harm, directly or indirectly, a person, or the property of that person, so as to influence participation or a decision in a procurement process or affect the execution of a contract;

“collusive practice” means a scheme or arrangement between two or more tenderers, with or without the knowledge of the procuring entity, designed to establish tender prices at an artificial, or non-competitive level;

“conflict of interest” means circumstances in which the personal interest of an officer, or of a close relative or close associate of an officer, might benefit, directly or indirectly, from their official actions;

“consulting services” means services of an intellectual or advisory nature, including the delivery of reports, drawings or designs and includes architectural or engineering design or supervision, accountancy, auditing, financial services, procurement services, training and capacity building services, management advice, policy studies and advice, assistance with institutional reforms and software development;

“contract” means an agreement between a procuring entity and a supplier for the provision of goods, works or services;

“controlling officer” means an officer designated by the Minister in terms of the financial and accounting instructions as the officer responsible for the control of each head of expenditure and each item of revenue in the estimates of revenue and expenditure laid before Parliament;

“corrupt practice” means the offering, giving, receiving or soliciting, directly or indirectly, of any thing of value to influence the action of a public officer or politician in the procurement process or in contract execution;

“Executive Director” means the Executive Director of the Agency appointed in accordance with section 18;

“fraudulent practice” means a misrepresentation or omission of facts in order to influence a procurement process or the execution of a contract;

“goods” means objects of every kind and description, including raw materials, products and equipment, objects in solid, liquid or gaseous form, and electricity, and includes works and services incidental to the supply of the goods if the value

of those incidental works and services does not exceed that of the goods themselves;

“Government Tender Board” means the Swaziland Government Tender Board established under section 25;

“invitation document” means a tender document, request for proposals, request for quotations or any other document inviting tenderers to submit a tender;

“lead procuring entity” means the procuring entity designated with responsibility for procuring a certain category of items or common use items on behalf of all or a group of requesting entities in accordance with section 31;

“Minister” means the minister responsible for Finance;

“non-consulting services” means services other than consulting services, for the carrying out of work or any kind, with or without the use of vehicles, machinery or equipment or the provision of operators, technicians or drivers;

“politician” means any person who holds any of the following positions; Senator, Member of Parliament, Member of Bucopho, Regional Administrator, Kings (Advisory) Counsellor, Municipal Councillor and Indvuna Yenkhundla;

“procurement” means the acquisition, by purchase, rental, lease, hire purchase, license, franchise or any other contractual means, of any type of goods, works, services or assets or any combination of goods, works, services or assets;

“public procurement” means procurement using public funds, whether wholly or partially, in accordance with this Act;

“public procurement regulations means regulations issued in terms of section 65;

“procuring entity” means any entity designated to conduct public procurement activities, in accordance with section 31, whether on behalf of itself or another requesting entity, and may include the Technical Secretariat and any Ministry, Department, Agency, category A public enterprise or Local Government Authority;

“public funds” means monetary resources appropriated to requesting entities through budgetary processes, including the Consolidated Fund, grants and credits

put at the disposal of requesting entities by foreign donors, and revenues generated by requesting entities;

“public officer” means any officer employed in the public service including in procuring entities, requesting entities, the Agency and Tender Boards;

“requesting entity” means any Ministry, Department, Agency, category A public enterprise, Local Government Authority or other body initiating a procurement requirement;

“services” means any object of procurement other than goods or works, which involve the furnishing of labour, time or effort;

“statement of requirements” means the description of the technical and quality characteristics of the goods, works or services being procured;

“supplier” means a natural person or an incorporated body that is party to a contract with a procuring entity for the provision of goods, works or services and includes a contractor, consultant or service provider;

“Swazi company” means a company which is registered in Swaziland and of which at least 60% of the controlling shares are owned by Swaziland citizens;

“tender” means an offer to provide goods, works or services submitted by a tenderer in response to an invitation from a procuring entity and includes tenders, proposals, quotations and, where applicable, applications to pre-qualify;

“Tender Board” means the appropriate Entity Tender Board established in accordance with section 27, and includes, the Swaziland Government Tender Board established under section 25;

“tenderer” means an entity that offers to provide goods, works or services in response to an invitation from a procuring entity and includes, where applicable potential tenderers and applicants to pre-qualify;

“undue influence” includes any form of pressure brought to bear by any official, elected or appointed, who is in a position to either provide a benefit to, or exact punishment against, any person involved in procurement activities or decisions;

“works” means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, road, structure or activities, such as

site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the contract, if the value of those services does not exceed that of the works themselves.

### *Purpose and Objectives*

3. (1) The purpose of this Act shall be to establish public procurement institutions and to regulate the procurement of goods, works and services by procuring entities.

(2) The objectives of this Act shall be to establish a system and practices that serve to-

- (a) ensure transparency and accountability in public procurement while maintaining appropriate confidentiality of information;
- (b) achieve economy, efficiency and maximum competition to ensure value for money in the use of public funds;
- (c) promote more diverse private sector participation, through fair and non-discriminatory treatment of tenderers;
- (d) develop economic capacity in Swaziland, through the provision of opportunities for Swazi companies to participate in public procurement; and,
- (e) promote regional and international trade in accordance with agreements entered into by the Government of Swaziland.

### *Application*

4. (1) This Act shall apply to all public procurement conducted by or for requesting or procuring entities, except as provided in section 4(2) and section 5 (1).

(2) Where procurement is related to defence or national security, the application of the rules and procedures set out in this Act may be modified, but only to the extent necessary for the protection of the public interest and in accordance with procedures agreed with the Agency.

*International Obligations*

5. (1) Where this Act conflicts with an obligation of the Government of Swaziland arising out of an agreement with one or more States or with an international organisation, the provisions of the agreement shall, to the extent that this Act conflicts with that obligation, prevail over this Act; but in all other respects, the procurement shall be governed by this Act.

(2) Government entities shall seek the opinion of the Agency before entering into any agreement which requires the application of procurement procedures or arrangements other than those in this Act.

*Deviations*

6. (1) A deviation from the use of a public procurement method, rule, process or document may be permitted by the Agency -

- (a) where exceptional requirements make it impossible, impractical or uneconomical to comply with the Act;
- (b) where market conditions or behaviour do not allow effective application of the methods, rules, processes or documents;
- (c) for specialised or particular requirements that are regulated or governed by harmonised international standards or practices; or,
- (d) where national security may be compromised.

(2) The procedure for applying for and issuing deviations shall be as specified in Regulations.

*Public Accessibility*

7. The text of this Act, public procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by

this Act, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained by the Agency.

*Introduction of Information and Communication Technology*

8. (1) The Agency shall examine and recommend ways of introducing in public procurement, at appropriate stages, the use of information and communications technology, and other technical innovations, where such technology promotes the objectives of this Act.

(2) The Agency may issue circulars and instructions on measures and programmes to introduce the use of information and communications technology in public procurement in accordance with section 66.

(3) The Agency shall identify any required additions or amendments to the legal and regulatory framework for public procurement to support the application of information and communications technology and shall promote their introduction.

**PART II**

**SWAZILAND PUBLIC PROCUREMENT REGULATORY AGENCY**

*Establishment of Swaziland Public Procurement Regulatory Agency*

9. (1) There is hereby established the Swaziland Public Procurement Regulatory Agency.

(2) The Agency shall serve as an independent regulatory body, with responsibility for policy, regulation, oversight, professional development and information management and dissemination in the field of public procurement.

(3) The Agency shall be a body corporate with perpetual succession and a common seal, capable of suing and of being sued in its corporate name, and with power, subject to the provisions of this Act, to do all such acts and things as a body corporate may, by law, do or perform.

*Functions of the Agency*

10. Without prejudice to the generality of section 9 (2), the functions of the Agency are -

- (a) policy formulation, in pursuance of which the Agency shall –
  - (i) advise the Government and procuring entities on procurement policy and all other matters relating to public procurement; and,
  - (ii) report on the performance and functioning of the public procurement system and recommend changes;
- (b) regulation, in pursuance of which the Agency shall –
  - (i) formulate regulations governing the procurement of goods, works and services for the Government and recommend these to the Minister;
  - (ii) issue public procurement manuals, circulars and instructions to provide further guidance on the interpretation and application of this Act and public procurement regulations issued under this Act;
  - (iii) issue standard tender documents and other standard procurement documents whose use shall be mandatory in all procurement proceedings by procuring entities, unless otherwise specified by the Agency;
  - (iv) promote measures to facilitate participation by Swazi companies in public procurement; and,
  - (v) consider applications for deviations to public procurement processes, methods and rules in accordance with section 6;
- (c) oversight of public procurement, in pursuance of which the Agency shall –
  - (i) monitor compliance with this Act and procurement performance by procuring entities;
  - (ii) conduct audits of any procurement activities governed by this law;
  - (iii) investigate the conduct of any procurement activities that are suspected to involve violations of this law or public procurement regulations;

- (iv) refer breaches of this Act to the relevant budgetary, oversight and law enforcement bodies or initiate prosecution action by the Agency where appropriate;
  - (v) constitute and provide secretariat services to Independent Review Committees, where required for the purposes of administrative review; and,
  - (vi) maintain a list of tenderers and suppliers who are suspended from participation in public procurement;
- (d) capacity building in, and professionalisation of the public procurement system, in pursuance of which the Agency shall –
- (i) coordinate and promote capacity-building and professional development in the public procurement system; and,
  - (ii) work with the appropriate human resources authorities to set standards and professional qualifications requirements for staff involved in procurement activities; and,
- (e) data and information management, in pursuance of which the Agency shall organise and maintain systems for the management and public dissemination of procurement data, statistics and information.

#### *Powers of the Agency*

11. (1) The Agency shall have the competence, authority, power and responsibility to enforce this Act and public procurement regulations issued under this Act.
- (2) In the exercise of its functions, the Agency shall have the power to-
- (a) collect any data or reports from procuring entities, as determined by the Agency;
  - (b) have access to all information, documents, records and reports belonging to a procuring entity in respect of any public procurement process;
  - (c) have access, at all reasonable times to the premises of any procuring entity whose procurement is being monitored;

- (d) issue an order to any person to provide testimony regarding any matter that the Agency considers, in the exercise of reasonable discretion, relevant to the conduct of its functions;
- (e) call for any relevant information from persons responsible for the financial administration of any procuring entity whose procurement is being monitored;
- (f) constitute Independent Review Committees in accordance with section 50;
- (g) suspend bidders and suppliers from participation in public procurement in accordance with section 55;
- (h) subject to section 162 (5) of the Constitution, prosecute breaches of this Act or make recommendations for further action to other budgetary, oversight and law enforcement bodies; and,
- (i) authorise deviations in accordance with section 6.

#### *Cooperation with oversight authorities*

12. The Agency shall cooperate with other bodies responsible for exercising oversight functions over public procurement in Swaziland and for that purpose may establish mechanisms for sharing information and work jointly with such bodies.

#### *Establishment and Composition of Board of Directors of the Agency*

13. (1) There is hereby established a Board of Directors of the Agency, which shall be the governing body of the Agency.

(2) The Board shall be composed of a non-executive Chairperson and four non-executive members, amongst whom at least two shall be from the private sector, civil society or professional bodies, who shall be appointed by the Minister, in consultation with the Cabinet, from among persons of good standing and recognised for their high levels of professional competence and integrity.

(3) The Chairperson and the members shall be appointed from a range of professional backgrounds, which may include, but not be limited to procurement, law,

management, accountancy, auditing, engineering, professional development and commerce.

(4) In appointing the Chairperson and the members, the Minister shall seek to create a Board with multi-sectoral skills and experience, which is representative of all key stakeholders in the public procurement system and reflects the range of functions of the Authority.

(5) The Board may co-opt advisers to provide specific advice to assist it in the discharge of its functions. Advisers shall not vote on any submission and shall only attend the part of the meeting on which their advice is required.

(6) The tenure of the Board members shall be a period not exceeding three years and they may be appointed for not more than two consecutive terms.

(7) Notwithstanding the provisions of subsection (5), when appointing members of the Board for the first time, on commencement of this Act, the Minister shall appoint three members for a tenure of two years, in order to ensure both continuity and rotation in the membership of the Board.

(8) Upon the expiry of the period for which a member is appointed, they shall continue to hold office until a successor has been appointed, but in no case shall such further period exceed three months.

(9) A member shall be paid such remuneration or allowance as the Minister may from time to time determine.

(10) Members shall have no direct or indirect personal involvement in public procurement functions during the period of their service on the Board.

#### *Termination of Office of Board Members*

14. (1) The Minister may, at any time, terminate the appointment of a member of the Board for-

- (a) abuse of office;
- (b) corruption;
- (c) incompetence;

- (d) any physical or mental incapacity that renders a person incapable of performing the duties of that office;
- (e) failure to attend three consecutive scheduled Board meetings without reasonable grounds;
- (f) conviction of an offence involving moral turpitude;
- (g) being adjudged or declared bankrupt; or,
- (h) any other reasonable ground.

(2) Any member of the Board may resign from the Board by giving not less than one month's prior notice in writing.

#### *Meetings of the Board*

15. (1) The Board shall meet as often as is necessary for the proper discharge of its functions but in any event, not less than once every three months. The Chairperson, in consultation with the Secretary, shall determine the times and places for meetings and call meetings.

(2) In the absence of the Chairperson the members present shall elect, from among their number, an acting Chairperson.

(3) Subject to this Act, the Board shall regulate its procedure in the conduct of its business.

(4) The validity of any proceedings, act or decision of the Board shall not be affected by any vacancy in the membership of the Board or by any defect in the appointment of any member or by reason that any person not entitled so to do took part in the proceedings.

(5) The quorum of the Board shall be three of the members holding office at that time, except that when a member has declared an interest in an agenda item, or in a matter before the Board, the member in question shall not be counted for the purpose of forming a quorum in relation to the item or matter in question.

(6) The decision of the Board shall be by a majority of votes of all members present, and where there is an equality of votes, the Chairperson shall have a casting vote in addition to a deliberative vote.

(7) Notwithstanding the provisions of subsection (6), a decision may be made by the Board on any urgent matter by the circulation of the relevant papers among the members, and by the expression in writing of the views of the majority thereof: provided that any member shall be entitled to require that any decision shall be deferred until the matter is considered at a meeting of the Board.

(8) The Board may invite any person, whose presence is in its opinion desirable, to attend and to participate in the deliberations of a meeting of the Board, but such person shall have no vote.

(9) The Board shall cause minutes to be kept of the proceedings of every meeting of the Board and of every meeting of any committee established by the Board.

#### *Committees of the Board*

16. (1) The Board may, for the purpose of carrying out the functions of the Agency under this Act, establish committees and delegate to any such committee such of the Authority's functions as it may think fit.

(2) The Board may appoint as members of a committee established under subsection 16, persons who are or are not members of the Board and such persons shall hold office for such period as the Board may determine.

(3) Subject to any specific or general direction of the Board, any committee established under subsection (1) may regulate its own procedure.

#### *Disclosure of Interest*

17. (1) Where a member, or a close relative or close associate of a member, has, or intends to acquire, a direct or indirect personal interest in any agenda item or specific matter requiring the Board's consideration and decision, the member shall-

- (a) disclose such interest, as soon as possible after receiving the agenda of the meeting of the Board, or on notification of a matter being brought to the attention of the Board; and,

- (b) not be present at or participate in the deliberations or decision-making process of the Board in relation to the agenda item or the matter in question.

(2) A disclosure of interest made under this section shall be recorded in the minutes of the meeting at which it is made or to which it relates.

#### *Appointment and Functions of Executive Director*

18. (1) There shall be an Executive Director, who-
- (a) shall be the chief executive officer of the Agency;
  - (b) be responsible to the Board for the management and operations of the Agency; and,
  - (c) serve as Secretary of the Board.
- (2) The Executive Director shall be an officer in the public service.
- (3) The Executive Director shall-
- (a) be of high moral character and proven integrity;
  - (b) have acceptable academic qualification and experience in procurement, law, commerce, audit, investigation, human resources development or any other related profession relevant to the functions of the Agency; and,
  - (c) possess considerable experience and demonstrated professional competence in the field of procurement and in the development and implementation of policy and strategy.
- (4) The Executive Director shall attend all meetings of the Board and shall be entitled to address such meetings, but shall not vote on any matter under discussion. The Board may, for good cause, request the Executive Director to withdraw from any meeting of the Board, but such withdrawal shall be noted in the minutes of the meeting.

#### *Staff of the Agency*

19. (1) The Agency shall be staffed by such other staff, in addition to the Executive Director, as are necessary for the efficient and professional performance of the Agency's functions under this Act, including prosecutors to enable the Agency to fulfil its functions and powers in accordance with sections 10(c)(iv) and 11(2)(h).

(2) Public officers may be seconded on such terms and conditions as may be decided in line with government secondment policy.

#### *Funds of the Agency*

20. The funds of the Authority shall consist of-

- (a) money appropriated by Parliament for the purposes of the Agency;
- (b) loans or grants received by the Agency for its activities;
- (c) revenues collected from services that are rendered by the Agency; and,
- (d) any such other money received or made available to the Agency for the purposes of its functions.

#### *Accounts and Audit*

21. (1) The Agency shall keep proper books of account and other records relating thereto and shall prepare in respect of each financial year a statement of account and balance sheet showing, in all necessary detail, the income and expenditure and the assets and liabilities of the Agency.

(2) The accounts of the Agency shall be audited annually by auditors appointed by the Board and a detailed report shall be submitted to the Minister and to the Board.

(3) The Auditor General shall review such audit reports and shall have access at all reasonable times to all books of accounts, records, returns, reports and other documents relating to the Agency's accounts.

#### *Annual Management Plan and Budget*

22. (1) The Executive Director shall, not later than three months before the end of each financial year, prepare and submit to the Board for its approval, a Management Plan, including a budget, setting out its objectives and planned activities for the next year.

(2) The Executive Director may, at any time, prepare and submit to the Board for approval any estimates supplementary to the budget of the current financial year.

(3) Expenditure shall not be made out of the funds of the Agency, unless that expenditure is part of the budget or supplementary estimates approved by the Board.

#### *Annual Report*

23. (1) The Board shall, as soon as practicable, but not later than four months after the expiry of each financial year, submit to the Minister a report concerning the Agency's activities during that financial year.

(2) The report shall be in such form as the Minister shall approve and shall include-

- (a) an evaluation of the Agency's activities during that year, including performance against its plans and budget;
- (b) the Agency's audited financial statements;
- (c) information on the performance and functioning of the public procurement system; and,
- (d) such other information as the Minister may direct or as the Board may consider appropriate.

(3) The Minister shall cause the report to be laid before Parliament within thirty days after receipt of the report, or within fourteen days of the next sitting of Parliament, whichever comes first.

### **PART III**

#### **TENDER BOARDS AND PROCUREMENT AUTHORISATIONS**

##### *Approvals Authorities and Procurement Authorisations*

24. (1) The function of the approvals authority shall be to ensure that procurement is conducted in accordance with this Act and public procurement regulations by providing prior authorisation of specified stages of the procurement process in accordance with subsection 24(2) and public procurement regulations.

(2) Public procurement regulations shall define the stages of the procurement process which require the prior authorisation of the relevant approvals authority.

(3) The approvals authority shall be the-

- (a) controlling officer or Chief Executive Officer, where the value of the procurement does not exceed the level of authority specified in public procurement regulations;
- (b) appropriate Entity Tender Board, where so established in accordance with section 27 and where the value of the procurement does not exceed the level of authority granted in accordance with section 27(3); or,
- (c) Government Tender Board established under section 25, or any appropriate sub committee established in accordance with section 27(3), where the value of the procurement exceeds the levels of authority of all lower approvals authorities.

*Establishment and Composition of Swaziland Government Tender Board*

25. (1) There is hereby established the Swaziland Government Tender Board, which shall be the highest approvals authority for the Government of Swaziland.

(2) The Government Tender Board shall have an unlimited level of authority, but shall have no authority over any procurement which falls within the level of authority of any subsidiary Tender Board or officer.

(3) The Government Tender Board shall be composed of-

- (a) A chairperson who shall be a person with a minimum degree qualification and of high repute;
- (b) the Principal Secretary, Ministry of Economic Planning and Development or a representative;
- (c) the Principal Secretary, Ministry of Public Works and Transport or a representative;
- (d) the Principal Secretary, Ministry of Commerce, Industry and Trade or a representative;

- (e) the PS Finance or a representative;
- (f) a representative of the Attorney General's Office;
- (g) two representatives from the Private Sector;
- (h) the Head of the Technical Secretariat, who shall be Secretary, but shall not have a vote.

(4) The two members referred to in subsections 3(a) and (g) shall-

- (a) be appointed by the Minister, in consultation with the Cabinet, for a period not exceeding two years and shall be entitled to re-appointment; and,
- (b) not participate as tenderers in public procurement during the period of their service on the Government Tender Board.

(5) Where the Members have voted upon a matter and the votes are tied, the Chairperson shall have a casting vote.

(6) The Government Tender Board may co-opt advisers to provide specific advice to assist it in the discharge of its functions whom-

- (a) shall not vote on any submission; and,
- (b) shall only attend the part of the meeting on which their advice is required.

(7) A member shall be paid such remuneration or allowance as the Minister may from time to time determine.

#### *Sub-Committees of the Government Tender Board*

26. (1) The Government Tender Board may establish subcommittees to-

- (a) conduct particular functions of the Government Tender Board, such as the opening of tenders;
- (b) provide prior authorisations under delegated authority from the Government Tender Board up to a level of authority specified by the Government Tender Board; or,
- (c) approve sources of supply for common use items.

(2) Notwithstanding subsection (1), the Government Tender Board shall remain responsible and accountable for the activities of any subcommittees.

*Establishment of Entity Tender Boards and Levels of Authority*

27. (1) The Agency may authorise a procuring entity to establish an Entity Tender Board.

(2) An Entity Tender Board shall act as the approvals authority for all procurement conducted by the entity, whether for itself or on behalf of another requesting entity, which falls within the level of authority granted in accordance with subsection (3) and all procurement with a value above this level of authority shall be submitted to the Government Tender Board for prior authorisation.

(3) The Agency shall grant levels of authority, which shall be determined by the capacity and workload of each entity, for each Entity Tender Board established by issue of circulars.

(4) The Agency shall assess the procurement capacity and workload of each entity to determine-

- (a) the need for an Entity Tender Board, taking into account the procurement workload of the entity;
- (b) the procurement capacity of the entity, taking into account the capacity of both the Entity Procurement Unit and the current or proposed members of the Entity Tender Board; and,
- (c) the appropriate level of authority for the Entity Tender Board.

(5) The Agency shall also advise the entity of the findings of its capacity assessment and any actions needed to improve procurement capacity.

(6) The Authority shall agree its work programme and methodology for capacity assessments with the Government Tender Board and shall keep the Government Tender Board informed of all assessment findings and levels of authority issued.

(7) A procuring entity which has implemented measures to improve its capacity may request the Agency to review its capacity and level of authority and the Agency shall

undertake such review as soon as possible, but in no case later than three months from the date of the request.

*Composition and Appointment of Entity Tender Boards*

28. (1) An Entity Tender Board shall be composed of-
- (a) a chairperson appointed by the controlling officer or Chief Executive Officer, who shall be of a level not below Under Secretary, Director or equivalent level or shall be a member of the procuring entity's senior management team;
  - (b) between two and four other members appointed by the controlling officer or Chief Executive Officer in accordance with subsection (2) and,
  - (c) the head of the entity's Procurement Unit, who shall be Secretary, but shall not have a vote.
- (2) In appointing members of an Entity Tender Board, the controlling officer or Chief Executive Officer shall ensure that members-
- (a) are of an appropriate level of seniority and experience in decision making;
  - (b) are appointed with due regard to their technical competence and the skills and knowledge required for the discharge of the functions of the Entity Tender Board; and,
  - (c) provide a balance of skills and experience across the Entity Tender Board.

*Meetings of Tender Boards*

29. (1) A Tender Board shall meet as often as is necessary for the proper and timely review and authorisation of procurement requirements within its authority and the Chairperson, in consultation with the Secretary, shall determine the times and places for meetings and call meetings.

(2) In the absence of the Chairperson the members present shall elect, from among their number, an acting Chairperson.

(3) The quorum of a Tender Board shall be three of the members holding office at that time; except that when a member has declared an interest in an agenda item, or in a matter before the Tender Board, the member in question shall not be counted for the purpose of forming a quorum in relation to the item or matter in question.

(4) The decision of a Tender Board shall be by a majority of votes, and where there is an equality of votes, the Chairperson shall have a casting vote in addition to a deliberative vote.

(5) A Tender Board shall consider each submission made, based on the information and supporting documents contained in the submission and shall approve or reject each submission, but shall not vary a recommendation submitted, particularly a contract award recommendation.

(6) Where a submission is rejected, a Tender Board shall state its reasons in writing. A rejected submission may be re-submitted, following correction of the reasons for its rejection.

(7) A Tender Board may give a conditional approval to a submission, where there is a minor issue to be resolved.

(8) A Tender Board may co-opt advisers to provide specific advice to assist it in the discharge of its functions, but an adviser shall not vote on any submission and shall only attend the part of the meeting on which their advice is required.

(9) Observers, including representatives of the Agency, may attend a meeting of a Tender Board, where so agreed by the Tender Board but shall not vote on any submission.

(10) A Tender Board shall cause minutes to be kept of the proceedings of every meeting of the Tender Board, which shall record at least-

- (a) the members present at the meeting;
- (b) any advisers or observers attending the meeting;
- (c) any disclosure of interest made in accordance with section 30;

- (d) all submissions considered and whether the submission was approved or rejected;
- (e) the reasons for rejection of any submission and any conditions to approved submissions; and,
- (f) the key issues discussed in relation to each submission, including any advice given or disagreement between the members.

(11) Minutes and decisions of a Tender Board shall be available and distributed within two working days of the Tender Board meeting.

(12) A decision may be made by a Tender Board on any urgent matter by the circulation of the relevant papers among the members, and by the expression in writing of the views of the majority thereof: provided that any member shall be entitled to require that any decision shall be deferred until the matter is considered at a meeting of the Tender Board.

#### *Disclosure of Interest*

30. (1) Where a member, or a close relative or close associate of a member, has, or intends to acquire, a direct or indirect personal interest in any agenda item or specific matter requiring a Tender Board's consideration and decision, the member shall-

- (a) disclose such interest, as soon as possible after receiving the agenda of the meeting of the Tender Board, or on notification of a matter being brought to the attention of the Tender Board; and,
- (b) not be present at or participate in the deliberations or decision-making process of the Tender Board in relation to the agenda item or the matter in question.

(2) A disclosure of interest made under this section shall be recorded in the minutes of the meeting at which it is made or to which it relates.

## PART IV

### TECHNICAL SECRETARIAT AND RESPONSIBILITIES FOR PROCUREMENT

#### *Responsibility for Procurement Activities*

31. (1) Public procurement regulations shall define the procuring entity responsible for different types and values of procurement, according to the following principles-

- (a) certain specialised items or categories of procurement shall be purchased solely by a designated lead procuring entity with technical or sector specific expertise;
- (b) common use items shall be purchased centrally on behalf of all procuring entities by one or more designated lead procuring entities;
- (c) items other than those in (a) and (b) may be purchased directly by the requesting entity, providing the estimated value does not exceed the monetary threshold for the entity specified in accordance with subsections (3) and (4); and,
- (d) all other items shall be purchased by the Technical Secretariat or a procuring entity designated by the Technical Secretariat.

(2) Public procurement regulations may specify alternative responsibilities for central government bodies, public enterprises and local government authorities.

(3) The monetary threshold specified in subsection (c) shall be determined by the procurement capacity of the requesting entity, but shall be no less than the level of authority of the controlling officer or Chief Executive Officer in accordance with section 24(3)(a).

(4) The monetary threshold specified in subsection (c) shall be issued by the Authority.

#### *Establishment of the Technical Secretariat*

32. (1) There shall be established within the Ministry of Finance a Technical Secretariat.

- (2) The Technical Secretariat shall be responsible for-

- (a) the management of designated procurement activities as a lead procurement organisation in accordance with section 31; and,
- (b) providing secretarial services for the Government Tender Board.

(3) The Technical Secretariat shall be staffed by professional procurement staff with appropriate training and experience in procurement and may hire such expertise as required from time to time.

(4) The head of the Technical Secretariat shall be secretary to the Government Tender Board, but shall not have a vote.

#### *Functions of the Technical Secretariat*

33. The functions of the Technical Secretariat shall include-

- (a) all functions of a procuring entity, in accordance with section 34, for procurement for which it is designated as responsible;
- (b) providing support to the Government Tender Board in managing the tendering process, including the receipt and opening of tenders;
- (c) reviewing all requests for prior authorisation, prior to their submission to the Government Tender Board;
- (d) providing secretarial services to the Government Tender Board, including preparation of agendas and minutes, distribution of tender documents and notification of Tender Board decisions to procuring entities;
- (e) coordinating Government wide procurement planning; and,
- (f) coordinating activities relating to the procurement of common use items in accordance with section 37.

#### *Functions of Procuring Entities*

34. (1) The functions of the procuring entity designated as responsible for any procurement in accordance with section 31 shall include-

- (a) preparing individual procurement plans where appropriate;
- (b) developing statements of requirements where appropriate;

- (c) recommending the appropriate method of procurement;
  - (d) preparing invitation documents, advertisements and shortlists;
  - (e) providing technical inputs during the procurement process, including to pre-bid meetings and clarifications, or obtaining technical inputs from appropriately qualified persons;
  - (f) leading the evaluation of tenders and preparation of evaluation reports, including contract award recommendations;
  - (g) preparing contract documents and amendments;
  - (h) managing contracts, including supplier performance, where appropriate; and,
  - (i) providing reports on procurement as may be required.
- (2) The procuring entity shall-
- (a) liaise with the requesting entity throughout the procurement process;
  - (b) obtain technical inputs and advice, where required, from the requesting entity; and,
  - (c) include representatives of the requesting entity and/or end user of the goods, works or services on the evaluation committee.

#### *Entity Procurement Units*

35. (1) Where its procurement workload is sufficient, a procuring entity may establish an Entity Procurement Unit, which shall be responsible for managing the procurement activities of the procuring entity in accordance with this Act.

- (2) In particular, the functions of an Entity Procurement Unit shall include-
- (a) performing the functions of the procuring entity in accordance with section 34; and,
  - (b) obtaining all required approvals from the appropriate approvals authority.
- (3) A procuring entity shall have an Entity Procurement Unit in order to-

- (a) act as a lead procuring entity in accordance with section 31(a) or 31(b); or,
- (b) establish its own Tender Board in accordance with section 27.

(4) An Entity Procurement Unit shall be staffed by professional procurement staff with appropriate training and experience in procurement and may hire such expertise as required from time to time.

#### *Functions of Requesting Entities*

36. The functions of requesting entities, in relation to public procurement, shall include-

- (a) preparing an annual procurement plan and providing information on forecast procurement requirements to the Technical Secretariat;
- (b) initiating procurement requirements and obtaining all necessary authorisations for the commitment of funds;
- (c) preparing statements of requirements for the goods, works or services required;
- (d) participating in the evaluation of tenders and preparation of evaluation reports as members of the evaluation committee in accordance with section 34(2)(c);
- (e) managing contracts, including supplier performance;
- (f) liaising with and providing all required information to the designated procuring entity or entities throughout the procurement process; and,
- (g) providing procurement reports as may be required.

#### *Procurement of Common Use Items*

37. (1) Common use items shall be purchased centrally on behalf of all requesting entities, or a group of requesting entities, by one or more lead procuring entities designated in accordance with section 31(b).

(2) Common use items shall be any goods, works or services required by more than one requesting entity, for which the Government can obtain greater efficiency and value for money through centralised purchasing.

(3) The Technical Secretariat shall determine which goods, works or services are common use items and shall regularly distribute a list of items designated as common use items, the designated lead procuring entities and the requesting entities for which they are purchasing.

(4) The lead procuring entity for any common use items -

- (a) shall liaise with all requesting entities, as part of the annual procurement planning process and on an ongoing basis, to establish a detailed list of common use items and estimated needs;
- (b) may evaluate suppliers for common use items in order to issue a list of approved sources of supply;
- (c) may enter into framework contracts or other appropriate contractual arrangements for the purchase of common use items;
- (d) may utilise warehouses for cost effective storage and distribution of common use goods; and,
- (e) shall issue regularly updated information to all requesting entities on the items available, prices, delivery times and arrangements established for ordering or obtaining such items.

(5) A requesting entity shall utilise approved sources of supply or framework contracts to obtain common use items in accordance with instructions issued by the lead procuring entity.

## PART V

### PROCUREMENT PRINCIPLES, METHODS AND RULES

#### *Procurement Principles*

38. All procurement shall be conducted in a manner which promotes economy, efficiency, transparency, accountability, fairness, competition and value for money.

#### *Non Discrimination and Measures to Promote Swazi Companies*

39. (1) A tenderer shall not be excluded from participating in public procurement on the basis of nationality, race, religion, gender or any other criterion not related to its eligibility or qualifications, except to the extent provided for in this Act or public procurement regulations.

(2) Notwithstanding the provisions of sub-section (1), the Government, through Regulations, shall, with a view to promoting economic capacity and the competitiveness of businesses in Swaziland, initiate measures to facilitate effective participation by Swazi companies and citizen service providers in public procurement.

(3) Such measures, including but not limited to preferences in the evaluation of tenders and proposals, may be specified in public procurement regulations.

#### *Supplier Eligibility*

40. (1) In order to be eligible to participate in public procurement, a tenderer shall demonstrate to the satisfaction of the procuring entity that –

- (a) it has the legal capacity to enter into the contract;
- (b) it is not insolvent, in receivership, bankrupt or being wound up, its affairs are not being administered by a court or a judicial officer, its business activities have not been suspended, and it is are not the subject of legal proceedings for any of the foregoing;
- (c) it has fulfilled its obligations to pay taxes and social security contributions;
- (d) it adheres to basic labour legislation;

- (e) it does not have a conflict of interest in relation to the procurement requirement;
- (f) it, or any of its directors or officers, have not been convicted of any criminal offence relating to professional conduct or the making of false statements or misrepresentations as to its qualifications to enter into a procurement contract within a period of five years preceding the commencement of procurement proceedings; and,
- (g) it is not subject to suspension in accordance with section 55, and none of its directors or officers have been involved in a tenderer or supplier currently subject to suspension.

(2) All invitation documents shall state the eligibility requirements and specify any documentary evidence required as proof of eligibility.

#### *Supplier Qualifications*

41. (1) A procuring entity may require bidders to meet such qualification criteria as the procuring entity considers appropriate to a particular procurement requirement, to demonstrate that it has the capability and resources to effectively perform a contract.

(2) Any qualification criteria shall be specified in the invitation document and may relate to-

- (a) professional and technical qualifications;
- (b) financial resources and condition;
- (c) equipment and other physical facilities;
- (d) personnel and managerial capability;
- (e) record of past performance of similar contracts; or,
- (f) registration or licensing with the relevant professional body in Swaziland or in the tenderer's country of origin where so required by law.

(3) Invitation documents shall state any qualification requirements and specify the documentary evidence or information required to demonstrate the tenderer's qualifications.

*Procurement Methods and Process*

42. (1) A procuring entities shall use one of the methods specified in the public procurement regulations for all procurement.

(2) The preferred methods of procurement shall be-

- (a) open tendering for goods, works and non-consulting services; and,
- (b) request for proposals for consulting services,

and other methods shall only be used where the procurement meets the conditions for use of an alternative method specified in the public procurement regulations.

(3) All procurement activities shall be conducted in accordance with the detailed rules specified in public procurement regulations.

*Procedures for procurement of infrastructure on the basis of private financing and for award of concessions*

43. (1) Contracts for the construction and/or operation of public infrastructure and other public goods on the basis of private investment, and contracts for service concessions, shall be awarded in accordance with the principles and objectives of this Act and Government policy.

(2) Special methods and procedures for the implementation of subsection (1) may be specified in regulations.

*General Procurement Rules*

44. Requesting and procuring entities shall-

- (a) maintain records of all procurement proceedings;
- (b) ensure that all communications with tenderers and suppliers are in writing;

- (c) keep confidential the information that comes into their possession relating to procurement proceedings;
- (d) plan their procurement in a rationale manner;
- (e) document requirements and obtain authorisation before initiating procurement proceedings;
- (f) define their needs in a statement of requirements which gives a correct and complete description of the goods, works or services and use this in invitation documents, evaluation and contracts;
- (g) use the appropriate standard documents issued or authorised by the Agency in accordance with section 10(b) (iii);
- (h) clearly state the methodology and criteria to be used in the evaluation of tenders and the determination of the best evaluated tender; and,
- (i) comply with such other rules as are specified in this Act and public procurement regulations.

#### *Contract Award Procedures*

45. (1) The awarding of contract shall be recommended to the best evaluated tenderer, as determined by the evaluation methodology and criteria specified in the invitation document.

(2) The contract award decision shall be taken by the appropriate approvals authority, but the award decision does not constitute a contract.

(3) Following the contract award decision, the procuring entity shall prepare a notice indicating the name of the best evaluated tenderer, the value of the proposed contract and any evaluation scores. The notice shall be-

- (a) sent directly to all tenderers who submitted tenders by letter and, where appropriate, by fax or email; and,
- (b) published on the Government's public procurement website.

(4) A procuring entity shall allow a period of at least ten working days to elapse from the date of despatch and publication of the notice in accordance with subsection (3) before a contract is awarded.

- (5) The provisions of subsections (3) and (4) shall not apply -
- (a) where the value of the procurement does not exceed the threshold specified in public procurement regulations; or,
  - (b) in any other circumstances specified in public procurement regulations.

## **PART VI**

### **ADMINISTRATIVE REVIEW AND SUSPENSION OF TENDERERS AND SUPPLIERS**

#### ***Right to Review***

46. (1) Any tenderer that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on a procuring entity by this Act or public procurement regulations, may seek review in accordance with section 47.

(2) A tenderer seeking review may be required to pay a fee, in accordance with public procurement regulations.

#### ***Review by Procuring Entity***

47. (1) An application for review shall, in the first instance, be submitted in writing to the controlling officer or Chief Executive Officer of the procuring entity conducting the procurement.

(2) The controlling officer or Chief Executive Officer of the procuring entity shall not entertain an application for review, unless it was submitted within ten working days of when the tenderer submitting it became aware of the circumstances giving rise to the application for review or of when that tenderer should have become aware of those circumstances, whichever is earlier.

(3) Despatch and publication of a notice indicating the best evaluated tenderer in accordance with section 45(3) shall be deemed to satisfy the requirements of awareness in subsection (2).

(4) Unless the application is dismissed or resolved by mutual agreement of the tenderer that submitted it and the procuring entity, the controlling officer or Chief Executive Officer of the procuring entity shall-

- (a) immediately institute an investigation;
- (b) ensure that no contract award is made prior to completion of the review process; and,
- (c) issue a written decision, within ten working days after the submission of the application.

(5) The decision shall state-

- (a) whether the application is upheld, in whole or in part or dismissed;
- (b) the reasons for the decision; and,
- (c) any corrective measures that are to be taken.

#### *Right to Administrative Review*

48. (1) Where-

- (a) the controlling officer or Chief Executive Officer does not issue a decision within the period specified in section 47(4)(c); or,
- (b) the tenderer is not satisfied with the decision of the controlling officer or Chief Executive Officer;

a tenderer may seek administrative review in accordance with section 49.

(2) A tenderer seeking administrative review may be required to pay a fee, in accordance with public procurement regulations.

#### *Administrative Review Procedures*

49. (1) An application for administrative review in accordance with section 48, shall be submitted in writing to the Agency.

(2) The Agency shall not entertain an application for administrative review, unless it was submitted within ten working days of the date of issue of the controlling

officer or Chief Executive Officer's decision or the date by which the controlling officer or Chief Executive Officer should have issued a decision.

- (3) Upon receipt of an application for administrative review, the Agency shall-
  - (a) immediately give notice of the application to the procuring entity;
  - (b) prohibit the procuring entity from awarding a contract prior to completion of the administrative review process; and,
  - (c) establish an Independent Review Committee in accordance with section 50, which shall investigate and decide on the application in accordance with section 51.

*Constitution of an Independent Review Committee*

50. (1) For the purposes of hearing applications for administrative review and appeals against suspension, the Authority shall constitute a standing review panel.

(2) The standing review panel shall consist of members of high integrity with experience in public procurement or related fields, but with no direct or indirect personal involvement in public procurement functions during the period of their service on the standing review panel.

(3) For each application for administrative review or appeal against suspension, the Agency shall constitute an Independent Review Committee, composed of three members of the standing review panel.

(4) In selecting members for an Independent Review Committee, the Agency shall seek to establish a balance of relevant knowledge and experience among members to ensure that the Independent Review Committee has both-

- (a) knowledge and experience of the applicable public procurement rules; and,
- (b) technical knowledge of the subject of the contract.

(5) The Agency shall designate staff to provide secretariat services to the Independent Review Committee, but no Board members or staff of the Agency shall be included on the standing review panel or selected as a member of any Independent Review Committee.

(6) The Independent Review Committee may engage technical specialists to assist in its work if so required.

(7) The members of an Independent Review Committee, technical specialists and staff providing secretariat services shall be required to declare that they have no conflict of interest in relation to the application being heard.

(8) The members of an Independent Review Committee shall be paid sitting allowance and travelling allowances as are paid to the members of the governing body of a category A, Group 1 public enterprise.

*Administrative Review by Independent Review Committee*

51. (1) Unless the application is dismissed, the Independent Review Committee shall-

- (a) immediately institute an investigation; and,
- (b) issue a written decision, within fifteen working days after the submission of the application.

(2) In conducting its investigation, the Independent Review Committee shall have the power to-

- (a) access any information, documents, records and reports in respect of any aspect of the procurement process subject to the investigation; and,
- (b) summon witnesses and examine witnesses and parties concerned.

(3) The decision shall state-

- (a) whether the application is upheld, in whole or in part or dismissed;
- (b) the reasons for the decision; and,
- (c) any corrective measures that are to be taken or remedies ordered in accordance with section 52.

*Remedies by Independent Review Committee*

52. (1) The Independent Review Committee may grant one or more of the following remedies-

- (a) prohibit a procuring entity from acting or deciding unlawfully or from following an unlawful procedure and require the procuring entity to act or to proceed in a lawful manner or to reach a lawful decision;
- (b) annul in whole or in part or revise an unlawful act or decision of the procuring entity or substitute its own decision for such a decision, other than any act or decision bringing a contract into force;
- (c) require the payment of compensation for any reasonable costs incurred by the tenderer submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of the procuring entity;
- (d) order that the procurement proceedings be terminated;
- (e) recommend to the procuring entity that a contract be terminated; or,
- (f) recommend to the Agency that specific action be taken including prosecution.

*Notification to other Bidders*

53. (1) Promptly after the submission of an application for administrative review, the Agency shall notify all tenderers who participated in the procurement proceedings to which the application relates of the submission of the application and of its substance.

(2) Any such tenderer or any other party whose interests are or could be affected by the review proceedings has the right to participate in the review proceedings.

(3) A tenderer who fails to participate in the review proceedings is barred from subsequently making the same type of claim.

*Prohibition on contract award during review proceedings*

54. (1) Where a procurement requirement is subject to -
- (a) review in accordance with section 47, no contract shall be awarded until ten working days after completion of the review process; or,
  - (b) administrative review in accordance with section 49, no contract shall be awarded prior to completion of the administrative review process.
- (2) Notwithstanding the provisions of subsection 54, where urgent public interest considerations require goods, works or services to be contracted, the Government Tender Board may authorise an award of contract or an extension to an existing contract prior to completion of the review or administrative review process. Such award shall be limited to the quantity of goods, works or services required to meet urgent needs during the time period for completion of the review or administrative review process.
- (3) Where a procuring entity seeks a contract award or extension in accordance with subsection (2), it shall prepare a submission to the Government Tender Board which-
- (a) states that urgent public interests require a contract award or extension;
  - (b) justifies the grounds for claiming urgent public interests;
  - (c) specifies the quantity of goods, works or services required to meet urgent needs; and,
  - (d) recommends the tenderer or supplier to whom the contract or extension is to be awarded.
- (4) The submission shall be made a part of the record of the procurement proceedings and shall be copied to the controlling officer, Chief Executive Officer or Independent Review Committee responsible for the review or administrative review.

*Suspension of Tenderers and Suppliers*

55. (1) The Agency may suspend a tenderer or supplier from participation in public procurement on the grounds specified in section 56.

- (2) A tenderer or a supplier shall not be suspended prior to-
  - (a) reasonable notice in writing to the tenderer or supplier involved of the grounds for the proposed suspension and the details of the alleged grounds;
  - (b) reasonable opportunity for the tenderer or supplier to respond to the alleged grounds and provide information in its defence; and,
  - (c) a thorough investigation of the facts of the case by the Agency.

(3) Any suspension shall be for a minimum period of one year and a maximum period of five years.

(4) A suspension in accordance with subsection (1) may also apply to named directors, shareholders or staff of a tenderer or supplier, where the investigation demonstrates the involvement of such individuals.

(5) Where an investigation into a tenderer or supplier causes the Agency to suspect misconduct or breach of this Act by a public officer or politician, such suspicions shall be referred to the appropriate authority for further investigation.

(6) Notwithstanding the provisions of subsection (2), any tenderer, supplier or person endorsed on the Register for Tender Defaulters in accordance with the Prevention of Corruption Act, 2006, shall automatically be suspended from participation in procurement.

(7) Notwithstanding the provisions of subsection (3), the suspension shall be for the full duration of the time the tender, supplier or person is endorsed on the Register.

#### *Grounds for Suspension*

56. A tenderer or supplier may only be suspended from participation in procurement on the following grounds –

- (a) knowing provision of false information in a tender or any other document submitted to a procuring entity in connection with a procurement process or contract;
- (b) connivance to interfere with the participation of other tenderers;

- (c) misconduct relating to the submission of tenders, including corrupt, fraudulent, collusive or coercive practices, price fixing, a pattern of underpricing of tenders and breach of confidentiality;
- (d) taking an order knowing that the order had not been authorised or was not in a proper format or had been issued by a person not authorised to do so;
- (e) making delivery against an order knowing that the order had not been authorised or was not in a proper format or had been issued by a person not authorised to do so;
- (f) making a claim for payment against an order knowing that the order had not been authorised or was not in a proper format or had been issued by a person not authorised to do so;
- (g) refusal to sign a contract or to furnish a performance security in accordance with the terms of the invitation document and tender if required to do so;
- (h) substantial non-performance of contractual obligations, provided that the non-performance was not due to circumstances beyond the control of the supplier;
- (i) conviction of a criminal offence relating to obtaining or attempting to obtain a contract or subcontract; or,
- (j) conviction of a crime related to business or professional activities.

#### *Appeal against Suspension*

57. (1) A tenderer or supplier may appeal against a decision to suspend the tenderer or supplier from participation in public procurement by submitting an appeal in writing to the Agency for review by an Independent Review Committee.

(2) The Agency shall not entertain an appeal unless it was submitted within ten working days of the date of issue of the suspension notice by the Agency..

(3) For the purposes of hearing such appeals the Agency shall constitute an Independent Review Committee composed of three members of the standing review panel selected in accordance with section 50(3).

(4) The Independent Review Committee shall-

- (a) immediately review the original investigation and decision by the Agency; and,
  - (b) issue a written decision, within fifteen working days after the submission of the appeal.
- (5) In conducting its review, the Independent Review Committee shall have the power to-
- (a) access any information, documents, records and reports in respect of any aspect of the procurement process or contract; and,
  - (b) summon witnesses and examine witnesses and parties concerned.
- (6) The decision of the Independent Review Committee shall state-
- (a) whether the suspension is upheld or overturned or the period of the suspension or named individuals revised; and,
  - (b) the reasons for the decision.
- (7) A tenderer or supplier seeking to appeal against suspension may be required to pay a fee, in accordance with public procurement regulations.
- (8) Where an investigation into a tenderer or supplier causes the Independent Review Committee to suspect misconduct or breach of this Act by a public officer or politician, such suspicions shall be referred to the appropriate authority for further investigation.

#### *Legal Representation*

58. A tenderer or supplier who appeals in terms of this Part, shall have the right to be represented by legal counsel in the appeal proceedings.

## PART VII

### CODES OF CONDUCT, OFFENCES AND PENALTIES

#### *Codes of Conduct*

59. The Agency may promulgate codes of conduct to guide the behaviour of public officers, politicians, tenderers and suppliers involved in public procurement.

#### *Conduct of Public Officers and Politicians involved in Procurement*

60. (1) All public officers and politicians who have responsibilities for procurement shall-

- (a) always act in the public interest and in accordance with the objectives and procedures set out in this Act and public procurement regulations;
- (b) exercise powers and discharge duties for a proper purpose, consistent with their responsibilities, and with the degree of care and diligence that a reasonable person would exercise in similar circumstances;
- (c) discharge duties impartially so as to assure fair competitive access to public procurement by tenderers;
- (d) not use their position, or information obtained because of their position, improperly to gain an advantage for themselves or someone else or cause a detriment to a procuring entity;
- (e) not interfere with or exert undue influence on any person to affect a procurement activity or decision;
- (f) at all times avoid conflicts of interest and the appearance of conflicts of interest;
- (g) not commit or abet corrupt, fraudulent, collusive or coercive practices; and,
- (h) keep confidential the information that comes into their possession relating to procurement, including tenderers' proprietary information.

*Conduct of Tenderers and Suppliers*

61. Tenderers or suppliers participating in public procurement shall-
- (a) at all times abide by their obligations under this Act and public procurement regulations, contracts and other instruments applicable to their conduct and activities related to public procurement; and,
  - (b) not commit or abet corrupt, fraudulent, collusive or coercive practices.

*Offences*

62. A person commits an offence who-
- (a) without reasonable excuse fails or refuses to give information, or produce any document, records or reports required under section 11, 51(2)(a) or 57(5)(a);
  - (b) without reasonable excuse refuses to answer summons as required under section 11, 51(2)(b) or 57(5)(b);
  - (c) knowingly gives false or misleading information or evidence in purported compliance with a summons under section 11, 51(2)(b) or 57(5)(b);
  - (d) assaults, resists or obstructs any member of staff of the Authority, or any other authority exercising monitoring and oversight functions over public procurement, in the exercise of their powers of access or power to call for relevant information in accordance with section 11;
  - (e) connives or colludes to commit a corrupt, fraudulent, collusive or coercive practice;
  - (f) contrary to this Act, interferes with or exerts undue influence on any officer or employee of the Agency or a procuring entity in the performance of their functions or in the exercise of their powers under this Act;
  - (g) as the result of recklessness or intentional dishonesty fails to exercise their powers as a public officer or politician and to discharge their duties for a proper purpose consistent with their responsibilities;

- (h) uses their position as a public officer or politician dishonestly with the intention of directly or indirectly gaining an advantage for himself or someone else or causing a detriment to a procuring entity;
- (i) uses their position as a public officer or politician recklessly without regard to whether their conduct may directly or indirectly gain an advantage for himself or someone else or cause a detriment to a procuring entity;
- (j) dishonestly uses information obtained because of their position as a public officer or politician to gain an advantage for himself or someone else or cause a detriment to a procuring entity;
- (k) publishes or discloses information relating to procurement, other than in the proper and authorised course of their duties as a public officer or politician; or,
- (l) contravenes or fails to comply with a provision of this Act or public procurement regulations.

#### *Penalties*

63. (1) A person who commits an offence under section 62 is liable on conviction to a fine not exceeding ten million Emalangeni or to a term of imprisonment not exceeding ten years or to both such fine and imprisonment.

(2) A court of competent jurisdiction may order a person to compensate the procuring entity for any damage suffered by the procuring entity, if the damage resulted from the offence. Such compensation amount is a civil debt payable to the procuring entity.

(3) Where a procuring entity or individual consistently contravenes this Act, this shall be-

- (a) reported to the relevant budget and oversight authorities and service commissions as appropriate; and,
- (b) recorded in the Agency's Annual Report.

#### *Protection from Prosecution*

64. No action or other proceedings shall lie or be instituted against any person empowered by this Act to oversee manage or regulate the procurement process for or in respect of any act or omission done in good faith.

## PART VIII

### MISCELLANEOUS

#### *Public Procurement Regulations*

65. (1) The Minister may, on the recommendation of the Agency, issue public procurement regulations to regulate the procurement of goods, works and services by procuring entities.

(2) Where appropriate, different regulations may regulate central government bodies, public enterprises and local government authorities.

#### *Public Procurement Manuals, Circulars and Instructions*

66. The Agency may issue public procurement manuals, circulars and instructions to provide further guidance on the interpretation and application of this Act and public procurement regulations issued under this Act.

