

PPRA CIRCULAR NO: 1 of 2022

REF: PPRA 1/1/1 I (1) Exch

23rd May 2022

The Permanent Secretary to the President
All Permanent Secretaries
The Director, Public Service Management
The Commander, Botswana Defence Force
The Commissioner, Botswana Police Service
The Commissioner, Botswana Prisons and Rehabilitation
The Attorney General
The Auditor General
The Governor, Bank of Botswana
Chief Registrar of the High Court of Botswana
The Registrar, Industrial Court
The Director General, Directorate on Intelligence and Security Services
The Director General, Directorate on Corruption and Economic Crime
The Director General, National Strategy Office
The Director General, Ethics and Integrity
The Director General, Counter-Terrorism and Fusion Agency
Director, Public Service Management
The Ombudsman
The Clerk of National Assembly
The Secretary, Independent Electoral Commission
Coordinator, National AIDS and Health Promotion Agency
All District Commissioners
All Former Chairpersons, Ministerial Tender Committees
All Chief Executive Officers, Parastatals
All Land Board Secretaries
All Council Secretaries/ Town Clerks

Dear Sir/ Madam

**RE: GUIDANCE ON PROGRESSION OF PENDING AND NEW PROCUREMENTS
FOLLOWING COMMENCEMENT OF THE PUBLIC PROCUREMENT ACT, 2021.**

1. Kindly refer to the matter at caption.
2. On the 14th April 2022, Government announced its decision to commence implementation of the Public Procurement Act, 2021, Act No 24 of 2021 (The Act/ PP Act) through Statutory Instrument No. 37 of 2022 that was issued on the said date. The commencement of the PP Act resulted in the repeal of the Public Procurement

and Asset Disposal (PPAD) Act. Consequently, the Local Authorities Procurement and Asset Disposal (LAPAD) Act was repealed through the Local Authorities Procurement and Asset Disposal (Repeal) Act, 2021, No 25 of 2021 (LAPAD Repeal Act), which effected on the 14th April 2022. In addition, the asset disposal function has been moved to the Public Finance Management Act.

3. The Public Procurement Regulatory Authority (PPRA/The Authority) has been continued under the PP Act as an oversight body in public procurement and has been bestowed with a responsibility for the implementation and enforcement of the Act. Its roles, amongst others, include regulation and control of the public procurement system, to advise the government and any entity that falls within the scope of the Act on procurement principles and practices; setting standards and practices for the public procurement system; ensuring adherence to the principles of public procurement and to provide support and capacity building of all procuring entities and stakeholders in the procurement system.
4. The Authority guides that the PP Act, fully alive to, and cognisant of the fact that there will be ongoing/pending procurement activities and processes upon commencement of implementation of the Act, provides for continuation of procurement activities or processes, tender notices, awards, appeals, responsibilities or functions that would not have yet been completed when the Act commenced.
5. The PP Act explicitly and in clear terms gives guidance on how new procurement matters and appeals are to be handled in terms of the transitional and saving provisions at section 152 of the PP Act read with section 3 of the LAPAD Repeal Act.
6. The Board of the Authority having convened its first meeting on the 18th May 2022 in the exercise of its mandate in terms of the PP Act, **RESOLVED** and advises as follows in respect to pending, new procurements, complaints and appeals for compliance by Addressees:

A. PROCUREMENT ACTIVITIES OR PROCESS ISSUED BEFORE COMMENCEMENT OF THE PP ACT

In terms of Section 152 (5) of the PP Act read with section 3 (4) of the LAPAD Repeal Act, *“any tender notice, an award or decision made under the repealed Act shall, in so far as it is consistent with the provisions of this Act, be deemed to have been made under this Act”*.

Further to that, Section 152 (6) of the PP Act read with section 3 (5) of the LAPAD Repeal Act places the responsibility to deal with pending procurements on the Authority. These provisions provide as follows;

“ Any procurement activity or process pending on the date of commencement of this Act shall be dealt with by the Authority in accordance with the relevant

legislation in force when the activity or process commenced.” (the two provisions are couched exactly the same).

7. The Board resolved that **ALL outstanding procurements and complaints** emanating from procuring entities that were commenced under the repealed PPAD and LAPAD Acts, before the 14th April 2022 should be finalised by Accounting Officers (as defined in terms of section 2 of the PP Act) of the respective Procuring Entities **in accordance with the relevant legislation in force when the activity or process commenced** in line with section 152 (6) of the PP Act read with section 3 (5) of the LAPAD Repeal Act. The decision by the Board is also in line with, sections 152 (9) and 3 (8) of both the PP Act and LAPAD (Repeal) Act, respectively which have transferred functions or responsibilities that were undertaken by Boards and Committees under the repealed statutes to relevant bodies established under the PP Act. Therefore, in the Board's view the purported continuation of execution of the adjudication and award mandate that was conferred on Boards and Committees that existed under the repealed statutes may be seen to be ultra vires the Act. In addition, the Authority lacks the mandate to adjudicate over tenders and complaints under the PP Act, hence the decision to transfer pending matters to Accounting Officers to handle them as Accounting Officers have been conferred with the authority to make all decisions relating to all pending procurement.
8. Accounting Officer (AO) is defined under section 2 the PP Act as; Permanent Secretaries for Ministries, Chief Executive Officers or Heads of Organisations for public bodies and Oversight bodies, Land-Board Secretaries for Land-Boards and Council Secretaries and Town-Clerks for Local Authorities.

B. NEW PROCUREMENT MATTERS

Section 41 of the PP Act vests the overall responsibility and accountability of the execution and decision on all procurement in the Procuring Entity on the Accounting Officer. Therefore, all procurements initiated on or after the 14th April 2022 are to be handled by the Accounting Officer of any Procuring Entity (PE) for a decision in line with the PP Act

The PP Act further vests on the Accounting Officers the prerogative to delegate their authority.

C. COMPLAINTS PENDING ON OR BEFORE COMMENCEMENT OF THE PP ACT

In terms of Section 104 of the PP Act, complaints are to be submitted before Accounting Officers at first instance and thereafter can be escalated to the Public Procurement Tribunal (Tribunal) as appeals in line with the Act.

The Board has resolved that all pending complaints, are to be handled by the relevant Accounting Officers to complete regardless of the stage they were at to facilitate a smooth transition from the old to the new law.

D. APPEALS

Section 152 (7) of the PP Act and section 3 (6) of the LAPAD Repeal Act provide as follows; *"Any right of appeal which subsisted immediately before the commencement of this Act is to be treated as subsisting by virtue of the corresponding provisions in this Act"*.

Further to the above, section 152 (8) of the PP Act provides that *"Any appeal which commenced under the repealed Act shall be prosecuted and disposed of as though commenced in terms of the provisions of this Act"*.

Similarly, section 3 (7) of the LAPAD Repeal Act provides thus;

"Any appeal which commenced under the repealed Act shall be prosecuted and disposed of as though commenced in terms of the Public Procurement Act."

It will be noted that in terms of the above cited provisions from both statutes, appeals that were pending before commencement of the Act or were filed on or after the 14th April 2022 are to be forwarded to the Tribunal which is the entity established to adjudicate over appeals emanating from tenders in terms of the PP Act.

E. HANDING OVER OF PENDING PROCUREMENT RECORDS

In order to ensure efficiency and timeous progression of outstanding matters, Accounting Officers, former Chairpersons of the repealed Boards and Committees, etc are urged to expedite the transfer of all outstanding matters including records to the relevant entities. Find herein attached a form to be completed in respect of each matter to be handed over. A copy of the list of record of transferred matters is to be forwarded to the Authority by the relevant Accounting Officer by the 10th June 2022.

9. Finally, the Authority will on dates to be communicated in due course convene virtual workshops for Central Government, Councils, Land Boards and Parastatals, which should be attended, by all Accounting Officers and Heads of procurement oversight units (Buyers) whereat the Board decision and its operationalisation will be explained in detail. All are invited to attend.
10. All addressees are requested to ensure that this communication is widely distributed to all their Departments at the earliest opportunity.

11. On a different but related note, let me take this opportunity to acknowledge and appreciate the dedication displayed by members of the Ministerial Tender Committees (MTCs), District Administration Tender Committees (DATCs), parastatal Board Tender Committees, LAPAD Adjudication Committees and the Appeals Board that served under the repealed Acts, despite the known challenges they faced daily. We wish them all the best in their future endeavours."

Thank you.

Yours faithfully,


TUMELO-MOTSUMI
ACTING CHIEF EXECUTIVE OFFICER

CC: The President, Public Procurement Tribunal