

PUBLIC PROCUREMENT ACT, 2021

No. 24



of 2021

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An Act to establish the Public Procurement Regulatory Authority; to provide for its functions; to provide for the management of the procurement of works, services and supplies; and for matters incidental thereto and connected therewith.

Date of Assent: 19.11.2021

Date of Commencement: On Notice

ENACTED by the Parliament of Botswana.

PART I — *Preliminary*

1. This Act may be cited as the Public Procurement Act, 2021, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Short title and commencement

2. In this Act, unless the context otherwise requires —
 “Accounting Officer” means a person who is responsible for the administration and day-to-day management of the affairs of a procuring entity, and any other person, who may be designated as such by the Minister under this Act;

Interpretation

- “any combination thereof, however classified” means, in relation to works, services and supplies, a turnkey project or any arrangement in this genre, which may include management, maintenance, testing, commissioning or training;
- “Authority” means the Public Procurement Regulatory Authority continued under section 6;
- “bid” means a written offer in the form determined by an instruction, in response to an invitation for the procurement of works, services or supplies to submit an offer, including an unsolicited bid;
- “bidder” means a contractor who responds to an invitation to bid by submitting an offer in procurement proceedings;
- “bidding package” includes an invitation to tender, solicitation documents, a statement of requirements or any other documents inviting bidders to participate in procurement proceedings, including documents inviting potential bidders for prequalification;
- “Board” means the Public Procurement Regulatory Authority Board established under section 12;
- “Chief Executive Officer” means the Chief Executive Officer of the Authority appointed under section 26;
- “citizen contractor” means a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Botswana;
- “code of conduct” means a code of conduct of contractors provided for under section 99;
- “common use items” includes works, services or supplies that are usable by a procuring entity irrespective of type or category, and items as may be prescribed;
- “competent authority” means a person, body of persons, organ or agency competent to take action as may be referred to or directed to it by the Authority, or any other person authorised, under this Act;
- “consultancy services” means activities of an intellectual and advisory nature that do not lead to a measurable physical output and include design, supervision, training, advisory, auditing, software development and similar services;
- “contract” means an agreement between a procuring entity and a contractor resulting from the application of the appropriate and approved procurement procedures and proceedings, and concluded in pursuance of a bid award decision;
- “contractor” or “service provider” means a natural person or an incorporated body licensed by a competent authority to undertake works, services, supplies or any combination thereof, however classified;
- “Contractors’ Register” means a Contractors’ Register kept and maintained by the Authority in accordance with Part XIII;
- “cooling-off period” means the period which starts from the time of the publication of an award decision to a bidder for a period provided under section 104 (1) (a);

- “day” means a day of the week other than Saturday, Sunday or a public holiday under the Public Holidays Act;
- “Department” means a public entity, extra ministerial body or a subdivision of the central Government, including state-owned entities, local authorities, Land Boards, parastatals, schools and hospitals that derive their regular funding from the Consolidated Fund;
- “emergency” means a natural disaster, epidemic, pandemic, riot, war, fire, flood or any other situation that may result in the threat to —
- (a) life; or
 - (b) health, welfare or safety of the public,
- which requires immediate action;
- “eProcurement” means the process of procurement using electronic medium;
- “Evaluation Committee” means an *ad hoc* committee set up by the Accounting Officer to review and evaluate proposals submitted in response to an invitation to bid and make selection recommendation;
- “framework contract” means a contractual arrangement which allows a procuring entity to procure goods, services or works that are needed continuously or repeatedly at an agreed price over an agreed period of time through placement of orders as and when the need arises;
- “immediate family member” has the same meaning assigned to it under the Corruption and Economic Crime Act;
- “industry standards” means best practices, and include practices and standards which —
- (a) are safe and environmentally friendly;
 - (b) are innovative and increase efficiency;
 - (c) save time and costs;
 - (d) relate to materials, processes, methods, designs, equipment, products, services and practices; and
 - (e) are defined and coded by internationally recognised contractors’ associations and professional bodies in the concerned fields;
- “integrity agreement” means an agreement between a procuring entity and a contractor which regulates ethical behaviour and integrity during a bidding process and execution of a contract;
- “local authority” means a city council, town council, township authority, district council, sub district council or an administrative authority;
- “local contractor” means a contractor whose operation is based in Botswana, irrespective of the contractor’s nationality or domicile;
- “member” means a member of the Board;

Cap. 03:07

Cap. 08:05

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Cap. 59:04

“model structure” means a structure that is provided by the Authority for standardisation to ensure that —

- (a) a procuring entity has the appropriate structure according to its capacity and matters it handles; and
- (b) proper segregation of duties is in place;

“National Archives and Records Services” has the same meaning assigned to it under the National Archives and Records Services Act;

“National eProcurement System” means the end-to-end electronic procurement system established under section 55;

“pre-qualification” means a screening process designed to ensure that invitations to bid are confined to capable contractors;

“procurement” means the acquisition in the public interest by any means, including purchase, rental, lease, hire-purchase, licence, tenancy, franchise, auction, reverse auction, public private partnership, of any type of works, services or supplies of any combination thereof, however classified, and includes management, maintenance, testing, training and commissioning;

“procurement agent” means a natural person or an incorporated company engaged by a procuring entity to perform or carry out a procurement activity on behalf of the procuring entity in accordance with the provisions of this Act;

“procurement practitioner” means any person or a procurement personnel who provides input in whatsoever form or contribution, in part or in full, or has been or will be involved in the process of public procurement, directly or indirectly;

“procuring entity” means any Ministry or Department duly authorised to engage in public procurement, and includes —

- (a) all entities of the central and local Government, and local authority which are involved in public procurement, whether they are located abroad or within Botswana;
- (b) every public body, unless specifically exempted from the application of this Act by the Minister, under section 3; and
- (c) any other body or entity that is the recipient of public funds and uses the said funds for public procurement purposes;

“public body” means any office, organisation, establishment or body created by or under any enactment or under powers conferred by any enactment; or any organisation, trust, company or body where public moneys are used and includes —

- (a) any Ministry or Department;
- (b) a local authority;
- (c) land board;
- (d) statutory body; and

Cap. 42:01

- (e) a company registered under the Companies Act being a company in which the Government or an agency of the Government through holding of shares or otherwise, is in a position to direct the operations of that company;

- “public funds” means monetary resources appropriated to a procuring entity through budgetary processes, and includes the Consolidated Fund provided under the Public Finance Management Act, grant, loan and credit put at the disposal of the procuring entity by a local or foreign donor, and revenue generated by such procuring entity;
- “Public Oversight Agencies” means the Auditor-General’s Office, the Directorate on Corruption and Economic Crime, the Financial Intelligence Agency, Competition and Consumer Protection Authority, the office of the Ombudsman and any other institution charged with the responsibility to oversee the activities of other Departments;
- “public private partnership” has the same meaning assigned to it under the Public Finance Management Act;
- “registered contractor” means a contractor registered by the Authority in accordance with this Act;
- “repealed Act” means the Public Procurement and Asset Disposal Act repealed under section 151;
- “retroactive approval” means a formal approval of a bid or invitation to tender made effective or operative as of a date prior to a procurement process;
- “reverse auction” means a purchasing technique utilised by a procuring entity to select a successful submission, which involves the presentation by a supplier or contractor of a successively lowered bid during a scheduled period of time and the evaluation of the bids;
- “sensitive procurement” means procurement of highly sensitive works, services, supplies and properties, or any combination thereof, however classified, which may require confidentiality or secrecy;
- “services” means all services, other than works and supplies, including banking services, insurance coverage services, travel services, cleaning services, and includes consultancy services, management, maintenance and commissioning;
- “specifications” means the national standards specifications, and includes —
- (a) a generic or functional description of the qualities required of a procurement item;
 - (b) the relevant industry standards of approaching and executing the assignment in question; and
 - (c) the appropriate good practice tests that are to be used to verify the specified quality and performance of the procured item before delivery, on delivery, during installation and in the course of operation as applicable and the use of which shall be mandatory in all bidding packages;
- “supplies” means goods, raw materials, products, equipment or objects of any kind and description in solid, liquid or gaseous form, and in the form of electricity, as well as services incidental to the provision of such supplies;

“Tender Notice” means any invitation to eligible contractors to submit written offers to provide works, services and supplies, or any combination thereof, however classified;

“Tribunal” means the Public Procurement Tribunal established under section 114;

“unsolicited bid” means a proposal that demonstrates substantial, technical or financial innovation, or meets an unidentified need submitted to a procuring entity for consideration in the absence of an invitation by the procuring entity; and

“works” means any work associated with the construction, reconstruction, demolition, repair or renovation of a building or structure, on the surface or underground, on or under water, and includes the preparation, excavation, erection, assembly, installation, testing and commissioning of any plant, equipment or materials, decoration and finishing, as well as services incidental to or independent of the foregoing works such as drilling, mapping, satellite photography, seismic investigations, similar services, and any combination thereof, however classified, provided pursuant to a contract.

Application of Act in public procurement

3. This Act shall apply to —

- (a) a Department;
- (b) a public body, parastatal and statutory body, except where exempted by the Minister by Order published in the *Gazette*;
- (c) the procurement of assets acquired through —
 - (i) purchase,
 - (ii) rental,
 - (iii) lease,
 - (iv) hire-purchase,
 - (v) licence,
 - (vi) tenancy, or
 - (vii) franchise;
- (d) the procurement of all works, services, supplies, or any combination thereof, however classified; and
- (e) the sensitive procurement of works, services, supplies, or any combination thereof, however classified.

Application of Act in public private partnership

4. (1) This Act shall apply to an approved procurement activity under a public private partnership.

(2) The Minister may prescribe a structural arrangement, procedure and processes relating to a procurement activity under a public private partnership under this Act.

Conflict with other laws

5. In the event of any conflict or inconsistency between the provisions of this Act and any other law on public procurement, the provisions of this Act shall take precedence.

PART II — *Establishment of Public Procurement Regulatory Authority and Board*

- 6.** (1) The Public Procurement and Asset Disposal Board established under section 10 of the repealed Act repealed under this Act is hereby continued under the new name of the Public Procurement Regulatory Authority and shall continue as if established under this Act. Continuation of Authority
- (2) The Authority shall be a body corporate capable of suing and being sued in its own name and, subject to the provisions of this Act, of performing such acts as bodies corporate may, by law, perform including to —
- (a) acquire and sell such movable and immovable property as may be necessary for the efficient operation of the Authority; and
 - (b) enter into such contracts as may be required under the seal, and for the efficient operation, of the Authority.
- 7.** (1) The Authority shall be responsible for the implementation and enforcement of this Act. Objectives of Authority
- (2) Notwithstanding the generality of subsection (1), the Authority shall —
- (a) set standards and practices for the public procurement system;
 - (b) regulate and control the public procurement system;
 - (c) ensure the application of fair, equitable, competitive, transparent, accountable, efficient, non-discriminatory, honest, value for money and public confidence in procurement standards and practices;
 - (d) monitor and enforce compliance with this Act and any relevant law by a procuring entity;
 - (e) monitor the performance of a procuring entity in procurement activity; and
 - (f) provide and support capacity building of all procuring entities and stakeholders in the procurement system.
- 8.** (1) Notwithstanding the generality of subsection (2), the Authority shall — Functions of Authority
- (a) monitor, assess, review and report on the performance of the public procurement system to the Minister and advise on desirable changes;
 - (b) issue standardised bidding documents to a procuring entity;
 - (c) issue a model structure for a procuring entity taking into account the separation of duties, efficiency, transparency, good corporate governance, and any other principle of public procurement;
 - (d) conduct periodic inspections of the records and proceedings of a procuring entity to ensure compliance with this Act;
 - (e) institute periodically, in respect of any procurement —
 - (i) a procurement audit during a tender process,
 - (ii) a contract audit in the course of execution of an awarded tender,
 - (iii) a performance audit after the completion of a contract, and
 - (iv) an investigation at any stage of a procurement process;

- (f) develop and maintain a system for the publication of annual performance plans, data on public procurement opportunities, awards and any other information of public interest as may be determined by the Authority;
- (g) advise the Government and any entity that falls within the scope of this Act on the procurement principles and practices;
- (h) register, monitor and discipline contractors, and keep and maintain an up to date Contractors' Register;
- (i) undertake research and conduct surveys, nationally and internationally, on procurement matters;
- (j) issue of a code of conduct, guidelines, standards, directives, procedures, instructions and manuals for the implementation of this Act;
- (k) promote the training and professional development of any person engaged in public procurement in accordance with this Act, including contractors, to ensure adherence to ethical standards;
- (l) ensure the implementation of a preference and reservation scheme by a procuring entity in respect of a procurement matter that falls within the scope of this Act;
- (m) determine the policies relating to, and terms and conditions of service of the employees of the Authority;
- (n) determine the financial arrangements and any ancillary management issue relating to the Authority;
- (o) issue administrative sanctions and enforcement procedures, as may be prescribed, to ensure compliance with the provisions of this Act; and
- (p) carry out any other functions as are conferred by the law.

(2) The Authority shall periodically, and in consultation with a procuring entity, contractor and Public Oversight Agencies, make recommendations to the Minister on any policy matter the Government may adopt involving public procurement.

Functions of Authority in professionalisation of procurement personnel

9.(1) The Authority shall establish and set up an appropriate structure to regulate and register procurement personnel, and oversee any other matter relating to the professionalisation of procurement personnel.

(2) Notwithstanding the generality of subsection (1), the Authority shall —

- (a) establish, develop and implement a public procurement professional training program;
- (b) establish, monitor and publish standards for a procurement professional;
- (c) undertake accreditation and registration of a procurement practitioner;
- (d) establish requirements for, and monitoring of, continuous professional education or development programs;
- (e) establish, publish and review a code of professional conduct and ethics for public procurement practitioners which shall be consistent with international best practice;

- (f) determine practical training requirements for the purpose of registration of a procurement practitioner;
 - (g) inquire into any professional misconduct of any procurement practitioner, either on its own initiative or at the request of any person for violation or breach of a code of professional conduct and ethics, rules and standards;
 - (h) determine the appropriate entry category and qualification requirement for registration as a procurement practitioner;
 - (i) debar, de-register, take disciplinary measures or suspend a procurement practitioner for a breach of code of professional conduct and ethics; and
 - (j) perform such other functions as may be necessary for the professionalisation of procurement personnel under this Act.
- (3) The Authority may delegate its functions in professionalisation under this section to any self-regulatory body that it may determine.

10. (1) The Authority shall, in the exercise of its functions in accordance with sections 8 and 9, have the power to —

Powers of
Authority

- (a) require any information, document, record or report in respect of any aspect of a public procurement process where a breach, wrongdoing, mismanagement or collusion has been alleged, reported or proven against any procuring entity or bidder, or against any entity outside of Government which has been a beneficiary of a Government contribution for a procurement activity;
 - (b) summon a witness, call for the production of books of accounts, plans, documents and examine a witness and any party concerned under oath;
 - (c) commission or undertake an investigation; and
 - (d) request for any professional or technical assistance from any appropriate body or person in Botswana or elsewhere.
- (2) The Authority shall not incur any liability towards a procuring entity or any other entity or person interested in a tender under review or investigation under this section.
- (3) Notwithstanding anything contrary provided for in any other written law, the Authority may, after conducting an investigation referred to under subsection (1) (c) and it is reasonably satisfied that there is a contravention of any provision of this Act, take any remedial action as may be prescribed.
- (4) The Authority shall in its Annual Performance Evaluation Report include —
- (a) the complaints investigated and its findings;
 - (b) its recommendations on the corrective measures to be taken in each case;
 - (c) the response and action taken by the —
 - (i) respective competent authority,
 - (ii) procuring entity, and
 - (iii) Public Oversight Agencies;

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Delegation of functions and powers of Authority

- (d) any other remedial measures taken; and
- (e) the performance of the Authority in relation to its other functions under this Act.

11. (1) The Authority may, in writing, delegate any of its functions or powers to a —

- (a) committee or subcommittee;
- (b) procurement agent;
- (c) private entity; or
- (d) consultant,

to exercise any of the functions or powers under this Act, and shall be responsible to the Board.

(2) A person shall, in exercising the delegated functions or powers under this Act, comply with any directions given by the Authority.

(3) A delegation in terms of this section —

- (a) may be subject to conditions specified in the instrument of delegation;
- (b) shall be exercised in accordance with the functions and powers set out in the instrument of delegation; and
- (c) may be varied or revoked.

(4) A delegation under this section shall not prevent the Authority from exercising the delegated functions or powers.

Public Procurement Board

12. (1) There is established a body to be known as the Public Procurement Board which shall be the governing body of the Authority and shall be responsible for the direction of the affairs of the Authority.

(2) Notwithstanding the generality of subsection (1), the Board shall give general policy direction to the Authority.

(3) The Minister may give the Board written directions of a general or specific nature regarding the exercise of its powers and the performance of its functions, which directions shall not be inconsistent with this Act or with the contractual or other obligations of the Authority, and the Board shall give effect to such directions.

Membership of Board

13. (1) The Board shall consist of nine non-executive members appointed by the Minister, in writing.

(2) In appointing the members to the Board, the Minister shall select persons —

- (a) of good standing and recognised for their high level of professional, competence and integrity; and
- (b) who have experience of not less than 10 years in the procurement, supply chain management, finance, accounting, audit, law, engineering, commerce or any other area relevant to the objects and functions of the Board.

(3) The Chief Executive Officer shall be an *ex officio* member and shall not vote.

(4) The Minister shall appoint the Chairperson of the Board from amongst the members.

(5) The Vice Chairperson of the Board shall be elected by the members from amongst their number.

(6) The Minister shall, within 30 days of the appointments under this section being made, by notice in the *Gazette*, publish the appointment of members, specifying the dates of their appointment and the period for which they are appointed to the Board.

14. (1) A member shall be —

- (a) appointed by the Minister for a period not exceeding four years, on such terms and conditions as may be specified in their instruments of appointment; and
- (b) eligible for re-appointment for one further term not exceeding four years.

Tenure of office and conditions of service of members of Board

(2) The Minister shall determine the conditions of service of members of the Board.

15. (1) A person shall not qualify for appointment as a member or continue to hold office, if he or she —

- (a) has, in terms of any law in force in any country —
 - (i) been adjudged or otherwise declared bankrupt or insolvent and has not been rehabilitated or discharged, or
 - (ii) made an assignment to, or arrangement or composition with, his or her creditors, which has not been rescinded or set aside;
- (b) has, within a period of ten years immediately preceding the date of his or her proposed appointment, been convicted —
 - (i) in Botswana, of a criminal offence which has not been overturned on appeal or in respect of which he or she has not received a free pardon, or
 - (ii) outside Botswana, of an offence, which in Botswana, would have been a criminal offence, and sentenced by a court of competent jurisdiction to imprisonment for one month or more without the option of a fine, whether that sentence has been suspended or not,

Disqualification, suspension and removal from membership of Board

and which conviction has not been overturned on appeal and in respect of which he or she has not received a free pardon; or

- (c) is, at the time of appointment, a councillor, member of the National Assembly or *Ntlo ya Dikgosi*.

(2) The Minister may suspend from office, a member against whom criminal proceedings are instituted for an offence in respect of which a sentence of imprisonment without an option of a fine may be imposed, and while the member is so suspended, such member shall not carry out any functions under this Act or be entitled to any remuneration or allowances.

(3) The Minister shall remove a member from office, if the member —

- (a) becomes subject to a disqualification under subsection (1);
- (b) has failed to comply with the provisions of section 21 or 22;
- (c) is convicted of an offence under this Act, or under any other Act and after a period of 30 days from the date that a ruling against the member is made on all appeals made in respect of the conviction, he or she is sentenced to imprisonment for a term of six months or more without an option of fine;

- (d) is absent, without reasonable cause, from three consecutive meetings of which that member has had notice;
 - (e) is found to be physically and mentally incapable of performing his or her duties efficiently, and a medical doctor has issued a medical certificate to that effect;
 - (f) commits a material breach of the code of ethical behaviour; or
 - (g) contravenes the provisions of this Act or otherwise misconducts himself or herself to the detriment of the objectives of the Board.
- 16.** A member shall vacate his or her office and such office shall become vacant —
- (a) if he or she is disqualified, suspended or removed, in terms of section 15;
 - (b) if he or she is adjudged bankrupt or insolvent;
 - (c) upon his or her death;
 - (d) upon the expiry of such time as the Minister may specify in writing, notifying the member of his or her removal from office by the Minister;
 - (e) upon the expiry of one month's notice in writing to the Minister of his or her intention to resign from office;
 - (f) if he or she becomes physically or mentally incapable of performing his or her duties efficiently and a medical doctor has issued a medical certificate to that effect;
 - (g) if he or she is convicted of an offence under this Act or any other Act for which he or she is sentenced to imprisonment for a term of six months or more without an option of a fine; or
 - (h) if he or she is summarily dismissed from the Board by the Minister for contravening this Act.
- 17.** A member may resign from his or her appointment by giving one month's notice, in writing, to the Minister.
- 18.** (1) Where the office of a member becomes vacant before the expiry of the member's term of office due to death, resignation or removal from office, the Minister shall, in accordance with section 14 and within four months from the date the vacancy occurs, appoint another person to be a member.
- (2) The person appointed under subsection (1) shall —
 - (a) take the place of the member who has vacated office; and
 - (b) be appointed on a new or full term.
 - (3) Notwithstanding subsection (2), a person appointed under subsection (1) may hold office for such period as the Minister may, subject to section 14, specify.
 - (4) The Chairperson or the Vice Chairperson may be eligible for appointment as a member, where he or she has vacated his or her office before the expiry of his or her term, or on the expiry of his or her term.
- 19.** A member shall be paid out of the funds of the Authority such remuneration and allowances, for the member's services on the Board, as the Minister may determine.

Vacation of office of members of Board

Resignation from Board

Filling of vacancy in Board

Remuneration of members of Board

PART III — *Meetings and Proceedings of Board*

20. (1) Subject to the provisions of this Act, the Board may regulate its own proceedings.

Meetings of
Board

(2) The Board shall hold its first meeting on such date and at such a place as the Minister may determine and thereafter the Board shall meet as often as is necessary or expedient for the discharge of its functions, which shall not be less than twice a year.

(3) The Board shall, at its first meeting, elect the Vice Chairperson in accordance with section 13(5).

(4) Meetings of the Board may be held virtually, or in person at such places and times as the Board may determine and shall be convened by the Chairperson.

(5) The Chairperson may, in writing, convene a meeting of the Board by giving the members of the Board a notice of not less than seven days of the meeting.

(6) The Chairperson may, where a matter is urgent and does not permit the giving of notice in terms of subsection (5), call a special meeting of the Board within a notice less than seven days of receipt of a special request in writing by the Chairperson.

(7) There shall preside at any meeting of the Board —

- (a) the Chairperson;
- (b) in the absence of the Chairperson, the Vice Chairperson; or
- (c) in the absence of the Chairperson and the Vice Chairperson, such member as the members present may elect from among themselves for the purpose of that meeting.

(8) A quorum at any meeting of the Board on any matter shall be five members present and voting at the meeting and, in the event of an equality of votes, the Chairperson shall have a casting vote in addition to the Chairperson's deliberative vote.

(9) A decision of the Board on any question shall be by the majority of the members present and voting at the meeting and, in the event of an equality of votes, the Chairperson shall have a casting vote in addition to the Chairperson's deliberative vote.

(10) The Secretary of the Board shall cause proper minutes of the meetings of the Board to be taken and recorded, and such minutes shall be kept and confirmed by a subsequent meeting of the Board.

21. (1) A member of the Board, committee or sub-committee, or any person attending a meeting of the Board, committee or sub-committee shall, immediately upon commencement of the meeting of the Board, at which any matter in which the member or the member's immediate family member is directly or indirectly interested in a private capacity is the subject of consideration, disclose such interest and shall not take part in any consideration or discussion of or vote on any question concerning the matter unless the Board otherwise directs.

Disclosure of
interest

(2) A disclosure of interest made under subsection (1) shall be recorded in the minutes of the meeting at which it was made.

(3) Where a member or person fails to disclose his or her interest in accordance with subsection (1) and a decision by the Board, committee or sub-committee is made benefiting such member or person or an immediate family member of the member or person, such decision shall be void to the extent that it benefits such member, person or the family member.

(4) A person who fails to comply with the provisions of subsection (1) commits an offence and is liable to a fine not exceeding P500 000 or to imprisonment for a term not exceeding five years, or to both.

Confidentiality

22. (1) Subject to section 87, a member of the Board, committee or sub-committee, and any other person assisting the Board, committee or sub-committee, shall observe and preserve the confidentiality of all matters coming before the Board, committee or sub-committee, and such confidentiality shall subsist even after the termination of the member's term of office or that person's mandate.

(2) A member of the Board, committee or sub-committee, or a person to whom confidential information is revealed by virtue of his or her association with the Board, committee or sub-committee shall not disclose that information to any other person unless he or she is required to do so in terms of any written law or for purposes of any judicial proceedings.

(3) Upon ceasing to hold office, neither a member of the Board, committee or sub-committee, the Secretary and support staff nor a person co-opted by the Board, shall use to their personal advantage, information acquired by them, by virtue of their association with the Board, committee or sub-committee for a period of two years after leaving office.

(4) A member or person who contravenes the provisions of this section commits an offence and is liable to a fine not exceeding P500 000 or to imprisonment for a term not exceeding five years, or to both.

Committees of Board

23. (1) The Board may establish a committee or sub-committee which shall carry out any function of the Board, which the Board may delegate to the committee or sub-committee.

(2) A committee or sub-committee established in terms of subsection (1) shall be responsible for, but not limited to —

- (a) finance and audit;
- (b) risk management; and
- (c) compliance and monitoring.

(3) The provisions of sections 19, 21 and 22 shall, with the necessary modifications, apply to a member of a committee and sub-committee of the Board.

Signification of documents

24. All documents made by, and all decisions of the Board shall be signified under the hand of the Chairperson or any two members specifically authorised by the Board.

- 25.** (1) The Board may, where it considers it necessary, co-opt any person whose presence at a meeting of the Board is deemed necessary to —
- (a) attend and participate in the deliberations at the meeting of the Board; or
 - (b) undertake occasional assignments.
- (2) A person so co-opted shall —
- (a) have no right to vote; and
 - (b) be remunerated at the rate set by the Board.
- (3) The provisions of sections 21 and 22 shall, with the necessary modifications, apply to co-opted persons.

Co-option of
advisory panel

PART IV — *Chief Executive Officer and Other Employees of Authority*

- 26.** (1) The Authority shall have a Chief Executive Officer who shall be appointed by the Minister on the recommendation of the Board, and upon such terms and conditions as the Minister may determine.
- (2) A person shall not be appointed as the Chief Executive Officer unless he or she —
- (a) possesses such qualifications, experience and training as the Minister, on the recommendation of the Board, may determine; and
 - (b) has demonstrated that he or she is competent to carry out the functions of the Authority.
- (3) The Chief Executive Officer shall, subject to such directions on matters of policy as may be given by the Board —
- (a) be responsible for the —
 - (i) efficient administration and day-to-day management of the affairs of the Authority,
 - (ii) organisation and management of the employees of the Authority,
 - (iii) management of the funds, assets, liabilities and business of the Authority, and
 - (iv) executive decisions of the Board; and
 - (b) report directly to the Board.
- (4) The Chief Executive Officer may, subject to the provisions of this Act, delegate in writing, the exercise of any of the Chief Executive Officer's functions under this Act, to a senior officer of the Authority.

Chief
Executive
Officer

27. (1) Subject to subsection (2), the Chief Executive Officer shall hold office for a term not exceeding five years and shall be eligible for re-appointment for a further term not exceeding five years before the attainment of 60 years of age, whichever comes first.

Tenure of
office of
Chief
Executive
Officer

- (2) The Minister may, on the recommendation of the Board, terminate the appointment of the Chief Executive Officer for —
- (a) conduct which undermines the integrity of the Authority;
 - (b) prolonged or permanent incapacity; or
 - (c) incompetence.

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Appointment
of Secretary
of Board

28. The Board shall, with the recommendation of the Chief Executive Officer, appoint a Secretary of the Board who shall be suitably qualified and experienced in the legal discipline to a level appropriate for the seniority of the position.

Functions of
Secretary of
Board

29. (1) The Secretary of the Board shall attend meetings of the Board but shall have no right to vote, and shall —

- (a) advise the Board on all legal and procedural issues in respect of its deliberations and decisions;
- (b) be responsible for the accurate and complete recording of the Board's proceedings and decisions; and
- (c) be responsible for all legal business of the Board and institutional linkages and representation of the Board.

(2) The Secretary of the Board shall be the liaison officer between the Authority and the Tribunal.

Accountability
to Authority

30. The Secretary of the Board shall be accountable to the Authority, for his or her functions and responsibilities.

Conditions of
service of
Secretary of
Board

31. The conditions of service, including the remuneration package of the Secretary, shall be set by the Board, with the recommendation of the Chief Executive Officer.

Appointment
of employees
of Authority

32. (1) The Board shall, on the recommendation of the Chief Executive Officer and on terms and conditions determined by the Board, appoint senior employees of the Authority as it may consider necessary for the proper discharge of the functions of the Authority, and shall determine the terms and conditions of employment of the senior employees.

(2) The senior employees shall under the direction of the Chief Executive Officer, assist the Chief Executive Officer in the proper management and administration of the functions and affairs of the Authority in accordance with the policies laid down by the Board.

(3) The Chief Executive Officer shall appoint such other employees as may be necessary for the proper discharge of the functions of the Authority.

PART V — *Financial and Administrative Provisions*

Funds of
Authority

33. (1) The funds of the Authority shall include —

- (a) moneys appropriated by the National Assembly for the purposes of the Authority;
- (b) any money accruing to the Authority arising from performance of its functions under this Act, including fees, charges and levies for services provided to all beneficiaries; and
- (c) any payments received from any other sources in favour of the Authority.

(2) The Authority shall maintain with a bank, a designated account into which shall be paid all sums accruing to the Authority in respect of subsection (1) and from which all due payments shall be effected.

- 34.** The financial year of the Authority shall be a period of 12 months starting on 1st April and ending on 31st March each year. Financial year
- 35.** (1) The Authority shall keep proper accounts and records in respect of every financial year relating to its assets, liabilities, income and expenditure, and shall prepare in each financial year, a statement of such accounts. Financial report
- (2) The accounts of the Authority in respect of each financial year shall, within three months of the end of each financial year, be audited by an auditor appointed by the Board.
- (3) The auditor shall report in respect of the accounts for each financial year, in addition to any other matter on which the auditor considers it pertinent to comment on, whether or not —
- (a) the auditor has received all the information and explanation which, to the best of the auditor's knowledge and belief, were necessary for the performance of the auditor's duties;
 - (b) the accounts and related records of the Authority have been properly kept;
 - (c) the Authority has complied with all the financial provisions of this Act with which it is the duty of the Authority to comply; and
 - (d) the statement of accounts prepared by the Authority was prepared on a basis consistent with that of the preceding year and represents a true and fair view of the transactions and financial affairs of the Authority.
- (4) The report of the auditor and a copy of the audited accounts shall, within 14 days of the completion thereof, be forwarded to the Authority by the auditor.
- 36.** (1) The Authority shall, within a period of six months after the end of the financial year or within such longer period as the Minister may approve, submit to the Minister, a comprehensive report on the operations of the Authority during such year, together with the auditor's report and the audited accounts as provided for in section 35. Annual report
- (2) The Minister shall, within 30 days of his or her receiving the Authority's report referred to under subsection (1), lay such report before the National Assembly.
- (3) The Authority shall cause the report referred to under subsection (1) to be published in print form or electronic media.
- 37.** (1) The Authority shall submit to the Minister —
- (a) an Annual Management Plan, based on its current development plan; and
 - (b) any other occasional report required by the Minister.
- (2) An Annual Management Plan should set out the previous year's performance result, objective of the current year and resource required to deliver on a specified output, and any other output. Annual and medium term plans
- 38.** (1) The Authority may, out of its revenues, establish and maintain such pension, superannuation, provident or other funds as it may consider desirable or necessary for the payment of benefits or other allowances on the death, sickness, injury, superannuation, resignation, retirement or discharge of its employees and may make rules providing for the payment of money out of its revenues to such funds and providing for contributions to such funds by its employees. Pension and other funds

(2) The Authority may contract with insurance companies or such other bodies as may be appropriate for the maintenance and administration of the funds authorised under subsection (1).

PART VI — *Procuring Entities and Accounting Officers*

Composition of procuring entities

39. A procuring entity shall consist of —

- (a) the Accounting Officer;
- (b) the procurement oversight unit;
- (c) a procurement unit;
- (d) an *ad hoc* Evaluation Committee;
- (e) the user Department; or
- (f) any other appropriate structure put in place by the Government.

Functions of procuring entities

40. (1) A procuring entity shall be responsible for the management of a procurement activity, evaluation and monitoring of the performance of a contract in accordance with this Act.

(2) Notwithstanding the generality of subsection (1), a procuring entity shall, in the execution of its functions —

- (a) undertake to achieve the highest standards of equity and transparency, taking into account —
 - (i) equality of opportunity to all contractors,
 - (ii) fairness of treatment to all parties, and
 - (iii) the need to obtain the best value for money in terms of price, quality and delivery, having regard to prescribed specifications and criteria;
- (b) ensure that a procurement activity is implemented and reported through an electronic process or, where an electronic facility is not available, manually;
- (c) standardise procurement items and activities in order to ensure cost reduction, ease of maintenance and technological effectiveness;
- (d) aggregate procurement items and activities that are common to a procuring entity in order to benefit from economies of scale;
- (e) ensure an open competitive public procurement environment while observing the changing external obligations in relation to trade and procurement, which dynamically impact on a continual basis on domestic procurement policy and practice;
- (f) ensure competition among contractors by using the most efficient and competitive methods of procurement to achieve the best value for money;
- (g) take into account the fair and equitable treatment of all contractors in the interest of efficiency and the maintenance of a level playing field;
- (h) consider the accountability and transparency in the management of public procurement, in order to promote ownership of a procurement process and minimise challenges that may be in the procurement process;

- (i) ensure the sustainability of procurement in relation to economic, environmental and social factors; and
 - (j) take into account the total lifecycle cost of acquisition, operation and maintenance of supplies, works and services.
- (3) The functions related to procurement under this Act, of a procuring entity, shall be carried out —
- (a) by a person qualified or knowledgeable in procurement matters; and
 - (b) independently in relation to such functions.

41. (1) An Accounting Officer shall have the overall responsibility for the execution of a procurement process in a procuring entity in accordance with the provisions of this Act.

Functions of
Accounting
Officers

(2) Notwithstanding the generality of subsection (1), the Accounting Officer shall be responsible for the —

- (a) establishment of appropriate procurement structures to undertake the procurement functions under this Act, which shall be staffed at an appropriate level in line with the model structure issued by the Authority;
 - (b) establishment, as may be prescribed, of a committee within a procuring entity which shall oversee procurement activities;
 - (c) establishment, as may be prescribed, of an oversight committee to monitor procurement activities in a procuring entity;
 - (d) adjudication and award of tenders, including the adjudication of a bid recommendation submitted to the Accounting Officer through a procurement oversight unit;
 - (e) cancellation of a tender process and rejection of a tender offer at any time prior to entering into a contract, in the manner as may be prescribed, and the Accounting Officer shall not compensate the bidder of a tender that has been cancelled;
 - (f) returning of a bid recommendation to the sender for reconsideration, rejection of a bid recommendation, appointment of an independent evaluation team to re-evaluate a bid recommendation, and on the determination of the Accounting Officer, make an award to a compliant bidder detailing the action taken and the reasons for such action;
 - (g) handling of a complaint by a supplier, contractor or consultant within the set timeframe as may be prescribed;
 - (h) submission to the Authority of —
 - (i) an annual procurement plan,
 - (ii) a list of contracts awarded, and
 - (iii) copies of complaints and reports of the findings; and
 - (i) proper management of an awarded contract, by ensuring that an implementation of the awarded contract is in accordance with the terms and conditions of the award.
- (3) An Accounting Officer —

Functions of Accounting Officers in contract management

- (a) may, in the exercise of his or her functions, request for a technical and professional advice from an appropriate body or person; and
- (b) shall, in relation to his or her functions under this Act, exercise such functions independently.

42. (1) An Accounting Officer shall ensure that a procuring entity keeps and maintains an effective and efficient contract management system in accordance with the provisions of this Act.

- (2) The contract management system shall be aimed at ensuring —
 - (a) effective management of contracts for the procurement of goods, services or works;
 - (b) performance, in line with the contract; and
 - (c) that appropriate timely measures are taken in the case of non-performance or underperformance of a contract, or any contravention of contractual obligations.
- (3) An Accounting Officer shall —
 - (a) comply with the procedures and rules for managing a procuring entity contract; and
 - (b) exercise his or her functions in relation to contract management in accordance with section 41 (3) (b).

Delegation of functions of Accounting Officers

43. (1) An Accounting Officer may, in accordance with the terms and conditions as may be prescribed, delegate, in writing, a procurement function of a procuring entity to —

- (a) a subdivision of the procuring entity;
- (b) another procuring entity; or
- (c) a procurement agent or a procurement service provider.

(2) The delegation referred to under subsection (1) shall not divest an Accounting Officer of any procurement function delegated and the Accounting Officer may vary or set aside any decision made in the exercise of the procurement function delegated by such Accounting Officer.

(3) An Accounting Officer shall remain responsible and accountable for any decision made in the exercise of a procurement function delegated by the Accounting Officer.

Procurement agents or procurement service providers

44. (1) An Accounting Officer may, in a manner as may be prescribed, appoint a procurement agent or a procurement service provider to carry out procurement functions on behalf of the Accounting Officer:

Provided that —

- (i) the procurement agent or procurement service provider shall be appointed in accordance with the provisions of this Act, and
- (ii) all procurement by the procurement agent or procurement service provider shall be undertaken in accordance with the provisions of this Act.

(2) An Accounting Officer shall remain accountable for decisions made by a procurement agent or a procurement service provider.

PART VII — *Procurement Oversight Units, Ad Hoc Evaluation
Committees, User Departments and Central Agencies*

45. An Accounting Officer shall cause to be established in a procuring entity, a procurement oversight unit consisting of such number of employees, with the relevant qualifications and at the appropriate level, and as the Accounting Officer may determine.

Establishment and composition of procurement oversight units

46. (1) A procurement oversight unit shall —

Functions of procurement oversight units

- (a) be the principal advisor to an Accounting Officer on any procurement matter falling within the scope of this Act;
- (b) ensure that any procurement activity by a procuring entity is conducted in accordance with the provisions of this Act; and
- (c) be responsible for the pre-adjudication, adjudication and recommendation of an award, rejection, cancellation or any other appropriate recommendation related to a tender in a procuring entity.

(2) A procurement oversight unit shall, in the exercise of its functions, carry out such functions independently.

(3) The independence of a procurement oversight unit referred to under subsection (2) relates to the segregation of duties and shall not be construed to mean that a procurement oversight unit shall not report to or be under the supervision or direction of an Accounting Officer.

47. An Accounting Officer shall cause to be established in a procuring entity, a procurement unit consisting of such number of employees, with the relevant qualifications and at the appropriate level, and as the Accounting Officer may determine.

Establishment and composition of procurement units

48. (1) A procurement unit shall be responsible for the acquisition of goods, works and services for a procuring entity, provision of guidance, oversee the procurement function, and monitor the procurement activity to ensure compliance with the provisions of this Act.

Functions of procurement units

(2) Notwithstanding subsection (1), a procurement unit shall —

- (a) manage a procurement activity of a procuring entity;
- (b) plan the procurement by a procuring entity;
- (c) prepare a statement of requirements;
- (d) prepare a tender document;
- (e) maintain a list of suppliers;
- (f) evaluate or manage the evaluation of a bid;
- (g) prepare a contract document;
- (h) issue an approved contract document;
- (i) administer and manage a contract once placed;
- (j) arrange for the payment of a contractor;
- (k) keep and maintain any record of procurement;
- (l) prepare a monthly report for an Accounting Officer;
- (m) coordinate a project and liaise with a procuring entity's Department on any other aspect of its procurement;
- (n) act as a procurement coordinator for the user Department of a procuring entity; and
- (o) undertake any other procurement function as may be delegated by an Accounting Officer.

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- (3) A procurement unit shall, in the exercise of its functions under this section, carry out such functions independently.
- 49.** (1) An Accounting Officer shall establish an *ad hoc* Evaluation Committee which shall conduct the evaluation of bids and submit recommendations to a procurement unit.
- (2) The composition, functions, meetings and other matters relating to an *ad hoc* Evaluation Committee shall be as prescribed.
- 50.** (1) The functions of a user Department shall be as prescribed.
- (2) Subject to the provisions of this Act, a user Department shall exercise its functions under this Act independently.
- 51.** (1) The Minister may, by Order published in the *Gazette*, designate a central agency as a Government Procurement Office.
- (2) The functions of a Government Procurement Office shall be to —
- (a) determine and publish in the *Gazette*, works, services and supplies that are categorised as common use items for Government;
 - (b) develop and manage framework contracts for procurement of common use items by a procuring entity within Government;
 - (c) develop, manage and issue guidelines and policies on the procurement of works, services and supplies falling under the category of common use items; and
 - (d) ensure proper management and implementation of procurement regulations and procedures.
- (3) A procuring entity shall, once a central agency is designated under subsection (1), procure common use items or any other works, services or supplies in accordance with such procedures as may be prescribed.
- (4) For purposes of this section, “Government Procurement Office” means the central office responsible for the —
- (a) control and management of the procurement of common use items by Ministries or Departments; and
 - (b) management of framework contracts for different Ministries.

PART VIII — *Methods and Selection of Procurement*

- 52.** (1) A procuring entity may conduct procurement by means of —
- (a) open domestic bidding;
 - (b) open international bidding;
 - (c) restricted domestic bidding;
 - (d) restricted international bidding;
 - (e) request for quotations;
 - (f) micro procurement;
 - (g) request for proposals with competitive negotiations;
 - (h) competitive dialogue;
 - (i) reverse auction;
 - (j) direct procurement;
 - (k) unsolicited bid;

- (l) best and final offer;
 - (m) negotiated procedure;
 - (n) expression of interest; or
 - (o) any other method that the Minister may prescribe.
- (2) The term “competitive dialogue” under subsection (1) (h) means a —
- (a) bidding method that allows a bidder to develop alternative proposals in response to a procuring entity’s requirements and tenderers are invited to submit competitive bids when the proposals are developed to sufficient detail; or
 - (b) a procedure in which a contractor or a bidder is allowed to develop alternative proposals in response to a procuring entity’s requirements, and candidates with proposals that are suitable and capable of meeting the procuring entity’s requirements are invited to tender.

53. (1) Except as otherwise prescribed, a procuring entity shall conduct procurement by means of open domestic bidding.

Selection of
procurement
method

(2) A procuring entity may use a method of procurement other than open domestic bidding to accommodate the circumstances of the procurement concerned but shall seek to maximise competition to the extent practicable.

(3) If a procuring entity uses a method of procurement other than open domestic bidding, it shall, subject to the approval by an Accounting Officer, provide justification for the use of that method.

(4) A procuring entity shall not split a procurement in order to avoid a formal procurement.

54. (1) The procurement of highly sensitive works, services, supplies or any combination thereof, however classified, shall be done in accordance with the provisions of this Act, taking into account the sensitivity and confidential nature of such procurement.

Procurement
of highly
sensitive
works, services
or supplies

(2) A procuring entity that undertakes the procurement of highly sensitive works, services, supplies or any combination thereof, however classified, shall manage its procurement on the basis of a dual list, covering items that are subject to —

- (a) open procurement method; and
 - (b) restricted procurement of such highly sensitive works, services, supplies or any combination thereof, however classified, in respect of which strict confidentiality and utmost secrecy may be required for a fixed period of time.
- (3) A procuring entity shall agree with the Authority annually on the —
- (a) category of restricted items to be included in a restricted list; and
 - (b) restricted procurement to be applied to each category of items on a restricted list.

(4) The restricted list referred to under subsection (3) shall be subject to a classified audit by the Auditor General.

55. (1) The Minister shall establish a National eProcurement System which shall be an electronic end-to-end one stop information and transaction portal for any public procurement in accordance with this Act.

National
eProcurement
System

(2) A document which has to be submitted in writing under this Act shall include a document submitted electronically using the National eProcurement System referred to under subsection (1).

(3) The National eProcurement System shall provide for —

- (a) the registration of users and suppliers;
- (b) the preparation of a tender;
- (c) the advertising of a tender;
- (d) auction;
- (e) the submission of a tender and opening of a tender;
- (f) the evaluation and award of a tender;
- (g) the signing of a contract;
- (h) the certification of a payment;
- (i) the handling of a complaint by a contractor;
- (j) a catalogue;
- (k) the management of demand;
- (l) the management of a supplier;
- (m) a quotation;
- (n) the management of a contract;
- (o) the evaluation of a supplier;
- (p) procurement planning; and
- (q) any other procurement process.

(4) The procedure and process for the conduct of procurement through the National eProcurement System shall be as prescribed.

PART IX — *Standardised Bidding Packages and Bidding Processes*

Standardised
bidding
packages and
bidding
processes

56. (1) The Authority shall develop and issue, and amend where necessary, a standardised bidding package and contract, which shall be used on a mandatory basis by any procuring entity as may be prescribed.

(2) A procuring entity shall enter into an integrity agreement with contractors to promote compliance to ethical conduct and integrity in the bidding process and execution of a contract.

(3) An integrity agreement referred to under subsection (2) shall form part of a standardised bidding package.

(4) A procuring entity shall issue a bidding document to a bidder who intends to respond to an invitation to bid in accordance with the procedures and requirements specified in the bidding document.

(5) A procuring entity shall charge a bidder fee, as may be prescribed, for a bid document.

(6) The Minister shall prescribe the process and procedure for —

- (a) the submission of a bid;
- (b) the bidding method;
- (c) the publication of a bid;
- (d) the issue content of a bidding package;
- (e) the validity of a bid;
- (f) the evaluation of a bid;

- (g) the modification of a bid;
- (h) the closing of a bid;
- (i) the withdrawal of a bid;
- (j) the opening of a bid; and
- (k) any other related matter.

57. (1) The Authority shall issue national standards specifications to a procuring entity for use in its procurement activity.

National standards specifications

(2) Where the Authority has not yet issued the national standards specifications referred to under subsection (1), the Authority shall, in the interim and after consultation with the relevant stakeholders, determine which country's or institution's national standards specifications shall be used by a procuring entity in its bidding packages.

58. (1) A procuring entity may, in exceptional cases, apply to the Authority for derogation from national standards specifications.

Derogation from national standards specifications

(2) An application under subsection (1) shall be —

- (a) in such form as may be prescribed; and
- (b) accompanied by supporting documentation and justification, as the Authority may require.

(3) The Authority shall, where a procuring entity submits satisfactory documents detailing the variation sought and justification for the variation, permit such variation.

59. (1) From the time a Tender Notice is issued, the following shall form part of the contract and have legal validity, the —

Legal status of bid package correspondence

- (a) correspondence between a bidder and a procuring entity including the bidding package, up to the point of adjudication; and
- (b) communication between an awarded bidder and a procuring entity, up to the point of signing of the contract and thereafter, throughout the period of the execution and completion of the contract.

(2) Notwithstanding subsection (1), electronic and paper form of an invitation to tender, the issue of a bidding package and the receipt of submission of a bid shall have legal validity.

60. Where procurement is by electronic means, the transmitter shall, in each instance, be responsible for the confidentiality, completeness, integrity and timeliness of the data and the document being transmitted.

Electronic procurement

61. The period of validity of a tender shall be the period specified in a tender document.

Validity period of tenders

62. (1) English shall be the official language of any communication in relation to a procurement process, except where —

Medium of communication

- (a) the Authority otherwise determines; or
- (b) it is otherwise stated in the specific instructions in a bidding package or Tender Notice.

(2) Subject to the provisions of this Act, any document, notification, decision and any other communication in accordance with this Act shall be in writing.

(3) Notwithstanding subsection (2), a procuring entity may use any other form of communication, including electronic communication, for publication of an invitation to bid, transmission of a bidding document, submission of a bid, conclusion of a contract and the processing of payment.

PART X — Evaluation and Adjudication Procedure

Evaluation of
bid packages
and adjudication
procedure

- 63.** (1) A procuring entity shall —
- (a) in a bid package, provide for, in the instructions —
 - (i) the criteria to be used in the evaluation process,
 - (ii) the value and weights to be attached to each criterion, and
 - (iii) the evaluation procedure or methodology to be followed in the conduct of the evaluation; and
 - (b) establish which procurement method and procedure shall apply in each case and class of bids, except in an emergency where either a sole procurement or competitive negotiation method and procedure may apply.
- (2) A procuring entity shall consider only a substantially compliant bid for comparison, evaluation, adjudication and award.
- (3) A bid or an invitation to tender issued for a procurement activity which does not comply with the applicable procedures under this Act shall be invalid.

Use of industry
standards in
evaluation and
adjudication

- 64.** (1) In the evaluation and adjudication of a bid, an evaluator or adjudicator shall not take into account any factor that is outside the national standards specifications or the evaluation procedure explicitly stated in the bidding package when arriving at a recommendation or in making an award, unless there is an extenuating reason to use an industry standard.
- (2) Subject to section 58, an industry standard may be used as an alternative or supplement to an evaluation method set out in the bidding package if there is an extenuating reason under subsection (1).
- (3) A procuring entity shall advise, in writing and in advance, a pre-qualification applicant or bidder of the use of an industry standard under subsection (2), and indicate in such advice —
- (a) which industry standard shall be followed;
 - (b) the specific criteria and the values and weights to be attributed to each in the conduct of the evaluation and adjudication; and
 - (c) the percentage of the total points the industry standard shall account for.
- (4) Where there is a conflict between an industry standard under subsection (3) (a) and a standard under any provision of this Act, an interested party shall immediately, in writing, bring such conflict to the attention of the Authority, and the Authority shall decide which standard shall be followed.

65. (1) An alteration to the conditions of an awarded bid by a procuring entity, either before or in the course of its implementation, shall require the prior written approval of an Accounting Officer, if the alteration —

Alterations to awarded bids

(a) is likely to impact on the evaluation and adjudication ranking of the awarded bid and thus, the choice of contractor; and

(b) amends the nature of the awarded bid in terms of the contract cost, implementation schedule, components, aggregation or splitting.

(2) Subsection (1) shall not apply to a normal variation in the execution of a contract, where such variation is within the contingency sum of a bid approved by an Accounting Officer.

(3) The guidelines for a normal variation referred to in subsection (2) shall be as prescribed.

66. (1) A bidder, or any party with an interest in the procurement process in question, shall —

Changes in bidder's circumstances

(a) from the point of the submission to the adjudication of a bid; or

(b) at any point after the award, including execution,

immediately draw to the attention of an Accounting Officer or a procuring entity, any changes in the circumstances of the bidder that could materially affect such bidder's capacity to successfully deliver the required scheduled outputs.

(2) Subject to section 65, an Accounting Officer or a procuring entity may take such action as may be necessary to ensure the successful delivery of the required outputs.

67. A procuring entity shall, in the conduct of its business —

Inclusion of all relevant clauses in bidding packages

(a) include in a bidding package all relevant standard clauses in respect of matters such as assurance, warranty, bond and insurance;

(b) ensure that the relevant penalty clauses are contained in a bidding package, and shall apply the penalty clauses in respect of non-performance by a contractor;

(c) not waive provisions relating to good practice;

(d) not exempt a party from any liability relating to negligent conduct; and

(e) not expose the Government to unnecessary commercial risk and liability.

68. (1) An Accounting Officer shall not approve any retroactive invitation to tender or bid, or any procurement activity issued by a procuring entity.

Retroactive approval

(2) Notwithstanding subsection (1), an Accounting Officer may approve a retroactive bid issued or invitation to tender, where the Accounting Officer is satisfied that a procuring entity was required to proceed with the procurement due to an urgent requirement or emergency arising from special circumstances.

(3) An Accounting Officer shall, where the reason or circumstance for the retroactive approval of a procurement is not justifiable, ensure that action is taken against a person responsible for the retroactive approval of the procurement.

Availability of funds	<p>(4) The Minister may prescribe the special circumstances under subsection (2) that an Accounting Officer shall consider sufficient to justify the issuing of a retroactive approval of a bid or invitation to tender.</p>
End of activity report	<p>69. A procuring entity shall not invite a bid or sign a public private partnership contract if the —</p> <ul style="list-style-type: none"> (a) funds for the bid are inadequate or not available; or (b) procuring entity has not issued a written confirmation that the funds required for the bid are available. <p>70. (1) In order to facilitate performance evaluation and monitoring by the Authority, a procuring entity shall submit to the Authority in respect of each bid, an end of activity report not later than the date of final payment to the contractor, including, the activity's —</p> <ul style="list-style-type: none"> (a) estimated, awarded and final cost, or revenue; (b) changes in scale, complexity, component and output during execution <i>vis-à-vis</i> the awarded bid; (c) achievement of performance indicators as per specifications; (d) variations and sources; (e) cost escalation and sources; (f) performance record, in relation to the contractor; and (g) any other information as may be required by the Authority. <p>(2) In addition to the requirement under subsection (1), the Authority may require a procuring entity to submit —</p> <ul style="list-style-type: none"> (a) an interim report detailing the contractor's performance; and (b) any other information as may be required by the Authority. <p>(3) The Authority shall, taking into account the complexity and duration of the activity, determine the frequency of submission of the interim report referred under subsection (2) (a).</p> <p>(4) A procuring entity shall, in the execution of its functions under section 40, report to the Authority, any deviations from the specifications of a contract by the contractor.</p> <p>(5) Where a procuring entity reports to the Authority in accordance with this section, the Authority shall conduct an investigation and take appropriate action under this Act.</p> <p>(6) Where a procuring entity fails to report to the Authority in accordance with subsection (4), the Authority may take appropriate action under this Act against the procuring entity and an Accounting Officer.</p>
Annual strategic procurement plans	<p>71. (1) A procuring entity shall —</p> <ul style="list-style-type: none"> (a) prepare an annual strategic procurement plan to support its approved procurement budget for each financial year; and (b) by notice in the <i>Gazette</i>, in a newspaper of national circulation, electronic media or Government portal, publish such approved procurement plan at the beginning of each financial year for any person interested in bidding to prepare for optimal competition.

(2) A procuring entity shall not divide a procurement plan into parts or lower the value of a procurement in order to avoid the application of this Act.

(3) The Minister may prescribe the manner in which an annual procurement plan shall be prepared and the timelines for the publication of procurement plans.

PART XI — *Reservation and Preferential Treatment*

72. (1) Pursuant to its economic and social objectives, the Government shall from time to time introduce a reservation and preferential procurement scheme for a citizen or citizen contractor, which shall be consistent with its external obligations and its stable, market oriented, macro-economic framework.

Economic and social objectives in procurement

(2) The reservation and preferential procurement scheme referred to under subsection (1) shall apply to a citizen, or a citizen contractor of works, service and supplies or any combination thereof, however classified.

73. In order to promote the empowerment of a citizen contractor —

Empowerment of citizen contractors

- (a) the citizen contractor shall, in relation to the respective classification of contractors, be treated fairly and equitably in respect of any procurement activity;
- (b) there shall be an equitable distribution of procurement activities within and across the grades and codes of the contractor, where applicable;
- (c) the extent of reservation or preference extended to a citizen contractor shall be proportional to the citizen contractor's assessed capacity to fully comply with the applicable specifications, specific instructions and conditions in the relevant bidding packages;
- (d) a bid shall be awarded strictly on a competitive basis among contractors of a given grade, code and classification in relation to a reservation and preference scheme; and
- (e) a procuring entity shall, as the Minister may prescribe, unbundle a tender to promote participation of a citizen or citizen contractor.

74. A procuring entity shall, when preparing a bidding package or brief, or evaluating a bid proposal, comply with the provisions of this Act in respect of a reservation and preferential scheme which may be in place from time to time.

Process for preferential schemes

75. To be eligible for a specific reservation or preference scheme, a contractor shall attach to its bidding package certification or proof of eligibility from the competent issuing authority.

Certification of eligibility

76. (1) Except as otherwise provided under this Act, all works, services and supplies procurement shall be reserved for a citizen or citizen contractor.

Reserved schemes

- (2) Notwithstanding the generality of subsection (1), a reservation scheme shall apply to —
- (a) a procurement activity offered only by a 100 percent citizen owned micro, small and medium enterprise;
 - (b) goods that are manufactured locally by a 100 percent citizen owned contractor;
 - (c) services that are provided by a citizen or a 100 percent citizen owned contractor;
 - (d) a citizen contractor based in a locality, district or region;
 - (e) a targeted citizen or a category of businesses or sectors;
 - (f) a procurement activity intended to promote innovation, local technology and the commercialisation of the procurement activity; and
 - (g) the creation of jobs, capacity building and skills transfer.
- (3) For purposes of this section —
- (a) “manufacture” means to subject a physical matter to any process which materially changes it or its packaging in substance, character or appearance and it includes the assembly of parts;
 - (b) “manufactured locally” means goods that are manufactured in Botswana by an entity that is registered and undertakes business in Botswana or is locally based; and
 - (c) “targeted citizen” has the same meaning assigned to it in the Economic Inclusion Act.

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Procurement reservation and preference schemes

77. (1) The Minister may prescribe any applicable procurement reservation and preference schemes to be applied by a procuring entity, and the procurement reservation or preference schemes shall be expressly provided for in the evaluation criteria section of a bidding package to which they are applicable.

(2) An Accounting Officer shall ensure that a procuring entity, when preparing a bidding package or evaluating a bid proposal, complies with the provisions of this Act in respect of reservation and preference schemes, as may be prescribed.

(3) A bidding package that is issued without expressly providing for the inclusion of the prescribed reservation or preference schemes, where such reservation or preference scheme is applicable, shall be invalid.

Scale of preference

78. (1) The level of preference shall be applied in the following descending order —

- (a) joint ventures between citizen contractors;
- (b) sole citizen contractors;
- (c) joint ventures between citizen and local contractors, with majority shares held by citizen contractors; and
- (d) association arrangements between citizen subcontractors and local contractors.

(2) The application of preference under subsection (1) shall be as may be prescribed.

(3) A procuring entity shall, where a preference is for a citizen owned contractor or a joint venture with a non-citizen owned contractor, ensure compliance with the provisions relating to a beneficial owner under the Companies Act.

(4) The rules and procedures relating to a beneficial owner under this Act shall be as prescribed.

(5) For purposes of this section, “beneficial owner” has the same meaning assigned to it under the Companies Act.

79. A procuring entity shall, for the purposes of the ranking of bids and for comparison only, apply the applicable percentage preferences to eligible bids.

Ranking of bids

80. (1) A preference in respect of supplies may apply to any product produced in Botswana.

Preference for supplies

(2) A preference referred to under subsection (1) may vary in accordance with the percentage of value addition or local content as may be prescribed.

(3) For purposes of this section, “local content” means the sum of domestic or locally generated input of materials, labour, services, technology, works or parts, or any other related input, that is required or used at any stage in a supply chain.

81. (1) Where the primary contractor, either domestic or abroad, elects or is required to use citizen subcontractors in respect of any bid submission or in the execution of a bid award, such primary contractor shall append to its bidding package a subcontracting agreement for each subcontractor, detailing the key operational principles which shall govern the contract of the parties.

Primary contractors and subcontractors

(2) For purposes of this section, “primary contractor” means the principal contractor responsible for the completion of a project under a contract.

(3) The Minister shall make regulations to promote fair, equitable, transparent, timely and successful execution of contracts in order to build sustainable and competitive citizen capacity.

PART XII — *Accountability and Transparency: Records and Ethics*

82. The Authority, procuring entity and any other entity that falls within the scope of this Act shall —

Maintenance of records

- (a) keep and maintain detailed records of all their processes; and
- (b) preserve, maintain and safeguard all relevant documents issued and received.

83. (1) The Authority shall issue a price guide which shall provide indicative prices for commonly procured goods, works and services for reference by a procuring entity, procuring unit or bidder, when preparing a bid for procurement, in order to —

Access to documentation and databases

- (a) estimate contract value; and
- (b) measure the reasonableness of prices when evaluating a tender.

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(2) The Authority shall, subject to the cost recovery charges, give the public access to —

- (a) the standard bidding packages, forms, national standards specifications and annual reports, and all amendments thereto; and
- (b) databases containing the —
 - (i) contractors' register,
 - (ii) specification providers,
 - (iii) test and certification contractors,
 - (iv) insurance and intermodal transport operations,
 - (v) documentation collection,
 - (vi) contractors' prices and construction price index,
 - (vii) professional register, and
 - (viii) price guide referred under subsection (1).

Obligation to advertise

84. (1) The Authority shall make the information on Contractor Register available to an applicant, including a list of registered contractors, grades and codes.

(2) The Authority shall publish the decision made in respect of any action taken, including the de-registration, debarring and suspension of contractors.

Publicity and media

85. (1) A procuring entity and the Tribunal shall, in a manner as may be prescribed, publicise any decision arising from a complaint and challenges dealt with by the procuring entity or the Tribunal.

(2) The Authority shall conduct outreach programmes from time to time on the developments in the procurement system that are of public interest.

Code of ethical behaviour and declaration of interest

86. A member of the Board, committee or sub-committee, a co-opted person, and employees of the Authority, a procuring entity, and any other person involved in procurement shall sign and adhere to a code of ethical behaviour as may be prescribed.

Classification of information

87. A bid submission and pre-qualification application for registration, shall remain confidential and shall only be available to the Public Oversight Agencies in the event of —

- (a) an investigation, from the time they are received, until a decision or an award is made;
- (b) an appeal, until a decision is arrived at; or
- (c) a court process.

Rights of review and research

88. Once —

- (a) a pre-qualification list is approved or a bid has been awarded and the contract duly signed by the contractor and the procuring entity; or
- (b) an application for registration has been approved and the details of the registration have been communicated to the applicant, any relevant communication shall, subject to section 87, be declassified in accordance with section 89 and shall be available to the public for review and research.

89. Any communication on a bid and registration shall be declassified after two years, except in cases where a project is still in progress, disclosure would be prejudicial to the interest of the Government or the interest of the contractors or private party, in which case a procuring entity or the Authority shall retain the communication for a further period that the procuring entity or the Authority may deem appropriate in any given circumstances.

Declassification
of information

90. The Authority shall transmit any of its records that have been in existence for five years or more to the National Archives and Records Services, except where an awarded bid continues to be under implementation, dispute or investigation, in which case such files shall be retained by the Authority until the process in question is completed, before being transmitted to the National Archives and Records Services.

Transmission
of documents

PART XIII — *Registration of Contractors*

91. (1) The Authority shall continue to keep and maintain an up-to-date register of contractors, known as the “Contractors’ Register”, in works, services and supplies, or any combination thereof, however classified.

Contractors’
Register

(2) The Contractors’ Register shall be open for inspection to any member of the public upon payment of such fees as may be prescribed.

(3) The Authority shall enter in the Contractors’ Register, in respect of each contractor —

- (a) the contractor’s name;
- (b) the postal address and physical address at which the contractor carries out its business;
- (c) the name of the company’s representative;
- (d) the contact details of the contractor;
- (e) the grade, code and sub code;
- (f) the class of works, services or supplies;
- (g) the date of registration, and registration number and expiry date of registration; and
- (h) any other particulars as may be prescribed.

(4) Where —

- (a) a contractor ceases to carry on the business in respect of which it is registered; or
- (b) a change occurs in any particulars which are required to be entered in the Contractors’ Register with respect to the contractor, such contractor shall, not more than three months from the time the circumstances upon which the change is based arise, submit to the Authority, particulars of change of their registration status.

(5) Where a contractor fails to submit to the Authority, any particulars of change of their registration status in accordance with subsection (4), the contractor —

- (a) shall cease to bid for any tender during the period of registration under section 92 (4); and
 - (b) may be liable to pay such penalty as may be prescribed, or be de-listed from the Contractors' Register for failure to pay the penalty.
 - (6) A contractor may apply to the Authority for the upgrade or downgrade of the contractor by the Authority in such form and on payment of such fees as may be prescribed.
 - (7) The Authority may upgrade or downgrade a contractor as it deems necessary in line with the criteria to be prescribed.
- 92.** (1) A contractor who intends to bid for procurement may apply to the Authority in such form as may be prescribed, to be listed in the Contractors' Register, if the contractor —
- (a) is licensed or incorporated under the relevant Laws of Botswana; and
 - (b) is domiciled in Botswana.
- (2) An application under subsection (1) shall be accompanied by —
- (a) such information as may be prescribed; and
 - (b) such fees as may be prescribed.
- (3) The Authority shall —
- (a) assess every application received for registration for the mandatory requirements, as may be prescribed;
 - (b) where a contractor complies with the requirements of this section, issue the contractor with a certificate of registration; and
 - (c) where a contractor does not comply, not register the contractor.
- (4) The registration of a contractor in the Contractors' Register shall be valid for a period of five years, after which a contractor may apply for re-registration in accordance with subsections (1) and (2).
- (5) Notwithstanding any provision of this Act, the Authority may, where it deems appropriate, register a contractor for a grade of works, services or supplies other than that which they applied for.
- 93.** (1) The Contractors' Register shall not be considered as a pre-qualification list.
- (2) A registered contractor shall satisfy such other pre-qualification conditions as may be specified by a procuring entity in respect of any bid, in order to be eligible to tender in each specific case.
- 94.** A non-registered contractor shall be disqualified from tendering, except in projects where the specific instructions in both the bidding package and the Tender Notice explicitly state that registration is not an eligibility requirement to participate.
- 95.** (1) The registration of contractors shall be by —
- (a) classification of contractors, such as works, services and supplies and any other rational division within a class;
 - (b) grades and codes, based on scale and complexity of procurement and the capacity of contractors, according to international practice; and
 - (c) types of business associations or arrangements between contractors.
- (2) The modality for the classification under subsection (1) shall be as per the criteria set and revised from time to time by the Authority.

Registration requirements

Registration and pre-qualification

Non-registered contractors

Classification of contractors

96. The Authority shall review the Contractors' Register every five years and de-list from the Contractors' Register any contractor who has not applied for the renewal of the certificate of registration.

Review of
registration

97. (1) A contractor, registered in accordance with this Act, shall within three months of the date on which the contractor's certificate of registration is due to lapse, apply to the Authority, in such manner as may be prescribed for a renewal of the certificate of registration.

Renewal of
registration

(2) An application under subsection (1) shall be accompanied by —

- (a) such information as may be required by the Authority; and
- (b) such fee as may be prescribed.

(3) Where a contractor fails to pay the prescribed fee within the stipulated time under subsection (1), the Authority shall remove such contractor from the Contractors' Register.

(4) The Authority shall assess every application received for renewal to ensure that the requirements for registration under this Act are met.

(5) Section 92 (3), (4) and (5) shall, with the necessary modifications, apply to an application for renewal of certificate of registration.

98. (1) The Authority may at any time de-list a registered contractor from the Contractors' Register where the contractor fails to discharge the duties, responsibilities and obligations of a contractor in terms of the code of conduct.

De-listing and
restoration of
contractors

(2) A contractor who has been de-listed from the Contractors' Register under this section shall, with effect from the date of the de-listing, cease to be registered for the purposes of this Act.

(3) Where the name of a contractor has been de-listed from the Contractors' Register the Authority may, either on its own volition or on application by the contractor concerned, in such manner as may be prescribed, direct that the contractor be restored in the Contractors' Register.

(4) The restoration of the registration status of a contractor in terms of subsection (3) shall meet the requirements of section 92.

99. (1) A contractor shall, by virtue of registration, conform to a code of conduct, as may be prescribed, in respect to any procurement activity.

Code of
conduct of
contractors

(2) A contractor who is —

- (a) convicted of corruption or bribery under the Corruption and Economic Crime Act; or
- (b) listed in the financial crime, anti-money laundering or counter terrorism activities in terms of the Financial Intelligence Act and the Counter Terrorism Act, respectively, or any other law as a person who is not eligible to participate in public procurement, including the contractor's shareholders, directors, partners, or any person in a key operational position of the contractor, shall not be eligible to participate in any procurement activity for such period as may be specified in the code of conduct.

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- Suspension of contractors
- (3) Where a contractor referred to under subsection (2) is awarded a tender without the knowledge of a procuring entity, the procuring entity shall terminate the tender and such procuring entity shall not be liable for such termination.
- 100.** (1) The Authority may suspend or de-list, from the Contractors' Register, a contractor for —
- (a) conduct which contravenes the code of conduct; or
 - (b) underperformance of a contract, which contravenes the provisions set out in the code of conduct.
- (2) A bidder who is debarred from taking part in any procurement activity by a local or recognised international regulatory body or organisation, or professional body or organisation shall, by virtue of being barred by that body or organisation, and for the duration of such debarment, be suspended or de-listed from participating in any procurement activity under this Act.
- (3) The Authority shall debar from registration, any entity associated with a suspended contractor, for such period as may be prescribed.
- Non-registration of suspended contractors
- 101.** The Authority shall debar a suspended contractor from registering a newly incorporated entity for the period of suspension in question.
- Restrictions on contractors with suspended shareholders
- 102.** (1) Where a defaulting shareholder, director, partner or any person who holds a key operational position of the suspended contractor joins another contractor, the contractor shall be debarred from bidding on a new tender until the period of suspension has lapsed.
- (2) Where at the time of a contractor's suspension the contractor owns shares in another company, a shareholder, director, partner or any person who holds a key operational position in any of the other companies in which the suspended contractor owns shares shall be debarred from bidding on a new tender until the period of the suspension has lapsed.
- Procedures for registration
- 103.** The procedures and modalities to be used by the Authority in the registration, de-registration, grading, review, de-listing, debarring and suspension of any contractor shall be as prescribed.

PART XIV — *Complaints and Dispute Resolution*

- Lodging of complaints
- 104.** (1) A procuring entity shall, after the publication of an award decision —
- (a) allow a cooling-off period of 10 days in order for the procuring entity to receive and address complaints, if any, from any contractor who is aggrieved by the award decision; and
 - (b) not enter into a contract relating to the award before the expiration of a cooling-off period referred to under paragraph (a).
- (2) A contractor who is aggrieved by a breach of any provision of this Act or claims to have suffered or is likely to suffer loss or damages due to a breach of a duty imposed on a procuring entity shall, at the first instance, lodge a complaint before an Accounting Officer for review.

(3) A contractor who lodges a complaint in terms of subsection (1) shall have the right to participate in the review proceedings before an Accounting Officer.

(4) A contractor who fails to participate in the review proceedings shall be barred from subsequently lodging the same complaint.

(5) Notwithstanding subsection (3), an Accounting Officer may allow an application for the condonation of failure to participate in the review proceedings, where the complainant shows good cause for such failure.

(6) An Accounting Officer shall not entertain a complaint after a contract has entered into force.

105. (1) An Accounting Officer may, after considering a complaint and determining that the complaint is a frivolous or vexatious complaint, dismiss such complaint.

Frivolous or
vexatious
complaints

(2) Notwithstanding subsection (1), an Accounting Officer may refer a complaint considered and determined to be frivolous or vexatious to the Tribunal for the Tribunal to take any appropriate action as may be prescribed.

(3) For purposes of this section, “frivolous or vexatious complaint” means a complaint —

- (a) that lacks arguable basis in law or fact, or its contention is baseless and intended to cause delays or frustrate the procurement process;
- (b) where the complainant appears to have no interest in the complaint to which the grievance relates; or
- (c) where it appears that any procedure for resolving the complaint, that has been agreed by the parties to such complaint has not been followed or completed by any of the parties to the complaint.

106. (1) An aggrieved person shall submit his or her complaint in writing to an Accounting Officer within 10 days from the date of the publication of an award decision by the Accounting Officer, relating to the complaint.

Timelines for
submission of
complaints

(2) An Accounting Officer shall not entertain a complaint unless it is submitted to the Accounting Officer within the period referred to under subsection (1).

107. (1) An Accounting Officer shall, after receipt of a complaint, make a preliminary assessment of the merits of the complaint, and where warranted, cause a procurement process to be suspended pending the resolution of such complaint.

Suspension of
procurement
process

(2) Notwithstanding subsection (1), an Accounting Officer may not suspend an emergency procurement.

(3) A decision of an Accounting Officer in terms of this section, and the grounds and circumstances for the decision shall be made part of the record of a procurement process by the Accounting Officer.

(4) Where a Public Oversight Agency is investigating a procurement process, the Public Oversight Agency may not suspend a procurement process without the prior written approval by the Authority.

Notification of bidders	<p>(5) Where a procurement process has not been suspended in terms of this section and a complaint by an aggrieved bidder is determined in favour of the aggrieved bidder, on appeal to the Tribunal, the Tribunal may determine an appropriate award to the bidder.</p>
Decision of Accounting Officer	<p>108. An Accounting Officer shall, as soon as it is possible after receipt of a complaint lodged in terms of section 104 (2), notify in writing, any other bidder participating in a procurement process to which the complaint relates, of the circumstances leading to such complaint.</p> <p>109. (1) An Accounting Officer shall, within the period to be prescribed, deliver a written decision on a complaint which shall —</p> <ul style="list-style-type: none"> (a) state the reasons for the decision; and (b) where the complaint is upheld in whole or in part, indicate the corrective measures to be taken by the other party against whom the complaint is brought. <p>(2) Where an Accounting Officer fails to make a decision on a complaint within the prescribed period, the complainant may, in writing, refer the complaint to the Tribunal.</p>
Independent review panel	<p>110. An Accounting Officer may, after receipt of a complaint and depending on the nature of the complaint, constitute an independent review panel from a procuring entity of the Accounting Officer, or another procuring entity, which shall review such complaint and advise such Accounting Officer on the relevant action to be taken within a period to be prescribed.</p>
Public officers and employees of public bodies	<p>111. (1) A public officer or employee of a public body shall not participate as a bidder in any public procurement activity and no award of a tender shall be made to such public officer or employee of the public body.</p> <ul style="list-style-type: none"> (2) Without prejudice to subsection (1), an employee — <ul style="list-style-type: none"> (a) or member of a committee, of a procuring entity, or a member of the Board; and (b) of a public body or any entity falling within the scope of this Act, including the Authority and the Tribunal, shall, by virtue of his or her interest or employment in a procuring entity, be excluded from participating in public procurement. (3) An immediate member of the family of a public officer or of an employee of a public body shall not participate as a bidder in any procurement activity involving the employer of the public officer or of the public body where such public officer or employee of the public body is employed, and no award of a tender shall be made to such immediate member of the family of public officer or of an employee of a public body. (4) An Accounting Officer shall, where, after an investigation as a result of a complaint, it is established that a public officer of a procuring entity or employee of a public body has contravened the provisions of this Act, take the appropriate action against the public officer in accordance with the Public Service Act, and in relation to the employee of the public body, take appropriate action against such employee of a public body in terms of this Act and the Corruption and Economic Crime Act.

- (5) For purposes of this section —
- (a) “public officer” has the same meaning assigned to it under the Public Service Act; and
 - (b) the Minister shall, by Order published in the *Gazette*, designate a public body.

112. (1) A contractor who is aggrieved by a decision of an Accounting Officer may appeal to the Tribunal within 14 days from the date of the decision of the Accounting Officer. Appeals to Tribunal

(2) A contractor may, within the period referred to under subsection (1), in writing, submit a complaint to the Tribunal where a contract involving the complaint has entered into force.

(3) The Tribunal may, subject to the terms and conditions as may be prescribed and on application by an aggrieved contractor, condone an appeal brought outside the period under subsection (1), where it is satisfied that there is reasonable cause for failure to lodge the appeal within the set period by the aggrieved contractor.

(4) The Tribunal may, where a contract has not been concluded after receipt of a complaint, suspend —

- (a) a procurement process pending determination of the complaint or review where necessary or where, in the opinion of the Tribunal, there are grounds to suspend the procurement process; or
- (b) the performance of the contract pending determination of the complaint or review.

(5) Where a contract has been concluded by a procuring entity, based on an award decision of an Accounting Officer, the contract shall be irrevocable and its execution shall proceed without interruption whether the award decision by the Accounting Officer may in itself remain disputable by a contractor through the Tribunal.

(6) Notwithstanding subsection (5), the Tribunal may suspend and subsequently revoke or terminate the execution of a contract if in the opinion of the Tribunal, sufficient evidence has been adduced to demonstrate that the execution of the contract may cause substantial loss to the public revenue or prejudicially affect public interest.

113. A complainant who wishes to lodge a complaint shall exhaust the dispute resolution processes provided in this Act before the complainant refers the complaint to a court. Exhaustion of dispute resolution processes

PART XV — *Public Procurement Tribunal*

114. There is established, for purposes of this Act, a body independent of the Public Procurement Regulatory Authority, known as the Public Procurement Tribunal. Establishment of Tribunal

115. (1) The Tribunal shall adjudicate over any matter brought before it by a complainant for a breach of any of the provisions of this Act, or any appeal brought in accordance with the provisions of this Act. Jurisdiction of Tribunal

(2) Notwithstanding the generality of subsection (1), the Tribunal shall adjudicate over —

- (a) an appeal by a complainant of the decision of the Authority or an Accounting Officer arising at any point in a procurement process;
- (b) an appeal by a complainant at any point in the registration, declassification or disciplinary process or decision;
- (c) a complaint by the Authority against a procuring entity;
- (d) a dispute and resolution of a conflict between —
 - (i) a procuring entity and the Authority, and
 - (ii) contractors in respect of the interpretation of this Act;
- (e) a breach, termination or interpretation of a procurement contract including an integrity agreement; and
- (f) any issue within the scope of this Act upon which the Tribunal has received a written petition from the public, which the Tribunal deems to be of public interest, in respect of the procurement process.

(3) The Tribunal may recommend to the Minister any improvement to this Act, which it may deem necessary in the execution of its mandate and to prevent a recurrence of any challenges or to improve the performance of the regulatory framework.

Composition of Tribunal

- 116.** The Minister shall appoint, as a member of the Tribunal —
- (a) a President of the Tribunal, who shall be a retired High Court judge or a legal practitioner who qualifies to be appointed as a High Court Judge;
 - (b) a Vice President of the Tribunal who shall be a retired High Court Judge or a legal practitioner who qualifies to be appointed as a High Court Judge; and
 - (c) five other persons of good standing who have considerable knowledge and experience in the area of commerce, industry, public procurement and any other area of specialty relevant to the functions or mandate of the Tribunal.

Appointment of members of Tribunal

- 117.** (1) A person shall not qualify for appointment as a member of the Tribunal if he or she is —
- (a) regulated by the Authority or has an interest in an entity which is regulated by the Authority; or
 - (b) a member of the Board or is an employee of the Authority.
- (2) The Minister shall, by notice in the *Gazette*, publish the appointment of members of the Tribunal, specifying the dates of their appointment and the period for which they are appointed to the Tribunal.
- (3) A member of the Tribunal shall be paid such allowances as shall be determined by the Minister.

Tenure of office of members of Tribunal

118. The President and other members of the Tribunal shall hold office for a period not exceeding four years, and shall be eligible for re-appointment for only one further term not exceeding four years.

Disqualification, removal and suspension of members of Tribunal

119. Section 15 shall, with the necessary modifications, apply to the members of the Tribunal.

- 120.** Section 16 shall, with the necessary modifications, apply to the members of the Tribunal. Vacation of office of members of Tribunal
- 121.** Section 18 shall, with the necessary modifications, apply to the members of the Tribunal. Filling of vacancy in Tribunal
- 122.** The Tribunal shall meet —
 (a) at least once in every three months; or
 (b) whenever it deems necessary to conduct its business. Meetings of Tribunal
- 123.** Sections 21 and 22 shall, with the necessary modifications, apply to a member, Registrar and employees of the Tribunal. Disclosure of interest and confidentiality
- 124.** (1) The Tribunal may establish a committee or sub-committee which shall carry out any function of the Tribunal, which the Tribunal may delegate to the committee or sub-committee. Committees of Tribunal
 (2) The provisions of sections 21, 22 and 122 shall, with the necessary modifications, apply to a member of a committee and sub-committee of the Tribunal.
- 125.** Section 25 shall, with the necessary modifications, apply to the Tribunal. Co-option of experts by Tribunal
- 126.** (1) There shall be a Registrar of the Tribunal appointed by the Minister on such terms and conditions as the Minister may determine. Appointment of Registrar of Tribunal
 (2) The Registrar shall be the accounting officer, and an ex officio member, of the Tribunal.
 (3) The Registrar shall be appointed for a period of five years and may be eligible for re-appointment for one further term not exceeding five years.
 (4) The Registrar may resign from his or her appointment by giving a three months' notice, in writing, to the Minister or by paying a month's salary in lieu of the notice.
 (5) Subject to the general supervision and direction of the Tribunal, the Registrar shall —
 (a) manage the operations of the Tribunal;
 (b) manage the funds, property and the general business of the Tribunal;
 (c) register the orders and decisions made by the Tribunal;
 (d) maintain and keep a proper record of all proceedings and correspondence of the Tribunal;
 (e) have custody and keep proper accounts of all awards payable or paid to the Tribunal and of all moneys paid out of the Tribunal; and
 (f) carry out such other duties as the Minister may, from time to time, determine.
- 127.** A person involved in public procurement shall cooperate with the Registrar by providing the Registrar with any necessary information, documentation and data required by the Registrar for the Tribunal to discharge its functions under this Act. Cooperation with Registrar of Tribunal

A.270

Appointment
of employees
of Tribunal

128. The Tribunal shall —

- (a) on the recommendation of the Registrar, appoint such employees of the Tribunal as it may consider necessary for the proper discharge of the functions of the Tribunal; and
- (b) determine the terms and conditions of the employment of such employees.

Funds of
Tribunal

129. (1) The funds of the Tribunal shall consist of any —

- (a) grants or donations that the Tribunal may receive; and
- (b) fees that the Tribunal may charge for services rendered in terms of this Act.

(2) There shall be paid from the funds of the Tribunal —

- (a) the salaries and allowances of its members and employees;
- (b) such other remuneration necessary to pay the members and employees of the Tribunal, or any other person engaged in the business of the Tribunal, as the Minister may determine; and
- (c) any other expenditure incurred by the Tribunal in the performance of its functions or discharge of its mandate.

(3) The Tribunal shall manage its own budget through subvention or grant from the Government until such time that the Tribunal is able to source its own funding.

(4) The Registrar shall open a bank account for the Tribunal, in a bank that is registered under the Banking Act and approved by the Tribunal.

Cap. 46:04

Financial year
of Tribunal

130. The financial year of the Tribunal shall be a period of 12 months starting on 1st April and ending on 31st March of the following year.

Accounts and
audit of
Tribunal

131. (1) The Tribunal shall keep and maintain proper accounts and records of accounts in respect of every financial year relating to the assets, liabilities, income and expenditure of the Tribunal, and shall prepare, in each financial year, a financial report in accordance with applicable accounting standards which shall consist of an annual report on the operations of the Tribunal during a financial year.

(2) A financial report shall include all information necessary to give a true and fair view of the financial position and performance of the Tribunal.

(3) The Tribunal shall cause a financial report to be audited by an independent auditor, appointed by the Tribunal and approved by the Minister.

(4) The independent auditor shall audit a financial report and report to the Tribunal whether, in his or her opinion, the financial report gives a true and fair view of the state of affairs of the Tribunal as at the end of a financial year to which it relates, and where the independent auditor is not of that opinion, he or she shall state his or her reasons in a report (hereinafter referred to as an “independent auditor’s report”).

(5) The Tribunal shall, within six months after the end of each financial year, or such longer period as the Minister may approve, submit to the Minister, a copy of the —

- (a) financial report; and
- (b) independent auditor’s report.

(6) The Minister shall within 30 days of receipt of the financial report and a copy of the independent auditor's report, lay the financial report and the independent auditor's report before the National Assembly.

132. (1) The Tribunal shall, within six months after the end of each financial year, cause to be prepared and submitted to the Minister, an annual report on its activities and operations, and all complaints and appeals handled during a financial year.

Annual plans

(2) A copy of an annual report shall, when submitted to the Minister, be accompanied by —

- (a) a copy of audited accounts or financial report of the Tribunal;
- (b) a copy of the independent auditor's report on the accounts of the Tribunal; and
- (c) such other information as the Minister may direct.

(3) The Tribunal shall submit to the Minister, an annual management plan based on its current rolling development plan, which shall be concurrent to the National Development Plan, setting out —

- (a) the previous year's performance results;
- (b) the objectives of the current year and the resources required to deliver on the specified outputs for the Minister's approval; and
- (c) such other information as may be required by the Minister.

133. Section 38 shall, with the necessary modifications, apply to the employees of the Tribunal.

Pension and other funds of employees of Tribunal

134. (1) Subject to the provisions of this Act, the Tribunal shall regulate its own proceedings.

Proceedings of Tribunal

(2) The procedure and process to be used in the conduct of the business of the Tribunal shall be as prescribed.

135. A person appearing before the Tribunal shall —

- (a) appear in person or virtually and not by means of a legal representation;
- (b) take an oath or affirmation; and
- (c) produce such evidence as he or she is requested by the Tribunal to produce for purposes of the proceedings.

Appearance before Tribunal

136. (1) The Tribunal shall, within such period as may be prescribed, after consideration of a complaint, make a decision in writing stating the reasons for the decision.

Decision by Tribunal

(2) A decision of the Tribunal shall —

- (a) be binding unless appealed to the High Court; and
- (b) have the same force and effect as a judgment or order of a court of competent jurisdiction and shall be enforceable in the same manner as such judgment or order.

137. A party who is aggrieved by the decision of the Tribunal may appeal to the High Court against such decision.

Appeal against decision of Tribunal

A.272

Notice of
intention to
appeal or
institute
proceedings
Cap. 04:02
(Sub. Leg.)
Cap. 10:01

138. Notwithstanding Order 12 rule 2 of the Rules of the High Court, where a party wishes to appeal in accordance with section 137 or institute proceedings in a court, against Government, the party shall before the institution of such appeal or proceedings in the court, give Government 30 days' notice of such party's intention to institute such appeal or proceedings in accordance with the State Proceedings (Civil Actions by or against Government or Public Officers) Act.

PART XVI — General Provisions

Decision by
courts in
procurement
matters

139. (1) Where a procurement matter is before a court, the court may in the case where a contract involving the procurement matter has not been concluded at the time of the institution of an appeal or proceedings in terms of this Act, suspend —

- (a) a procurement process pending determination of such procurement matter by such court, where the court finds that there are grounds to suspend the procurement process; or
- (b) the performance or conclusion of the contract pending determination of such procurement matter by such court.

(2) Where a procurement matter is before a court, in the case where a contract involving the procurement matter has been concluded by the parties to such procurement matter, the court may —

- (a) not suspend or interdict the execution of the contract; and
- (b) order for the execution of the contract to proceed without interruption whether the award decision relating to such contract may in itself be disputable in court.

(3) Notwithstanding subsection (2), a court may suspend, interdict or revoke the execution of a contract if in the court's decision, sufficient evidence has been adduced to demonstrate that the execution of the contract may cause substantial loss to the public revenue or prejudicially affect public interest.

External
obligations

140. (1) Where a treaty or agreement to which Botswana is a party contains provisions favourable to citizens and local contractors, full advantage shall, subject to the applicable provisions of this Act, be taken of these in the interest of promoting domestic capacity development.

(2) If Botswana is required, under the terms of any treaty or agreement to which Botswana is a party, to contribute from Botswana's own resources, in any form, to any procurement activity within Botswana in part or wholly, jointly or separately, then procurement through such contribution shall be —

- (a) in a discrete activity, where possible; and
- (b) subject to the applicable provisions of this Act.

Procurement
for external
obligations

141. Where procurement under section 140 (1) favours an external beneficiary —

- (a) procurement through contribution made by Botswana shall be undertaken in Botswana through contractors registered in Botswana;

- (b) all relevant insurances shall be placed with companies registered in Botswana; and
- (c) supplies shall be transported in carriers owned by citizens or companies registered in Botswana.

142. A procuring entity shall apply to the Authority for a derogation from the application of the relevant provisions of this Act in respect of external obligations, in the prescribed form and submit such form together with supporting documentation and justification.

Derogation
from provisions
of Act

143. The Minister shall, by Order published in the *Gazette*, exempt any person, procuring entity or procurement activity from the provisions of this Act.

Exemption
from provisions
of Act

144. Any contribution by the Government in any form to an entity such as a parastatal, private entity, non-governmental body, charity or trust, falling outside of the scope of this Act, which entails procurement activity shall be —

Contribution
to other entities

- (a) kept discrete and identifiable, as far as possible; and
- (b) subject to the applicable provisions of this Act.

145. (1) In the event of evidence demonstrating —

- (a) discrimination of any form against citizen owned or Botswana registered contractors by a public or private entity of any other country, either in that country or in a third country, in respect of a procurement activity; or
- (b) discrimination or underpricing or action to this effect by a public or private entity of Botswana or public or private entity from another country, which limits competition and places a locally registered contractor at a disadvantage in the domestic market in respect of a procurement activity,

Discrimination
and
underpricing

the Authority shall, in consultation with the Competition and Consumer Protection Authority as established under the Competition Act and any other interested party, taking into account any treaty obligation of the Government, submit recommendations to the Minister on commensurate measures to compensate for the discrimination or underpricing.

Cap. 46:09

(2) The Minister shall, on approval of the recommendations submitted in terms of subsection (1), cause the requisite measures to be taken by the competent authority or agency.

146. The Authority may issue guidelines from time to time for the better carrying out of the objectives or any function under this Act.

Guidelines

147. (1) A person shall not —

- (a) open any sealed tender, including any tender submitted through an electronic system and any document required to be sealed, or divulge its contents, prior to the appointed time for public opening of the tender document;
- (b) interfere with, or exert undue influence on, an employee of the Authority or officer of a procuring entity in the performance of his or her functions or powers under this Act;

Offences and
penalties

- (c) use his or her position as a public officer dishonestly or with the intention to directly or indirectly gain an advantage for himself or herself or any other person, or cause detriment to a procuring entity;
 - (d) use information obtained by virtue of his or her position as a public officer to gain advantage for himself or herself or any other person, or cause detriment to a procuring entity;
 - (e) enter or attempt to enter into a collusive agreement, whether enforceable or not, with any other supplier or contractor where any price quoted in a given tender, proposal or quotation is higher than would have been the case had there not been collusion between the persons that are parties to the agreement;
 - (f) directly or indirectly influence or attempt to influence, in any manner, a procurement process to obtain an unfair advantage in the award of a contract;
 - (g) connive or collude to commit a fraudulent, corrupt, collusive, coercive or obstructive act;
 - (h) obstruct or hinder a person exercising a function or power under this Act;
 - (i) contravene any lawful order of the Authority or the Tribunal;
 - (j) misrepresent a material fact of the ownership, management and control of a contractor in order to appear compliant with any reservation or preferential treatment; or
 - (k) with the intent to influence the outcome of tender proceedings, alter a procurement document or insert a mandatory compliance document at a bid opening.
- (2) A person who contravenes any provision of this Act commits an offence.
- (3) Where a body corporate or unincorporated body is convicted of an offence under this Act, every person who —
- (a) is a director, or otherwise concerned with the management, of the body corporate or unincorporated body; and
 - (b) knowingly authorises or permits an act or omission constituting an offence, commits an offence.
- (4) Where an offence under this Act is —
- (a) committed by a contractor or by a person purporting to act on behalf of the contractor; or
 - (b) proved to have been committed with the consent or connivance of, or to be attributable to, or to have been facilitated by any neglect on the part of any officer or employee of the contractor, such contractor, person or employee commits an offence.
- (5) A body corporate or unincorporated body which commits an offence under this section is liable to a fine not exceeding P1 500 000 or, in the case of a person referred to under subsection (3), to a fine not exceeding P500 000 or to imprisonment for a term not exceeding five years, or to both.

148. Where the Authority is satisfied on reasonable grounds that a person has contravened any provision of the law for which a civil penalty is to be imposed by the Authority, the Authority may, by notice —

Administrative actions

- (a) give such person a written warning;
- (b) issue a fine to such person;
- (c) recommend to supervisor of such person, the relevant action to be taken against the person; or
- (d) directing the person to do a specified act or refrain from doing a specified act, in order to —
 - (i) remedy the effects of the contravention, or
 - (ii) ensure that the person does not commit further contravention of the law.

149. An action shall not be taken against any employee of the Authority, any member or Secretary of the Board, any employee, member or Registrar of the Tribunal, any member of a committee or sub-committee, or any official of a procuring entity for any act or omission except in so far as the act or omission complained of was done in bad faith.

Immunity

150. (1) The Minister may make regulations providing for any matter under this Act which is to be prescribed or which is necessary or convenient to be prescribed for the better carrying out of the objects and purposes of this Act, or to give force and effect to the provisions of this Act.

Regulations

(2) Without prejudice to the generality of subsection (1), the regulations may provide for —

- (a) the structure of a procuring entity;
- (b) the procedure and processes for procurement for a procuring entity;
- (c) the procedure for selection and use of procurement methods;
- (d) the procedure for tender submission, tender opening and evaluation, awarding of tender, de-briefing of a bidder and cancellation of the procurement process;
- (e) the qualification of a tender and the procedure for prequalification process;
- (f) the reservation or preference scheme;
- (g) the procedure for negotiation and the award of a contract;
- (h) the procedure, rules and thresholds for the management, variation, amendment or variation of a contract;
- (i) the procedure for retroactive approval;
- (j) the terms and conditions for delegation of procuring functions of a procuring entity;
- (k) the manner of, and duration for, keeping procurement records by a procuring entity;
- (l) the procedure for the discipline of a contractor;
- (m) the procedure for procurement under a public private partnership arrangement;
- (n) the procedure for investigations under this Act;

- (o) the procedure for lodging procurement complaints and appeals;
- (p) the procedure and processes of the Authority;
- (q) the procedure and processes of the Tribunal;
- (r) the procedure for consideration of unsolicited bid;
- (s) the conditions for deviation from applicable procurement process, method, rules and documentation, and for accreditation of alternative procurement system;
- (t) the procedure and processes for conducting eProcurement;
- (u) the procedure for monitoring and compliance enforcement, and administrative sanctions to be applied under this Act;
- (v) the procedure and requirements for professionalisation of the procurement cadre;
- (w) fees to be charged under this Act;
- (x) a process and procedure for the evaluation, adjudication and award of a bid;
- (y) the procedure for the procurement of highly sensitive works, services, supplies or any combination thereof, however classified; and
- (z) the procedure and rules for registration of contractors.

Repeal of
Cap. 42:08

Savings and
transitional
provisions

151. The Public Procurement and Asset Disposal Act is hereby repealed.

152. (1) Notwithstanding the effect of the repeal under section 151, any subsidiary legislation made under the repealed Act, and in force immediately before the coming into operation of this Act, shall, in so far as the subsidiary legislation is consistent with the provisions of this Act, continue to be in force as if made under this Act.

(2) All rights, obligations, assets and liabilities which accrued to the Public Procurement and Asset Disposal Board in terms of the repealed Act shall, upon this Act coming into force, simultaneously pass and accrue to the Authority and be dealt with in terms of this Act.

(3) Any disciplinary proceedings which, before the coming into operation of this Act, were pending shall continue or be enforced by or against the Public Procurement and Asset Disposal Board, in the same manner as they would have been continued or enforced before the coming into operation of this Act.

(4) Any action, suit or legal proceedings by or against the Public Procurement and Asset Disposal Board under the repealed Act which are pending on the date of commencement of this Act shall continue to be carried out or prosecuted by or against the Authority and no such suit, action or legal proceedings shall abate or be affected by the coming into operation of this Act.

(5) 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.

(6) 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.

(7) 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.

(8) 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.

(9) Any responsibility or function of the Board or its Committee under the repealed Act, which has been or is performed by any other person or Committee shall be deemed to be transferred to the relevant Board, committee or sub-committee established by, or as provided for in this Act.

(10) An employee of the Public Procurement and Asset Disposal Board of the repealed Act shall become a corresponding employee of the Authority and shall continue in office for the period for which, and subject to the conditions under which, the employee was appointed as an employee of the Public Procurement and Asset Disposal Board of the repealed Act.

(11) A member of the Public Procurement and Asset Disposal Board of the repealed Act shall not continue to be a member of the Public Procurement Board and his or her membership shall be terminated at the commencement of this Act.

(12) A member of the Independent Complaints Review Committee of the repealed Act shall not continue to be a member of the Tribunal and his or her membership shall be terminated at the commencement of this Act.

PASSED by the National Assembly this 31st day of August, 2021.

BARBARA. N. DITHAPO,
Clerk of the National Assembly.