

#### **PART IV - GENERAL PROCUREMENT RULES**

Choice of procurement procedure.

**29.**(1) For each procurement, the procuring entity shall use open tendering under Part V or an alternative procurement procedure under Part VI.

(2) A procuring entity may use an alternative procurement procedure only if that procedure is allowed under Part VI.

(3) A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity —

- (a) obtains the written approval of its tender committee; and
- (b) records in writing the reasons for using the alternative procurement procedure.

(4) A procuring entity shall use such standard tender documents as may be prescribed.

Procurement not to be split or inflated.

**30.**(1) No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure.

(2) Any person who contravenes the provisions of this section shall be guilty of an offence.

(3) Standard goods, services and works with known market prices shall be procured at the prevailing real market price.

(4) Public officials involved in transactions in which standard goods, services and works are procured at unreasonably inflated prices shall, in addition to any other sanctions prescribed in this Act or the regulations, be required to pay the procuring entity for the loss resulting from their actions.

Qualifications to be awarded contract.

**31.**(1) A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria —

- (a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;
- (b) the person has the legal capacity to enter into a contract for the procurement;
- (c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;
- (d) the procuring entity is not precluded from entering into the contract with the person under section 33;
- (e) the person is not debarred from participating in procurement proceedings under Part IX.

(2) The procuring entity may require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

(3) The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents or the request for proposals or quotations or, if a procedure is used to pre-qualify persons, in the documents used in that procedure.

(4) The procuring entity shall determine whether a person is qualified and that determination shall be done using the criteria and requirements set out in the documents or requests described in subsection (3).

(5) The procuring entity may disqualify a person for submitting false, inaccurate or incomplete information about his qualifications.

(6) No person shall be excluded from submitting a tender, proposal or quotation in procurement proceedings except under this section and under section 39.

(7) Procuring entities shall use creative approaches, such as design and build in order to enhance efficiency of the procurement process and project implementation.

Pre-qualification procedures.

**32.** To identify qualified persons a procuring entity may use a pre-qualification procedure or may use the results of a pre-qualification procedure used by another public entity.

Limitation on contracts with employees, etc.

**33.**(1) Except as expressly allowed under the regulations, a procuring entity shall not enter into a contract for a procurement with —

- (a) an employee of the procuring entity or a member of a board or committee of the procuring entity;
- (b) a Minister, public servant or a member of a board or committee of the Government or any department of the Government or a person appointed to any position by the President or a Minister; or
- (c) a person, including a corporation, who is related to a person described in paragraph (a) or (b).

(2) Whether a person is related to another person for the purpose of subsection (1)(c) shall be determined in accordance with the regulations.

Specific requirements.

**34.**(1) The procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.

(3) The technical requirements shall, where appropriate —

- (a) relate to performance rather than to design or descriptive characteristics; and
- (b) be based on national or international

standards.

(4) The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless —

- (a) there is no other sufficiently precise or intelligible way of describing the requirements; and
- (b) the requirements allow equivalents to what is referred to.

Verification that not debarred.

**35.** A tender, proposal or quotation submitted by a person shall include a statement verifying that the person is not debarred from participating in procurement proceedings under Part IX and a declaration that the person will not engage in any corrupt practice.

Termination of procurement proceedings.

**36.(1)** A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

(3) On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.

(4) If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.

(5) The procuring entity shall not be liable to any person for a termination under this section.

(6) A termination under this section shall not be reviewed by the Review Board or a court.

(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.

(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due.

Form of  
communications.

**37.**(1) If the procurement procedure used is open or restricted tendering or a request for proposals, communications between the procuring entity and a person seeking a contract for the procurement shall be in writing.

(2) If the procurement procedure used is direct procurement or a request for quotations, communications between the procuring entity and a person seeking a contract for the procurement shall either be —

- (a) in writing; or
- (b) referred to and confirmed in writing.

(3) To the extent allowed under written directions of the Authority, electronic communications may be used instead of written communications.

Inappropriate  
influence on  
evaluations, etc.

**38.**(1) After the deadline for the submission of tenders, proposals or quotations —

- (a) no person who submitted a tender, proposal or quotation shall make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders, proposals or quotations; and
- (b) no person who is not officially involved in the evaluation and comparison of tenders, proposals or quotations shall attempt, in any way, to influence that evaluation and comparison.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable on conviction —

- (a) if the person is an individual, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding three years or to both; or
- (b) if the person is a corporation, to a fine not exceeding ten million shillings.

Participation in procurement.

**39.**(1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

(2) Subject to subsection (8), the Minister shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and disposal.

(3) The preferences and reservations referred to in subsection (2) shall -

- (a) be non-discriminatory in respect of the targeted groups;
- (b) allow competition amongst the eligible;
- (c) be monitored and evaluated.

(3) The preferences and reservations shall apply to—

- (a) candidates such as disadvantaged groups, micro, small and medium enterprises;
  - (b) works, services and goods, or any combination thereof;
  - (c) identified regions; and
  - (d) such other categories as may be prescribed.
- (5) A procuring entity shall, when processing

procurement, comply with the provisions of this Act and the regulations in respect of preferences and reservations.

(6) To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility.

(7) The Authority shall maintain an up-to-date register of contractors in works, goods and services, or any combination thereof, in order to be cognizant at all times of the workload and performance record.

(8) In applying the preferences and reservations under this section -

(a) exclusive preference shall be given to citizens of Kenya where -

(i) the funding is 100% from the Government of Kenya or a Kenyan body; and

(ii) the amounts are below the prescribed threshold.

(b) a prescribed margin of preference may be given

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(i) in the evaluation of bids to candidates offering goods manufactured, mined, extracted and grown in Kenya; or

(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

Corrupt practice.

**40.(1)** No person, agent or employee shall be involved in any corrupt practice in any procurement proceeding.

(2) If a person or an employee or agent of a person contravenes subsection (1) the following shall apply —

(a) the person shall be disqualified from entering into a contract for the procurement; or

(b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have.

(4) A person, employee or agent who contravenes subsection (1) shall be guilty of an offence.

Fraudulent  
practice.

**41.**(1) No person shall be involved in a fraudulent practice in any procurement proceeding.

(2) If a person contravenes subsection (1) the following shall apply —

(a) the person shall be disqualified from entering into a contract for the procurement; or

(b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have.

(4) A person who contravenes subsection (1) shall be guilty of an offence.

Collusion.

**42.**(1) No person shall collude or attempt to collude with any other person —

(a) to make any proposed price higher than would otherwise have been the case;

(b) to have that other person refrain from submitting a tender, proposal or quotation or withdraw or change a tender, proposal or quotation; or

(c) to submit a tender, proposal or quotation with a specified price or with any specified inclusions or exclusions.

(2) If a person contravenes subsection (1) the following shall apply —

- (a) both persons referred to in subsection (1) shall be disqualified from entering into a contract for the procurement; or
- (b) if a contract has already been entered into with either person referred to in subsection (1), the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have.

(4) A person who contravenes subsection (1) shall be guilty of an offence.

Conflicts of interest.

**43.**(1) An employee or agent of the procuring entity or a member of a board or committee of the procuring entity who has a conflict of interest with respect to a procurement —

- (a) shall not take part in the procurement proceedings; and
- (b) shall not, after a procurement contract has been entered into, take part in any decision relating to the procurement or contract.

(2) An employee, agent or member described in subsection (1) who refrains from doing anything prohibited under that subsection that, but for that subsection, would have been within his duties shall disclose the conflict of interest to the procuring entity.

(3) If a person contravenes subsection (1) with respect to a conflict of interest described in subsection (5)(a) and the contract is awarded to the person or his relative or to another person in whom one of them had a direct or indirect pecuniary interest, the contract shall be voidable at the option of the procuring entity.

(4) The voiding of a contract by the procuring entity

under subsection (3) does not limit any other legal remedy the procuring entity may have.

(5) For the purpose of this section, a person has a conflict of interest with respect to a procurement if the person or a relative of the person —

- (a) seeks, or has a direct or indirect pecuniary interest in another person who seeks, a contract for the procurement; or
- (b) owns or has a right in any property or has a direct or indirect pecuniary interest that results in the private interest of the person conflicting with his duties with respect to the procurement.

(6) In this section, “relative” means —

- (a) a spouse, child, parent, brother or sister;
- (b) a child, parent, brother or sister of a spouse; or
- (c) any other prescribed relative.

(7) For the purpose of subsection (5), the following are persons seeking a contract for a procurement —

- (a) a person submitting a tender, proposal or quotation; or
- (b) if direct procurement is being used, a person with whom the procuring entity is negotiating.

(8) Any person who contravenes the provisions of this section shall be guilty of an offence.

Confidentiality.

**44.(1)** During or after procurement proceedings, no procuring entity and no employee or agent of the procuring entity or member of a board or committee of the procuring entity shall disclose the following —

- (a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public

interest;

- (b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests or inhibit fair competition;
- (c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or
- (d) the contents of tenders, proposals or quotations.

(2) This section does not prevent the disclosure of information if any of the following apply —

- (a) the disclosure is to an employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;
- (b) the disclosure is for the purpose of law enforcement;
- (c) the disclosure is for the purpose of a review under Part VII or an investigation under Part VIII or as required under section 105;
- (d) the disclosure is pursuant to a court order; or
- (e) the disclosure is allowed under the regulations.

(3) Notwithstanding the provisions of subsection (2), the disclosure to an applicant seeking a review under Part VII shall constitute only the summary referred to in section 45(2)(e).

(4) Any person who contravenes the provisions of this section shall be guilty of an offence.

Procurement records.

**45.(1)** A procuring entity shall keep records for each procurement for at least six years after the resulting contract was entered into or, if no contract resulted, after the procurement proceedings were terminated.

(2) The records for a procurement must include —

- (a) a brief description of the goods, works or services being procured;
- (b) if a procedure other than open tendering was used, the reasons for doing so;
- (c) if, as part of the procurement procedure, anything was advertised in a newspaper or other publication, a copy of that advertisement as it appeared in that newspaper or publication;
- (d) for each tender, proposal or quotation that was submitted —
  - (i) the name and address of the person making the submission; and
  - (ii) the price, or basis of determining the price, and a summary of the other principal terms and conditions of the tender, proposal or quotation;
- (e) a summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used;
- (f) if the procurement proceedings were terminated without resulting in a contract, an explanation of why they were terminated;
- (g) a copy of every document that this Act requires the procuring entity to prepare; and
- (h) such other information or documents as are prescribed.

(3) After a contract has been awarded or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the procurement available to a person who submitted a tender, proposal or quotation or, if direct procurement was used, a person with whom the procuring entity was negotiating.

(4) The procuring entity may charge a fee for

making the records available but the fee shall not exceed the costs of making the records available.

(5) No disclosure shall be made under subsection (3) that would be contrary to section 44(1), but a disclosure, under subsection (3), of anything described in paragraphs (a) to (f) of subsection (2) shall be deemed not to be contrary to paragraphs (b) to (d) of section 44(1).

(6) A procuring entity shall maintain a proper filing system with clear links between procurement and expenditure files.

Publication of  
procurement  
contracts.

**46.(1)** The Authority shall publish notices of the contracts awarded by procuring entities together with such other information as may be prescribed.

(2) The Authority shall issue directions governing the publication of notices under this section, including directions specifying what must be included in a notice and how it must be published.

Amendments to  
contracts.

**47.** An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if —

- (a) the amendment has been approved in writing by the tender committee of the procuring entity; and
- (b) any contract variations are based on the prescribed price or quantity variations for goods, works and services.

Interest on  
overdue  
amounts.

**48.** The following shall apply with respect to overdue amounts owed by a procuring entity under a contract for a procurement —

- (a) unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts; and
- (b) the interest to be paid under paragraph (a) shall be in accordance with prevailing commercial bank rates.

Inspections and audits relating to contracts.

**49.(1)** The following shall apply in relation to a contract for a procurement —

- (a) the Director-General, or anyone authorised by the Director-General, may inspect, at any reasonable time, the records and accounts of the procuring entity and contractor relating to the contract and the procuring entity and contractor shall co-operate with and assist whoever does such an inspection; and
- (b) the Controller and Auditor-General, or an auditor authorised by the Controller and Auditor-General, may audit the accounts of the procuring entity and contractor relating to the contract and the procuring entity and contractor shall co-operate with and assist whoever does such an audit.

(2) The costs of an audit under subsection (1)(b) shall be borne by the Authority if the audit was conducted at the request of the Director-General.