

PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT
(Cap. 42:08)

**PUBLIC PROCUREMENT AND ASSET DISPOSAL
(SUSPENSION AND DE-LISTING OF CONTRACTORS)
(AMENDMENT) REGULATIONS, 2013**
(Published on 22nd March, 2013)

ARRANGEMENT OF REGULATIONS

REGULATION

1. Citation
2. Amendment of regulation 4 of Cap. 42:08 (Sub. Leg.)
3. Amendment of regulation 7 of the Regulations
4. Insertion of regulations 7A and 7B to the Regulations
5. Insertion of Schedule to the Regulations

IN EXERCISE of the powers conferred on the Minister of Finance and Development Planning by section 130 of the Public Procurement and Asset Disposal Act, the following Regulations are hereby made —

- | | |
|--|--|
| <p>1. These Regulations may be cited as the Public Procurement and Asset Disposal (Suspension and De-Listing of Contractors) (Amendment) Regulations, 2013.</p> | <p>Citation</p> |
| <p>2. Regulation 4 of the Public Procurement and Asset Disposal (Suspension and De-Listing of Contractors) (Amendment) Regulations (hereinafter referred to as “the Regulations”) is amended by inserting, immediately after subregulation (4), the following new subregulation —
“(5) The code of conduct referred to in subregulation (1) shall be as set out in the Schedule to these Regulations.”.</p> | <p>Amendment of regulation 4 of Cap. 42:08 (Sub. Leg.)</p> |
| <p>3. Section 7 of the Regulations is amended by substituting for subsection (2), the following new subsection —
“(2) Where the Board orders that a contractor be de-listed under subsection (1) (a) (v) —
(a) the contractor shall submit to the Board, within seven days of receipt of the Board’s decision, all Board certificates in the contractor’s possession; and
(b) the Board shall notify, in writing, the procuring or disposing entity that the contractor has been de-listed.”.</p> | <p>Amendment of regulation 7 of the Regulations</p> |
| <p>4. The Regulations are amended by inserting immediately after regulation 7, the following new regulations —</p> | <p>Insertion of regulations 7A and 7B to the Regulations</p> |
| <p>“Endorsement of conviction in register
Cap. 08:05</p> | <p>7A. The Board, on the recommendation of the Disciplinary Committee, shall determine the period within which the particulars of a contractor shall remain endorsed in the register of contractors in accordance with the provisions of the Corruption and Economic Crime Act, and during such period no offer in respect of any contract from the contractor may be considered by a procuring or disposing entity:</p> |

Provided that, the period within which the particulars of a contractor shall remain in the register shall not be more than five years.

Termination of contracts 7B. (1) Where a contractor has been de-listed and removed from the register of contractors under regulation 7 (1) (a) (v) or the register has been endorsed in accordance with the Corruption and Economic Crime Act, a procuring or disposing entity may, in consultation with the Board, terminate any contract entered into with the contractor whose name has been endorsed in the register:

Provided that, in considering the termination of the contract, the procuring or disposing entity shall take into account the following circumstances —

- (a) the extent and duration of the contract concerned;
- (b) whether it is likely to conclude a similar contract with another contractor or within a specified time frame;
- (c) the extent to which the contract has been executed;
- (d) the urgency of the services to be delivered or supplied in terms of the contract;
- (e) whether any costs will follow such termination; and
- (f) any other factor which in the opinion of the procuring or disposing entity, may impact on the termination of the contract.

(2) The Board shall, during the period referred to in subregulation (1), disqualify a contractor whose contract has been terminated from making any offer or obtaining any contract relating to the procurement of specific works, services or supplies.

(3) The procuring or disposing entity shall take the decision to terminate a contractor's contract —

- (a) where the contractor has been convicted of an offence under section 28 or 29 of the Corruption and Economic Crime Act, after any appeal against the conviction or sentence, or both, has been finalised by a court; or
- (b) where there has been a breach of contract or the provisions of the code of conduct by the contractor.

(4) Where a procuring or disposing entity has decided to terminate the contract of a contractor, the procuring or disposing entity shall, within 14 days of the decision, notify, in writing —

- (a) the contractor whose contract has been terminated; and
- (b) all other procuring or disposing entities,

of the decision and request such bodies not to enter into contracts with the contractor for such period within which such contractor has been de-listed.”.

5. The Regulations are amended by inserting, immediately after regulation 8, the following Schedule —

Insertion of
Schedule to the
Regulations

“SCHEDULE
(*regulation 4 (5)*)

CODE OF CONDUCT FOR CONTRACTORS

1. GENERAL

- 1.1 A contractor shall ensure that competent persons carry out the contractual obligations of the contractor.
- 1.2 A contractor shall ensure that certified copies of all mandatory certificates, professional qualifications, accreditation and affiliation of employees are kept in the office and shall be made available to the Board promptly on request.
- 1.3 A contractor shall ensure that all relevant requirements are provided for in procurement documents that services and products are delivered on time in line with the procurement documents’ service requirements.

2. DISCLOSURE OF INFORMATION

- 2.1 A contractor shall not disclose information acquired from or through its association or relationship with the Board or its Committees, or a Government department or agency which has not been made public on a potential or current service provider for the contractor’s advantage, material gain and advancement.
- 2.2 A contractor shall not use its, or his or her association or relationship (other than as allowed in the association agreement) with the Board or its Committees, or Government departments or agencies for the contractor’s advantage, material gain or advancement.

3. COLLUSION AND FRONTING

- 3.1 A contractor shall not manipulate his or her true shareholding, directorship, management, employees or financial resources in order to be compliant with the requirements of section 121 of the Act regarding categorisation of contractors in terms of ownership, etc.
- 3.2 A contractor shall not be involved in fronting, tokenism, window dressing and “rent a Motswana” practices during the tendering stage or when seeking registration in the register of contractors under section 116 of the Act. For the purposes of this code, the terms “fronting”, “tokenism”, “window dressing” and “rent a Motswana” mean the misrepresentation of a material fact of the ownership, management and control, as well as in the skilled and specialist positions (core to the purpose of existence) of a contractor in order to appear compliant with citizen reservation and citizen preferential treatment and for material gain, advancement or advantage in the procurement process.

- 3.3 A contractor shall not sublet or sub-contract without declaration at tender stage a disproportionate amount of work, or the core aspect of the assignment to a contractor who does not qualify for reservation or preferential treatment. This may also take the form of utilizing the resources (human, equipment, facilities, material, financial, etc.) of a contractor who does not qualify for reservation or preferential treatment. In this regard the true material benefit and advancement does not meaningfully and tangibly accrue to the contractor the due reservation or preferential treatment.
- 3.4 A contractor shall not have a predominance of non-executive directors or tokenism whose qualification and experience does not correlate to the core business of the contractor. Passive ownership of an entity can also lead to some form of fronting.
- 3.5 A contractor shall not engage in any collusive practices that have a direct or indirect adverse impact on the cost of engagement to the procuring or disposing entities.
- 3.6 A contractor shall not engage in any activity that gives one bidder an improper and unethical advantage over other bidders.
4. PROFESSIONAL CONDUCT AND INTEGRITY
- 4.1 A contractor shall not submit false information to the Board in order to influence the decision of the Board to register such contractor in the register of contractors under section 116 of the Act.
- 4.2 A contractor shall not submit false information during the tendering process in order to deceive the Board, a procuring or disposing entity or clients into believing that the contractor has capabilities and capacities to perform contracts which the contractor is not capable of doing by:
- 4.2.1 Submitting the educational qualification documents and references of persons whom the contractor purports to be in his or her employees when they are not, or without such persons' consent to the Board or its committees; or
- 4.2.2. Overvaluing of the contractor's assets as well as overcharging of professional fees by the contractor.
- 4.3 A contractor shall meet his or her contractual obligations in the delivery of products and services.
- 4.4 A contractor shall ensure that he or she conducts himself or herself professionally during the procurement process and honours contractual commitments timeously and in a professional manner.
- 4.5 A contractor shall ensure that the contractor's obligations in terms of contracts with sub-contractors and agents are scrupulously and timeously met, particularly in regard to making payments.
- 4.6 A contractor shall not engage in unfair and unethical practices in dealings with sub-contractors.

- 4.7 A contractor shall not make spurious claims for additional payment and extension of time.
- 4.8 A contractor shall not use an advance mobilization loan for any purpose than the intended purpose of that loan.
- 4.9 A contractor shall perform the contractor's contractual duties in an unbiased and conscientious manner, bearing in mind the legitimate interests of all parties to the procurement process and the public.
- 4.10 A contractor shall not abandon the work that such contractor is contracted to do.
- 4.11 A contractor shall not fail to deliver work to the expectations and obligations as provided by the contract under which the registered contractor is contracted without any valid reason.
- 4.12 A contractor shall ensure that he or she delivers or performs his or her obligations under the contract according to the specifications of his or her contract with a procuring or disposing entity.”.

MADE this 12th day of March, 2013.

O.K. MATAMBO,
*Minister for Finance and
Development Planning.*

AGC 9/1/196 I