

18th June, 2013

LEGAL NOTICE NO. 106

THE PUBLIC PROCUREMENT AND DISPOSAL ACT

(No. 3 of 2005)

IN EXERCISE of the powers conferred by Section 140 of the Public Procurement and Disposal Act, the Cabinet Secretary for the National Treasury makes the following Regulations-

THE PUBLIC PROCUREMENT AND DISPOSAL (AMENDMENT) REGULATIONS, 2013

Citation.

1. These Regulations may be cited as the Public Procurement and Disposal (Amendment) Regulations, 2013.

Sub. Leg.

2. Regulation 8(3) of the Public Procurement and Disposal Regulations, 2006, in these Regulations referred to as “the principal Regulations”, is amended by deleting subparagraph (a) and substituting therefor the following new subparagraph –

(a) maintain and update bi-annually, standing lists of registered tenderers required by the procuring entity through a pre-qualification process and submit the results to the Authority for consolidation, within fourteen days from date of notification.

3. Regulation 10 of the principal Regulations is amended in paragraph (2) by deleting paragraph (d) and substituting therefor the following new paragraph-

(d) approve the commencement of the procurement process upon the approval of the annual procurement plan by the accounting officer and where applicable the board of directors or a similar body and upon satisfaction that sufficient funds are available to meet the obligations of the entity arising from any contract as set out in the budgetary estimates or such documentation evidencing the availability of the funds, before making an award is provided;

4. Regulation 12 of the principal Regulations is amended–

(a) in paragraph (8) by deleting the word “fifty” and substituting therefor the word “one hundred”;

(b) adding the following new paragraph immediately after paragraph (10)-(11) The observers shall be to-

(a) monitor the procurement process and prepare a report on whether the process has been

carried out in accordance with Section 2 of the Act; and

(b) submit to the accounting officer and the Authority, within fourteen days from date of notification of the award, the report prepared under subparagraph (a).

5. The principal Regulations are amended by deleting regulation 16 and substituting therefor the following new regulation—

Evaluation, Negotiations, Inspection and Acceptance Committee.

16. (1) A procuring entity shall establish a tender processing committee in relation to each procurement process for the purposes of carrying out the evaluation of the tenders or proposals, negotiations or inspection and acceptance of goods, works or services.

(2) A committee established under paragraph (1) shall consist of a chairperson and at least three other members all appointed by the accounting officer or the head of the procuring entity upon recommendation by the procurement unit.

(3) A person shall be appointed as a member of the committee under paragraph (2) if he or she is a member of the tender committee of the procuring entity.

(4) The committee shall-

(a) adhere to the compliance and evaluation criteria set out in the tender documents in undertaking in carryout the technical and financial evaluation of the tenders or proposals received by the procuring entity;

(b) evaluate the tenders within a period of fifteen days after the opening of the tenders; and

(c) carry out the tender evaluation with all due diligence.

(5) Each member of the committee shall evaluate the tenders or proposals received by the procuring entity independently from the other members prior to sharing his or her analysis, questions and evaluation including his or her rating with the other members of the committee.

(6) A member of the committee shall not communicate with a tenderer who has submitted a tender or proposal that is under the consideration of the evaluation.

(7) A tender processing committee shall prepare an evaluation report on the analysis of the tenders receive, and final ratings assigned to each tender and submit the report to the tender committee.

(8) The report prepared under paragraph (7) shall include-

(a) the results of the preliminary evaluation, with reasons why any tender or proposal was

rejected;

- (b) the scores awarded by each evaluator for each tender or proposal;
- (c) a summary of the relative strengths and weaknesses of each tender or proposal;
- (d) the total score for each tender or proposal; and
- (e) a recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score.

6. The principal Regulations are amended by deleting regulation 17 and substituting therefor the following new regulation—

Inspection and acceptance

17. The committee established under regulation 16 shall immediately after the delivery of the goods, works or services—

- (a) inspect and where necessary, test the goods received;
- (b) inspect and review the goods, works or services in order to ensure compliance with the terms and specifications of the contract;
- (c) accept or reject, on behalf of the procuring entity, the delivered goods, works or services;
- (d) ensure that the correct quantity of goods have been received;
- (e) ensure that the goods, works or services meet the technical standards specified in the contract;
- (f) ensure that the goods, works or services have been delivered or completed on time, or that any delay has been noted;
- (g) ensure that all required manuals or documentation in relation to the goods, works or services have been received; and
- (h) ensure the issuance of interim or completion certificates or goods received notes, as appropriate and in accordance with the contract.

7. Regulation 20 of the principal regulations is amended—

- (a) in paragraph (5) by inserting the words “tender committee,” immediately after the words “approved by the”;

(b) by adding the following new paragraph immediately after paragraph (5) -

(6) The approval of a plan under paragraph (5) by the tender committee shall be deemed to include the approval of all alternative procurement procedures under section 29(3) of the Act.

8. Regulation 24 of the principal Regulations is amended in paragraph (4) by deleting the word “fourteen” and substituting therefor the word “seven”.

9. Regulation 31 of the principal Regulations is amended by adding the following paragraph immediately after paragraph (4)-

(e) the cumulative value of all contract variations do not result in an increment of the total contract price by more than twenty five percent of the original contract sum.

10. Regulation 36 of the principal Regulations is amended by deleting the word “thirty” and substituting therefor the words “twenty one”.

Fee for tender documents.

11. The principal Regulations are amended by deleting regulation 39 and substituting therefor the following new regulation—

(1) A procuring entity may, pursuant to section 56(2) of the Act, charge a fee not exceeding one thousand shillings for hard copies of tender documents.

(2) In determining the fee payable under paragraph (1), a procuring entity shall only have regard to the costs related to printing, copying, and distributing or of converting the documents into electronic form. (3) A procuring entity shall not charge a fee under paragraph (1) where the tender documents are –

(a) obtained electronically;

(b) invitations for expression of interest; or

(c) invitations for pre-qualification.

(4) Where a procuring entity charges a fee for the delivery of tender documents, the procuring entity shall permit potential tenderers to inspect the documents, prior to paying the fee for the document.

12. The principal Regulations are amended by deleting regulation 40 and substituting therefor the following new regulation—

Time for preparing national tenders.

40. The minimum period for the preparation of national open tenders for the purposes of

section 55 (1) of the Act shall be fourteen days.

13. Regulation 41 of the principal Regulations is amended by deleting paragraph (3) and substituting therefor the following new paragraph –

(3) The tender security under section 57 of the Act shall be provided in the following form-

(a) cash;

(b) a bank guarantee;

(c) such insurance company guarantee as may be approved by the Authority;

(d) a letter of credit; or

(e) guarantee by a deposit taking microfinance institution, Sacco society, the Youth Enterprise Development Fund or the Women Enterprise Fund.

14. Regulation 46 of the principal Regulations is amended by -

(a) renumbering the existing provision as paragraph (1);

(b) deleting the word “thirty” appearing in the new paragraph (1) and substituting therefore the word “fifteen”;

(c) inserting the following new paragraph immediately after the new paragraph (1) –

(2) Where a tender is complex or has attracted a high number of tenderers, the accounting officer or head of the procuring entity may extend the period for tender evaluation under paragraph (1) for a further period within the tender validity period not exceeding thirty more days from date of expiry of initial period.

15. Regulation 54 of the principal Regulations is amended in paragraph (5) by deleting the word “fourteen” and substituting therefor the word “seven”.

16. Regulation 55 of the principal Regulations is amended –

(a) in paragraph (2) by deleting the word “fourteen” and substituting therefor the word “seven”;

(b) by adding the following new paragraph immediately after paragraph (2) -

17. Regulation 64 of the principal Regulations is amended in paragraph (1) by adding the following new paragraph immediately after paragraph (c) -

(d) where competitive negotiations are critical for achieving value for money in the procurement of specialized goods, works or services.

18. Regulation 65 of the principal Regulations is amended by –

(a) renumbering the existing provision as paragraph (1); and

(b) adding the following new paragraph immediately after paragraph (1) –

(2) The period of tender award shall not exceed thirty days from the date of tender opening.

19. Regulation 66 of the principal Regulations is amended by deleting paragraph (2) and substituting therefor the following new paragraph –

(2) A procuring entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful.

20. Regulation 73 of the principal Regulations is amended in paragraph (2) by –

(a) deleting the word “fourteen” appearing in subparagraph (c) and substituting therefor the word “seven”;

(b) deleting the word “three” appearing in paragraph (d) and substituting therefor the word “fifteen”;

(c) inserting the word “non-refundable” immediately after the words “by the” appearing in paragraph (e).

21. Regulation 74 of the principal Regulations is amended by deleting paragraph (3) and substituting therefor the following new paragraph –

(3) Upon being served with a notification of a request, the procuring entity shall-

(a) notify the Secretary of the names and contact details of all parties to the review; and

(b) within five days or such lesser period as may be specified by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the reasons for the request together with such documents as the Secretary may specify.

22. The principal Regulations are amended by inserting the following new regulations immediately after regulation 94-

Reporting on public contract awards.

95. For purposes of section 46(1), each procuring entity shall submit to the Authority, on

a quarterly basis, information of all public contract awards as directed by the Authority.

23. The principal Regulations are amended by deleting the First Schedule and substituting therefor the following new Schedule.

Part II

FEES FOR REVIEWS

1. Administrative fee KES 5,000

2. Upon filing a request for review, the fees payable shall be as follows-

Amount of Tender	Fees
1. Tenders of Ascertainable Value	
(a) Does not exceed KES. 2,000,000	1% subject to a minimum of KES. 20,000/-
(b) Exceeds KES. 2,000,000/- but not over KES. 50,000,000/-	The fees for KES. 2000,000 plus an additional fee of 0.25% on the amount above KES. 2,000,000
(c) Exceeds KES. 50,000,000/-	The fees for tender sum of KES. 50,000,000 plus an additional fee of 0.025% on the amount above KES.50,000,000/- subject to a maximum fee of KES. 200,000/-
2. Pre-qualification and other “Unquantified Tenders	KES. 40,000
(f) Any other Tenders	Subject to a minimum of KES. 20,000/- and a maximum of KES. 40,000/-
3. Upon request of an adjournment to a party by the Board	KES.10, 000/-
4. filing preliminary objection	KES.5, 000/-
5. Fee to accompany the review of	KES.40, 000/-

Director General's order (s.106 (3))	
6. Filing fees on each request for a review on debarment order (s.117(3))	KES.40, 000/-
7. The Secretary may demand additional fee if the fee paid at the time of filing is less than that ascertained to be chargeable.	