

18th June, 2013

LEGAL NOTICE NO. 109

**THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005
(No. 3 of 2005)**

IN EXERCISE of the powers conferred by Section 140 of the Public Procurement and Disposal Act, the Cabinet Secretary for 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.

2. The Public Procurement and Disposal Regulations, 2006 and Public Procurement and Disposal (Amendments) Regulations, 2009 in these regulations referred to as “the principal Regulations”, are amended by inserting the following new regulations immediately after regulation 94—

Reporting on public contract awards

96. In order fulfil the requirements of section 46(1) of the Act, every procuring entity shall on quarterly basis submit to the Authority information of all public contract awards as directed by the Authority.

6. Regulation 8 (3) (a) of the principal regulations is amended by deleting and substituting therefore the following new paragraph—

(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.

4. Regulation 10(2) (d) of the principal Regulations is amended by deleting and substituting therefore the following new paragraph—

(d) approve the commencement of the procurement process after the annual procurement plan is approved by the accounting officer, and where applicable by the board of directors or a similar body and upon satisfaction that sufficient funds to meet the obligations of the resulting contract are reflected in its budgetary estimates, or the evidence of the availability of such sufficient funds before making an award is provided.

5. Regulation 12 of the principal regulations is amended by adding the following sub-regulation—

(11) The role of the observers shall be –

(c) to observe whether the procurement proceedings have been carried out in accordance with Section 2 of the Act and prepare a report;

(d) the report prepared under sub-regulation (a) shall simultaneously be submitted to the accounting officer and the Authority within fourteen days from date of notification of award.

Evaluation, Negotiations, Inspection and Acceptance Committee

6. Regulation 16 of the principal regulations is amended by deleting and substituting therefor the following new paragraph –

(1) For each procurement, the procuring entity shall establish an Evaluation, Inspection and Acceptance & Negotiations Committee for the purposes of carrying out the evaluation of the tenders or proposals or negotiations or inspection and acceptance of goods, works or services.

(2) A committee established under paragraph (1) shall consist of a chairman 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) No person shall be appointed under paragraph (2) if such person is a member of the tender committee of the procuring entity.

(4) In tender evaluations, the committee established under subparagraph (1) shall be responsible for—

(d) the technical evaluation of the tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents;

(e) committee established under paragraph (1) performing the evaluation with all due diligence and within a period of fifteen days after the opening of the tenders;

(f) the financial evaluation of the tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents or request for proposals; and

(g) performing the tender evaluation with all due diligence.

(5) Each member of the committee shall evaluate 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) Under no circumstances may any member of the committee enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering.

(7) An evaluation committee shall prepare a report on the analysis of the tenders received, and final ratings assigned to each tender and submit the report to the tender committee.

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

(f) the results of the preliminary evaluation, with reasons why any tenders or proposals were rejected;

(g) the scores awarded by each evaluator for each tender or proposal;

(h) a summary of the relative strengths and weaknesses of each tender or proposal;

(i) the total score for each tender or proposal; and

(j) a recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score.

Inspection and acceptance

7. Regulations 17 of the principal regulations is amended by deleting and substituting therefor the following new paragraph –

A committee established under regulation 6 of these Regulations shall immediately after delivery of the goods, works or services –

(i) inspect and where necessary, test the goods received;

(j) inspect and review the goods, works or services in order to ensure compliance with the terms and specifications of the contract;

(k) accept or reject, on behalf of the procuring entity, the delivered goods, works or services;

(l) ensure that the correct quantity of has been received; (m) ensure that the goods, works or services meet the technical standards defined in the contract;

(n) ensure that the goods, works or services have been delivered or completed on time, or that any delay has been noted;

(o) ensure that all required manuals or documentation have been received; and

(p) ensure issuance of interim or completion certificates or goods received notes, as appropriate and in accordance with the contract.

Procurement planning.

8. Regulation 20 (5) of the principal regulations is amended by deleting and substituting therefor the following new paragraph and adding the following sub-regulations—

(5) The consolidated annual procurement plan shall be prepared by the procurement unit and approved by both the tender committee, the head of the procuring entity and where applicable by the board of directors or a similar body.

(6) The approval of the plan in sub-regulation (5) by the tender committee shall be deemed to include approval of all alternative procurement methods as required under section 29(3) of the Act.

Prequalification documents.

9. Regulation 24(4) of the principal Regulations is amended by deleting and substituting therefor the following new paragraph –

The procuring entity shall allow the candidates at least seven days to prepare and submit their applications to be pre-qualified.

Variations to contracts.

10. Regulation 31 is amended by adding the following subregulation—

(e) the cumulative value of all contract amendments shall not increase the total contract price by more than twenty five percent from the original contract sum.

Time for international tendering.

11. Regulation 36 of the principal Regulations is amended by deleting and substituting therefor the following new paragraph –

For the purposes of section 71(c) of the Act, the minimum period of time between advertisement and deadline for submission of international tenders shall be twenty one days.

Fee for tender documents.

12. Regulation 39 of the principal Regulations is amended by deleting and substituting therefor the following new paragraph—

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

(2) In arriving at the fee payable under paragraph (1), a procuring entity shall only have regard to the costs related to printing, copying, and distribution or of converting the documents into electronic form.

(3) No fee shall be charged where the tender documents are—

(a) obtained electronically;

(b) for invitations for expression of interest; or

(c) for invitations for pre-qualification.

(4) Where tender documents are sold, the procuring entity shall allow potential tenderers to inspect the documents, prior to purchasing the document.

Time for preparing national tenders.

13. Regulation 40 of the principal Regulations is amended by deleting and substituting therefor the following new paragraph—

The minimum time for the preparation of national open tenders for the purposes of section 55 (1) of the Act shall be a period of fourteen days.

Tender security.

14. Regulation 41 (3) of the principal Regulations is amended by deleting and substituting therefore the following new paragraph—

(3) The tender security to be provided under section 57 of the Act shall be in any of the following forms only—

(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.

Period for evaluation of tenders.

15. Regulation 46 of the principal Regulations is amended by deleting and substituting therefore the following new paragraph—

(1) A procuring entity shall, for purposes of section 66 (6) of the Act, evaluate the tenders within a period of fifteen days after the opening of the tender.

(2) Where a tender is complex, and/or has attracted a high number of tenderers, the accounting officer or head of a procuring entity may extend the period for tender evaluation to a further period within the tender validity period but not exceeding thirty more days.

Procedure for restricted tendering.

16. Regulation 54(5) of the principal Regulations is amended by deleting and substituting therefore the following new paragraph—

The minimum time for the preparation of tenders for the purposes of section 73 of the Act shall be a period of seven days.

Request for proposals.

17. Regulation 55 is amended by deleting and substituting therefor the following new paragraph –

(1) A procuring entity that conducts procurement using the request for proposals method pursuant to section 76 of the Act shall be subject to the procurement thresholds set out in the First Schedule.

(2) The notice inviting expressions of interest prepared by the procuring entity pursuant to section 78 of the Act shall give a minimum period of seven days for tenderers to submit their expressions of interest.

(3) Invitation of expressions of interest may not apply where the tender committee of a procuring entity has expressly approved—

(a) direct Request for Proposals;

(b) direct procurement or Single Source Selection;

(c) restricted tendering; or

(d) request for quotations

Use of specially permitted procedures.

18. Regulation 64 (1) is amended by adding the following subregulation—

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

Notification of the award.

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

A procuring entity shall 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.

Mode of filing requests.

20. Regulation 73 of the principal Regulations is amended by deleting and substituting therefore the following new paragraph—

(1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule of the principal Regulations.

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint, including any alleged breach of the Act or Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) from the date of the occurrence of the breach complained of where the request is made before the making of an award or the notification under sections 67 or 83 of Act be made within—

(i) ten calendar days if procurement proceeding is a national tender; or

(ii) ten working days if procurement proceeding is an international tender.

(d) be submitted in three bound copies and a soft copy, pages of which shall be consecutively numbered;

(e) be accompanied by non-refundable fees set out the Second Schedule of these Regulations.

(3) Every request for review shall be filed with the Secretary of the Review Board upon payment of the requisite fees.

(4) The Secretary shall acknowledge filing of the request for review.

Notification of filing of request.

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

Upon being served with a notification of a request, the procuring entity shall—

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

(b) within five days or such lesser period as may be stated 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.

The First Schedule

22. The First Schedule of the principal regulations is amended by deleting and substituting therefor with the First Schedule of these Regulations.

The Fourth Schedule

23. Part II of the Fourth Schedule of the principal regulations is amended by deleting and substituting with the Second Schedule to these Regulations.

Made on the 18th June, 2013.

HENRY ROTICH,
Cabinet Secretary for the National Treasury.