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S T A T U T O R Y I N S T R U M E N T S

2014 No. 7.

**THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
(PROCURING AND DISPOSING ENTITIES) REGULATIONS, 2014.**

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S T A T U T O R Y I N S T R U M E N T S

2014 No. 7.

The Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2014.

(Made under section 96(1) of the Public Procurement and Disposal of Public Assets Act, 2003, Act No 1 of 2003).

IN EXERCISE of the powers conferred upon the Minister responsible for finance by section 96(1) of the Public Procurement and Disposal of Public Assets Act, 2003, on the recommendation of the Authority and with the approval of Parliament, these Regulations are made, this 6th day of February, 2014.

1. Title and commencement.

(1) These Regulations may be cited as the Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2014.

(2) These Regulations shall come into force on the 3rd day of March, 2014.

2. Interpretation.

In these Regulations, unless the context otherwise requires—

“Act” means the Public Procurement and Disposal of Public Assets Act, 2003.

3. Annual procurement plan of procuring and disposing entity.

(1) The procurement and disposal unit shall for each financial year, prepare an annual procurement plan for the procuring and disposing entity using the procurement plans of the user departments.

(2) For the purposes of subregulation (1), a user department shall, based on the approved budget of the procuring and disposing entity, prepare the procurement plan for the user department, and submit it to the procurement and disposing unit.

(3) A user department shall promptly notify the procurement and disposal unit of any change in the procurement plan of the user department.

(4) The annual procurement plan and any updates to it shall be approved by the Contracts Committee.

4. Contents of annual procurement plan.

The annual procurement plan of a procuring and disposing entity shall state—

- (a) the works, services and supplies to be procured;
- (b) the contract packages of the works, services and supplies to be procured and the estimated cost of each package;
- (c) a time schedule of the procurement requirements;
- (d) the common use items;
- (e) the works, services and supplies to be used in common by the procuring and disposing entity with another procuring and disposing entity;
- (f) the resources required for the procurement, supported by a schedule of the projected funding;
- (g) the recommended method of procurement for each contract package and the time estimated for each stage of procurement; and
- (h) the type of contract recommended for each requirement and where applicable, the requirement for deviation from the use of the standard bidding documents.

5. Aggregating procurement requirements.

(1) A procuring and disposing entity shall aggregate its procurement requirements for—

- (a) the user departments of the procuring and disposing entity;
- (b) a financial year or any other appropriate period of time; and
- (c) any other appropriate circumstance.

(2) For the purposes of subregulation (1), a procuring an disposing entity shall—

- (a) determine the market structure for the items required;
- (b) aggregate the items which are of a similar nature and which are likely to attract the same potential bidders;
- (c) determine the optimum size and type of contract that attracts the greatest and most responsive competition or the best prices;
- (d) aggregate the items for which the method of procurement and bidding conditions are to be the same;
- (e) aggregate the items which are to be ready for bidding at the same time;
- (f) aggregate the items which are to be subject to the same conditions of contract;
- (g) determine the potential savings in time or transaction costs;
- (h) determine the appropriate size of the contract which facilitates the application of a preference and reservation scheme, where applicable; and
- (i) determine the optimum number and size of contracts which facilitate the management and administration of contracts by the procuring and disposing entity.

6. Splitting of requirements.

(1) A procuring and disposing entity shall not split a procurement requirement where the requirement can be procured as a single contract.

(2) Notwithstanding subregulation (1), a procuring and disposing entity may split a procurement requirement, where the split offers a clear and calculable economic or technical advantage.

7. Division into lots.

(1) A procuring and disposing entity shall, at the commencement of a procurement process, divide the procurement requirements allocated to a procurement process, into separate lots, where it is anticipated that the award of several separate contracts will result in value for the procuring and disposing entity.

(2) Where a procurement requirement is divided into lots, which may result in separate contracts, the choice of procurement method shall not be determined by the estimated value of each individual lot but by the total value of all the lots.

(3) Where a number of lots are to be procured under the same procurement process, the bidding documents shall clearly state—

- (a) the number of lots included in the procurement process;
- (b) the nature and size of each lot;
- (c) the proportion of each lot for which a bidder may bid, or whether a bid shall be for complete lots; and
- (d) the method of evaluating multiple lots.

8. Procurement with another procuring and disposing entity of items used in common.

(1) A procuring and disposing entity shall, for the purposes of undertaking procurement of works, services or supplies which are used in common with another procuring and disposing entity, be guided by the prices for the works, services or supplies determined by the Authority.

(2) A procuring and disposing entity shall, agree with the other procuring and disposing entity—

- (a) on the funds available for the procurement;
- (b) on the mode of payment for the requirements;
- (c) on the reimbursement of the costs of the procurement including the advertising costs, photocopying costs and the cost of the personnel, to the procuring and disposing entity that conducts the procurement; and
- (d) on the appropriate contract, including the delivery arrangements.

9. Appointment of members of Contracts Committee.

(1) An Accounting Officer shall using Form 1 in the Schedule appoint a member of the Contracts Committee of the procuring and disposing entity.

(2) The appointment under subregulation (1) shall be after the approval of the member, by the Secretary to the Treasury.

(3) A person appointed member of the Contracts Committee shall—

- (a) be a member of the procuring and disposing entity, or where this is not possible, member of another procuring and disposing entity;
- (b) have a proven track record of sound judgment; and
- (c) be at an appropriate level of seniority and have experience in decision-making.

(4) A Contracts Committee shall have among its members—

- (a) a person with experience in the functions of the procuring and disposing entity; and

(b) a person with experience in public procurement and disposal.

(5) A Contracts Committee shall not have more than two of its members from the same department.

(6) In reappointing members to the Contracts Committee, the Accounting Officer shall take into account the need for continuity of the membership of the Contracts Committee.

(7) Where a procuring and disposing entity cannot apply section 27 (6) of the Act, the Accounting Officer shall request for exemption from the application of the provision, from the Secretary to the Treasury, giving reasons why the provision does not apply to the procuring and disposing entity.

(8) The Accounting Officer shall appoint as secretary of the Contracts Committee, a member of the procuring and disposing entity, but who shall not be a member of the Procurement and Disposal Unit.

(9) The secretary of the Contracts Committee shall have the right to vote at a meeting of the Contracts Committee.

10. Membership of Contracts Committee.

(1) A person shall be a member of a Contracts Committee in his or her individual capacity, and not by virtue of his or her position or designation.

(2) A member of a Contracts Committee who is not able to attend a meeting of the Contracts Committee shall not nominate a representative or proxy, for purposes of the meeting.

(3) Where a procuring and disposing entity has a governing body, a member of the governing body shall not be a member of the Contracts Committee of the procuring and disposing entity.

11. Termination of office or removal of member of the Contracts Committee.

(1) The Accounting Officer may only terminate the appointment of a member of the Contracts Committee—

- (a) for abuse of office;
- (b) for corruption;
- (c) for incompetence;
- (d) for physical or mental incapacity which renders the member incapable of performing his or her duties;
- (e) for failure to attend three consecutive scheduled meetings without reasonable grounds;
- (f) for conviction of an offence involving moral turpitude;
- (g) where the member is declared bankrupt by a court of law; or
- (h) for any other justifiable reason.

(2) The Accounting Officer shall, for the purposes of regulation 9 (3), (4) or (5), or where the structure or status of the procuring entity changes, remove and substitute a member of the Contracts Committee, prior to the expiry of his or her term of office.

(3) The removal of a member of a Contracts Committee by an Accounting Officer shall be subject to the prior approval of the Secretary to the Treasury.

12. Performance of functions by Contracts Committee.

In the performance of its functions, a Contracts Committee shall confirm that—

- (a) a statement of requirements is complete and suitable for the procurement or disposal;
- (b) the proposed evaluation methodology and criteria contained in the bidding documents are appropriate and applicable to the procurement or disposal;

- (c) the type of contract proposed for the procurement or disposal is appropriate;
- (d) the special conditions of the contract proposed in respect of a contract are appropriate; and
- (e) the proposed bidding period is reasonable, having regard to the complexity of the procurement process and the requirement of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non Consultancy Services) Regulations, 2013, the Public Procurement and Disposal of Public Assets (Procurement of Consultancy Services) Regulations, 2013 and the Public Procurement and Disposal of Public Assets (Procurement of Medicines and Medical Supplies) Regulations, 2013, as the case may be.

13. Submissions to Contracts Committees.

(1) A request by a Procurement and Disposal Unit to the Contracts Committee shall be made using the appropriate Forms specified in the Regulations made under the Act.

(2) A Contracts Committee shall consider each request based on the information contained in the Form submitted and the supporting documents, and may approve or reject the request.

(3) Where a Contracts Committee rejects a request, the Contracts Committee shall indicate the reasons for rejecting the request.

(4) A Contracts Committee may give a conditional approval to a submission, where there is a correction to be effected.

(5) A decision of a Contracts Committee shall be unanimous but, where unanimity cannot be achieved, the decision shall be by a simple majority of the members present.

14. Member of Contracts Committee to declare personal interests.

(1) Where a member of a Contracts Committee has any pecuniary or other interest that may conflict with the performance of the functions of the member, the member shall disclose the interest at the meeting.

(2) Where a member has or discloses an interest in any matter before the Contracts Committee, that member shall not take part in the proceedings or exercise of any powers by the committee relating to the item or the matter in which the member has an interest.

15. Conduct of meetings of Contracts Committee.

(1) The chairperson shall chair the meetings of the Contracts Committee and in the absence of the chairperson, the members shall elect from amongst themselves a member to chair the meeting.

(2) The quorum for a meeting of the Contracts Committee shall be any three members present at a meeting.

16. Records of Contracts Committee meetings.

(1) The secretary of a Contracts Committee shall record the minutes of a meeting of the Contracts Committee.

(2) The minutes of a meeting of a Contracts Committee shall include—

- (a) a register of attendance signed by the members and the advisers, which shall indicate whether attendance by a member was for the entire meeting or for only part of the meeting and where a member attended only part of the meeting, indicate the items on the agenda in which the member participated;
- (b) the discussion in relation to each item on the agenda, including any advice given by an adviser and any disagreement between the members; and
- (c) the decisions made for each item on the agenda including, the conditions, if any, given for a request that is approved, or the reasons rejecting a request, which shall be recorded in the relevant Forms.

17. Co-opting of advisers to meetings of the Contracts Committee.

(1) Where a Contracts Committee co-opts an adviser to assist it in the discharge of its functions, the adviser shall not take part in the decisions of the Contracts Committee or vote and shall only attend the part of the meeting where the matter on which advice is required, is considered.

(2) A Contracts Committee may request a member of, a User Department, an evaluation committee or a negotiation team to attend a meeting of the Contracts Committee, as an adviser, to offer clarification on a submission.

(3) An adviser who attends a Contracts Committee meeting shall sign the register of attendance.

18. Disagreement between Accounting Officer and Contracts Committee.

Where the Accounting Officer does not agree with a decision of the Contracts Committee in respect of the application or interpretation of a procurement or disposal process or method, the Accounting Officer shall—

- (a) return the decision with the reasons for rejection, to the Contracts Committee for its review; or
- (b) refer the decision with the reasons for rejecting the decision, to the Authority, with a request for an independent review of the decision by the Authority.

19. Management of procurement and disposal process by the Procurement and Disposal Unit.

(1) A Procurement and Disposal Unit shall manage the procurement or disposal process up to the point of contract placement.

(2) For each procurement or disposal requirement, a User Department shall nominate an official who shall work with the Procurement and Disposal Unit on all matters relating to that procurement or disposal requirement.

(3) Unless otherwise indicated by a User Department, the officer who signs Part 1 of Form 5 of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non Consultancy Services) Regulations, 2013 on behalf of the user department, shall be the officer nominated for the purposes of this Regulation.

20. Monthly report on procurement.

(1) A procuring and disposing entity shall for each month, submit to the Authority, by the fifteenth day of the following month, a report on the procurement activities under taken by the procuring and disposing entity in the month.

(2) The report shall be made using Form 2 in the Schedule.

21. Delegation of functions by Accounting Officer.

(1) An Accounting Officer may delegate a procurement function or a disposal function of the Accounting Officer, Contracts Committee or the procurement and disposal unit to a sub-division of the procuring and disposal entity or a member of staff of the procuring and disposal entity.

(2) The Contracts Committee or the Procurement and Disposal Unit may request the Accounting Officer to delegate a procurement or disposal function of the Contracts Committee or of the Procurement and Disposal Unit, respectively.

(3) A request for delegation of a procurement function shall be made using Part I of Form 3 in the Schedule and Part I of Form 4 in the Schedule for delegation of a disposal function.

(4) On receipt of a request for delegation of functions, the Accounting Officer shall issue his or her decision within ten working days using Part II of Form 3 in the Schedule for delegation of a procurement function and Part II of Form 4 in the Schedule for delegation of a disposal function.

(5) An Accounting Officer may at his or her own initiative or following a written recommendation by the Contracts Committee or the Procurement and Disposal Unit, revoke a delegation of functions.

(6) A delegation of functions shall be revoked through written instructions to the person to whom the delegation was made and shall have immediate effect unless otherwise stated.

22. Contracting out of procurement or disposal function to another procuring and disposing entity.

(1) An Accounting Officer may contract out a procurement function or a disposal function of the Contracts Committee, the procurement and disposal unit or the user department to another procuring and disposing entity or to a third party procurement and disposal provider.

(2) Where a procurement or a disposal function of the procuring and disposal entity is contracted out to another procuring and disposing entity, the Accounting Officers of the two procuring and disposing entities shall, in writing, agree on—

- (a) the functions to be contracted out;
- (b) the mechanisms for implementation of the procurement or disposal function;
- (c) the procedures for reporting and monitoring;
- (d) the procedure for approving the procurement or disposal function;
- (e) the limitations or exceptions to the contract, if any; and
- (f) the costs to be paid, if any.

(3) Notwithstanding subregulation (2), the Accounting Officer of the procuring and disposing entity whose function is contracted out to another procuring and disposing entity shall be accountable for the decisions taken by the procuring and disposing entity to which a procurement or disposal function is contracted out.

23. Conditions for contracting out procurement or disposal function.

A procurement or a disposal function of a procuring and disposal entity may be contracted out to another procuring and disposing entity—

- (a) where that other procuring and disposing entity has specialised knowledge, expertise or experience in the subject matter of the procurement or disposal;
- (b) where the procurement or disposal is common to both procuring and disposing entities;
- (c) where a project is implemented by both procuring and disposing entities jointly;
- (d) where it would be more economical or efficient to contract out a procurement or disposal function; or
- (e) for any other justifiable reason.

24. Contracting out of procurement or disposal function to third party.

(1) Where there is lack of technical capacity an Accounting Officer may contract out a procurement or disposal function of the procuring and disposal entity to a third party.

(2) Where an Accounting Officer contracts out a procurement or disposal function to a third party, the Accounting Officer shall select the third party from the providers pre-qualified by the Authority.

(3) The contracting out of a procurement or disposal function to a third party shall be in accordance with the procurement rules and methods in the Act, regulations made under the Act and the relevant guidelines.

(4) Notwithstanding subregulation (2), where none of the providers pre-qualified by the Authority is competent to provide the required procurement or disposal function, a procuring and disposing entity may contract another person to provide the required procurement or disposal function.

(5) The procuring and disposing entity shall, before contracting another person to provide the required procurement or disposal function, make an application to the Authority requesting the Authority to pre-qualify that person as a provider.

(6) The third party contracted under this regulation shall submit a report of the procurement or disposal function undertaken, to the Accounting Officer.

25. Contract with third party.

Where Accounting Officer contracts out a procurement or disposal function to a third party, the Accounting Officer shall enter into a contract with the third party, which shall state—

- (a) the procurement or disposal function to be undertaken by the third party which may be defined by value, type, procurement or disposal method or any other criteria;
- (b) that the procurement or disposal function to be undertaken by the third party shall be in accordance with the Act, regulations made under the Act and the relevant guidelines;
- (c) the fee or unit rate to be paid for the services of the third party by the procuring and disposing entity;
- (d) whether a function may be sub-contracted by the third party and where this is allowed, state the requirement for the prior written approval of the Accounting Officer;
- (e) that the records of the procurement or disposal are the property of the procuring and disposing entity;
- (f) the procedural arrangements for implementing the procurement or disposal function; and
- (g) any other appropriate contract provisions, based on the standard solicitation document for services.

26. Procedure for applying for a deviation from use of standard documents.

(1) A procuring and disposing entity may, where the standard bidding documents, procedural forms or any other attendant documents are not suitable for a procurement or disposal process, apply to the Authority, in writing, for approval to deviate from the use of these documents.

(2) An application for deviation shall—

- (a) indicate the standard bidding document, procedural form or other attendant document for which a procuring and disposing entity requests for a deviation;
- (b) state the reasons for requesting for a deviation, including an explanation of the relevant specialised requirements, market conditions and industry standards, which affect the requirement;
- (c) indicate the proposed alternative document, and how the alternative document differs from the standard bidding document, procedural form or other attendant document and the advantages of using the proposed alternative document; and
- (d) indicate whether the deviation is required for a single procurement or disposal requirement or for a number of procurement or disposal requirements of the same class, over a period of time.

(3) Where a deviation from use of a standard document is approved for a specified period of time, a procuring and disposing entity that made the application, may using subregulation (2), apply to the Authority for renewal of the deviation.

(4) The Authority shall issue its decision within fourteen working days of the receipt of the application.

27. Procedure for applying for accreditation of alternative procurement and disposal systems.

(1) A procuring and disposing entity which is not able to comply with a particular procurement or disposal procedure required under the Act, shall, in writing, apply to the Authority for an alternative system.

(2) The application under subregulation (1) shall—

- (a) state the procurement or disposal procedure for which an alternative system is sought;
- (b) state the alternative system sought by the procuring and disposing entity;
- (c) include an analysis of how the alternative system sought, differs from the relevant procurement and disposal procedure required under the Act;
- (d) include a justification for using the alternative system, including a copy of any relevant agreement or legislation; and
- (e) state how the proposed alternative system complies with the principles of public procurement.

(3) An alternative accredited system shall—

- (a) comply with the basic principles of public procurement and disposal in Part IV of the Act; and
- (b) except for the particular procurement or disposal procedure the procuring and disposing entity cannot comply with, comply with all the other provisions of the Act, Regulations made under the Act, the relevant guidelines and the standard bidding documents.

(4) The Authority shall issue its decision within twenty one working days of the receipt of the application.

28. Customisation of standard documents.

(1) Subject to subregulation (2), a procuring and disposing entity may customize a standard bidding document or any other document issued by the Authority.

(2) The customisation of a standard bidding document or any other document issued by the Authority shall be limited to—

- (a) the entry of the contract details of a procuring and disposing entity such as, the name and address of the procuring and disposing entity; and
- (b) the addition of a logo or any other form of identification of a procuring and disposing entity.

(3) A procuring and disposing entity shall not, when customising a standard bidding document or any other document issued by the Authority, alter or amend the content or substance of the document, including the style and format of the document, without the prior written authority of the Authority.

(4) The Contracts Committee shall approve the use of the customised documents by a procuring and disposing entity.

29. Preference schemes.

(1) A preference scheme shall be determined and developed by a competent authority.

(2) The competent authority shall certify the eligibility of a provider to participate in a preference scheme.

(3) A preference scheme shall—

- (a) state the target group, the eligibility requirements, the period of the scheme and arrangements for phasing in and out;
- (b) contain the objectives to be achieved and the benchmarks to assess progress; and

(c) not be discriminatory in terms of capacity, specialization and classification of ownership of the eligible providers.

(4) Where a preference scheme is to be used, the bidding documents shall state, as shall be necessary—

(a) that a preference scheme shall be applied;

(b) the percentage of the preference;

(c) eligibility for the preference;

(d) the evidence required to prove eligibility for the preference; and

(e) the manner in which the preference is to be determined during evaluation.

(5) A procuring and disposing entities shall verify eligibility for a preference during pre-qualification or at the preliminary examination of bids.

(6) Where the register of providers of the Authority has information indicating that a provider is eligible to participate in a preference scheme, the provider shall use this as proof of eligibility.

30. Reservation schemes.

(1) A reservation scheme shall be determined and developed by a competent authority.

(2) A reservation scheme—

(a) shall state the target group, the eligibility requirements, the period of the scheme and arrangements for phasing in and out;

(b) shall contain the objectives to be achieved and the benchmarks to assess progress; and

(c) shall not be discriminatory in terms of capacity, specialization and classification of ownership of the eligible providers.

(3) A provider shall be eligible to participate in a reservation scheme—

(a) based on the capacity, area of specialization and the ownership classification as registered by the Authority; and

(b) where the provider is certified by a competent authority.

(4) Where a reservation scheme is to be used, the bidding documents shall state, as shall be necessary—

(a) that the procurement is subject to a reservation scheme;

(b) eligibility to participate in the procurement; and

(c) the evidence of required to prove eligibility.

(5) A procuring and disposing entity shall verify eligibility for a reservation scheme during pre-qualification or the preliminary examination of bids.

(6) Where the register of providers of the Authority has information indicating that a provider is eligible to participate in a reservation scheme, the provider shall use this as proof of eligibility.

31. Due diligence.

(1) A procuring and disposing entity may at any time during a procurement and disposal process carry out a due diligence test on a bidder or a bid.

(2) A due diligence test shall cover any area of operation of a provider or any area of the bid that the procuring and disposing entity determines requires verification or checking, in exercising due care in a procurement or disposal process.

32. Role of internal audit department.

(1) The internal audit department of a procuring and disposing entity shall audit—

- (a) the procurement procedure used for a procurement and the payment made to establish whether the supplies, works or services are properly ordered, received, verified and paid for in accordance with the Public Finance and Accountability Act, 2003 and the other applicable laws; and
- (b) the disposal procedure used for a disposal and the payments received, if any, by the procuring and disposing entity.

33. Procurement and disposal notice board of a procuring and disposing entity.

(1) A procuring and disposing entity shall position its procurement and disposal notice board at a location within its premises, which is freely accessible to members of the public.

(2) The procuring and disposing entity shall display on the procurement and disposal notice board the following information—

- (a) the annual procurement plan of the procuring and disposing entity;
- (b) the pre-qualification notices;
- (c) bid notices;
- (d) shortlists for pre-qualified providers;
- (e) bid opening records;
- (f) notices of best evaluated bidders;
- (g) notices of awards of contract;
- (h) notifications of public auctions; and
- (i) public invitation notices under disposal by public bidding.

(3) Where a procuring and disposing entity has a website, it may in addition to displaying the information on the procurement and disposal notice board, post it on the website.

(4) The use of a notice board or website shall not relieve a procuring and disposing entity of its responsibility to publish a relevant notice publicly in the media or on the website of the Authority where this is required under the Act or regulations made under the Act.