

## GENERAL INFORMATION

<b>Capital:</b> Lusaka	<b>Population:</b> 19,08 Million (2021)	<b>GDP:</b> USD 19,32 Billion (2020)
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## LEGAL AND INSTITUTIONAL FRAMEWORK

### PPP Law and other applicable texts

- The Public-Private Partnership Act (Amendment), 2018
- The Public-Private Partnership Act, 2009 (PPP Act)
- The Public-Private Partnership (Amendment) Act, 2021
- The Public Procurement Act, 2020

### Other applicable sectoral laws

- The Energy Regulation Act, 2019
- The Electricity Act, 2019
- The Railways Act, 2002
- The Zambia Development Agency (ZDA) Act No. 11 of 2006

### PPP Unit

- Public-Private Partnership Department (PPP Department) under the control of the Ministry responsible for Finance
- Public-Private Partnership Council (PPP Council)
- Public-Private Partnership Technical Committee (PPP Tech Committee)
- The Zambia Development Agency (ZDA)

### Definition

#### (Art. 3 of the PPP Act)

"Public-private partnership agreement" means a contractual arrangement between a contracting authority and a concessionaire, made in accordance with this Act, in which the concessionaire:

- (a) undertakes to perform or undertake any infrastructure project or infrastructure facility as specified in the First Schedule or as prescribed;
- (b) undertakes to provide or provides such social sector services as may be prescribed;
- (c) assume substantial financial, technical and operational risks in connection with the performance of the institutional function or use of State property; and

- (d) receives consideration for performing a public function or utilising State property, either by way of:
- (i) a fee from any revenue fund or a Ministry's budgetary funds;
  - (ii) user levies collected by the concessionaire from users or customers for a service provided by it; or
  - (iii) a combination of the consideration paid under subparagraphs (i) and (ii).

## **General Principles**

### **(Art. 20 – procurement procedure of the PPP Act)**

The procurement system shall be fair, equitable, transparent, competitive and cost effective.

The procurement procedure relating to PPPs shall take into account the Citizens Economic Empowerment Act, 2006 regarding preferential treatment for certain categories of disadvantaged or marginalized citizens in accessing and being awarded tenders for the procurement of goods and services.

## **Tendering and contracting process / Choice of the private partner**

### **(Art. 20 to 38 of the PPP Act)**

- Competitive selection (art. 20-34)
- Non-competitive selection may be adopted in case of urgent need of provision, project with short duration and limited initial investment, national security, exclusive capacity of service provider, unsatisfied pre-selection results etc. (art. 35, 36)
- Unsolicited proposal received by the contracting authority may be advertised for competing proposals. After reviewing the proposals the contracting authority may award the project to the original proposal proponent, the competing proposal proponent, neither, or both. (art. 42)
- The project award needs to be approved by the PPP Unit while the project contract needs to be approved by the PPP Council. (art.38(3))

## **Project Evaluation**

### **(Art. 19 of the PPP Act)**

A contracting authority shall, after undertaking a feasibility study and in accordance with the advice of the PPP Unit, submit a project proposal together with the proposed agreement to the PPP Technical Committee for evaluation. The PPP Technical Committee will submit the feasibility study, the project proposal and the proposed agreement to the PPP Council for approval. Similar procedures and approvals need to be done immediately when any assumption in the feasibility study is materially revised. (art.19)

## **Rights and Obligations of the public partner**

### **(Art. 46, 47, 55 and 56 of the PPP Act)**

- Obligation to make available to the concessionaire or, as appropriate, shall assist the concessionaire in obtaining such rights related to the project site. (art. 46)

- Obligation to assist the concessionaire with obtaining easements, i.e., to enjoy the right to enter upon, transit through or do work or fix installations upon, property of third parties, as appropriate and required for the implementation of the project. (art. 47)
- Right to temporarily take over the operation of an infrastructure project or facility upon a material default by the concessionaire. (art. 55)
- Right of the PPP Unit to agree with any entity extending financing for a project and a concessionaire to provide for step in rights. (art.56(1))
- Obligation to facilitate a concessionaire to securitize any project receivables and assets in favor of a lender subject to terms and conditions to safeguard the implementation, completion, working, management and control of the project. (art.56(2))

### **Rights and Obligations of the private partner**

**(Art. 43, 48, 49, 50, 52, 53 and 54 of the PPP Act)**

- Obligation to guarantee the performance of and maintain insurance policies for the implementation of the project. (art.43 (j))
- Right to charge, receive or collect user levies, or direct payments from the contracting authority as a substitute (full or partial), for the use of an infrastructure facility or its services in accordance with an agreement. (art.48)
- Right of a concessionaire to create security interests over any of its assets, rights or interests, including those relating to the project. (art.49 (1))
- Right of the shareholders of a concessionaire's company to pledge or create any other security interest in their shares in the company. (art.49 (2))
- The rights and obligations of the concessionaire may not be assigned to a third party without the prior written consent of the appropriate contracting authority. (art.50 (1))
- A controlling interest in the concessionaire's company shall not be transferred to third parties without the consent of the appropriate contracting authority. (art.51 (1))
- The concessionaire shall have the right to issue and enforce rules governing the use of the infrastructure facility. (art.52 (2))
- Obligation related to the operation of infrastructure facility. (art. 52 (1))
- Right to be entitled compensation for costs/losses due to the change of laws specifically applicable to the project. (art.53)

- Right to revise the agreement and be compensated for costs/losses due to changes in economic conditions or unforeseeable changes in laws not specifically applicable to the project. (art.54)
- Obligations and Rights of Both Public and Private Partners (Art. 37, 42, 54 and 58 of the PPP Act, 2018)**
- Obligation of non-disclosure (art.37 (1)(2), art.42(3))
  - Right to terminate the agreement in some circumstances, e.g. material default by the other party, or failed to agree on a revision of the agreement (under art.54) or circumstances beyond either party's control. A contracting authority or the Unit can also terminate the agreement for public interest, subject to compensation to the concessionaire. (art.58)
- Applicable Law**
- Law of Zambia (art.44)
- Dispute resolution (Art. 44, 64 and 67 of the PPP Act, 2018)**
- Dispute settled through the agreed dispute settlement by the parties and by default in accordance with Arbitration Act, 2000. (art.64)
  - The PPP Act also applies to PPP agreements entered into before the commencement of the Act. (art.67)

## EXAMPLES OF PROJECTS STRUCTURED AS PPP

<b>Power</b>	Ngonye Solar PV Plant (34 MW) Bangweulu Solar PV Plant (47.5 MW) Maamba Coal-Fired Power Plant- Phase-I (300 MW) Kabompo Gorge Hydropower Plant (40 MW)
<b>Urban Transports</b>	Chingola-Solwezi-Lumwana-Jimbe freight railway line
<b>Roads</b>	Toll road project Lusaka-Livingstone in BOOT Kaliba-Mwenda Road Project

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**THE PUBLIC-PRIVATE PARTNERSHIP ACT, 2009**

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*Copies of this Act can be obtained from the Government Printer,  
P.O. Box 30136, 10101 Lusaka. Price K20,500 each.*

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GOVERNMENT OF ZAMBIA

**ACT**

No. 14 of 2009

Date of Assent: 26th August, 2009

**An Act to promote and facilitate the implementation of privately financed infrastructure projects and effective delivery of social services by enhancing transparency, fairness and long term sustainability and removing undesirable restrictions on private sector participation in the provision of social sector services and the development and operation of public infrastructure; establish a Public-Private Partnership Unit and provide for its functions; establish the Public-Private Partnership Council and provide for its functions; provide for public-private partnerships for the construction and operation of new infrastructure facilities and systems and the maintenance, rehabilitation, modernisation, expansion and operation of existing infrastructure facilities and systems and the provision of social sector services; develop general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects and facilities and provision of social sector services and rules governing public-private inception, procurement, contracting and management of public-private partnerships; provide for the implementation of public-private partnership agreements between contracting authorities and concessionaires; and provide for matters connected with, or incidental to, the foregoing.**

[28th August, 2009

ENACTED by the Parliament of Zambia.

Enactment

PART I  
PRELIMINARY

1. This Act may be cited as the Public-Private Partnership Act, 2009, and shall come into operation on such date as the Minister may, by statutory instrument, appoint.

Short title  
and  
commen-  
cement



- Application      **2.** This Act applies to infrastructure projects and facilities, and the provision of social sector services as may be prescribed by the Minister, implemented through the Public-Private Partnership Unit, but does not apply to the following infrastructure projects or infrastructure facilities:
- (a) projects which are undertaken by any joint venture between any statutory body, Government Ministry or department, statutory body or local authority;
  - (b) projects between any statutory body and any Government Ministry or department;
  - (c) projects which may be taken over by any concessionaire or private sector entity on privatisation or dis-investment by any Government Ministry, department, statutory body, State corporation, local authority or agency; or
  - (d) projects which have been expressly excluded from the provisions of this Act or which are not prescribed by the Minister.
- Interpretation      **3.** In this Act, unless the context otherwise requires—
- “affordable” in relation to an agreement, means a contractual arrangement where a contracting authority is able to meet any financial commitment likely to be incurred under the agreement from its existing or future budgetary funds;
  - “agreement” means a public-private partnership agreement entered into in accordance with this Act which may incorporate any approvals, licences, permits and authorisations necessary for its implementation;
  - “asset” includes an existing asset of a relevant contracting authority or a new asset to be acquired for the purposes of entering into an agreement;
  - “bid” means a tender, an offer, a proposal or price quotation, given in response to an invitation to participate in an infrastructure facility or infrastructure project;
  - “bidder” means any person, including a group of persons, that participates in selection proceedings relating to a project;
  - “bidding documents” means the tender solicitation documents or other documents for solicitation of bids, on the basis of which bidders are to prepare their bids;
  - “bidding consortium” means a situation where a proposal for an infrastructure project or infrastructure facility is made by more than one person, and “bidding consortia” shall be construed accordingly;
  - “concessionaire” means a person from the private sector who undertakes an infrastructure project or infrastructure facility or the provision of any social sector services under a public-private partnership agreement, other than a contracting authority;

“contracting authority” means the public authority that has the power to enter into an agreement for the implementation of an infrastructure project or infrastructure facility or the provision of any social sector services under any law, and includes any Ministry, Government department, local authority or statutory body;

“contingent liability” includes Government’s guarantee for loan and foreign currency transfer and step in function in the event of default by the relevant contracting authority;

“Council” means the Public-Private Partnership Council established under section six;

“generic risks” means any circumstances that have the potential to adversely affect the development of, or interests of the parties to, an infrastructure project or infrastructure facility or the provision of any social sector services or the interest of a contracting authority, in the nature of construction period risk, operation period risk, market and revenue risk, finance risk, legal risk and miscellaneous risk, as prescribed by the Minister;

“infrastructure facility” means any physical facility and systems that directly or indirectly provide services to the general public;

“infrastructure project” means the design, construction, development and operation of any new infrastructure facility or the rehabilitation, modernisation, expansion or operation of any existing infrastructure facility;

“local authority” has the meaning assigned to it under the Local Government Act;

Cap. 281

“material default” means any failure of a concessionaire to perform any duty under a public-private agreement which affects or will affect the delivery of service to the public, and remains unsatisfied after a reasonable period of time and after the concessionaire has received written notice of the failure from the Unit;

“National Council for Construction” means the Council established under the National Council for Construction Act, 2003;

Act No. 13  
of 2003

“preferred bidder” means a bidder, including any bidding consortium, selected as a successful bidder during the competitive selection process;

“project” means an infrastructure project, an infrastructure facility, or the provision of any social sector service, as the case may be;

“public-private partnership” means investment through private sector participation in an infrastructure project or infrastructure facility;

“public-private partnership agreement” means a contractual arrangement between a contracting authority and a concessionaire, made in accordance with this Act, in which the concessionaire—

(a) undertakes to perform or undertake any infrastructure project or infrastructure facility as specified in the First Schedule or as prescribed;

(b) undertakes to provide or provides such social sector services as may be prescribed;

(c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function or use of State property; and

(d) receives consideration for performing a public function or utilising State property, either by way of—

(i) a fee from any revenue fund or a Ministry’s budgetary funds;

(ii) user levies collected by the concessionaire from users or customers for a service provided by it; or

(iii) a combination of the consideration paid under sub-paragraphs (i) and (ii);

“regulatory agency” means a public authority that is entrusted with the power to issue and enforce the laws governing infrastructure development or the provision of services;

“Technical Committee” means the Public-Private Partnership Technical Committee established under section *ten*;

“Unit” means the Public-Private Partnership Unit established under section *four*;

“unsolicited proposal” means any proposal relating to the implementation of an infrastructure project or infrastructure facility that is not submitted in response to a request or solicitation issued by the Unit or a contracting authority within the context of a competitive selection procedure;

“user levy” means the right or authority granted to a concessionaire by the contracting authority to recover investment and a fair return on investment and includes

tolls, fees, tariffs, charges or other benefit whatsoever called;

“value for money” means the carrying out of the institutional function of a contracting authority or the use of State property by a concessionaire, in terms of an agreement, which results in a net benefit to the contracting authority or consumer, defined in terms of cost, price, quality, quantity, risk transfer or a combination thereof; and

“Zambia Development Agency” has the meaning assigned to it in the Zambia Development Agency Act, 2006.

Act No. 11 of 2006

PART II

THE PUBLIC-PRIVATE PARTNERSHIP UNIT, COUNCIL AND TECHNICAL COMMITTEE

4. (1) There is hereby established the Public-Private Partnership Unit which shall be responsible for the implementation of the provisions of this Act.

Establishment of Public-Private Partnership Unit

(2) The Unit shall be a department in the Ministry responsible for finance and shall be under the control and supervision of the Minister responsible for finance.

(3) The expenses of the Unit shall be charged upon and issued out of the general revenues of the Republic.

5. (1) The functions of the Unit are to—

Functions of Unit

(a) promote the participation of the private sector in the financing, construction, maintenance and operation of any project irrespective of its cost;

(b) advise Government on administrative procedures in relation to project development and on all matters of policy relating to public-private partnerships;

(c) conceptualise, identify and categorise projects for purposes of this Act and prepare a project register as may be Prescribed;

(d) co-ordinate with contracting authorities in respect of any project;

(e) develop technical and best practice guidelines in relation to all aspects of public-private partnerships, standardised bidding documents and public-private partnership agreement provisions for purposes of this Act and as may be prescribed;

(f) receive and make an assessment of any proposed project submitted to it and give its recommendations to the contracting authority as to whether the project or facility-

- (i) is affordable to a contracting authority;
  - (ii) provides value for money; and
  - (iii) presents optimum transfer of technical, operational and financial risks to the concessionaire;
- (g) examine the request for proposals to ensure conformity with the approved feasibility study and as may be prescribed;
  - (h) monitor the competitive selection process and provide for review of the process if so required, under this Act;
  - (i) monitor progress of implementation of public-private partnerships;
  - (j) facilitate the internal and external auditing of projects and prepare a road map for project development;
  - (k) in liaison with the Zambia Development Agency, facilitate and market investment in public-private partnerships;
  - (l) identify inter-sectoral linkages and facilitate approvals from the Ministry responsible for finance required under this Act;
  - (m) approve terms of reference for consultancy assignments for a project and the consultant selection process for such assignment in liaison with the Technical Committee;
  - (n) determine financial support and approve the allocation of contingent liability for any project, as prescribed by the Minister;
  - (o) monitor issues pertaining to user levies and recommend to the Council, in liaison with the appropriate regulatory agency, mechanisms and procedures for setting, revising and collecting user levies and the settlement of disputes relating to user levies, notwithstanding any other law to the contrary;
  - (p) train, and provide advisory services to, project officers; and
  - (q) promote public-private partnership awareness and advocacy in Zambia.

(2) The Unit shall be responsible for ensuring the proper implementation, management, enforcement and monitoring of any agreement and the reporting by a concessionaire on an agreement.

(3) The Unit shall exercise and perform such other powers and functions as are conferred or imposed on it by, or under, this Act or any other written law.

6. (1) There is hereby established the Public-Private Partnership Council. Establishment of Public-Private Partnership Council
- (2) The provisions of the Second Schedule apply to the Council.
7. (1) The functions of the Council are to— Functions of Council
- (a) formulate policies relating to public-private partnerships for purposes of this Act;
  - (b) approve projects for purposes of this Act;
  - (c) approve the preliminary award of agreements under this Act;
  - (d) ensure competition, transparency, fairness and equity in the selection process under this Act;
  - (e) make recommendations to the contracting authority on generic risk sharing principles for any project and the grounds for entering into negotiations with a preferred bidder;
  - (f) give directions to any contracting authority, regulatory agency or concessionaire regarding the implementation of any project and the contracting authority, regulatory agency or concessionaire shall comply with the directive, subject to any other written law;
  - (g) set time limits for the clearance of any project and review the time limits periodically;
  - (h) resolve issues relating to the project approval process; and
  - (i) refer any bid received by it to an appropriate contracting authority for examination and evaluation;
- (2) The Council shall approve or reject a project or award of an agreement before it within twenty one days of receiving a recommendation on it from the Technical Committee.
- (3) The Council shall, in the performance of its functions under this Act, take into consideration the recommendation of the Technical Committee.
- (4) In the discharge of its functions under this Act, the Council may—
- (a) commission any study relevant to the determination of the award of any agreement;
  - (b) request any contracting authority, regulatory agency, concessionaire or any other body or person to furnish the Council with information, details, documents and particulars required in connection with or relating to any project;

- (c) request any professional or technical assistance from any appropriate body or person in Zambia or elsewhere; and
  - (d) inspect, visit, review and monitor any project and its implementation, execution, operation and management.
- (5) The Council may —
- (a) request the chairperson, supervising officer or chief executive officer of a contracting authority to—
    - (i) produce any records or other document relating to a project; and
    - (ii) answer all relevant questions, on a project as requested by the Council; and
  - (b) examine any record or other document submitted under paragraph (a) and take copies or extracts from them.
- (6) Any person to whom a request is made under subsection (5) who—
- (a) fails to comply with the request; or
  - (b) refuses to answer or gives any false or misleading answer to any question lawfully put by the Council;

commits an offence and is liable upon conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a term not exceeding five years, or to both.

(7) Where the Council makes recommendations under paragraph (e) of subsection (1), any change in the terms of the agreement shall be submitted by the contracting authority to the Council for final approval before the signing of the agreement.

(8) The Council may delegate any of its functions to the Technical Committee.

Composition  
of Council

**8.** The Council shall consist of the following part-time members:

- (a) the Minister responsible for finance, who shall be the Chairperson;
- (b) four Ministers appointed by the President, one of whom shall be designated the Vice-Chairperson;
- (c) not more than four other persons who shall be appointed by the President on such conditions as the President may determine.

9. (1) The Permanent Secretary in the Ministry responsible for finance shall be the Secretary to the Council. Secretary to Council

(2) The Secretary shall be responsible for the day-to-day affairs of the Council under the general supervision of the Chairperson.

10. (1) There is hereby constituted the Public-Private Partnership Technical Committee, which shall consist of the following part-time members appointed by the Minister: Constitution of Public-Private Partnership Technical Committee

(a) the Secretary to the Treasury, as Chairperson;

(b) a representative of the Attorney-General;

(c) the Permanent Secretary of the Ministry responsible for works and supply;

(d) the Permanent Secretary of the Ministry responsible for industry;

(e) the Permanent Secretary of the Ministry responsible for land;

(f) the Permanent Secretary of the Ministry responsible for local government;

(g) a representative of the Engineering Institution of Zambia;

(h) a representative of the National Council for Construction;

(i) a representative of the Environmental Council of Zambia;

(j) a representative of the Zambia Public Procurement Authority;

(k) a representative of the Economic Association of Zambia, nominated by that Association; and

(l) two persons appointed by the Minister.

(2) The Minister shall appoint the Vice-Chairperson from among the members.

(3) Subject to subsection (4), the members of the Technical Committee referred to in paragraphs (g) to (l) of subsection (1) shall hold office for a period of three years from the date of appointment and are eligible for appointment for a further term of three years.

(4) The office of a member becomes vacant—

(a) if the member is absent, without reasonable excuse, from three consecutive meetings of the Technical Committee of which the member has had notice;

(b) upon the member's death;

(c) if the member is adjudged bankrupt;

(d) if the member ceases to hold the office by virtue of which the member was appointed;



- (e) if the member becomes mentally or physically incapable of performing the duties of a member;
- (f) if the member is removed by the Minister;
- (g) if the member is convicted of an offence involving dishonesty or fraud under this Act or any other law;
- (h) upon the expiry of one month's notice of the member's intention to resign from office, given by the member to the Minister.

(5) A member may resign from office by giving one month's notice in writing to the Minister.

(6) Where a vacancy occurs in terms of subsection (4), the Minister shall appoint another person to replace the member who vacates office, but that person shall hold office for the remainder of the outgoing member's term.

(7) A member of the Technical Committee shall be paid such allowances as the Minister may determine.

Functions of  
Technical  
Committee

**11.** (1) The Technical Committee shall advise the Council and the Unit on all technical matters relating to public-private partnerships and projects under this Act.

(2) Notwithstanding the generality of subsection (1), the Technical Committee shall—

- (a) recommend to the Council the award of agreements under this Act;
- (b) evaluate and select projects for award for recommendation to the Council;
- (c) recommend the approval of projects under this Act; and
- (d) perform such other functions provided for under this Act, or as may be assigned by the Council.

Proceedings  
of Technical  
Committee

**12.** (1) Subject to the other provisions of this Act, the Technical Committee may regulate its own procedure.

(2) The Technical Committee shall meet for the transaction of business at least once in every three months at such places and at such times as the Chairperson may determine.

(3) Upon giving notice of not less than fourteen days, a meeting of the Technical Committee may be called by the Chairperson and shall be called if not less than five members so request in writing:

Provided that if the urgency of any particular matter does not permit the giving of such notice, a special meeting may be called upon giving a shorter notice.

(4) Six members shall form a quorum at any meeting of the Technical Committee.

(5) There shall preside at any meeting of the Technical Committee—

(a) the Chairperson;

(b) in the absence of the Chairperson, the Vice-Chairperson;  
and

(c) in the absence of both the Chairperson and the Vice-Chairperson, such member as the members present may elect from among themselves for purposes of the meeting.

(6) The determination of any matter before the Technical Committee shall be according to the votes of the majority of the members present and considering the matter.

(7) The Technical Committee may invite any person whose presence is in its opinion desirable to attend and to participate in the deliberations of a meeting of the Technical Committee but such person shall have no vote.

(8) The Technical Committee shall cause minutes to be kept of the proceedings of every meeting of the Technical Committee.

13. (1) A person present at a meeting of the Technical Committee at which any matter is the subject of consideration and in which matter that person is directly or indirectly interested shall, as soon as is practicable after the commencement of the meeting, disclose the interest and shall not, unless the Technical Committee otherwise directs, take part in any consideration or discussion of or vote on, any question touching that matter.

Disclosure of  
interest

(2) A disclosure of interest made under subsection (1) shall be noted in the minutes of the meeting at which it is made.

14. (1) There shall be a Director for the Unit who shall be a public officer appointed by the Public Service Commission.

Director and  
other public  
officers

(2) The Director shall, subject to the general or specific directions of the Council—

(a) be responsible for the administration of the Unit;

(b) be an ex-officio member of the Technical Committee;  
and

(c) exercise the functions conferred upon the Director by, or under, this Act.

(3) The Public Service Commission shall appoint such other officers as are necessary for purposes of this Act.

Conciliation,  
mediation  
and  
arbitration

**15.** Notwithstanding section *sixty four*, the Council may act as mediator, conciliator or arbiter with regard to any dispute, arising under this Act or an agreement, between a contracting authority and a concessionaire at the request of the parties.

Appointment  
of mediator  
or arbitrator

**16.** Notwithstanding section *fifteen*, the Council may appoint a suitable person to act as mediator or arbitrator for the settlement of disputes on its behalf, in accordance with this Act or the Arbitration Act, and any action or decision of a person so appointed shall be deemed to be an action or a decision of the Council.

Act No. 19 of  
2000

### PART III

#### PROJECT IDENTIFICATION AND FEASIBILITY STUDY

Participation  
in project

**17.** Any person in the private sector may participate in the financing, construction, rehabilitation, maintenance, operation and management of any projects as enumerated in the First Schedule or as prescribed, notwithstanding any other law to the contrary.

Project  
identifica-  
tion and  
feasibility  
study

**18.** The Minister may, by statutory instrument, make regulations to provide for—

- (a) the identification, evaluation, operation and management of projects under this Act;
- (b) the undertaking of feasibility studies for purposes of this Act;
- (c) the implementation and monitoring of projects under an agreement; and
- (d) any other matter to ensure that agreements provide value for money and afford the optimum transfer of appropriate technical, operational or financial risk to concessionaires.

Approval  
by Council

**19.** (1) Subject to subsection (5), a contracting authority shall, after undertaking a feasibility study and in accordance with the advice of the Unit, submit a project proposal together with the proposed agreement to the Technical Committee for evaluation.

(2) The Technical Committee shall consider the project proposal and the proposed agreement submitted under subsection (1) and submit the feasibility study, the project proposal and the proposed agreement to the Council which shall—

- (a) accept the project proposal and agreement with or without amendments, within the prescribed time;
- (b) return the project proposal and agreement to the contracting authority for re-consideration and re-submission for approval, within the prescribed time; or

(c) reject the project proposal and agreement, within the prescribed time.

(3) If at any time, after the Council has approved a feasibility study for a project, any assumption in the feasibility study is materially revised, including any assumption concerning affordability, value for money and substantial technical, operational and financial risk transfer, the contracting authority shall immediately

(a) provide the Technical Committee with details of the intended revision including a statement regarding the purpose and impact of the intended revision on the affordability, value for money and risk transfer evaluation contained in the feasibility study; and

(b) ensure that the Technical Committee is provided with a revised feasibility study for submission to the Council for consideration in accordance with subsection (2).

#### PART IV

##### COMPETITIVE SELECTION PROCESS AND AWARD PROCEEDINGS

**20.** (1) The procurement procedure relating to public private partnerships provided for under this Act shall be as follows:

Procurement  
procedure

(a) the procurement system shall be fair, equitable, transparent, competitive and cost effective;

(b) the procurement process shall be in accordance with

(i) this Act or the bidding documents; or

(ii) where this Act or the bidding documents do not specifically provide for a process, commission, omission, offence or penalty in relation to any aspect of the procurement process relating to public-private partnerships, the Public Procurement Act, 2008, shall apply; and

Act No. 12 of  
2008

(c) take into account the Citizens Economic Empowerment Act, 2006, regarding preferential treatment for certain categories of citizens that have been disadvantaged or marginalised, as defined under that Act, in accessing and being awarded tenders for the procurement of goods and services.

Act No. 9 of  
2006

**21.** A contracting authority may engage in pre selection proceedings with a view to identifying bidders that are suitably qualified to implement the proposed project.

Pre-selection  
proceedings

Request for  
expression  
of interest

22. (1) A contracting authority shall prepare a request for submission of expressions of interest, after the approval of the feasibility study.

(2) A contracting authority shall submit the request for submission of expressions of interest prepared by it to the Unit for written authorisation to advertise, invite, solicit or call for bids for the purposes of engaging in pre selection proceedings.

(3) A contracting authority shall not issue any bidding document for a public private partnership to any prospective bidder before obtaining the approval of the Unit.

(4) The invitation for submission of expressions of interest shall be published in accordance with regulations issued under it.

(5) The invitation to submit expressions of interest for participation in the pre selection proceedings shall include at least the following:

- (a) a description of the infrastructure project or facility;
- (b) an indication of other essential elements of the project, such as the—
  - (i) services to be delivered by the concessionaire; and
  - (ii) financial arrangements envisaged by the contracting authority;
- (c) where already known, a summary of the main required terms of the agreement to be entered into;
- (d) the manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their expressions of interest;
- (e) the manner and place for solicitation of the pre selection bidding documents; and
- (f) an appropriate statement to the effect that the contracting authority reserves the right to request proposals upon completion of the pre selection proceedings only from a limited number of bidders that best meet the pre selection criteria.

(6) The pre-selection bidding documents shall include at least the following information:

- (a) the pre-selection criteria in accordance with section *twenty-three*;
- (b) whether the contracting authority intends to waive any limitation on the participation of consortia in accordance with section *twenty-four*;

- (c) whether the contracting authority intends to request only a limited number of pre selected bidders to submit proposals upon completion of the pre selection proceedings and, if applicable, the manner in which this selection shall be carried out; and
- (d) whether the contracting authority intends to require the preferred bidder to establish an independent legal entity under any other law in accordance with section *forty-one*.

23. Any person who meets the criteria stated in the pre selection bidding documents shall qualify for the pre selection proceedings which criteria shall include the following: Pre selection criteria

- (a) adequate professional and technical qualifications, human resources and equipment and other physical facilities as may be necessary to carry out all the phases of the project; and
- (b) appropriate managerial and organisational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.

24. (1) A contracting authority when requesting for submission of expressions of interest for the pre selection proceedings, may allow bidders to form bidding consortia and in such a case the bidding consortium shall demonstrate its qualifications, in accordance with section *twenty-three*, relating to the consortium as a whole as well as to its individual members. Participation of consortia

(2) Unless otherwise authorised by a contracting authority in the pre selection bidding documents, each member of a consortium may participate, either directly or indirectly, in only one consortium at the same time.

(3) When considering the qualifications of bidding consortia, a contracting authority shall consider the capabilities of each of the consortium's members and assess whether the combined qualifications of the consortium's members are adequate to meet the needs of all phases of the project.

25. (1) A contracting authority shall evaluate the qualifications of each bidder that has submitted an expression of interest for pre selection, applying only the criteria that are set forth in the pre-selection bidding documents and this Act. Approval of Unit

(2) All pre selected bidders shall, after the approval of the Unit, as specified in section *twenty-six*, be invited by the contracting authority to submit proposals in accordance with this Act.

Single stage  
and two  
stage  
procedures  
for  
requesting  
technical  
proposals

26. (1) After the evaluation of the pre selection bids, the contracting authority shall submit a report for approval to the Unit, demonstrating how the pre selection criteria specified under section *twenty-three* has been met.

(2) The report shall contain the following statements:

(a) that the bids explain the capacity of the concessionaires and their proposed mechanisms and procedures to effectively implement, manage, enforce, monitor and report on the proposed infrastructure project and facility; and

(b) that a satisfactory due diligence including a legal due diligence has been completed by the Unit and the selected concessionaires in relation to matters of their respective competence and capacity are qualified to enter into the public private partnership agreement.

Content of  
request for  
technical  
proposals

27. (1) A contracting authority shall provide a set of the request for technical proposals and related documents issued in accordance with section *twenty-eight* to each pre-selected bidder that pays the price, if any, charged for those bidding documents.

(2) Notwithstanding subsection (1), a contracting authority may use a two stage procedure to request for technical proposals from pre selected bidders when the contracting authority does not consider it to be feasible to describe the characteristics of the project in the request for technical proposals.

(3) Where a two stage procedure is used, the following shall apply:

(a) the initial request for technical proposals shall call upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as the main contractual terms proposed by the contracting authority or Unit;

(b) the contracting authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for technical proposals or the initial technical proposals and accompanying documents submitted by the bidders which shall be recorded in minutes of the meeting or discussion; and

(c) following evaluation of the technical proposals received, the contracting authority may review and, as appropriate, revise the initial request for technical proposals by removing, modifying or adding to any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project,

including the main contractual terms and any criterion for evaluating technical proposals and ascertaining the preferred bidder, as set out in the initial request for technical proposals; the contracting authority shall indicate in the record of the selection proceedings, to be kept pursuant to section *thirty-nine*, the justification for any revision to the request for technical proposals and which shall be communicated in the invitation to submit final proposals; and at the second stage of the procedure, the contracting authority, shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with sections *twenty eight* through to section *thirty-four*.

**28.** To the extent not required by, or under, the Public Procurement Act, 2008, a request for technical proposals shall include the following:

- (a) general information as may be required by the bidders in order to prepare and submit their proposals;
- (b) project specifications and performance indicators, as appropriate, including the contracting authority's or Unit's requirements regarding safety and security standards and environmental protection;
- (c) contractual terms proposed by the contracting authority or Unit including an indication of which terms are considered to be non negotiable; and
- (d) criteria for evaluating technical proposals, and the thresholds, if any, set by the contracting authority for identifying non responsive proposals, the relative weight to be accorded to each evaluation criterion and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

**29.** (1) A request for technical proposals shall set out the requirements with respect to the issue of, and the nature, form, amount and other principal terms and conditions of, the required bid security.

(2) A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of a —

- (a) withdrawal or modification of a technical proposal after the deadline for submission of proposals and, if so stipulated in the request for technical proposals, before that deadline;

Content of  
request for  
technical  
proposals  
Act No. 12  
of 2008

Bid securities



- (b) failure to enter into final negotiations with the contracting authority pursuant to subsection (1) of section *thirty-four*;
- (c) failure to submit its best and final offer within the time limit prescribed by the contracting authority pursuant to subsection (2) of section *thirty-four*;
- (d) failure to sign the agreement, if required by the contracting authority to do so, after the technical proposal has been accepted; or
- (e) failure to provide the required security for the fulfillment of the agreement after the technical proposal has been accepted or to comply with any other condition prior to signing the agreement, as specified in the request for technical proposals.

Clarifications  
and  
modifications

30. (1) A contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for technical proposals as set out in section *twenty eight*.

(2) A contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to section *thirty-nine* the justification for any revision to the request for technical proposals and which shall be communicated to the bidders, in the same manner as the request for technical proposals, at a reasonable time prior to the deadline for submission of technical proposals.

Evaluation  
criteria

31. (1) The criteria for evaluating technical proposals shall include the following:

- (a) technical soundness;
- (b) compliance with environmental standards under any law;
- (c) operational feasibility;
- (d) quality of services and measures to ensure their continuity; and
- (e) any other prescribed criteria.

(2) The criteria for evaluating financial and commercial proposals shall include, as appropriate:

- (a) the present value of proposed user levies, unit prices, and other charges over the agreement period;
- (b) the present value of proposed direct payments by the contracting authority, if any;
- (c) the costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

- (d) the extent of financial support, if any, expected from a public authority in Zambia;
- (e) the soundness of the proposed financial arrangements;
- (f) the extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for technical proposals;
- (g) the social and economic development potential offered by the technical proposals; and
- (h) any other prescribed criteria.

32. (1) A contracting authority shall evaluate each technical proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion and the evaluation process set out in the request for technical proposals.

Evaluation  
of technical  
proposal

(2) For the purposes of subsection (1), a contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects of the proposal.

(3) For the purposes of subsection (2), the lowest evaluated bid shall not necessarily be the lowest offered price.

33. (1) A contracting authority may require any bidder that has been pre selected to demonstrate again its qualifications in accordance with the same criteria used for pre selection.

Further  
demonstration  
of fulfillment  
of  
qualification  
criteria

(2) A contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.

34. (1) A contracting authority shall rank all responsive technical proposals on the basis of the evaluation criteria and invite, for final negotiation of the agreement, the bidder that has attained the best rating, except that the final negotiations shall not include those contractual terms, if any, that were stated as non negotiable in the final request for technical proposals.

Final  
negotiations

(2) A contracting authority shall, where it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in an agreement, inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer.

(3) Where a bidder puts forward its best and final offer and the contracting authority does not find that offer acceptable, it shall terminate the negotiations with the bidder concerned.

(4) Where a contracting authority terminates negotiations under subsection (3), the contracting authority shall invite the other bidders for negotiations, in the order of their ranking, until the parties conclude an agreement or the contracting party rejects all the remaining proposals.

(5) A contracting authority shall not resume negotiations with a bidder with whom negotiations have been terminated in accordance with this section.

Circumstances authorizing award without competitive procedures

35. A contracting authority may negotiate an agreement, subject to the approval of the Unit, without using the procedure set out in this Part in the following cases:

(a) when there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set out in this Part would be impractical:

Provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of any dilatory conduct on its part;

(b) where the project is of short duration and the anticipated initial investment value does not exceed an amount prescribed;

(c) where the project involves national defense or national security;

(d) where there is only one source capable of providing the required service, such as, when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;

(e) where an invitation to the pre selection proceedings or a request for technical proposals has been issued but no proposals were submitted or all proposals failed to meet the evaluation criteria set out in the request for proposals and if, in the opinion of the contracting authority, issuing a new invitation to the pre selection proceedings and a new request for technical proposals is not likely to result in an infrastructure project or facility award within the required time frame; or

(f) in any other case where the Unit authorises such an exception for compelling reasons of national or public interest.

Procedure for negotiation of agreement

36. Where an agreement is negotiated without using the procedures set out in this Part, a contracting authority shall —

(a) except for an agreement negotiated pursuant to subparagraph (c) of section *thirty five*, cause a notice, of its intention to commence negotiations in respect of the agreement, to be published in the prescribed manner;

- (b) engage in negotiations with as many persons as the contracting authority considers capable of carrying out the project, as circumstances permit; and
- (c) establish evaluation criteria against which proposals shall be evaluated and ranked.

**37.** (1) A contracting authority and the Unit shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders and any discussion, communication or negotiation between the contracting authority and a bidder shall be confidential.

Confidentiality

(2) Unless required by law or by a court order or permitted by the request for proposals, a party to a negotiation shall not disclose, to any other person, any technical or financial matter or any other information in relation to any discussion, communication or negotiation submitted, received or done, as the case may be, under this Act, without the consent of the other party.

**38.** (1) Subject to subsection (3) and except for a contract awarded pursuant to paragraph (c) of section *thirty five*, a contracting authority shall cause a notice of the contract award to be published in the prescribed manner.

Notice of contract award

(2) A notice issued under subsection (2) shall identify the concessionaire and include a summary of the essential terms of the agreement.

(3) A contracting authority shall not award any project or sign any agreement unless the—

- (a) award of the project has been approved by the Unit; and
- (b) agreement relating to the project has been approved by the Council.

**39.** A contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in the prescribed manner.

Record of selection and award proceedings

**40.** A bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on a contracting authority under this Act or any other written law, may seek review of the contracting authority's acts or failure to act.

Review procedures

**41.** (1) A contracting authority may require that the preferred bidder establish a legal entity incorporated under the laws of Zambia.

Organisation of concessionaire

(2) Where a preferred bidder establishes a legal entity in accordance with subsection (1), the bidder shall make a statement to that effect in the pre selection bidding documents or in the request for technical proposals, as appropriate.

(3) Any requirement relating to the minimum capital of a legal entity established under subsection (1) and the procedures for obtaining the approval of a contracting authority to the legal entity's Articles of Association or any significant changes in the Articles shall be set out in the agreement consistent with the terms of the request for proposals.

Unsolicited  
proposal

**42.** (1) A contracting authority may receive, consider, evaluate and accept an unsolicited proposal for a public private partnership if the proposal

- (a) is independently originated and developed by the proposer;
- (b) shall be beneficial to the public;
- (c) has been prepared without the supervision of the Unit or a contracting authority; and
- (d) includes sufficient detail and information for a contracting authority to evaluate the proposal in an objective and timely manner.

(2) A contracting authority shall, within fourteen days after receiving an unsolicited proposal, undertake a preliminary evaluation of the unsolicited proposal to determine if the proposal complies with the requirements of subsection (1).

(3) A contracting authority or the Unit shall take appropriate action to protect confidential or proprietary information that a person provides as part of an unsolicited proposal.

(4) A contracting authority shall, where an unsolicited proposal does not comply with subsection (1), return the proposal without further action.

(5) A contracting authority may, if an unsolicited proposal complies with subsection (1), continue to evaluate the proposal in accordance with this section.

(6) A contracting authority shall, if an unsolicited proposal complies with subsection (1), advertise the unsolicited proposal for the purpose of receiving competitive proposals for the same project.

(7) An advertisement issued under subsection (6), shall outline the general nature and scope of the unsolicited proposal, including the location of the project, if appropriate and the work to be performed on or in connection with the project and shall specify an address to which a competing proposal may be submitted.

(8) An advertisement, issued under subsection (6), shall specify a reasonable time period by which competitors shall submit a competing proposal to the contracting authority.

(9) A contracting authority may charge, the original proposer or any competing proposer, a reasonable fee to cover its costs for processing, reviewing and evaluating an unsolicited proposal and any competing proposals, as the case may be.

- (10) A contracting authority shall —
- (a) determine if any competing proposal is comparable in nature and scope to the original unsolicited proposal;
  - (b) evaluate the original unsolicited proposal and any comparable competing proposal; and
  - (c) conduct any good faith discussions and, if necessary, any negotiations concerning each qualified proposal.
- (11) A contracting authority shall evaluate an unsolicited proposal and any comparable competing proposal using the following criteria:
- (a) novel methods, approaches or concepts demonstrated by the proposal;
  - (b) scientific, technical, or socio economic merits of the proposal;
  - (c) potential contribution of the proposal to the contracting authority's mission;
  - (d) capabilities, related experience, facilities, or techniques of the private entity or unique combinations of these qualities that are integral factors for achieving the proposal objectives;
  - (e) qualifications, capabilities, and experience of the proposed team leader or key personnel, who are critical to achieving the proposal objectives;
  - (f) how the proposal benefits the public; and
  - (g) any other factors appropriate to a particular proposal.
- (12) After evaluating an unsolicited proposal and any competing proposals, a contracting authority may —
- (a) accept the unsolicited proposal and reject any competing proposals;
  - (b) request the originator of the proposal to match any competing proposal or make a best and final offer and if the originator of the proposal does so, the project shall be awarded to the originator of the proposal;
  - (c) reject the unsolicited proposal and accept a comparable competing proposal if the contracting authority determines that the comparable competing proposal is the most advantageous to the Government;
  - (d) accept both the unsolicited proposal and a competing proposal if accepting both proposals is advantageous to the Government; or
  - (e) reject the unsolicited proposal and any competing proposal.

(13) Subsection (3) shall apply to any unsolicited proposal or competing proposal that has been rejected.

## PART V

### PUBLIC PRIVATE PARTNERSHIP AGREEMENTS

Contents  
and  
implemen-  
tation of  
agreement

43. An agreement shall provide for such matters as the parties consider appropriate, but shall include:

- (a) the nature and scope of works to be performed and services to be provided by the concessionaire;
- (b) the conditions for provision of services and the extent of exclusivity, if any, of the concessionaire's rights under the agreement;
- (c) the assistance that a contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the project;
- (d) the return of assets, if any, to a contracting authority, at the termination or expiry of the agreement, in such manner as may be provided for in the agreement, as specified in section *forty five*;
- (e) procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority and the procedures for testing and final inspection, approval and acceptance of the project;
- (f) the Unit's, contracting authority's or other regulatory agency's right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the Unit, contracting authority or the regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the project is properly operated and the services are provided in accordance with the applicable legal and contractual requirements;
- (g) the extent of the concessionaire's obligation to provide the Unit, contracting authority or regulatory agency, as appropriate, with reports and other information on its operations;
- (h) mechanisms to deal with additional costs and other consequences that might result from any order issued by the Unit, contracting authority or another public authority under this Act including any compensation to which the concessionaire might be entitled;

- (i) any rights of the Unit or contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire's own shareholders or other affiliated persons;
- (j) guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the project;
- (k) remedies available in the event of default of either party;
- (l) the extent to which either party may be exempt from liability for failure or delay to comply with any obligation under the agreement owing to circumstances beyond its reasonable control;
- (m) the duration of the agreement and the rights and obligations of the parties upon its expiry or termination;
- (n) the manner for calculating compensation under this Act as provided under section *sixty-one*;
- (o) the governing law and the mechanisms for the settlement of disputes that may arise between the Unit or contracting authority and the concessionaire;
- (p) the rights and obligations of the parties with respect to confidential information;
- (q) the relevant financial terms;
- (r) the sharing of generic risks between the contracting authority and the concessionaire;
- (s) the payment to the concessionaire by way of compensation from a revenue fund or of user levies collected by the concessionaire for a service provided by it as provided under section *forty-eight*; and
- (t) such other information as may be prescribed. Governing law.

**44.** Every agreement shall be governed by and construed in accordance with the laws of Zambia unless otherwise provided in the agreement. Governing law

**45.** (1) An agreement shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private property of the concessionaire. Ownership of assets

(2) An agreement shall, in particular, identify which assets belong to the following categories:

- (a) assets, if any, that the concessionaire is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the agreement;



(b) assets, if any, that the contracting authority, at its option, may purchase from the concessionaire; and

(c) assets, if any, that the concessionaire may retain or dispose of upon expiry or termination of the agreement.

Acquisition  
of rights  
related to  
project site

**46.** (1) A contracting authority or other public authority, under the terms of any relevant law and an agreement, shall make available to the concessionaire or, as appropriate, shall assist the concessionaire in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project .

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(2) Any compulsory acquisition of land that may be required for the implementation of a project shall be carried out in accordance with the Land Acquisition Act.

Easements

**47.** A contracting authority or other public authority, under the terms of any law and an agreement, shall make available to the concessionaire or, as appropriate, shall assist the concessionaire to enjoy the right to enter upon, transit through or do work or fix installations upon, property of third parties, as appropriate and required for the implementation of the project.

Financial  
arrangements

**48.** (1) A concessionaire shall have the right to charge, receive or collect user levies for the use of an infrastructure facility or its services in accordance with an agreement, which shall provide for methods and formulas for the establishment and adjustment of user levies in accordance with any rules established by the competent regulatory agency.

(2) A contracting authority may agree to make direct payments to the concessionaire as a substitute for, or in addition to, user levies for the use of the project or its services.

Security  
interest

**49.** (1) Subject to any restriction that may be contained in an agreement, a concessionaire shall have the right to create security interests over any of its assets, rights or interests, including those relating to the project, as shall be required to secure any financing needed for the project, including, in particular, the following:

(a) security over movable or immovable property owned by the concessionaire or its interests in project assets; and

(b) a pledge of the proceeds of, and receivables owed to the concessionaire for, the use of the project or the services it provides.

(2) The shareholders of a concessionaire's company shall have the right to pledge or create any other security interest in their shares in the company.

(3) No security under subsections (1) and (2) may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the laws of Zambia.

**50.** (1) Except as otherwise provided in section *forty-nine*, the rights and obligations of the concessionaire under an agreement may not be assigned to a third party without the prior written consent of the appropriate contracting authority.

Assignment  
of  
agreement

(2) An agreement shall set out the conditions under which a contracting authority shall give its consent to an assignment of the rights and obligations of the concessionaire under the agreement, including the acceptance by the new concessionaire of all obligations there under and evidence of the new concessionaire's technical and financial capability as shall be necessary for providing the service or undertaking the project.

**51.** (1) Except as otherwise provided in an agreement, a controlling interest in the concessionaire's company shall not be transferred to third parties without the consent of the appropriate contracting authority.

Transfer of  
controlling  
interest in  
concessionaire

(2) An agreement shall set forth the conditions under which the consent of a contracting authority shall be given.

**52.** (1) An agreement shall set out, as appropriate, the extent of a concessionaire's obligations to ensure—

Operation of  
infrastructure  
facility

- (a) the modification of the service so as to meet the demand for the service;
- (b) the continuity of the service;
- (c) the provision of the service under essentially the same conditions for all users; and
- (d) the non discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.

(2) A concessionaire shall have the right to issue and enforce rules governing the use of the infrastructure facility, subject to the approval of the appropriate contracting authority or regulatory agency.

**53.** An agreement shall set out the extent to which a concessionaire is entitled to compensation in the event that the cost of the concessionaire's performance of the agreement has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally

Compensation for  
specific  
changes in  
legislation

foreseen, as a result of changes in legislation or regulations specifically applicable to the project or the services it provides.

Revision of  
agreement

54. (1) Without prejudice to section *sixty three*, an agreement shall set out the extent to which a concessionaire is entitled to a revision of the agreement with a view to providing compensation in the event that the cost of the concessionaire's performance of the agreement has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of—

- (a) changes in economic or financial conditions; or
- (b) changes in legislation or regulations not specifically applicable to the project or the services it provides:

Provided that the economic, financial, legislative or regulatory changes—

- (i) occur after the conclusion of the agreement;
- (ii) are beyond the control of the concessionaire; and
- (iii) are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the agreement was negotiated or have avoided or overcome their consequences.

(2) An agreement shall establish procedures for revising the terms of the agreement following the occurrence of any changes.

Takeover of  
project

55. (1) A contracting authority shall have the right, under the circumstances set out in an agreement, to temporarily take over the operation of an infrastructure project or facility, for the purpose of ensuring the effective and uninterrupted delivery of a service or timely completion of the project, in the event of a material default by the concessionaire in the performance of its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

(2) In the event that a contracting authority elects to take over a project under subsection (1), the contracting authority —

- (a) shall collect and pay any revenues that are subject to lien to satisfy any obligation;
- (b) may develop and operate the project, impose user levies and comply with any service contract existing; and
- (c) may solicit proposals, as appropriate, for the construction, maintenance or operation of the infrastructure project.

56. (1) The Unit may agree with any entity extending financing for a project and a concessionaire to provide for the substitution of the concessionaire with another person appointed to perform under the existing agreement, upon a material default by the concessionaire or other event that could otherwise justify the termination of the agreement.

Substitution  
of  
concessionaire

(2) The Government may facilitate a concessionaire to securitise any project receivables and assests in favour of a lender subject to such terms as the Government may determine in order to safeguard the successful implementation, completion, working, management and control of the project.

57. The duration of a public private partnership shall be set forth in an agreement and the contracting authority may not agree to extend its duration except as a result of the following circumstances:

Duration  
and  
extension of  
agreement

- (a) delay in completion or interruption of operation due to circumstances beyond the reasonable control of either party;
- (b) project suspension brought about by acts of the Unit or a contracting authority or other public authority;
- (c) increase in costs arising from requirements of the Unit or a contracting authority not originally foreseen in the agreement, if the concessionaire would not be able to recover such costs without such extension; or
- (d) on agreement with the concessionaire, for reasons of national or public interest, as justified in the record to be kept by the Unit.

58. A contracting authority or the Unit may terminate an agreement

Termination  
of  
agreement  
by  
contracting  
authority

- (a) in the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, material default or otherwise; or
- (b) for compelling reasons of national or public interest, subject to payment of compensation to the concessionaire as agreed in the agreement.

59. A concessionaire shall not terminate an agreement except under the following circumstances:

Termination  
of agreement  
by  
concessionaire

- (a) in the event of material default by the Unit or a contracting authority or other public authority of its obligations under the agreement;
- (b) if the conditions for a revision of the agreement under subsection(1) of section *fifty-four* are met but the parties have failed to agree on a revision of the agreement; or

(c) if the cost of the concessionaire's performance of the agreement has substantially increased or the value that the concessionaire receives for such performance has substantially diminished as a result of acts or omissions of the Unit or a contracting authority or other public authority and the parties have failed to agree on a revision of the agreement.

Termination  
of agreement  
by either  
party

**60.** Either party has the right to terminate an agreement by mutual consent or if the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control.

Compensation  
upon  
termination  
of agreement

**61.** An agreement shall stipulate how compensation due to either party shall be calculated in the event of termination of the agreement and shall provide, where appropriate, for compensation for the fair value of works performed under the agreement, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

Management  
of public  
private  
partnership

**62.** A contracting authority shall be responsible for ensuring that the agreement is properly implemented, managed, enforced, monitored and reported on by the concessionaire.

Winding up  
and transfer  
measures

**63.** An agreement shall provide, as appropriate, for —

- (a) mechanisms and procedures for the transfer of assets to a contracting authority in case of a winding up;
- (b) the compensation to which the concessionaire may be entitled in respect of assets transferred to a contracting authority or to a new concessionaire or purchased by a contracting authority;
- (c) the transfer of technology required for the operation of a project;
- (d) the training of a contracting authority's personnel or of a successor concessionaire in the operation and maintenance of project; and
- (e) the provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the project to a contracting authority or to a successor concessionaire.

PART VI

SETTLEMENT OF DISPUTES AND GENERAL PROVISIONS

**64.** Any disputes between the Unit or a contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the agreement or, failing such agreement, in accordance with the Arbitration Act, 2000.

Disputes between contracting authority or Unit and concessionaire Act No. 19 of 2000

**65.** The Unit may, where a concessionaire provides services to the public or operates an infrastructure facility which is accessible to the public, require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.

Disputes involving customers or users

**66.** (1) The Minister may, by statutory instrument, make regulations for the carrying out of the purposes of this Act.

Regulations

(2) Without prejudice to the generality of subsection (1), the Minister may make regulations for—

- (a) any thresholds relating to the procurement process;
- (b) any matter relating to competitive public bidding and direct negotiations;
- (c) mechanisms for settling of disputes under this Act;
- (d) the imposition, revision and collection of user levies; and
- (e) anything that is required to be prescribed under this Act.

**67.** (1) Where an agreement was entered into before the commencement of this Act, and that agreement or arrangement would have been a public-private partnership arrangement if this Act was in operation on such date, then the agreement shall have effect as if this Act was in operation when the agreement or arrangement was entered into.

Savings

(2) An agreement entered into after the commencement of this Act shall comply with this Act.

## FIRST SCHEDULE

*(Sections 3 and 4)*

## INFRASTRUCTURE PROJECTS AND FACILITIES

The following public private partnership arrangements with their variations and combinations may be entered into by the Unit or contracting authority for undertaking any project. The arrangements enumerated in this Schedule are indicative in nature and the Unit or contracting authority may evolve and arrive at such agreement or arrangement incorporating any of the arrangement enumerated hereinafter or any other arrangements as are necessary or expedient for any specific project:

Build and  
Transfer  
(BT)

1. A contractual arrangement whereby a concessionaire undertakes the financing and construction of a given project and after its completion hands it over to the Government or a contracting authority. The Government or the contracting authority would reimburse the total project investment, on the basis of an agreed schedule. This arrangement may be employed in the construction of any project, including critical facilities, which for security or strategic reasons must be operated directly by the contracting authority.

Build Lease  
and  
Transfer  
(BLT)

2. A contractual arrangement whereby a concessionaire undertakes to finance and construct any project and upon its completion hands it over to the Government or a contracting authority concerned on a lease arrangement for a fixed period, after which ownership of the project is automatically transferred to the Government or the contracting authority concerned.

Build  
Operate and  
Transfer  
(BOT)

3. A contractual arrangement whereby a concessionaire undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The concessionaire operates the facility over a fixed term during which the concessionaire is allowed to collect user levies fees, rentals and other charges not exceeding those proposed in the bid or as negotiated and incorporated in the agreement or regulations to enable the recovery of the investment in the project. The concessionaire transfers the project to the Government or the contracting authority concerned at the end of the fixed term that shall be specified in the agreement. This shall include a supply and operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a given project, if the interest of the Government or the contracting authority so requires, operates the facility providing in the process technology transfer

and training to Government, regulatory agency or the contracting authority nominated individuals.

4. A contractual arrangement whereby a concessionaire is authorised to finance, construct, own, operate and maintain a project from which the concessionaire is allowed to recover this total investment by collecting user levies. Under the project, the concessionaire owns the assets of the project and may choose to assign its operation and maintenance to a project operator. The transfer of the project to the Government or the contracting authority is not envisaged in this structure. However, the Government or contracting authority may terminate its obligations after specified time period.

Build Own  
and Operate  
(BOO)

5. A contractual arrangement whereby a concessionaire is authorised to finance, construct, maintain and operate a project and whereby the project is to vest in the concessionaire for a specific period. During the operation period, the concessionaire will be permitted to charge user levies specified in the agreement, to recover the investment made in the project. The concessionaire is liable to transfer the project to the Government or the contracting authority after the expiry of the specified period of operation.

Build Own  
Operate  
Transfer  
(BOOT)

6. A contractual arrangement whereby the Government or a contracting authority contracts out a project to a concessionaire to construct the facility on a turn key basis, assuming costs overruns, delays and specified performance risks. Once the facility is commissioned satisfactorily, the concessionaire is

Build  
Transfer and  
Operate  
(BTO)

given the right to operate the project and collect user levies under an agreement. The title of the project always vests with the Government or the contracting authority in this arrangement.

7. A contractual arrangement whereby the concessionaire adds to an existing project which it rents from the Government or a contracting authority and operates the expanded project and collects user's levies, to recover the investment over an agreed franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the concessionaire.

Contract Add  
and Operate  
(CAO)

8. A contractual arrangement whereby favorable conditions external to a new project which is to be built by a concessionaire are integrated into the BOT arrangement by giving that entity the right to develop adjoining property and thus, enjoy some of the benefits the investment creates such as higher property or rent values.

Develop  
Operate and  
Transfer  
(DOT)



- Rehabilitate  
Operate and  
Transfer  
(ROT)      **9.** A contractual arrangement whereby any existing facility is handed over to the private sector to refurbish, operate and collect user levies in the operation period to recover the investment and maintain for a franchise period, at the expiry of which the facility is turned over to the Government or a contracting authority. The term is also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.
- Rehabilitate  
Own and  
Operate      **10.** A contractual arrangement whereby an existing facility is handed over to the concessionaire to refurbish and operate with no time limitation imposed on ownership. As long as the concessionaire is not in violation of its franchise, it can continue to operate the facility and collect user levies in perpetuity.
- Build Own  
Operate and  
Maintain  
contract      **11.** A contractual arrangement whereby a concessionaire undertakes to finance, construct, operate and maintain a project and whereby such project is to vest in the concessionaire for a specified period. During the period of operation of the project, the concessionaire may be permitted to charge user charges as specified.
- Lease  
Management  
Contract      **12.** A contractual arrangement whereby the Government or a contracting authority leases a project owned by the Government to the person who is permitted to operate and maintain the project for the period specified in the agreement and to charge user charges therefor.
- Management  
Contract      **13.** A contractual arrangement whereby the Government or a contracting authority entrusts the operation and management of a project to a person for the period specified in the agreement on payment of specified consideration. In such agreement, the Government or the contracting authority may charge the user charges and collect the same either itself or entrust the collection, for consideration, to any person who shall after collecting the user charges pay the same to the Government or the contracting authority.
- Service  
Contract      **14.** A contractual arrangement whereby an existing project is vested in a person to renovate, operate and maintain. The concessionaire shall be permitted to charge levies as specified in the agreement.
- Supply  
Operate and  
Transfer      **15.** A contractual arrangement whereby a person undertakes to provide services to the Government or contracting authority for a period. The Government or the contracting authority shall pay the person an amount according to the agreed schedule.

16. A contractual arrangement whereby a person supplies to the Government or a contracting authority the equipment and machinery for a project and undertakes to operate the project for a period and consideration specified in the agreement. During the operation of the project, the person shall undertake to train employees of the Government or contracting authority to operate the project.

Supply  
Operate and  
Transfer

## SECOND SCHEDULE

### (Section 6 (2))

#### ADMINISTRATION OF THE COUNCIL

1. (1) Subject to the other provisions of this Schedule, a member of the Council, shall hold office for a period of three years from the date of appointment and may be re-appointed for a further period of three years.

Tenure of  
office and  
vacancy

(2) Subject to the other provisions of this Schedule, a member shall, on the expiration of the period for which the member is appointed, continue to hold office until another member is appointed to succeed that member.

(3) The office of a member becomes vacant —

- (a) upon the member's death;
- (b) if the member is adjudged bankrupt;
- (c) if the member is absent from three consecutive meetings of the Council of which the member has had notice, without the prior approval of the Council;
- (d) upon the expiry of one month's notice of the member's intention to resign from office, given by the member in writing to the Council;
- (e) if the member becomes mentally or physically incapable of performing the duties of a member of the Council; or
- (f) if the member is convicted of an offence involving dishonesty or fraud under this Act or any other written law.

(4) A member may resign from office by giving not less than one month's notice in writing to the President.

(5) The President shall, where the office of a member becomes vacant, appoint another member in place of the member who vacates office, and such member shall hold office for the remainder of the term.

Proceedings  
of  
Council

2. (1) Subject to the other provisions of this Act, the Council may regulate its own procedure.

(2) The Council shall meet for the transaction of business, at least once in every three months at such places and times as the Chairperson may determine.

(3) The Chairperson may, upon giving notice of not less than fourteen days, call a meeting of the Council and shall call a special meeting upon receiving a written request from at least five members of the Council.

(4) If the urgency of any particular matter does not permit the giving of the notice required under subparagraph (3), a special meeting may be called by the Chairperson upon giving a shorter notice.

(5) The quorum at a meeting of the Council shall be half of the members of the Council.

(6) There shall preside at any meeting of the Council—

(a) the Chairperson;

(b) in the absence of the Chairperson, the Vice-Chairperson; and

(c) in the absence of both the Chairperson and the Vice-Chairperson, such member as the members present may elect from amongst themselves for the purpose of that meeting.

(7) A decision of the Council on any question shall be by a majority of votes of the members present and voting at the meeting and, in the event of an equality of votes, the person presiding at the meeting shall have, in addition to a deliberative vote, a casting vote.

(8) The Council may invite any person whose presence in its opinion is desirable to attend and to participate in the deliberations of a meeting of the Council but such person shall have no vote.

(9) The validity of any proceedings, act or decision of the Council shall not be affected by any vacancy in the membership of the Council or by any defect in the appointment of any member or by reason that any person not entitled so to do, took part in the proceedings.

(10) The Council shall cause minutes to be kept of the proceedings of every meeting of the Council and every meeting of any sub-committee established by the Council.

Committees  
of  
Council

3. (1) The Council may, for the purpose of performing its functions under this Act, constitute any committee and delegate to any such committee such of its functions as it thinks fit.

(2) The Council may appoint as members of a committee constituted under sub-paragraph (1), persons who are or are not members of the Council and such persons shall hold office for such period as the Council may determine.

(3) A committee of the Council may regulate its own procedure.

4. There shall be paid to members of the Council such allowances as the Council may, with the approval of the President, determine.

Allowances  
of  
members

5. (1) A member or person who is present at a meeting of the Council at which any matter, in which that person or any member of the person's immediate family, is directly or indirectly interested in a private capacity, is the subject of consideration, shall, as soon as is practicable after the commencement of the meeting, disclose that interest and shall not, unless the Council otherwise directs, take part in any consideration or discussion of, or vote on any question relating to, that matter.

Disclosure of  
interest

(2) A disclosure of interest made under this paragraph shall be recorded in the minutes of the meeting at which it is made.

6. (1) A person shall not, without the consent in writing given by or on behalf of the Council, publish or disclose to any unauthorised person, otherwise than in the course of duties of that person, the contents of any document, communication or information whatsoever, which relates to or which has come to the knowledge of that person in the course of that person's duties under this Act.

Prohibition of  
publication  
of, or  
disclosure of  
information  
to  
unauthorised  
persons

(2) A person who contravenes sub-paragraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

(3) A person who, having any information which to the knowledge of that person has been published or disclosed in contravention of sub-paragraph (1), unlawfully publishes or communicates the information to any other person, commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

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**THE PUBLIC PROCUREMENT ACT, 2020**

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SCHEDULES

GOVERNMENT OF ZAMBIA

# ACT

No. 8 of 2020

Date of Assent: 23rd November, 2020

**An Act to revise the law relating to procurement so as to enhance transparency, efficiency, effectiveness, economy, value for money, competition and accountability in public procurement; regulate and control practices relating to public procurement in order to promote the integrity of, fairness and public confidence in, the procurement process; promote the participation of citizens in public procurement; continue the existence of the Zambia Public Procurement Authority; repeal and replace the Public Procurement Act, 2008; and provide for matters connected with, or incidental to, the foregoing.**

[23rd November, 2020

ENACTED by the Parliament of Zambia.

Enactment

## PART I

### PRELIMINARY PROVISIONS

**1.** This Act may be cited as the Public Procurement Act, 2020, and shall come into operation on the date appointed by the Minister by statutory instrument.

Short title  
and  
commencement

**2.** In this Act, unless the context otherwise requires—

Interpretation

“approvals authority” means the body or individual with authority to grant prior authorisation of the stages in the procurement process specified in accordance with section 34;

Act No. 3 of  
2012

“asset” includes movable and immovable property, tangible and intangible, including stores, equipment, land, buildings, animals, inventory, stock, intellectual property rights vested in the State and proprietary rights;

“associate” has the meaning assigned to the word in the Anti-Corruption Act, 2012;

“Authority” means the Zambia Public Procurement Authority continued under section 5;

“best evaluated bidder” means the bidder ranked as first, following the application of the specified evaluation methodology and criteria;

“bid” means an offer to provide goods, works or services in response to an invitation from a procuring entity and includes a tender, proposal, quotation and, where applicable, an application to pre-qualify;

“bid document” means a document and required attachments or accompaniments that are submitted in response to an invitation to bid;

“bidder” means a person or group of persons that offers to provide goods, works or services in response to an invitation from a procuring entity and includes, where applicable, a subbidder, potential bidder and applicant to pre-qualify;

“bidder status” means the status of being a citizen bidder, local bidder or foreign bidder;

“Board” means the Board of the Authority constituted under section 7;

“Chairperson” means the person appointed as Chairperson of the Board under section 7;

“chief executive officer” means a chief executive officer of a parastatal, statutory body or a local authority;

Cap. 1

“citizen” has the meaning assigned to the word in the Constitution;

“citizen bidder or citizen supplier” means, in the case of —

(a) an individual, a bidder or supplier who is a citizen;

(b) a firm or company, whether corporate or unincorporate, a firm or company wholly owned by a citizen; and

(c) a body of persons wholly comprising of citizens;

“classified audit” means an audit of a procurement that involves or relates to the security, defence or international relations of the Republic;

“coercive practice” means a practice that causes harm or threatens to cause harm, directly or indirectly, on a person or a person’s property, in order to influence that person’s participation in a procurement process, affect the execution of a contract or influence the sale of public assets to a particular person or in a particular way;

“company” has the meaning assigned to the word in the Companies Act, 2017;

Act No. 10 of  
2017

“consulting services” includes services of an intellectual or advisory nature offered by a professional, the delivery of reports, drawings or designs;

“contract” means an agreement between a procuring entity and a supplier for the provision of goods, works or services;

“controlling officer” has the meaning assigned to the words in the Public Finance Management Act, 2018;

Act No. 1 of  
2018

“corrupt” has the meaning assigned to the word in the Anti-Corruption Act, 2012 and cognate expressions shall be construed accordingly, 2012;

Act No. 3 of  
2012

“direct bidding” means a procurement method where a bid is obtained directly from a single bidder, without competition;

“direct selection” means a procurement method where a proposal is obtained from a single consultant without competition;

“Director-General” means the person appointed as Director-General under section 9;

“document” includes an electronic copy of that document or record;

“due diligence” means the assessment of a bidder or supplier’s technical, financial, commercial, historical background and management capabilities and the bidder’s or supplier’s governance record to effectively execute a contract;

“electronic reverse auction” means an online real time purchasing technique utilised by a procuring entity to select the successful submission, which involves the presentation by tenderers, suppliers or contractors of successively lowered bids during a scheduled period of time and the automatic evaluation of bids;

- Cap. 1 “emoluments” has the meaning assigned to the word in the Constitution;
- Cap. 1 “Emoluments Commission” means the Emoluments Commission established by the Constitution;
- Act No. 17 of 2010 “Engineering Institution of Zambia” means the Engineering Institution of Zambia established under the Engineering Institution of Zambia Act, 2010
- “force account” means a mechanism by which a procuring entity undertakes some construction works using its own equipment and personnel;
- “foreign bidder or supplier” means a non-citizen bidder or supplier who is not registered to undertake business activities in the Republic in accordance with the relevant law;
- “framework agreement” means an agreement between a procuring entity and a selected supplier, or contractor identified for a definite term to supply goods, works or services whose quantities and delivery schedules are not definable or determinable at the beginning of work;
- “fraudulent practice” means a misrepresentation or omission of facts in order to influence a procurement or the execution of a contract to the detriment of the procurement entity, bidder or contractor and includes collusive practices prior to or after the tender submission;
- “fronting” means a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act;
- “goods” means objects of every kind and description including raw materials, products, equipment, objects in solid, liquid or gaseous form, electricity, and works and services incidental to the supply of the goods if the value of those incidental works and services does not exceed that of the goods;
- “Government Agency” means an unincorporate person or body of persons to which functions exercisable on behalf of the Republic, involving the use or collection of public moneys or stores as delegated by or under any law and “Government Agent” and cognate expressions shall be construed accordingly;

- “higher education institution” has the meaning assigned to the words in the Higher Education Act, 2013; Act No. 4 of 2013
- “international procurement agreement” means a convention, treaty or other agreement to which Zambia is a State party, a letter of intent, memorandum of understanding or agreement between a procuring entity and another country or a foreign company, institution or organisation, which requires the Government to contribute its resources in any form to any procurement activities within the Republic, wholly, partially, jointly or severally;
- “legally disqualified” means the absence of legal capacity as provided under section 4 of the Mental Health Act, 2019; Act No. 6 of 2019
- “limited bidding” means a procurement method for goods, works and non-consulting services where bids are obtained by direct invitation to a shortlist of bidders, without open advertisement;
- “limited selection” means a procurement method for consulting services where bids are obtained by direct invitation to a shortlist of bidders, without open advertisement;
- “local bidder or supplier” means a non-citizen bidder or supplier who is registered to undertake business activities in the Republic in accordance with the relevant written law;
- “local content” means the extent of utilisation of local inputs, products or personnel in the production of goods and services in the Republic;
- “market price index” means a metric that represents the price position relative to top competitors across commonly procured goods, works and services;
- “micro business enterprise” has the meaning assigned to the words in the Zambia Development Agency Act, 2006 Act No. 11 of 2006
- “non-consulting” services means services other than consulting services, for the carrying out of work of any kind, with or without the use of vehicles, machinery or equipment or the provision of operators, technicians or drivers;
- “office holder” has the meaning assigned to the words in the Public Finance Management Act, 2018; Act No. 1 of 2018
- “open bidding” means a procurement method for goods, works and non-consulting services which is open to participation on equal terms by all eligible bidders through advertisement of the opportunity;

“open data” means data that can be freely used, reused and redistributed by anyone subject to the requirement to attribute and share under a licence, to increase accessibility, usability and interoperability;

“open selection” means the procurement method for consulting services which is open to applications for short listing on equal terms by all bidders through advertisement of the opportunity;

“parastatal body” means a statutory corporation or body, a local authority or a company in which the Government has a majority or controlling interest;

“post-qualification” means the conduct of due diligence to determine whether the bidder is qualified to perform the contract effectively;

“price reasonableness analysis” means a review of the prices proposed by a supplier in order to ascertain whether the prices offered in the bids are fair to a procuring entity and supplier;

“procurement” means acquisition by purchase, rental, lease, hire purchase, licence, tenancy, franchise or any combination thereof;

“procurement agreement” means a bilateral or an international agreement relating to procurement;

“Procurement Committee” means a committee established under section 27;

“Procurement Unit” means the division or department in each procuring entity responsible for the execution of the procurement or stores function;

“procuring entity” means—

(a) a Government Agency or parastatal body carrying out procurement using public funds or any other funds;

(b) any other body or unit established or mandated by Government to carry out procurement using public funds;

“public body” has the meaning assigned to the words in the Public Finance Management Act, 2018



- “public funds” has the meaning assigned to the words in the Public Finance Management Act, 2018; Act No. 1 of 2018
- “public office” has the meaning assigned to the words in the Constitution; Cap. 1
- “public procurement” means the acquisition of goods, construction works or services by a procuring entity;
- “rate contract” means a mutual agreement between a procuring entity and supplier to operate a set of chosen items, during a given period of time at a fixed rate;
- “relative” has the meaning assigned to the word in the Anti-Corruption Act, 2012; Act No. 3 of 2012
- “repealed Act” means the Public Procurement Act, 2009; Act No. 12 of 2008
- “running contract” means a contract extending over a period of time for an estimated or variable quantity of goods and services;
- “service” means an object of procurement other than goods or works, which involves the provision of labour, time or effort and includes a professional, consultancy, technical, non-professional or commercial service and goods and works which are incidental to but not exceeding the value of those services;
- “simplified bidding” means a procurement method which invites bids from a minimum of three bidders;
- “simplified selection” means a procurement method which invites proposals from a minimum of three bidders;
- “small business enterprise” has the meaning assigned to the words in the Zambia Development Agency, 2006; Act No. 11 of 2006
- “solicitation document” means a bidding document, a request for proposals, request for quotation and, where applicable, a pre-qualification document or document of any kind issued by a procuring entity, inviting bidders to participate in procurement proceedings;
- “supplier” means a contractor, consultant, service provider or a natural person or incorporate body that is a party to a contract with a procuring entity for the provision of goods, works or services including a person that has a contract with the supplier in relation to the provision of goods, works or services to a procuring entity;

“user department” means a department, division, branch or project unit of the procuring entity which initiates procurement requirements and is, or represents, the end user of the goods, works or services;

“variation” means any change to a statement of requirements for goods, works and services;

“Vice-Chairperson” means the person appointed as Vice-Chairperson of the Board under section 7;

“works” means all work associated with the construction, reconstruction, demolition, repair, maintenance or renovation of a building, road, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, and includes services incidental to construction provided in a contract, where the value of those services does not exceed that of the works;

“Zambia Institute of Purchasing and Supply” means the Zambia Institute of Purchasing and Supply established under the Zambia Institute of Purchasing Supply Act, 2003 and

Act No. 15 of  
2003

“Zambia Qualifications Authority” means the Zambia Qualifications Authority established under the Zambia Qualifications Authority Act, 2016;

Act No. 12 of  
2011

Application

**3.** (1) This Act applies to procurement carried out by a procuring entity.

(2) Despite subsection (1), a procuring entity may, where a procurement involves or relates to the security, defence or international relations of the Republic, modify the application of the rules and procedures of procurement set out in this Act to the extent necessary to protect the public interest and in accordance with procedures that the Authority may determine.

(3) Where a procuring entity undertakes a procurement that is related to or involves the security, defence or international relations of the Republic, the procuring entity shall—

(a) agree with the Authority on the type of goods, works or services to be subject to modified rules and procedures of procurement;

(b) agree with the Authority on the modifications to be made to the rules and procedures provided for in this Act and to be applied to the goods, works and services under paragraph (a); and

(c) apply the rules and procedures provided for in this Act to the procurement of goods, works and services in a manner that is not prejudicial to the security, defence and international relations of the Republic.

(4) A procuring entity and the Authority shall, on an annual basis or as need arises, review and update the type of goods, works and services subject to modified rules and procedures of procurement and the modified rules and procedures of procurement under subsections (2) and (3).

(5) The Authority shall, access any information, document, record or report, or enter any premises of the Defence Force and the Zambia Security Intelligence Service with the written consent of the President.

(6) A procurement that is subject to the modified rules and procedures of procurement under subsection (2) shall be subject to a classified audit.

**4.** (1) A procuring entity shall, before entering into an international procurement agreement, obtain the approval of the Authority and the Treasury and once the approval is given, seek the advice of the Attorney-General.

Approval required for international procurement agreements

(2) A procurement agreement under subsection (1) purportedly entered into without the approval of the Authority and the Treasury, and the advice of the Attorney-General, is void.

(3) The financier of a commercial or concessional loan of an international procurement agreement under subsection (1) shall ensure that the contractor partners with a citizen bidder identified through a competitive process.

## PART II

### THE ZAMBIA PUBLIC PROCUREMENT AUTHORITY

**5.** (1) The Zambia Public Procurement Authority established under the repealed Act is continued as if established under this Act.

Continuation of Zambia Public Procurement Authority

(2) The Authority is a body corporate with perpetual succession and a common seal capable of suing and being sued in its corporate name and with power, subject to the provisions of this Act, to do the acts and things that a body corporate may, by law do or perform.

(3) The First Schedule applies to the Authority.

Functions of  
Authority

**6.** (1) The Authority is an independent regulatory body responsible for regulation, standard setting, compliance and performance monitoring, professional development, planning, information management and dissemination in public procurement.

(2) Without limiting the generality of subsection (1) the functions of the Authority are to—

(a) regulate the public procurement of goods, works and services by procuring entities and ensure transparency, economy, efficiency, competition and accountability;

(b) monitor, assess and review the public procurement systems and recommend improvements of the systems;

(c) monitor public procurement and the implementation of preference and reservation schemes by procuring entities, and report on the overall performance of procuring entities and make recommendations to the Minister on their performance and functions;

(d) recommend and ensure the application of preference and reservation schemes to promote the economic development of citizen bidders and suppliers in collaboration with appropriate Government institutions;

(e) consider applications for—

(i) deviations from public procurement processes, methods and rules; and

(ii) accreditation of alternative procurement systems;

(f) prepare, issue and publicise standard public procurement documents and formats to be used by procuring entities and other stakeholders;

(g) provide advice and technical support to Government and procuring entities on procurement policy and other matters related to public procurement;

(h) investigate and act on complaints received on procurement proceedings from procuring entities, bidders, suppliers or the general public;

Act No. 29  
of 2016

(i) for the purposes of the Public Audit Act, 2016 institute procurement audits;

(j) promote private sector participation through fair and non-discriminatory treatment of bidders;

- (k) coordinate and promote capacity building and professional development in the public procurement system;
- (l) monitor the execution of contracts entered into by procuring entities;
- (m) research on the public procurement system and any developments arising from the system;
- (n) organise and maintain systems for the management of procurement data, statistics and information and for the publication of data on public procurement opportunities, contract awards and other information of public interest in the form of open data on the website set up by the Authority and create a central repository or database which includes—
  - (i) complaints made against procuring entities;
  - (ii) a record of suspended or banned bidders or suppliers;
  - (iii) market prices of goods, services and works;
  - (iv) benchmarked prices;
  - (v) State organs and public entities that are non-compliant with procurement laws;
  - (vi) statistics related to public procurement;
  - (vii) price comparisons for goods, services and works;  
and
  - (viii) any information related to procurement that may be necessary for the public;
- (o) provide guidelines on the disclosure of procurement data and information and ensure the publication of data and information that is required to be published by the procurement entities using free and open data formats and templates provided by the Authority that enable the use and reuse of procurement and contract management information; and
- (p) develop a code of conduct to guide procuring entities, suppliers and bidders when undertaking public procurement with Government and public entities.

- (3) The Authority may, in the performance of its functions—
- (a) cooperate with Government Agencies and other stakeholders with a view to obtaining recommendations on how public procurement can be improved;
  - (b) collect data and reports from procuring entities for purposes of this Act;
  - (c) access information, documents, records and reports of a procuring entity in respect of a public procurement process;
  - (d) access, at a reasonable time, the premises of any procuring entity whose procurement is being monitored and request for any relevant information from a person responsible for the financial administration of the procuring entity; and
  - (e) suspend or ban a bidder or supplier from participating in public procurement.

Constitution  
of Board

**7.** (1) There is constituted the Board of the Authority consisting of the following part-time members appointed by the Minister:

- (a) a representative of the Bank of Zambia;
- (b) a representative of the Attorney-General;
- (c) a representative of a public university with knowledge relevant to the Act;
- (d) a representative of the ministries responsible for—
  - (i) finance; and
  - (ii) commerce;
- (e) a representative from Cabinet responsible for information and communication technology;
- (f) a representative of the Zambia Institute of Purchasing and Supply;
- (g) a representative of the Engineering Institution of Zambia;
- (h) two persons with relevant knowledge and experience in matters relevant to this Act; and
- (i) the Director-General, as *ex-officio*.

(2) The Minister shall appoint the Chairperson and the Vice-Chairperson from among the members under subsection (1), except that where the Chairperson is from the public sector, the Vice-Chairperson shall be from the private sector, and vice-versa.

(3) The First Schedule applies to the Board.

- 8.** (1) The Board is the governing body of the Authority. Functions of Board  
(2) Without limiting the generality of subsection (1), the functions of the Board are to—
- (a) ensure the proper and effective performance of the functions of the Authority;
  - (b) oversee the management, control and administration of the assets of the Authority in a manner and for purposes that promote the object and purpose of the Authority; and
  - (c) cooperate with other organisations and undertakings.
- 9.** (1) The President shall appoint a Director -General. Director-General  
(2) The office of Director-General shall be an office in the public service.  
(3) A person qualifies for appointment as Director-General if that person—
- (a) is a citizen;
  - (b) holds a bachelor's degree or its equivalent in procurement, business administration, marketing, economics or any other field relevant to procurement which is accredited or recognised and validated by the Zambia Qualifications Authority;
  - (c) has at least five years work experience at a senior management level;
  - (d) is of proven integrity; and
  - (e) has not been convicted of an offence involving fraud or dishonesty.
- (4) The Director-General is the chief executive officer of the Authority and is responsible for the day-to-day management of the affairs of the Authority and is subject to the general or specific direction of the Board.  
(5) The Director-General shall attend meetings of the Board and may participate in those meetings but shall not vote on any matter.  
(6) The office of the Director-General becomes vacant if the Director-General—
- (a) dies;
  - (b) becomes legally disqualified;
  - (c) resigns by a written notice of three months addressed to the President;
  - (d) is adjudged bankrupt; or
  - (e) is convicted of an offence and sentenced to imprisonment for a period of not less than six months without the option of a fine.

Secretary and other staff

**10.** (1) The Board shall appoint a Secretary who shall perform corporate secretarial duties for the Authority.

(2) The Authority may appoint other staff it considers necessary for the performance of its functions.

Emoluments and other conditions of service of Director-General, Secretary and other staff

**11.** (1) The Emoluments Commission shall, on the recommendation of the President, determine the emoluments of the Director-General.

(2) The President shall determine the terms and conditions of service, other than emoluments, of the Director-General.

(3) The Emoluments Commission shall, on the recommendation of the Board, determine the emoluments of the Secretary and other staff of the Authority.

(4) The Board shall determine the conditions of service, other than emoluments, of the Secretary and other staff of the Authority.

### PART III

#### GENERAL PRINCIPLES OF PUBLIC PROCUREMENT

Procurement pricing

**12.** (1) Except as permitted under this Act, a procuring entity shall not structure a single procurement as two or more procurements.

(2) A procuring entity shall procure standard goods, services and works in accordance with the price index issued by the Authority.

(3) The Authority shall issue a quarterly market price index to be used by a controlling officer, chief executive officer and procuring entity for purposes of an informed price decision.

(4) A procuring entity shall, where an item to be procured is not covered in the quarterly market price index, undertake a price reasonableness analysis subject to the approval of the Authority, as prescribed.

(5) An office holder who willfully or negligently engages or is involved in a transaction in which standard goods, services and works are procured at an inflated price commits an offence.

(6) Despite subsection (5), an office holder who is willfully or negligently involved in a transaction in which a standard good, service and work is procured at an inflated price is liable to disciplinary action.

(7) Where an office holder is subjected to disciplinary action under subsection (6), that office holder shall—



- (a) be informed of the allegations made against the officer;
- (b) be given the opportunity to respond to those charges;
- (c) be formally charged with the applicable offences if the response under paragraph (b) is unsatisfactory; and
- (d) where formally charged under paragraph (c), be afforded a fair hearing in accordance with the disciplinary procedures applicable in the procuring entity.

**13.** (1) Except as permitted or otherwise provided under this Act, a person shall not be excluded from participating in public procurement on the basis of nationality, race, religion, gender or any other criterion not related to the person's eligibility.

Non-discrimination from participation

(2) Except as otherwise provided in this Act, a procuring entity shall not establish a requirement aimed at limiting participation in the procurement process.

(3) A procuring entity shall, where it limits participation in the procurement process as provided for under this Act, include in the record of the procurement proceedings, the reason for limiting that participation.

**14.** (1) A procuring entity shall use the standard procurement documents issued by the Authority in procurement proceedings.

Standard procurement documents

(2) The documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equity, transparency, efficiency, cost-effectiveness and competition among persons who intend to participate in the procurement process.

(3) The standard procurement documents issued by the Authority under subsection (1) shall include—

- (a) solicitation documents;
- (b) procurement plans;
- (c) tender notices, invitations for expression of interest and for pre-qualifications and invitations for quotations;
- (d) a bid opening report;
- (e) notification or form for use by evaluators;
- (f) award notices and bid evaluation reports;
- (g) reports on implementation progress;

- (h) details of any contract amendments or variations;
  - (i) formal complaints to, and decisions of, the Authority, procuring entities and the Review Board;
  - (j) reports of investigations;
  - (k) lists of sanctioned or restricted and suspended companies;
  - (l) lists of contractors, consultants, procurement experts, procurement trainers and training institutions;
  - (m) a declaration not to engage in corruption;
  - (n) declaration of interest forms; and
  - (o) other relevant documents as the Authority may issue from time to time.
- (4) The standard procurement documents issued by the Authority under subsection (1) shall be published—
- (a) on the Authority's website;
  - (b) through any other electronic advertisement; or
  - (c) in at least two daily newspapers of general circulation in the Republic.
- (5) The information contained in the standard procurement documents shall be confidential except—
- (a) the contents of the request for expression of interest, pre-qualification documents, bidding documents or request for proposals after the date of issuance;
  - (b) the contents of expressions of interest, pre-qualification applications, bids, proposals, note-taking books, minutes of bid evaluation meetings, comments or remarks on each expression of interest, pre-qualification application, bid or proposal after the contractor selection result is published;
  - (c) a request for clarification of bids or proposal made by the procuring entity and responses to those requests submitted by bidders during the bid evaluation process after publication of the contractor selection results;
  - (d) reports made by the procuring entity, by the evaluation team, appraisal reports, reports of consultants or other related reports in the selection process after publication of the contractor selection results; and

(e) other relevant documents in the selection process that are marked “confidential” in accordance with this Act, or other written law.

**15.** (1) An office holder, or that office holder’s relative, shall not participate as a bidder in a procurement by a procuring entity by which the office holder is employed.

Restriction on office holders

(2) A person who served as a procurement officer or participated in the approval of a procurement or execution of a procurement contract shall not participate—

(a) in any manner, except as an officer, employee, agent or representative of a supplier, in negotiations or technical discussions leading to the award, modification or extension of the contract for that procurement; or

(b) personally or substantially on behalf of a supplier in the performance of that procurement contract.

(3) The restriction under subsection (2) shall remain in effect for the duration of the procurement proceedings or procurement contract, concerned.

**16.** (1) A procuring entity shall use the electronic government procurement system or any other electronic procurement system that the Minister may, by statutory instrument, prescribe.

Use of information and communication technologies

(2) Subject to subsection (1), the electronic government procurement system or any other electronic procurement system shall provide for—

(a) publication of bidding documents, notices and invitations to tender;

(b) submission and opening of tenders;

(c) bid evaluation;

(d) requests for information on the tender process;

(e) publication of changes in tender documents and explanations for those changes, if any;

(f) publication of procurement contracts subject to the confidentiality provisions under section 20;

(g) publication of notices of amendments to procurement contracts subject to the confidentiality provisions under section 20;

(h) reporting on the award and performance of procurement contracts;

(i) dissemination of laws, regulations and directives on public procurement; or

(j) digital signatures.

(3) The Minister shall prescribe the manner of procurement proceedings relating to the matters under subsection (2).

Form of communication and advertisements

**17.** (1) A communication between parties to a procurement proceeding shall be in writing or in form of a data message that provides a record of the content of the information that is accessible and usable for subsequent reference.

(2) A procuring entity shall take steps that are reasonable to bring the invitation to tender to the attention of those who may wish to submit a tender.

(3) A procuring entity shall advertise an invitation to tender—

(a) on the Government portal or a portal dedicated to tenders set up by the Authority;

(b) in electronic advertisement as prescribed;

(c) by posting an advert at a conspicuous place reserved for this purpose in the premises of the procuring entity;

(d) in a notice published in at least two daily newspapers of general circulation in the Republic or in the *Gazette*; or

(e) in a foreign newspaper or journal if it is an international bidding or selection method of procurement.

Inappropriate influence on evaluations and other matters

**18.** (1) A bidder shall not, after the deadline for the submission of bids, proposals or quotations, make 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.

(2) A person shall not influence, or attempt to influence, an evaluation and comparison of a bid, proposal or quotation.

(3) A person who contravenes subsection (1) or (2) commits an offence.

- (4) Despite subsection (2) where—
  - (a) a bidder contravenes subsection (1), that bidder is disqualified from participating in any existing or future procurement proceeding; or
  - (b) an office holder contravenes subsection (1), that office holder is subject to disciplinary action.

**19.** (1) A person shall not engage or be involved in a corrupt, coercive, obstructive, collusive or fraudulent practice or conflicts of interest in any procurement proceeding.

Corrupt,  
coercive,  
obstructive,  
collusive or  
fraudulent  
practice and  
conflict of  
interest

(2) A procuring entity may, where a contract has been entered into in contravention of subsection (1), void the contract and seek other legal remedies available to the procuring entity, including the institution of criminal proceedings or a civil action for recovery of any sums the procuring entity may have paid under the contract.

(3) An employee or agent of the procuring entity or a member of the Board or committee of the procuring entity who has a conflict of interest with respect to a procurement shall not—

- (a) take part in the procurement proceedings;
- (b) after a procurement contract is entered into, take part in any decision relating to the procurement or contract; or
- (c) be a subcontractor for the bidder to whom the contract is awarded, or a member of the group of bidders to whom the contract was awarded.

(4) An employee, agent or member referred to in subsection (3) who refrains from doing anything prohibited under that subsection and who except for that subsection, would have been within that employee, agent or member's duties shall disclose the conflict of interest to the procuring entity.

(5) A procuring entity shall terminate a contract awarded to a person involved in corrupt, coercive, obstructive, collusive or fraudulent practice or who has an undeclared conflict of interest in any procurement proceedings.

(6) For the purposes of this section, a person has a conflict of interest with respect to a procurement if that person or a relative of that 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 that person's duties with respect to the procurement.

(7) The ownership of, or right in, any property under subsection (6) does not include rights arising by virtue of owning shares in publicly listed companies.

(8) For the purposes of subsection (6), the following are persons seeking a contract for a procurement:

(a) a person submitting a tender, proposal or quotation; or

(b) if direct bidding procurement is being used, a person with whom the procuring entity is negotiating.

(9) A person who contravenes this section commits an offence.

(10) A person convicted of an offence under this section shall, in addition to the penalty imposed by the court, be disqualified from participating in a procurement proceeding for five years from the date of conviction.

Confidentiality  
Act No. 46  
of 2010

**20.** (1) Subject to the Financial Intelligence Centre Act 2010 and any other written law, an office holder shall keep confidential the information that comes into the office holder's possession relating to procurement proceedings and to bids, including any bidder's proprietary information.

(2) Without limiting the generality of subsection (1), a procuring entity shall not, except where required to do so by an order of court or the disclosure is made to the Authority under this Act, disclose any information relating to procurement proceedings and bids where the disclosure would—

(a) amount to a contravention of the law;

(b) obstruct law enforcement;

(c) prejudice the legitimate commercial interests of the parties;

(d) inhibit fair competition in public procurement; or

(e) in anyway be contrary to public interest.

(3) A person who contravenes a provision of this section commits an offence.

**21.** (1) A procuring entity shall keep records of each procurement for at least ten years after the resulting contract is completed or, where a contract is not awarded, after the procurement proceedings is terminated.

(2) The records of a procurement shall 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 bid, proposal or quotation that was submitted—
  - (i) the name and address of the person making the submission;
  - (ii) the price, or basis of determining the price, and a summary of the other principal terms and conditions of the bid, proposal or quotation; and
  - (iii) a summary of the proceedings of the opening of bids, evaluation and comparison of the bids, proposals or quotations, including the evaluation criteria used as prescribed;
- (e) if the procurement proceedings were terminated without resulting in a contract, an explanation of why they were terminated;
- (f) a copy of a document that the procuring entity is required to prepare under this Act; and
- (g) any other information or document that may be prescribed.

(3) Where a contract is awarded to any person or the procurement proceedings are terminated, the procuring entity shall, on request, make a record of the procurement proceedings for—

- (a) a person who submitted a bid, proposal or quotation;
- (b) an interested member of the public where that information held is aligned to the principle of public interest or is information that may be accessed under any other relevant written law; or

(c) a person with whom the procuring entity was negotiating where the direct bidding procurement method was used.

(4) A procuring entity shall maintain a proper filing system with clear links between procurement and expenditure files that facilitate an audit trail.

Procurement approvals

**22.** (1) An approval relating to any procedure in procurement shall be properly dated, documented and filed.

(2) A procuring entity shall furnish a controlling officer or chief executive officer, for the purposes of approving an urgent procurement need, with adequate evidence to verify the urgency as may be prescribed.

(3) A procuring entity shall maintain specimen signatures of persons authorised to make approvals within the procurement process.

(4) The individual signatories and controlling officer or chief executive officer shall be responsible for each approval made in the procurement process, whether or not the authority is delegated.

Stakeholder feedback

**23.** The Authority shall put in place mechanisms to facilitate the receipt of feedback from stakeholders on electronic submissions, detecting violations of this Act, deficiencies in the website or the portal set up by the Authority and on contract performance to the procuring entities.

#### PART IV

##### PROCURING ENTITIES

Composition of procuring entities

**24.** For the purposes of this Act, a procuring entity consists of a—

(a) controlling officer or chief executive officer;

(b) Procurement Committee;

(c) Procurement Unit; and

(d) user department.

Functions of procuring entities

**25.** (1) A procuring entity is responsible for the management of procurement within that procuring entity in accordance with this Act.

(2) Procurement and stores management shall be carried out by a person who is a member of the Zambia Institute of Purchasing and Supply.



(3) A person who contravenes subsection (2) commits an offence and is liable, on conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

**26.** (1) Despite anything to the contrary contained in any written law, where any commitment or expenditure is incurred on any procurement, a controlling officer or chief executive officer of a procuring entity shall ensure that the procurement is in accordance with this Act.

Duties and responsibilities of controlling officer or chief executive officer

(2) Without limiting the generality of subsection (1), the functions of a controlling officer or chief executive officer are to—

- (a) ensure, prior to any procurement activity, that procurements of goods, works and services of the procuring entity are within the approved budget of that entity;
- (b) constitute a Procurement Committee in a procuring entity in accordance with this Act;
- (c) ensure that procurement plans are prepared in conformity with the policy objectives of the Government agency, parastatal body or any other body or unit mandated by Government to carry out those procurement activities;
- (d) ensure proper documentation of procurement proceedings and safe custody of procurement records in accordance with the Act;
- (e) authorise contract awards which fall within the controlling officer's or chief executive officer's level of authority;
- (f) approve and sign contracts of the procuring entity;
- (g) ensure the procurement processes of the procuring entity comply with this Act;
- (h) ensure that the procurement processes are handled by different professional offices in respect of initiation, processing, procurements, and receipt of goods, works and services;
- (i) ensure that procurement processes are within the approved budget of the procuring entity and are planned by the procuring entity concerned through an annual procurement plan unless otherwise changed by approval;

(j) ensure that minutes of the Procurement Committee meetings are prepared and submitted to the Authority within seven days of the date of the meeting at which they are to be confirmed; and

(k) ensure that reports required by the Authority are prepared and submitted to the Authority.

(3) An office holder is responsible for the office holder's actions and omissions in the performance of that office holder's procurement function.

**27.** (1) A procuring entity shall establish a Procurement Committee consisting of the following members:

Establishment  
and  
composition  
of  
Procurement  
Committee

(a) the controlling officer or chief executive officer, as chairperson;

(b) not less than four and not more than eight members appointed by the controlling officer or chief executive officer in writing;

(c) the head of Procurement, as an *ex-officio* and secretary to the Procurement Committee; and

(d) the head of finance.

(2) A procurement committee shall, in the performance of a procurement function under this Act, establish systems and procedures to facilitate decision making for procurement processes.

(3) The procedures required under subsection (2) shall be consistent with this Act.

(4) The members under subsection (1) (b) shall be officers of the procuring entity, except that a maximum of two persons who are not public officers of the procuring entity or office holders shall be appointed as members under that subsection.

(5) The Authority shall, where a procuring entity is too small to constitute a Procurement Committee, determine the composition and the procedures to be followed by the procuring entity.

(6) A controlling officer or chief executive officer shall, in appointing members of a Procurement Committee, seek to establish a balance of skills and experience among the members to ensure that the Procurement Committee—

- (a) has an appropriate level of seniority, integrity and experience in decision making;
- (b) includes knowledge and experience in public procurement and other relevant professional disciplines; and
- (c) includes persons with knowledge and experience of the procuring entity's operations.

(7) Despite section 29, a controlling officer or chief executive officer shall, when appointing members of a procurement committee for the first time, appoint half the members for a tenure of two years to ensure continuity and rotation in the membership of the Procurement Committee.

**28.** (1) A Procurement Committee shall ensure that a procurement by a procuring entity is conducted in accordance with this Act.

Functions of Procurement Committee

(2) A Procurement Committee is responsible for providing prior authorisation of the procurement process in accordance with the procedure specified in section 34.

**29.** (1) A member of the Procurement Committee appointed by the controlling officer or chief executive officer under section 27(1)(b) shall hold office for a term of three years and may be reappointed for a further term of three years.

Tenure of office of Procurement Committee

(2) A controlling officer or chief executive officer shall inform the Authority of the membership of the Procurement Committee not later than fourteen days of the date of appointment of the Procurement Committee of any change in the membership of the Procurement Committee.

(3) A controlling officer or chief executive officer may terminate the appointment of a member of the Procurement Committee if that member—

- (a) abuses the member's office;
- (b) is involved or participates in corrupt or coercive practices;
- (c) is incompetent;
- (d) is legally disqualified;
- (e) is absent from three consecutive meetings of the Procurement Committee, of which the member has had notice, without the prior approval of the controlling officer or chief executive officer;
- (f) is convicted of an offence involving dishonesty; or
- (g) is adjudged or declared bankrupt.

(4) A controlling officer or chief executive officer may remove or substitute a member of the Procurement Committee prior to the expiry of the member's term of office where—

- (a) it is necessary to maintain a balance of skills and experience on the Procurement Committee in accordance with section 27(5);
- (b) the structure or status of the procuring entity has changed;
- (c) the position of a member has changed or the member has resigned; or
- (d) the member dies.

(5) Despite subsection (1), a controlling officer or chief executive officer may re-appoint a member who has served for six years for a further period of three years if a procuring entity lacks adequately qualified persons to replace that member.

Proceedings  
of  
Procurement  
Committee

**30.** (1) Subject to this Act, a Procurement Committee shall regulate its own procedure.

(2) The quorum at a meeting of a Procurement Committee shall be half of its members.

(3) There shall preside at a meeting of the Procuring Committee—

- (a) the controlling officer; and
- (b) in the absence of the controlling officer, the person lawfully acting as controlling officer.

(4) Where a member is for any reason unable to attend any meeting of the Procurement Committee, that member may, in writing, nominate another person from the same department of the procuring entity which that member represents to attend the meeting in that member's stead and that person is deemed to be a member for the purposes of that meeting.

(5) Despite subsection (4)—

- (a) the proxies present for a particular meeting shall not exceed half the number of the appointed members; and
- (b) subsection (4) shall not apply to an external member appointed under section 27.

(6) A member or person who is present at a meeting of a Procurement Committee or a subcommittee of a Procurement Committee at which any matter, in which that person or that person's relative or associate, is directly or indirectly interested in a private capacity is the subject of consideration, shall, as soon as is practicable after the commencement of the meeting, disclose that interest and shall not take part in any consideration or discussion of, or vote on any question relating to that matter.

(7) A disclosure of interest made under this section shall be recorded in the minutes of the meeting at which it is made.

Subcommittees  
and  
subdivisions  
of  
Procurement  
Committee

**31.** (1) A Procurement Committee may establish a subcommittee—

(a) to provide procurement authorisation for a subdivision of a procuring entity, where the subdivision's procurement would be more effectively managed by a subcommittee; and

(b) to carry out particular functions of the Procurement Committee except that—

(i) the appointment of the members of the subcommittee shall meet the requirements of section 27; and

(ii) the Procurement Committee shall be responsible and accountable for the activities of a subcommittee.

(2) The Chairperson and secretary of a subcommittee established under subsection (1) shall be the head of the subdivision of the procuring entity and the person in charge of procurement activities of that subdivision of the procuring entity, respectively.

(3) Subject to this Act, a subcommittee shall regulate its own procedure.

(4) The quorum at a meeting of a subcommittee shall be one half of its membership.

(5) Despite subsection (4), the proxies present for a particular meeting shall not exceed half the number of the appointed members.

Establishment  
of  
Procurement  
Unit and  
functions

**32.** (1) A procuring entity shall establish a Procurement Unit which shall report directly to the controlling officer or chief executive officer and is responsible for managing procurement activities of the procuring entity in accordance with this Act.

(2) Without limiting the generality of subsection (1), the functions of a Procurement Unit are to—

- (a) plan the procurement activities of a procuring entity and recommend the appropriate method of procurement;
- (b) prepare solicitation documents, bid notices, short-lists, evaluation reports, contract award recommendations and contracts;
- (c) manage the bidding process, including pre-bid meetings, clarifications, receipt and opening of bids;
- (d) manage the evaluation of bids and any post qualification or negotiations;
- (e) manage contracts and oversee contracts management by the designated contracts manager;
- (f) prepare a procurement report required by the Authority, a controlling officer, chief executive officer or a Procurement Committee for the purposes of this Act;
- (g) submit a procurement report to the controlling officer or chief executive officer on a quarterly basis;
- (h) publish the contracting information in accordance with the procedure under this Act on the website of the procuring entity or the website set up by the Authority; and
- (i) ensure the completeness and accuracy of the data and information published on the procuring entity's website and the data and information shared by the procuring entity for publication on the website set up by the Authority.

Functions of  
user  
departments

**33.** The functions of a user department, in relation to procurement, are to—

- (a) provide information on forecast procurement requirements to the Procurement Unit for the purposes of procurement planning;
- (b) initiate procurement requirements;
- (c) participate in providing technical inputs to the standard solicitation documents prior to their issue;
- (d) represent the end user of the goods, works or services in the procurement process; and
- (e) manage contracts and assist the designated contracts manager as required.

Procurement  
authorisation  
and levels of  
authority

**34.** (1) The following stages of the procurement process require the prior authorisation of the relevant approvals authority:

- (a) the use of the limited or direct bidding methods of procurement, except where direct bidding is on the grounds of the low value;
- (b) standard solicitation documents prior to their issue, on approval by the Authority;
- (c) evaluation reports prior to any further bid opening, the subsequent stage of evaluation or notification of award;
- (d) any other documents incorporating contract award recommendations, such as reports on negotiations, prior to notification of award;
- (e) amendments to contracts prior to their issue;
- (f) the cancellation of procurement proceedings; and
- (g) the termination of a contract.

(2) The approvals authority is the—

- (a) controlling officer or chief executive officer, where the value of the procurement does not exceed the prescribed level of authority; or
- (b) Procurement Committee for all other procurements.

(3) A controlling officer or chief executive officer shall, before the issuance of a contract, authorise the contract and ensure that the contract conforms to the contract award recommendations authorised by the Procurement Committee.

(4) A controlling officer or chief executive officer may delegate a level of authority, up to the maximum specified in subsection (2)(a), to any designated senior officer or officers, including the head of the Procurement Unit.

(5) A delegation made by a controlling officer or chief executive officer, under subsection (4) shall be in writing and copied to the head of the Procurement Unit.

(6) For purposes of subsection (2), the value of the procurement shall be—

- (a) the estimated value in the case of subsection (1)(a), (b) and (f) and technical evaluation reports in the case of subsection (1)(c);

- (b) the proposed contract value, in the case of subsection (1)(c) and financial evaluation reports in the case of subsection (1)(b); and
- (c) the original or amended contract value.

(7) A procuring entity shall, where the proposed or actual value of a contract exceeds the value originally estimated for the procurement and exceeds the level of authority of the approvals authority that authorised any previous stage in the procurement process, make a subsequent request for authorisation by the appropriate approvals authority, with details of the earlier stages and prior authorisation.

(8) The authorisation of the appropriate approvals authority shall be obtained for all subsequent stages of the procurement process.

(9) A procuring entity shall, where the proposed or actual value of a contract exceeds the threshold for a method of procurement, make a subsequent request for authorisation from the Authority to continue with the original method of procurement.

Procurement  
of common  
use items

**35.** (1) The Minister may, on the recommendation of the Authority, by statutory instrument—

- (a) designate a central agency or central unit to procure common use items for a procuring entity or a group of procuring entities; and
- (b) specify the procedure to be used by the central agency or central unit, in determining common use items and designating procuring entities for the procurement of common use items.

(2) A procuring entity shall, until the Minister designates a central agency or central unit under subsection (1), procure common use items in accordance with this Act.

(3) For the purposes of this section, “central agency or central unit” means any Government or quasi-Government body that the Minister designates to procure common use items on behalf of a procuring entity under this section.

Use of  
procurement  
agent or  
service  
provider

**36.** A procuring entity may, in accordance with this Act, as prescribed, appoint an existing procuring entity as a procurement agent or procurement service provider to carry out procurement functions on its behalf.



PART V  
METHODS OF PROCUREMENT

**37.** Subject to this Act, a procuring entity shall procure goods, works or services by a method which may include any of the following: Methods of procurement

- (a) open national bidding;
- (b) open international bidding;
- (c) open national selection;
- (d) open international selection;
- (e) limited bidding;
- (f) limited selection;
- (g) simplified bidding;
- (h) simplified selection;
- (i) direct bidding;
- (j) direct selection;
- (k) force account;
- (l) electronic reverse auction;
- (m) purchase from other procuring entities;
- (n) procurement of infrastructure from private financing and award of concessions; and
- (o) community participation.

**38.** (1) The objective of open bidding is to obtain value for money and promote private sector participation through the maximum possible competition. Open bidding

(2) Subject to this Act, a procuring entity shall use open bidding for the procurement of goods, works and non-consulting services.

(3) A procuring entity shall use open national bidding or open international bidding in accordance with section 39.

(4) Where a procuring entity uses a method of procurement other than open bidding the procuring entity shall include, in the record of procurement, a statement of the reasons and circumstances on which the procuring entity relied on to justify the use of the other method.

National and international bidding

**39.** (1) Subject to subsection (2), a procuring entity shall use open national bidding for procurement of goods, works and non—consulting services.

(2) Participation in open national bidding shall be limited to citizen bidders and in the absence of successful citizen bids to local bidders.

(3) A local bidder awarded a procurement contract in accordance with subsection (2), shall partner with a citizen supplier.

(4) A procuring entity shall use open international bidding where—

(a) the goods, works or non-consulting services are not available under competitive price and other conditions from at least three suppliers in the Republic; or

(b) regional or international participation is required in accordance with an agreement entered into by the Government.

(5) Participation in open international bidding shall be open to all bidders, including citizen bidders, local bidders and foreign bidders in partnership with citizen bidders or citizen suppliers.

(6) A foreign bidder who participates in open international bidding under subsection (5) shall partner with a citizen supplier or citizen bidder.

(7) Where open international bidding is used, a bid notice shall, in addition to the requirements under section 17, be published in any regional or international media and on the website of the procuring entity and the website set up by the Authority.

Open selection

**40.** (1) The objective of open selection is to promote private sector participation to obtain the best possible shortlist in order to obtain value for money.

(2) Subject to this Act, a procuring entity shall use open selection for the procurement of all consulting services.

National and international selection

**41.** (1) Subject to subsection (2), a procuring entity shall use open national selection in the procurement of consulting services.

(2) A procuring entity shall use open international selection where—

(a) the consulting services are not available under competitive price and other conditions from at least three suppliers in the Republic; or

(b) regional or international participation is required in accordance with an agreement entered into by the Government.

(3) Participation in open national selection shall be limited to citizen bidders and in the absence of successful citizen bids, to local bidders.

(4) Participation in open international selection shall be open to all bidders, including citizen bidders, local bidders and foreign bidders.

(5) Where open international selection is used a bid notice shall, in addition to the requirements under section 17, be published in any regional or international media and on the website of the procuring entity and the website set up by the Authority.

(6) A foreign bidder who participates in open international selection under subsection (4) shall partner with a citizen bidder.

**42.** (1) The objective of limited bidding is to obtain competition and value for money to the extent possible where the circumstances do not justify or permit the use of open bidding. Limited bidding

(2) Limited bidding may be used where—

(a) the goods, works or non-consulting services are only available from a limited number of suppliers; or

(b) there is an urgent need for the goods, works or services and engaging in open bidding would be impractical.

**43.** (1) The objective of limited selection is to obtain competition and value for money to the extent possible where the circumstances do not justify or permit the use of open selection. Limited selection

(2) Limited selection may be used where —

(a) the consulting services are only available from a limited number of suppliers; or

(b) there is an urgent need for the consulting services and engaging in open selection would be impractical.

**44.** (1) The objective of simplified bidding is to obtain competition and value for money to the extent possible, while maintaining economy and efficiency, where the circumstances do not justify the use of open bidding. Simplified bidding

(2) Simplified bidding may be used where the estimated value of the goods, works or non-consulting services does not exceed the prescribed threshold.

Simplified  
selection

**45.** (1) The objective of simplified selection is to obtain competition and value for money to the extent possible, while maintaining economy and efficiency, where the circumstances do not justify the use of open selection.

(2) Simplified election may be used where the estimated value of the consulting services does not exceed the prescribed threshold.

Direct  
bidding

**46.** (1) The objective of direct bidding is to achieve timely and efficient procurement, where the circumstances or value of the procurement do not justify or permit the use of competition.

(2) Direct bidding may be used where—

(a) the goods, works or non-consulting services are only available from a single source and no reasonable alternative or substitute exists;

(b) due to an emergency, there is urgent need for the goods, works or non-consulting services making it impractical to use other methods of procurement because of the time involved in using those methods;

(c) additional goods, works or non-consulting services must be procured from the same source because of the need for compatibility, standardisation or continuity;

(d) an existing contract could be extended for additional goods, works or non-consulting services of a similar nature and no advantage could be obtained by further competition;  
or

(e) the estimated value of the goods, works or non-consulting services does not exceed the prescribed threshold.

Direct  
selection

**47.** (1) The objective of direct selection is to achieve timely and efficient procurement, where the circumstances or value of the procurement do not justify or permit the use of competition.

(2) Direct selection may be used where—

(a) the consulting services are only available from a single source and no reasonable alternative or substitute exists;

(b) due to an emergency, there is urgent need for the consulting services, making it impractical to use other methods of procurement because of the time involved in using those methods;

- (c) additional consulting services must be procured from the same source because of the need for compatibility, standardisation or continuity; or
- (d) an existing contract may be extended for additional consulting services of a similar nature and no advantage could be obtained by further competition.

**48.** (1) The objective of electronic reverse auction, is to enable a procuring entity to seek competitive pricing by inviting pre-qualified suppliers to participate in a realtime dynamic online procurement proceeding.

Electronic  
reverse  
auction

(2) A procuring entity may use electronic reverse auction, if—

- (a) it is feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement;
- (b) there is a competitive market of bidders anticipated to be qualified to participate in the electronic reverse auction, to ensure effective competition; and
- (c) the criteria to be used by the procuring entity in determining the successful bid are quantifiable and can be expressed in monetary terms.

(2) A procuring entity shall only qualify to use the reverse auction method if it has—

- (a) a procurement portal; and
- (b) an appropriate secure software with electronic procurement capabilities and functionalities approved by the Authority.

**49.** (1) The procedure for electronic reverse auction shall include the following:

Procedure  
for  
electronic  
reverse  
auction

- (a) the procuring entity shall solicit bids through an invitation to the electronic reverse auction to be published or communicated in accordance with this Act; and
- (b) the invitation shall, in addition to the information specified in section 63, include details relating to—
  - (i) access to and registration for the auction;
  - (ii) opening and closing of the auction;
  - (iii) norms for conduct of the auction; or
  - (iv) any other information that may be relevant to this method of procurement.

(2) Despite subsection (1), the Minister shall prescribe the other procedures relating to an electronic reverse auction.

Force  
account

**50.** (1) The objective of force account is to permit a procuring entity to use its own resources, equipment and personnel to undertake some construction works, where force account is the only practical method of undertaking those works.

(2) The use of force account may be justified where—

(a) the quantities of work involved cannot be defined in advance;

(b) the works are small and scattered or in remote locations for which qualified construction firms are unlikely to bid at reasonable prices;

(c) work is required to be carried out without disrupting ongoing operations;

(d) risks of unavoidable work interruption are better borne by the procuring entity than by a bidder or supplier; or

(e) there is an emergency that requires prompt attention.

Purchases  
from other  
procuring  
entities

**51.** (1) The objective of purchases from other procuring entities is to enable a procuring entity to fulfil a procurement requirement through purchase from or engaging the services of a Government agency where there would be no benefit in purchasing from or engaging a supplier that is not a Government agency.

(2) A procuring entity may, subject to a favourable price comparison, purchase directly from or engage a Government agency without the application of any other method of procurement, except that the Government agency must be able to meet the procuring entity's requirements as specified in the statement of requirements.

Procurement  
of  
infrastructure  
for private  
financing and  
award of  
concessions  
Act No. 14  
of 2009

**52.** A contract for the construction, rehabilitation or operation of public infrastructure and other public goods, services, concessions and comparable forms of contracting shall be subject to the procedures set out in the Public-Private Partnership Act, 2009 if it is financed by or through private sector participation based on the public-private partnership model.

- 53.** (1) The Authority shall, adapt procurement procedures, specifications and contract packaging for purposes of project sustainability or achieve certain specific social objectives of the project, where it is desirable in selected project components to—
- (a) call for participation of local communities and non-governmental organisations;
  - (b) increase the utilisation of local know how and materials; and
  - (c) employ labour intensive and other appropriate technologies.
- (2) The procedures under subsection (1) shall be prescribed.

Community participation in procurement

**PART VI**  
**PROCUREMENT PROCESS**

**54.** (1) A procuring entity shall use open bidding as the preferred procurement method for the public procurement of goods, works, services and for the purposes of the Republic.

Choice of procurement procedure

(2) A procuring entity may use an alternative procurement procedure if that procedure is allowed and satisfies the conditions under this Act for the use of that method.

(3) Subject to subsection (2), a procuring entity shall adopt open bidding for the procurement of goods, works and services for the prescribed threshold.

**55.** (1) Subject to subsection (2), a procuring entity may conduct a pre-qualification procedure as a basic procedure prior to adopting a procurement method other than open bidding for the purpose of identifying the qualified persons for the procurement.

Pre-qualification

(2) A procuring entity shall use a pre-qualification procedure for complex and specialised goods, works and services.

(3) A controlling officer or chief executive officer of a procuring entity shall, in conducting a pre-qualification procedure, publish an invitation notice to candidates to submit applications for pre-qualification.

**56.** (1) A procuring entity shall document procurement requirements prior to the commencement of any procurement proceedings, recording the goods, works or services required and the estimated value.

Commencement of procurement proceedings

(2) A procuring entity shall commence procurement proceedings only if the procurement is within the approved budget and the approvals authority has—

- (a) confirmed the availability of funding for the procurement requirement;
- (b) granted approval to proceed; and
- (c) in the case of procurement works, approved the proposed design.

(3) A person who knowingly commences or approves a procurement proceeding without ascertaining whether the procurement is within budget or funds are available for the procurement, commits an offence.

(4) Despite subsection (3), disciplinary action may be taken against a person who contravenes this section which may include—

- (a) an appropriate surcharge;
- (b) a demotion, where applicable; or
- (c) other disciplinary action that may be decided by the appropriate disciplinary authority.

Procurement  
planning

**57.** (1) A procuring entity shall plan its procurement in a rational manner and, in particular—

- (a) aggregate its requirements wherever possible, both within the procuring entity and between procuring entities, to obtain value for money and reduce procurement costs;
- (b) make use of rate or running contracts wherever appropriate to provide an efficient, cost effective and flexible means to procure goods, works or services that are required continuously or repeatedly over a set period of time;
- (c) avoid splitting of procurement to defeat the use of appropriate procurement methods;
- (d) ensure that a procurement that is subject to a preference or reservation scheme is identified and dealt with in accordance with section 91; and
- (e) integrate its expenditure programme with the procurement plan.

(2) A controlling officer or chief executive officer of a procuring entity shall prepare and submit an annual procurement plan approved by a procurement committee to the Authority.

(3) The procurement plan under subsection (2) shall be prepared prior to the commencement of each financial year as part of the annual budget preparation process and shall be in the prescribed format and within the approved budget.

(4) Procurement planning shall be based on indicative or approved budgets.



(5) A procuring entity may prepare a multi-year procurement plan in the prescribed format which shall be consistent with the medium term budgetary expenditure framework for projects or contracts that go beyond one year as provided under the National Planning and Budgeting Act, 2020.

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2020

(6) An office holder commits an offence if that office holder knowingly approves procurement beyond the approved budget of the procuring entity.

**58.** (1) A procuring entity shall use one of the procurement methods specified in Part V.

Determination  
of  
procurement  
method

(2) Subject to section 38(4), the procurement method used by a procuring entity shall be determined in accordance with the conditions specified in this Part, taking into account—

- (a) the estimated value of the procurement;
- (b) whether the procurement is of goods, works, non-consulting or consulting services;
- (c) any special circumstances, such as a limited number of potential sources or an emergency requirement; and
- (d) whether national or international competition is required.

(3) A procuring entity shall not split procurement requirements with the intention of avoiding a particular method of procurement, where that requirement could be procured as a single contract.

**59.** (1) A procuring entity shall prepare a statement of procurement requirements relating to the goods, works or services being procured that —

Statement of  
procurement  
requirements

- (a) is clear;
- (b) gives a correct and complete description of what is to be procured;
- (c) allows for fair and open competition among persons who may wish to participate in the procurement proceedings; and
- (d) ensures that the goods, works or services are fit for the purpose for which they are being purchased and are of appropriate quality.

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

- (3) The technical requirements shall, where appropriate—
- (a) include and conform to design, specification, functionality and performance;
  - (b) be based on national or international standards whichever is superior;
  - (c) factor in the life of the item;
  - (d) factor in the socio-economic impact of the item;
  - (e) be environmentally sustainable;
  - (f) factor in the cost of servicing and maintaining the item; and
  - (g) factor in the cost of disposing of the item.
- (4) The technical requirements shall not refer to a particular trademark, brand name, patent, design, type, producer or service provider or to a specific origin unless—
- (a) there is no other way of describing the requirements; and
  - (b) the requirements allow equivalents to what is referred to.
- (5) A statement of procurement requirements shall be—
- (a) included in the solicitation document to inform bidders of the procuring entity's requirements;
  - (b) used in evaluation to determine whether a bidder meets the procuring entity's requirements, as specified in the solicitation document, and where appropriate, to determine the quality of the bid; and
  - (c) included in the contract to define the goods, works or services being purchased.
- (6) A statement of procurement requirements shall, to the extent possible, be based on the relevant, objective, technical and quality characteristics of the goods, works or services to be procured.

Solicitation documents

- 60.** (1) A solicitation document shall be in the form issued by the Authority or any other document approved by the Authority.
- (2) A solicitation document shall contain—
- (a) clear instructions on the management of the procurement process and the applicable rules;
  - (b) a clear description of the object of the procurement in the form of a statement of requirements;

(c) a clear description of the eligibility requirements in respect of bidders and specification of documentary evidence required as proof of eligibility; and

(d) the proposed form and conditions of contract or a statement of the form and conditions of contract.

(3) A solicitation document shall clearly state the methodology and criteria to be used in the evaluation of bids and the determination of the best evaluated bidder.

(4) A procuring entity shall state in a solicitation document—

(a) whether the successful submission shall be ascertained on the basis of price or price and other criteria;

(b) the evaluation criteria, including price as modified by any preference;

(c) the relative weights of the evaluation criteria and shall list the evaluation criteria in descending order of importance; and

(d) the manner of application of the evaluation procedure.

(5) A procuring entity shall not take into account methodology or criteria, other than those stated in the solicitation document, and all methodology and criteria shall be applied equally to bids.

Selection of  
bidders

**61.** The method for selection of bidders shall be determined by the procurement method used and shall provide for the—

(a) publication of a bid notice for open bidding or a pre-qualification process;

(b) publication of a notice requesting expressions of interest in order to develop a shortlist for open selection;

(c) development of a shortlist for limited selection, simplified selection, limited bidding and simplified bidding; or

(d) selection of a single bidder for direct bidding or selection.

Invitation to  
bid

**62.** (1) A procuring entity shall keep a record of bidders to whom the solicitation document is issued.

(2) Where solicitation documents are issued to pre-qualified or shortlisted bidders, the documents shall be issued to the bidders at the same time.

(3) Bidding documents may be sold at a fee that may be prescribed by statutory instrument.

(4) A procuring entity shall, in setting bidding deadlines—

(a) allow sufficient time for bidders to—

(i) obtain solicitation documents;

(ii) prepare complete and responsive bids; and

(iii) submit bids; and

(b) comply with the minimum bidding periods as may be prescribed.

(5) A procuring entity may require a bidder to submit a bid security in the prescribed manner.

(6) A procuring entity shall require a bidder to submit sealed written bids, unless otherwise provided under this Act.

(7) The method for bid submission shall be as prescribed and shall take into account the method of procurement, the complexity of the procurement and the evaluation methodology used.

Bid security  
or bid  
securing  
declaration

**63.** (1) A controlling officer or chief executive officer of a procuring entity may, subject to requirements or limits as may be prescribed, require a bidder to provide a bid security or a bid securing declaration.

(2) A person submitting a bid shall forfeit a bid security if that person submitting the bid—

(a) withdraws the bid after the deadline for submitting bids but before the expiry of the bid validity period; or

(b) refuses to enter into a written contract as required under this Act or fails to furnish any required performance security.

(3) A procuring entity may, invoke the provisions of the bid security declaration form if a bidder does not comply with its requirements.

(4) A procuring entity may immediately release a bid security if—

(a) the procurement proceedings are terminated;

(b) the procuring entity determines that none of the submitted bids are responsive;

(c) a contract for the procurement is entered into; or

(d) a bidder declines to extend the bid validity.

(5) A bid security is not required in a procurement reserved for a small business enterprise and micro business enterprise owned by a woman, youth, person with disabilities and other targeted citizen or citizen group, participating in a procurement, except that the citizen or citizen group shall complete a bid securing declaration in the prescribed manner and form.

**64.** (1) A solicitation document shall clearly state the date, place and time of the bidding deadline and late bids shall be rejected.

Receipt of bids

(2) A procuring entity shall ensure that—

- (a) a bid box, or other means of receiving bids, is made available to bidders;
- (b) bids are kept confidential, and, in the case of sealed bids unopened, until the time for opening of bids; and
- (c) bidding is closed at the precise date and time of the bidding deadline and late bids shall not be accepted.

**65.** Open bidding, limited bidding, open selection and limited selection processes bids shall include a public bid opening, in accordance with the procedures as prescribed.

Opening of bids

**66.** (1) A procuring entity shall establish an evaluation committee for the purposes of electronic or non-electronic evaluation of bids.

Evaluation

(2) The composition, functions, procedures and sittings of an evaluation committee shall be prescribed.

(3) The evaluation methodology and criteria shall be done in accordance with this Act and may be determined by—

- (a) the type, value and complexity of the procurement;
- (b) the price;
- (c) the cost of operating, maintaining and repairing goods or of construction;
- (d) the time of delivery of the goods, of construction or provision of services;
- (e) the characteristics of the subject matter of the procurement;
- (f) the terms of payment and guarantees relating to the subject matter of procurement; or

- (g) where relevant, the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel involved in providing the subject matter of the procurement.
- (2) In addition to the criteria set out in subsection (1), the determination of the evaluation methodology may also take into account a margin of preference for the benefit of domestic suppliers or contractors or of domestically produced goods, or any other preference.
- (3) A procuring entity may request a bidder to clarify the bid in order to assist in the evaluation, but changes in the substance of the bid, including changes in price, shall not be permitted—
- (a) following a clarification under this section or other provisions of this Act; or
  - (b) after the date and time of the closing of the bid, unless otherwise provided for in this Act.
- (4) A procuring entity may correct arithmetical errors that are discovered during the examination of the submissions and shall promptly notify the bidder that presented the submission of that correction.
- (5) A procuring entity that corrects an error in terms of subsection (4) shall not make a—
- (a) substantive change to the qualification information or to a submission;
  - (b) change aimed at making an unqualified bidder qualified or an unresponsive submission responsive; or
  - (c) change aimed at making a qualified bidder or a responsive submission unresponsive.
- (6) A procuring entity shall not—
- (a) engage in a negotiation with a bidder with respect to qualification information or submissions; or
  - (b) make a change in price following a clarification under subsection (4) or other provisions of this Act.
- (7) A procuring entity may undertake a post-qualification procedure in accordance with the criteria in the solicitation document, to determine whether the best evaluated bidder has the capability and resources to effectively carry out the contract.

(8) A procuring entity shall prepare an evaluation report for submission to the appropriate approvals authority.

**67.** (1) A procuring entity may, where specified in the solicitation document, conduct a post-qualification of the best evaluated bidder to determine whether that bidder is qualified to perform the contract effectively.

Post-qualification

(2) The criteria for post-qualification shall be set out in the solicitation document, as prescribed.

(3) A procuring entity shall, where it determines that a bidder is not qualified, reject the bid and conduct a post-qualification on the bidder who submitted the second best evaluated bid.

(4) A procuring entity shall, where a pre-qualification is conducted, use a post-qualification procedure to verify the information submitted by the bidder who submitted the best evaluated bid and if that bidder no longer meets the qualification criteria, the procuring entity shall reject that bidder and verify the qualifications of the next bidder.

**68.** (1) Subject to subsection (3), a procuring entity shall undertake negotiations with a successful bidder in accordance with the prescribed conditions and procedures.

Negotiations

(2) The negotiations undertaken under subsection (1) shall not relate to the price of the bid, except as provided under subsection (4) or where the price of the bid has not been taken into account in the evaluation methodology.

(3) The use of compound interest in a negotiation or contract is prohibited.

(4) A procuring entity may conduct negotiations as prescribed where—

(a) there is a tie in the lowest evaluated price by two or more bidders;

(b) there is a tie in the highest combined score points; or

(c) the lowest evaluated price is in excess of the available budget.

(5) The revised prices relating to a negotiation shall not compromise the quality specifications of the original tender.

Termination  
or  
cancellation  
of  
procurement  
proceedings

**69.** (1) A procuring entity may, at any time, prior to notification of contract award, terminate or cancel procurement proceedings without entering into a contract if—

- (a) the subject procurement is overtaken by—
  - (i) operation of law; or
  - (ii) substantial technological change;
- (b) the procurement need has ceased to exist or changed significantly;
- (c) funding is not sufficient for the procurement;
- (d) there is a significant change in the required technical details, bidding conditions, conditions of contract or other details, such that the recommencement of procurement proceedings is necessary;
- (e) there is evidence of collusion among bidders;
- (f) it is otherwise in the public interest;
- (g) there is evidence of corrupt practices by an office holder or any other person involved in the procurement;
- (h) bids were not received;
- (i) there is evidence that prices of the bids are above market prices;
- (j) material governance issues are detected;
- (k) all evaluated bids are non-responsive; or
- (l) there is an incidence of *force majeure*.

(2) A procuring entity that terminates or cancels procurement proceedings under this section shall, within fourteen days from the date of the termination or cancellation —

- (a) submit to the Authority, a written report on the termination or cancellation stating the reasons for the termination or cancellation; and
- (b) notify, in writing, the person that submitted bids of the reasons for the termination or cancellation.

Decision to  
award  
contract

**70.** (1) An award of contract shall be recommended to the best evaluated bidder, as determined by the evaluation methodology and criteria specified in the solicitation document.

(2) The decision to award a contract shall be taken by the appropriate approvals authority.



(3) A decision to award a contract by the approvals authority shall not constitute a contract.

**71.** (1) A procuring entity shall, within two days of a decision to award a contract, prepare a notice indicating the best evaluated bidder and the value of the proposed contract, and send the notice to bidders who submitted bids.

Notification  
of best  
evaluated  
bidder

(2) A procuring entity shall award a contract after ten working days, from the date on which the notice under subsection (1) is sent.

(3) This section does not apply to procurement using—

- (a) simplified bidding;
- (b) simplified selection;
- (c) direct bidding;
- (d) direct selection; or
- (e) limited bidding on grounds of insufficient time.

**72.** (1) A solicitation document shall state the procedure for award of contract, which shall be by—

Award of  
contract

- (a) placement of a written contract document; or
- (b) issue of a letter of bid acceptance, which shall be confirmed by the written contract.

(2) A contract, purchase order, letter of bid acceptance or other communication in any form conveying acceptance of a bid or award of contract shall not be issued prior to—

- (a) an award decision by the appropriate approvals authority in accordance with section 70;
- (b) publication and dispatch of the notice of best evaluated bidder in accordance with section 71;
- (c) confirmation that the procurement is not subject to review by the Authority;
- (d) confirmation that funding is available for the contract; and
- (e) any other approvals required, including clearance of the contract by the Treasury and the legal advice of the Attorney-General.

(3) A contract, purchase order, letter of bid acceptance or other communication issued contrary to subsection (2) is void.

(4) A procuring entity shall, where a standard contract is cleared by the Treasury and the Attorney-General in accordance with subsection (2), accept a bid or award a contract in the prescribed manner and form.

Standard contract

**73.** (1) A procuring entity shall use a standard contract approved by the Attorney-General and issued by the Authority or any other contract approved by the Authority.

(2) A procuring entity shall publish a notice of the contracts awarded which exceed the prescribed threshold within fourteen days of award of contract.

Prohibition from assigning contract

**74.** (1) A supplier to whom a contract is awarded shall not assign the contract to a third party.

(2) A supplier who contravenes this section commits an offence and is liable, on conviction, to a fine not exceeding one million penalty units or to imprisonment for a term of ten years, or to both.

Notification of unsuccessful bidder

**75.** A procuring entity shall, before signing a contract, notify the other bidders that their bids have not been successful and shall give reasons for that decision.

Contract management

**76.** (1) A procuring entity shall appoint a contract manager for every contract awarded, who is responsible for —

(a) managing the obligations of the procuring entity specified in the contract; and

(b) ensuring that the supplier performs the contract in accordance with the terms and conditions specified in the contract.

(2) A contract manager shall be selected in accordance with the prescribed procedures, taking into account the skills, experience and functions required for management of the contract.

Amendment or variation of contract

**77.** (1) An amendment or variation to a contract shall not be effected without the approval of the Treasury and the legal advice of the Attorney-General.

(2) Subject to subsection (1), a proposed amendment or variation to a contract shall not be submitted to the Attorney-General without prior written authorisation of the appropriate approvals authority.

(3) An approvals authority may approve an amendment or variation proposed under subsection (2).

(4) The cumulative value of contract variation and amendment shall not result in an increment of the total contract price by more than twenty-five percent of the original contract price as prescribed, except that where the variation results in an increment exceeding twenty-five percent, the contract shall be cancelled and the procurement re-tendered.

(5) A controlling officer or chief executive officer shall submit a quarterly report of the varied or amended procurement contracts to the Authority.

(6) An office holder or approvals authority that contravenes subsection (5) commits an offence.

**78.** (1) A person shall not process final payment of a contract sum where a defects liability certificate or certificate of final completion has not been issued.

Defects  
liability  
certificate  
and  
payments

(2) The issuance of a defects liability certificate or certificate of final completion is *prima facie* evidence of the completion of works in accordance with the set standards.

(3) A person who contravenes subsection (1) or (2) commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a term not exceeding five years, or to both.

**79.** The Authority may, in a prescribed manner and form permit a procuring entity to deviate from the use of a public procurement method, rule, process or document—

Deviations

- (a) where exceptional requirements make it impossible, impractical or uneconomical to comply with the provisions of this Act;
- (b) where market conditions or behaviour do not allow the effective application of the procurement methods, rules, processes or documents; or
- (c) specialised or particular requirements are regulated or governed by international standards or practices.

**80.** The Authority may, in the prescribed manner, accredit an alternative procurement system where a procuring entity—

Accreditation  
of alternative  
procurement  
system

- (a) operates in a specialised field or discipline which requires an alternative system;
- (b) has a status which requires alternative or additional procedures; or
- (c) is required to use an alternative system to comply with the provisions of an international or other agreement.

## PART VII

INVENTORY CONTROL, ASSET AND STORES MANAGEMENT AND  
DISTRIBUTION

Stores  
management  
system  
Act No. 1 of  
2018

**81.** (1) Subject to the Public Finance Management Act, 2018 a procuring entity may use the stores management and control system to assist the procuring entity meet the objectives of sound supply chain management.

(2) A person who manages stores shall not be involved in procurement within the procuring entity.

Management  
of purchased  
goods

**82.** (1) A procuring entity shall ensure that goods purchased are received, but shall not be used until taken on charge and as a basis for ensuring that all procured items are properly accounted for and put in proper use as intended by the procuring entity.

(2) The head of the stores unit shall, submit the following reports to the controlling officer or chief executive officer:

(a) quarterly inventory management report;

(b) quarterly stores inspection report;

(c) quarterly stock taking reports;

(d) annual stock taking report; and

(e) any other reports as directed and requested.

(3) A controlling officer or chief executive officer shall—

(a) submit the reports referred to under subsection (2) to the Authority;

(b) ensure the inspection of the stores at least quarterly in each calendar year; and

(c) conduct quarterly and annual inventory analysis and stock taking.

(4) A procuring entity shall—

(a) put measures in place to ensure that stores do not deteriorate from any preventable cause; and

(b) avoid overstocking of any particular item.

(5) A procured item assigned for use by an office holder shall be requisitioned from stores and issued by a stores officer of a procuring entity.

PART VIII

COMPLIANCE MONITORING AND ENFORCEMENT

**83.** (1) The Authority may, by notice in writing, require a procuring entity, or any other person the Authority considers has relevant information, to furnish it with information that it may require for the performance of its functions and exercise of its powers in terms of this Act.

Supply of information by public entity

(2) A procuring entity or person with information sought by the Authority shall furnish the Authority with the information within ten working days of receipt of the notice for a request of information under subsection (1).

(3) A procuring entity or person who fails to furnish the information required by the Authority under subsection (2), commits an offence.

**84.** (1) The Authority may, where the Authority has reasonable grounds to believe, either on its own motion or at the request, in writing, by any person, that there is a contravention of this Act, direct, in writing, an inspector to investigate the breach and report the findings of the investigation to the Authority.

Investigations and inspections

(2) The Authority may, at any reasonable time, inspect the records and accounts of a procuring entity, supplier or bidder relating to the procurement proceedings or contract and the procuring entity and supplier or bidder shall co-operate with, and assist the inspector.

(3) Where the Authority is satisfied that an investigation should be conducted under subsection (1), the Authority may conduct audits—

- (a) during the tender preparation;
- (b) in the course of execution of an awarded contract; and
- (c) of the performance of a contract in respect of any procurement as may be required.

(4) The Authority shall, on the commencement of an investigation under subsection (1)—

- (a) suspend the procurement proceedings until the conclusion of the investigation; and
- (b) issue a written decision, within ten working days of the commencement of the investigation.

Appointment  
of inspectors

**85.** (1) The Authority shall appoint suitably qualified persons as inspectors for the purpose of ensuring compliance with this Act.

(2) The Authority shall provide an inspector with a certificate of appointment, in the prescribed form, which shall be *prima facie* evidence of the inspector's appointment.

(3) An inspector shall, in performing a function under this Act —

(a) be in possession of the certificate of appointment; and

(b) show the certificate of appointment to a person who requests to see it or who is subject to an investigation under this Act.

Powers of  
inspectors

**86.** (1) An inspector may, with a warrant, enter premises where information, documents or articles which may be relevant to an investigation may be kept and—

(a) search the premises;

(b) search a person on the premises if there are reasonable grounds for believing that the person has personal possession of a document or article that has a bearing on the investigation, except that a person shall only be searched by a person of the same sex;

(c) examine a document or article found on the premises that has a bearing on the investigation;

(d) take extracts from or make copies of any book or document found on the premises that has bearing on the investigation;

(e) use a computer system on the premises, or require the assistance of a person on the premises to use that computer system, to—

(i) search any data contained in, or available from, the computer system;

(ii) reproduce any record from the data; or

(iii) obtain information from the computer for examination and copying; or

(f) attach and, if necessary, remove from the premises, for examination and safeguarding, any document or article that appears to have a bearing on the investigation.

(2) An inspector who removes a document or article from any premises in accordance with subsection (1) shall—

- (a) issue a receipt for the document or article to the owner, or person in charge or in control, of the premises; and
- (b) return the document or article as soon as practicable after achieving the purpose for which it was removed.

**87.** An inspector shall, after completing an investigation or inspection under section 86, submit a written report relating to the investigation or inspection to the Authority within a period the Authority may specify. Report of investigation or inspection

**88.** (1) The Authority may, after considering the report of an inspector made under section 87 and on being satisfied that there is a breach of this Act— Powers of Authority in investigation or inspection

- (a) direct the procuring entity to take actions that are necessary to rectify the contravention;
- (b) terminate the procurement proceedings;
- (c) prepare and submit a summary of the inspector's findings and recommendations to the relevant authorities for action; or
- (d) require the procuring entity to transfer procuring responsibilities of the subject procurement to another procuring entity.

(2) The Authority shall, before making an order under subsection (1), give the procuring entity and any other person whose legal rights the Authority believes may be adversely affected by the order, an opportunity to be heard.

**PART IX**  
**BIDDERS AND SUPPLIERS**

**89.** (1) A bidder is eligible to participate in a procurement if — Eligibility of bidders

- (a) the bidder has the legal capacity to enter into a contract;
- (b) the bidder is solvent and not in receivership, or any business rescue proceedings or the subject of legal proceedings under the Corporate Insolvency Act, 2017; Act No. 9 of 2017
- (c) is licensed and in good standing with the professional body to which the bidder is aligned, where applicable;

- (d) the bidder has fulfilled the bidder's obligation to pay taxes and social security contributions;
- (e) the bidder does not misrepresent the bidder's bid status in relation to a bid by fronting or any other similar manner;
- (f) the bidder's directors or officers have not been convicted of any criminal offence related to professional conduct or the making of false statements or misrepresentations as to qualifications for entering into a contract within a period of five years preceding the commencement of the procurement proceedings, or have been suspended pursuant to section 95;
- (g) the bidder does not have a conflict of interest in relation to the procurement requirement; and
- (h) in the case of a foreign bidder or local bidders that bidder partners with a citizen supplier.

(2) A procuring entity shall require a person to provide information to establish that the eligibility criteria under subsection (1) is satisfied.

(3) A procuring entity shall consider a person as ineligible, where that person submits false, inaccurate or incomplete information about the person's qualifications.

(4) A procuring entity may exclude a foreign bidder from participating in procurement proceedings where—

- (a) open national bidding is used in accordance with section 39;
- (b) open national selection is used in accordance with section 41; or
- (c) the procurement is subject to a reservation scheme in accordance with section 91.

(5) The review of the eligibility of the bidders shall be conducted as part of the preliminary examination of bids, except where it is conducted as part of the pre-qualification proceedings.

Qualification  
of bidders

**90.** (1) A procuring entity may require a bidder to meet qualification criteria that the procuring entity considers appropriate to the particular procurement requirement, to demonstrate that the bidder has the capability and resources to effectively carry out the contract.



(2) A qualification criteria shall be specified in the solicitation document and may relate to—

- (a) professional and technical qualifications;
- (b) financial resources and condition;
- (c) equipment and other physical facilities;
- (d) personnel and managerial capability;
- (e) record of past performance of similar contracts; and
- (f) registration or licensing with the relevant professional body in the Republic or in the bidders country of origin where so required by law.

(3) A solicitation document shall state any qualification requirements and specify the documentary evidence or information required to demonstrate the bidder's qualifications.

(4) Qualifications shall be assessed by examining whether the bidder meets the qualification criteria.

(5) A point system for comparing the relative level of qualifications of participating bidders shall be applied as prescribed.

(6) A review of the qualifications of the bidders shall be conducted separately from the evaluation and comparison of bids.

(7) Where pre-qualification proceedings are not conducted, post qualification, in which the procuring entity ascertains the qualifications of the best evaluated bidder, shall be used.

**91.** (1) Despite section 13, a procuring entity shall, as prescribed—

Preference and reservation for schemes

- (a) grant a margin of preference for the benefit of bids by a target group offering goods, works or services manufactured or performed by the target group;
- (b) grant a prescribed margin of preference to a bidder offering goods, works or services with local content; or
- (c) reserve or set aside certain procurement requirements for a target group, by restricting bidding to the target group.

(2) A target group for any preference or reservation scheme shall be determined in accordance with Government economic and social policies and may include—

- (a) citizen or local suppliers;
- (b) goods, works or services manufactured in or provided from the Republic or a particular region or performed by citizens or persons from a particular region;

- (c) citizen suppliers in a particular industry or economic sector;
  - (d) small and medium sized enterprises;
  - (e) enterprises owned by women, youths or persons with disabilities; or
  - (f) any other group designated by Government policy.
- (3) The Authority may, in consultation with the Government bodies responsible for economic and social policy, formulate a preference or reservation scheme as prescribed.
- (4) A preference or reservation scheme shall state—
- (a) the target group and eligibility requirements;
  - (b) the percentage of the preference, where applicable;
  - (c) the period for the operation of the scheme; and
  - (d) the objectives of the scheme and the means of measuring its effectiveness in achieving those objectives.
- (5) Where a margin of preference is granted to citizen or local suppliers—
- (a) greater preference shall be granted to citizen suppliers, than local suppliers, with no preference to foreign suppliers;
  - (b) the preference to be accorded shall be proportional to the percentage of the contract to be actually executed by citizen or local suppliers; and
  - (c) greater preference shall be granted where citizen or local suppliers form part of a joint venture or association agreement, than where they are subcontracted by foreign suppliers.
- (6) The Authority may, in consultation with the relevant authorities, recommend other measures to facilitate private sector participation in public procurement and to further the development of economic capacity in the Republic, as prescribed.

Participation  
of public  
body or  
company in  
procurement

**92.** A public body or company in which the Government has a majority or controlling interest is eligible to participate as a bidder or supplier in public procurement in accordance with this Act.

Subcontracting  
policy

**93.** (1) A procuring entity shall, for the purposes of this Act and any other written law, require a foreign bidder or supplier to subcontract a percentage of the total value of the procurement for all procurements of goods, works and services exceeding the prescribed thresholds to citizen bidders and suppliers.

(2) The Minister shall, in consultation with the Authority, prescribe the percentage of the total value of the procurement to be subcontracted.

(3) A foreign bidder or supplier shall apply the following methods of subcontracting depending on the nature, complexity, urgency and value of the main contract:

(a) domestic subcontracting; or

(b) nominated subcontracting.

(4) The manner of implementation of a subcontracting method under subsection (3) shall be as prescribed.

(5) For the purposes of this section—

“domestic subcontracting” means a subcontracting method where a bidder selects a subcontractor to engage; and

“nominated subcontracting” means a subcontracting method where the procuring entity or procuring entity’s representative selects a subcontractor through a competitive process, as prescribed, and instructs the bidder to engage that selected subcontractor.

**94.** (1) The Authority shall maintain a system, in the form of a database or list, to provide centralised information on potential suppliers of goods, works and services.

Supplier  
database or  
list

(2) Subject to section 16, the electronic government procurement system shall be the source for the database established under subsection (1).

(3) The registration of potential suppliers who are foreign bidders shall, on an application to the Authority by that bidder, be done at the place where a bidder participates in a bidding process in the Republic.

(4) A potential supplier shall register on the electronic government procurement system.

(5) Where an application is made under subsection (3), a procuring entity may, within five days of the application, register a potential supplier on the database or list.

(6) The Authority shall regularly publicise—

(a) the existence of the database or list;

(b) procedures for registering and updating entries on the database or list;

(c) the conditions to be satisfied for entry on the database or list and the documentary evidence required; and

(d) the period of any registration and requirements for updating entries.

(7) An entry in the database or list shall not be subject to any eligibility criteria other than that set out in section 89.

(8) The registration of bidders shall be undertaken by the Authority as a continuous process.

(9) A database or list maintained by the Authority under this section shall be reviewed and updated on a regular basis.

(10) The Authority operating a system or database under this section shall notify potential suppliers of—

(a) their inclusion in the database or list;

(b) any rejection of a request to register and the reasons for that rejection; and

(c) their removal from the database or list and the reasons for such removal.

Suspension  
of bidder or  
supplier

**95.** (1) The Authority may, on its own motion or on the recommendation of an investigative agency, procuring entity or institution, suspend a bidder or supplier from participating in public procurement on the grounds specified in section 96.

(2) A bidder or supplier shall not be suspended except where—

(a) notice in writing is given to the bidder or supplier of the grounds for the proposed suspension and the details of the alleged grounds;

(b) an opportunity is given to the bidder or supplier to respond to the alleged grounds; and

(c) an investigation of the facts of the case is undertaken by the Authority.

(3) A suspension imposed under subsection (1) shall not be less than one year and shall not exceed five years.

Grounds for  
suspension  
of bidder or  
supplier

**96.** A bidder or supplier shall be suspended from participating in procurement where the bidder or supplier has—

(a) offered, given, or agreed to give, directly or indirectly an inducement or anything of value to a public officer to influence an act, decision or proceeding of a procuring entity;

- (b) provided false information in a bid or any other document submitted to a procuring entity in connection with a procurement process or contract;
- (c) connived to interfere with the participation of other bidders;
- (d) refused to sign a contract or to furnish a performance security in accordance with the terms of the solicitation document and bid, if required to do so;
- (e) assigned a contract to a third party;
- (f) failed to comply with a bid securing declaration; or
- (g) non-performance or under performance of contractual obligations except that the non-performance or under performance is not due to any *force majeure*.

**97.** (1) The Authority may, on its own motion or on recommendation of a law enforcement agency, procuring entity or institution, permanently prohibit a bidder or supplier from participating in public procurement on the following grounds:

Permanent  
bar of bidder  
or supplier

- (a) committing an offence relating to procurement under this Act or any other law;
- (b) giving false information about the bidder's or supplier's qualifications;
- (c) misconduct relating to the submission, evaluation and awarding of bids, including corrupt, fraudulent, collusive or coercive practices, price fixing, a pattern of underpricing of bids and breach of confidentiality;
- (d) conviction of a criminal offence relating to obtaining or attempting to obtain a contract or subcontract;
- (e) conviction of a crime related to business or professional activities; or
- (f) any other grounds as prescribed.

**98.** A procuring entity shall reject a bid, proposal, offer or quotation of a bidder or supplier if the bidder or supplier offers, gives or agrees to give, directly or indirectly an inducement or anything of value to an office holder to influence an act, decision or proceeding of a procuring entity.

Rejection of  
bid,  
proposal,  
offer or  
quotation

Appeal  
against  
suspension

**99.** A bidder or supplier aggrieved by a decision of the Authority to suspend the bidder or supplier from participating in public procurement or over any other matter under this Act may submit the matter to arbitration within ten days of the Authority's decision to suspend.

## PART X

### APPEALS

Appeal of  
decision by  
procuring  
entity

**100.** (1) A bidder or supplier who is aggrieved with a decision made by a procuring entity under this Act may appeal against the decision to the Authority.

(2) An application under subsection (1) shall be made in the prescribed manner on payment of the prescribed fee.

(3) The Authority shall not accept an application made under this section unless it is submitted within ten working days from the date the bidder submitting the application was informed of or became aware of the circumstances giving rise to the application or from the date the bidder should have become aware of those circumstances, whichever is earlier.

(4) Unless an application is dismissed or resolved by mutual agreement between the applicant and the procuring entity, the Authority shall—

(a) on receipt of the application, institute an investigation;

(b) ensure that no contract award is made prior to the resolution of the application; and

(c) issue a written decision, within ten working days after the submission of the application.

(5) A decision issued under subsection (4) (c) shall state—

(a) whether the application is upheld, in whole or in part or dismissed;

(b) the reasons for the decision; and

(c) any corrective measures that are to be taken by the procuring entity or the bidder.

(6) A bidder or supplier who is aggrieved by the decision of the Authority may submit the matter to arbitration under section 101 within ten working days of the Authority's decision.

**101.** Any dispute over a matter or decision made under this Act shall be determined by arbitration in accordance with the provision of the Arbitration Act.

Dispute to be determined by arbitration Act No. 19 of 2000

PART XI  
GENERAL PROVISIONS

**102.** (1) The objective of a framework agreement is to enable a procuring entity make an arrangement with a selected supplier or identified contractor to procure goods, works and services whose quantities and delivery schedules are not defined or determined in the procurement process.

Framework agreements

(2) A procuring entity may enter into a framework agreement through open tender if—

(a) the procurement value is within the thresholds prescribed under this Act; and

(b) the required quantity of goods, works or services cannot be determined at the time of entering into the agreement.

(3) The maximum term for a framework agreement shall be three years and, for agreements exceeding one year, a value for money assessment shall be undertaken annually to determine whether the terms designated in the framework agreement remain competitive.

(4) When implementing a framework agreement, a procuring entity may—

(a) procure through call-offs order when necessary; or

(b) invite mini competition among persons that have entered into the framework agreement in the respective category.

(5) For the purposes of subsection (4)—

“call-offs order” means an order made using a framework agreement with one or more contractors, suppliers or consultants for a defined quantity of works, goods, consultancy covering terms and conditions including price that users require to meet the immediate requirements.

(6) An evaluation committee shall evaluate bids under the category specified in subsection (4) (b).

(7) A procurement unit shall prepare procurement reports every quarter with an analysis of items procured through framework agreements and these reports shall include an analysis of pattern of usage, procurement costs in relation to the prevailing market rates and any recommendations.

(8) A procurement undertaken through a framework agreement may be subject to preferences and reservations provided for in this Act.

Code of conduct      **103.** The Authority may promulgate a code of conduct to regulate office holders, bidders and suppliers involved in public procurement of goods, works and services.

Conduct of bidder and supplier      **104.** (1) A person participating in public procurement of goods, works or services shall—

(a) abide by the obligations under this Act, the contract and other instruments applicable to the person's conduct and activities related to public procurement; and

(b) not commit or abet corrupt, fraudulent, collusive or coercive practices.

(2) Subject to subsection (3), a person who contravenes subsection (1) commits an offence and is liable, on conviction to a fine not exceeding five hundred thousand penalty units or to imprisonment for a term not exceeding five years, or to both.

Act No. 3 of 2012      (3) A person who commits an act of corruption shall be prosecuted in accordance with the provisions of the Anti-Corruption Act, 2012

Offences      **105.** (1) A person commits an offence if that person—

(a) without reasonable excuse fails or refuses to give information, or produce any document, record or report required under this Act;

(b) assaults, resists or obstructs any officer or employee of the Authority, or any other authority exercising monitoring and oversight functions over public procurement, in the exercise of their functions under this Act;



- (c) contrary to this Act, interferes with or exerts undue influence on any officer or employee of the Authority or a procuring entity in the performance of their functions or in the exercise of the powers under this Act;
  - (d) conspires to raise prices or lower the quantity or quality of goods, services or works for procuring entities that intend to acquire products or services through a bidding process;
  - (e) in the case of an electronically submitted bid, alters, modifies, intercepts or deletes information; or
  - (f) certifies substandard goods or works that are incomplete, non-existent, or whose quality is below the specifications contained in the contract.
- (2) An office holder commits an offence if that office holder—
- (a) due to recklessness or dishonesty, fails to exercise the powers as an office holder and to discharge duties in accordance with this Act;
  - (b) uses the position as an office holder dishonestly or with the intention of directly or indirectly gaining an advantage for oneself or someone else or causing detriment to a procuring entity;
  - (c) subject to the Penal Code Act, uses the position as an office holder recklessly without regard to whether the conduct may directly or indirectly gain an advantage for oneself or someone else or cause detriment to a procuring entity; Cap. 87
  - (d) uses information obtained because of the position as an office holder to gain an advantage for oneself or someone else or cause detriment to a procuring entity;
  - (e) tampers with a bid, including any document or item submitted with the bid, by opening, burning, tearing, destroying, or partially burning, tearing or destroying, altering, erasing, falsifying or rendering incomplete or misleading information;
  - (f) publishes or discloses information relating to procurement of assets, other than in the proper and authorised course of duties as an office holder; or
  - (g) contravenes or wilfully fails to comply with this Act.

(3) A person convicted of an offence under subsection (2), is liable to the applicable administrative and legal sanctions applicable to office holders under the office holders conditions of employment and any other written law.

(4) Without limiting the generality of subsection (3), the Authority may, where an office holder contravenes this Act, recommend to the employer appropriate administrative and legal sanctions on the office holder, including—

(a) disciplinary proceedings;

(b) suspension from employment;

(c) demotion;

(d) surcharge;

(e) transfer or refusal of transfer;

(f) summary dismissal; or

(g) any other recommendation that the Authority may consider appropriate.

(5) Despite subsection (4), the Authority may refer the case of an erring office holder to an appropriate law enforcement agency or professional body.

Limitation of liability of controlling officer or chief executive officer

**106.** Where a controlling officer or chief executive officer of a procuring entity satisfies the Authority, or other relevant oversight or enforcement body, that the controlling officer or chief executive officer had, in accordance with this Act delegated functions to another person or body or committee, that other person and every member of that body or committee shall be accountable for any failure to comply.

General penalty

**107.** A person who commits an offence under this Act for which a penalty is not specified is liable, on conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a term not exceeding five years, or to both.

Offence by principal officers of body corporate and unincorporate body

**108.** Where an offence under this Act is committed by a body corporate or unincorporate body, with the knowledge, consent or connivance of the director, manager, shareholder or partner of the body corporate or unincorporate body, that director, manager, shareholder or partner commits the same offence as the body corporate or body unincorporate and is liable, on conviction, to the penalty specified for that offence.

**109.** (1) A court may order a person to compensate a procuring entity for any damage or loss suffered by the procuring entity, if the damage or loss resulted from an offence committed by the person. Compensation

(2) Any compensation ordered under subsection (1) is a civil debt due to the procuring entity.

**110.** The Authority may, where a procuring entity contravenes this Act, transfer its procurement function to a body or procurement agency appointed by the Authority, until the Authority is satisfied that the causes of the contravention have been rectified by the procuring entity. Transfer of functions of procuring entity to other body

**111.** (1) The Authority may issue public procurement circulars and instructions to provide further guidance on the interpretation and application of this Act. Circulars and publications

(2) The Authority shall publish, for public information, texts of this Act, regulations, circulars, standards and directives of general application and the list of bidders and suppliers who are suspended or prohibited from participating in public procurement.

**112.** (1) The Minister may, on the recommendation of the Authority, by statutory instrument, make regulations for the better carrying out of the provisions of this Act. Regulations

(2) Without limiting the generality of subsection (1), regulations made under this Act may provide for the—

- (a) publication of notices, pre-qualification, development of short-lists and selection of single bidders;
- (b) management of the bidding process, including pre-bid meetings, clarification and amendment of solicitation documents and the withdrawal, modification and substitution of bids;
- (c) use of a procurement procedure structured as two or more procurements;
- (d) sanctions imposed on office holders that incur loss from that office holder's actions;
- (e) use of information and communication technologies, including the use of an e-procurement system or website set up by the Authority and the publication of data and information in open data formats;
- (f) evaluation criteria;
- (g) maintenance of procurement records;
- (h) circumstances amounting to an emergency;

- (i) form and manner of appointment of a procurement agent;
- (j) procurement thresholds;
- (k) manner of conducting negotiations;
- (l) form and manner of preparing multi-year procurement plans;
- (m) fees and charges to be levied and paid in respect of any matter or thing required or permitted to be done for the purposes of this Act;
- (n) forms to be used for the purposes of this Act and the manner in which applications are to be made;
- (o) types of contract to be used;
- (p) amount to be paid by an office holder for the loss resulting from that office holder's actions; and
- (q) socio-economic impact of any procurement and environmental sustainability.

Repeal of  
Act No. 12  
of 2008

**113.** (1) The Public Procurement Act, 2008 is repealed.

(2) Despite subsection (1), every order, direction or appointment issued, given or made under the provisions of the repealed Act shall be valid until otherwise cancelled, revoked or varied under the provisions of this Act.

(3) A person who immediately before the commencement of this Act held office as Director, Secretary or employee of the Authority shall continue to hold that office as Director, Secretary or employee of the Authority as if appointed under this Act.

(4) The service of the staff of the Authority referred to under subsection (3) shall be treated as continuous service.

(5) The Director-General appointed under the repealed Act shall continue to hold office as if appointed under this Act subject to the terms and conditions of appointment and is eligible for reappointment for a further term.

(6) A person who immediately before the commencement of this Act held office as a member of the former Board or member of a Committee of the Board shall hold office as a member of the Board for a period of three months after which the Minister shall appoint the members of the Board in accordance with the provisions of this Act.

(7) A procuring entity, which at the commencement of this Act is unable to use the electronic government procurement system shall comply with the provisions of this Act within three years of commencement of this Act.

(8) The Second Schedule applies to the matters specified in that Schedule.

FIRST SCHEDULE  
(Sections 5 (3) and 7(3))

ADMINISTRATION OF THE AUTHORITY

PART I  
BOARD OF AUTHORITY

1. (1) The seal of the Authority is a device that may be determined by the Board and shall be kept by the Secretary.

Seal of  
Authority

(2) The affixing of the seal shall be authenticated by the Chairperson or the Vice-Chairperson and the Secretary or any other person authorised in that behalf by a resolution of the Board.

(3) A contract or instrument which, if entered into or executed by a person not being a body corporate, would not be required to be under seal, may be entered into or executed without seal on behalf of the Authority by the Secretary or any other person generally or specifically authorised by the Board in that behalf.

(4) A document purporting to be a document under the seal of the Authority or issued on behalf of the Board shall be received in evidence and shall be executed or issued, as the case may be, without any further proof, unless the contrary is proved.

2. (1) Subject to the other provisions of this Act, a member of the Board shall hold office for a period of three years from the date of appointment and may be reappointed for a further period of three years.

Tenure of  
office and  
vacancy

(2) Subject to the other provisions of this Part, a member shall, on the expiration of the period for which the member is appointed, continue to hold office until another member is appointed to succeed that member.

(3) The office of a member becomes vacant—

(a) on the member's death;

(b) if the member is adjudged bankrupt;

(c) if the member is absent from three consecutive meetings of the Board of which the member has had notice, without the prior approval of the Board;

(d) on the expiry of one month's notice of the member's intention to resign from office, given by the member in writing to the Board;

(e) if the member ceases to hold the office which qualified that member for appointment;

(f) if the member becomes mentally or physically incapable of performing the duties of a member of the Board; or

(g) if the member is convicted of an offence under this Act or any other written law and sentenced to imprisonment for a term of six months or more.

(4) A member may resign from office by giving not less than one month's notice in writing to the Board.

(5) Where the office of a member becomes vacant, another person shall be appointed in the place of the member who vacates office in accordance with subparagraph (1), and such member shall hold office for the remainder of the term.

Proceedings  
of Board

3. (1) Subject to the other provisions of this Act, the Board may regulate its own procedure.

(2) The Board shall meet for the transaction of business, at least once in every three months at such places and times as the Chairperson may determine.

(3) The Chairperson may, upon giving notice of not less than fourteen days, call a meeting of the Board and shall call a special meeting upon receiving a written request from at least five members of the Board.

(4) If the urgency of any particular matter does not permit the giving of the notice required under subparagraph (3), a special meeting may be called by the Chairperson upon giving a shorter notice.

(5) Seven members of the Board shall form a quorum.

(6) There shall preside at any meeting of the Board—

(a) the Chairperson;

(b) in the absence of the Chairperson, the Vice-Chairperson;  
and

(c) in the absence of both the Chairperson and the Vice-Chairperson, such member as the members present may elect from amongst themselves for the purpose of that meeting.

(7) A decision of the Board on any question shall be by a majority of votes of the members present and voting at the meeting and, in the event of an equality of votes, the person presiding at the meeting shall have, in addition to a deliberative vote, a casting vote.

(8) Where a member is for any reason unable to attend any meeting of the Board, the member may, in writing, nominate another person from the same organisation to attend such meeting in that member's stead and such person shall be deemed to be a member for the purpose of that meeting.

(9) The Board may invite any person whose presence is in its opinion desirable to attend and to participate in the deliberations of a meeting of the Board but such person shall have no vote.

(10) The validity of any proceedings, act or decision of the Board shall not be affected by any vacancy in the membership of the Board or by any defect in the appointment of any member or by reason that a person not entitled so to do, took part in the proceedings.

(11) The Board shall cause minutes to be kept of the proceedings of every meeting of the Board and every meeting of any committee established by the Board.

**4.** (1) The Board may, for the purpose of performing its functions under this Act, establish such committees as it considers necessary and delegate to those committees any of its functions.

Committees

(2) The Board may appoint as members of a committee constituted under subparagraph (1), persons who are or are not members of the Board and such persons shall hold office for such period as the Board may determine.

(3) A committee of the Board may regulate its own procedure.

**5.** (1) A Procurement Committee shall ensure that a procurement by a procuring entity is conducted in accordance with this Act.

Functions of Procurement Committee

(2) A Procurement Committee is responsible for providing prior authorisation of the procurement process in accordance with the procedure specified in section 34.

**6.** There shall be paid to members of the Board or members of a committee of the Board such allowances as the Emoluments Commission may, on the recommendation of the Minister, determine.

Allowances of members

**7.** An action or other proceeding shall not lie or be instituted against a member of the Board or a committee of the Board, or a member of staff of the Authority for or in respect of any act or thing done or omitted to be done in good faith in the exercise or performance of any of the powers, functions or duties conferred under this Act.

Immunity of members and staff of Authority

Disclosure of interest

**8.** (1) A member or person who is present at a meeting of the Board or a committee of the Board at which any matter, in which that person or that person's relative or associate, is directly or indirectly interested in a private capacity, is the subject of consideration shall, as soon as is practicable after the commencement of the meeting, disclose that interest and shall not, unless the Board or the committee otherwise directs, take part in any consideration or discussion of, or vote on any question relating to, that matter.

(2) A disclosure of interest made under this paragraph shall be recorded in the minutes of the meeting at which it is made.

Prohibition of publication of, or disclosure of information to unauthorised persons

**9.** (1) A person shall not, without the consent in writing given by or on behalf of the Board, otherwise than in the course of duties of that person, publish or disclose to any other person, the contents of any document, communication or information, which relates to, or which has come to the knowledge of that person in the course of that person's duties under this Act.

(2) A person who contravenes subparagraph (1) commits an offence and is liable, on conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

(3) A person who, having any information which to the knowledge of that person has been published or disclosed in contravention of subparagraph (1), unlawfully publishes or communicates the information to any other person, commits an offence and is liable, on conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a term not exceeding one year, or to both.



PART II  
FINANCIAL PROVISIONS

- 10.** (1) The funds of the Authority consists of moneys that may— Funds of Authority
- (a) be appropriated to the Authority by Parliament for the purposes of the Authority;
  - (b) be paid to the Authority by way of fees, charges, grants or donations; and
  - (c) otherwise vest in or accrue to the Authority.
- (2) The Authority may—
- (a) subject to the approval of the Minister, accept moneys by way of grants or donations from any source within or outside Zambia;
  - (b) subject to the approval of the Minister, raise by way of loans or otherwise, such moneys as it may require for the discharge of its functions; and
  - (c) in accordance with the regulations made under this Act, charge fees for services provided by the Authority.
- (3) There shall be paid from the funds of the Authority—
- (a) the salaries, allowances, loans, gratuities and pensions of the staff of the Authority and other payments for the recruitment and retention of the staff;
  - (b) such reasonable travelling and subsistence allowances or other allowances for members, members of any committee of the Board and staff of the Authority when engaged on the business of the Authority at such rates that Emoluments Commission, on the recommendation of the Board, determine; and
  - (c) any other expenses incurred by the Board in the performance of the Board's functions under this Act.
- (4) The Authority may, with the approval of the Board, invest in manner that it considers necessary funds that it does not immediately require for the discharge of its functions.
- 11.** The financial year of the Authority shall be the period of twelve months ending on 31st December of each year. Financial year

Accounts

**12.** (1) The Authority shall cause to be kept proper books of account and other records relating to its accounts.

(2) The accounts of the Authority shall be audited annually by the Auditor-General or an auditor appointed by the Auditor-General.

Annual report

**13.** (1) As soon as practicable, but not later than ninety days after the end of the financial year, the Authority shall submit to the Minister a report concerning its activities during the financial year.

(2) The report, under subparagraph (1), shall include information on the financial affairs of the Authority and there shall be appended to the report—

(a) an audited statement financial position;

(b) an audited statement of comprehensive income; and

(c) such other information as the Minister may require.

(3) The Minister shall, not later than seven days after the first sitting of the National Assembly next after receipt of the report referred to in subparagraph (1), lay the report before the National Assembly.

SECOND SCHEDULE

(Section 113 (8))

SAVINGS AND TRANSITIONAL PROVISIONS

1. (1) On or after the commencement of this Act, there shall be transferred to, vest in and subsist against, the Authority by virtue of this Act and without further assurance, the assets, rights, liabilities and obligations which immediately before the commencement of this Act were the assets, rights, liabilities and obligations of the Authority under the repealed Act.

Transfer of  
assets and  
liabilities

(2) Subject to subparagraph (1), every deed, bond or agreement, other than an agreement for personal service, to which the Authority was a party immediately before the commencement of this Act whether or not of a nature that rights, liabilities and obligations could be assigned, shall, unless its subject matter or terms make it impossible that it should have effect as modified, as provided under this paragraph, have effect as if—

- (a) the Authority had been party to it;
- (b) for any reference to the Authority under the repealed Act, there were substituted, with respect to anything required to be done on or after the commencement of this Act, a reference to the Authority; or
- (c) for any reference to an officer of the Authority under the repealed Act, not being a party to it and beneficially interested, there were substituted, with respect to anything required to be done on or after the commencement of this Act, a reference to such officer of the Authority as the Authority shall designate.

(3) Where under this Act, any assets, rights, liabilities and obligations of the Authority under the repealed Act are considered to be transferred to the Authority in respect of which transfer a written law provides for registration, the Authority shall make an application, in writing, to the appropriate registration authority for registration of the transfer.

(4) The registration authority referred to in subparagraph (3) shall make such entries in the appropriate register as shall give effect to the transfer and, where applicable, issue to the transferee concerned a certificate of title in respect of the property or make necessary amendments to the register and shall endorse the deeds relating to the title, right or obligation concerned and registration fees or other duties shall not be payable in respect of the transaction.

Legal  
proceedings

2. (1) Any legal proceedings or application of the Authority under the repealed Act pending immediately before the commencement of this Act by or against the Authority under the repealed Act may be continued by or against the Authority.

(2) After the commencement of this Act, proceedings in respect of any right, liability or obligation which was vested in, held, enjoyed, incurred or suffered by the Authority under the repealed Act may be instituted by or against the Authority.

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GOVERNMENT OF ZAMBIA

**ACT**

**No. 9 of 2018**

Date of Assent: 28th July, 2018

**An Act to amend the Public-Private Partnership Act, 2009.**

[31st July, 2018

ENACTED by the Parliament of Zambia.

Enactment

**1.** This Act may be cited as the Public-Private Partnership (Amendment) Act, 2018, and shall be read as one with the Public-Private Partnership Act, 2009, in this Act referred to as the principal Act.

Short title  
Act No. 14  
of 2009

**2.** Section 3 of the principal Act is amended by the—

Amendment  
of section 3

(a) deletion of the definitions “local authority” and “Unit”;  
and

(b) insertion of the following definitions in the appropriate places:

“Consolidated Fund” means the consolidated fund established under the Constitution;

Cap. 1

“Department” means the department established under section 4 which performs the functions of a Public-Private Partnership Unit for the purposes of Public-Private Partnerships undertaken under this Act; and

“local authority” has the meaning assigned to the words in the Constitution.

Cap. 1

**3.** The principal Act is amended by the deletion of section 4 and the substitution therefor of the following:

Amendment  
of section 4

**224 No. 9 of 2018 ] *Public-Private Partnership (Amendment)***

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Establishment of Department	<p>4. (1) There is established the Public-Private Partnership Department, which is responsible for the implementation of the provisions of this Act.</p> <p>(2) The department shall be under the control and supervision of the Ministry responsible for finance.</p>
Repeal and replacement of section 5	<p>4. The principal Act is amended by the repeal of section 5 and the substitution therefor of the following:</p>
Functions of Department	<p>5. (1) The functions of the Department are to—</p> <ul style="list-style-type: none"><li>(a) recommend to the Government on the use of public-private partnerships in the financing, construction, maintenance and operation of any project;</li><li>(b) advise Government on administrative procedures in relation to project development and on matters of policy relating to public-private partnerships;</li><li>(c) categorise projects for purposes of this Act and prepare a project register as may be prescribed;</li><li>(d) coordinate with contracting authorities in respect of any project;</li><li>(e) develop technical and best practice guidelines in relation to all aspects of public-private partnerships, standardised bidding documents and public-private partnership agreement provisions for purposes of this Act;</li><li>(f) receive and make an assessment of any proposed project submitted to it and give its recommendations to the contracting authority as to whether the project or facility—<ul style="list-style-type: none"><li>(i) is affordable to a contracting authority;</li><li>(ii) provides value for money for the Republic; and</li><li>(iii) presents optimum transfer of technical, operational and financial risks to the concessionaire;</li></ul></li><li>(g) examine the request for proposals to ensure conformity with the feasibility study and legal and regulatory requirements;</li></ul>

- (h) monitor the competitive selection process and provide for review of the process, if so required, under this Act;
- (i) in liaison with the ministry responsible for national planning and development, monitor progress of implementation of public-private partnership agreements in order to facilitate timely completion;
- (j) approve terms of reference for consultancy assignments for a project; and
- (k) facilitate training and provide advisory services to contracting authorities.

(2) The Department shall exercise and perform such other powers and functions as are conferred or imposed on it by, or under, this Act or any other law.

5. The principal Act is amended by the repeal of section 7 and the substitution therefor of the following:

Repeal and replacement of section 7

7. (1) The functions of the Council are to—
- (a) formulate policies relating to public-private partnerships for purposes of this Act;
  - (b) approve projects for purposes of this Act as prescribed;
  - (c) approve the award of agreements under this Act;
  - (d) ensure competition, transparency and equity in the selection process under this Act; and
  - (e) give directives to any contracting authority, or concessionaire regarding the implementation of any project.

Functions of Council

(2) The Council shall, on receipt of a recommendation from the Technical Committee, approve or reject a project or award of an agreement.

(3) The Council may, in the discharge of its functions under this Act—

- (a) commission any study relevant to the determination of the award of any agreement;
- (b) request any contracting authority, regulatory agency, concessionaire or any other body or person to furnish the Council with information, details, documents and particulars required in connection with or relating to any project;

(c) request any professional or technical assistance from any appropriate body or person in Zambia or elsewhere; and

(d) inspect, visit, review and monitor any project and its implementation, execution, operation and management.

Amendment of section 8

**6.** Section 8 of the principal Act is amended by the deletion of paragraph (b) and the substitution therefor of the following:

(b) five Ministers appointed by the President, one of whom shall be designated the Vice-Chairperson;.

Repeal and replacement of section 10

**7.** The principal Act is amended by the repeal of section 10 and the substitution therefor of the following:

Constitution of Public-Private Partnership Technical Committee

**10.** (1) There is constituted the Public-Private Partnership Technical Committee, which consists of the following part-time members:

(a) the Secretary to the Treasury, as Chairperson;

(b) a representative of the Attorney-General;

(c) the Permanent Secretary of the Ministry responsible for national planning and development;

(d) the Permanent Secretary of the Ministry responsible for industry;

(e) the Permanent Secretary of the Ministry responsible for infrastructure;

(f) the Permanent Secretary of the Ministry responsible for land;

(g) the Permanent Secretary of the Ministry responsible for local government;

(h) a representative of the Engineering Institution of Zambia;

(i) a representative of the National Council for Construction;

(j) a representative of the Zambia Environmental Management Agency;

(k) a representative of the Zambia Public Procurement Authority;



(l) a representative of the Zambia Institute of Chartered Accountants;

(m) a representative of the Economics Association of Zambia; and

(n) one person appointed by the Minister.

(2) The Minister shall appoint the members under subsection (1) (b), (h), (i), (j), (k), (l) and (m).

(3) The members shall elect the Vice-Chairperson from amongst themselves.

(4) Subject to subsection (2), the members of the Technical Committee appointed by the Minister under subsection (2) shall hold office for a period of three years from the date of appointment and are eligible for appointment for a further term of three years.

(5) The office of a member becomes vacant —

(a) if the member is absent, without reasonable excuse, from three consecutive meetings of the Technical Committee of which the member has had notice;

(b) upon the member's death;

(c) if the member is adjudged bankrupt;

(d) if the member ceases to hold the office by virtue of which the member was appointed;

(e) if the member becomes incapable of performing the duties of a member;

(f) if the member is removed by the Minister;

(g) if the member is convicted of an offence involving dishonesty or fraud under this Act or any other law; or

(h) upon the expiry of one month's notice of the member's intention to resign from office, given by the member to the Minister.

(6) A member may resign from office by giving one month's notice in writing to the Minister.

(7) Where a vacancy occurs in terms of subsection (4), the Minister shall appoint another person to replace the member who vacates office, but that person shall hold office for the remainder of the outgoing member's term.

(8) A member of the Technical Committee shall be paid allowances that the Minister may determine with the approval of the Emoluments Commission.

Repeal and replacement of section 14

**8.** The principal Act is amended by the repeal of section 14 and the substitution therefor of the following:

Director and other public officers

**14.** (1) There is a Director for the Department who is a public officer appointed by the Civil Service Commission.

(2) The Director shall, subject to the general or specific directions of the Council—

(a) be responsible for the administration of the Department;

(b) be an *ex-officio* member of the Technical Committee; and

(c) exercise the functions conferred on the Director by, or under, this Act.

(3) The Civil Service Commission shall appoint such other officers as are necessary for purposes of this Act.

Repeal and replacement of sections 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35

**9.** The principal Act is amended by the repeal of sections 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 and the substitution therefor of the following:

Single stage and two stage procedures for requesting proposal

**26.** (1) After the evaluation of the pre-selection bids, the contracting authority shall submit a report for approval to the Department, demonstrating how the pre-selection criteria specified under section 23 has been met.

(2) The report shall contain the following statements:

(a) that the bids explain the capacity of the concessionaires and their proposed mechanisms and procedures to effectively implement, manage, enforce, monitor and report on the proposed infrastructure project and facility; and

(b) that a satisfactory due diligence including a legal due diligence has been completed by the Department and the selected concessionaires in relation to matters of their respective competence and capacity are qualified to enter into the public-private partnership agreement.

**27.** (1) A contracting authority shall provide a set of the request for proposals and related documents issued in accordance with section 28 to each pre-selected bidder that pays the fee, if any, charged for those bidding documents.

Content of  
request for  
proposals

(2) Despite subsection (1), a contracting authority may use a two stage procedure to request for a proposal from pre-selected bidders when the contracting authority does not consider it to be feasible to describe the characteristics of the project in the request for a proposal.

(3) Where a two stage procedure is used, the following shall apply:

- (a) the initial request for proposals shall call on the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as the main contractual terms proposed by the contracting authority or Department;
- (b) the contracting authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders which shall be recorded in minutes of the meeting or discussion;
- (c) following evaluation of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by removing, modifying or adding to any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms and any criterion for evaluating proposals and ascertaining the preferred bidder, as set out in the initial request for the proposals;

Content of  
request for  
proposal  
Act No. 12  
of 2008

- (d) the contracting authority shall indicate in the record of the selection proceedings, to be kept pursuant to section 39, the justification for any revision to the request for proposals and which shall be communicated in the invitation to submit final proposals; and
- (e) at the second stage of the procedure, the contracting authority, shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with sections 28 through to section 34.

**28.** To the extent not required by, or under, the Public Procurement Act, 2008, a request for proposals shall include the following:

- (a) general information as may be required by the bidders in order to prepare and submit their proposals;
- (b) project specifications and performance indicators, as appropriate, including the contracting authority's or Department's requirements regarding safety and security standards and environmental protection;
- (c) contractual terms proposed by the contracting authority or Department including an indication of which terms are considered to be non-negotiable; and
- (d) criteria for evaluating proposals, and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals, the relative weight to be accorded to each evaluation criterion and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

Bid securities

**29.** (1) A request for a proposal shall set out the requirements with respect to the issue of, and the nature, form, amount and other principal terms and conditions of the required bid security.

(2) A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of a—

- (a) withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for a proposal, before that deadline;
- (b) failure to enter into final negotiations with the contracting authority pursuant to section 34 (1);
- (c) failure to submit its best and final offer within the time limit prescribed by the contracting authority pursuant to section 34 (2);
- (d) failure to sign the agreement, if required by the contracting authority to do so, after the technical proposal has been accepted; or
- (e) failure to provide the required security for the fulfillment of the agreement after the proposal has been accepted or to comply with any other condition prior to signing the agreement as specified in the request for a proposal.

**30.** (1) A contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for a proposal as set out in section 28.

Clarifications  
and  
modifications

(2) A contracting authority shall indicate in the record of the selection proceedings, to be kept pursuant to section 39, the justification for any revision to the request for a proposal and which shall be communicated to the bidders, in the same manner as the request for a proposal, at a reasonable time prior to the deadline for submission of proposals.

**31.** (1) The criteria for evaluating technical proposals shall include the following:

Evaluation  
criteria

- (a) technical soundness;
- (b) compliance with environmental standards under any law;
- (c) operational feasibility;
- (d) quality of services and measures to ensure their continuity; and
- (e) any other prescribed criteria.

- (2) The criteria for evaluating financial and commercial proposals shall include, as appropriate—
- (a) the present value of proposed user levies, unit prices and other charges over the agreement period;
  - (b) the present value of proposed direct payments by the contracting authority, if any;
  - (c) the costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;
  - (d) the extent of financial support, if any, expected from a public authority in Zambia;
  - (e) the soundness of the proposed financial arrangements;
  - (f) the extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for technical proposals;
  - (g) the social and economic development potential offered by the technical proposals; and
  - (h) any other prescribed criteria.

Evaluation of proposal

**32.** (1) A contracting authority shall evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such proposal criterion and the evaluation process set out in the request for proposals.

(2) For the purposes of subsection (1), a contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects of the proposal.

Further demonstration of fulfilment of qualification criteria

**33.** (1) A contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection.

(2) A contracting authority shall disqualify any bidder that fails to demonstrate its qualifications again if requested to do so.

**34.** (1) A contracting authority shall rank all responsive proposals on the basis of the evaluation criteria and invite, for final negotiation of the agreement, the bidder that has attained the best rating, except that the final negotiations shall not include those contractual terms, if any, that were stated as non-negotiable in the final request for a proposal.

Final negotiations

(2) Where a bidder puts forward its best and final offer and the contracting authority does not find that offer acceptable, it shall terminate the negotiations with the bidder concerned.

(3) Where a contracting authority terminates negotiations under subsection (2), the contracting authority shall invite the other bidders for negotiations, in the order of their ranking, until the parties conclude an agreement or the contracting authority rejects all the remaining proposals.

(4) A contracting authority shall not resume negotiations with a bidder with whom negotiations have been terminated in accordance with this section.

**35.** A contracting authority may negotiate an agreement, subject to the approval of the Council, without using the procedure set out in this Part in the following cases:

Circumstances authorising award without competitive procedures

- (a) where the project is of short duration and the anticipated initial investment value does not exceed an amount prescribed;
- (b) where the project involves national defence or national security;
- (c) where there is only one source capable of providing the required service, such as, when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;
- (d) where an invitation to the pre-selection proceedings or a request for a proposal has been issued but no proposals were submitted or all proposals failed to meet the evaluation criteria set out in the request for proposals

and if, in the opinion of the contracting authority, issuing a new invitation to the pre-selection proceedings and a new request for technical proposals is not likely to result in an infrastructure project or facility award within the required time frame; or

(e) in any other case where the Council authorises such an exception for compelling reasons of national or public interest.

Amendment of section 43

**10.** Section 43 of the principal Act is amended in paragraph (q) by the insertion of the words “including proceeds arising from the projects” immediately after the word “terms”.

Insertion of new section 65A  
Remission of funds

**11.** The principal Act is amended by the insertion of the following section immediately after section 65:

**65A.** A contracting authority shall remit such percentage of the fees, as determined by the Council, collected under sections 27 (1) and 42 (9) to the Department to defray the costs of undertaking due diligence, reviewing, evaluating reports, processing recommendation or handling projects on behalf of the contracting authority.

Amendment of section 67

**12.** Section 67 is amended by the deletion of subsection (2).

Amendment of Second Schedule

**13.** Paragraph 2 of the Second Schedule is amended by the deletion of subparagraph (5) and the substitution therefor of the following:

“(5) Five members shall constitute a quorum at a meeting of the Council”.

General amendment

**14.** The principal Act is amended by the deletion of the—

- (a) word “Unit” wherever the word appears and the substitution therefor of the word “Department”;
- (b) words “Public Service Commission” wherever the words appear and the substitution therefor of the words “Civil Service Commission”; and
- (c) word “Notwithstanding” and the substitution therefor of the word “Despite”.

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