

GAZETTE EXTRAORDINARY

**The Malawi Gazette Supplement dated 22nd August, 2017 containing
Acts (No. 7C)**

MALAWI GOVERNMENT

(Published 22nd August, 2017)

Act

No. 27 of 2017

I assent

PROF. ARTHUR PETER MUTHARIKA

PRESIDENT

18th August, 2017

ARRANGEMENT OF SECTIONS

SECTION

PART I—PRELIMINARY

1. Short title and commencement
2. Interpretation
3. Application of this Act

**PART II—THE PUBLIC PROCUREMENT AND DISPOSAL OF
ASSETS AUTHORITY**

4. Establishment of the Public Procurement and Disposal of
Assets Authority
5. Functions of the Authority
6. Powers of the Authority
7. Membership of the Authority
8. Meetings of the Authority
9. Committees of the Authority
10. Director General
11. Tenure of office of the Director General
12. Removal of the Director General
13. Deputy Director General
14. Acting Director General
15. Other staff of the Authority
16. Funds of the Authority
17. Borrowing by the Authority
18. Advances to the Authority
19. Books of accounts
20. Financial year of the Authority

SECTION

21. Audit of accounts
22. Disclosure of interest
23. Post engagement restrictions
24. Immunity of members and employees of the Authority

PART III—RESPONSIBILITY OF CONTROLLING OFFICERS, INTERNAL
PROCUREMENT AND DISPOSAL COMMITTEES, PROCUREMENT AND
DISPOSAL UNIT AND *AD-HOC* EVALUATION TEAMS

25. Responsibility of a Controlling Officer
26. Constitution of Internal Procurement and Disposal
Committees
27. Composition of the Internal Procurement and Disposal
Committees
28. *Ad-hoc* evaluation teams
29. Procurement and Disposal Unit

PART IV—PRINCIPLES OF PUBLIC PROCUREMENT AND DISPOSAL OF
ASSETS

30. Principles of public procurement
31. Principles of disposal of assets
32. Records of procurement and disposal proceedings
33. Mode of communication
34. Confidentiality
35. Limitation on contracts with employees
36. Participation by micro, small and medium enterprises

PART V—PROCUREMENT AND DISPOSAL METHODS

37. Methods of procurement
38. Disposal of assets

PART VI—PROCUREMENT AND DISPOSAL PLANNING AND PROCEEDINGS

39. Planning of procurement and disposal activities
40. Publication of invitation to bid
41. Issuance of bidding document
42. Submission of bids
43. Bid opening
44. Bid evaluation
45. Use of standard bidding documents
46. Cancellation of procurement proceedings

SECTION

47. Negotiations
48. Intention to award a contract
49. Procurement contract
50. Amendment of a signed procurement contract
51. Contract management

PART VII—SUPPLIERS AND BIDDERS

52. Eligibility of criteria of suppliers
53. Qualification of bidders
54. Supplier database or lists
55. Conduct of bidders and suppliers
56. Debarment of suppliers and contractors

PART VIII—PROCUREMENT INTEGRITY

57. Conduct of public officials
58. Code of Conduct for public officials and suppliers

PART IX—ADMINISTRATIVE REVIEW AND APPEAL

59. Right to review
60. Review procedure

PART X—MISCELLANEOUS

61. Framework agreements
62. Oath by members and employees of the Authority
63. Offences
64. Regulations
65. Repeal and savings
66. Transitional provisions

An Act to provide for the establishment of the Public Procurement and Disposal of Assets Authority; to provide for its functions and powers; to maximise economy and efficiency in public procurement and disposal of public assets; to provide for, and regulate, a decentralised institutional structure for the public procurement and disposal of public assets; and to provide for matters connected with or incidental thereto

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

- Short title and commencement 1. This Act may be cited as the Public Procurement and Disposal of Public Assets Act, 2016, and shall come into operation on such date as the Minister may appoint by notice published in the *Gazette*.
- Interpretation 2. In this Act, unless the context otherwise requires—
- “Authority” means the Public Procurement and Disposal of Assets Authority established under section 4;
- “award” means the granting of a contract by a procuring and disposing entity to a supplier for purposes of entering into a procurement contract;
- “bid” means an offer to provide goods, works and services submitted by a bidder in response to an invitation from a procuring and disposing entity and includes a tender, proposal, quotation and, where applicable, an application to pre qualify;
- “bidder” means any participant who has expressed interest in procurement proceedings by submitting a bid;
- “bidding document” means a tender solicitation document or any other document for solicitation of offers, proposals or quotations;
- “bid notice” means any advertisement by which eligible bidders are invited to submit written offers to provide or acquire works, services and goods or any combination of them in case of procurement and disposal respectively;
- “bid security” means a security bond required to ensure that a bid will remain valid during the period stated in the bidding document;
- “bid securing declaration” means a declaration specified under the regulations;
- “chairperson” means the chairperson of the Authority;
- “close relative” means a spouse, child, sibling or parent or guardian;
- “Controlling Officer” means the head or principal person who is in charge of procuring and disposing entity;

“coercive practices” mean practices intended at harming or threatening to harm, directly or indirectly, a person, or a person's asset, to influence that person's participation in a procurement or disposal proceeding or to effect the execution of a procurement contract;

“collusive practices” mean a scheme or arrangement between two or more bidders, with or without the knowledge of the procuring and disposing entity, designed to establish bid prices at artificial or non-competitive levels;

“consultant”; means a person who is under a procurement contract to provide consultancy services to a procuring and disposing entity;

“consultancy services” means services of an intellectual or advisory nature;

“contract” means a legally binding agreement between two or more parties formed by the mutual consent of the parties;

“contractor” means a natural or legal person who is registered with a relevant authority to perform construction works;

“corrupt practice” has the meaning ascribed to the term by the *Cap 7:04* Corrupt Practices Act;

“Director General” means the Director General appointed under section 10;

“disposal” means the divestiture of public assets, including intellectual and proprietary rights and goodwill, and any other rights of a procuring and disposing entity by any means of sale, auction or any combination of these;

“disposal process” means the successive stages in the disposal cycle;

“domestic bidder” means any bidder whose principal place of business is within Malawi;

“domestic supplier” means any supplier whose principal place of business is within Malawi;

“donor organization” means an organization which provides, or joins in providing, grants, credits or loans to the Government or its agencies;

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

“emergency” means a situation which poses an imminent threat to the physical safety of a population or damage to property;

“e-procurement” means the process of procurement using the internet or other information and communication technologies;

“foreign bidder” means a bidder other than a domestic or regional bidder;

“foreign supplier” means a supplier other than a domestic or regional supplier;

“framework agreement” means an agreement between a procuring and a disposing entity and a supplier and a contractor through which a supplier or contractor undertakes to supply goods, works or services on indefinite quantity basis at an agreed unit price for an agreed period of time;

“fraudulent practice” means a misrepresentation of facts in order to influence a procurement or disposal process or the execution of a contract;

“goods” means objects of every kind and description, including raw materials, products and equipment, and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed the value of the goods themselves;

“information” includes written, visual, oral and electronic information;

“Internal Procurement and Disposal Committee” means a committee constituted under section 26;

“joint venture” means an association of two or more bidders for the purposes of participating in and carrying out a procurement contract;

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

“local enterprise” means supplier, contractor or consulting firm registered and operating in Malawi and whose shareholding is held in majority by Malawian nationals;

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

“misprocurement” means a procurement that has not followed the laid down procedures and guidelines;

“national supplier” means a supplier registered and operating in Malawi;

“non-consulting services” means any object of procurement other than goods, works and consulting services;

“no objection” means permission to proceed with the intention for contract award;

“officer” means a person who is assigned to, or employed by, the Authority; *

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

“pre-qualification documents” means documents issued by the procuring and disposing entity that set out the terms and conditions of the pre-qualification proceedings;

“procurement contract” means an agreement between a procuring and disposing entity and a bidder, supplier, or consultant resulting from the procurement proceedings and includes a framework agreement or an agreement to dispose public assets, if applicable in the context;

“procurement professional” means a member of the cadre of procurement professionals;

“Procurement and Disposal Unit” means a division or section in each procuring and disposing entity responsible for the execution of the procurement and disposal function;

“procuring and disposing entity” means a Government ministry, department, agency, any other public body or any sub division thereof engaging in procurement or disposal of public assets;

“public interest” means something that is to the advantage, direct or indirect, of the people of Malawi;

“public procurement” means acquisition by a procuring and disposing entity, of goods, works, services or any combination thereof, funded in whole or in part by public funds;

“public asset” means any property, tangible or intangible, owned by the Government or by a procuring and disposing entity, including physical property, shares, proprietary rights and land;

“public body” means any organ or agency of the Government and includes—

- (a) a statutory body;
- (b) local authorities; and
- (c) such other bodies as may be prescribed;

“public official” means—

- (a) an officer; or
- (b) a public officer or other person employed by a public body;

“public funds” means any monetary resources appropriated to procuring and disposing entities through budgetary processes, grants and credits, put at the disposal of procuring and disposing entities by donor organizations or revenues of procuring and disposal entities;

“record” means any recorded information, in any format, including an electronic format;

“regional bidder” means a bidder from countries in the region or regional block as prescribed in the regulations;

“regional preference” means the margin of preference applicable to bidders and suppliers from the countries in the region or regional block, as stipulated in the bidding document;

“responsive” means satisfying the minimum requirements of a bidding process as stipulated in the bidding document;

“reverse auction” means an online real-time sourcing technique utilized by a procuring and disposing entity to select the successful bid, which involves presentation by suppliers or contractors of successively lowered bids during a scheduled period of time and automated evaluation of the bids;

“Review Committee” means the independent Review Committee constituted under Part IX;

“socio-economic policies” means environmental, social, economic and other policies of the Government which a procuring and disposing entity is required to take into account in the procurement and disposal proceedings;

“small and medium enterprises” means an enterprise including its affiliates that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts and qualified as such under the criteria and size standards in the relevant instruments of the Ministry responsible for industry and trade or the National Construction Industry Council of Malawi;

“statutory body” has the meaning assigned to it in the Public Audit Act;

“supplier” means a natural, or legal person, who has entered into a procurement contract with a procuring and disposing entity;

“undue influence” means pressure or influence exerted on a public officer to make a decision in favour of the person exerting such pressure or influence or anyone connected to him;

“user department” means any department, division, branch or section of the procuring and disposing entity, including any project unit working under the authority of the procuring and disposing entity, which initiates procurement and disposal requirements and is the user of the requirements;

“vice-chairperson” means the person appointed as vice chairperson of the Authority; and

“works” means works associated with the construction, re-construction, demolition, repair or renovation of a building, road, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations, and related services provided pursuant to a procurement contract, if the value of those services does not exceed that of the works themselves.

3.—(1) This Act applies to all procurement involving public funds and disposal of public assets.

Application
of this Act

(2) Notwithstanding the provision of subsection (1) the Act shall not apply to—

(a) employment contracts;

(b) lease or rental of real property, subject to approval of the Director General;

(c) contracting for procurement of financial services relating to the issue, urgency or assignment of securities or other financial instruments; and

(d) procurement and disposal of assets under the Public-Private Partnership Act.

Cap. 46:07

PART II—THE PUBLIC PROCUREMENT AND DISPOSAL OF ASSETS AUTHORITY

4. There is hereby established the Public Procurement and Disposal of Assets Authority (in this Act otherwise referred to as the “Authority”), which shall be—

Establishment
of the Public
Procurement
and Disposal
of Assets
Authority

- (a) a public body responsible for the administration of this Act;
- (b) a body corporate with perpetual succession and a common seal; and
- (c) capable of doing or performing all such acts and things as bodies corporate may, by law, do or perform.

Functions of
the Authority

5.—(1) The Authority shall be responsible for the regulation, monitoring and oversight of public procurement and disposal of assets in Malawi.

(2) Without prejudice to the generality of subsection (1), the functions of the Authority shall be—

- (a) to develop and enhance the efficiency and effectiveness of public procurement and disposal of assets operations;
- (b) to develop standardized and unified procurement and disposal of assets regulations, instructions, and bidding documents which shall be binding on all procuring and disposing entities, in consultation with concerned professional and official entities, for issuance by the relevant authorities for use throughout Malawi;
- (c) to establish and maintain institutional linkages with Malawi Institute of Procurement and Supply and other professional bodies having interest in regulating the ethical behaviour and standards of supply chain management professionals;
- (d) to collect and establish a data and information base on public procurement and disposal of assets and monitor the performance of procuring and disposing entities and suppliers, contractors, consultants and other service providers so as to ascertain efficiency and compliance with applicable legislation;
- (e) to maintain and circulate lists of debarred bidders, suppliers, contractors, consultants and other service providers;
- (f) to provide an annual report of procurement and disposal activities carried out by procuring and disposal entities within three months of the close of the financial year through the Authority to the Minister, who shall lay it before the National Assembly, not less than six months from the date of report.
- (g) to refer some violations of this Act and the regulations relating to public procurement and disposal of public assets to the relevant budgetary and law enforcement authorities for appropriate action;
- (h) to facilitate administrative review of bid protests in accordance with Part IX; and

(i) to carry out economic studies on public procurement and disposal of assets, comparisons, and future projections, so as to provide advice to the Government in respect of the mid-term and long-term policy it may formulate in public procurement and disposal of assets' matters;

(3) In the exercise of its functions under this Act, the Authority shall act in a manner that is impartial and independent.

6.—(1) The Authority shall, through subsidiary legislation—

Powers of the
Authority

(a) set and enforce monetary thresholds for regulating procurement and disposal functions;

(b) subject to paragraph (a), issue a “No Objection” for procurements above the set prior review thresholds;

(c) subject to paragraph (a), the Authority shall set a limit below which a “No Objection” shall be considered or issued by the Director General; any “No Objection” above the limit shall be subject to the approval of the Authority;

(d) in some cases issue a *subpoena* within a reasonable time requiring the production of books or accounts, records, documents, or other relevant financial papers or objects necessary for the performance of its duties;

(e) access, at any reasonable time, the premises of any procuring and disposing entity whose procurement is being monitored and request for any relevant information from any person, including a Controlling Officer and the head of Procurement and Disposal Unit;

(f) summon and examine witnesses regarding any procurement proceeding or disposal process;

(g) suspend or debar any bidder, supplier, contractor, consultant and any other service provider that breaches any provision of this Act from participating in procurement proceedings or disposal process;

(h) institute procurement or disposal reviews at any time before, during or after contract award;

(i) declare mis-procurement where applicable and impose appropriate disciplinary and punitive measures;

(j) investigate and sanction any procuring and disposing entity or individual involved or suspected to have been involved in mis-procurement and any other misconduct;

(k) set special conditions for targeted procurement in enhancement of the capacity and performance of micro, small and medium enterprises in consultation with other regulatory bodies; and

(1) do all such acts and things as it may consider incidental or conducive to the exercise of its functions under this Act.

(2) In exercising its powers and functions, the Authority may cooperate with other bodies exercising oversight functions over procuring and disposing entities and may, for that purpose, establish mechanisms for sharing information and working jointly with those bodies.

(3) The Authority shall provide strategic direction in order to ensure the attainment of their functions under this Act.

Membership
of the
Authority

7.—(1) The Authority shall consist of—

(a) the following five members appointed by the Minister from the following organizations—

- (i) one member nominated by the Malawi Law Society;
- (ii) one member nominated by the Malawi Institute of Procurement and Supply;
- (iii) one member nominated by the Malawi Institute of Engineers;
- (iv) one member nominated by Malawi Confederation of Chambers of Commerce and Industry; and
- (v) one member nominated by the Institute of Chartered Accountants in Malawi; and

(b) the following *ex officio* members—

- (i) the Chief Secretary or his representative;
- (ii) the Secretary to the Treasury or his representative; and
- (ii) the Solicitor General or his representative.

(2) The members of the Authority other than *ex-officio* members, shall have a minimum of bachelor's degree in their respective fields, obtained from a reputable institution and their appointment shall be subject to the approval of the Public Appointments Committee.

(3) The Minister shall appoint the chairperson and vice chairperson from amongst the members appointed under subsection (1).

(4) With the exception of the *ex-officio* members of the Authority, the rest of the members shall hold office for a period of three years, on such terms and conditions as the Minister may determine, and shall be eligible for reappointment for one further term only:

Provided that when electing members into office after the expiry of the three year term the Minister shall have regard to the need to maintain a reasonable degree of continuity on the membership of the Authority so that at least one half of the members or whose terms has expired shall be reappointed for the next term of office.

(5) Every member of the Authority shall be paid by the Authority such allowances as the Authority may, with the approval of the Minister, determine.

(6) The Minister may, on the advice of the Authority, terminate the appointment of a member who—

(a) has been declared bankrupt;

(b) has, within the last five years, been convicted by a competent court of a crime which is punishable with imprisonment without an option of a fine;

(c) is otherwise incapacitated;

(d) is in default or breach of trust in the discharge of the members' duties under this Act; or

(e) if appointed under subsection (1) (a), has ceased to be a member of the professional body which nominated him.

(7) A member may resign from the Authority upon giving a written notice of one month to the Minister.

(8) On occurrence of a vacancy in the membership of the Authority due to death or vacation of office by a member, the professional body that nominated the outgoing member shall within six months of such death or vacation of office, nominate other persons from which the Minister shall appoint a new member for the remainder of the term for the outgoing member.

8.—(1) The Authority shall meet to conduct its business at least once every three months at such place and time, as the chairperson may determine.

Meetings of
Authority

(2) An ordinary meeting of the Authority shall be convened with at least fourteen days written notice to the members.

(3) The chairperson, in consultation with the Director General, or at the written request of two or more members of the Authority may cause an extraordinary meeting of the Authority to be summoned at such place and time as the chairperson may appoint within seven days.

(4) The quorum at any meeting of the Authority shall be at least five members.

(5) The chairperson, or in his absence the vice chairperson, shall preside at the meetings of the Authority and in absence of both the chairperson and vice chairperson, the members present and forming a quorum shall elect one of their number to preside over such meeting, and the member so elected shall exercise all the powers and perform all the duties of the chairperson.

(6) The Authority may make standing orders for the regulation of its proceedings and business of any of its committees, and may vary, suspend or revoke any such standing orders.

(7) Minutes of each meeting of the Authority and a committee of the Authority shall be kept by the secretary to the Authority and shall be confirmed at the succeeding meeting.

(8) The decision of the Authority at any meeting on any matter shall be that of the majority of the members present and voting, and at all meetings, the person presiding shall have, in the event of an equality of votes, a casting vote in addition to his or her deliberate vote.

(9) The Authority may, at its discretion, at any time co-opt any person to attend any meeting of the Authority for the purpose of assisting or advising the Authority in respect of any matter under consideration by the Authority but such a member shall not be entitled to vote.

(10) Subject to the provisions of this section, the Authority shall regulate its meetings and proceedings in such a manner as it deems fit.

Committees
of the
Authority

9.—(1) For the proper exercise of its functions, the Authority may establish such number of committees whose chairpersons shall be members of the Authority in which it may vest such functions as it deems fit.

(2) Notwithstanding the provisions of subsection (1) above, the Authority may itself exercise that function, and may amend or rescind any decision of the committee.

(3) The Authority may, as it deems fit, co-opt persons who are not its members to be part of the committee.

(4) The Chairperson of a committee may at any reasonable time and place convene a meeting of that committee.

(5) The procedures to be followed at a meeting of a committee shall be prefixed by the Authority.

Director
General

10.—(1) The Authority shall, in consultation with the Minister, appoint the Director General through a competitive selection process on such terms and conditions as the Authority may determine.

(2) The Director General shall be a person with—

(a) sufficient qualifications and experience in any of the following areas—

- (i) finance;
- (ii) economics;

- (iii) engineering;
- (iv) accountancy;
- (v) commerce;
- (vi) law; or
- (vii) procurement; or
- (viii) administration; and

(b) demonstrable knowledge and experience in procurement.

(3) The Director General shall be the Chief Executive Officer of the Authority and shall, subject to the general supervision and control of the Authority, be in overall in charge of—

(a) day to day operations of the Authority;

(b) management of the funds, property and business of the Authority;

(c) effective administration and implementation of the provisions of this Act; and

(d) provision of secretarial functions to the Authority.

(4) The Director General shall hold office for a term of four years, and shall be eligible for re-appointment for a further term.

(5) The Director General or, in his absence, such other employee of the Authority as he may designate, shall attend meetings of the Authority and acting as the secretary for such meetings, and may address the meetings, but shall not vote on any matter transacted at the meeting.

11. The Director General shall be appointed to a term of office of four years, and may be re-appointed for a further term.

Tenure of
office of the
Director
General

12.—(1) The Authority may terminate the Director General's appointment on the following grounds—

Removal of
the Director
General

(a) incompetence;

(b) inability to perform the functions of his office by reason of a mental or physical infirmity;

(c) conviction of an offence which is punishable with imprisonment without an option of a fine;

(d) involvement in a corrupt transaction; and

(e) misconduct that brings the Authority into disrepute; .

(f) non-disclosure of interest;

(g) undischarged bankruptcy.

(2) The Authority, if it considers desirable in the public interest so to do, may suspend the Director General from exercising the duties of his office for up to sixty days pending investigations to determine whether or not he may be removed from the office under subsection (1).

(3) The Director General shall not be removed from office unless he has been given an opportunity to be heard.

Deputy
Director
General

13.—(1) The Authority shall appoint the Deputy Director General of the Authority through competitive selection process on such terms and conditions as the Authority shall determine.

(2) The Deputy Director General shall perform such functions and duties as may be assigned to him by the Director General.

(3) Sections 11 and 12 shall apply *mutatis mutandis* in respect of tenure of office and removal of the Deputy Director General.

Acting
Director
General

14.—(1) If the office of the Director General is vacant or the Director General is absent from duty or unable for any other reason to perform the functions of his office, the Deputy Director General shall act as Director General.

(2) If both the Director General and the Deputy Director General are absent from duty or unable for any other reason to perform the functions of their offices, the Authority shall appoint another duly qualified person within the Authority to act as Director General during such temporary absence or vacancy:

Provided that where the period of such temporary absence has exceeded twenty-one days, the Authority shall, within fourteen days thereafter, furnish to the Minister the reasons why the vacancy in both or either of the two offices cannot be substantively filled with immediate effect and an estimate of the time within which the vacancy shall be filled, being not longer than six months from the expiry of twenty-one days herein referred to.

Other staff of
Authority

15.—(1) The Director General shall appoint other members of staff as may be required for the performance of the functions of the Authority on such the terms and conditions determined by the Authority

Funds of the
Authority

16. The operational and financial costs of the Authority shall be provided through—

(a) advances made to the Authority under section 18;·

(b) fees, levies and other moneys payable to the Authority under this Act or regulations;

(c) fines payable to the Authority in respect of breaches of the Act or other conditions imposed by the Authority;

(d) grants or donations received by the Authority;

(e) such sums as shall be appropriated to the Authority by Parliament; and

(f) proceeds from the sale by the Authority of any of its assets or equipment to which it has title.

17. Subject to the Public Finance Management Act, the Authority may borrow such amounts of money as it may require for the performance of its functions under this Act.

Borrowing by
the Authority
Cap. 37:02

18. Where in any financial year the income of the Authority, together with any surplus income brought forward from a previous year, is insufficient to meet the actual or estimated liabilities of the Authority, the Minister may make advances to the Authority out of moneys appropriated for that purpose by Parliament.

Advances to
the Authority
Cap. 37:01
Cap. 37:02

19.—(1) The Authority shall cause to be kept proper books and other records of account in respect of receipts and expenditures of the Authority in accordance with the Public Audit Act and the Public Finance Management Act.

Books of
accounts
Cap. 37:01
Cap. 37:02

(2) The Authority may charge fees in respect of publications, seminars, documents, advisory and other services provided by the Authority.

(3) The moneys of the Authority which are not immediately required for the performance of its functions may be invested on short-term deposit with any bank or financial institution in Malawi.

(4) All moneys of the Authority which, in the opinion of the Minister, are in excess of its budgetary requirements shall be paid into the Consolidated Fund, but the Authority shall be entitled to retain such sums as it reasonably requires for its operations.

20.—(1) The financial year of the Authority shall be the same as the financial year of the Government:

Financial year
of the
Authority

(2) The Minister shall cause to be prepared, as soon as practicable, but not later than six months after the end of the financial year, an annual report on all the financial transactions of the Authority.

(3) The report under subsection (2) shall include—

(a) an audited statement of financial position;

(b) an audited statement of income and expenditure;

(c) an annual report of the Auditor General; and

(d) any justification for retention of any monies by the Authority, where applicable;

(4) The Minister shall lay before the National Assembly, the report referred to in subsection (2).

Audit of
accounts
Cap.37:01

21. The Authority shall be audited in accordance with the Public Audit Act.

Disclosure of
interest

22.—(1) Where any member of the Authority, a committee of the Authority, any employee of the Authority, any public official or member of an Internal Procurement and Disposal Committee has any direct or indirect pecuniary interest in relation to any matter before the Authority, any of its committees, or the procuring and disposing entity, he shall—

(a) disclose at or before the meeting convened to discuss that matter, the nature of his interest; and

(b) not take part in any deliberation or any decision-making process in relation to that matter.

(2) A disclosure of interest made under this section shall be recorded in the minutes of the meeting of the Authority, or a committee as the case may be.

(3) A person who fails to disclose an interest as required under this section commits an offence and shall, upon conviction, be liable to a fine of K 1,000, 000 and to imprisonment for five years.

Post
engagement
restrictions

23.—(1) Every member of the Authority or committee of the Authority, shall maintain, during or twenty four months after a person's relationship with the Authority, or the committee the confidentiality of any matter relating to this Act which comes to that person's knowledge in the course of duty.

(2) Any person who, without lawful excuse, contravenes subsection (1) commits an offence and shall, upon conviction, be liable to a fine of K500,000 or to imprisonment for two years.

Immunity of
members and
employees of
the Authority

24. A member or every member of the Authority or employee shall not, in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omission done in good faith in the performance of his duties or functions under this Act.

PART IV—RESPONSIBILITY OF CONTROLLING OFFICERS, INTERNAL PROCUREMENT AND DISPOSAL COMMITTEES, PROCUREMENT AND DISPOSAL UNITS AND *AD-HOC* EVALUATION TEAMS

25.—(1) A Controlling Officer shall ensure that the procuring and disposing entity complies with this Act.

Responsibility
of a
Controlling
Officer

(2) Without prejudice to the generality of subsection (1), a Controlling Officer shall be responsible for—

(a) appointing members of the Internal Procurement and Disposal Committee;

(b) submitting annual procurement and disposal plans, quarterly reports and other statutory reports as may be prescribed from time to time;

(c) to providing corrective measures to prevent misconducts throughout the procurement and disposal processes;

(d) to managing bidders' protests and grievances;

(e) to reporting misconducts by bidders, suppliers or public officials, to the Authority and other relevant bodies;

(f) to implementing disciplinary measures against public officials and suppliers;

(g) to ensuring that procurement and disposal documentation is made available to the Authority and other oversight institutions whenever required; and

(h) to providing leadership and oversight role of the procuring and disposing entity.

(3) Where a Controlling Officer fails to comply with his responsibilities as provided in this section, the Authority shall recommend imposition of any of the following sanctions—

(a) withholding of the procuring and disposing entity's annual budget for procurement from Treasury;

(b) reprimand by the appointing authority; and

(c) bearing of any loss suffered by the procuring and disposing entity or part thereof by the Controlling Officer.

26.—(1) There shall be established in all procuring and disposing entities Internal Procurement and Disposal Committees.

Establishment
of Internal
Procurement
and Disposal
Committees

(2) The functions of the Internal Procurement and Disposal Committees shall include—

(a) ascertaining the availability of funds to pay for each procurement;

(b) approving the methods of procurement and disposal to be used in each case;

(c) approving the procurement and disposal plans for the procuring and disposing entity;

(d) appointing the chairperson of the bid opening from amongst its membership;

(e) appointing *ad-hoc* evaluation team for the examination, evaluation and comparison of bids;

(f) reviewing and approving bid evaluation reports;

(g) reviewing and approving any contract amendments; and

(h) such other functions as may be prescribed for the committees by the Regulations.

Composition
of Internal
Procurement
and Disposal
Committees

27.—(1) An Internal Procurement and Disposal Committee shall comprise senior personnel appointed by the Controlling Officer who shall be well informed of public procurement and disposal of public assets matters, and shall meet the minimum qualifications set by regulations.

(2) Notwithstanding the generality of subsection (1), membership of the Internal Procurement and Disposal Committee shall at a minimum comprise the following—

(a) a senior officer designated by the Controlling Officer as the chairperson of the Internal Procurement and Disposal Committee;

(b) head of the procurement and disposal unit or his representative;

(c) an accountant or other budget professional; and

(d) other senior officers.

(3) Except in very exceptional circumstances and with the prior approval of the Director General, the Internal Procurement and Disposal Committee shall comprise a maximum of seven members.

(4) The quorum shall be made up of the chairperson of the Internal Procurement and Disposal Committee, head of the procurement and disposal unit and the accountant or budget professional.

(5) The term of members of the Internal Procurement and Disposal Committee shall be two years and members may be re-appointed to the Committee.

(6) The procuring and disposing entities that do not have a Procurement and Disposal Unit shall seek guidance from the Authority on how to execute its procurement and disposal activities.

28.—(1) The Internal Procurement and Disposal Committee shall appoint an *ad-hoc* evaluation team whenever there is a procurement or disposal proceeding, Ad-hoc
evaluation
teams

(2) An *ad hoc* evaluation team shall have maximum of five members, comprising—

(a) the head or representative of the procurement and disposal unit who shall be the secretary;

(b) member from the user or disposing department; and

(c) three non-Internal Procurement and Disposal Committee members who have technical knowledge of the procurement or disposal bids to be evaluated.

(3) Use of external evaluation teams or consultants shall only be resorted to in very exceptional circumstances and only upon prior approval of the Director General.

29.—(1) Procuring and disposing entities shall establish Procurement and Disposal Units which shall be staffed by qualified procurement and disposal professionals, and assign to such units authority to conduct procurement and disposal activities in accordance with this Act. Procurement
and Disposal
Unit

(2) Notwithstanding the generality of subsection (1), the functions of the Procurement and Disposal Units shall include—

(a) preparing procurement and disposal plans and reports for the procuring and disposing entities;

(b) preparing bidding documents;

(c) facilitating Internal Procurement and Disposal Committee meetings;

(d) keeping records of all procurement and disposal activities carried out by the procuring and disposing entity;

(e) acting as the secretariat to the meetings of the Internal Procurement and Disposal Committee and the *ad-hoc* Evaluation Team;

(f) evaluating simple low value procurements as prescribed in the Act; and

(g) preparing contract documentation and managing the resultant contract in conjunction with user departments.

PART IV—PRINCIPLES PROCUREMENT AND DISPOSAL OF ASSETS

30. All public procurement proceedings shall be conducted in a manner which promotes transparency, accountability, non-discrimination, fairness, open competition, anonymity, economy, Principles of
public
procurement

efficiency and responsiveness to modern information and communications technology.

Principles of disposal of assets

31.—(1) All disposal proceedings shall be conducted in a manner which promotes transparency, accountability and fairness.

(2) All disposal proceedings shall be conducted in a manner to maximize competition and achieve value for money.

(3) A bidder shall not be excluded from participating in disposal on the basis of nationality, race, religion, gender or any other criterion not related to qualification, except to the extent provided for in this Act.

(4) A procuring and disposing entity shall, in all disposal proceedings, choose appropriate procedures and cause the disposal of assets to be carried out diligently and efficiently, so that the prices received by the procuring entity represent the best value or net outcome that can reasonably be obtained for the assets disposed of.

(5) Procuring and disposing entities shall plan disposal activities with a view to achieving maximum value from any such disposals and other objectives set forth in this Act.

(6) A procuring and disposing entity shall, take due care of all assets earmarked for disposal its public assets until such time the actual disposal is concluded as prescribed in this Act.

Records of procurement and disposal proceedings

32.—(1) A procuring and disposing entity shall maintain records of all procurement and disposal proceedings for a period of five years from the date of—

- (a) contract completion or termination;
 - (b) the decision to cancel the procurement proceedings or disposal process;
 - (c) the settlement of any dispute under a procurement contract;
- or
- (d) the resolution of any complaint, challenge or appeal made under this Act.

(2) In an event that the period referred to in subsection (1) has expired but the documentation has not been subjected to an audit, the records of procurement and disposal proceedings shall still be maintained by the procuring and disposing entity.

Mode of communication

33. All communication, including electronic communication, between a procuring and disposing entity and a bidder, supplier or contractor shall be in English and in writing.

34.—(1) All public officials shall keep confidential, the information that comes into their possession relating to the procurement and disposal proceedings and to bids, including any bidder's proprietary information: Confidentiality

Provided that the procuring entity shall upon request for an unsuccessful bidder communicate to the bidder the grounds for the rejection of its application to pre-qualify all of its bid.

(2) Any person who contravenes subsection (1) commits an offence, and shall, upon conviction, be liable—

(a) to a fine of K500,000 and to imprisonment for two years; and

(b) disciplinary action.

35. A procuring and disposing entity shall not enter into a procurement or disposal contract with its employee, or any close relative of any employee. Limitation on contracts with employees

36.—(1) A procuring and disposing entity may, in the prescribed manner— Participation by micro, small and medium enterprises

(a) grant a margin of preference for the benefit of a bid by a micro small and medium enterprise offering goods, works, consultancy services or other services manufactured, grown or performed by a local enterprise; and

(b) reserve or set aside certain procurement requirements for micro, small and medium enterprises by restricting bidding to those enterprises as prescribed in the Act.

(2) Notwithstanding the provisions of subsection (1), the Director General, in consultation with the Ministers responsible for trade, economic or social policy may, by order published in the *Gazette*, prescribe any preference or reservation for micro, small and medium enterprises.

PART V—PROCUREMENT AND DISPOSAL METHODS

37.—(1) Public procurement shall be realized by means of open tender proceedings, subject to the exceptions provided in this section, and as may be prescribed in the regulations. Methods of procurement

(2) Subject to the approval of the Director General, the application of subsection (1) may be waived in the case of national defence or national security related procurement to the extent that such procurement is determined to be of a sensitive nature, in accordance with regulations.

(3) Restricted tender may be used in the following cases—

(a) when the goods, works or services are only available from a limited number of suppliers, all of whom are known to the procuring and disposing entity; and

(b) the time and cost of considering a large number of bids is disproportionate to the value of the procurement.

(4) A tender may be held in two stages in the following cases—

(a) when it is not feasible at the outset of the procurement proceedings to define fully the technical or contractual aspects of the procurement; or

(b) when, because of the complex nature of the goods, works and services to be procured, the procuring and disposing entity wishes to consider various technical or contractual solutions, and to negotiate with bidders about the relative merits of those variants, before deciding on the final technical or contractual specifications.

(5) An international tender (otherwise referred to as an “international competitive bidding”) shall involve publication in the international media of the invitation to submit bids, or to apply for pre-qualification.

(6) International competitive bidding shall be held in the following cases—

(a) where the estimated value of the stated procurement exceeds the amount set by regulations;

(b) where the goods, works or services are not available under competitive price and other conditions from more than two suppliers in Malawi; or

(c) where a supplier was not identified by a national tender proceeding.

(7) Request for proposals is the method to be used for the procurement of consultancy services.

(8) The request for quotations method may be used for the procurement of goods, works and routine services when the estimated value of the procurement does not exceed the amount set by the regulations.

(9) Single-source method is permitted only in the following circumstances—

(a) where the estimated value of the procurement does not exceed the amount set in the regulations;

(b) where only one supplier has the technical capability or capacity to fulfill the procurement requirement, or only one supplier has the exclusive right to manufacture the goods, carry out the works, or perform the services to be procured;

(c) where there is an emergency need for the goods, works and services; or

(d) where the procuring and disposing entity, having procured goods, works and services from a supplier, determines that additional goods, works or services need to be procured from the same source for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology, or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring and disposing entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question.

(10) Use of the method of procurement other than open tender or, in the case of procurement of consultancy services, a method other than request for proposals, is subject to approval by the Director General; and the procuring and disposing entity shall note in the record of the procurement proceedings the grounds for the choice of the procurement method:

Provided that when seeking approval from the Director General to use the method other than open tender or the case of procurement of consultancy services, a method other than request of proposal, the procuring and disposing entity shall provide written reasons with sufficient clarity to the Director General for the choice of the procurement method.

(11) Single source method of procurement or any high value procurement shall be subject to vetting by the Anti-Corruption Bureau, pursuant to the powers conferred on the Bureau under section 10 of the Corrupt Practices Act.

Cap 7:04

(12) The Authority shall by regulations prescribe the threshold for the high value procurements referred to under subsection (11).

38.—(1) Public assets shall be disposed of by open means such as public auction or tendering with sealed bids.

Disposal of
assets

(2) Notwithstanding subsection (1), a procuring and disposing entity may, upon obtaining prior approval from the Director General, use alternative means including—

- (a) transfer the asset to another procuring and disposing entity;
- (b) destruction or writing off of the asset;

- (c) trade-in; or
- (d) conversion or classification of asset into another form.

PART VI—PROCUREMENT AND DISPOSAL PLANNING AND
PROCEEDINGS

Planning of
procurement
and disposal
activities

39.—(1) Procuring and disposing entities shall plan procurement and disposal activities with a view to achieving maximum value from both public expenditures and disposal proceedings including other objectives set forth in this Act.

(2) Procuring and disposing entities shall not artificially split procurement or disposal requirements with a view to circumventing the use of competitive methods of procurement or disposal as prescribed by the Authority.

(3) Any person who contravenes either subsection (1) or (2) shall be guilty of an offence and shall, upon conviction, be liable to a fine of K500,000 and imprisonment for two years.

(4) The annual procurement and disposal plans shall be 5 submitted to the Authority by the last date of the first month of the financial year failing which the Authority shall impose necessary sanctions to the procuring and disposing entity and the Controlling Officer.

(5) The Authority shall report the Controlling Officer to relevant authorities for disciplinary sanctions in case of non-compliance with the sanctions impose pursuant to subsection (4).

Publication of
invitation to
bid

40.—(1) An invitation to tender, or an invitation to prequalify, shall be published in two national widely circulated newspapers and, in the case of international tendering, shall also be published in internationally recognized papers in the English language, and in other media of wide international circulation, and the website of the Authority.

(2) Notwithstanding the generality of subsection (1), the procuring and disposing entity shall publish in the *Gazette* all procurements of values and nature as may be prescribed from time to time by the Authority.

(3) In addition to the publication referred to in subsection (1), the invitation to tender, or an invitation to prequalify, shall be displayed in the head office of the procuring and disposing entity in a publicly accessible place.

Issuance of
bidding
document

41.—(1) A procuring and disposing entity shall ensure that bidding documents—

(a) are provided to all bidders responding to the invitation to tender or, in the event of pre-qualification proceedings, to all bidders that have been pre-qualified;

(b) provide bidders with the information that they require in order to submit bids that are responsive to the needs of the procuring and disposing entity; and

(c) include the terms and conditions of the resultant contract.

(2) Where a fee is charged for the bidding documents, such a fee shall only reflect the cost of printing and distributing the documents.

(3) All bidders shall be provided with the same information.

(4) A procuring and disposing entity shall respond promptly to any request by a bidder for clarification of the bidding documents that is received by the procuring and disposing entity prior to the deadline for the submission of bids, and responses to such requests for clarification shall be circulated to all participating bidders.

42.—(1) A bid shall be submitted in written form as instructed in the bidding document.

Submission
of bids

(2) A bidding document may provide for submission of bids electronically:

Provided that measures are put in place to protect the confidentiality of bidders' bids, and to ensure their authenticity and integrity.

(3) A procuring and disposing entity shall, upon request, provide to a bidder a receipt showing the date and time when its tender was received.

(4) The deadline for submission of bids shall be set taking into account the nature of the procurement or disposal process and the time required for the preparation of bids.

(5) The minimum bidding periods for the various procurements shall be as follows—

(a) international competitive bidding-forty five days;

(b) national competitive bidding-thirty days;

(c) restricted tender-twenty one days;

(d) request for proposals-twenty one days;

(e) request for quotation method-five days;

(f) single sourcing-five days; and

(g) single sourcing in an emergency-twenty four hours:

Provided that the procuring and disposing entity may seek a waiver from the Director General to carry out specific procurement for a shorter period than provided in this section.

Bid opening

43.—(1) Bids shall be opened at the time and place indicated in the bidding document, and the time of opening of the bids shall coincide with the deadline for submission of bids.

(2) Bidders or their respective representatives may attend the opening of bids at which the names and addresses of the bidders submitting bids, and their prices, shall be read out and recorded.

Bid
evaluation

44.—(1) The choice of evaluation methodology shall be determined by the type, value and complexity of the procurement or disposal requirement and shall be done in accordance with this Act and as may be prescribed in regulations.

(2) Bids shall be evaluated and compared only in accordance with the criteria, and their relative weight, as set forth in the bidding document.

(3) Bids containing non-material deviations may be evaluated, with the deviations being quantified in the manner indicated in the bidding documents.

(4) Subject to section 47, no negotiations whatsoever may be held with bidders as to the substance or prices of their bids.

(5) A procuring and disposing entity may only seek clarifications of bids, and may not solicit or accept changes in the substance or prices of bids.

(6) In the evaluation of bids, a procuring and disposing entity may apply a margin of price preference in favour of domestic or regional bidders in accordance with the regulations, provided that such application has been disclosed in the bidding documents.

(7) A successful bid shall be the lowest evaluated bidder subject to any margin of preference provided in the bidding documents. Alternatively, if so stipulated in the bidding documents, the successful bid shall be the lowest evaluated on the basis of price and subject to any margin of preference, and non-price criteria specified in the bidding documents.

(8) Non-price criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms, wherever practicable.

(9) Prior to the entry into force of the procurement contract and, if so required, the successful bidder shall provide security for the performance of the contract.

(10) A procuring entity shall ensure prioritization of all bids submitted to give preference to 60 per cent indigenous black Malawians and 40 per cent others for national competitive bidding.

45.—(1) The Director General shall issue standard bid documents to procuring and disposing entities for use in procurement and disposal proceedings. Use of standard bidding documents

(2) The use of such standard bidding documents shall be mandatory on all procuring and disposing entities.

46. A procuring and disposing entity may—

(a) reject all bids at any time prior to the acceptance of a bid, without incurring thereby any liability to the bidders; Cancellation of procurement proceedings

(b) cancel the procurement proceedings in the public interest, without incurring thereby any liability to the bidders; and

(c) terminate a procurement contract for convenience, if it is determined to be in the public interest, and subject to payment for work satisfactorily completed, or services satisfactorily performed prior to the effective date of termination and for reimbursable expenses actually incurred, or for any goods specially manufactured under the procurement contract, and reasonable termination costs, but excluding lost profit.

47.—(1) A procuring and disposing entity may invite the lowest evaluated bidder for negotiations aimed at finalizing the award of the contract. Negotiations

(2) Negotiations shall not relate to the price of the bid, except in the case of single sourcing or where the price of the bid has not been taken into account in the evaluation methodology.

(3) If the negotiations with the lowest evaluated bidder fail to result in an acceptable contract, the procuring and disposing entity shall, by letter addressed to that bidder, terminate the negotiations and invite the next ranked bidder for negotiations.

48. The procuring and disposing entity shall publish the intention to award contract in two widely circulated newspapers and on the Authority's website for a period of fourteen days for any procurement contract above a threshold to be set by the Director General before signing the contract. Intention to award a contract

49.—(1) Subject to a no objection be issued in pursuance of this Act or subsidiary legislation thereunder, and to section 47 in notice of acceptance of the bid, shall be given to the successful bidder and the procuring and disposing entity shall prepare and sign the contract with the such bidder prior to its institution. Procurement contract

(2) All contracts shall be prepared in the manner prescribed in the appropriate standard bidding document issued by the Director General or any other document approved by the Director General

Amendment
of a signed
procurement
contract

50.—(1) All amendments to a signed procurement contract shall require the prior approval of the responsible authorities and shall be effected as prescribed in the regulations.

(2) For the purpose of this section, “responsible authority” means the Internal Procurement Disposal Committee or the Director General.

Contract
management

51.—(1) A procuring and disposing entity shall be responsible for the administration of procurement contracts into which they enter, and to that end, they shall establish procedures for contract administration and provide the necessary material and human resources for their implementation.

(2) A procuring and disposing entity may appoint a contract manager, depending on the nature and complexity of the contract, whose main responsibility shall be to ensure that the supplier, contractor or consultant performs the contract in accordance with the terms and conditions specified therein.

PART VII—SUPPLIERS AND BIDDERS

Eligibility
criteria of
suppliers

52. In order to be eligible to be awarded a procurement contract, a bidder shall—

(a) be registered, depending upon the nature of the contract, with the Registrar of Companies, or with the National Construction Industry Council of Malawi, or such other entity as may be prescribed by regulations;

(b) be tax compliant; and

(c) not be debarred from participating in procurement proceedings under this Act:

Provided that the sole absence of an application for entry in the registry or classification system is not ground for exclusion of a bidder from participation in procurement proceedings.

Qualification
of bidders

53.—(1) In order to enter into a procurement contract, a bidder shall qualify by meeting the criteria the procuring and disposing entity considers appropriate.

(2) The criteria referred to in subsection (1) may concern—

(a) the legal capacity;

(b) professional and technical qualifications;

- (c) financial resources and condition;
- (d) equipment and other physical facilities;
- (e) personnel and managerial capability; and

(f) past performance, including history of legal disputes, conviction of a bidder, or its directors or officers, of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to its qualifications to enter into a procurement contract within a period of three years preceding the commencement of the procurement proceedings.

54.—(1) The Director General shall organize and maintain a centralized system, in the form of a database or list, to provide centralized information on potential suppliers of goods, works or services. Supplier databases or lists

(2) A procuring and disposing entity may organize and maintain its own system or database of potential suppliers and shall submit such list to the Director General for approval prior to its use.

(3) Entry into database or list shall be open at any time to potential suppliers and requests to register shall be acted upon within fourteen days from receipt of request at a fee to be set by the Director General.

(4) The detailed procedures for compilation and maintenance of such databases and lists shall be prescribed in the regulations.

55.—(1) Bidders and suppliers shall not engage in or abet— Conduct of bidders and suppliers

(a) corrupt practices, such as the offering of improper inducements;

(b) fraudulent practices, including misrepresentation of facts in order to influence a procurement process or the execution of a contract; and

(c) collusion among bidders, prior to or after bid submission, designed to establish bid prices at artificial, non competitive levels and to deprive the procuring and disposing entity of the benefits of free and open competition.

(2) Any information concerning the occurrence or attempt of malpractices in subsection (1) shall be reported immediately to the head of the procuring and disposing entity, to the Authority and to the relevant law-enforcement authorities.

56.—(1) The Director General may exclude a a supplier, contractor, consultant or any bidder from participation in public procurement for any misconduct prescribed in this Act in accordance with procedures set out in the Regulations. Debarment of suppliers and contractors

(2) A supplier or a bidder may be excluded from participation in public procurement proceedings on the following grounds—

(a) refusal by a successful bidder to sign a procurement contract or furnish a performance security in accordance with the terms of the bidding documents;

(b) supplying false information supplied in its bid;

(c) collusion between the bidder and a public official pertaining to the bidding process;

(d) collusion amongst bidders aimed at fixing prices at artificial and non-competitive levels;

(e) conviction of a criminal offence relating to obtaining or attempting to obtain a contract or subcontract; or

(f) conviction of an offence under the Corrupt Practices Act or the Financial Crimes Act; or

(g) breach of contractual obligations.

(3) A bidder or supplier who has been found liable for the misconduct after the hearing shall be excluded from public procurement for a period commensurate with the gravity of the misconduct as prescribed in the regulations.

(4) A bidder or supplier aggrieved by a decision of the Authority may appeal to High Court for a judicial review.

PART VIII—PROCUREMENT INTEGRITY

57.—(1) Public officials involved in requisitioning, planning, preparing and conducting procurement proceedings, disposal processes, and implementation of procurement and disposal contracts, shall—

(a) discharge their duties impartially so as to ensure fair and competitive access to procurement opportunities by suppliers;

(b) always act in the public interest, and in accordance with the objectives and procedures set out in this Act;

(c) at all times, avoid conflicts of interest, and the appearance of impropriety in carrying out their duties and conducting themselves, and shall not interfere in the work of the Internal Procurement and Disposal Committee;

(d) not commit or abet any corrupt or fraudulent practice, including the solicitation or acceptance of improper inducements;

(e) not interfere with or exert undue influence on any person to effect a procurement or disposal activity or decision;

(f) keep confidential any information that comes into their possession relating to procurement proceedings or disposal processes, including bidders' proprietary information; and

Cap. 7:04
No. 14 of
2017

Conduct of
public
officials

(g) not, for a period of two years after leaving the public service, get involved in the implementation of a procurement contract on behalf of a private organization with their previous employer.

(2) A procuring and disposing entity shall disclose to any party with an interest in the procurement or disposal process, during and after the procurement or disposal proceedings, all the information which may materially affect the implementation of the procurement or disposal process as prescribed in the regulations.

(3) A procuring entity carrying out a procurement for works or consultancy services in the construction industry shall disclose all material project information and shall comply with the principles of transparency and accountability at all stages of the project life cycle inclusive of pre-contract and post-contract process as prescribed in the regulations.

58. The Director General may promulgate codes of conduct to guide the behaviour of public officials and bidders and suppliers involved in public procurement or disposal processes.

Codes of
conduct for
public
officials and
suppliers

PART IX—ADMINISTRATIVE REVIEW AND APPEAL

59.—(1) Any bidder that claims to have suffered, or that may suffer loss or injury due to breach of a duty imposed on the procuring and disposing entity, or Director General may seek a review in accordance with this Part.

Right to
review

(2) The following do not constitute grounds for the review under subsection (1)—

(a) the choice of a selection procedure in request for proposals for services, in accordance with the regulations;

(b) a decision by the procuring and disposing entity under section 46 to reject all bids, proposals, offers or quotations; and

(c) a refusal by the procuring and disposing entity to respond to an expression of interest in participating in requests for proposals for services under section 37(7).

60.—(1) An application for a review pursuant to section 59 shall be made during the period of intention to award a contract or within fourteen days of the bidder submitting the application becoming aware of the circumstances giving rise to the application, or of when that bidder should have become aware of those circumstances, whichever is earlier.

Review
procedures

(2) An application in subsection (1) shall be made, in the first instance, and in writing, to the Controlling Officer or head of the procuring and disposing entity or the Authority.

(3) Where an application for review is made to the Authority, the Director General shall convene three-member *ad hoc* committee from an established standing review committee (in this Act otherwise referred to as the “Review Committee”) which shall hear and decide upon applications for review brought to the Authority.

(4) A Review Committee shall consist of members of high integrity with experience in different fields of procurement and procurement procedures but who should not have participated in procurement or disposal proceedings in question in any capacity as bidders, suppliers or perform any procurement functions on behalf of the procuring and disposing entity in respect of the proceedings in question.

(5) The manner in which a Review Committee shall conduct its hearings shall be as prescribed in the regulations.

(6) A Controlling Officer or head of the procuring and disposing entity or the Authority shall not entertain the application for review unless—

(a) it was submitted within the period of the publication of an intention to award contract for procurement or disposal proceedings whose estimated values are above a set threshold; or

(b) for all procurement and disposal processes below the set threshold, within fourteen days of the bidder submitting the application becoming aware of the circumstances giving rise to the application, or when the bidder should have become aware of those circumstances, whichever is earlier.

(7) Upon receipt of the application for review, the procurement or disposal proceedings shall be suspended for ten days.

(8) The suspension period in subsection (7) may be extended to thirty days in cases where the dispute has not been resolved.

(9) A Controlling Officer or head of the procuring and disposing entity or the Review Committee established under subsection (3) shall render a decision on the application within fourteen days of the submission of such application.

(10) An appeal against a decision of a Controlling Officer or head of a procuring and disposing entity shall be made to the Director General and the decision of the Review Committee shall be subject to review by the High Court.

(11) Any application submitted to the Director General in the first instance or by way of appeal, shall attract a fee prescribed by the Director General.

(12) Unless an application is dismissed, the remedies that may be ordered by the Review Committee may include—

- (a) prohibiting the procuring and disposing entity from acting or deciding unlawfully or from following an unlawful procedure;
- (b) annulling, in whole or in part, an unlawful act or decision of the procuring and disposing entity, other than any decision bringing the procurement contract into force;
- (c) revising an unlawful decision by the procuring and disposing entity or substituting its own decision for such decision, other than any decision bringing the procurement contract into force;
- (d) compelling the procuring and disposing entity to pay the successful applicant its costs of preparing and submitting a bid and application for the review;
- (e) reporting the public official who committed the misconduct to relevant oversight bodies for proper action like disciplinary action and prosecution; and
- (f) any other remedy which may be prescribed by regulations.

PART X—MISCELLANEOUS

61.—(1) A procuring and disposing entity may engage in a framework agreement procedure, as prescribed under the regulations. Framework agreements

(2) The procuring and disposing entity may enter into a public private partnership arrangement based on an open competitive method except as otherwise provided in the Public Private Partnerships Act. Cap. 46:07

(3) Public procurement by means of community participation shall be used where the participation of the beneficiary community of a project may result in enhancing the economy, quality or sustainability of the service to be procured, or the very objective of the project is to create employment and involvement of the beneficiary community, the community may participate in the delivery of services in accordance with such procedures to be prescribed by the Authority

62.—(1) Every member and employee of the shall, on assumption of duty, take an oath of secrecy as may be prescribed in regulations. Oath by members and employees of the Authority

(2) Any officer who fails to comply with subsection (1) shall be guilty of an offence and shall be liable to a fine of K100,000 or six months imprisonment.

- Offences** **63.—**(1) Any person who contravenes the provisions of this Act shall be guilty of an offence.
- (2) A person guilty of an offence under subsection (1), whose penalty has not been prescribed, shall be liable to a fine not less than K500,000.00 but not exceeding K5,000,000.00 or, in case of an individual, to imprisonment for five years and to such fine.
- Regulations** **64.—**(1) The Minister may make regulations for the better carrying into effect the provisions of this Act.
- Cap. 1:01** (2) Notwithstanding section 21(e) of the General Interpretation Act, the regulations made under this Act may create offences in respect of any contravention to the regulations, and may for any such contravention impose a fine of up to K500,000, and to imprisonment for up to two years.
- Repeal and savings** **65.—**(1) Subject to section 66, the Public Procurement Act, is hereby repealed.
Cap. 37:03
- (2) All subsidiary legislation made under the repealed Act and in force immediately before the commencement of this Act, shall so far as it is not inconsistent with the provisions of this Act, continue in force as if made under this Act.
- (3) Notwithstanding subsection (1) every prior review, investigation, inquiry, administrative review, debarment proceedings, procurement contract, post procurement review, order, direction or appointment issued, given or made pursuant to the provisions of the repealed Act shall be valid until otherwise cancelled, revoked or varied under the provisions of this Act.
- Transitional provisions** **66.—**(1) The person holding the office of Director of Public Procurement immediately before the commencement of this Act shall assume the office of the Director General in accordance with the provisions of this Act.
- (2) The person holding office of Deputy Director of Public Procurement immediately before the commencement of this Act shall assume the office of the Deputy Director General in accordance with the provisions of this Act.
- (3) Every person holding office as an employee of the Office of Director of Public Procurement immediately before the commencement of this Act shall continue to hold such office in the Authority on no less favourable terms and conditions of employment than those under the employment with the Office of Director of Public Procurement established under the repealed Act.

(4) Every undertaking by the Director of Public Procurement shall continue to have effect or be undertaken by the Director General in accordance with the provisions of this Act.

(5) Except as otherwise provided in this Act, all the capital assets of the Office of Director of Public Procurement shall become the property of the Authority.

Passed in Parliament this twenty eight day of June, two thousand and seventeen.

FIONA KALEMBA
Clerk of Parliament