



PART VI

ADMINISTRATIVE REVIEW AND SUSPENSION OF TENDERERS AND SUPPLIERS

Right to Review

29. (1) Any tenderer that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on a procuring entity by this Act or public procurement regulations, may seek review in accordance with section 47.

(2) A tenderer seeking review may be required to pay a fee, in accordance with public procurement regulations.

Review by Procuring Entity

30. (1) An application for review shall, in the first instance, be submitted in writing to the controlling officer or Chief Executive Officer of the procuring entity conducting the procurement.

(2) The controlling officer or Chief Executive Officer of the procuring entity shall not entertain an application for review, unless it was submitted within ten working days of when the tenderer submitting it became aware of the circumstances giving rise to the application for review or of when that tenderer should have become aware of those circumstances, whichever is earlier.

(3) Despatch and publication of a notice indicating the best evaluated tenderer in accordance with section 45(3) shall be deemed to satisfy the requirements of awareness in subsection (2).

(4) Unless the application is dismissed or resolved by mutual agreement of the tenderer that submitted it and the procuring entity, the controlling officer or Chief Executive Officer of the procuring entity shall-

- (a) immediately institute an investigation;
- (b) ensure that no contract award is made prior to completion of the review process; and,
- (c) issue a written decision, within ten working days after the submission of the application.

(5) The decision 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.

Right to Administrative Review

48. (1) Where-

- (a) the controlling officer or Chief Executive Officer does not issue a decision within the period specified in section 47(4)(c); or,
- (b) the tenderer is not satisfied with the decision of the controlling officer or Chief Executive Officer;

a tenderer may seek administrative review in accordance with section 49.

(2) A tenderer seeking administrative review may be required to pay a fee, in accordance with public procurement regulations.

Administrative Review Procedures

49. (1) An application for administrative review in accordance with section 48, shall be submitted in writing to the Agency.

(2) The Agency shall not entertain an application for administrative review, unless it was submitted within ten working days of the date of issue of the controlling officer or Chief Executive Officer's decision or the date by which the controlling officer or Chief Executive Officer should have issued a decision.

- (3) Upon receipt of an application for administrative review, the Agency shall-
 - (a) immediately give notice of the application to the procuring entity;
 - (b) prohibit the procuring entity from awarding a contract prior to completion of the administrative review process; and,



- (c) establish an Independent Review Committee in accordance with section 50, which shall investigate and decide on the application in accordance with section 51.

Constitution of an Independent Review Committee

50. (1) For the purposes of hearing applications for administrative review and appeals against suspension, the Authority shall constitute a standing review panel.

(2) The standing review panel shall consist of members of high integrity with experience in public procurement or related fields, but with no direct or indirect personal involvement in public procurement functions during the period of their service on the standing review panel.

(3) For each application for administrative review or appeal against suspension, the Agency shall constitute an Independent Review Committee, composed of three members of the standing review panel.

(4) In selecting members for an Independent Review Committee, the Agency shall seek to establish a balance of relevant knowledge and experience among members to ensure that the Independent Review Committee has both-

- (a) knowledge and experience of the applicable public procurement rules; and,
- (b) technical knowledge of the subject of the contract.

(5) The Agency shall designate staff to provide secretariat services to the Independent Review Committee, but no Board members or staff of the Agency shall be included on the standing review panel or selected as a member of any Independent Review Committee.

(6) The Independent Review Committee may engage technical specialists to assist in its work if so required.

(7) The members of an Independent Review Committee, technical specialists and staff providing secretariat services shall be required to declare that they have no conflict of interest in relation to the application being heard.

(8) The members of an Independent Review Committee shall be paid sitting allowance and travelling allowances as are paid to the members of the governing body of a



category A, Group 1 public enterprise.

Administrative Review by Independent Review Committee

51. (1) Unless the application is dismissed, the Independent Review Committee shall-
- (a) immediately institute an investigation; and,
 - (b) issue a written decision, within fifteen working days after the submission of the application.
- (2) In conducting its investigation, the Independent Review Committee shall have the power to-
- (a) access any information, documents, records and reports in respect of any aspect of the procurement process subject to the investigation; and,
 - (b) summon witnesses and examine witnesses and parties concerned.
- (3) The decision 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 or remedies ordered in accordance with section 52.

Remedies by Independent Review Committee

52. (1) The Independent Review Committee may grant one or more of the following remedies-
- (a) prohibit a procuring entity from acting or deciding unlawfully or from following an unlawful procedure and require the procuring entity to act or to proceed in a lawful manner or to reach a lawful decision;
 - (b) annul in whole or in part or revise an unlawful act or decision of the procuring entity or substitute its own decision for such a decision, other than any act or decision bringing a contract into force;
 - (c) require the payment of compensation for any reasonable costs



incurred by the tenderer submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of the procuring entity;

- (d) order that the procurement proceedings be terminated;
- (e) recommend to the procuring entity that a contract be terminated; or,
- (f) recommend to the Agency that specific action be taken including prosecution.

Notification to other Bidders

53. (1) Promptly after the submission of an application for administrative review, the Agency shall notify all tenderers who participated in the procurement proceedings to which the application relates of the submission of the application and of its substance.

(2) Any such tenderer or any other party whose interests are or could be affected by the review proceedings has the right to participate in the review proceedings.

(3) A tenderer who fails to participate in the review proceedings is barred from subsequently making the same type of claim.

Prohibition on contract award during review proceedings

54. (1) Where a procurement requirement is subject to -

- (a) review in accordance with section 47, no contract shall be awarded until ten working days after completion of the review process; or,
- (b) administrative review in accordance with section 49, no contract shall be awarded prior to completion of the administrative review process.

(2) Notwithstanding the provisions of subsection 54, where urgent public interest considerations require goods, works or services to be contracted, the Government Tender Board may authorise an award of contract or an extension to an existing contract prior to completion of the review or administrative review process. Such award shall be limited to the quantity of goods, works or services required to meet urgent needs during the time period for completion of the review or administrative review process.



(3) Where a procuring entity seeks a contract award or extension in accordance with subsection (2), it shall prepare a submission to the Government Tender Board which-

- (a) states that urgent public interests require a contract award or extension;
- (b) justifies the grounds for claiming urgent public interests;
- (c) specifies the quantity of goods, works or services required to meet urgent needs; and,
- (d) recommends the tenderer or supplier to whom the contract or extension is to be awarded.

(4) The submission shall be made a part of the record of the procurement proceedings and shall be copied to the controlling officer, Chief Executive Officer or Independent Review Committee responsible for the review or administrative review.

Suspension of Tenderers and Suppliers

55. (1) The Agency may suspend a tenderer or supplier from participation in public procurement on the grounds specified in section 56.

- (2) A tenderer or a supplier shall not be suspended prior to-
 - (a) reasonable notice in writing to the tenderer or supplier involved of the grounds for the proposed suspension and the details of the alleged grounds;
 - (b) reasonable opportunity for the tenderer or supplier to respond to the alleged grounds and provide information in its defence; and,
 - (c) a thorough investigation of the facts of the case by the Agency.

(3) Any suspension shall be for a minimum period of one year and a maximum period of five years.

(4) A suspension in accordance with subsection (1) may also apply to named directors, shareholders or staff of a tenderer or supplier, where the investigation demonstrates the involvement of such individuals.

(5) Where an investigation into a tenderer or supplier causes the Agency to suspect misconduct or breach of this Act by a public officer or politician, such suspicions



shall be referred to the appropriate authority for further investigation.

(6) Notwithstanding the provisions of subsection (2), any tenderer, supplier or person endorsed on the Register for Tender Defaulters in accordance with the Prevention of Corruption Act, 2006, shall automatically be suspended from participation in procurement.

(7) Notwithstanding the provisions of subsection (3), the suspension shall be for the full duration of the time the tender, supplier or person is endorsed on the Register.

Grounds for Suspension

56. A tenderer or supplier may only be suspended from participation in procurement on the following grounds –

- (a) knowing provision of false information in a tender or any other document submitted to a procuring entity in connection with a procurement process or contract;
- (b) connivance to interfere with the participation of other tenderers;
- (c) misconduct relating to the submission of tenders, including corrupt, fraudulent, collusive or coercive practices, price fixing, a pattern of underpricing of tenders and breach of confidentiality;
- (d) taking an order knowing that the order had not been authorised or was not in a proper format or had been issued by a person not authorised to do so;
- (e) making delivery against an order knowing that the order had not been authorised or was not in a proper format or had been issued by a person not authorised to do so;
- (f) making a claim for payment against an order knowing that the order had not been authorised or was not in a proper format or had been issued by a person not authorised to do so;
- (g) refusal to sign a contract or to furnish a performance security in accordance with the terms of the invitation document and tender if required to do so;
- (h) substantial non-performance of contractual obligations, provided that the non-performance was not due to circumstances beyond the control of the supplier;



- (i) conviction of a criminal offence relating to obtaining or attempting to obtain a contract or subcontract; or,
- (j) conviction of a crime related to business or professional activities.

Appeal against Suspension

57. (1) A tenderer or supplier may appeal against a decision to suspend the tenderer or supplier from participation in public procurement by submitting an appeal in writing to the Agency for review by an Independent Review Committee.

(2) The Agency shall not entertain an appeal unless it was submitted within ten working days of the date of issue of the suspension notice by the Agency.

(3) For the purposes of hearing such appeals the Agency shall constitute an Independent Review Committee composed of three members of the standing review panel selected in accordance with section 50(3).

(4) The Independent Review Committee shall-

- (a) immediately review the original investigation and decision by the Agency; and,
- (b) issue a written decision, within fifteen working days after the submission of the appeal.

(5) In conducting its review, the Independent Review Committee shall have the power to-

- (a) access any information, documents, records and reports in respect of any aspect of the procurement process or contract; and,
- (b) summon witnesses and examine witnesses and parties concerned.

(6) The decision of the Independent Review Committee shall state-

- (a) whether the suspension is upheld or overturned or the period of the suspension or named individuals revised; and,
- (b) the reasons for the decision.

(7) A tenderer or supplier seeking to appeal against suspension may be required to pay a fee, in accordance with public procurement regulations.



(8) Where an investigation into a tenderer or supplier causes the Independent Review Committee to suspect misconduct or breach of this Act by a public officer or politician, such suspicions shall be referred to the appropriate authority for further investigation.

Legal Representation

58. A tenderer or supplier who appeals in terms of this Part, shall have the right to be represented by legal counsel in the appeal proceedings.

