



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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CONTENTS

Page

GOVERNMENT NOTICE

No. 236 Promulgation of Public Procurement Amendment Act, 2022 (Act No. 3 of 2022), of the Parliament 1

Government Notice

OFFICE OF THE PRIME MINISTER

No. 236

2022

PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 3 of 2022: Public Procurement Amendment Act, 2022.

Act No. 3, 2022**PUBLIC PROCUREMENT AMENDMENT ACT, 2022****EXPLANATORY NOTE:**

_____ Words underlined with a solid line indicate insertions in existing provisions.

[] Words in bold type in square brackets indicate omissions from existing provisions.

ACT

To amend the Public Procurement Act, 2015, so as to insert certain definitions and substitute certain definitions; to provide for the appointment of the chief executive officer of the Central Procurement Board of Namibia; to clarify certain methods of procurement; to provide for joint procurement of goods and services; to provide for the application for reconsideration of the decisions of the Board or public entities; and to provide for incidental matters.

(Signed by the President on 25 July 2022)

BE IT ENACTED as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

Amendment of section 1 of Act No. 15 of 2015

1. Section 1 of the Public Procurement Act, 2015 (hereafter referred to as the “principal Act”) is amended by -

(a) the substitution for the definition of “accounting officer” of the following definition:

““accounting officer” means -

(a) the accounting officer of a public entity; or

(b) if the accounting officer is absent or is for any other reason unable to perform his or her functions -

(i) a person acting as accounting officer with the written authority of the accounting officer or a person appointed as acting accounting officer in terms of section 21(1)(a) of the Public Service Act, 1995 (Act No. 13 of 1995); and

(ii) in the case of a public entity governed by a board, local authority council, regional council or a similar governing body the person acting as accounting officer with the written authority of the board, local authority council, regional council or governing body;”;

(b) insert the following definition after the definition of “accounting officer”:

““associate” in relation to the disclosure of interest, includes -

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

- (a) a co-shareholder of a company incorporated under Chapter 4 of the Companies Act, 2004 (Act No. 28 of 2004) or an entity established by an Act of Parliament including subsidiaries of such an entity;
 - (b) a co-member of a close corporation contemplated in section 2 of the Close Corporations Act, 1988 (Act No. 26 of 1988);
 - (c) a person to whom one has granted or from whom one has received a general power of attorney;
 - (d) a trustee or beneficiary of a trust contemplated in section 1 of the Trust Monies Protection Act, 1934 (Act No. 36 of 1934);
 - (e) co-members of a co-operative registered under the Co-operatives Act, 1996 (Act No. 23 of 1996); or
 - (f) partners in a partnership or joint venture or similar arrangement;”;
- (c) the insertion of the following definitions after the definition of “Board”:
- ““chief executive officer” means the chief executive officer of the Board appointed in terms of section 18A(1);
- ““close relative” means a spouse, child, grandchild, parent or sibling, cousin, nephew, niece, aunt, uncle, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law and sister-in-law;”
- (d) the insertion of the following definition after the definition of “electronic reversed auction”:
- ““framework agreement” means an agreement, referred to in section 38A, and concluded between one or more public entities and one or more suppliers to supply, during a given period, goods, works or services whose quantities and delivery schedules are not definable or determinable in advance;”;
- (e) the insertion of the following definition after the definition of “contractor”:
- ““days” means a day other than Saturday, Sunday or public holiday;”;
- (f) the insertion of the following definition after the definition of “local authority”:
- ““local supplier” means a supplier -
- (a) who complies with the criteria stated in section 71(3); and
 - (b) whose goods, works or services complies with the minimum local content as may be determined by the Minister in the codes of good practice issued in terms of section 70;”;

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

- (g) the insertion of the following definition after the definition of “Minister”:
- ““Namibian citizen” means a citizen of Namibia by virtue of Article 4 of the Namibian Constitution and the Namibian Citizenship Act, 1990 (Act No. 14 of 1990).”;
- (h) the insertion of the following definition after the definition of “Policy Unit”:
- ““pooled procurement” means the joint procurement of goods or works referred to in section 38B.”;
- (i) the substitution for the definition of “public entity” of the following definition:
- ““public entity” means any office, ministry or agency of the Government, and includes -
- (a) a local authority council;
 - (b) a regional council;
 - (c) a public enterprise as referred to in the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019);
 - (d) an **[body]** entity or trust that is owned or controlled by the Government, when engaged in any procurement individually or in consortium; **[and]**
 - (e) an entity declared as public entity in terms of section 5; and
 - (f) a subsidiary of a public enterprise referred to in paragraph (c).”;
- (j) the insertion of the following definition after the definition of “services”:
- ““standstill period” means the period of seven days -
- (a) referred to in section 55(4A) within which other bidders, other than the successful bidder referred to in section 55(4)(a), may apply to the Board or public entity to reconsider the selection of the bid for the award; or
 - (b) referred to in section 59(1) within which a bidder or supplier may apply to the Review Panel for review of a decision or action taken by the Board or public entity.”; and
- (k) the substitution for the definition of “supplier” of the following definition:
- ““supplier” means a person delivering goods, works, consultancy services, **[or other services,]** non-consultancy services or other services.”.

Amendment of section 2 of Act No. 15 of 2015

2. Section 2 of the principal Act is amended by the substitution for paragraph (a) of the following paragraph:

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

- “(a) to promote integrity, accountability, transparency, competitive supply, effectiveness, efficiency, fair-dealing, value for money, responsiveness, informed decision-making, consistency, legality and integration in the procurement [**of assets, works or services**], the letting and hiring of anything, the acquisition or granting of rights and the disposal of assets including, among others, to -”.

Amendment of section 6 of Act No. 15 of 2015

3. Section 6 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

- “(2) The fundamental principles referred to in subsection (1)(d), include, but are not limited to, [as a minimum,] the principle of transparency, integrity, competitive supply, effectiveness, efficiency, fair dealing, value for money, responsiveness, informed decision-making, consistency, legality, integration, and accountability [**and such other aspects as the Minister may determine**].”.

Amendment of section 7 of Act No. 15 of 2015

4. Section 7 of the principal Act is amended by the substitution for paragraph (h) of subsection (1) of the following paragraph:

- “(h) to prepare, update and issue directives, instructions, guidelines, guidance notes and manuals, including any other incidental documents for mandatory use by public entities;”.

Amendment of section 11 of Act No. 15 of 2015

5. Section 11 of the principal Act is amended by -

- (a) the substitution for subsection (2) of the following subsection:

“(2) The Minister must appoint, from among the nine members of the Board appointed under subsection (1), two members of whom one must be a female [**on a five-year full-time basis**] to serve as [-

(a)] Chairperson and Deputy Chairperson of the Board. [**; and**

(b) **administrative head and deputy administrative head,**

of the Board, respectively, and the Chairperson serves as the accounting officer of the Board.]”; and

- (b) the insertion of the following subsection after subsection (2):

“(2A) Despite the provisions of subsection (1)(c), subsection (2) and section 12(1), the Minister may, at the expiry of the term of office of the Chairperson, Deputy Chairperson or other member of the Board -

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

- (a) extend the term of office of the Chairperson, the Deputy Chairperson or the member of the Board, until a Chairperson, Deputy Chairperson or a member of the Board is appointed; or
- (b) appoint a suitably qualified, fit and proper person having knowledge and experience relevant to the functions of the Board as a Chairperson, Deputy Chairperson or a member of the Board until a Chairperson, Deputy Chairperson or a member of the Board is appointed.

(2B) The extension granted in terms of subsection (2A)(a) or an appointment made in terms of subsection (2A)(b) must be for a period not exceeding six months but the Minister may at the expiry of the period of extension or the period of appointment, further extend the term of office or term of appointment for an additional period of not more than two months at a time until a Chairperson, Deputy Chairperson or a member of the Board is appointed but the total period of extension or appointment may not exceed twelve months.”.

Amendment of section 12 of Act No. 15 of 2015

6. Section 12 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

- “(1) A member of the Board appointed under [-]
- [(a)] subsection (1) and (2) of section 11 is appointed for a term of three years **[on a part-time basis; and**
- (b) subsection [(1) and] (2) of section 11 is appointed for a term of five years on a full-time basis as referred to in that subsection (2)],**

and is eligible for reappointment at the expiry of that term, but a person **[member]** may not be appointed as a member of the Board for more than two consecutive terms.”.

Amendment of section 15 of Act No. 15 of 2015

7. Section 15 of the principal Act is amended by substitution for subsection (9) of the following subsection:

“(9) Where a member does not **[,for good cause,]** attend a meeting of the Board, the **[secretary]** Chairperson or Deputy Chairperson of the Board must as soon as practicable furnish the member with the minutes of the meeting for the member to keep **up** **[abreast]** with any new development.”.

Amendment of section 18 of Act No. 15 of 2015

8. Section 18 of the principal Act is amended by substitution for section 18 of the following section:

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

“18. (1) [Except for the Chairperson and Deputy Chairperson, a] A member of the Board or a member of a committee of the Board [who is not a full-time employee of the State] is paid such allowances, including travelling and subsistence allowances necessary for the exercise or performance of his or her powers or functions conferred or imposed by or under this Act, as the Minister may determine under subsection (2).

(2) The [Chairperson and Deputy Chairperson of the Board are paid such remuneration and allowances as the] Minister may determine, after having due regard to the requirements of section 18 [22] of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019) [2006 (Act No. of 2006)], the allowances, including travelling and subsistence allowances, payable to a member of the Board or a member of a committee of the Board.”.

Insertion of section 18A in of Act No. 15 of 2015

9. The principal Act is amended by insertion of the following sections after section 18:

“Chief executive officer

18A. (1) The Board must, with the concurrence of the Minister and on such terms and conditions as the Board may determine, appoint a suitably qualified person to be the chief executive officer of the Board.

(2) Subject to the policies and direction of the Board, the chief executive officer is responsible for the day-to-day management and administration of the Board.

(3) A person appointed as chief executive officer holds office for a period of five years.

(4) The Board may not appoint a person as chief executive officer, if that person does not comply with the provisions of section 14, which provisions apply with changes required in the context, to a person to be appointed as chief executive officer.

(5) The chief executive officer is the accounting officer of the Board.

(6) The chief executive officer must attend meetings of the Board, but is not entitled to vote at the meetings of the Board.

(7) The chief executive officer -

(a) is a full-time employee of the Board; and

(b) may not actively engage in any other business, occupation or employment, whether for remuneration or not, without the prior written approval of the Board.

(8) The chief executive officer may, at any time, resign from office by submitting a written resignation to the Board at least three calendar months before the intended date of resignation and the Board -

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

(a) must inform the Minister immediately of the intended resignation; and

(b) may, with the concurrence of the Minister, allow a shorter period for giving intention to resign.

(9) The Board, with the concurrence of the Minister and after giving the chief executive officer a reasonable opportunity to be heard, may at any time remove the chief executive officer from office on the grounds of misconduct, incapacity, incompetence or failure to comply with the terms and conditions of his or her appointment.

(10) If the office of the chief executive officer is vacant or if he or she is for any reason unable to perform his or her functions, the Board must, with the concurrence of the Minister, appoint a senior staff member of the Board or another suitable individual to act as chief executive officer for the period determined by the Board, provided that the provisions of subsection (1) and (4) are complied with.

(11) At the expiry of the term of office of the chief executive officer, the Board, with the concurrence of the Minister, may re-appoint the chief executive officer for another term but a person may not be appointed as chief executive officer for more than two consecutive terms.

(12) The office of the chief executive officer becomes vacant -

(a) if the chief executive officer -

(i) dies;

(ii) resigns from office under subsection (8);

(iii) is removed from office under subsection (9); or

(iv) becomes subject to a disqualification referred to in section 14; or

(b) on expiry of his or her term of appointment.”.

Amendment of section 19 of Act No. 15 of 2015

10. Section 19 of the principal Act is amended by substitution for section 19 of the following section:

“**19.** [(1)] The Board is assisted in the performance of its administrative functions incidental to its powers and functions conferred or imposed by or under this Act by staff members appointed by the chief executive officer [**Board**] on such terms and conditions as the chief executive officer [**Board**] with the concurrence [**consent**] of the Board [**Minister**] may determine.

[(2) **One of the staff members appointed under subsection (1) is designated by the Board as Secretary to the Board.**]”.

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

Amendment of section 20 of Act No. 15 of 2015

11. Section 20 of the principal Act is amended by substitution for subsection (4) of the following subsection:

“(4) Money or donations which are not in the form of money and received [by way of a donation] for the benefit of the Board may be administered on such conditions as may be agreed on between the donor and the Board, but before agreeing on the conditions for the donation the Board must obtain the Minister’s approval of the conditions.”.

Amendment of section 21 of Act No. 15 of 2015

12. Section 21 of the principal Act is amended by -

(a) the substitution for subsection (2) of the following subsection:

“(2) The **[Secretary of the Board]** chief executive officer must ensure that -

- (a) all money received by or on behalf of the Board is deposited into its bank account as soon as practicable after being received;
- (b) a payment by or on behalf of the Board is made from its bank account; and
- (c) money is not withdrawn, paid or transferred from its bank account without the written authority of the Board.”; and

(b) the substitution for subsection (3) of the following subsection:

“(3) Money [Cheques] drawn on the bank account of the Board, or any other form or document to be completed for the withdrawal, payment or transfer of money from any of the bank accounts of the Board, [are] must be [signed] authorised on behalf of the Board by **[two persons authorised for that purpose by the Board]** the chief executive officer and the chief financial officer.”; and

(c) the insertion of the following subsection after subsection (3):

“(3A) If the chief executive officer or chief financial officer referred to in subsection (3) is unable to exercise the powers conferred under that subsection, the chief executive officer or chief financial officer may in writing delegate that power to a suitably qualified staff member of the Board.”.

Amendment of section 25 of Act No. 15 of 2015

13. Section 25 of the principal Act is amended by -

(a) the substitution for paragraph (a) of subsection (1) of the following paragraph -

“(a) must, in the prescribed manner, set up an internal organisational structure which includes a procurement committee, a bid evaluation committee and a procurement management unit for the conduct and management of procurement at the public entity; and”;

Act No. 3, 2022**PUBLIC PROCUREMENT AMENDMENT ACT, 2022**

- (b) the substitution for subsection (4) of the following subsection:

“(4) An accounting officer must -

- (a) engage in procurement planning, plan each step of the procurement process and prepare an annual procurement plan, and must submit the plan to the Policy Unit at least three months before the commencement of each financial year;
- (b) certify the availability of funds before the commencement of each procurement process and ensure that the funds remain committed for the duration of the procurement contract; and
- (c) ensure that the proceedings of the internal structures of a public entity or the Board are properly recorded and kept in a safe and secure place in the prescribed manner.”; and

- (c) the insertion of the following subsection after subsection (4):

“(4A) If the accounting officer considers it necessary, the accounting officer must amend the annual procurement plan referred to in subsection (4)(a) and submit the amended plan to the Policy Unit within 7 days of the amendments.

(4B) An accounting officer who fails to submit the annual procurement plan on time may be held liable for non-compliance in terms of section 7(4)(a).”.

Amendment of section 26 of Act No. 15 of 2015

14. Section 26 of the principal Act is amended by the substitution for subsection (8) of the following subsection:

“(8) For the sake of an independent evaluation process and avoidance of conflict of interest, a member of the Board may not form part of a bid evaluation committee of the Board, and -

- (a) a member of a procurement committee; **[or]**
- (b) an accounting officer^[,]; or
- (c) a staff member of procurement management unit,

of the same public entity may not form part of a bid evaluation committee of the same public entity.”.

Amendment of section 27 of Act No. 15 of 2015

15. Section 27 of the principal Act is amended by -

- (a) the substitution for subparagraph (i) of paragraph (a) of subsection (1) of the following subparagraph -

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

- “(i) open advertised bidding in the form of either open national bidding or open international bidding;”; and
- (b) the addition of the following subsection after subsection (1):
- “(1A) The Board or a public entity may use a -
- (a) framework agreement for the procurement of goods, works or non-consultancy services; or
- (b) pooled procurement procedure for the procurement of goods or works.”.

Amendment of section 29 of Act No. 15 of 2015

16. Section 29 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“Open national bidding

29. (1) A public entity may limit participation in open advertised bidding proceedings -

- (a) to [**the citizens of Namibia**] Namibian citizens; or
- (b) to -
- (i) an entity incorporated or registered in Namibia in terms of the company or close corporation laws of Namibia;
- (ii) a co-operative registered under the laws regulating co-operatives in Namibia;
- (iii) a trust registered under the laws regulating trusts in Namibia; or
- (iv) a partnership or a joint venture or similar arrangement,
- [entities incorporated in Namibia with no less than 51 percent equity that is owned by Namibian citizens of which no less than 30 percent is owned by previously disadvantaged persons, where such limitation is stated in the invitation for pre-qualification or bidding and is in accordance with the prescribed criteria.]**
in which Namibian citizens own 51 percent equity.

(2) The limitation referred to in subsection (1) must be stated in the invitation for pre-qualification or bidding and must be in accordance with the prescribed criteria.”.

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

Amendment of section 33 of Act No. 15 of 2015

17. Section 33 of the principal Act is amended by -
- (a) the substitution for paragraph (b) in subsection (3) of the following paragraph:

“(b) life or the quality of life or environment or national interest or public interest may be seriously compromised; or”; and
 - (b) the addition of the following subsections after subsection (3):

“(4) If a public entity procures goods, works or services under subsection (1), the accounting officer of such public entity, or in the case of the Board, the Chairperson of the Board must submit a report to the Policy Unit in the prescribed manner and form stating the reasons for, or the situation which necessitated, the emergency procurement.

(5) If Policy Unit establishes that there was negligent conduct which necessitated the emergency procurement, the Minister may refer the matter with recommendations to the appointing authority as contemplated in section 7(4).”.

Insertion of section 38A and 38B in Act No. 15 of 2015

18. The principal Act is amended by the insertion of the following sections after section 38:

“Procurement under framework agreement

38A. (1) The Board or public entity may in terms of a framework agreement procure goods, works or non-consultancy services -

- (a) if the Board or public entity determines that the need for the subject matter of procurement is expected to arise on an indefinite or repeated basis during a given period of time within a public entity or across public entities;
- (b) where it is the most appropriate and most efficient and cost-effective means to procure goods, works or non-consultancy services; and
- (c) if the estimated value of the procurement does not exceed the prescribed thresholds for the required goods, works or non-consultancy services.

(2) A public entity wishing to procure under a framework agreement must use the open advertised bidding method of procurement.

(3) The Board or public entity must include a minimum of three alternative suppliers for each category identified for procurement in terms of a framework agreement.

(4) A procurement contract based on a framework agreement must be awarded in accordance with the prescribed procedure.

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

(5) The Board or public entity must record the reasons and circumstances on which it relied to justify the use of the framework agreement and the type of framework agreement used.

(6) The Minister must prescribe the types of framework agreements, the form and manner of framework agreements, the terms and conditions of framework agreements and other matters to be included in or to be complied with in respect of a framework agreement.

Pooled procurement

38B. (1) In the circumstances referred to in subsection (3) -

(a) public entities may use pooled procurement to jointly procure goods or works with other public entities in Namibia;

(b) public entities may use pooled procurement to jointly procure goods or works with -

(i) entities in another country, provided that such entity is authorised by the laws of that country to procure goods or works; or

(ii) a foreign state, a regional or an international organisation; or

(c) public entities may use pooled procurement to procure goods from a regional or an international organisation that combines several entities from different countries who intend to procure the same type of goods and the regional or international organisation procures the goods on behalf those entities.

(2) Where a public entity that is an office, ministry or agency of the government procures goods or works in accordance with subsection (1)(b), the accounting officer must enter into the pooled procurement agreement with the entity in another country, foreign state, a regional or an international organisation.

(3) Pooled procurement may be used for the procurement of goods or works under the following circumstances:

(a) there must be a demonstrable price and non-price benefits for its use;

(b) pooled procurement must be the most cost-effective and efficient means for procuring the goods or works in the circumstances;

(c) there must be proof that the public entity or government can leverage from economies of scale; and

(d) there must be an identified supplier who can supply the required quantity of the goods or works.

(4) Where a public entity makes use of pooled procurement as contemplated in subsection (1)(a), the Board must procure on behalf of the public entities irrespective of the prescribed threshold.

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

(5) Where a public entity makes use of pooled procurement as contemplated in subsection (1)(b) and -

- (a) the value of the procurement does not exceed the prescribed threshold, the public entity must facilitate the procurement; or
- (b) if the value of the procurement exceeds the prescribed threshold the Board must procure on behalf of the public entities.

(6) Where a public entity makes use of pooled procurement as contemplated in subsection (1)(c), the public entity must facilitate the procurement of the goods.

(7) For pooled procurement to be valid -

- (a) there must be a pooled procurement agreement entered into between the contracting entities, and between the contracting entities and suppliers;
- (b) the agreement referred to in paragraph (a) must determine the practical arrangement governing that procedure, and the decision-making process with regard to the choice of procurement method to be used, the evaluation of the bid and the award of the contract; and
- (c) if the pooled procurement is used as contemplated in subsection (1)(b) or (c), the agreement referred to in paragraph (a) must be approved by the Attorney-General.

(8) Public entities making use of pooled procurement in terms of this section must ensure that pooled procurement does not constitute unfair discrimination, restriction of trade or distort competition.

(9) The Minister must prescribe other measures regarding the management of agreements contemplated in subsection (7).

(10) The public entities making use of pool procurement must record or ensure the recording of reasons and circumstances on which the entity relied to justify the use of pooled procurement.”.

Amendment of section 50 of Act No. 15 of 2015

19. Section 50 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

“(2) [A bidder of supplier is disqualified from bidding if such bidders or supplier] In addition to other documents or information which may be required from a bidder or supplier, the bidder or supplier must submit the following documents at the time of submitting a bid to a public entity, failing which the bidder or supplier must be disqualified -

- (a) [is not in] a valid certificate of good standing with the Receiver of Revenue;
- (b) [is not in possession of] a valid certificate of good standing with the Social Security Commission or, in the case where a company has no employees, confirmation letter from the Social Security Commission;

Act No. 3, 2022**PUBLIC PROCUREMENT AMENDMENT ACT, 2022**

- (c) ~~[is not,]~~ as required by the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998)~~], in possession of]~~ -
- (i) a valid affirmative action compliance certificate issued under section 41 of that Act;
 - (ii) an exemption issued under section 42 of that Act; or
 - (iii) a proof from the Employment Equity Commissioner that the bidder or supplier is not a relevant employer as defined in that Act; ~~[or]~~
- (d) ~~[has not submitted]~~ a written undertaking as contemplated in section 138(2) of the Labour Act, 2007~~(Act No. 11 of 2007)[.]; and~~
- (e) a valid -
- (i) certificate of business registration for an entity incorporated or registered under the company or close corporation laws of Namibia;
 - (ii) certificate of registration of a co-operative registered under the laws regulating co-operatives in Namibia;
 - (iii) document serving as evidence of registration as a trust and the trust deed for a trust registered under the laws regulating trusts in Namibia; or
 - (iv) partnership agreement in the case of a partnership, a valid joint venture agreement in the case of a joint venture or a valid agreement in case of other similar arrangements.

but a bidder or supplier who is a sole proprietor only needs to comply with the provisions of paragraph (a) to (d).”.

Amendment of section 51 of Act No. 15 of 2015

20. Section 51 of the principal Act is amended by the substitution for subsection (4) of the following subsection:

“(4) At a bid opening session, the name of the bidder, the total amount of each bid, any discount or alternative offered, ~~[and]~~ the presence or absence of any bid security if required, and the documents referred to in section 50(2), are ~~[is]~~ read out and recorded, and a copy of the record is made available to any bidder on request.”.

Amendment of section 52 of Act No. 15 of 2015

21. Section 52 of the principal Act is amended by -

- (a) the substitution for subsection (5) of the following subsection:

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

“(5) Where a bid discloses an arithmetical error, the Board or public entity concerned must -

(a) notify the bidder about the error and its intention to correct the error; and

(b) after notifying the bidder in terms of paragraph (a) correct the error [and notify the bidder].”; and

(b) the substitution for subsection (9) of the following subsection:

“(9) Every bid is evaluated according to the criteria and methodology set out in the bidding documents and **[the evaluated cost of each bid]** is compared with **[the evaluated cost of]** other bids to determine the lowest evaluated substantially responsive bid which meets the qualification criteria [most economically advantageous bid].”.

Amendment of section 55 of Act No. 15 of 2015

22. Section 55 of the principal Act is amended by -

(a) the substitution for subsection (1) of the following subsection:

“(1) The Board or a public entity must award a procurement contract to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the pre-qualification or bidding documents, **[following the steps outlined in subsections (3) and (4)]** but only after the Board or public entity has complied with the provisions of subsections (3), (4), (4A), (4B), (4C), (4D) and (5).”;

(b) the substitution for subsection (4) of the following subsection:

“(4) An accounting officer or the Chairperson of the Board where the Board is procuring on behalf of a public entity must, in the prescribed manner and form, notify -

(a) the successful bidder of the selection of its bid for award; and

(b) the other bidders, specifying the name and address of the successful bidder and the price of the contract, accompanied by the executive summary of the bid evaluation report.”;

(c) the insertion of the following subsections after subsection (4):

“(4A) A bidder referred to in subsection (4)(b) may, within seven days from the date of receipt of the notice referred to in subsection (4), apply to the Board or public entity to reconsider its selection of a bid for award and the Board or public entity must, within seven days from the date of receipt of the application, notify the bidder of its decision.

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

(4B) If the bidder referred to in subsection (4A) does not, in terms of that subsection, receive a response from or is not satisfied with a decision of the Board or public entity the unsuccessful bidder may within the seven days referred to in section 59 apply to the Review Panel for review of the decision or action as contemplated in section 59(1).

(4C) An accounting officer or the Chairperson of the Board where the Board is procuring on behalf of a public entity, may not award a contract or sign any agreement during the standstill period and any contract awarded or agreement signed during the standstill period is invalid *ab initio*.

(4D) A bidder who is aggrieved by a decision or action of the Board or public entity must exhaust remedies under this section before applying for review under section 59(1).”; and

(d) the substitution for subsection (5) of the following subsection:

“(5) **[In the absence of an application for review]** If -

(a) no application for reconsideration is made by any [other] bidder [within 7 days of the notice referred to in subsection (4),] under subsection (4A); or

(b) after the Board or public entity has made a decision on an application under subsection (4A) and no application for review is made under section 59(1),

the accounting officer or the Chairperson of the Board where the Board is procuring on behalf of a public entity, must award the procurement contract to the successful bidder.”

Amendment of section 57 of Act No. 15 of 2015

23. The principal Act is amended by the substitution for section 57 of the following section:

“57. The accounting officer or the Chairperson of the Board, where the Board is procuring on behalf of a public entity, on request of an unsuccessful bidder, must promptly brief the bidder of the reasons for which its bid or its application for pre-qualification was unsuccessful, if the request for such information was submitted within the prescribed period of the publication of the notice referred to in section 55(8).”.

Amendment of section 58 of Act No. 15 of 2015

24. Section 58 of the principal Act is amended by -

(a) the substitution for subsection (1) of the following subsection:

“(1) **[When the Minister thinks it necessary on account of any of the grounds mentioned in subsection (3),]** From the list of persons referred to in subsection (4), the Minister may [, subject to subsection (7),] appoint five persons [from a list of persons referred to in subsection (4)] -

Act No. 3, 2022**PUBLIC PROCUREMENT AMENDMENT ACT, 2022**

- (a) having qualifications, wide knowledge and experience in legal, administrative, economic, financial, trade, engineering, scientific or technical matters; and
 - (b) of whom not more than three are of the same sex,
- to constitute a Review Panel to adjudicate on **[application for]** -
- (i) application for review;
 - (ii) the suspension, debarment and disqualification of bidders and suppliers; or
 - (iii) any other matter that the Minister may refer to the Review Panel for its consideration.”; and
- (b) the substitution for subsection (3) of the following subsection:
- (3) The Minister must [-
- (a) **exercise the powers under subsection (1) on the grounds of allegations made in the application submitted to the Review Panel in terms of section 59 of this Act; and**
 - (b)] constitute more than one Review Panel during the same period as the circumstances may require.”.

Amendment of section 59 of Act No. 15 of 2015

25. Section 59 of the principal Act is amended by -

- (a) the substitution for subsection (1) of the following subsection:

“(1) A bidder or supplier may, as prescribed, apply to the Review Panel for review of a decision or an action taken -

- (a) by the Board; or
- (b) by a public entity,

[for the award of a procurement contract] within seven days after the bidder or supplier is notified of the decision or action.”; and

- (b) the deletion of subsection (2).

Amendment of section 60 of Act No. 15 of 2015

26. Section 60 of the principal Act is amended by the substitution for paragraph (c) of the following subsection:

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

- “(c) set aside in whole or in part a decision or an action of the Board or public entity that is not in compliance with this Act, **[other than any decision or action bringing the procurement contract or the framework agreement into force,]** and refer the matter back to the Board or public entity for reconsideration with specific instructions;”.

Amendment of section 66 of Act No. 15 of 2015

27. Section 66 of the principal Act is amended by -

- (a) the deletion of subsection (2);
- (b) the insertion of the following subsections after subsection (2):

“(2A) If a staff member of the Board or a public entity involved in the bid preparation process, at any stage of a bid indicates that he or she wishes to recuse himself or herself because of conflict of interest, the staff member may not participate in the bidding process as a bidder or supplier.”

“(2B) The following persons may not participate, either personally or through an entity corporate or incorporate in which he or she has a financial, economic or personal interest, as a bidder or supplier in a procurement process conducted by the Board or public entity:

- (a) staff members of the public entity;
- (b) members of the Board or its staff members; or
- (c) members of a board, local authority council, regional council or similar governing body.

(2C) A -

- (a) staff member of a public entity;
- (b) member of the Board or its staff members; or
- (c) members of a board, local authority council, regional council or similar governing body.

who contravenes or fails to comply subsection (1), (2A) or (2B) commits an act of misconduct, and the Board or public entity or the relevant functionary may deal with the individual in accordance with the terms and conditions of appointment or may apply the applicable disciplinary procedures.”; and

- (c) the substitution for subsection (3) of the following subsection:

“(3) A staff member referred to in subsection (1), and staff members of the Board who -

- (a) acts or abets corruptly or fraudulently to gain favour or benefit, including soliciting or accepting improper inducement; or

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

- (b) contravenes, or refuses or fails to comply with subsection (1), ~~(2A) or (2B)~~ [or (2)],

commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.”.

Insertion of section 66A in Act No. 15 of 2015

28. The following section is inserted after section 66 of the principal Act:

“Disclosure of interest by staff members of public entities

66A. (1) A staff member of the Board or public entity -

- (a) who is a member of the procurement committee, bid evaluation committee or procurement management unit of the public entity;
- (b) who is involved in planning or conducting procurement process or contract administration in relation to the public entity or Board;
or
- (c) who has a close relative, associate or friend,

with a direct or indirect financial, economic or personal interest in the bidding entity or a matter that requires the decision of the Board, procurement committee, bid evaluation committee or procurement management unit, must disclose that interest in accordance with subsection (2).

(2) The staff member referred to in subsection (1), with an interest referred to in that subsection -

- (a) must immediately inform the relevant Minister, chairperson or the accounting officer of the interest; and
- (b) may not participate in the deliberations or take part in the decision-making process in relation to that matter, unless the relevant decision-making body directs otherwise after having considered the matter and having found that there is no conflict of interest.

(3) The public entity or Board must record the disclosure of interest made in terms of this section in the minutes of the meeting at which it is made.

(4) A staff member contemplated in subsection (1) who fails to comply with that subsection or subsection (2) commits an act of misconduct, and the Board or public entity may institute misconduct disciplinary proceedings in accordance with the disciplinary procedures of the Board or public entity.

Act No. 3, 2022

PUBLIC PROCUREMENT AMENDMENT ACT, 2022

(5) A person who contravenes or fails to comply with this subsection (1) or (2) commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.”.

Amendment of section 71 of Act No. 15 of 2015

29. Section 71 of the principal Act is amended by the substitution for subsection (3) of the following subsection:

“(3) **[Namibian suppliers]** Bidders are eligible to be granted a margin of preference as provided for in subsection (2)(b)(ii), if they meet the following criteria and the criteria referred to in subsection (3A) -

- (a) for a company or close corporation if -
 - (i) it is incorporated or registered in Namibia;
 - (ii) the majority of the members interest or paid up share capital of the company is owned either by the Government or by Namibian citizens **[citizens of Namibia]**; and
 - (iii) a major part of the net profits or other tangible benefits of the company accrues to Namibian citizens and no other arrangements by the company to the contrary[.];
- (b) for joint ventures of **[local]** companies if -
 - (i) individual member companies are incorporated or registered in Namibia;
 - (ii) the majority beneficial owner and majority shares in the joint venture company are held by Namibian citizens **[citizens of Namibia]**;
 - [(iii) the joint venture itself is registered in Namibia;]**
 - (iv) the joint venture agreement -
 - (aa) contains the minimum terms and conditions prescribed by the Minister; **[and]**
 - (bb) does not have arrangement whereby any major share of the net profit or dividend accrues to or is to be paid to persons who are not Namibian citizens **[citizens of Namibia]** or to entities which would not be eligible for national preferences under this section; and[”.]
 - (cc) is signed by all parties to the agreement;

Act No. 3, 2022**PUBLIC PROCUREMENT AMENDMENT ACT, 2022**

- (c) for partners **[or individuals]** trading as suppliers if [and] the majority of shares or interests in the partnership is held by Namibian citizens [the citizens of Namibia, or the individuals are Namibian citizens.];
- (d) for individuals trading as suppliers, if the individuals are Namibian citizens;
- (e) for a co-operative registered under the laws regulating co-operatives in Namibia if a majority of the benefits of the co-operative accrues to Namibian citizens; and
- (f) for a trust registered under the laws regulating trusts in Namibia if a majority of the benefits of the trust accrues to Namibian citizens.”.

Amendment of section 76 of Act No. 15 of 2015

30. Section 76 of the principal Act is amended by the substitution for section 76 of the following section:

“Disclosure of interest by members of Board and Review Panel

76. (1) A member of the Board or Review Panel who has, any direct or indirect financial interest in any matter brought before the Board or Review Panel, or who has a close relative, associate or friend with a direct or indirect financial, economic or personal interest in the matter brought before the Board or Review Panel -

- (a) must immediately inform the chairperson of the Board or Review Panel of the interest; and
- (b) may not participate in the deliberations or take part in the decision-making process in relation to that matter, unless the Board or the Review Panel directs otherwise after having considered the matter and having found that there is no conflict of interest.

(2) The Board or Review Panel must record the disclosure of interest made in terms of this section in the minutes of the meeting at which it is made.

(3) A person who contravenes or fails to comply with subsection (1) commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.”.

General amendment

31. The principal Act is amended by the substitution for the words “Procurement Policy Unit” as they appear in subsection (3) of section 6 and subsections (1), (3), (4), (6) and (7) of section 7 of the words “Policy Unit”.”.

Act No. 3, 2022**PUBLIC PROCUREMENT AMENDMENT ACT, 2022****Short title and commencement**

32. (1) This Act is called the Public Procurement Amendment Act, 2022, and it comes into operation on a date determined by the Minister by notice in the *Gazette*.

(2) The Minister, under subsection (1), may determine different dates for different sections.
