

# CHAPTER 15.10

## PUBLIC PROCUREMENT ACT

### Revised Edition

Showing the law as at 31 December 2022

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• Act • Subsidiary Legislation •

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### ACT

**(Acts 19 of 2015 and 13 of 2020)**

Act 19 of 2015 .. in force 1 June 2021 (S.I. 202/2020)

Amended by Act 13 of 2020 .. in force on 4 December 2020

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**CHAPTER 15.10  
PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT**

AN ACT to regulate and provide for the procedures to be applied in the public procurement of goods, works and services, for the public procurement of projects under a public-private partnership, for the institutions responsible for those matters and related matters. *(Amended by Act 13 of 2020)*

Commencement [1 June 2021]

**PRELIMINARY**

**1. Short title and Commencement**

This Act may be cited as the Public Procurement Act. *(Amended by Act 13 of 2020)*

**2. Interpretation**

(1) In this Act —

“**accounting officer**” means —

- (a) a Permanent Secretary in the procuring entity; or
- (b) a public officer who is the head of a department or who performs the duties of a head of department in the procuring entity;

“**Appropriation Act**” has the same meaning assigned to it under the Public Finance Management Act; *(Inserted by Act 13 of 2020)*

“**asset**” —

- (a) in relation to a public-private partnership, includes an existing asset of a procuring entity or a new asset to be acquired for the purpose of entering into a public-private partnership contract;
- (b) in relation to disposal of assets —
  - (i) includes intellectual and proprietary rights and goodwill and other rights of a procuring entity other than assets regulated by any other written law,
  - (ii) does not include financial assets;

“**Board**” means the Central Public Procurement Board established under section 11;

“**business case**” means a business case developed under section 98;

**"CARICOM"** means the Caribbean Community established by Article 2 of the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy signed at Nassau in the Bahamas on the 5<sup>th</sup> day of July, 2001;

**"Chairperson"** means —

- (a) in relation to the Board, the Chairperson of the Board;
- (b) in relation to the Public Procurement Committee, the Chairperson of the Public Procurement Committee; and
- (c) in relation to the Steering Committee, the Chairperson of the Steering Committee;

**"close relative"** means a spouse, partner, parent, brother, sister or child;

**"coercive practice"** means harming or threatening to harm, directly or indirectly, a person or the property of a person, in order to influence that person's participation in a public procurement procedure or affect the execution of a public procurement contract;

**"collusive practice"** means a scheme or an arrangement between two or more tenderers, with or without the knowledge of a procuring entity, designed to establish prices of tenders at artificial or non-competitive levels;

**"complaint"** means a matter submitted under section 83A; *(Inserted by Act 13 of 2020)*

**"complainant"** means a person who submits a complaint; *(Inserted by Act 13 of 2020)*

**"confidential information"** means any fact that —

- (a) is available to any person under this Act; and
- (b) is not a matter of public knowledge or is not available to the public on request;

**"consultancy services"** means advisory, intellectual or professional services provided by a consultant; *(Inserted by Act 13 of 2020)*

**"contractor"** means a person who has entered into a public procurement contract with a procuring entity;

**"Core Team"** means the Public-Private Partnership Core Team appointed under section 36;

**"corrupt practice"** means the giving, conferring, procuring, or promising or offering to give, confer or procure or attempt to procure, directly or indirectly anything of value to a public officer, to influence his or her action in a public procurement procedure or in the execution of a public procurement contract;

**"design contest"** means —

- (a) a competitive process between designers, architects, artists and such other service providers for creating or developing a sculpture, a layout, a structure, or a plan of a building, a bridge, a park or any such other specific object or facility; or
- (b) the procedure which enables a procuring entity to acquire, mainly in the field of physical planning and development, architectural, engineering or machine- readable designs or plans, after a competition, with or without prizes;

**"Director"** means the public officer appointed by the Public Service Commission to hold the office of Director of Public Procurement within the Ministry responsible for finance;

**"disposal"** means the transfer of assets by any means including sale, lease, franchise or any combination however classified;

**"donor organisation"** means an establishment based outside Saint Lucia which provides, or joins in providing, grants, credits or loans to the procuring entity;

**"framework agreement"** means a contract or other arrangement between one or more procuring entity and one or more supplier which establishes the terms and conditions under which the supplier enters into a contract with the procuring entity in the period during which the contract or arrangement applies;

**"fraudulent practice"** means —

- (a) a misrepresentation or omission of facts in order to influence a public procurement procedure or the execution of a public procurement contract;
- (b) the offering or giving, directly or indirectly, of improper inducements, in order to influence a public procurement procedure or the execution of a public procurement contract, including interference in the ability of competing tenderers to participate in public procurement procedures; or
- (c) any other deceptive conduct related to business or professional activities;

**"goods"** mean objects of every kind and description including commodities, raw materials, manufactured products and equipment, industrial plant, objects in solid, liquid or gaseous form, and services incidental to the supply of the goods such as freight and insurance;

**"intermediate value"** means the monetary amount specified as the intermediate value in Schedule 1;

**"international competitive tendering"** means a procurement method that is available to bidders in and outside Saint Lucia; *(Inserted by Act 13 of 2020)*

**"list of suppliers"** means the list prepared and maintained by a procuring entity under section 57A; *(Inserted by Act 13 of 2020)*

**"lot"** means the division of the goods, services or works into several complete parts for tendering;

**"major value"** means the monetary amount specified as the major value in Schedule 1;

**"member"** means a member of the Board;

**"Minister"** means the Minister responsible for finance;

**"minor value"** means the monetary amount specified as the minor value in Schedule 1;

**"misconduct"**, in relation to a tenderer, includes price fixing, breach of confidentiality, a pattern of under-pricing, an act of corrupt practice and any delinquency relating to the responsibilities of the tenderer;

**"national competitive tendering"** means a procurement method that is only available to bidders in Saint Lucia; *(Inserted by Act 13 of 2020)*

**"OECS"** means the Organization of Eastern Caribbean States established by the Treaty signed on 18 June 1981 at Basseterre, St. Kitts and continued under Article 2 of the Treaty of Basseterre Establishing the Organisation Eastern Caribbean States Economic Union;

**"open competitive tendering"** means the tendering procedure under section 57;

**"person"** includes a corporation or unincorporated body;

**"pooling agreement"** means a contract in which several national or a mixture of national and international procuring bodies perform together procurement

procedures in order to make use of lower prices for commodities when purchased in higher quantities;

**“procuring entity”** —

- (a) means a Ministry, department or other agency of Government;
- (b) includes a Ministry that acts on behalf of a Constituency Council or statutory body;

**“professional service”** includes a legal, accounting, auditing or forensic service;

**“project”** means an activity identified under section 96 for implementation as a public-private partnership;

**“Project Team”** means the Public-Private Partnership Project Team appointed under section 33;

**“public funds”** include —

- (a) all revenue or other finance raised or received for the purpose of the Government; and
- (b) any monies or funds held, whether temporarily or otherwise, by any officer in his or her official capacity, alone or jointly with any other person, whether or not that person is an officer;

**“public-private partnership”** means investment through private sector participation in a project;

**“public-private partnership contract”** means an agreement between a procuring entity and a person in the private sector, made under this Act, in which the person —

- (a) undertakes to perform or undertakes the project;
- (b) assumes substantial financial, technical and operational risks in connection with the performance of the project; and
- (c) receives consideration for carrying out the project by way of —
  - (i) a fee from any revenue fund or budgetary funds of the procuring entity,
  - (ii) user fees collected by the person from users or customers for a service provided by it, or
  - (iii) a combination of the consideration paid under sub-paragraphs (i) and (ii);

**“public-private partnership transaction”** includes the public procurement procedures under sections 100 to 110;

**“public procurement”** means the acquisition by a procuring entity of goods, works or services or any combination of such goods, works or services for or on behalf of a procuring entity, by way of purchase, lease, concession or hire purchase with or without an option to buy and not with a view to commercial resale or use in the production of goods and services for commercial sale;

**“Public Procurement Committee”** means the Public Procurement Committee appointed under section 23;

**“public procurement contract”** —

- (a) means an agreement between a procuring entity and a contractor resulting from public procurement procedures; and
- (b) includes an agreement under a framework agreement or an agreement evidenced by the issue of a purchase order;

**"public procurement requirement"** means the need for public procurement specified under section 40;

**"Public Procurement Unit"** means the division or department in a procuring entity that is responsible for public procurement;

**"regional"** means CARICOM or the OECS;

**"responsive"**, in relation to a tender, means receptive to the basic requirements of a tender regarding ability to perform and complete on time;

**"services"** means any consultancy service or non-consultancy service;

**"specification"** includes any description of —

- (a) the physical or functional characteristic of works, goods or services;
- (b) the nature of works, goods or services; and
- (c) any requirement for inspecting, testing or preparing works, goods or services for delivery;

**"Steering Committee"** means the Public-Private Partnership Steering Committee established under section 29;

**"supplier"** means a person who provides or could provide goods, services or works to a procuring entity;

**"tender"** means an offer submitted under section 67;

**"tenderer"** means a person who has submitted a tender;

**"Tender Evaluation Committee"** means the Tender Evaluation Committee appointed under section 26;

**"tendering document"** —

- (a) means any instrument issued by a procuring entity on the basis of which tenderers prepare tenders;
- (b) includes any instrument which contains instructions to tenderers, specifications, maps, designs, terms of reference, work schedules, evaluation criteria, bills of quantities, conditions of public procurement contract or other similar items;

**"tender security"** means the commitment instrument required to ensure that a tender remains valid during the period stated in the tendering document;

**"Vice Chairperson"** means either of the 2 Vice-Chairpersons of the Board;

**"works"** mean any job associated with the construction, reconstruction, demolition, repair or renovation of a building, 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 similar services.

*(Amended by Act 13 of 2020)*

(2) A reference in this Act to "publish" includes publishing by electronic means.  
*(Inserted by Act 13 of 2020)*

### **3. Purpose**

The purposes of this Act are —

- (a) to simplify, clarify and modernize public procurement;
- (b) to make public procurement procedures transparent;

- (c) to require competition in the public procurement proportionate to the circumstance, value, complexity, nature or size of the procurement;
- (d) to foster and encourage broad participation in public procurement procedures;
- (e) to provide for increased public confidence in the public procurement procedures followed by a procuring entity;
- (f) to ensure fair and equitable treatment of all persons participating in public procurement;
- (g) to provide increased economy in public procurement procedures and ensure that the best value is obtained for public funds expended;
- (h) to provide safeguards for the maintenance of the quality, integrity and transparency of public procurement.

#### **4. Application**

(1) Subject to subsection (2), this Act applies to —

- (a) financial service contracts concluded at the same time as, before or after a contract of acquisition or rental of immovable property, in whatever form;
- (b) any public procurement effected by a procuring entity.

(2) This Act does not apply to public procurement undertaken —

- (a) to protect national security or defence, where —
  - (i) the Prime Minister so determines, and
  - (ii) the public procurement is undertaken by the most competitive method of public procurement available in the circumstances;
- (b) for the acquisition or rental, by whatever financial means, of immovable property or concerning rights in such property;
- (c) for the acquisition, development, production or co-production of programme material or commercials intended for broadcasting by broadcasters or publication in the media, and contracts for broadcasting time;
- (d) for arbitration and conciliation services;
- (e) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, including transactions to raise money or capital;
- (f) for research and development services on a non-discriminatory basis;
- (g) for any public procurement made under a co-operative procurement agreement among OECS Member States;
- (h) subject to section 54, for any public procurement funded by a donor organisation on the condition or understanding that the procuring entity uses or causes to be used the public procurement procedures —
  - (i) of the donor organisation, or
  - (ii) approved, or agreed to, by the donor organisation; and
- (i) for the supply of electricity, telecommunications, water or other similar services by a contractor which is regulated by another enactment.

(3) Nothing in this Act or the Regulations affects the Civil Law of obligations and contracts as contain in the Civil Code of Saint Lucia; Cap.

**PART 1**  
**ADMINISTRATION**

**Division 1**

***Functions of the Minister, Director, Procuring Entity, Procurement Unit and  
Accounting Officer***

*(Amended by Act 13 of 2020)*

**4A. Functions of the Minister**

The Minister is responsible for —

- (a) formulating and issuing directives and policies relating to public procurement in Saint Lucia;
- (b) presenting an annual report to Parliament regarding the overall functioning of public procurement;
- (c) appointing the members of the Board under section 14(2);
- (d) appointing the members of the Steering Committee under section 29.

*(Inserted by Act 13 of 2020)*

**4B. Powers of the Minister**

The Minister may —

- (a) issue directives, procedures and guidelines for the implementation of this Act;
- (b) exercise a power that the Minister is authorized to perform under this Act to ensure the effective execution of the public procurement policy of the Government.

*(Inserted by Act 13 of 2020)*

**4C. Delegation of powers**

(1) The Minister may, subject to any terms and conditions that the Minister specifies, delegate, in writing, to the Permanent Secretary in the Ministry of Finance any power that the Minister is authorized to perform under this Act.

(2) The Minister is not authorized to delegate a power to make regulations or a power to delegate under subsection (1).

*(Inserted by Act 13 of 2020)*

**5. Functions of Director**

(1) The functions of the Director are —

- (a) subject to any directives given by the Minister, to issue instructions under which goods, services or works may be procured; *(Substituted by Act 13 of 2020)*
- (b) to formulate policies relating to public procurement, including directives, procedures, instructions, technical notes and manuals, for the implementation of this Act;
- (c) to issue standard forms of public procurement contracts, tendering documents, pre-qualification documents, requests for proposals and other similar documents for mandatory use by every procuring entity implementing public procurement procedures;
- (d) to collect from the Board and procuring entities, information on public procurement procedures and monitor compliance with this Act;

- (e) to organise and maintain systems for the management and public dissemination of public procurement data, statistics and information;
- (f) to act as a focal point to guide the Board and procuring entities with a view to ensuring consistency in the application of this Act and any regulations made under this Act;
- (g) to recommend, and facilitate the implementation of, measures to improve the functioning of public procurement including the introduction of information and communications technology and the dissemination of publications through the setting up of websites dedicated to public procurement for —
  - (i) disseminating information from procuring entities concerning public procurement opportunities, and relevant to the standard public procurement specifications for goods, works or services,
  - (ii) providing tendering documents, requests for proposals and invitations,
  - (iii) assisting in the introduction of information technology in public procurement,
  - (iv) subject to this Act, such other purpose related to public procurement as the Director considers necessary;
- (h) to solicit the views of the business community and civil society on the effectiveness of public procurement;
- (i) to present an annual report to the Minister to be tabled in Parliament regarding the overall functioning of public procurement;
- (j) to communicate and cooperate with international institutions and other foreign entities on matters of public procurement;
- (k) to advise on and monitor foreign technical assistance in the field of public procurement;
- (l) to propose amendments to the legislative and regulatory framework and implement Regulations;
- (m) to advise the Minister regarding delegation of financial authority to public officers enabling them to approve contract awards and changes to contracts of a financial nature and the annual review of such delegation; *(Amended by Act 13 of 2020)*
- (n) to advise the Minister on the opportunity for and management of any pooling agreement involving other OECS Member States; and *(Amended by Act 13 of 2020)*
- (o) to publish a notice containing the public procurement plan in respect of each procuring entity in accordance with section 39(6) for each financial year. *(Inserted by Act 13 of 2020)*

*(Amended by Act 13 of 2020)*

(2) Public procurement may be undertaken by electronic means.

(3) Where public procurement is undertaken by electronic means, the Director shall ensure that —

- (a) a record of the content of every communication is preserved;
- (b) access to the records of the tenderer in the public procurement procedure is preserved;
- (c) an adequate level of security and confidentiality is provided having regard to the provisions of this Act; and
- (d) the persons concerned comply with the other requirements of this Act.

## **6. Powers of Director**

(1) In the discharge of his or her functions, the Director may —

- (a) request for such information, records and other documents as he or she may require from the Board or any procuring entity;
- (b) examine such records or other documents;
- (c) carry out an audit; and
- (d) transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent in the event of delay or in other prescribed instances.

(2) Any person to whom a request is made under subsection (1)(a) and who refuses to comply with the request, or wilfully provides false or misleading information, commits an offence and is liable on summary conviction to a fine not exceeding \$5,000.

## **7. Functions of procuring entity**

A procuring entity shall ensure that this Act, Regulations made under this Act and any directions of the Director, accounting officer, Public Procurement Committee or Board are complied with in respect to each public procurement procedure.

## **8. *(Repealed by Act 13 of 2020)***

## **9. Functions of Public Procurement Unit**

(1) The Public Procurement Unit is responsible for managing public procurement procedures of a procuring entity under this Act.

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

- (a) to manage the public procurement of the procuring entity, except adjudication and the award of a public procurement contract; *(Substituted by Act 13 of 2020)*
- (b) to support the functioning of the Public Procurement Committee;
- (c) to implement the decisions of the Public Procurement Committee;
- (d) to plan the public procurement of the procuring entity; *(Substituted by Act 13 of 2020)*
- (e) to prepare specifications or terms of reference, tendering documents, advertisements and public procurement contracts;
- (f) to issue notifications and orders to tenderers on behalf of the Public Procurement Committee;
- (g) to maintain and archive records of public procurement and a list or register of all public procurement contracts awarded; *(Substituted by Act 13 of 2020)*
- (h) to prepare reports for the Public Procurement Committee on the implementation of the annual public procurement plan;
- (i) to manage clarifications to a tenderer at the tendering stage and to solicit clarifications from a tenderer at the evaluation stage; and *(Substituted by Act 13 of 2020)*
- (j) to monitor the management of public procurement contracts assigned to the procuring entity and ensure a report on outcomes of the public procurement contract is provided.

## **10. Functions of accounting officer**

(1) Notwithstanding the Finance (Administration) Act, an accounting officer is responsible and accountable for ensuring that all the public procurement procedures used by the procuring entity are conducted in accordance with this Act.

(2) Without prejudice to the generality of subsection (1), the functions of an accounting officer include —

- (a) to recommend the appointment of a Public Procurement Committee;
- (b) to certify the availability of funds, prior to the commencement of any public procurement procedure or designate an officer to whom this function is delegated;
- (c) to submit public procurement contract documents including requests for approval of tendering documents and communicating award decisions;
- (d) to award public procurement contracts on completion of the public procurement procedure in accordance with the provisions of this Act;
- (e) to serve as the public procurement contract administrator for the procuring entity;
- (f) to submit such information, data and reports as are required by the Public Procurement Committee, Board or the Director for the purposes of this Act.

(3) In exercising his or her functions as the public procurement contract administrator under subsection (2)(e), the accounting officer shall —

- (a) administer the public procurement contract under this Act and the procedures issued by the Director;
- (b) be responsible for the administration of public procurements of a minor value and maintenance of proper documentation and records, including —
  - (i) keeping an accurate record of all dealings with the contractor including minutes of every meeting with the contractor and the details of any matter discussed or decision made,
  - (ii) not later than the 31<sup>st</sup> day of July in each year, preparing an annual report respecting his or her activities for the immediately preceding financial year,
  - (iii) submitting a copy of the annual report to the Director,
  - (iv) safeguarding the interests of Saint Lucia and the procuring entity under every public procurement contract, and
  - (v) placing the record referred to in subparagraph (i) and any change to the public procurement contract price approved by the procuring entity in a public procurement document file.

(4) In the exercise of his or her functions, the accounting officer may seek clarification from the Tender Evaluation Committee, Public Procurement Unit and Public Procurement Committee and may request any person to furnish any information, record or documents relating to any public procurement procedure.

(5) The accounting officer may request any professional or technical assistance from any appropriate body or person if the procuring entity does not have the required expertise.

**Division 2**  
**Central Public Procurement Board**

**11. Establishment of Central Public Procurement Board**

There is established a Central Public Procurement Board.

**12. Functions of the Board**

(1) The Board shall, in respect of a public procurement of a major value —

- (a) establish appropriate internal procedures for the operations of the Board and ensure compliance with them;
- (b) *(deleted by Act 13 of 2020)*
- (c) receive and publicly open tenders;
- (d) select persons from a list of qualified evaluators maintained by it to act as members of a Tender Evaluation Committee and oversee the examination and evaluation of tenders; and
- (e) review the recommendations of a Tender Evaluation Committee.  
*(Substituted by Act 13 of 2020)*

(1A) Where the Board accepts the recommendations of the Tender Evaluation Committee, the Board may approve the award of the public procurement contract.  
*(Inserted by Act 13 of 2020)*

(1B) The Board —

- (a) shall examine the grounds for the dissenting views;
- (b) may require the Tender Evaluation Committee to review its evaluation on specific grounds,  
  
where the Board is in receipt of the recommendations of the Tender Evaluation Committee with dissenting views that has a significant effect on the result arrived at by the Board.

*(Inserted by Act 13 of 2020)*

(1C) The Board may, if dissenting views persist —

- (a) decide on the issue and approve the award of the public procurement contract;
- (b) cancel the tendering process; or
- (c) appoint another Tender Evaluation Committee to make a new evaluation.

*(Inserted by Act 13 of 2020)*

(2) The Board shall strive to achieve the highest standards of transparency and equity in the execution of its functions, taking into account —

- (a) the evaluation criteria and methodology disclosed in the tendering documents;
- (b) the qualification criteria and methodology disclosed in the tendering documents;
- (c) equality of opportunity to all tenderers;
- (d) fairness of treatment to all parties;
- (e) the need to obtain the best value for money in terms of price, quality and delivery, having regard to set specifications; and
- (f) transparency of process and decisions.

(3) The Board shall exercise such functions, as may be assigned to it under any other enactment.

(2) The Board shall strive to achieve the highest standards of transparency and equity in the execution of its functions, taking into account —

- (a) the evaluation criteria and methodology disclosed in the tendering documents;
- (b) the qualification criteria and methodology disclosed in the tendering documents;
- (c) equality of opportunity to all tenderers;
- (d) fairness of treatment to all parties;
- (e) the need to obtain the best value for money in terms of price, quality and delivery, having regard to set specifications; and
- (f) transparency of process and decisions.

(3) The Board shall exercise such functions, as may be assigned to it under any other enactment.

### **13. Powers of the Board**

(1) In the discharge of its functions under section 12, the Board may —

- (a) carry out any study relevant to the determination of the award of a public procurement contract for public procurement of a major value;
- (b) request any professional or technical assistance from any appropriate person in Saint Lucia or elsewhere; or
- (c) do all such acts and things as it may consider incidental or conducive to the exercise of its functions under section 12.

(2) Where —

- (a) any variation in a public procurement contract price subsequent to the conclusion of a public procurement contract entered into by a procuring entity causes the total public procurement contract amount to exceed the major value by more than 20%; or
- (b) the lowest tender submitted in response to an invitation made by a procuring entity exceeds the major value;

the matter together with all the tendering documents and the public procurement contract, if any, shall be referred to the Board for approval.

(3) Where it comes to the knowledge of the Board that a public procurement contract has been awarded or is about to be awarded in breach of this Act, the Board shall immediately report the matter to the Director, recommending such action as it considers appropriate.

(4) The Director may, where he or she considers appropriate, refer any matter reported to him or her under subsection (3) to the Public Service Commission or the police, as the case may be, for enquiry.

### **14. Composition of the Board**

(1) Subject to subsections (2) and (3), the Board shall consist of —

- (a) a Chairperson who is the Permanent Secretary in the Ministry of Finance or a person nominated by the Permanent Secretary; (*Substituted by Act 13 of 2020*)
- (b) two Vice-Chairpersons; and

(c) three public officers. (*Substituted by Act 13 of 2020*)

(2) The Board shall be appointed by the Minister on such terms and conditions as the Minister determines.

(3) A person appointed under subsection (1) must have wide experience in one or more of the following fields —

- (a) legal;
- (b) administration;
- (c) business;
- (d) public procurement;
- (e) economics;
- (f) finance;
- (g) engineering;
- (h) science or technology.

(4) The Board may co-opt other persons capable of assisting it with expert advice but no such person has the right to vote on any matter considered by the Board.

(5) The Minister shall cause to be published in the *Gazette* the names of all members of the Board as first appointed and every change in the membership of the Board and the revocation of any such appointment.

## **15. Duration of appointment**

Subject to section 16, a member holds office for a period of 3 years and is eligible for re-appointment.

## **16. Revocation**

The Minister may revoke the appointment of a member who has been guilty of —

- (a) any misconduct, default or breach of trust in the discharge of his or her duties;
- (b) an offence of such nature as renders it desirable that his or her appointment should be revoked.

## **17. Secretary to the Board**

(1) The Public Service Commission shall appoint a Secretary to the Board.

(2) The Secretary shall —

- (a) be responsible for the execution of the policy of the Board and for the control and management of the day-to-day business of the Board;
- (b) attend every meeting of the Board and may take part in its deliberations but does not have the right to vote.

## **18. Staff of the Board**

The Board shall, in the conduct of its business, be assisted by such public officers as may be designated by the Public Service Commission or by such persons as may be appointed by the Board under contract terms and conditions.

## **19. Meetings of the Board**

(1) The Board shall meet as often as is necessary and at such time and place as the Chairperson considers necessary.

(2) Everything authorised or required to be done by the Board shall be decided by simple majority of the members present and voting.

(3) In the absence of the Chairperson at any meeting, the other members shall designate one of the 2 Vice-Chairpersons to preside over the meeting.

(4) At any meeting of the Board —

- (a) except where the Board meets for the purpose of opening bids, no person other than a member or a person referred to in section 14(4) shall be present;
- (b) the Chairperson or one of the 2 Vice-Chairpersons and 2 other members constitute a quorum; and
- (c) each member shall have one vote on the matter in question and, in the event of an equality of votes, the person chairing the meeting has a casting vote.

(5) Where a member does not, for good cause, attend a meeting of the Board, the Secretary shall immediately communicate to the member the decision taken at the meeting, and the member may, within 24 hours, request the Chairperson to reconvene the Board so as to reconsider the decision.

(6) Subject to this section, the Board shall conduct its proceedings in such manner as it thinks fit.

## **20. Oath of office**

A member shall, on assumption of duty, take the oath or affirmation specified in Schedule 2.

## **21. Disclosure of interest**

(1) A member shall, as soon as practicable, disclose to the Chairperson any matter in which he or she has, directly or indirectly, personally or by his or her close relative, business associate or company, any pecuniary or business interest.

(2) Where a member discloses an interest under subsection (1), the Board shall determine whether or not the member's interest in a matter is material and where the Board determines that the member's interest is material, the member shall not take part in and shall be absent from any decision relating to the matter.

(3) A disclosure and the absence of a member from the decision relating to the matter in accordance with subsection (2) shall be noted in the minutes of the meeting by the Secretary.

(4) A member shall not —

- (a) fail to comply with subsection (1);
- (b) vote in respect of a matter before the Board in which he or she is materially interested, whether directly or indirectly; or
- (c) seek to influence the vote of any other member in relation to a matter before the Board in which he or she is materially interested, whether directly or indirectly.

(5) A member who contravenes subsection (4) commits an offence and is liable on summary conviction to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.

## **22. Funds**

The Board shall derive its funds from the Consolidated Fund.

### **Division 3 Public Procurement Committee**

## **23. Appointment of Public Procurement Committee**

Subject to section 24, the Director shall, on the recommendation of the accounting officer, appoint a Public Procurement Committee.

## **24. Composition of Public Procurement Committee**

(1) Subject to subsections (2) and (3), the Public Procurement Committee comprises —

- (a) a chairperson;
- (b) a representative appointed by the Permanent Secretary in the Department of Finance;
- (c) three other persons.

*(Substituted by Act 13 of 2020)*

(2) A person appointed under this section must have —

- (a) technical and professional competence;
- (b) public procurement skills and knowledge required for the performance of the functions of the Public Procurement Committee; and
- (c) proven integrity and sound decision-making abilities.

(3) The Director shall, in appointing the members of a Public Procurement Committee, seek to establish a balance of skills and experience to ensure that the Public Procurement Committee —

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

## **25. Functions of the Public Procurement Committee**

(1) The Public Procurement Committee shall ensure that all public procurement by a procuring entity is conducted in accordance with this Act.

(2) The functions of the Public Procurement Committee, in respect of public procurement of an intermediate value, are —

- (a) to approve public procurement procedures, tendering documents, public procurement contracts and conditions and addenda to tendering documents;
- (b) *(Deleted by Act 13 of 2020)*
- (c) to deliberate on the findings of Tender Evaluation Committees and advise on award of public procurement contracts or otherwise; and
- (d) to review and approve variations, addenda or amendments to on-going public procurement contracts in accordance with best public procurement practices and in compliance with this Act.

(3) All matters handled at each meeting of the Public Procurement Committee shall be recorded and minutes of meetings circulated prior to the next meeting.

(4) The accounting officer shall maintain a record of the minutes under subsection (3).

(5) In the course of examination of tenders, the Public Procurement Committee may invite a member of the Tender Evaluation Committee to provide clarifications on the contents of the Tender Evaluation Report and the Public Procurement Committee may request the Tender Evaluation Committee to review its recommendations on specific grounds backed by the contents of the tendering documents, guidelines issued by the Director and in accordance with the provisions under this Act.

(6) Where the Public Procurement Committee is in receipt of a Tender Evaluation Report with dissenting views that has a significant effect on the result arrived at by the Public Procurement Committee, the Public Procurement Committee shall examine the grounds for the dissenting views.

(7) The Public Procurement Committee may in the case mentioned in subsection (6) request for a review on specific grounds and where the dissenting views persist, it may decide on the issue and approve the award of the procurement contract, cancel the tendering process or as a last resort appoint another Tender Evaluation Committee to look into the evaluation exercise afresh.

(8) The decision made and the reasons for it shall be recorded and signed by the Chairperson.

#### **Division 4** ***Tender Evaluation Committee***

### **26. Appointment of Tender Evaluation Committee**

Where the examination and evaluation of a tender is required under this Act, a Tender Evaluation Committee may be appointed by —

- (a) in the case of a public procurement of a minor value, the accounting officer;
- (b) in the case of a public procurement of an intermediate value, the Public Procurement Committee; or
- (c) in the case of a public procurement of a major value, the Board.

### **27. Composition of Tender Evaluation Committee**

(1) Subject to this section, the Tender Evaluation Committee comprises a minimum of 3 persons.

(2) A person on a Tender Evaluation Committee must possess skills, knowledge and experience relevant to a public procurement requirement including —

- (a) technical skills;
- (b) public procurement and contracting skills;
- (c) financial management or financial analysis skills; or *(Amended by Act 13 of 2020)*
- (d) legal expertise.

(3) The number and level of expertise of persons on a Tender Evaluation Committee must reflect the value and complexity of the public procurement.

(4) Where necessary, the accounting officer, Public Procurement Committee or Board may, following a request from a Tender Evaluation Committee, appoint an adviser or a technical sub-committee to assist it.

(5) A member of the Board or Public Procurement Committee shall not be a member of a Tender Evaluation Committee.

#### **27A. Evaluation of works contract by consultant**

(1) A procuring entity may engage a consultant with respect to an aspect of a works contract including its design, evaluation or supervision.

(2) Where a consultant is engaged under subsection (1) to evaluate a works contract, the accounting officer, Public Procurement Committee or Board may require the consultant to present the required evaluation in the form of recommendations to the —

- (a) Tenders Evaluation Committee;
- (b) accounting officer;
- (c) Public Procurement Committee; or
- (d) Board.

*(Inserted by Act 13 of 2020)*

#### **28. Functions of Tender Evaluation Committee**

A Tender Evaluation Committee is responsible for the evaluation of tenders, proposals or quotations, and the preparation of Tender Evaluation Reports.

### **Division 5** ***Administration for Public-Private Partnerships***

#### **29. Appointment of Public-Private Partnership Steering Committee**

The Minister shall appoint a Public-Private Partnership Steering Committee to carry out the functions under section 31.

#### **30. Composition of the Steering Committee**

(1) The Public-Private Partnership Steering Committee comprises —

- (a) the Permanent Secretary of the Ministry responsible for finance, who is the Chairperson;
- (b) the Permanent Secretary of the Ministry within which the procuring entity exists;
- (c) a representative of the Attorney General's Chambers;
- (d) a representative from the private sector appointed by the Minister responsible for finance.

(2) The Public-Private Partnership Steering Committee may co-opt any other person, for the purpose of assisting or advising it, but persons co-opted do not have the right to vote.

#### **31. Functions of the Steering Committee**

(1) The Steering Committee shall provide direction to the public-private partnership programme, and oversee the development and implementation of public-private partnership projects.

(2) Without prejudice to the generality of subsection (1), the functions of the Steering Committee are —

- (a) to guide the development of a public-private partnership policy, including the adoption as appropriate of detailed guidelines and regulations or standard forms of key documents for use by each procuring entity that implements public-private partnerships;
- (b) to identify projects to be implemented as a public-private partnership based on an initial screening by the Core Team;
- (c) to ensure that projects are developed and implemented within the agreed project timeline;
- (d) to guide public-private partnership development and implementation, including by taking project scope and structuring decisions to inform the work of the Project Team;
- (e) to evaluate and select tenderers for projects, based on evaluation reports prepared by the Project Team against pre-established clear, objective and quantifiable criteria;
- (f) to guide Contract Managers as required to manage change during the period of the public-private partnership contract;
- (g) to carry out, from time to time, an evaluation of projects or the public-private partnership to assess whether the public-private partnership has delivered the anticipated value for money.

(3) Notwithstanding subsection (2)(b), Cabinet may identify projects to be implemented as a public-private partnership.

### **32. Meetings of the Steering Committee**

(1) The Steering Committee shall meet at such times as may be necessary or expedient for the transaction of business, and such meetings shall be held at such places and times and on such days as the Chairperson determines.

(2) The Chairperson shall preside at all meetings of the Steering Committee and may nominate another Steering Committee member to preside at the meeting in his or her absence.

(3) Three members of the Steering Committee is a quorum.

(4) Subject to the provisions of this section, the Steering Committee has power to regulate its own proceedings.

### **33. Appointment of Public-Private Partnership Project Team**

The Steering Committee may appoint a Public-Private Partnership Project Team for each project selected for development as a public-private partnership.

### **34. Composition of the Project Team**

(1) Each Project Team must include representatives of the Core Team and other relevant Government entities.

(2) Each Project Team must be led by a representative of the procuring entity.

### **35. Functions of the Project Team**

The functions of each Project Team are —

- (a) to develop a business case for the public-private partnership project; and
- (b) to implement the public-private partnership transaction, with the support of experienced legal, technical and transaction advisors.

### **36. Appointment of Public-Private Partnership Core Team**

(1) The Director shall appoint a Public-Private Partnership Core Team.

(2) The Public-Private Partnership Core Team consists of persons from the departments within the Ministry responsible for finance.

### **37. Functions of the Core Team**

The functions of the Core Team are —

- (a) to act as Secretariat to the Steering Committee in managing the public-private partnership;
- (b) to develop and disseminate the public-private partnership policy including advising on the development of the public-private partnership policy and regulation;
- (c) to develop guidance material and templates for use by the Steering Committee and build understanding in public and private sectors of the public-private partnership;
- (d) to regulate the public-private partnership by ensuring that all projects are developed in accordance with the public-private partnership policy, principles, and processes including ensuring —
  - (i) that projects are properly reviewed against required criteria at each stage,
  - (ii) that review processes are completed,
  - (iii) that Cabinet submissions include all the information required for a well-informed decision, and
  - (iv) that projects are properly managed;
- (e) to contribute to the development of projects by forming part of or leading the Project Team responsible for developing the business case for each project and implementing the public-private partnership transaction;
- (f) to maintain an up-to-date record of projects in Saint Lucia;
- (g) to monitor the implementation of projects, including acting on emerging risks and liaising as necessary with public-private partnership contract managers;
- (h) to evaluate, from time to time, the public-private partnership by reviewing and systematically analyzing the success of projects to inform the development of the public-private partnership including supporting the Steering Committee in carrying out evaluations;
- (i) to provide advice on the management of public-private partnerships in accordance with international standards;
- (j) to coordinate the review and approval process in accordance with public investment management approval processes.

### **38. Conflict of interest**

(1) A member of the Steering Committee, Project Team or Core Team shall, as soon as practicable, disclose any matter in which he or she has, directly or indirectly, personally or by his or her close relative, business associate or company, any pecuniary or business interest.

(2) Where a member of the Steering Committee, Project Team or Core Team discloses an interest under subsection (1), the Steering Committee, Project Team or Core Team shall determine whether or not the member's interest in a matter is material and where the Steering Committee, Project Team or Core Team determines

that the member's interest is material, the member shall not take part in and shall be absent from any decision relating to the matter.

(3) A disclosure and the absence of a member from the decision relating to the matter in accordance with subsection (2) shall be recorded by the Steering Committee, Project Team or Core Team.

(4) A member shall not —

- (a) fail to comply with subsection (1);
- (b) vote in respect of a matter before the Steering Committee, Project Team or Core Team, in which he or she is materially interested, whether directly or indirectly; or
- (c) seek to influence the vote of any other member in relation to a matter before the Steering Committee, Project Team or Core Team, in which he or she is materially interested, whether directly or indirectly.

(5) A member who contravenes subsection (4) commits an offence and is liable on summary conviction to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.

## **PART 2 PUBLIC PROCUREMENT**

### **Division 1**

#### ***Public procurement plan, requirement, specification and description***

#### **39. Public procurement plan**

(1) A procuring entity shall prepare a public procurement plan for each financial year and shall revise the plan as appropriate during the course of the year.

(2) A public procurement plan shall be integrated with applicable budget processes based on indicative or approved budgets, as the case may be.

(3) A public procurement plan for each procuring entity shall include —

- (a) a list of the goods, works and services required;
- (b) a schedule of the delivery, implementation or completion dates for all goods, works and services required;
- (c) an indication of which items can be aggregated for procurement as a single package or through any applicable arrangements for bulk purchases in accordance with this Act;
- (d) an estimate of the value of each package of goods, works or services required and details of the budget available and sources of funding;
- (e) an indication of the anticipated public procurement procedure for each procurement requirement, including any need for pre-qualification, and the anticipated time for the procurement procedure, taking into account the applicable approval requirements; and
- (f) an indication of how the procuring entity is expected to manage the public procurement.

(4) A procuring entity shall submit a copy of the public procurement plan, and each update of it to the Director.

(5) A procuring entity shall plan its procurement in a rational manner and in particular shall —

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

(6) Within 3 months of the passage of the Appropriation Act, the Director shall publish a notice on the Government's official website, the *Gazette* and any regional platform that contains information with respect to the public procurement plan of each procuring entity for that financial year. *(Substituted by Act 13 of 2020)*

(7) A notice under subsection (6) must include —

- (a) the subject matter of planned public procurements and the desired volumes of the subject matter;
- (b) the proposed date or range of dates for the publication of an invitation to tender.

*(Substituted by Act 13 of 2020)*

(8) Each procuring entity shall employ best endeavours to conduct public procurement procedures in accordance with the public procurement plan published under section 5(1)(o). *(Substituted by Act 13 of 2020)*

#### **40. Public procurement requirement**

(1) A public procurement requirement must be documented before the commencement of any public procurement procedure, recording at least the goods, works or services required and their estimated value.

(2) A statement of public procurement requirements must —

- (a) provide a correct and complete description of the goods, works or services required;
- (b) be included in a tendering document to inform tenderers of the requirements of the procuring entity;
- (c) be used in evaluation to determine whether a tenderer meets the requirements of the procuring entity as specified in the tendering document, and where appropriate, to determine the quality of a tender;
- (d) be included in the public procurement contract to define the goods, works or services being purchased; and
- (e) to the extent possible be based on the objective, technical and quality characteristics of the goods, works or services to be procured.

(3) A statement of public procurement requirements included in a tendering document must be prepared with a view to —

- (a) creating fair and open competition; and
- (b) ensuring that the goods, works or services are fit for the purpose for which they are being purchased and of appropriate quality.

#### **41. Specifications and descriptions of public procurement**

(1) The procuring entity shall prepare clear and specific requirements relating to the goods, works or services being procured which —

- (a) give a correct and complete description of the goods, services or works required to be procured;
- (b) accurately describe the actual needs intended to be satisfied by public procurement;
- (c) avoid descriptions entailing features in excess of actual needs; and
- (d) allow for fair and open competition among persons who may wish to participate in the public procurement procedure.

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

(3) The technical requirements must, where appropriate —

- (a) relate to performance rather than to design and descriptive characteristics; and
- (b) be based on national or international standards.

(4) For the purpose of avoiding unnecessary obstacles to participation by tenderers in any public procurement procedure, a procuring entity shall ensure that the specifications set out in respect of goods, services and works to be procured under this Act —

- (a) subject to subsection (5), do not include references to brand names, model numbers, catalogue numbers or any other similar classifications unless there is no other practical way of describing the public procurement requirements;
- (b) do not favour any single contractor or supplier;
- (c) do not, in relation to a single contractor or supplier, put other contractors or suppliers at a disadvantage;
- (d) allow the highest possible degree of competition; and
- (e) are generic.

(5) Where a procuring entity has reason to believe that the use of, or a reference to, a brand name, model number or catalogue number is essential to complete an otherwise incomplete specification, the procuring entity shall qualify such use or reference with the words "or equivalent".

#### **42. Initiation of public procurement procedure**

A public procurement procedure shall only be initiated where —

- (a) the availability of funding for the public procurement requirement has been confirmed; and
- (b) approval to proceed has been given by —
  - (i) in the case of a public procurement of a minor value, the accounting officer,
  - (ii) in the case of a public procurement of an intermediate value, the Public Procurement Committee, or
  - (iii) in the case of a public procurement of a major value, the Board.

**Division 2**  
**Public Procurement Procedures for Consultancy Services**  
*(Substituted by Act 13 of 2020)*

**43. Notice of expression of interest**

(1) A procuring entity may give notice seeking an expression of interest in submitting a proposal for consultancy services. *(Amended by Act 13 of 2020)*

(2) The notice under subsection (1) must —

- (a) contain the name and address of the procuring entity and a brief description of the procurement requirements; and
- (b) be published in the *Gazette* and one newspaper of wide circulation. *(Amended by Act 13 of 2020)*

**44. Short listing**

Where a procuring entity receives expression of interest under section 43, the procuring entity shall prepare a short list of persons to participate in the selection process on the basis of the knowledge and information of the procuring entity.

**45. Request for proposals**

(1) Where a short list is prepared under section 44, the procuring entity may request proposals from persons on such short list.

(2) A request for proposals must include —

- (a) the name and address of the procuring entity;
- (b) the language in which proposals are to be prepared;
- (c) the manner, place and deadline for the submission of proposals;
- (d) a statement to the effect that the procuring entity reserves the right to reject any proposal;
- (e) the criteria and procedures related to the evaluation of the qualifications of persons;
- (f) the requirements of documentary evidence or other information that must be submitted by a tenderer to demonstrate the qualifications of the tenderer;
- (g) the nature and characteristics of the procurement requirements including the location where and time when the procurement requirements are to be provided;
- (h) whether the procuring entity is seeking proposals on various possible ways of meeting its needs;
- (i) the currency —
  - (i) in which the proposal price is to be expressed,
  - (ii) that will be used to evaluate and compare proposals and the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;
- (j) the manner in which the proposal price is to be expressed, including a statement of whether the price covers elements apart from the cost, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

- (k) the procedure selected to ascertain the successful proposal;
- (l) the criteria to be used to determine the successful proposal and the relative weight of the criteria;
- (m) a statement of alternatives to the characteristics of the procurement requirement, contractual terms and conditions or other requirements set out in the request for proposals, if permitted, and a description of the manner in which the alternative proposals are to be evaluated and compared;
- (n) the name, functional title and address of the officers or employees of the procuring entity who are authorised to communicate directly with and to receive communications directly from persons in connection with the public procurement procedures, without intervention of an intermediary;
- (o) the means by which persons may seek clarification on the request for proposals and a statement whether the procuring entity intends to convene a meeting of persons; and
- (p) the terms and conditions of the public procurement contract as known to the procuring entity and the public procurement contract form to be signed by the parties.

(3) A person may request clarification of the request for proposals from the procuring entity.

(4) On receipt of a request under subsection (3), a procuring entity shall —

- (a) respond to the request within 7 days of the request being made if the request is received by the procuring entity within 14 days prior to the deadline for the submission of proposals; and
- (b) where the request is made later than 14 days prior to the deadline for the submission of proposals, respond promptly and early enough to enable the person to make a timely submission of his or her proposal and shall, without identifying the source of the request, communicate the clarification to the other persons to whom the procuring entity has provided the request for proposals.

(5) A procuring entity may, whether on its initiative or as a result of a request for clarification by a person, modify the request for proposals by issuing an addendum prior to the deadline for the submission of proposals.

(6) An addendum referred to under subsection (5) must be communicated not later than 7 days before the deadline for the submission of proposals to the short listed persons to whom the procuring entity has provided the request for proposals and is binding on such persons.

(7) Where the procuring entity convenes a meeting, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the request for proposals and its responses to the requests, without identifying the sources of the request.

(8) The minutes under subsection (7) must be provided immediately before the deadline for the submission of proposals to the persons participating in the selection proceedings to enable such persons to take the minutes into account in preparing proposals.

#### **46. Submission of proposal**

(1) Where the procuring entity requires a technical and financial proposal, the technical and financial proposal shall be submitted in separate sealed envelopes.

(2) After the closing time for the submission of proposals —

- (a) in the case of a public procurement of a minor value, the accounting officer;

- (b) in the case a public procurement of an intermediate value, the Public Procurement Committee; or
- (c) in the case of a public procurement of a major value, the Board,

shall open the technical proposals.

- (3) The financial proposal must remain sealed until they are opened publicly.

#### **47. Evaluation of technical proposal**

The accounting officer, Public Procurement Committee or Board shall evaluate each technical proposal on the basis of criteria including —

- (a) the experience of the person;
- (b) the quality of the methodology proposed;
- (c) the qualifications of the key staff proposed;
- (d) the transfer of knowledge, if required in the request for proposals; and
- (e) in the case of international competitive tendering, the extent of participation by nationals among key staff in the performance of the public procurement. *(Amended by Act 13 of 2020)*

#### **48. Consideration and evaluation of financial proposal**

(1) The financial proposals of tenderers who have secured the minimum pass mark in the technical evaluation shall be considered and evaluated by the accounting officer, Public Procurement Committee or Board after a public announcement of the results of the technical evaluation.

(2) Where the successful proposal is selected under section 49(1)(a), (c) or (d), the financial proposals of the tenderers whose technical proposals attained the required minimum pass mark shall be read out to the tenderers who wish to attend.

(3) Where the successful proposal is selected under section 49(1)(b), the financial proposal of the tenderer whose technical proposal achieved the highest ranking is evaluated.

#### **49. Selection of proposal**

(1) The accounting officer, Public Procurement Committee or Board shall select the successful proposal on the basis of —

- (a) the technical quality of the proposal, the experience of the tenderer, the expertise of the key staff of the tenderer, the proposed work methodology, as well as the price of the proposal;
- (b) the quality of the technical proposal submitted within a predetermined fixed budget;
- (c) the best financial proposal submitted by the tenderer having obtained an acceptable technical score pre- disclosed in the request for proposals; or
- (d) where the services are of an exceptionally complex nature or likely to have considerable impact on future projects or national economy or may lead to the submission of proposals with prices which are not comparable, exclusively on the technical quality of the proposal.

(2) The tenderer whose tender attains the highest score, in accordance with the criteria and selection method set out in the request for proposals, or the one with the least cost in the case of the least cost method of selection, must be selected for award, subject to satisfactory conclusion of negotiations.

(3) The procuring entity shall award the public procurement contract to the successful tenderer and notify all the other shortlisted tenderers of the decision.

## **50. Negotiation of proposal**

(1) The public procurement contract may be negotiated with the successful tenderer with regard to the terms of the request for proposals, the scope of the proposed services, deliverables, progress reports, and facilities to be provided by Government and, subject to subsection (2), the financial proposal.

(2) Where price has been a factor, the fee for services is not subject to negotiation and only the cost of reimbursable items may be negotiated.

(3) Where the negotiations fail to result in a public procurement contract, the procuring entity shall notify the successful tenderer and proceed to the next ranked tenderer.

### **Division 2A** **Public Procurement Procedures for Goods, Works and Services** *(Inserted by Act 13 of 2020)*

## **51. Request for sealed quotation**

(1) A procuring entity may request sealed quotations for goods, works or services of minor value for —

- (a) readily available goods or services that are not specially produced or provided to the particular specifications of the procuring entity; *(Amended by Act 13 of 2020)*
- (b) a procurement made on the basis of price and other price-related factors;
- (c) a procurement where it is not necessary to conduct discussions with the tenderer about the tender; or
- (d) a procurement where there is a reasonable expectation of receiving more than one quotation.

*(Amended by Act 13 of 2020)*

(2) A sealed quotation shall be requested in writing by the procuring entity from not less than 3 tenderers, unless goods, works or services are not available from 3 suppliers. *(Amended by Act 13 of 2020)*

(3) The request must contain a clear statement of the requirements of the procuring entity as to —

- (a) the quality;
- (b) the quantity;
- (c) the term and time of delivery; and
- (d) other special requirements, together with such other prescribed information.

(4) Each tenderer may submit one sealed quotation, which may not be altered or negotiated.

(5) After the closing time for the submission of sealed quotations, the accounting officer shall open the sealed quotations.

(6) The accounting officer shall select the successful quotation on the basis of the lowest priced quotation. *(Amended by Act 13 of 2020)*

## **52. Direct public procurement**

(1) The Minister may issue directions for the procurement of goods, services and works by direct public procurement on the following grounds —

- (a) where only one supplier has the exclusive right to manufacture the goods, carry out the works, or perform the services to be procured, and no suitable alternative is available;
- (b) where additional deliveries of goods by the original supplier which are intended either as partial replacement or extension for existing goods, services, or installations and where a change of supplier would compel the procuring entity to procure equipment or services not meeting requirements of inter-changeability with already existing equipment or service;
- (c) where additional works, which were not included in the initial public procurement contract have, through unforeseeable circumstances, become necessary and the separation of the additional works from the initial public procurement contract would be difficult for technical or economic reasons;
- (d) *(Deleted by Act 13 of 2020)*
- (e) *(Deleted by Act 13 of 2020)*
- (f) *(Deleted by Act 13 of 2020)*
- (g) where continuity of the procurement requirement is essential to meet the objectives of the public procurement; or
- (h) *(Deleted by Act 13 of 2020)*

*(Amended by Act 13 of 2020)*

(2) Where direct public procurement under subsection (1) is used, the procuring entity may request a proposal or request a sealed quotation from one supplier.

### **53. Emergency public procurement**

(1) The Minister may issue directions for the procurement of goods, services and works for an emergency procurement where —

- (a) the country is seriously threatened by a disaster, war, *force majeure* or there is a threat to national security; *(Amended by Act 13 of 2020)*
- (b) the country is impacted by a disaster, war or *force majeure*, or national security is compromised; *(Amended by Act 13 of 2020)*
- (c) life or the quality of life or environment may be seriously compromised;
- (d) the condition or quality of goods, equipment, building or publicly owned capital goods may seriously deteriorate unless action is urgently and necessarily taken to maintain them in their actual value or usefulness; or
- (e) an investment project may be seriously delayed for want of an item of a minor value.

*(Amended by Act 13 of 2020)*

(2) The scope of the emergency public procurement is, as far as possible, limited to the period of the emergency, so that appropriate competitive public procurement procedures may be utilised at the conclusion of the emergency period.

### **54. Minor value public procurement**

(1) Where the public procurement of goods, works or services is of a minor value or other prescribed amount, a procuring entity may procure such goods, works or services by open competitive tendering under section 57(3)(a). *(Substituted by Act 13 of 2020)*

(2) Notwithstanding subsection (1) and section 57(3)(a), a procuring entity may procure small quantities of goods, small works or services of a minor value without open

competitive tendering if open competitive tendering is unlikely to attract sufficient competition. *(Amended by Act 13 of 2020)*

(3) *(Deleted by Act 13 of 2020).*

## **55. Public procurement of bulk purchases**

(1) The procurement unit within the Ministry responsible for finance is responsible for the procurement of bulk purchases.

(2) The Director shall determine, after consultation with each procuring entity, the goods, works or services which are to be purchased in bulk, and regularly distribute a list of such goods, works or services to each procuring entity.

(3) The procurement unit within the Ministry responsible for finance —

- (a) may evaluate suppliers for purchase of goods, works or services in bulk in order to issue a list of approved sources of supply;
- (b) may enter into a framework agreement or other appropriate contractual arrangement for the purchase of goods, works or services in bulk;
- (c) shall regularly issue updated information to each procuring entity on the goods, works or services available, prices, delivery times and arrangements established for ordering or obtaining such goods, works or services; and
- (d) shall report to the Director on the management, costs and outcomes achieved from the purchase of goods, works or services in bulk or the framework agreement to which it was assigned responsibility.

## **56. Public procurement under framework agreement**

A procuring entity may enter into a framework agreement where —

- (a) the need for the subject matter of a public procurement is expected to arise on a repeated basis during a given period of time within a procuring entity or for all procuring entities;
- (b) the nature of the subject matter of the public procurement causes the need for public procurement to arise on an urgent basis during a given period of time; or
- (c) the Director considers that a particular public procurement can best be undertaken through a framework agreement.

## **Division 3 Tendering**

## **57. Open competitive tendering**

(1) Subject to this Act, in the procurement of goods, services and works a procuring entity shall use open competitive tendering.

(2) Open competitive tendering —

- (a) shall provide equal access to all eligible and qualified tenderers without discrimination;
- (b) may include a pre-qualification procedure or post qualification procedure, before selection of the winning tender.

(3) Where open competitive tendering is used, the procuring entity shall use —

- (a) national competitive tendering where the public procurement is of a minor value and —

- (i) the works, goods or services are widely available in Saint Lucia at a competitive price,
- (ii) the works are labour intensive and most suitable for suppliers in Saint Lucia,
- (iii) the works are scattered geographically or spread over time; or
- (b) in the case of the monetary thresholds specified in Schedule 3, international competitive tendering where sufficient competition does not exist in Saint Lucia. *(Amended by Act 13 of 2020)*

(4) Where national competitive tendering is used, the invitation to tender is published in the *Gazette* and one newspaper of wide circulation in Saint Lucia.

(5) Where international competitive tendering is used, the invitation to tender is published in one regional and one international newspaper. *(Amended by Act 13 of 2020)*

#### **57A. List of suppliers**

(1) A procuring entity shall prepare and maintain a list of suppliers which is unrelated to a particular public procurement contract.

(2) A procuring entity shall publish a notice of invitation for suppliers to register to be included on the list under subsection (1), at the beginning of each financial year.

(3) A supplier may register with the procuring entity to be included on the list under subsection (1) by submitting a request for registration accompanied by the documentation specified under section 64(2)(b)(i), (ii), (iii), (iv), (vi) and (c).

(4) The procuring entity shall, within 15 business days of receipt, accept or refuse a request for registration under subsection (3).

(5) The procuring entity shall inform a supplier, in writing, of the reasons for refusing a request for registration under subsection (3).

*(Inserted by Act 13 of 2020)*

#### **58. Restricted tendering**

(1) A procuring entity may use restricted tendering —

- (a) where a procuring entity has reason to believe that the procurement requirement is only available from a limited number of tenderers;
- (b) where the time and cost of considering a large number of tenders is disproportionate to the value of the public procurement;
- (c) subject to section 83, where there is no response following open competitive tendering and a re-tender exercise is not considered practical; or *(Amended by Act 13 of 2020)*
- (d) by limiting the participation in a particular public procurement to suppliers included on the list of suppliers drawn up and maintained by the procuring entity so as to ensure that suppliers of specialised goods and services have and maintain the necessary technical and financial capability to provide them. *(Amended by Act 13 of 2020)*

(2) Where restricted tendering is used on the ground referred to in subsection (1)(a), all known suppliers capable of supplying the procurement requirement must be directly procured.

(3) Where restricted tendering is used on the ground referred to in subsection (1)(b), the procuring entity shall, as far as reasonably possible, directly solicit tenders from a minimum of 5 tenderers.

(4) A procuring entity may consider only the technical capacity of a supplier on the list of suppliers to fulfil the technical requirements of a specific contract. *(Inserted by Act 13 of 2020)*

(5) A supplier that is included on the list of suppliers under section 57A is presumed to be eligible to participate in a restricted tendering procedure. *(Inserted by Act 13 of 2020)*

## **59. Two-stage tendering**

(1) A procuring entity may carry out 2-stage tendering where —

- (a) it is not feasible to fully define the technical or contractual aspects of the public procurement to elicit competitive bids; or
- (b) due to the complex nature of the goods, other services or works to be procured, the procuring entity wishes to consider various technical or contractual solutions, and to discuss with tenderers the relative merits of those variants before deciding on the final technical specifications and public procurement contractual conditions.

*(Amended by Act 13 of 2020)*

(2) In the first stage, the tendering documents shall —

- (a) outline —
  - (i) the purpose,
  - (ii) the expected performance,
  - (iii) the broad specifications of the equipment or works to be procured, and
  - (iv) the qualifications required to perform the public procurement contract; and
- (b) call upon tenderers to submit —
  - (i) technical tenders without a tender price, and
  - (ii) comments on the proposed public procurement contract conditions.

(3) The procuring entity may engage in discussions with any tenderer with a view to understanding a technical tender or to indicating changes required to make it acceptable and seeking the tenderer's willingness to make such changes.

(4) At the end of the first stage, the procuring entity may —

- (a) reject a tender which does not, and cannot be changed to meet the basic requirements, minimum performance, or required completion time or has any other weakness which makes the tender substantially non-responsive; or
- (b) modify the technical specifications, evaluation criteria, and contract conditions in order to maximise competition and articulate appropriate evaluation methodology in order to consider various options provided by tenderers.

(5) In the second stage, the procuring entity shall invite tenderers whose tenders have not been rejected to submit final tenders with prices to the revised tendering documents.

## **60. Pre-qualification procedure**

(1) A procuring entity may use pre-qualification procedures with a view to identifying tenderers that are qualified, before the invitation to tender —

- (a) in order to identify qualified persons; *(Deleted by Act 13 of 2020)*

- (b) for the public procurement of large or complex works;
- (c) in other cases of particularly high value or complex public procurement, such as industrial plant, or in case of framework arrangements.

(2) A procuring entity shall invite pre-qualification applications by causing an invitation to prequalify to be published in the manner specified for open competitive tendering under section 57(3) to (5). (*Substituted by Act 13 of 2020*)

(3) An invitation to pre-qualify must contain —

- (a) the name and address of the procurement entity;
- (b) in the case of —
  - (i) goods, the nature, quantity and place of delivery of the goods to be supplied and the country of origin,
  - (ii) works, the nature and location of the works to be effected,
  - (iii) technical services, the nature of the technical services and the location where such services are to be provided;
- (c) the desired or required time for the supply of the goods or for the completion of the works, or the timetable for the provision of the services;
- (d) the criteria and procedures to be used to evaluate the qualifications of persons;
- (e) a declaration, which may not be subsequently altered that persons may participate in the procurement procedures regardless of nationality, or a declaration that participation is limited on the basis of nationality;
- (f) the price, if any, charged by the procuring entity for the pre-qualification document;
- (g) the currency and means of payment for the pre-qualification document;
- (h) where the information required under paragraphs (a) to (g) is already known —
  - (i) the place for the submission of pre-qualification applications and the deadline,
  - (ii) the means to obtain the pre-qualification document and the place where the pre-qualification document can be obtained,
  - (iii) the price charged by the procuring entity for the pre-qualification document,
  - (iv) the currency and terms of payment for the pre- qualification document,
  - (v) the language in which the pre-qualification document is available,
  - (vi) the place for the submission of pre-qualification applications, the time allowed for the preparation of pre-qualification applications which is not less than 4 weeks and the deadline.

(4) Where pre-qualification procedures are held, the procuring entity shall provide pre-qualification documents to all tenderers responding to the invitation to pre-qualify, so as to provide them with the information required to prepare and submit pre-qualification applications.

(5) The pre-qualification document under subsection (4) must include —

- (a) instructions for preparation and submission of a pre-qualification application;

- (b) a summary of the main terms and conditions required for the public procurement contract to be entered into as a result of the public procurement procedure;
- (c) any documentary evidence or other information that must be submitted by persons to demonstrate their qualifications;
- (d) the manner and place for the submission of the pre-qualification application and the deadline for submission, expressed as a specific date and time which allows sufficient time for persons to prepare and submit applications, taking into account the procurement requirement of the procuring entity; and
- (e) any other requirement that may be established by the procuring entity under this Act or Regulations made under this Act relating to the preparation and submission of pre-qualification applications and to the pre-qualification procedures.

(6) The procuring entity shall respond to any request by a person for clarification of the pre-qualification documents if the request is made at least 10 days before the deadline for the submission of pre-qualification applications.

(7) The response by the procuring entity shall be given within a period not exceeding 7 working days so as to enable the person to make a timely submission of the pre-qualification application. *(Amended by Act 13 of 2020)*

(8) The response to any request that might be expected to be of interest to other persons shall, without identifying the source of the request, be communicated to other persons provided with the pre-qualification document by the procuring entity.

(9) A procuring entity shall promptly notify each person who submitted a pre-qualification application of whether or not he or she has pre-qualified and shall make available to any member of the general public, upon request, the names of the persons who have been pre-qualified.

(10) A person who is pre-qualified may participate further in the procurement procedure.

(11) The procuring entity shall, upon request, communicate to a person who did not satisfy the pre-qualification criteria, the grounds for his or her disqualification.

(12) The procuring entity may require a person who has been pre-qualified to demonstrate his or her qualifications again in accordance with the same criteria used to pre-qualify the person.

(13) The procuring entity shall promptly notify each person requested to demonstrate his or her qualifications again whether or not the person has done so to the satisfaction of the procuring entity.

(14) The procuring entity shall disqualify any person who fails to demonstrate his or her qualification again if requested to do so.

## **61. Invitation to tender**

(1) A procuring entity shall invite tenders by causing an invitation to tender to be published under section 57.

(2) An invitation to tender under subsection (1) must contain —

- (a) the name and address of the procuring entity;
- (b) the nature, quantity and place of delivery of the goods to be supplied, the country of origin, the nature and location of the works to be effected or the nature of the technical services and the location where they are to be provided;
- (c) the desired or required time for the supply of the goods or for the completion of the works or the timetable for the provision of the services;

- (d) the criteria and procedures to be used to evaluate the qualifications of suppliers or contractors;
- (e) a declaration, which may not be subsequently altered that suppliers or contractors may participate in national competitive tendering or international competitive tendering; *(Amended by Act 13 of 2020)*;
- (f) the means of obtaining the tendering document and the place where it may be obtained;
- (g) the price, if any, charged by the procurement entity for the tendering document;
- (h) the currency and means of payment for the tendering document;
- (i) the language in which the tendering document is available;
- (j) the place for the submission of tenders and the deadline;
- (k) the place, date and time for the opening of tenders; and
- (l) any other information considered relevant.

(3) Notwithstanding subsection (1), where a procuring entity considers it necessary to ensure open competitive tendering, it may, after the date of publication of the invitation to tender, send such invitation directly to —

- (a) a potential tenderer, who may be a pre-qualified tenderer, past supplier or any other identified potential source;
- (b) a professional or industry association; or
- (c) a Saint Lucian embassy in a country which is likely to participate or a foreign embassy in Saint Lucia.

(4) A procuring entity shall keep a record of tenderers to whom an invitation to tender is sent directly.

(5) A procuring entity shall submit to the Board a copy of an invitation to tender published under subsection (1). *(Inserted by Act 13 of 2020)*

## **62. Eligibility of tenderer**

(1) In order to be eligible to participate in public procurement, a tenderer shall demonstrate to the satisfaction of the procuring entity that he or she —

- (a) has the legal capacity to enter into the public procurement contract;
- (b) is not insolvent, in receivership, bankrupt or being wound up, his or her affairs are not being administered by a court or a judicial officer, and his or her business activities have not been suspended;
- (c) has fulfilled obligations to pay taxes and social security contributions;
- (d) *(deleted by Act 13 of 2020)*
- (e) does not have a conflict of interest in relation to the public procurement requirement;
- (f) or any director or officer, has not been convicted of any criminal offence relating to professional conduct or the making of false statements or misrepresentations as to his or her qualifications to enter into a public procurement contract within a period of 5 years preceding the commencement of the public procurement procedure; and
- (g) is not subject to suspension, or none of his or her directors or officers have been associated with a tenderer or supplier subject to suspension in Saint Lucia, the region or internationally.

(2) A government-owned tenderer is eligible if it can establish that it is legally and financially autonomous and is not a dependent agency of the procuring entity.

### **63. Qualification of tenderer**

(1) A procuring entity may require tenderers to meet such qualification criteria as the procuring entity considers appropriate to a particular public procurement requirement, to demonstrate that the tenderer has the capability and resources to effectively perform a public procurement contract.

(2) Qualifications shall be assessed by examining whether the tenderer does or does not meet the qualification set and not by using a point system for comparing the relative level of qualifications of participating tenderers.

### **64. Tendering document**

(1) The procuring entity shall provide the tendering document to tenderers in accordance with the procedures and requirements specified in the invitation to tender.

(2) A tendering document shall contain —

- (a) the eligibility requirements and specify any documentary evidence required as proof of eligibility;
- (b) all qualifications including —
  - (i) professional and technical qualifications,
  - (ii) financial resources and conditions,
  - (iii) equipment and other physical facilities,
  - (iv) personnel and managerial capability,
  - (v) record of past performance of similar contracts, and
  - (vi) registration or licensing with a professional body in Saint Lucia or outside Saint Lucia where required by law;
- (c) documentary evidence or information required to demonstrate the tenderer's qualifications;
- (d) clear instructions on the management of the public procurement procedure and the applicable rules;
- (e) a clear description of the goods, services or works in the form of a statement of requirements;
- (f) the methodology and criteria to be used in the evaluation of tenders and the determination of the best evaluated tender;
- (g) qualifications and evaluation criteria based on life cycle costing;
- (h) subject to section 68, the period of time that the tender remains valid;
- (i) the date and time of the tendering deadline clearly stated, and a statement that a late tender will not be accepted; and (*Amended by Act 13 of 2020*)
- (j) the proposed form and conditions of a public procurement contract or a statement of the form and conditions of a public procurement contract which will apply.

(3) A procuring entity shall provide the tendering documents to all tenderers that respond to an invitation to tender or, if pre-qualification procedures have taken place, to all tenderers that have been pre-qualified.

(4) A procuring entity shall keep a record of all tenderers to whom tendering documents are issued.

(5) Where tendering documents are issued to pre-qualified or short-listed persons, the documents shall be issued to all tenderers at the same time.

(6) The tendering document may be sold at a prescribed fee which does not exceed the cost of printing of such document.

## **65. Clarification and modification of tendering document**

(1) A tenderer may, by notice, seek clarification or modification of a tendering document at least 10 days before the deadline for the submission of a tender.

(2) The procuring entity shall —

- (a) respond to the notice at least 7 days before the deadline for the submission of the tender to enable the tenderer to make a timely submission of the tender;
- (b) without disclosing the source of the notice communicate the clarification to the tenderers provided with the tendering document.

(3) The procuring entity may modify the tendering document by issuing an addendum before the deadline for submission of a tender.

(4) The addendum under subsection (3) —

- (a) shall be immediately communicated to each tenderer provided with the tendering document by the procuring entity;
- (b) is binding on each tenderer.

(5) The procuring entity —

- (a) may convene a meeting of tenderers to clarify and modify the tendering document; and
- (b) shall prepare minutes of the meeting under paragraph (a) without identifying the source of the notice.

(6) The minutes of any meeting under subsection (5) shall be immediately given to each tenderer provided with the tendering document to enable the tenderer to take the minutes into account in the preparation of the tender.

## **66. Tendering deadline**

(1) In setting a tendering deadline, a procuring entity shall allow sufficient time for tenderers to obtain the tendering document, prepare complete and responsive tenders, and submit a tender.

*(Amended by Act 13 of 2020)*

(2) Without limiting the generality of subsection (1), a tendering deadline shall not be —

- (a) in the case of national competitive tendering and restricted tendering, less than 20 days;
- (b) in the case of international competitive tendering, less than 40 days, between the date of publication of the invitation to tender and the date for submission of the tender. *(Amended by Act 13 of 2020)*

*(Inserted by Act 13 of 2020)*

## **67. Submission of tender**

(1) Subject to this Act, a procuring entity may require a tenderer to —

- (a) submit a sealed and written tender; or

(b) use a prescribed method for submission of a tender.

(2) Without prejudice to subsection (1), the method for the submission of the tender must take into account the public procurement procedure, the complexity of the public procurement and the evaluation methodology to be used.

#### **68. Period of validity of tender**

(1) The period of validity of a tender is a period not exceeding 180 days commencing from the deadline for submission of the tender.

(2) The period of validity of a tender may be extended only with the agreement of the tenderer.

(3) A tenderer who agrees to an extension of the validity period of his or her tender shall furnish a corresponding extension of his or her tender security, if security was required for the original submission of the tender.

#### **69. Withdrawal and modification of tender**

A tenderer may, by notice, modify or withdraw the tender before the deadline for the submission of the tender without forfeiting the tender security unless otherwise stipulated in the tendering documents.

#### **70. Tender security or tender securing declaration**

(1) A procuring entity may include in the tendering document the requirement for a tender security or a tender securing declaration.

(2) A procuring entity may forfeit the tender security or, in case of a tender securing declaration, make a proposal to the Director for the suspension of the tenderer where —

- (a) a tenderer seeks modification or withdrawal of a tender after the deadline for submission of the tender or during the period of validity of the tender;
- (b) a tenderer refuses to accept a correction of an error in the tender;
- (c) a successful tenderer fails to sign the public procurement contract in accordance with the terms set out in the tendering documents; or
- (d) a successful tenderer fails to provide security for the performance of the public procurement contract if required to do so by the tendering documents.

#### **71. Receipt of tender**

(1) A procuring entity, the Public Procurement Committee and the Board shall ensure that —

- (a) the tender box, or other means of receiving the tender, are made available to the tenderer;
- (b) the tender is kept confidential, and in the case of a sealed tender, the tenders remain unopened, until the time for opening of the tender; and
- (c) the tender is closed at the precise date and time of the tendering deadline. *(Amended by Act 13 of 2020)*

*(Amended by Act 13 of 2020)*

(2) Where online submission of a tender is allowed, a tender must be received into an electronic tender box and maintained to high standards of security for long term record-keeping and audit.

## **72. Opening of tender**

(1) A tender shall be opened at the time and place indicated in the tendering documents.

(2) The tender opening must be on the deadline for the submission of the tender, or follow immediately after such deadline, where for logistic reasons the tender cannot be opened on the deadline.

(3) A tenderer may attend the tender opening, or electronically access the tender opening if electronic access is made available.

(4) The name of the tenderer, the total amount of each tender, any discount or alternative offered, the presence or absence of any tender security, if required, is read out and recorded, and a copy of the record is made available to any tenderer on request.

(5) A decision regarding the disqualification or rejection of the tender must not be taken or announced at the opening of the tender.

## **73. Examination and evaluation of tender**

(1) The accounting officer, Public Procurement Committee or Board may seek clarification during the examination of the tender from any tenderer to facilitate evaluation, but the accounting officer, Public Procurement Committee or Board shall not permit any tenderer to change the price or substance of his or her tender.

(2) After the tender opening, the accounting officer, Public Procurement Committee or Board shall —

- (a) examine the tender to determine whether the tender is complete and is in accordance with the tendering document; and
- (b) ascertain whether —
  - (i) the tender is properly signed, and
  - (ii) the documents required to establish legal validity and the required tender security have been furnished.

(3) Where a pre-qualification procedure is used, a tender received from a tenderer other than a pre-qualified tenderer shall be rejected by the accounting officer, Public Procurement Committee or Board.

(4) Where a tender discloses an arithmetical error, the error shall be corrected by the accounting officer, Public Procurement Committee or Board and the tenderer notified.

(5) Where there is a discrepancy between figures and words, the amount in words prevails, and the mistake shall be corrected by the accounting officer, Public Procurement Committee or Board and the tenderer notified.

(6) Where there is a minor deviation in any tender that did not warrant rejection of the tender at an earlier stage, such minor variation shall be quantified by the accounting officer, Public Procurement Committee or Board in monetary terms, as far as possible.

(7) A tender is evaluated according to the criteria and methodology set out in the tendering documents and the evaluated cost of each tender must be compared with the evaluated cost of other tenders to determine the lowest evaluated tender.

(8) Where a pre-qualification procedure is applicable, the qualification of the lowest evaluated tenderer is verified anew to take account of any change since the original pre-qualification procedure.

(9) The Tender Evaluation Committee shall prepare an evaluation report detailing the examination and evaluation of tenders and identifying the lowest evaluated substantially responsive tender that meets the qualification criteria. *(Amended by Act 13 of 2020)*

(10) The evaluation report under subsection (9) shall be securely stored by the procuring entity.

#### **74. Post-qualification**

(1) Where there was no pre-qualification procedure, the qualifications of the lowest evaluated substantially responsive tenderer is checked against the tender requirements and selection criteria specified in the tendering document.

(2) Where the tender fails to conform to the criteria specified in the tendering document, the tender is rejected and the same procedure is applied to the next ranked tender.

#### **75. Negotiation with successful tenderer**

(1) Subject to subsections (2) and (3), the procuring entity shall not negotiate with the successful tenderer or any other tenderer except in prescribed special circumstances.

(2) The accounting officer, Public Procurement Committee or Board shall, where the special circumstances referred to under subsection (1) apply, initiate and oversee the negotiation between a procuring entity and the successful tenderer or any other tenderer in accordance with instructions issued by the Director.

(3) Negotiation between a procuring entity and the successful tenderer must follow the prescribed procedure.

(4) For the purposes of subsection (3), negotiation does not relate to the price of the tender, except in the case of direct tendering, or where the price of the tender has not been taken into account in the evaluation methodology.

#### **76. Award of public procurement contract**

(1) A public procurement contract shall be awarded to the tenderer having submitted the lowest evaluated substantially responsive tender. *(Amended by Act 13 of 2020)*

(2) Notwithstanding subsection (1), where the specificity of the subject matter of a public procurement requires recourse to more than one tenderer to execute the public procurement contract and the procuring entity intends to award a public procurement contract to more than one tenderer based on rates, the procuring entity may award the public procurement contract after the determination of a common rate and the pre-qualification procedure.

(3) A procuring entity shall notify the successful tenderer of the selection of the tender for award and a notice shall be given to the other tenderers, specifying the name and address of the proposed successful tenderer and the price of the public procurement contract.

(4) The public procurement contract must be awarded to the successful tenderer 7 days after the date of the notice under subsection (3). *(Substituted by Act 13 of 2020)*

(5) The procuring entity may require the successful tenderer to submit security for the performance of the public procurement contract and sign the public procurement contract within the period specified in the tendering document.

(6) Where the successful tenderer fails to sign the public procurement contract or fails to provide any required security for the performance of the public procurement contract within the time specified in the tendering document, the procuring entity shall select another tenderer from among the remaining valid tenders in accordance with subsection (1). *(Amended by Act 13 of 2020)*

(7) The procuring entity shall, by notice, immediately publish the public procurement contract award in a newspaper or on the Government website.

## **77. Debriefing of unsuccessful tenderer**

(1) Subject to subsection (2), a procuring entity shall immediately, on request of an unsuccessful tenderer, inform that tenderer of the reasons for which the tender, or application for pre-qualification, was unsuccessful where the request for such debriefing was submitted within 30 days of the publication of the notice under section 76(3).

(2) The procuring entity shall not provide to a tenderer, information with respect to other bids which is not publicly available.

*(Substituted by Act 13 of 2020)*

## **Division 4 General**

## **78. Public procurement not to be split or inflated**

(1) A procuring entity shall not split any public procurement as two or more public procurements for the purpose of avoiding the use of a public procurement procedure.

(2) Standard goods, services and works shall be procured at the lowest prevailing real market price.

## **79. Lots**

(1) Where the splitting up or division of a public procurement contract into a separate lot or segment is financially and technically possible, the procuring entity shall, for the purpose of promoting public procurement under a small and medium sized enterprise, divide the public procurement for the award of the separate part or lot to a different tenderer.

(2) Where a public procurement contract is divided under subsection (1), the tendering document must specify —

- (a) the number and the nature of the lot;
- (b) the manner in which the tender for one or more lots is submitted, indicating whether separate tenders are submitted for each lot; and
- (c) the basis for an award, which is the lowest combination of evaluated tenders.

(3) Where one or more lots have not been awarded, the procuring entity may, in any new public procurement procedures, modify the division of the lots that have not been awarded.

(4) Nothing in this section limits or restricts the procuring entity from awarding all the lots to the same tenderer, if such an award achieves the lowest evaluated tender for the combined lots.

## **80. Cancellation of public procurement procedure**

(1) A public procurement procedure may be cancelled before opening of a tender if it is in the public interest to do so.

(2) A cancellation of a public procurement procedure before the opening of a tender is in the public interest —

- (a) when the object of the public procurement is no longer required; or
- (b) when the tendering document has to be modified so substantially that it will be more efficient and convenient to cancel the invitation to tender, revise the tendering document and re-issue an invitation to tender.

(3) A procuring entity may at any time cancel the public procurement procedure after the opening of tenders where —

- (a) all the tenders are non-responsive;
- (b) the lowest evaluated tender is substantially above the applicable updated cost estimate;
- (c) the object of the public procurement is no longer required;
- (d) it has become necessary, in the public interest, to modify the specifications or critical aspects of the conditions of the public procurement contract;
- (e) defects or gaps in the specifications have been revealed, which prevent consideration of a substantially less expensive and functionally equivalent item other than the one called for in the tendering document, or which prevent consideration of all items of cost to the procuring entity in the evaluation process; or
- (f) there is reliable evidence of collusive or other non-sanctioned behaviour from a supplier that has been reported to the Director.

(4) Written notice of cancellation of the public procurement procedure must be given to all tenderers that submitted a tender.

(5) Where a public procurement procedure is cancelled under this section, any tender received must be returned unopened to the tenderers.

(6) An invitation to re-tender must not be issued for public procurement on the same specifications and public procurement contract conditions unless the cancellation of the public procurement procedure is made on a ground specified in subsection (3)(a) or (b).

## **81. Record of public procurement**

(1) A procuring entity shall maintain records of all public procurement procedures.

(2) A procuring entity shall record and preserve all documentation and data relating to public procurement procedures for a period of at least five years from the date of —

- (a) the completion of a public procurement contract or its termination;
- (b) the decision to terminate the public procurement procedure;
- (c) the settlement of any dispute under the public procurement contract; or
- (d) the decision of a review.

(3) A procuring entity shall maintain a proper filing system with clear links between public procurement and expenditure files.

(4) Without prejudice to the means of retention or storage employed, a procuring entity shall ensure that its public procurement record includes the following information —

- (a) a brief description of the works, goods or services procured;
- (b) the names and addresses of the suppliers;
- (c) the public procurement procedure employed and the reason for choosing the public procurement procedure;
- (d) the name and address of the successful tenderer employed;
- (e) the date of approval of the tender;
- (f) the contract price and actual completion cost;
- (g) the duration of the public procurement contract;
- (h) the information relating to the qualification of suppliers;

- (i) the report on the evaluation and comparison of tenders;
- (j) the reasons for the rejection of any or all tenders;
- (k) a summary of the requests for clarification or verification of the tendering documents and any modifications;
- (l) information relating to the successful tenderer's performance on the public procurement contract; and
- (m) information relating to review decisions.

## **82. Statement and declaration**

A tender, proposal or quotation submitted by a person shall include a statement attesting to the fact that the person is not debarred from participating in a public procurement procedure under this Act or in any other country or by any funding agency, and a declaration that the person shall not engage in any corrupt practice.

## **83. Failed public procurement procedure**

(1) Where no responsive tenders are received or public procurement procedures are otherwise unsuccessful, the procuring entity shall investigate the failed tendering process and prepare a report for submission to the accounting officer, Public Procurement Committee or Board.

(2) The report made under subsection (1), shall include the reasons for the failed public procurement procedures, and recommendations on how any new public procurement procedures should be managed to avoid such failures.

### **83A. Complaint**

A person may submit to the procuring entity a complaint in writing against a public procurement procedure not later than 7 days after the date of the notice under section 76(3) where —

- (a) the public procurement procedure is not carried out in accordance with this Act;
- (b) the person has incurred loss or is likely to incur loss due to paragraph (a).

*(Inserted by Act 13 of 2020)*

### **83B. Assessment of complaint by procuring entity**

(1) Subject to subsection (2), the procuring entity shall assess a complaint within 7 days of receipt of the complaint and may allow or disallow the complaint.

(2) Before assessing a complaint under subsection (1), the procuring entity shall —

- (a) give the complainant an opportunity to make oral representations; and
- (b) take the oral representations made under paragraph (a) into consideration.

(3) The procuring entity shall notify the complainant of its decision by notice in writing.

(4) If the complaint is allowed, the procuring entity may exercise the powers necessary to rectify the ground of the complaint including cancelling the tendering procedure and republishing a new invitation to tender.

(5) If the complaint is disallowed, the procuring entity shall notify the complainant of the reasons for its decision in writing and the right to review under section 84.

*(Inserted by Act 13 of 2020)*

## **84. Review**

(1) A tenderer may make an application to the Director to review the public procurement procedure if —

- (a) an assessment is not made within the time specified under section 83B; or
- (b) the tenderer is dissatisfied with the assessment of the procuring entity under section 83B; and
- (c) the public procurement procedure is not carried out in accordance with this Act; or
- (d) the tenderer has incurred loss or is likely to incur loss under paragraph (b).

*(Substituted by Act 13 of 2020)*

(2) An application for review under subsection (1) shall —

- (a) be in writing;
- (b) specify the reasons for making the application;
- (c) be accompanied by a statement of case together with any witness statement referred to in subsection (3); and
- (d) be made within 30 days of the knowledge of the contravention or loss.  
*(Amended by Act 13 of 2020)*

(3) A statement of case shall contain precisely and concisely —

- (a) the facts of the case;
- (b) the issues under dispute and the arguments relating to such dispute and arguments;
- (c) submissions on any point of law; and
- (d) other submissions on the case.

(4) The tenderer shall, at the time of his or her application for review, submit to the procuring entity a copy of the application.

(5) An applicant shall pay the prescribed non-refundable fee for processing the application.

(6) Where an application for review is made under this section, the procurement procedures shall be suspended until the review is heard and determined.

(7) The suspension under subsection (6) does not apply where the procuring entity certifies that urgent public interest considerations require the procurement procedure to proceed.

(8) A certificate issued by a procuring entity under subsection (7) —

- (a) must expressly state the grounds of the urgent public interest considerations and shall be made a part of the record of the public procurement procedure;
- (b) is binding on the Director and the public procurement procedure must proceed unless an application for leave to seek a judicial review is successful.

(9) The Director, after consultation with an independent expert —

- (a) shall make a decision under this section within 60 days;
- (b) may dismiss an application for review or may, if he or she determines that there is merit in it, do one or more of the following —

- (i) prohibit the procuring entity from acting or deciding in an unauthorised manner or from following an incorrect public procurement procedure,
- (ii) order the annulment in whole or in part of any unauthorised act or decision of the procuring entity,
- (iii) order a re-evaluation of the tenders or a review of the decision for an award, specifying the grounds for such recommendation, or
- (iv) order payment of reasonable costs incurred in participating in the tendering procedure where a legally binding contract has been awarded which, in the opinion of the Director, should have been awarded to the applicant.

*(Amended by Act 13 of 2020)*

### **PART 3 PUBLIC PROCUREMENT CONTRACT**

#### **85. Contents of public procurement contract**

(1) Subject to this section, a public procurement contract shall include the terms and conditions that are set out in the tendering documents or request for proposals.

(2) A public procurement contract must include —

- (a) the name, address, telephone and fax numbers, of the contact persons of the parties to the public procurement contract;
- (b) the scope of the work;
- (c) the order of priority of public procurement contract documents;
- (d) the contract price or its mode of determination;
- (e) the conditions of acceptance;
- (f) the conditions and mode of payment;
- (g) the modalities of '*force majeure*';
- (h) the price adjustment mechanisms;
- (i) the provisions for termination of the public procurement contract;
- (j) the procedure for dispute resolution; and
- (k) the applicable law.

(3) Where a public procurement contract exceeds twelve months, the public procurement contract must permit fair price adjustment for changes in costs.

(4) For the purposes of subsection (3), a price adjustment clause of the public procurement contract must specify —

- (a) the timing for determining any price adjustment;
- (b) the conditions, which will justify the formula of price adjustment, such as increases or decreases in the cost of materials, labour, and energy according to official indices;
- (c) limits which will determine the amount of any price adjustment; and
- (d) other procedures to be followed.

(5) The public procurement contract shall provide for termination or re-negotiation, if price adjustment exceeds a certain sum or percentage of the contract.

(6) A public procurement contract may provide for —

(a) the making of progress payments at —

- (i) defined points in the fulfilment of the public procurement contract, such as completion of a percentage of the performance due under the public procurement contract, or
- (ii) any other performance milestones described in the public procurement contract; or

(b) retention of progress payments as security.

(7) A progress payment is authorized by an interim certificate that confirms the conditions for payment, based on such documentation of performance as is required by the public procurement contract.

(8) A procuring entity may, by means of a public procurement contract, require a contractor to provide training and spare parts during the average operating life of goods or works which require after-sale service or maintenance.

(9) Where insurance is required in respect of a public procurement contract, a procuring entity shall indicate, in the public procurement contract, the amount and essential terms of the required insurance.

(10) The procuring entity reserves the right to reject insurance coverage which does not comply with the requirements in the public procurement contract.

(11) The consent for sub-contractors may be conditioned on their obtaining insurance in accordance with the requirements of the public procurement contract.

(12) The contractor and any of his or her sub-contractors shall —

- (a) assign any and all rights to compensation from the signed insurance covers to the procuring entity; and
- (b) inform the insurance company of the assignment.

(13) A public procurement contract may provide for payment of a bonus to the contractor for early completion.

## **86. Amendment of public procurement contract**

(1) Any amendment to the public procurement contract, other than changes which do not alter the basic nature or scope of the public procurement contract, shall be expressly agreed by the parties in writing.

(2) An amendment to the contract that will increase the public procurement contract value by more than 25% requires the initiation of a new public procurement procedure.

(3) A formal amendment of the public procurement contract is not required where the procuring entity wishes to make a variation or invokes a public procurement contract price adjustment which is expressly authorised in the public procurement contract.

## **87. Commencement of work**

The accounting officer shall not permit any work to commence under a public procurement contract before the public procurement contract has been executed, except when the public procurement is made as an emergency public procurement.

## **88. Transfer or assignment of public procurement contract**

(1) A contractor shall not transfer, assign or sub-contract the performance of a public procurement contract or any part of a performance of a public procurement

contract without obtaining, in writing, the consent of the procuring entity, but the procuring entity shall not unreasonably withhold its consent.

(2) Consent to a sub-contract shall be granted on condition that the contractor remains fully responsible for all obligations as set out in the public procurement contract and that the sub-contractor has proof of the necessary technical qualifications relating to the works under the sub-contract.

## **89. Inspection of goods**

(1) The procuring entity shall establish appropriate procedures and mechanisms for inspecting and examining supplied goods in accordance with applicable supply management procedures.

(2) The procuring entity may designate one or more agencies to supervise and inspect the performance with the technical requirements of procurement contracts and applicable quality standards.

(3) The inspecting official or agency designated under subsection (2) shall —

- (a) inspect and examine the supplied items and compare with the stamped and approved samples and other specifications, putting aside the rejected goods to be returned to the supplier;
- (b) examine varying percentages following principles of statistical sampling methods;
- (c) prepare an inspection report.

(4) The inspection report under subsection (3)(c) must indicate the percentage that the inspecting official has examined, the names, specifications, and results of testing.

(5) In the event of a dispute between the supplier and the inspecting official or agency, such dispute must be resolved by using the dispute settlement procedures under the public procurement contract.

## **90. Acceptance report**

(1) Where goods are accepted after an inspection under section 89, the procuring entity shall prepare an acceptance report.

(2) An acceptance report under subsection (1) must contain —

- (a) the public procurement contract reference number;
- (b) a description of the item or service received;
- (c) the date of delivery and acceptance; and
- (d) the authorised signature in writing, or in electronic form.

(3) An acceptance report must be transmitted immediately to the appropriate disbursement authorities for payment.

## **91. Payments**

(1) Subject to the specific terms of a public procurement contract, the accounting officer shall ensure that a contractor is paid on the basis of the submission of an invoice in accordance with the closing date and time set out in the public procurement contract.

(2) In the case of the public procurement of works, a contractor is not entitled to any payment in respect of work performed in the execution of the public procurement contract unless he or she has, together with his or her claim for payment, filed a certificate —

- (a) stating rates of remuneration and hours of work of the various categories of workers employed in the execution of the public procurement contract;
- (b) stating whether any remuneration payable in respect of work done is due;
- (c) containing such other information as the procuring entity requires to satisfy itself that the provisions of this Act have been complied with.

## **92. Advance Payment**

(1) A procuring entity may make an advance payment when necessary to enable the effective implementation of a public procurement contract, but the aggregate of any advance payments made under the public procurement contract shall not exceed 10% of the value of the public procurement contract, unless otherwise justified.

(2) Unless otherwise stipulated in the public procurement contract, an advance payment shall not be made unless an advance payment guarantee is furnished in the form specified in the tendering document.

(3) The contractor shall —

- (a) subject to paragraph (b), utilize materials, equipment and labour acquired with the advance payment only for fulfilment of the public procurement contract, under which the advance payment was made; and
- (b) where the public procurement contract is for works, use such materials, equipment and labour exclusively at sites related to the public procurement contract.

(4) Advance payments are subject to the application of payment terms and to repayment as set out in the tendering document.

## **93. Monitoring, evaluation and reporting**

For the purposes of ensuring timely and effective performance of a public procurement contract and assisting a procuring entity, the accounting officer shall —

- (a) throughout the duration of the public procurement contract, monitor —
  - (i) the performance of the contractor, and
  - (ii) the quality and quantity of the outputs and outcomes of the public procurement contract;
- (b) prepare a post-completion evaluation report respecting the performance of the contractor where necessary, or, on the request of the Public Procurement Committee or Board; and
- (c) submit to the Director a copy of the post-completion evaluation report.

## **94. Deficient performance, breach and termination**

(1) When a contractor defaults in the performance of the public procurement contract, the procuring entity may, subject to the rights of the tenderer who provided the security for the performance of the public procurement contract, take any action respecting the default as it considers appropriate, including issuing an invitation to tender or a request for proposals or negotiating a new public procurement contract.

(2) Notwithstanding any other law, where a procuring entity —

- (a) determines that, by reason of changed circumstances, the continuation of a public procurement contract is not in the public interest; and
- (b) with the approval of the accounting officer, Public Procurement Committee or Board, terminates the public procurement contract,

the contractor is entitled, upon such a termination, to reimbursement of expenses incurred in the performance of the public procurement contract, but the contractor is

not entitled to recover profits which would have been realised if the public procurement contract had been completed, but for its termination.

#### **95. Dispute resolution under public procurement contract**

The accounting officer shall ensure that any dispute which arises out of a public procurement contract is dealt with in a just, prompt and cost-effective manner.

### **PART 4 PUBLIC-PRIVATE PARTNERSHIP**

#### **96. Project identification and screening**

(1) The Steering Committee may, on its own initiative or on the direction of Cabinet, identify a project for implementation as a public-private partnership where the project —

- (a) provides assets and services in key infrastructure sectors including —
  - (i) transport,
  - (ii) energy,
  - (iii) water,
  - (iv) communications,
  - (v) construction and management of public facilities, such as schools, hospitals and office buildings;
- (b) is a significant investment in priority productive sectors that require use of assets, including land;
- (c) is a more effective and innovative utilization of assets in priority areas of development including —
  - (i) agriculture,
  - (ii) tourism;
- (d) provides other high-potential and export-oriented commercial activities.

(2) In identifying a project for implementation as a public-private partnership, the Steering Committee shall be satisfied that the project —

- (a) provides value for money;
- (b) is affordable to the procuring entity;
- (c) transfers appropriate operational or financial risk to the private party.

(3) Where a project is identified for implementation as a public-private partnership under subsection (2), the Core Team shall screen the project for public-private partnership potential by ensuring that —

- (a) the project complies with economic policy priorities and sector plans over the short and long term;
- (b) the project is technically, legally, environmentally and socially sustainable, economically cost-benefit justified and least-cost solution to the identified service need;
- (c) the cost of the project is in line with fiscal priorities and risks retained by the Government is not fiscally destabilizing;
- (d) there is a qualified private party available to implement the project and the project is expected to provide a commercial rate of return sufficient to attract such party and create competition for the opportunity;

- (e) the public-private partnership is expected to achieve value for money compared to alternative implementation options and other public-private partnership structures.
- (4) The Core Team may, in screening a project under subsection (2), require —
  - (a) stakeholder consultation; and
  - (b) pre-feasibility analysis to identify technical solutions and major risks, and estimate project costs and revenues.

## **97. Project concept note**

(1) Where a project has been identified and screened under section 96, the procuring entity shall prepare a project concept note to be accompanied with an estimate of the scope of work and resources required to develop a business case and prepare for a public-private partnership transaction.

(2) The project concept note shall be reviewed for completeness by the Core Team before being submitted to the Steering Committee for review.

## **98. Development of business case**

(1) Where the Steering Committee approves the project concept note, the Project Team shall develop a business case for the project.

- (2) A business case referred to under subsection (1) must —
  - (a) set out the scope and proposed structure of the project; and
  - (b) present a detailed assessment of the viability and suitability of the project for implementation as a public-private partnership.
- (3) The scope and structure of a proposed project under subsection (2) must —
  - (a) comply with the Government's economic policy priorities and sector plans over the short and long term;
  - (b) be technically, legally, environmentally and socially sustainable; economically cost-benefit justified and the least-cost solution to the identified service need;
  - (c) demonstrate that the cost of the project complies with Government fiscal priorities and that risks retained by Government would not be fiscally destabilizing;
  - (d) indicate that there is a qualified private party available to implement the project, and that the project is expected to provide a commercial rate of return sufficient to attract such party and create competition for the opportunity;
  - (e) indicate that the project is expected to achieve value for money compared to alternative implementation options and other public-private partnership structures.

(4) In developing the business case, the Project Team may, depending on the nature of the project —

- (a) conduct stakeholder consultation on project needs and options;
- (b) undertake or cause to be undertaken, technical feasibility analysis, including identifying costs and significant risks;
- (c) prepare concept design drawings;
- (d) require social and environmental impact assessments and management plans in accordance with any other law;

- (e) conduct financial and economic analysis of the project and of proposed public-private partnership structures, including estimating revenues;
- (f) develop key commercial terms for the proposed public-private partnership, including the contract type, allocation of risks and payment mechanisms;
- (g) assess the commercial attractiveness of the proposed public-private partnership through initial market soundness for potential investors in the project;
- (h) assess the rationale for implementing the project as a public-private partnership under the proposed structure in terms of value for money for Government and end users;
- (i) identify and assess the level of fiscal support required for the project whether direct or contingent, and the risks to be accepted by Government and the affordability of such support given fiscal priorities and constraints.

(5) The Core Team, Steering Committee and other relevant agencies shall review the business case.

(6) Once reviewed, the Project Team shall submit the business case to Cabinet for determination.

#### **99. Public-private partnership transaction**

Where the business case is approved by Cabinet, the Project Team shall proceed with the public-private partnership transaction.

#### **100. Expression of interest and pre-qualification of tenderers**

(1) The procuring entity may invite expressions of interest from private sector investors to ascertain the level of market interest and determine whether a private party has the financial and technical capability to implement the project.

(2) An expression of interest must —

- (a) be published in national, regional, and international platforms relevant to the sector;
- (b) provide an overview of the project scope and guidelines for the submission requirements and criteria for assessing the qualification of a tenderer.

(3) An expression of interest may commence together with the preparation of the public-private partnership transaction document.

#### **101. Shortlist of potential tenderers**

The Project Team may on the basis of expressions of interest select a shortlist of potential tenderers.

#### **102. Preparation of public-private partnership transaction document**

(1) The Project Team shall prepare a public-private partnership transaction document to be issued to qualified tenderers.

(2) The public-private partnership transaction document referred to under subsection (1) must include —

- (a) the draft public-private partnership contract which is based on the business case;
- (b) the request for proposals document that includes —
  - (i) a detailed description of the transaction process,

- (ii) required proposal contents,
- (iii) evaluation criteria,
- (iv) protocols for interactions with a tenderer during tender preparation including a structured, transparent, and fair process for feedback from a tenderer and adjustment of the draft public-private partnership contract,
- (v) a statement that the tenderer abides by the terms of the request for proposals, and if selected as the preferred tenderer to execute the transaction document substantially in the form of the draft public-private partnership contract issued to all pre-qualified tenderers.

### **103. Submission of tender under the transaction**

(1) A tenderer shall submit information on qualifications and detailed technical and financial proposals where the request for proposals requires submission of technical and financial proposals.

(2) A tenderer may be required to include signed copies of the public-private partnership contract.

### **104. Evaluation of tender under the transaction**

(1) The Project Team shall evaluate a tender according to the process and criteria set out in the request for proposals.

(2) Where 2-stage tendering is used —

- (a) technical proposals are evaluated first;
- (b) the tenderers who do not meet the minimum required standards are rejected; and
- (c) the tenderers who pass the technical stage move onto the opening of financial bids.

(3) After evaluation of a tender, the Project Team shall submit a report to the Steering Committee.

### **105. Selection of preferred tenderer**

(1) The Steering Committee shall, based on the report submitted under section 104(3) select the preferred tenderer.

(2) The Steering Committee shall identify the highest-scoring financial tenderer as the preferred tenderer.

### **106. Determination by Cabinet**

(1) A public-private partnership contract must be submitted to Cabinet for determination before signing.

(2) The submission under subsection (1) must present any changes to the expected cost and project structure as approved in the business case and provide a clear rationale for the changes.

### **107. Vetting of public-private partnership contract**

A public-private partnership contract must, before determination by Cabinet, be submitted to the Attorney General for a legal opinion.

## **108. Finalization and negotiation**

(1) Once the preferred tenderer has been approved by Cabinet, the Project Team shall finalize the public-private partnership contract with that tenderer.

(2) Negotiation with the tenderer approved under subsection (1) may be required to clarify elements of the proposal or public-private partnership contract, but changes to the draft public-private partnership contract that may have had a different result from the tendering process may not be incorporated during negotiation.

## **109. Public-private partnership contract**

A public-private partnership contract must —

- (a) be in writing;
- (b) provide for risk allocation and management;
- (c) set out the performance standard required and mechanisms by which the private party is paid;
- (d) set out adjustment mechanisms by which services or payments are adjusted in response to changing circumstances;
- (e) set out how the gains from refinancing are determined and treated;
- (f) establish a dispute resolution process to ensure disputes are resolved quickly and efficiently without interruption of service;
- (g) set out the termination date and arrangements for close and handover of assets; and
- (h) set out circumstances that would allow for early termination and any financial consequences arising from such termination.

## **110. Unsolicited proposal**

(1) A private party may submit to the Core Team an unsolicited proposal.

(2) An unsolicited proposal must include the information necessary to screen the project proposal under section 96.

(3) The Project Team may accept an unsolicited proposal where the proposal is —

- (a) an innovative solution to a priority infrastructure or public asset management challenge; or
- (b) a solution to a public need that is unique to the private entity proposing the solution.

(4) Once accepted, sections 57 and 97 to 109 apply to an unsolicited proposal.

(5) Where the private party who submitted the unsolicited proposal is not selected as the winning tenderer, the winning tenderer may be required to compensate the private party for costs incurred in developing the project, to an amount agreed in advance by the Government with the private party upon acceptance of the initial proposal.

(6) Direct public procurement of a project may be used where there is a clear reason that the original private party is the only one capable of implementing the proposal and in such cases, the Government will make every effort to ensure the proposal provides value for money.

## **111. Public-private partnership contract management**

(1) Where the public-private partnership transaction reaches financial close, a contract manager or contract management team is appointed by the procuring entity, in consultation with the Core Team.

- (2) The functions of the contract manager or contract management team are to —
- (a) monitor the public-private partnership delivery and risk by ensuring —
    - (i) that services are delivered continuously and to a high standard, in accordance with the standards contained in the public-private partnership contract,
    - (ii) that risk allocations are maintained in practice and risks are properly mitigated, and
    - (iii) that payments or penalties are made according to contractual specifications;
  - (b) establish and manage contract monitoring arrangements such as periodic reviews of public-private partnership performance by independent consultants, or mechanisms for measuring consumer satisfaction;
  - (c) manage change by ensuring that external risks and opportunities are identified and changing circumstances are acted on effectively in a way that achieves value for money over the period of the project, and adopting contractually-defined mechanisms to deal with contract adjustments, dispute resolution and public-private partnership contract termination;
  - (d) manage contract expiry and asset handover by handling the transition of assets and operations at the end of the contract period, including ensuring that conditions on handover meet contractually-required quality and operational standards;
  - (e) maintain up-to-date project performance information and financial indicators, and make that information available for inclusion in the budget and other Government internal and public reporting as required.

**PART 5**  
**ASSET DISPOSAL**  
*(Deleted by Act 13 of 2020)*

**112.** *(Repealed by Act 13 of 2020)*

**PART 6**  
**MISCELLANEOUS**

**113. Confidentiality**

(1) The Director, accounting officer, staff of the procurement unit, members of the Board or any Committee established or appointed under this Act shall keep confidential any information relating to public procurement procedures and to tenders, including any tenderer's proprietary information.

(2) Without prejudice to the generality of subsection (1), the Director, accounting officer, staff of the procurement unit, members of the Board or any Committee established or appointed under this Act shall not, except where required to do so by an order of a court, disclose any information relating to public procurement procedures and tenders, where the disclosure would —

- (a) amount to a contravention of an enactment;
- (b) obstruct law enforcement;
- (c) prejudice the legitimate commercial interests of the parties;
- (d) inhibit fair competition in public procurement; or
- (e) in anyway be contrary to public interest.

#### **114. Suspension of tenderer and contractor**

(1) The Director may suspend a tenderer or contractor where the tenderer or contractor —

- (a) deliberately provides false information in a tender or any other document submitted to a procuring entity in connection with a public procurement procedure or public procurement contract;
- (b) supports the interference with the participation of other tenderers;
- (c) engages in misconduct relating to the submission of tenders, including corrupt, fraudulent, collusive or coercive practices, price fixing, a pattern of under-pricing of tenders and breach of confidentiality;
- (d) takes 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 take the order;
- (e) makes 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 take the order;
- (f) makes 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) refuses to sign the public procurement contract or to furnish security for performance of the public procurement contract under the terms of the tendering document if required to do so;
- (h) engages in substantial non-performance of contractual obligations, provided that the non-performance was not due to circumstances beyond the control of the tenderer or contractor; or
- (i) has been convicted of a criminal offence relating to obtaining or attempting to obtain a public procurement contract or sub-contract or a fraudulent practice.

(2) A tenderer or a contractor shall not be suspended without —

- (a) reasonable notice in writing to the tenderer or contractor involved of the grounds for the proposed suspension and the details of the alleged grounds;
- (b) reasonable opportunity for the tenderer or contractor to respond to the alleged grounds and provide information in his or her defence; and
- (c) a thorough investigation of the facts of the case by the Director,

in accordance with prescribed procedures.

(3) A suspension under this section is for a minimum period of 6 months and a maximum period of 5 years and does not affect the implementation of an on-going public procurement contract by the tenderer or contractor.

(4) A suspension in accordance with subsection (1) applies to named directors, shareholders or staff of a tenderer or contractor, where the investigation demonstrates the involvement of such persons.

(5) A tenderer or supplier, suspended under this section for the first time, may, after the expiry of 6 months from the date of the start of the suspension, apply to the Director for the modification of the period of suspension.

#### **115. Conduct of tenderer and contractor**

(1) A tenderer or a contractor shall not —

- (a) engage in or abet any corrupt or fraudulent practice;

- (b) engage in any coercive practice threatening to harm, directly or indirectly, any person or his or her property to influence his or her participation in a public procurement procedure, or affect the execution of a public procurement contract;
- (c) engage in collusion, before or after a tender submission, designed to allocate procurement contracts among tenderers, establish tender prices at artificial non- competitive levels or otherwise deprive a procuring entity of the benefit of free and open competition.

(2) A tenderer or contractor who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding \$10,000 or to a term of imprisonment not exceeding 2 years or to both such fine and imprisonment.

#### **116. Design contests**

In appropriate cases, such as the public procurement of architectural designs or urban planning designs, a procuring entity may conduct a design contest for the purposes of selecting a design in accordance with such procedure as may be approved by the Director.

#### **117. Immunities**

An action cannot be maintained against the Board or any member of a Committee for any act or omission, except in so far as the act or omission complained of was done in bad faith.

#### **118. General penalty**

A person who contravenes any of the provisions of this Act, not otherwise specifically provided for, commits an offence and is liable on summary conviction to a fine not exceeding \$20,000 or imprisonment for a term not exceeding 8 years or to both such fine and imprisonment.

#### **119. Amendment of Schedules**

The Minister may, after consultation with the Director, amend the Schedules by Order published in the *Gazette*.

#### **120. Regulations**

(1) The Minister may, after consultation with the Director, make Regulations for the purposes of this Act.

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

- (a) the standard documents issued by the Director under section 5;
- (b) the instances where the Director may transfer public procurement to a procuring agent under section 6(1)(d);
- (c) the information under section 51(3)(d);
- (d) the fees for the tendering document under section 64(6);
- (e) the method of submission of a tender under section 67(1)(b);
- (f) the special circumstances under section 75(1);
- (g) the procedure for negotiation under section 75(3);
- (h) the non-refundable application fee under section 84(5);
- (i) the procedures for suspension of a tenderer or contractor under section 114(2).

(3) Regulations made under subsection (1) or (2) may provide that any person who contravenes the Regulations commits an offence and is liable on summary conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.

## **121. Repeal**

(1) Regulations 9 to 26 of the Finance (Administration) (Procurement and Stores) Regulations are repealed.

(2) Any reference in any other law to the provisions repealed under subsection (1) is a reference to the equivalent provisions of this Act where the reference relates to public procurement.

## **122. Transitional provisions**

(1) A procuring entity may continue any public procurement procedures in respect of the procurement of goods, services or works —

- (a) commenced before the coming into operation of this Act; and
- (b) which have not been determined, terminated or completed, as if this Act were not enacted, but the provisions of this Act applies to any contract which is awarded or executed as a consequence of such procedures.

(2) Where —

- (a) a public procurement contract is executed before the commencement of this Act; and
- (b) the public procurement contract is still subsisting, this Act applies to the public procurement contract as if that public procurement contract were executed under this Act.

(3) The Minister may make Regulations providing for any transitional matter arising as a consequence of the coming into operation of this Act or the Regulations.

## **Schedule 1**

(Section 2)

| <b>Value</b> | <b>Amount</b>                   |
|--------------|---------------------------------|
| Minor        | Below \$100,000                 |
| Intermediate | Between \$100,000 and \$500,000 |
| Major        | \$500,000 and above             |

*(Substituted by Act 13 of 2020)*

## **Schedule 2**

(Section 20)

## **OATH OF OFFICE**

I ..... swear by Almighty God that I will fulfil my responsibilities and duties as a member of the Board truly and faithfully, and use the powers and trust placed in me according to my skill, knowledge and ability, under the Public Procurement and Asset Disposal Act and any other law of Saint Lucia.

## **AFFIRMATION OF OFFICE**

I ..... do solemnly affirm that I will fulfil my responsibilities and duties as a member of the Board, and use the powers and trust placed in me truly and faithfully, according to my skill, knowledge and ability, under the Public Procurement and Asset Disposal Act and any other law of Saint Lucia.

### Schedule 3

(Section 57)

|          | Threshold                                           |
|----------|-----------------------------------------------------|
| Goods    | \$US 241,000 – (155,000 Special Drawing Rights)     |
| Services | \$US 214,000 – (155,000 Special Drawing Rights)     |
| Works    | \$US 8,975,000 – (6,500,000 Special Drawing Rights) |

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#### **CHAPTER 15.10 PUBLIC PROCUREMENT ACT**

#### **SUBSIDIARY LEGISLATION**

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*No Subsidiary Legislation*

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