



Ministry of Finance

# PROPOSED AMENDMENTS TO THE PUBLIC PROCUREMENT ACT, 2015 (NO. 15 OF 2015)



2021/03/03



# PROPOSED AMENDMENT TO THE ACT

## IDENTIFIED SECTIONS

## LACUNA/ PROBLEM

## PROPOSED AMENDMENT

### 1. Title of the Act

The Act reads as the Public ‘Procument’ Act. The letters “re” have been omitted and as such the word Procurement has not been correctly spelled.

The title on each page of the Act must be amended to read as Public Procurement Act, 2015.



# PROPOSED AMENDMENT TO THE ACT CONT'...

IDENTIFIED SECTIONS	LACUNA/ PROBLEM	PROPOSED AMENDMENT
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**2. Section 1:**

“Accounting Officer”: In this Act, unless the context otherwise indicates, accounting officer means accounting officer of a public entity

While **Section 74(1)** reads:

An accounting officer may delegate or assign to a staff member any powers or functions conferred upon or imposed on the accounting officer by or under this Act, except the power to issue contract awards, sign agreements and appointing or recommending staff members for appointment to procurement committee, bid evaluation committee or procurement management unit.

The current definition does not provide for an acting Accounting Officer. If one reads the definition in Section 1 of Accounting Officer together with Section 74 (1) on delegation, it means that an Acting Accounting Officer cannot carry out the tasks required of an Accounting Officer as per Section 74(1) which include the following:

- power to issue contract awards,
- sign agreements, and
- appointing or recommending staff members for appointment to procurement committee, bid evaluation committee or procurement management unit

Section 1: In this Act, unless the context otherwise indicates – “accounting officer” **means the substantial accounting officer or any person acting with competent authority as determined by the board of the Public Entity or the Accounting Officer of a public entity;**

In addition to this, and in line with Section 2 of the Act which promotes efficiency, an Acting Accounting Officer will also not always be available. In this regard, Delegation of some of these tasks have been proposed in respect of small value procurement. [Discussions are welcome]



# PROPOSED AMENDMENT TO THE ACT CONT'...

## IDENTIFIED SECTIONS

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**3. Following further definitions to be inserted in Section 1.**

The lack thereof has created ambiguity and challenges in some respects.

Proposed Definitions:

- a) "Days" to mean working days
- b) "Affirmative Action" as per the Affirmative Action Act 29 of 1998
- c) Debarment
- d) Suspension



# PROPOSED AMENDMENT TO THE ACT CONT' ...

IDENTIFIED SECTIONS	LACUNA/ PROBLEM	PROPOSED AMENDMENT
<p><b>4. Section 11(1) &amp; (2)</b></p> <p>11. (1) The Board consists of nine members - (a) of whom not more than five may be of the same sex; (b) who are suitably qualified fit and proper persons having knowledge and experience relevant to the functions of the Board; and (c) appointed by the Minister after an open, fair and transparent prescribed process of invitation, interview and recommendation by a recruitment committee.</p> <p>(2) The Minister must appoint, from among the nine members of the Board appointed under subsection (1), two members of whom one must be a female on a five year full-time basis to serve as -</p> <p>(a) <u>Chairperson and Deputy Chairperson; and</u></p> <p>(b) <u>administrative head and deputy administrative head, of the Board, respectively, and the Chairperson serves as the accounting officer of the Board.</u></p>	<p>The current interpretation of the Section 11(2)(a) and (b) <b>speaks of two separate functionaries. However, they are currently vested in one person, which creates a serious governance issue.</b></p>	<p>The Chairperson of the Board will be separate from the Administrative Head.</p> <p>Out of the nine Board Members, the Minister will appoint two to serve as the Chairperson and Deputy Chairperson of the Board.</p> <p>Additionally, the Minister will appoint separate qualified persons to serve as the Administrative Head and Deputy Administrative Head of the Central Procurement Board. The Administrative Head shall be referred to as the Chief Executive Officer of the CPB. Will serve for a period of five years.</p>



# PROPOSED AMENDMENT TO THE ACT CONT'...

## IDENTIFIED SECTIONS

## LACUNA/ PROBLEM

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### 5. Section 20(4)

Money received by way of a donation for the benefit of the Board may be administered on such conditions as may be agreed on between the donor and the Board.

This exposes the Board to possible conflict of interest.

Public scrutiny or public's perceptions of bias, where the donor is one of the bidders on one of the contracts to be presided over by the Board. Transparency issues are raised.

It has been proposed that the entire section be deleted.

An alternative option to read as follows:

Money received by way of a donation for the benefit of the Board **must be channelled through the Ministry of Finance.** [Discussions welcome from Management.]



# PROPOSED AMENDMENT TO THE ACT CONT'...

IDENTIFIED SECTIONS	LACUNA/ PROBLEM	PROPOSED AMENDMENT
<p><b>6. Section 21 (2)</b></p> <p>(2) The <u>Secretary</u> of the Board must ensure that-</p> <p>(a) all money received by or on behalf of the Board is deposited into its bank account as soon as practicable after being received;</p> <p>(a) a payment by or on behalf of the Board is made from its bank account; and</p> <p>(a) money is not withdrawn, paid or transferred from its bank account without the authority of the Board.</p>	<p>In term of section 11(2)(b) the chairperson serves as the accounting officer of the board.</p> <p>Therefore, the responsibility conferred to the secretary under section 21 (2) (a) and (b) (c) are the core functions of the accounting officer.</p> <p>The accounting officer is responsible for the sound management of the board and thus takes accountability should there be irregularities with the accounting affairs of the board.</p> <p>While section 21(2) talks of a secretary of the board, there is no enabling section which talks to the appointment of a secretary of the board.</p>	<p>Therefore, the need to amend section 21(2)</p> <p>By deleting the word “Secretary of the Board” and substituting it with “The Accounting Officer”.</p> <p>*This role to be that of the Administrative Head once the Act is amended.</p>



# PROPOSED AMENDMENT TO THE ACT CONT'...

IDENTIFIED SECTIONS	LACUNA/ PROBLEM	PROPOSED AMENDMENT
<p><b>7. Section 21(3)</b></p> <p>Cheques drawn on the bank account of the Board, or any other form or document to be completed for the withdrawal, payment or transfer of money from any of the bank accounts of the Board, are signed on behalf of the Board <u>by two persons</u> authorised for that purpose by the Board.</p>	<p>The term “ two persons” create ambiguity. Who are these two persons? It further raises accountability issues.</p>	<p>New Section to read as follows:</p> <p>Money drawn on the bank account of the Board, or any other form or document to be completed for the withdrawal, payment or transfer of money from any of the bank accounts of the Board, are signed on behalf of the Board <u>by the Administrative Head and the Chief Financial Officer.</u></p>



# PROPOSED AMENDMENT TO THE ACT CONT'...

IDENTIFIED SECTIONS	LACUNA/ PROBLEM	PROPOSED AMENDMENT
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**8. Section 25(4)(a)**

An Accounting Officer must:

- Engage in procurement planning, plan each step of the procurement process and prepare annual procurement plan.

The Act and the regulations thereto, state that the Accounting Officers of public entities should file their annual procurement plans with the Procurement Policy Unit, however there is no date stipulated. This has created discrepancy in that some entities submit their annual procurement plans on time while others not.

Its therefore proposed that each public entity must submit their Annual Procurement plan **3 months before the commencement of the new financial year.**

Therefore, a proposal to amend section 25(4)(a) to read:

“An Accounting Officer must:

Engage in procurement planning, plan each step of the procurement process and prepare an annual procurement plan to be submitted to the Procurement Policy Unit 3 months before the commencement of the new financial year.” [Input welcome from Management]



# PROPOSED AMENDMENT TO THE ACT CONT'...

## IDENTIFIED SECTIONS

## LACUNA/ PROBLEM

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### 9. Section 25(4)(b)

An accounting officer must certify the availability of funds before the commencement of each procurement process;

Certifying that funds are available is not sufficient. One must ensure that these funds remain available for the intended contract.

To be amended as follows:

“An accounting officer must certify the availability of funds before the commencement of each procurement process **and ensure that these funds remain committed for the duration of the contract;**”



# PROPOSED AMENDMENT TO THE ACT CONT'...

## IDENTIFIED SECTIONS

## LACUNA/ PROBLEM

## PROPOSED AMENDMENT

### 10. Section 27(1)(a) Choice of Procurement Methods

(1) Subject to subsection (2), the choice of procurement methods available to the Board or a public entity is

(a) for the procurement of goods, works and non-consultancy services, by -

- (i) open advertised bidding;
- (ii) restricted bidding;
- (iii) request for sealed quotations;
- (iv) direct procurement;
- (v) execution by public entities;
- (vi) emergency procurement
- (vii) small value procurement;
- (viii) request for proposals; and
- (ix) electronic reverse auction;

There is currently a need to allow public entities to enter into framework agreements with suppliers for goods/services needed on a regular basis without always having to start a new procurement process.

Examples: Flight tickets. A public entity can enter into a framework agreement for a certain period of time e.g 2 years with a travel agent to deal with flights etc. Makes operations easier especially in cases of emergencies.

A new method to be added:

### (x) procurement under framework agreement

#### Requirements to be as follows:

(1) For the purpose of efficiency gains, a public entity may engage in prescribed types of framework agreements in accordance with the prescribed procedures, where it is determined that –

(a) the need for the subject matter of procurement is expected to arise on an indefinite or repeated basis during a given period of time within a public entity or across public entities; or

(b) by virtue of the nature of subject of procurements, the need for it may arise on urgent basis during a given period of time.

(2) A public entity must record the reasons and circumstances upon which it relied to justify the use of the framework agreement and the type of framework agreement used.

(3) The framework agreement must be entered into from three suppliers.



# PROPOSED AMENDMENT TO THE ACT CONT'...

IDENTIFIED SECTIONS	LACUNA/ PROBLEM	PROPOSED AMENDMENT
<p><b>11. Section 33(3)</b> Emergency procurement</p> <p>33(3) For the purposes of this section, “emergency”, includes a situation where –</p> <p>(a) the country is either seriously threatened by or actually confronted with a natural disaster, catastrophe, or war;</p> <p>(b) life or the quality of life or environment may be seriously compromised; or</p> <p>(c) 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.</p>	<p>Emergency procurement is anti-competitive. There is a need to curtail emergency procurement and the current Act does not prohibit self created emergency.</p>	<p>Section 33(3) to be amended as follows:</p> <p>“(3) For the purposes of this section, “emergency”, refers to a condition giving rise to urgency were <u>neither under the control nor due to the negligence of the procuring entity and the urgency could not have been foreseen</u>, and includes a situation where -</p> <p>(a) the country is either seriously threatened by or actually confronted with a natural disaster, catastrophe, or war;</p> <p>(b) life or the quality of life or environment or <u>national interest</u> may be seriously compromised; [or] and</p> <p>(c) 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</p>



# PROPOSED AMENDMENT TO THE ACT CONT'...

## IDENTIFIED SECTIONS

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### 12. Section 50(2)

50. (1) The Board or a public entity must ensure that no disqualified bidder or supplier is permitted to receive a procurement contract or otherwise participate in procurement proceedings.

(2) A bidder or supplier is disqualified from bidding if such bidder or supplier –

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

(c) is not, as required by the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998), in possession of -

(i) a valid affirmative action compliance certificate issue under section 41 of that Act;

(ii) an exemption issued under section 42 of that Act; or

(iii) a proof from the Employment Equity Commissioner that the bidder or supplier is not a relevant employer as defined in that Act; or

(d) has not submitted a written undertaking as contemplated in section 138(2) of the

1. Currently the Bidding Documents require Company Registration as a mandatory document (where applicable). However, the Act does not list this as a disqualifying factor.

2. In respect of International bidders, the mandatory documents do not apply. Issues of paying tax become a challenge. To address this issue, Namibia will require of international bidders to open a bank account in Namibia as a precondition to signing a contract of award. Tax, National Liquidity issues.

Section 50(2) to be amended by the following new additions:

(e) is not in possession of a valid applicable certificate of registration

(f) In cases of international companies, the following pre-condition will apply: Upon signing the contract of award, the bidder must have opened a Bank Account in Namibia. [Discussions welcome]



# PROPOSED AMENDMENT TO THE ACT CONT'...

## IDENTIFIED SECTIONS

## LACUNA/ PROBLEM

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### 13. Section 52(9)

Every bid is evaluated according to the criteria and methodology set out in the bidding documents and the evaluated cost of each bid is compared with the evaluated cost of other bids to determine the most economically advantageous bid.

Several public entities only compare the costs of bids but not the qualification of the bidders and often even do not prepare a respective scoring matrix.

Entire section 52(9) be replaced with the following:

“Every bid is evaluated according to the criteria and methodology as well as the costs of each bid and compared with other bids to determine the most advantageous bid”



# PROPOSED AMENDMENT TO THE ACT CONT'...

IDENTIFIED SECTIONS	LACUNA/ PROBLEM	PROPOSED AMENDMENT
<p><b>14. Section 55</b> Several new subsections to be inserted under section 55</p> <p><b>14.1. Section 55(4)(b)</b></p> <p>An accounting officer must, in the prescribed manner and form, notify-</p> <p>(a) <u>the successful bidder of the selection of its bid for award; and</u></p> <p>(b) <u>the other bidders, specifying the name and address of the successful bidder and the price of the contract.</u></p>	<p>Bidders are currently not briefed on the evaluation criteria during the 7 days standstill period and thus are not able to properly challenge the public entity's intended selection for award. It is crucial that bidders have access to such information from the onset in order to challenge such decision.</p>	<p>Section <b>55(4)(b)</b> to read as follows:</p> <p>(b) the other bidders, specifying the name and address of the successful bidder and the price of the contract, <u>accompanied by the Executive Summary of the Bid Evaluation Report.</u></p> <p>Furthermore, new Section 55 (5) to be added immediately after the current section 55(4) and will read as follows: <u>An unsuccessful bidder may apply to the Board or public entity to reconsider its selection for award within 7 days of the notice referred in subsection (4) and the Board or public entity must inform the bidder within 14 days on its final decision.</u></p>



# PROPOSED AMENDMENT TO THE ACT CONT'...

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### 14.2. -> Section 55(5)

(5) In the absence of an application for review by any other bidder within 7 days of the notice referred to in subsection (4), the accounting officer must award the contract to the successful bidder.

Section 55 (5) introduces a standstill period of 7 days within which a contract may not be awarded. This is to allow bidders to challenge the procurement process.

However Public entities are currently signing contracts during the standstill period because of Section 59(2) which states that the application for review does not suspend the award of a contract. Public entities also do this knowing that once a contract has been signed, the Review Panel cannot set it aside because of Section 60 (c) which prohibits the Review Panel from setting aside decisions that bring a contract into force.

Currently Bidders bring review Applications before the Review Panel at a cost, however the Review Panel cannot set aside contracts already signed.

A new subsection (6) is to follow the new proposed subsection (5) and will read as follows:

### **Section 55(6)**

**An accounting officer shall not sign any agreement or contract during the standstill period. Any agreement or contract signed during the standstill period is *void ab initio*.**

The current subsections (5), (6), (7) and (8) will move down and become subsection (7), (8), (9) and (10) respectively.



# PROPOSED AMENDMENT TO THE ACT CONT'...

IDENTIFIED SECTIONS	LACUNA/ PROBLEM	PROPOSED AMENDMENT
<p><b>14.3. Section 55(5)</b>            *To become the new section 55(7)</p> <p>(5) In the absence of an application for <u>review</u> by any other bidder within 7 days of the notice referred to in subsection (4), the accounting officer must award the contract to the successful bidder.</p>	<p>In the proposed amendments, it should be clearly stated that there are two forms of review procedures. The first one being before the Public Entity, and secondly the one before the Review Panel. Currently bidders flock to the Review panel without necessarily having to exhaust internal remedies such as seeking clarification from the public entity.</p>	<p>New subsection (7) to read as follows:</p> <p><u>5) In the absence of an application for reconsideration by any other bidder within 7 days of the notice referred to in subsection (4), the accounting officer must award the contract to the successful bidder.</u></p> <p>*This will make the process easier as some public entities may rectify their mistakes and will thus decrease the number of applications to be brought before the Review Panel.</p> <p>The word “review” to be replaced by the word “reconsideration” as the public entity must first reconsider its decision before a bidder takes it to the Review Panel.</p>



# PROPOSED AMENDMENT TO THE ACT CONT'...

## IDENTIFIED SECTIONS

## LACUNA/ PROBLEM

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### 15. Section 59 (1)

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

- (a) by the board; or
- (b) by a public entity

for the award of a procurement contract.

The wording “for the award of a procurement contract” that comes after (b) must be deleted and be replaced with new wording.

It should come out clearly that an unsuccessful bidder must first apply to the Board or public entity to reconsider its decision. Once the public entity reverts, the bidder must then approach the Review Panel for a review application within a set period of time after the decision taken by the Board / Public entity.

New wording to be as follows:

within 7 days after having received a decision of the Board or public entity regarding the application to reconsider the selection for award



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### 16. Section 59 (2)

(2) An application for review made in terms of subsection (1) does not suspend the award unless an application has been made and resolved in favour of suspension.

The Application for review is done during the standoff period. During the stand of period the Board or a public entity has not yet awarded the contract, only a decision taken to award. This section gives an interpretation that an award can be made during a standoff period. However, once an award is made by signing the contract the review panel cannot suspended the award as per section 60 (c) thus this provision creates ambiguity and absurdity in the law

Subsection 59(2) to be deleted or either to be amended and read as follows:

An application for review made in terms of subsection (1) suspends the award until the Review Panel has disposed off the matter.



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### 17. Section 60(c)

Upon receipt of the application for review referred to in section 59, the Review Panel may –

- (a) dismiss the application
- (b) direct the Board or the public entity that has acted or proceeded in manner that is not in compliance with this Act to act or proceed in a manner that is in compliance with this Act;
- (c) Set aside in whole or in part a decision or an action of the Board or public entity that is not compliance with this Act, **other than any decision or action bringing the procurement contract or the framework agreement into force**, and refer the matter back to the Board or public entity for reconsideration with specific instructions;
- (d) Correct a decision or action by the Board or public entity that is not in compliance with this Act;
- (e) Confirm the decision of the Board or public entity; or

Order that the procurement proceedings be terminated and start afresh.

When one reads section 60 (c), it is clear that once a decision is made or there has been an action bringing the procurement contract or the framework agreement into force, such cannot be set aside by the Review Panel.

It should be borne in mind that the purpose of the review is to get a relief from the un-procedural process such as setting aside such a decision.

The words “other than any decision or action bringing the procurement contract or the framework agreement into force” should be deleted from section 60 (c).



# PROPOSED AMENDMENT TO THE ACT CONT'...

## IDENTIFIED SECTIONS

## LACUNA/ PROBLEM

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### 18. Section 66(2)(a)

A staff member referred to in subsection (1) must:

(a) disclose his or her interest or the interest of his or her close relative, if any, in terms of section 76, and in this paragraph, “close relative” means parent, sibling, spouse, child or grandchild, having substantial financial interest in the bidding entity; and

(a) withdraw from the procurement process if there is a potential conflict of interests, unless the Board or public entity decides that the conflict is trivial to affect the impartiality of the staff member.

The current conflict of interest exists only where a close relative is involved. “Close relative means: - Parent, Sibling, Spouse, Child or Grandchild, having substantial financial interest in the bidding entity.

The above scope is too narrow and needs to be broadened in fighting against corruption, bribery and nepotism in procurement.

Furthermore, section 66(2)(a) talks about **substantial** financial interest. The word “substantial” is subject to subjective interpretation.

Section 66 (2)(a) to read as follows:

A staff member referred to in subsection (1) must:

(a) disclose his or her interest or the interest of his or her close relative, **friends and associates** if any, in terms of section 76, and in this paragraph, “close relative” means parent, sibling, spouse, child, grandchild, **cousin, nephew or niece**, having substantial financial interest in the bidding entity.

The word “**substantial**” to be deleted from the sentence.



# PROPOSED AMENDMENT TO THE ACT CONT'...

## IDENTIFIED SECTIONS

## LACUNA/ PROBLEM

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### 19. Section 66

Section 66(3) to become Section 66(4) as a new subsection will be added that has to come before it. This new subsection will become subsection (3).

Section 66 (2)(c)

Some staff members involved in bid preparations decide to start up companies of their own while involved in the bid preparation and later recuse themselves in order to participate in the bidding process of the same bid.

This creates issue of good governance and transparency

New section 66(3) to read as follows:

A Board member, staff member of the Board or a public entity that was involved in the bid preparation process at any stage of a bid and such person indicates that he/she wishes to recuse himself/herself at a later stage because of conflict of interest, such person and the entity he/she is conflicted are prohibited from participating in the bidding process as a bidder or supplier.

All staff members employed in a particular Ministry/Agency shall not conduct business/procurement with the same public entity.



# PROPOSED AMENDMENT TO THE ACT CONT'...

## IDENTIFIED SECTIONS

## LACUNA/ PROBLEM

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### 20. Section 76(1)(b)

Disclosure of interest

76. (1) A member of the Board, Review Panel, a procurement committee or a bid evaluation committee, a procurement management unit and any staff member thereof having any direct or indirect interest in any matter brought before the Board, Review Panel, a procurement committee, bid evaluation committee or procurement management unit –

(a) must immediately inform, as appropriate, the Minister, chairperson or the accounting officer concerned of such interest; and

(b) may not participate in the deliberations or any part of the decision- making process in relation to that matter, unless the Board, Review Panel or public entity, directs otherwise after having considered the matter and found the conflict of interest to be of trivial nature or consequences.

The words “trivial nature or consequences” lead to different and subjective interpretations.

*What is trivial to one person is not trivial to the next.*

Furthermore, the word “may” at the start of subparagraph (b) gives rise to discretion. This person will be allowed to sit until a determination is arrived at.

Subparagraph (b) to be amended with the following underlined words.

(b) will not participate in the deliberations or any part of the decision- making process in relation to that matter, unless the Board, Review Panel or public entity, directs otherwise after having considered the matter and found the conflict of interest to be of no bearing on the matter.



2021/03/03



# PROPOSED AMENDMENT TO THE ACT

**The End.**