

PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT
(Cap. 42:08)

**PUBLIC PROCUREMENT AND ASSET DISPOSAL (INDEPENDENT
COMPLAINTS REVIEW COMMITTEE) REGULATIONS, 2006**
(Published on 31st March, 2006)

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SCHEDULE

IN EXERCICE of the powers conferred on the Minister of Finance and Development Planning by section 130 as read with section 102 (2) of the Public Procurement and Asset Disposal Act the following Regulations are hereby made —

PART I — Preliminary

- Citation **1. These Regulations may be cited as the Public Procurement and Asset Disposal (Independent Complaints Review Committee) Regulations, 2006.**
- Interpretation **2. In these Regulations unless the context otherwise requires —**
“Board” means the Public Procurement and Asset Disposal Board established under section 10 of the Act;
“Independent Committee” means the Independent Complaints Review Committee established under regulation 3;
“member” means a member of the Independent Committee appointed under regulation 3;
“Secretary” means Secretary of the Independent Committee appointed under regulation 8;

PART II — Establishment, Membership and Procedure of Independent Complaints Review Committee

- Establishment of Independent Committee **3. (1) Pursuant to section 95 of the Act, there is hereby established a body to be known as the Independent Complaints Review Committee, which shall consist of five members appointed by the Minister.**
(2) The Independent Committee shall consist of —
(a) a Chairperson; and
(b) four other members.
(3) A member of the Independent Committee shall be appointed for a period not exceeding five years.
(4) The Minister shall specify, when appointing members to the Independent Committee, such periods of appointment as ensure that the appointments of not more than one third of the members expire in any one year.
(5) In the absence of the Chairperson at any meeting the members present shall elect a Chairperson for that meeting from among themselves.
- Disqualification from appointment **4. (1) No person shall be appointed as a member of the Independent Committee or continue to hold office who has —**
(a) in terms of a law in force in any country —
(i) been adjudged or otherwise declared insolvent or bankrupt and has not been rehabilitated or discharged; or
(ii) made an assignment to, or arrangement or composition with, his creditors, which has not been rescinded or set aside; or
(b) within the period of ten years immediately preceding the date of his appointment or election, been convicted —
(i) of a criminal offence; or
(ii) outside Botswana of an offence which, if committed within Botswana, would have been a criminal offence, and sentenced to imprisonment for six months or more without the option of a fine, whether or not that sentence has been suspended, and for which he has not received a free pardon;

(c) been convicted of an offence or dismissed from employment for an offence involving moral turpitude.

(2) The Minister shall suspend from office a member against whom criminal proceedings are instituted for an offence in respect of which a sentence of imprisonment may be imposed, and whilst that Committee member is so suspended he shall not carry out any duties or be entitled to any remuneration or allowances as a Committee member.

5. (1) A member may resign from the Independent Committee by giving 30 days notice, in writing, to the Minister.

Removal and
resignation

(2) The Minister may remove a member from office if the Minister is satisfied that the member —

(a) has been adjudged guilty of having acted improperly as a member of the Independent Committee; or

(b) is inefficient;

(c) has been found to be physically or mentally incapable of performing his or her duties efficiently, and the member's medical doctor has issued a certificate to that effect; or

(d) has failed to comply with the provisions of regulation 6 (1).

6. (1) Where a member is present at a meeting of the Independent Committee at which any matter is the subject of consideration and in which matter the member is directly or indirectly interested in a private capacity, the member shall forthwith upon the commencement of the meeting —

Disclosure of
interest

(a) disclose such interest and shall not, unless the Independent Committee otherwise directs, take part in any consideration or discussion of, or vote on, any question concerning that matter; and

(b) recuse himself or herself from the meeting, unless the person is otherwise directed in terms of paragraph (a).

(2) A disclosure of interest made under subsection (1) shall be recorded in the minutes of the meeting at which it is made.

(3) Where a member fails to —

(a) disclose his or her interest in a matter before the Committee for consideration, in accordance with subregulation (1); or

(b) recuse himself or herself from the meeting at which that matter is being considered,

and the Independent Committee makes a decision which benefits the member, the decision shall be void to the extent to which it benefits that member.

(4) A person who contravenes the provisions of subregulation (1) commits an offence and is liable to a fine not exceeding P500 or for a term of imprisonment not exceeding 1 year or to both.

7. (1) Meetings of the Independent Committee shall be held at such times and at such places as the Chairperson may determine, and at least four ordinary meetings of the Independent Committee shall be held in each year.

Procedure at
meetings

(2) At least seven days notice shall be given of any meeting of the Independent Committee, except in the case of an emergency.

(3) Special meetings of the Independent Committee may be convened by the Chairperson when the Chairperson considers such meetings to be necessary or desirable, and shall be convened by him or her within one month on the request, in writing, of at least three members of the Independent Committee setting out clearly the purpose for which the meeting is to be convened.

(4) At any meeting of the Independent Committee any three members shall constitute a quorum.

(5) Decisions of the Independent Committee at any meeting shall be decided by a majority of the members present at that meeting, and where there is equality of votes the Chairperson, or the person acting as Chairperson at the meeting, shall have a casting vote.

(6) The Independent Committee may co-opt experts holding relevant qualifications and experience to participate in the deliberations of the Independent Committee, but such experts shall not vote on any motion before the Independent Committee.

(7) Except as may be otherwise provided in the Act and these Regulations, the Independent Committee shall regulate its own affairs and proceedings.

Secretary

8. (1) The Minister shall appoint a public officer as secretary of the Independent Committee.

(2) The Secretary may require any person involved with public procurement and asset disposal to submit to the Independent Committee such information and data as the Independent Committee may consider necessary for the discharge of its functions.

PART III — *Complaints Procedure, orders and decisions of the Independent Committee*

Lodging of complaints

9. (1) Subject to sub-regulation (2) the Independent Committee shall deal with any matter that arises in terms of section 103 (1) of the Act, such matter referred to in these Regulations as 'a complaint'.

(2) The Independent Committee shall consider a complaint only where —

- (a) the complaint had, before submission to the Independent Committee, been submitted and considered under the review procedures of the Board and a decision of the Board had been made on the complaint; and
- (b) the complaint is lodged with the Independent Committee on application for review of the decision of the Board; and
- (c) the complaint is lodged in the format set out in regulation 10.

(3) A complaint shall be lodged with the Independent Committee not more than 14 days after the decision of the Board referred to in sub-regulation (2).

(4) A complaint fee equal to one percent of the estimated tender value pertaining to the complaint shall be paid at the lodging of each complaint, except that in no case shall the complaint fee payable be less than P1,500 or more than P350,000.

(5) The complaint fee paid shall be refunded where the complaint, after consideration by the Independent Committee, is found to have merit in relation to its substance.

(6) Every complaint lodged shall be accompanied by a lodging fee of P250.00.

Complaint format

10. (1) A complaint lodged with the Independent Committee under these Regulations shall be in Form 1, set out in the Schedule.

(2) The complaint shall be lodged together with copies of the following documents —

- (a) the decision of the Board on the complaint;
- (b) the relevant set of bidding documents;
- (c) the bidding process set forth in the invitation to tender;

- (d) any document supporting the complaint that was submitted during the bidding process by the complainant; and
 - (e) any other document pertinent to the case.
- (3) Each complainant shall, where the complaint concerns the procurement or disposing procedures, adduce sufficient evidence to prove either or both of the following —
- (a) that the procurement procedures were contravened, or that the procuring entity acted unlawfully with respect to the procurement procedures;
 - (b) that the complainant would have been awarded the procurement contract had there been no contravention of the procurement procedures or other unlawful act.

11. (1) The Independent Committee shall consider a complaint lodged in terms of these Regulations by —

Consideration of complaint

- (a) making reference to —
 - (i) the Board and to its records and decision on the matter;
 - (ii) the procuring or disposing entity concerned and to its records and decision on the matter, if any;
 - (iii) any procuring or disposing entity and to its records;
- (b) seeking the advice of experts co-opted in terms of regulation 7 (6);
- (c) comparing the process of procurement under inquiry with previous procurement patterns that resulted in fraud or corruption or both; and
- (d) conducting such further investigations as may be necessary for the making of an informed judgement on the matter.

(2) The Independent Committee shall make its decision on the complaint, lodged in compliance with the provisions of these Regulations, within a period of not more than 30 days from the receipt of the complaint.

(3) A person appearing before the Independent Committee shall appear in person and not by means of legal representation.

12. (1) Subject to sub-regulation (2) where the Independent Committee deems it to be in the interest of a particular procurement project being inquired into under these Regulations to suspend the procurement process for the purpose of an inquiry and in relation to such contract —

Interim order of Independent Committee

- (a) the Board has not made an award of the bid; and
 - (b) a letter has not been issued to the successful bidder indicating the commencement of the contract,
- the Independent Committee may order that the procurement process be suspended for a period not exceeding 21 days to enable the inquiry to be completed.

(2) The Independent Committee may, for purposes of an inquiry, suspend a procurement project based on a contract where the requirements of sub-regulation (1) (a) and (b) are not fulfilled only where an aggrieved party has adduced sufficient evidence to demonstrate that the execution of such a contract —

- (a) may cause substantial loss to the public revenue; or
- (b) will prejudicially affect the public interest.

13. (1) The Independent Committee may not, except after consulting the Board, allow —

Matters not to be allowed

- (a) a complaint that has been lodged to be withdrawn; or
- (b) the complainant to conclude an agreement with the procuring entity in respect of the complaint.

(2) In any case where the Independent Committee allows an application made in terms of sub-regulation (1), its decision shall be published by notice in the Gazette and the file containing all the documents pertaining to the case shall be made available for public inspection during business hours, on payment of a fee of P50.00.

Decisions of
Independent
Committee

14. (1) The Independent Committee shall, after considering the complaint in accordance with regulation 11, make a decision on the matter as follows —

- (a) uphold the decision of the Board and dismiss the complaint;
- (b) reject the decision of the Board and order the procuring entity to —
 - (i) do or redo an action or proceeding;
 - (ii) suspend procurement process in terms of regulation 12;
 - (iii) cancel the procurement proceedings; or
- (c) make a finding in favour of the complainant and award costs to the complainant that shall not exceed the commercial outlay for the preparation of a bidding package when the dispute relates to an award decision and less if the dispute is in respect of other complaints.

(2) If any allegation of fraud or bias is proved by the Independent Committee during the course of its enquiry, the Independent Committee shall order any person found guilty of the fraud or bias to be excluded from the procurement process that shall take place as a consequence of the decision of the Independent Committee under sub-regulation (1).

(3) The complainant shall be notified of the decision of the Independent Committee no later than 3 days after the decision is officially made.

(4) The decision of the Independent Committee on any complaint shall be published by notice in the Gazette.

PART IV— *Miscellaneous*

Referring
complaints to
other bodies

15. The Independent Committee may refer or report any aspect of their decisions on any complaint to the Attorney General, the Directorate on Corruption and Economic Crime or other authority for further action or inquiry.

Register of
persons found
with fault

16. (1) The Independent Committee shall establish a register of persons against whom fault was found in any inquiry under these Regulations.

- (2) The register shall give a brief statement of the —
 - (a) procurement project concerned; and
 - (b) decisions of the Board and the Independent Committee regarding the person concerned.

(3) The register shall be kept by the Secretary of the Independent Committee and shall be open to the public for examination on payment of a fee of P50.00 during business hours.

Fines

17. The Independent Committee may, after consultation with the Board, order a complainant against whom fault has been established in an inquiry to pay such fine as the Independent Committee may consider appropriate.

Offence

18. Any person who submits or provides to the Independent Committee any information that such person knows to be false or documents that such person knows to have been falsified, commits an offence and is liable to a fine not exceeding P500 or to imprisonment for a term not exceeding six months or to both.

**SCHEDULE
FORMS**

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Form 1

**COMPLAINT FORM
(reg. 9)**

Complaint No.....
(Print or type)

Date:.....

1. Particulars of complainant:

1.1 Name of complainant company or firm:.....
.....
.....

1.2 Address of complainant company or firm:.....
.....
Telephone number:.....

1.3 Name of complainant company or firm representative:.....
.....

1.4 Address of complainant company or firm representative:.....
.....
Telephone number:.....

2. Procuring entity and procurement project

2.1 Name and address of procuring entity:.....
.....

2.2 Procurement number:

2.3 Description of project or goods being tendered:.....
.....

2.4 Approximate value of the tender:.....
.....

2.5 Tendering timetable:
- when tenders were invited:.....
- closing date for tenders:.....
- date contract awarded (if applicable):.....

