

L.N. 70 of 1996

**FINANCIAL ADMINISTRATION AND AUDIT ACT
(CAP. 174)**

Public Service (Procurement) Regulations, 1996

IN VIRTUE of the powers conferred by section 4 of the Financial Administration and Audit Act, the Minister of Finance has made the following regulations:

1. These regulations may be cited as the Public Service (Procurement) Regulations, 1996, and shall come into force on such date as the Minister responsible for finance may by notice in the Gazette appoint and different dates may be so appointed for different provisions and different purposes of these regulations. Citation and coming into force.

2. In these regulations, unless the context otherwise requires — Interpretation.

“Director” means the Head of the Department of Contracts;

“Minister” means the Minister responsible for finance;

“Secretary” means the Permanent Secretary at the Ministry responsible for finance;

“variations outside the limit of the tender conditions” means a variation other than one for which provision is made in the relative call for tenders.

3. These regulations apply to procurement by Government departments and divisions: Applicability.

Provided that public corporations or other bodies (hereinafter referred to as public organisations) may, in accordance with or under their constituent law, be directed to have their procurement regulated by these regulations, or that certain funds may be made available to them by Government on condition that equipment, stores, works or services to be procured thereby are to be made in accordance with these regulations.

4. (1) These regulations set out the limits of the power of the Director, heads of department and other officers to enter into contracts on behalf of the Government, and any contract entered into contrary to the provisions thereof shall be rescindable at the request of the Government. Scope.

(2) These regulations do not confer any right to any tenderer, supplier or contractor beyond those pertaining under civil law.

(3) The Minister may, subject to such conditions and limitations as he may deem proper, delegate, in writing, to the Secretary, the Director or to any public officer (or, solely in the case of a public corporation or body referred to in the proviso to regulation 3, an officer of the respective public corporation or body) any of the powers reserved to him under these regulations.

(4) The Minister may, in writing, dispense from any of the provisions of these regulations and may order that any procedure therein prescribed be not carried out, he may further in writing convalidate any thing done not in accordance with these regulations or any procedure prescribed therein, or in writing direct that any procurement be carried out otherwise than in accordance with these regulations.

Director of
Contracts.

5. (1) There shall be a Director of Contracts who shall be responsible for the running of the Department of Contracts and generally for the administration of the procurement procedures as laid down in these regulations.

(2) It shall be the function of the Director of Contracts —

(a) to establish the general conditions of contract in relation to matters listed in the First Schedule to these regulations and to publish the same in accordance with the said schedule;

(b) to authorise deviations from standard specifications and conditions (whether technical or otherwise) to be included in tender documents;

(c) to ensure that tender conditions and specifications do not give an undue advantage or disadvantage to any particular supplier;

(d) to vet and approve (with or without modifications) tender documents, before the same are issued and published;

(e) to ensure that calls for tenders are adequately advertised and that sufficient time is allowed for the submission of tenders;

(f) to publish in the Gazette a notice of all awards of tenders, including variations outside the limit of the tender conditions, within four months after their award;

(g) with the concurrence of the General Contracts Committee and in accordance with the rules set out in the Second Schedule to these regulations, to draw up, in such sectors as may be determined by him, graded lists of qualified contractors to whom contracts may be awarded in the said sectors;

(h) to establish and regulate the procedure to be followed during meetings of the Contracts Committees and departmental boards, and during the issue and publication of calls for tenders, receipt of offers, opening of bids, adjudication of tenders and awards of contracts;

(i) to monitor Government procurement requirements, and, after appropriate calls for tenders, enter into period contracts as necessary;

(j) to consider and approve the appointment of contractors for supplies, works or services for specific periods at approved prices, rates and conditions;

(k) to determine complaints on the issue of tenders and awards of contracts made by interested persons in accordance with the Third Schedule to these regulations, and to determine any procedures for such complaints not otherwise provided for in the said schedule,

(l) to obtain information from Government departments or other organisations to which these regulations apply on the award of departmental contracts, variation orders, penalties (imposed or remitted) and generally as he may deem necessary for the carrying out of his functions under these regulations;

(m) to approve, where appropriate, as provided in the Fourth Schedule to these regulations, variations outside the limit of the tender conditions;

(n) to monitor the proper execution of contracts awarded by him, and, on the advice of the General Contracts Committee, to impose or remit, as appropriate, penalties due on such contracts; and

(o) to institute any proceedings that may be necessary in relation to any contract awarded by him.

6. (1) There shall be a General Contracts Committee whose members shall be appointed by the Prime Minister on such terms and conditions as may be specified in their letter of appointment.

General Contracts
Committee.

(2) The members of the General Contracts Committee shall be appointed for a fixed term of not more than three years, and may be reappointed.

(3) A member of the General Contracts Committee may during his tenure of office be removed by the Prime Minister where he is satisfied that there has been a clear case of misbehaviour by the member or inability of a member to perform his functions or where such circumstances exist that would disqualify such a member from remaining a member of the Contracts Committee.

Special Contract
Committees.

7. (1) Where the Prime Minister determines that the adjudication of tenders for the award of any particular contract requires special expertise, skills or other input, he may appoint a Special Contracts Committee for the award of that contract.

(2) The members of a Special Contracts Committee shall be appointed for the duration of the adjudication process of the particular call for tenders until a letter of acceptance of tender is issued or the Director declares that the award of the contract is not going to be proceeded with.

(3) Subject to the above, the provisions of regulation 6 shall apply to members of a Special Contracts Committee as they apply to members of the General Contracts Committee.

Provisions in
respect of members
of Contracts
Committees.

8. (1) The provisions of the Fifth Schedule to these regulations shall apply in respect of the members of the General Contracts Committee and Special Contracts Committees.

(2) The meetings of the Committees shall be called by the Chairman who shall preside over such meetings. Any three members of the Contracts Committee shall constitute a quorum at a meeting thereof.

(3) Decisions shall be taken by a simple majority of the votes of the members present and voting. The Chairman shall have an initial vote and, in the event of an equality of votes, a casting vote.

(4) During the opening of bids the meetings of the Contracts Committees shall be open to the public. The list of tenders received, together with the respective offered prices, shall be given publicity by the Director.

9. The Contracts Committees shall have the function to assist the Director in the execution of his duties in accordance with these regulations. In the discharge of their functions, the Contracts Committees shall be regulated by the provisions of these regulations generally and in particular by the provisions of the Sixth Schedule to these regulations.

Functions of
Contracts
Committees.

10. Subject to the other provisions of these regulations, the procurement of all equipment, stores, works and services by Government or any other body to which these regulations apply, shall be made by contract after a call for tenders in accordance with these regulations.

Public Contracts.

11. Except where the Minister otherwise directs, the procedure for the procurement of equipment, stores, works or services shall be the following:

Procurement
procedure.

(a) (i) equipment, stores, works or services costing not more than Lm500 may be procured departmentally either after obtaining quotations or direct from the open market at the discretion of the head of Department taking into consideration the amount involved, the urgency attached to the procurement and restrictions of choice and availability;

(ii) equipment, stores, works or services costing over Lm500 but not more than Lm1,000 may be procured departmentally after obtaining quotations;

(iii) equipment, stores, works or services costing over Lm1,000 but not more than Lm2,500 may be procured departmentally after a call for tenders, or after obtaining quotations, or from the open market after taking into account the amount involved, the urgency attached to the procurement and restrictions of choice and availability, as may be approved by the Minister responsible for that department, or by the Parliamentary Secretary, the Permanent Secretary or the Head of Department as may be delegated by such Minister;

(iv) purchases of the same or closely similar material in different lots under subparagraphs (i), (ii) and (iii) hereof during a period of six months shall not exceed a total value of Lm10,000;

(b) equipment, stores, works or services costing more than Lm2,500 but not more than Lm20,000 shall be procured after a departmental call for tenders. Such tenders shall be opened by three senior officers of the department:

Provided that the Minister, by written direction, may allow limits higher than Lm20,000 in the case of particular departments and may authorise, as and when he deems appropriate, the setting up of Procurements Committees as provided for in the Seventh Schedule to these regulations;

Provided further that the Minister may allow variations, penalties and remissions, in respect of such contracts, to be approved by the Minister charged with responsibility for that department, who may delegate his authority to the Parliamentary Secretary, the Permanent Secretary, or head of department.

Provided further that the head of the department shall publish in the Government Gazette all awards of such contracts, including variations outside the limit of the tender conditions, within four months after they are awarded;

(c) equipment, stores, works or services costing more than the limits set out or established under paragraph (b) hereof shall be procured after a public call for tenders issued by the Director.

Items common to various departments.

12. (1) Equipment, stores, works or services which the Director may from time to time designate as common to various departments may be procured by the Director through Period Contracts awarded by him after a public call for tenders.

(2) The Director shall periodically notify Heads of Department of the prices and conditions applicable for, and the procedure to be followed in, the procurement of such equipment, stores, works or services.

(3) Heads of Department shall obtain such equipment, stores, works or services directly from the contractor in accordance with such conditions and procedures notified by the Director in accordance with paragraph (2) hereof.

Separate packages in tender.

13. Where in accordance with a call for tenders a bid consists of separate packages, the procedures set out in the Eighth Schedule to these regulations shall be followed.

Powers of the Director. Cap. 249.

14. (1) Without prejudice to the provisions of the Interpretation Act, and to any order or direction given by the Minister —

(a) the Director may, at his discretion, accept or reject the recommendations of the majority of members of the Contracts Committee for the acceptance or rejection of any tender;

(b) where —

(i) the Director disagrees with any recommendation of the majority of the members of a Contracts Committee; or

(ii) any recommendation of a Contracts Committee differs from that submitted by the department or other body for whom the procurement is to be made,

the Director may refer the matter for the decision of the Minister:

Provided that the Director shall always refer any matter in which he disagrees with the majority of the members of a Special Contracts Committee for the decision of the Minister;

(c) the Director may, at his discretion, refer any matter for the decision of the Minister.

(2) Any matter referred for the decision of the Minister shall be so referred in writing and the decision of the Minister shall likewise be communicated in writing.

15. (1) The Director shall not later than three months after the end of each financial year make and transmit to the Minister a report dealing generally with the activities of the Committees during the financial year being reported upon, and including a summary report of any irregularities brought to their notice or detected and recommendations made thereon, as well as details of any complaints received and the results of every investigation carried out thereon. Annual Report.

(2) The Minister shall cause a copy of every such report to be laid on the Table of the House of Representatives as soon as practicable.

16. Regulations 104 to 108 of the General Financial Regulations, 1996, are hereby deleted. Repeal.
L.N. 40 of 1966.

FIRST SCHEDULE

(Regulation 5(2)(a))

General Conditions of Contracts

1. The general conditions of contracts shall deal with:
 - i. Contractor specifications required for different classes of contract;
 - ii. The nature and form of guarantees required by Government;
 - iii. The treatment of local taxes;
 - iv. The treatment of foreign currency;
 - v. The rate to be used in any calculation of a discounted cash flow calculations;
 - vi. Payment procedure;
 - vii. The retention amounts to be withheld and the system for their payment;
 - viii. Arbitration arrangements;
 - ix. The nature of penalties to be imposed for non-compliance and the procedure for their imposition;
 - x. The proper measuring of the performance, progress and execution of contracts;
 - xi. Sub-contracting procedures;
 - xii. Procedure on variation orders; and
 - xiii. Quality assurance procedures.
2. These standard conditions and any amendments thereto shall be published in the Government Gazette before they come into force.
3. A full updated version of such standard conditions shall be published in the Gazette during the first month of each year.

SECOND SCHEDULE

(Regulation 5(2)(g))

Classification of Contractors

1. The procedure for the classification of contractors shall be regulated as follows:

a. The Director shall publish the criteria on which the classification in each sector is to be made;

b. The Director may, on application, include or upgrade suppliers and contractors after he ensures himself that they fit the published criteria;

c. The Director may remove or downgrade a supplier and contractor either on application, or after facts indicating such an action become known to him, or as a penalty for breach of the conditions of any contract previously awarded to the supplier or contractor:

Provided that in the case of a removal or downgrading other than on application, the supplier and contractor concerned shall be informed of the action intended to be taken and shall be given two weeks within which to submit reasons against such action. The decision of the Director shall be final.

2. Contractor and supplier classifications and any amendments thereto shall be published in the Government Gazette before they come into force.

3. A full updated version of such contractor and supplier classifications shall be published in the Gazette during the first month of each year.

THIRD SCHEDULE

(Regulation 5(2) (k))

Procedure for complaints

The procedure to be followed in making and determination of complaints, and the conditions under which such complaints may be made shall be the following:

1. The decision of the Director at any stage of the adjudication process shall be made public at his department, prior to the award of the contract or prior to proceeding to the next stage as the case may be.

2. Any tenderer who feels aggrieved by the decision may, within three working days of the publication of the decision, file a notice of objection. Such a notice of objection shall only be valid if accompanied by a deposit of 1% of the estimated tender value. The deposit shall only be refunded if the objection is upheld:

Provided that in no case shall the deposit be less than Lm100 or more than Lm25,000.

3. The notice of objection shall be made public by the Director at his department on the day following its filing.

4. Within three days of the publication of a notice of objection, any other tenderer involved in the call for tenders may register an interest in the proceedings. The registration of interest shall only be valid if accompanied by a deposit amounting to the deposit paid under paragraph 2 hereof. This deposit shall only be refunded if the tender is finally awarded to the tenderer filing a registration of interest. The tenderer who had been indicated in the adjudication decision of the Director as the one to whom the tender was to be awarded, shall be deemed to have registered an interest but no deposit needs to be made by him.

5. The names of the tenderers who register an interest shall be made public by the Director at his department on the first day after the time limit specified in paragraph 4 hereof.

6. (a) Within three working days after the publication of the list of tenderers who registered an interest, the tenderer filing the notice of objection shall send to the Director a motivated letter of objection explaining the points of this objection.

(b) The letter of objection and any accompanying documentation shall be submitted in a number of copies that equals the number of tenderers with a registered interest plus three.

(c) The letter of objection shall be made public at the Department of Contracts and shall be circulated to all tenderers with a registered interest.

7. (a) Within five days from the publication of the letter of objection, any tenderer who had registered an interest may send a motivated reply to the letter of objection.

(b) The reply and any accompanying documentation shall be submitted in a number of copies that equals the number of tenderers with a registered interest plus three.

(c) The reply shall be made public at the Department of Contracts and shall be circulated to all tenderers with a registered interest and to all tenderers who have filed an objection.

8. The Director shall, within five days of the publication of the replies, prepare a report analysing the letter of objection and the replies thereto. This report shall be circulated to the tenderers who filed an objection and who have a registered interest as well as to all the members of the Contracts Committee involved in the award of the particular tender.

9. The Director shall, within five days after the distribution of his report, call a public session of the Contracts Committee involved in the award of the particular tender to deliberate his report and to arrive at their final recommendation. The decision of the Director is final:

Provided that during such public deliberation, the Contracts Committee, through its chairman, shall be empowered to call witnesses, to administer oaths and to engage non-Committee members to assist the Committee in the investigations;

Provided further that the power of the Director to accept or reject a majority decision of the Contracts Committee or to refer any matter to the Minister for his decision shall still apply.

FOURTH SCHEDULE

(Regulation 5(2) (m))

Variation Orders

1. In all cases where approval for variation orders is required, it is to be sought from the Director before a commitment is made by the department or public organisation with the contractor.

2. When requesting such an approval, the department or public organisation shall present a document specifying the background to the cause of such a variation, the effect on the total cost of the tender and any effect on the recurrent expenditure that will ensue.

3. When granting or refusing such a request for variation, the Director shall specify his view as to whether such a variation could have been avoided and the procedure to be followed in the future by the department or public organisation to avoid a recurrence.

4. The Director is to keep a full record of variation requests, including the name of the contractor involved and details of the documents specified in paragraphs 2 and 3 hereof.

FIFTH SCHEDULE

(Regulation 8)

Members of the Contracts Committees

(a) The Committees shall be composed of the Director of Contracts, who shall be, ex-officio, the Chairman of the Committees, and of four to ten members who appear to the Prime Minister to have the relevant qualifications or experience.

(b) The Prime Minister shall also appoint persons from among the staff at the Department of Contracts to act as secretaries of the Committees as may be directed by the Director. The secretaries shall not be members of the Committees and may not vote thereat.

(c) During the Chairman's absence or inability to act as Chairman, or during any vacancy in the office of the Chairman, the Minister may appoint an officer from among the most senior officers at the Department of Contracts to act as the Chairman of the Committees, to exercise all powers and perform all the functions of the Chairman.

(d) A person shall be disqualified from being appointed to and from remaining a member of a Committee if he —

(i) is a member of the House of Representatives; or

(ii) has such a financial or other interest as is likely to prejudice the discharge of his functions as a member of the Contracts Committees.

(e) A member of a Committee may resign his office by letter addressed to the Prime Minister.

(f) A member of any Committee who has any direct or indirect interest in any contract dealt with by the Committee shall disclose the nature of his interest at the first meeting of the Committee after the relevant facts have come to his knowledge; such disclosure shall be recorded in the minutes of that meeting of the Committee and the member having an interest as aforesaid shall withdraw from any meetings at which such contract is discussed.

SIXTH SCHEDULE

(Regulation 9)

Functions of the Contracts Committees

A Contracts Committee shall:

1. advise on all matters relating to public contracts, as well as on public procurement of materials, works and services either on its own initiative or on specific issues relating to its functions which may from time to time be referred for its advice;

2. evaluate tenders submitted as well as reports and recommendations made thereon by the respective departments and public organisations and to make definite recommendations for the award of tenders ensuring that the best value for money at the lowest possible cost is attained. In this regard, due consideration shall be given to —

i. the final cost including financing costs to Government or to the public organisation, and

ii. the impact of each offer on the recurrent expenditure of Government or the public organisation;

3. report any irregularities that may be brought to its notice or that may be detected in the tendering process and make recommendations thereon to the Minister charged with responsibility for the department or public organisation concerned;

4. deal with matters which, according to the contract, have to be referred to the Contracts Committee, and to hear and determine disputes between departments or public organisations, as the case may be, and Contractors, arising out of public contracts; and

5. formally investigate complaints concerning public contracts and procurements and make recommendations thereon:

In such cases the Chairman of the Contracts Committee shall be empowered to call witnesses (who may be asked to confirm their testimony before a Commissioner for Oaths) and to engage non-Committee members to assist in the investigations.

SEVENTH SCHEDULE

(Regulation 11(b))

Procurements Committees

1. The Minister may authorise the setting up of Committees, to be known as Procurements Committees, in respect of departmental tenders whose estimated value exceeds Lm20,000.

2. Each Procurements Committee shall be composed of the Head of the Department, or, in his absence, an officer appointed by the Minister from among the most senior officials at the department effecting the purchase, who shall be, *ex-officio*, the Chairman of the Committee, and of not less than four members appointed by the Minister, none of whom shall be performing duties at or members of the staff of the department effecting the purchase.

3. The provisions of regulations 6, 8(2), (3) and (4) and 14 and of the Fifth and Sixth Schedules to these regulations shall apply *mutatis mutandis* to the setting up and the functions of each Procurements Committee, its Chairman and its members.

EIGHTH SCHEDULE

(Regulation 13)

Separate packages in tender offer

The Director of Contracts shall, on all tenders with an estimated value of over Lm250,000 or, at his discretion, on tenders of a lower value,

1. direct that one of the tender conditions provides that bid offers shall only qualify for consideration provided they include in separate packages:

- i. Guarantees required by the tender, duly executed;
Adequate information and certifications regarding the tenderer;
and
Terms of delivery and execution.
- ii. Technical specifications.
- iii. Financial consideration including the price for schedule of the bills of quantity, financing arrangements and terms of payment.

2. In the process of adjudicating the tender, the packages for all tenderers shall be opened in public and in the sequence enumerated above. When, at any stage, any tenderer fails to comply with the tender specifications, the remaining packages in his tender offer are to be discarded unopened.

3. Any discarded tender is to be given publicity in the Department of Contracts and the affected tenderer is to be informed of the decision within two working days of its publication. A review is to be effected by the Contracts Committee involved in the adjudicating process of the relevant tender, before the next stage of the adjudication is started.

4. A request for a review shall be accompanied by a deposit of 0.5% of the estimated tender value. This deposit shall only be refundable if the Director of Contracts finds in the tenderer's favour:

Provided that the deposit shall in no case be less than Lm250 or more than Lm25,000.