

L.N. 65 of 2013

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

Public Procurement (Amendment) Regulations, 2013

BY VIRTUE of the powers conferred by article 4 of the Financial Administration and Audit Act, the Minister of Finance, the Economy and Investment has made the following regulations:-

1. The title of these regulations is the Public Procurement (Amendment) Regulations, 2013, and these regulations shall be read and construed as one with the Public Procurement Regulations, hereinafter referred to as the "principal regulations".

Citation.

S.L. 174.04

2. Sub-regulation (3) of regulation 7 of the principal regulations shall be substituted by the following:

Amends
regulation 7 of
the principal
regulations.

"(3) (a) Any interested person who feels aggrieved by a decision taken by the Director of Contracts in terms of this regulation may, on a point of law, appeal to the Court of Appeal (Superior Jurisdiction) as constituted in accordance with article 41(1) of the Code of Organization and Civil Procedure by means of an application filed in the registry of that court within twenty calendar days from the decision on which that decision has been made public.

(b) A copy of the appeal application shall be served on the Director of Contracts who may file a written reply within twenty days from the date of service.

(c) The Court of Appeal shall set down the cause for hearing at an early date, in no case later than two months from the date on which the appeal is brought before it and shall cause notice of such date to be given to the parties who, on their part, shall assume the responsibility to visit the court registry and be aware of the latest information regarding the appointment for the hearing of the case.

(d) After appointing the application for hearing, the Court shall decide the application on its merits after hearing the submissions of all parties, within the shortest time possible but not any later than four months from the day when the appeal had been filed and the parties have been duly notified. Pending the decision of the Court, the process of the call for tenders shall be suspended."

Amends
regulation 17 of
the principal
regulations.

3. In paragraph (k) of sub-regulation (1) of regulation 17 of the principal regulations, for the words "remunerated by the contracting authority." there shall be substituted the words "remunerated by the contracting authority;", and immediately thereafter there shall be added the following new paragraph:

"(l) public supply or service or works contracts, between one contracting authority and another, that are largely financed by the central government authority."

Amends
regulation 21 of
the principal
regulations.

4. Sub-regulation (5) of regulation 21 of the principal regulations shall be substituted by the following:

"(5) (a) Any tenderer or candidate who feels aggrieved by a decision taken by the Review Board may appeal to the Court of Appeal (Superior Jurisdiction) as constituted in accordance with article 41(1) of the Code of Organization and Civil Procedure by means of an application filed in the registry of that court within twenty calendar days from the decision on which that decision has been made public.

(b) A copy of the appeal application shall be served on the contracting authority and on the recommended tenderer, if any, who may file a written reply within twenty days from the date of service.

(c) The Court of Appeal shall set down the cause for hearing at an early date, in no case later than two months from the date on which the appeal is brought before it and shall cause notice of such date to be given to the parties who, on their part, shall assume the responsibility to visit the court registry and be aware of the latest information regarding the appointment for the hearing of the case.

(d) After appointing the application for hearing, and after listening to the oral submissions made by all parties, the Court shall decide the application on its merits, within the shortest time possible but not any later than four months from the day when the appeal had been filed and the parties have been duly notified. Pending the decision of the Court, the process of the call for tenders shall be suspended."

Amends
regulation 84 of
the principal
regulations.

5. In sub-regulation (1) of regulation 84 of the principal regulations, for the words "The notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated value of the tender submitted by the tenderer" there shall be substituted the words "The notice of objection shall only be valid if accompanied by a deposit equivalent to 0.75 per cent of the estimated

value of the whole tender prior to publication or if the tender is divided into lots according to the estimated value of the tender for each lot submitted by the tenderer".

6. Regulation 85 of the principal regulations shall be amended as follows:

Amends
regulation 85 of
the principal
regulations.

(a) sub-regulation (3) thereof shall be amended as follows:

(i) in sub-paragraph (i) of paragraph (a) thereof, immediately after the words "Directive 2004/18/EC" there shall be added the words "and Directive 2004/17/EC";

(ii) sub-paragraph (ii) of paragraph (a) thereof shall be substituted by the following:

"(ii) when, notwithstanding a complaint is lodged before the Review Board, a contracting authority or the central government authority concludes the contract before a final decision is given by the Review Board;"

(iii) immediately after sub-paragraph (ii) of paragraph (a) thereof, there shall be added the following new sub-paragraph:

"(iii) when the contract is concluded by a contracting authority or the central government authority before the expiry of the period for the filing of a complaint as provided for in regulations 83(4) and 84(1);"

(iv) paragraph (b) thereof shall be substituted by the following:

"(b) In addition to the declaration of ineffectiveness of the contract, if the Board establishes an infringement as contemplated in paragraph (a)(i), (ii) or (iii), the Board shall impose penalties as described in paragraph (c) after assessing all relevant factors, including the seriousness of the infringement and the behaviour of the contracting authority or the central government authority, as the case may be.";

(v) immediately after paragraph (b) thereof, there shall be added the following new paragraph:

(c) Penalties shall consist of:

(i) the imposition of fines on the contracting authority or the central government authority, as the case may be, in the amount of fifteen per cent of the tender value but not exceeding fifty thousand euro (€50,000); or

(ii) the shortening of the duration of the contract:

Provided that the award of damages prescribed in sub-regulation (2)(c) shall not be considered as an appropriate alternative penalty for the purposes of this sub-regulation:

Provided further that the Review Board may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph (a)(i), (ii) and (iii), if the Review Board finds, after having examined all relevant aspects, that the overriding reasons relating to a general interest require that the effects of the contract shall be maintained.";

(b) in sub-regulation (4) thereof, for the words "The decision of the Board shall be rendered in writing", there shall be substituted the "The decision of the Board shall be rendered in writing, be signed by all members of the Board and be dated";

(c) sub-regulation (5) thereof shall be substituted by the following:

"(5) (a) Any tenderer or candidate who feels aggrieved by a decision taken by the Review Board in terms of this regulation may appeal to the Court of Appeal (Superior Jurisdiction) as constituted in accordance with article 41(1) of the Code of Organization and Civil Procedure by means of an application filed in the registry of that court within twenty calendar days from the decision on which that decision has been made public.

(b) A copy of the appeal application shall be served on the contracting authority, on the Director of Contracts and on the recommended tenderer, if any, who may file a written reply within twenty days from the date

of service.

(c) The Court of Appeal shall set down the cause for hearing at an early date, in no case later than two months from the date on which the appeal is brought before it and shall cause notice of such date to be given to the parties to the suit who, on their part, shall assume the responsibility to visit the court registry and be aware of the latest information regarding the appointment for the hearing of the case.

(d) After appointing the application for hearing, and after listening to the oral submissions made by all parties, the Court shall decide the application on its merits, within the shortest time possible but not any later than four months from the day when the appeal had been filed and the parties have been duly notified. Pending the decision of the Court the process of the call for tenders shall be suspended.

(e) The Department of Contracts and a contracting authority may only refer a matter to the Court of Appeal (Superior Jurisdiction) in relation to a decision taken by the Board relating to sub-regulation (2)(c) and sub-regulation (3).";

(d) sub-regulation (6) thereof shall be substituted by the following:

"(6) Without prejudice to any other provision of these regulations, the Review Board shall not receive complaints in terms of sub-regulation (3)(a)(i), (ii) and (iii) which:

(a) are filed later than thirty calendar days with effect from the day following the date on which:

(i) the contracting authority or central government authority published a contract award notice in accordance with regulation 49:

Provided that where the contracting authority or the central government authority, as the case may be, publishes a contract award notice as stated above, without having

published a contract notice, it must include a justification for such contract award notice; or

(ii) the contracting authority or central government authority informed the tenderers and candidates concerned of the conclusion of the contract in terms of regulation 84(1); and

(b) in any case not provided for in paragraph (a) before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.";

(e) in paragraph (a) of sub-regulation (8) thereof, for the words "sub-regulation (6)" there shall be substituted the words "sub-regulation (5)"; and

(f) sub-regulation (12) thereof shall be substituted by the following:

"(12) In its decision the Review Board shall recommend on whether any deposit submitted by a tenderer in terms of regulation 84 should be refunded, in whole or in part, or not."

