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L.N. 155 of 2013

PUBLIC ADMINISTRATION ACT
(CAP. 497)
Procurement (Energy and Fuels) Appeals Board Regulations, 2013

IN exercise of the powers conferred by article 49 of the Public Administration Act, the Prime Minister has made the following regulations:-

PART I
General Provisions

Citation.

1. The title of these regulations is the Procurement (Energy and Fuels) Appeals Board Regulations, 2013.

Interpretation.

2. For the purposes of these regulations, unless the context otherwise requires -

Cap. 497.

"the Act" means the Public Administration Act;

"Board" means the board established in terms of regulation 4;

"candidate" means a natural or legal person or entity or group of such persons and, or bodies participating in a procurement procedure;

"Constitution" means the Constitution of Malta;

"contract" means any contract for pecuniary interest concluded in writing between one or more candidates and one or more procuring entities having as its main object the supply of energy or fuels for the production of energy;

"complainant" means any candidate who files a complaint with the Board in accordance with the provisions of regulation 30;

"government agency" or "agency" means a body listed in the Fourth Schedule of the Act;

"government department" or "department" means any entity in the Public Service that is listed in the Second Schedule of the Act;

"government entity" means an organisation, not being a government department, a government agency or a commercial partnership, in which Government has a controlling interest, whether or not such organisation is established by law;

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"procurement procedures" means a process initiated by a procuring entity for the award of a contract;

"procuring entity" means the Government, any government department, government agency or government entity;

"Public Service" shall have the same meaning assigned to it by the Constitution, but shall, for the purposes of these regulations, be understood in accordance with article 1(2) of the Act;

"recommended candidate" means the candidate who had been indicated in the adjudication decision of the procuring entity as the one to whom the contract was to be awarded;

"Secretary" means the Secretary of the Board;

"working days" means days other than a Saturday, Sunday or a public holiday or national holidays in Malta.

Scope.

3. These regulations provide for the determination of complaints from candidates against any decision of a procuring entity to disqualify and, or exclude the candidate from a procurement procedure or against a proposed award of a contract.

Establishment of Procurement (Energy and Fuels) Appeals Board.

4. There shall be established a review board to be known as the Procurement (Energy and Fuels) Appeals Board which shall be regulated in terms of these regulations.

Functions of the Board.

5. It shall be the function of the Board to:

(a) hear and determine complaints in relation to procurement procedures in respect of which the procuring entity shall have specifically indicated that candidates, who have been harmed or risk being harmed by any decision of the procuring entity may have recourse to the Board; and

(b) to disqualify and, or exclude the candidate from a procurement procedure or against a proposed award of a contract.

Procurement procedures to the review of the Board.

6. If a procuring entity wishes to subject a procurement procedure to the review of the Board, the document or documents governing the procurement procedure shall specifically refer to these regulations and may include a copy of Part III, for the guidance of candidates. These regulations shall apply to procurement procedures initiated prior to the promulgation of these regulations if the procuring entity notifies candidates that it submits to the jurisdiction of the Board in relation to the relevant procurement procedure.

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PART II
Composition and Powers of Board

Composition of the Board.

7. The Board shall be composed of a Chairperson and two other members who shall be appointed by the Prime Minister for a period of three years with the possibility of re-appointment.

Appointment of Chairperson of the Board.

8. A person shall not be qualified to be appointed as Chairperson of the Board unless he has practised as an advocate in Malta for a period of, or periods amounting in the aggregate to, not less than seven years.

Appointment of members of the Board.

9. A person shall not be qualified to be appointed or continue to hold office as a member of the Board, if he:

(a) is a Minister, a Parliamentary Secretary, a Member of the House of Representatives, a public officer or an employee of a government entity or an agency; or

(b) has been convicted of any crime punishable by imprisonment for any term; or

(c) is disqualified to be elected as a member of the House of Representatives for any of the reasons stated in article 54(1) a), (c), (d), (e), (f), (g) or (h) of the Constitution.

Disqualification of members of the Board.

10. A person shall be disqualified from being appointed or continuing to be a member of the Board if he has a financial interest or other interest that is likely to prejudice the discharge of his functions as a member of the Board.

Removal from office.

11. The Chairperson or other members of the Board may be individually removed by the Prime Minister from office on the ground of proved inability to perform the functions of that office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour.

Disqualification from participation in the hearing of the complaint.

12. The Chairperson or other member of the Board shall be disqualified from participating in the hearing of a complaint in such circumstances as would disqualify a magistrate or judge in a civil suit.

Direct or indirect interest in a contract.

13. Any member of the Board who may have a direct or indirect interest in any contract which becomes the subject of a complaint shall inform the Chairperson in writing of such interest in which case the member shall be precluded from further participation in the hearing of the complaint.

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Substitutes.

14. The Prime Minister may appoint a substitute or a number of substitutes, as Chairperson and as members of the Board, in which case the said substitute members shall serve for predetermined periods of time, in accordance with such distribution of duties, including provisions for inability of members to serve and other circumstances, as the Prime Minister may establish.

Secretary.

15. The Board shall be assisted by a secretary.

Remuneration.

16. The members of the Board shall receive such remuneration as the Prime Minister may determine.

Liability.

17. The members of the Board shall not be held personally liable for any act or omission done in good faith in the course of the exercise of their functions as members of the Board.

Powers of the Board.

18. The Board shall be empowered to call witnesses, to administer oaths and to seek expert advice from outside the procuring entity to assist it in its investigations.

Sessions of the Board.

19. The sessions of the Board during which the complaint is heard shall be held in public. The complainant and the recommended candidate, if any, shall have the right to attend and to be accompanied by any person, professional or otherwise, they consider suitable to defend their interests.

Power of the Chairperson to determine the procedure for hearing.

20. The Chairperson shall have the power to determine the procedure for the hearing of all complaints lodged with the Board and shall ensure that during the public hearing all interested parties are given the opportunity to make their case.

Review.

21. The review is to be effected by the Board before the next stage of the adjudication process is commenced and, or before the award of the contract as the case may be.

Procedure followed by the Board.

22. The procedure to be followed by the Board shall consist in a review of the decision of the adjudication board to determine whether the decision was, in substance, in accordance with the law and the documentation governing the relevant procurement procedure. The Board shall not substitute its discretion for that of the adjudication board.

Right to put appropriate questions.

23. In fulfilling the obligation referred to in regulation 22, the Chairperson of the Board may ask appropriate questions to the representative of any procuring entity as well as to the members of the respective adjudication boards and to have recourse to all pertinent documentation.

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Action taken by the Board.

24. Upon completing its review of a complaint, the Board may do any one or more of the following:

(a) annul anything the procuring entity has done in the procurement procedure, including annulling the procurement procedure in its entirety;

(b) give directions to the procuring entity with respect to anything to be done or redone in the procurement procedure; and

(c) substitute the decision of the Board for any decision of the procuring entity in the procurement procedure.

Interim measures.

25. The Board may decide to grant interim measures if, after having taken into consideration the probable consequences of the measures for all interests likely to be harmed, together with the public interest involved, it concludes that the benefits of the measures are to exceed their negative consequences.

Decision of the Board.

26. The decision of the Board shall be final insofar as it concerns the award of the relevant contract and, or the disqualification from or reintegration of a candidate in the procurement procedure:

Provided that, notwithstanding the candidate's rights in terms of Part IV, the procuring entity shall have the authority to proceed with the procurement procedure, including the award and execution of the contract with a candidate, as soon as the decision of the Board is published and notified to all interested parties:

Provided further that, candidates shall be prohibited from requesting any court to issue precautionary warrants against the procuring entity in order to stop the procuring entity from proceeding with the procurement procedure, including the award and execution of the contract with a candidate.

Unanimity.

27. Decisions of the Board shall preferably be taken on the basis of unanimity:

Provided that decisions taken on the basis of majority shall be final and binding with regard to the award of the contract:

Provided further that the Chairperson and the other two members shall have one vote each.

Form of decisions taken.

28. All decisions taken by the Board shall be rendered in writing, signed by all the members of the Board and dated. The Board shall indicate the reasons upon which such decision was taken and the

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decision shall be concluded with definite recommendations which shall be binding on the procuring entity and all the candidates involved.

Refund of deposits.

29. In its decision the Board shall recommend whether any deposit submitted by a candidate in terms of regulation 31 should be refunded, in whole or in part, or otherwise, giving written reasons for such recommendation and the recommendation of the Board shall be final and binding.

PART III
Procedure for the submission and hearing of complaints.

Complaint following a decision.

30. Any candidate who feels aggrieved either by a decision of the procuring entity to disqualify and, or exclude the candidate from the relevant procurement procedure or against a proposed award of a contract may, within six (6) working days of the publication of the decision, file a complaint at the premises of the procuring entity, which shall deliver the complaint to the Secretary of the Board forthwith:

For the purposes of this regulation, "publication of the decision" means the publication of the decision on the notice board of the procuring entity or, in the case of a decision which has been taken and published prior to the promulgation of these regulations, the fresh publication of the decision incorporating a notice to candidates that these regulations have come into force and that the procuring entity has submitted to the jurisdiction of the Board in relation to the relevant procurement procedure.

Validity of complaint.

31. The complaint referred to in regulation 30 shall only be valid if:

(a) accompanied by a deposit in the amount specified by the procuring entity in the procurement procedure, orin the case of procurement procedures initiated prior to the promulgation of these regulations, in the notice issued by the procuring entity in terms of regulation 6:

Provided that in no case shall the deposit be less than one thousand and two hundred euro (€1,200) or more than fifty eight thousand euro (€58,000); and

(b) it sets out in detail the grounds for the complaint and is accompanied by all supporting documentation.

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Preclusion from proceeding with the adjudication process.

32. The procuring entity shall be precluded from proceeding with the adjudication process and, or with the award of the contract, during the period of six (6) working days allowed for the submission of complaints, and, if a complaint is eventually submitted, until the Board has issued a final decision in relation to any complaints.

Procedure.

33. The procedure to be followed in submitting and determining complaints shall be the following:

(a) Any decision by a procuring entity shall be made public at the office of the procuring entity.

If the decision of the procuring entity is:

(i) the disqualification, rejection or exclusion of a candidate, the procuring entity shall notify the candidate concerned setting out a summary of the relevant reasons relating to the rejection of the candidate;

(ii) the award of a contract, the procuring entity shall notify all candidates still in the procurement procedure of the proposed award and the basis for the award.

(b) Any candidate who feels aggrieved by the decision of the procuring entity must file a complaint within six (6) working days in accordance with the provisions of regulation 31;

(c) The complaint duly filed in accordance with regulations 30 and 31 together with all supporting documentation shall be served on the recommended candidate, if any;

(d) The recommended candidate, in the case of a proposed contract award, shall have the right to file a reply to the complaint filed by the complainant within five (5) working days from being notified with a copy of the complaint. The reply shall be served upon the complainant;

(e) The Chairperson shall appoint the public hearing at the earliest possible date after the expiry of the period allowed to candidates for the filing of complaints as set out in regulation 30 or, in the case of complaints from a proposed award, after the expiry of the period allowed to the recommended candidate as set out in regulation 33(d), as the case may be, and in any case not later than three working days, and all public hearing sessions shall be concluded with urgency as from the date of the

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first session;

(f) The decision of the Board shall be pronounced in public within three working days after the holding of the final public hearing session and shall be published at the premises of the procuring entity:

Provided that if the Board is unable, for valid reasons, to deliver its decision within the stipulated period, the period shall be extended by a further period of three working days.

(g) The procuring entity shall transmit a copy of the decision of the Board to the complainant and the recommended candidate, if any.

Instances where a contract is declared to be null.

34. In its review, and unless otherwise specified in these regulations, the Board shall consider a contract executed by the procuring entity with a candidate to be ineffective, and thus shall declare the contract as null from the date of the decision by the Board if:

(a) notwithstanding that a complaint is lodged before the Board, the procuring entity concludes the contract before a final decision is given by the Board;

(b) the contract is concluded by the procuring entity before the expiry of the period allowed for the filing of complaints as provided for in regulation 30.

PART IV
Right to Judicial Review

Right of appeal.

35. Any candidate who feels aggrieved by a decision taken by the Board in terms of these regulations may appeal to the Court of Appeal (Superior Jurisdiction), as constituted in terms of article 41(1) of the Code of Organization and Civil Procedure, on a point of law arising out of a final decision of the Board within a period of twenty calendar days from the date of the final decision of the Board.

Validity of appeal.

36. The Court of Appeal shall only consider the appeal if the Court is satisfied -

(a) that the determination of the point of law will substantially affect the rights of the candidate;

(b) that the point of law is one which the Board was asked to determine or otherwise relied upon in its decision;

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(c) that on the basis of the findings of fact in the decision of the Board, the decision of the Board on the point of law is prima facie open to serious doubt;

(d) that based on a review of the complaint, and of any response and the decision of the Board, the appeal does not appear dilatory and vexatious; and

(e) and in all other cases the Court shall dismiss the appeal.

Recourse to the Court of Appeal shall not preclude or delay implementation of the Board's final decision.

37. Recourse to the Court of Appeal in terms of regulation 35 shall not however preclude or delay the procuring entity from implementing the Board's final decision.

Claim for damages.

38. In any appeal brought before the Court of Appeal in terms of regulation 35, it shall be lawful for the applicant to include (besides a declaration that the final decision of the Board contained a wrong determination of a point of law) a claim for damages (but not specific performance of any obligation). Damages shall not be awarded by the Court unless the applicant can demonstrate bad faith and manifest unreasonableness. Damages shall be limited to direct, foreseeable damages and shall not include loss of profit, opportunity or other indirect, eventual or consequential loss. Where the Court of Appeal finds that damages are due it may either determine the amount of damages itself or refer the case to the First Hall of the Civil Court for the amount to be determined.

Exclusion of article 469A of the Code of Organization and Civil Procedure. Cap.12.

39. Article 469A of the Code of Organization and Civil Procedure shall not apply in respect of any decision of the Board.

Ippubblikat mid-Dipartiment tal-Informazzjoni (doi.gov.mt) — Valletta — ***Published by the Department of Information (doi.gov.mt) — Valletta***
Mitbugħ fl-Istamperija tal-Gvern fuq karta riċiklata — ***Printed at the Government Printing Press on recycled paper***

Prezz/*Price*
€0.90