

**CHAPTER 42:08**  
**PUBLIC PROCUREMENT AND ASSET DISPOSAL**  
ARRANGEMENT OF SECTIONS  
PART I  
*Preliminary*

SECTION

1. Short title
2. Interpretation

PART II  
*Scope of the Act*

3. Application
4. External obligations
5. Procurement for external obligations
6. Derogation
7. Fair treatment
8. Contribution to other entities
9. Discrimination and underpricing

PART III  
*Establishment, Constitution and Membership of the Board*

10. Establishment of the Board
11. Composition of the Board
12. Appointment to the Board
13. Conditions of service
14. Tenure of Board members
15. Termination of membership to the Board
16. Resignation
17. Filling of vacancies of the Board

PART IV  
*Meetings and Proceedings of the Board*

18. Meetings of the Board
19. Signification of documents
20. Method of work of the Board
21. Appointment of Secretary to the Board
22. Functions of the Secretary
23. Accountability to the Board
24. Conditions of service of Secretary
25. Co-option of advisory personnel

PART V  
*Functions and Powers of the Board*

26. Functions and powers of the Board
27. Compliance with the Act
28. Advise stakeholders
29. Standardised bidding package
30. National standards specification
31. Derogation by Board
32. Approval of specific instructions
33. Revision of bid packages
34. Legal status of bid packages correspondence
35. Evaluation procedures
36. Evaluation and adjudication

37. Power to adjudicate
38. References
39. Industry standards
40. Precedent to be followed
41. Alterations to awarded bids
42. Changes in bidder's circumstances
43. Inclusion of all relevant clauses in bidding packages
44. Retroactive approval
45. Availability of funds
46. End of activity report
47. Resiling from agreements
48. Recommendation of systemic improvements
49. Management of contractors registration system
50. Establishment of committees and delegation of power
51. Operational modalities of sub-committees
52. Obtaining of information
53. Redressing complaints
54. Dispute resolution
55. Methods of procurement
56. Electronic procurement
57. Medium of communication

#### PART VI

##### *Financial and Administrative Provisions*

58. Financing of the Board
59. Technology, data-bases and manpower
60. Annual and medium term plans

#### PART VII

##### *Devolution of Public Procurement and Asset Disposal Management*

61. Establishment of Ministerial Committees
62. Responsibilities of Ministerial procurement and Asset disposal Committees
63. Special Procurement Committee
64. District Administration Committees
65. Financial ceilings

#### PART VIII

##### *Reserved and Preferential Treatment*

66. Economic and social objectives and procurement
67. Empowerment of citizen contractors
68. Process for preferential schemes
69. Certification of eligibility
70. Eligibility for preference
71. Reserved schemes
72. Procurement preferences and reservation schemes
73. Scale of preference
74. Ranking of bids
75. Preference for supplies
76. Prime contractor and subcontractor

#### PART IX

##### *Accountability and Transparency: Audit and Ethics*

77. Independent auditor
78. Liability of auditor
79. Audit by the Auditor General

80. Audit recommendation and the Board
81. Availability and comments on report
82. Co-operation with the auditors
83. Facilitating investigations
84. Maintenance of records
85. Access to documentation and data bases
86. Obligation to advertise
87. Publicity and the media
88. Disclosure of interest by members of the Board
89. Confidentiality obligations
90. Code of ethics and declaration of business interests
91. Classification of information
92. Rights of review and research
93. Declassification of information
94. Transmission of documents

#### PART X

##### *Establishment of the Independent Complaints Review Committee*

95. Independent Committee
96. Composition
97. Appointment
98. Levels and institutional representation
99. Conditions of service of Committee
100. Secretary of Independent Committee
101. Co-option of experts
102. Modalities of operation
103. Scope of responsibilities
104. Requirements in respect of grievances
105. Exemption
106. Meeting of costs
107. Imposition of fines
108. Award of costs
109. Co-operation with the Secretary

#### PART XI

##### *Advisory Committee on Public Procurement and Asset Disposal*

110. Establishment of Advisory Committee
111. Membership of Advisory Committee
112. Meetings and functions of Advisory Committee
113. Appointment to Advisory Committee
114. Conditions of service of Advisory Committee
115. Method of work of Advisory Committee

#### PART XII

##### *Registration of Contractors*

116. Register of contractors
117. Requirements to be registered
118. Domicile and registration
119. Registration and pre-qualification
120. Non-eligibility for non-registered contractors
121. Classification of contractors
122. Review of register
123. Code of conduct of contractors
124. Suspension and de-listing from the register
125. Non-registration of suspended contractors

- 126. Restriction on defaulting contractor
- 127. Procedures and regulations

PART XIII  
*General Provisions*

- 128. Offences
- 129. Immunities
- 130. Regulations
- 131. Repeal and savings
- 132. Transitional period

Act 10, 2001,  
S.I. 62, 2001,  
S.I. 49, 2002,  
Act 12, 2008,  
S.I. 72, 2008.

**An Act to establish the Public Procurement and Asset Disposal Board and its committees and provide for the procurement of works, supplies and services, for the disposal of public assets and related matters.**

[Date of Assent: 7th August, 2001]  
[Date of commencement: 2nd July, 2002]

**PART I**  
***Preliminary (ss 1-2)***

**1. Short title**

This Act may be cited as the Public Procurement and Asset Disposal Act.

**2. Interpretation**

In this Act, unless the context otherwise requires-

**"Advisory Committee"** means the Advisory Committee on Public Procurement and Asset Disposal established under section 110;

**"any combination thereof, however classified"** means turnkey projects, build own operate projects, build operate and transfer projects or any arrangement following in this genre, which may also include management, maintenance, testing, commissioning or training;

**"bid"** means tender and *vice versa* or an invitation by-

- (a) a procuring entity for a provider (works, supplies or services); or
- (b) a disposing entity for interested parties,

to submit a competitive offer in relation to a public solicitation for a specific activity which shall include design assignments;

**"bidding document"** means a standard bidding package, which shall include, in relation to-

- (a) works-
  - (i) invitation to bid;
  - (ii) specific instructions to bidders;
  - (iii) form of bid;
  - (iv) form of contract;
  - (v) conditions of contract (general and particular);
  - (vi) specifications and design drawings,
  - (vii) bills of quantities or equivalent documents approved by the Board;
  - (viii) schedule of commencement, delivery, completion, etc.; and
  - (ix) securities; or
- (b) services-

- (i) letter of invitation;
  - (ii) instructions or briefs to bidders;
  - (iii) description of services to be supplied;
  - (iv) terms of reference;
  - (v) technical proposal;
  - (vi) financial proposal (where applicable);
  - (vii) schedules; or
  - (viii) standard forms of contracts; and
- (c) supplies-
- (i) letter of invitation;
  - (ii) instructions to suppliers;
  - (iii) description of supplies;
  - (iv) technical specifications;
  - (v) financial proposal (where applicable);
  - (vi) schedules relating to delivery, payment, etc., or
  - (vii) standard forms of contracts; and
- (d) in respect of paragraphs (a), (b) and (c) above, any other relevant forms, documents, correspondences and clarification.

**"Board"** means the Public Procurement and Asset Disposal Board established under section 10;

**"Citizen Contractor"** means a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Botswana;

**"Committee"** means a Committee of the Public Procurement and Public Asset Disposal Board, established by a decision of the Board, and delegated specific functions and powers by the Board in respect of public procurement or the disposal of public assets under the Act;

**"contract"** means an agreement between a procuring entity or a disposing entity and a contractor resulting from the application of the appropriate and approved procurement or disposal procedures and proceedings, and shall be concluded in pursuance of a bid award decision by the Board or one of its Committees;

**"Contractor"** or **"provider"** are used interchangeably and mean a natural person or an incorporated body licensed by the competent authority to undertake works, services, supplies, or any combination thereof, however classified;

**"Department"** means a public entity, an extra ministerial body or a subdivision of the central Government, including schools and hospitals that derive their regular funding from the Consolidated Fund;

**"disposal"** means the divestiture of public assets, including intellectual property rights and goodwill, and any other rights of the State, by any means, including sale, rental, lease, licences, tenancies, franchises, auction or any combination thereof, however classified;

**"disposing entity"** means any Ministry or department duly authorised to engage in public procurement;

**"District Committees"** means the District Administration Public Procurement and Asset Disposal Committees established under section 64;

**"Executive Chairperson"** means the Executive Chairperson of the Public Procurement and Asset Disposal Board appointed under section 12(1);

**"Independent Committee"** means the Independent Complaints Review Committee established under section 95;

**"industry standards"** means best practices which shall include practices and standards which-

- (a) are safe and environmentally friendly;
- (b) are innovative and increase efficiencies;
- (c) save time and costs;

- (d) relate to materials, processes, methods, designs, equipment, products, services and practices; and
- (e) are as defined and coded by internationally recognised contractors' associations and professional bodies in the concerned fields;

**"local contractor"** means a contractor whose operation is based in Botswana irrespective of the contractor's nationality or domicile;

**"Minister"** means the Minister for Finance;

**"Ministerial Committee"** means the Ministerial Public Procurement and Asset Disposal Committee established by the Public Procurement and Asset Disposal Board at the ministerial level and vested with authority to conduct public procurement and the disposal of public assets on behalf of its departments, consistent with the procedures set out in this Act;

**"pre-qualification"** means a screening process designed to ensure that invitations to bid are confined to capable firms;

**"procurement"** means the acquisition in the public interest by any means, including by purchase, rental, lease, hire-purchase, licences, tenancies, franchises, etc., of any type of works, services or supplies or any combination thereof, however classified, and shall include management, maintenance and commissioning;

**"procuring entity"** means any Ministry or department duly authorised to engage in public procurement;

**"Public Oversight Agencies"** means the Attorney General's Chambers, the Auditor General's Office, the Directorate on Corruption and Economic Crime, the Office of the Ombudsman and any other institution charged with a responsibility to oversee the activities of other Government departments;

**"Registered Contractor"** means a contractor registered with the Public Procurement and Asset Disposal Board in terms of this Act and any regulations made thereunder;

**"services"** means all services, other than works and supplies, including banking services, insurance coverage, travel services, cleaning services, etc., and includes consultancy services;

**"specifications"** means National Standards Specifications, and includes-

- (a) a generic or functional description of the qualities required of a procurement item;
- (b) the relevant industry standards of approaching and executing the assignment in question; and
- (c) the appropriate good practice tests that are to be used to verify the specified quality and performance of the procured item before delivery, on delivery, during installation, and in the course of operation, as applicable and the use of which shall be mandatory in all bidding packages;

**"supplies"** means goods, raw materials, products, equipment or objects of any kind and description in solid, liquid or gaseous form, and in the form of electricity, as well as services incidental to the provision of such supplies;

**"Tender Notice"** means any invitation to eligible contractors to submit written offers to provide works, services and supplies, or any combination thereof; and

**"works"** means any work associated with the construction, reconstruction, demolition, repair, or renovation of a building or structure, on the surface or underground, on and under water, and includes the preparation, excavation, erection, assembly, installation, testing and commissioning of any plant, equipment or materials, decoration and finishing, as well as services incidental to or independent of the foregoing works such as drilling, mapping, satellite photography, seismic investigations, similar services, and any combination thereof provided pursuant to a procurement contract.

## **PART II**

### ***Scope of the Act (ss 3-9)***

#### **3. Application**

The provisions of this Act shall apply to-

- (a) all entities of the central Government which are involved in public procurement or the disposal of public assets, whether they are located abroad or within Botswana;
- (aa) all land boards;
- (ab) all parastatals, statutory organisations and local authorities, in accordance with the provisions of section 8, except where exempted by the Minister by notice published in the *Gazette*.
- (b) the procurement or disposal of all assets acquired by any means, including-
  - (i) purchase;
  - (ii) rental;
  - (iii) lease;
  - (iv) hire-purchase;
  - (v) licences;
  - (vi) tenancies;
  - (vii) franchises; or
  - (viii) auctions, etc.;
- (c) the procurement of all works, services, supplies, or any combination thereof, however classified; and
- (d) the disposal of serviceable and unserviceable-
  - (i) physical properties and land;
  - (ii) items acquired through works, services or supplies contracts;
  - (iii) intellectual and proprietary rights;
  - (iv) financial instruments, including shares, stocks, bonds, etc.; and
  - (v) goodwill and any other rights of the State.

#### **4. External obligations**

(1) To the extent that this Act conflicts with any obligations of the Republic of Botswana under or arising from any treaty or other agreement to which Botswana is a party, the requirements of such treaty or agreement shall prevail over this Act.

(2) Where such treaty or agreement contains provisions favourable to citizen and local contractors, full advantage shall be taken of these in the interest of promoting domestic capacity development.

(3) If Botswana is required under the terms of any treaty or agreement to which she is a party to contribute from her own resources, in any form, to any procurement activities within Botswana in part or wholly, jointly or separately, then procurement through such contributions shall be-

- (a) in discrete activities where possible; and
- (b) subject to the applicable provisions of this Act.

(4) The disposal of any, or all of the products, or public assets accruing to Botswana as a result of procurement activities made under subsections (1) and (2) shall, similarly, be subject to the appropriate provisions of this Act.

#### **5. Procurement for external obligations**

Where the procurement, in the context of section 4(1) favours an external beneficiary, then-

- (a) procurement through contributions made by Botswana shall be undertaken in Botswana, through contractors registered in Botswana;
- (b) all relevant insurances shall be placed with companies registered in Botswana; and
- (c) supplies shall be transported in carriers registered in Botswana.

#### **6. Derogation**

A derogation from the application of the relevant provisions of this Act in respect of sections 4 and 5 may be applied for to the Board, on the prescribed form, by the competent agency responsible for the procurement or disposal in question, with supporting documentation

and justification.

#### **7. Fair treatment**

Where, for reasons of limitations of capacity, contractors registered in Botswana are unable to satisfy wholly or in part, the specific procurement requirements, they shall be offered an equal opportunity to participate in the bidding process of the beneficiary entity (in conjunction with firms in that country) and where applicable to offer such requirements from third sources.

#### **8. Contribution to other entities**

Contributions by the Government of Botswana in any form to entities such as parastatals, local authorities, private companies, non-governmental bodies, charities and trusts, etc., falling outside of the scope of this Act, which entail procurement activities and the subsequent disposal of the products of such procurement activities, shall be-

- (a) kept discrete and identifiable as far as possible; and
- (b) subject to the applicable procurement or disposal provisions of this Act.

#### **9. Discrimination and underpricing**

(1) In the event of evidence demonstrating-

- (a) discrimination of any form against Botswana registered contractors by private firms or public entities of any other country, either in that country or in a third country, in respect of procurement or disposal activities; or
- (b) discrimination or underpricing or action to this effect by public or private entities of Botswana or public or private entities from another country, which limits competition and places locally registered firms at a disadvantage in the domestic market in respect of procurement or disposal activities,

the Board shall in consultation with other interested parties and bearing in mind any treaty obligations of the Government, submit recommendations to the Minister on commensurate measures to compensate for the injustices.

(2) The Minister shall on approval of the recommendations, cause the requisite counter measures to be taken by the competent agencies.

### **PART III**

#### ***Establishment, Constitution and Membership of the Board (ss 10-17)***

#### **10. Establishment of the Board**

There is hereby established a body to be known as the Public Procurement and Public Asset Disposal Board (hereinafter referred to as "the Board"), which shall be a body corporate with a common seal, capable of suing and being sued in its own name and, subject to the provisions of this Act, of doing or performing all such acts or things as bodies corporate may, by law, do or perform.

#### **11. Composition of the Board**

The Board shall consist of:

- (a) a full time Executive Chairperson;
- (b) three full time Members; and
- (c) three part time Members.

#### **12. Appointment to the Board**

(1) The Minister shall appoint the Executive Chairperson and members of the Board.

(2) The part time members of the Board shall be appointed from among nominees of the associations of contractors and professional bodies and the private sector.

#### **13. Conditions of service**

The Minister shall determine conditions of service and remuneration of Members of the Board.

#### **14. Tenure of Board members**

All Members of the Board, including the Executive Chairperson, shall be-

- (a) appointed for a period not exceeding four years; and
- (b) eligible for re-appointment for only one further term, not exceeding four years.



## **15. Termination of membership to the Board**

The Minister may at any time terminate the appointment of any Member of the Board on the grounds that the member-

- (a) is responsible for some act, misconduct, default or breach of trust in the discharge of his duties;
- (b) commits an offence or act of such nature as renders it desirable that his appointment should be terminated;
- (c) is absent from three consecutive meetings of the Board without leave of the Board;
- (d) has become insolvent or bankrupt under any law in force in Botswana and such member has not been rehabilitated or discharged or has made a composition with his creditors and has not paid his debts in full;
- (e) suffers from a physical or mental illness or infirmity;
- (f) is sentenced to imprisonment without the option of a fine or has been convicted of any offence involving dishonesty; or
- (g) becomes a Member of the National Assembly or a Councillor of a local authority.

## **16. Resignation**

A Member of the Board may resign from the Board by submitting, to the Minister, written notification three months, prior to the date of the termination of his membership.

## **17. Filling of vacancies of the Board**

On the death of, or the vacating of office by, a Board member, the Minister shall appoint another person to take the place of the member who died or vacated his office until the expiry of the period during which such member would have otherwise continued in office.

### **PART IV**

#### ***Meetings and Proceedings of the Board (ss 18-25)***

## **18. Meetings of the Board**

(1) Subject to the provisions of this Act, the Board shall regulate its own procedures.

(2) The Board shall meet as often as it is necessary or expedient for the proper discharge of its functions.

(3) The Executive Chairperson shall call and preside over all meetings of the Board, and in his absence, the Board Members present shall elect, from among their number, an acting Executive Chairperson to facilitate the conduct of its regular or unscheduled meetings.

(4) Two full time members and one part time member shall constitute a quorum of the Board:

Provided that when a member has declared an interest in an agenda item or a matter before the Board, in accordance with section 88(1), the member in question shall not be counted for the purpose of forming a quorum in relation to the item or matter in question.

(5) The decision of the Board shall be by a majority of votes and, in the event of an equality of votes, the Executive Chairperson shall have a casting vote in addition to his deliberative vote.

(6) The proceedings of each meeting of the Board shall be recorded and confirmed at the subsequent meeting of the Board.

## **19. Signification of documents**

All documents made by and all decisions of the Board may be signified under the hand of the Executive Chairperson, or any member of the Board generally or specifically authorized by the Act.

## **20. Method of work of the Board**

The procedures and processes to be used in the conduct of the business of the Board shall be prescribed in the Regulations.

## **21. Appointment of Secretary to the Board**

The Board shall with the concurrence of the Minister, appoint a Secretary of the Board, who shall be suitably experienced and trained in the legal discipline to a level appropriate for the

seniority of the position.

## **22. Functions of the Secretary**

(1) The Secretary of the Board shall attend meetings of the Board but without the right to vote, and shall-

- (a) advise the Board on all legal and procedural issues in respect of its deliberations and decisions;
- (b) be responsible for the accurate and complete recording of the Board's proceedings and decisions; and
- (c) be responsible for all legal business of the Board and institutional linkages and representation of the Board.

(2) The Secretary of the Board may attend the meetings of any of the Board's Committees, or that of any procuring or disposal entity dealing with a procurement or disposal activity, to observe and record its proceedings and decisions, and recommend thereafter to the Board, on legal or procedural grounds, any action to correct or improve the operational modality of the entity in question or to reverse its decision or suspend its operations.

(3) The Secretary of the Board shall be the liaison officer between the Board and the Independent Committee.

(4) The Secretary of the Board or his nominee shall serve as Secretary to the Advisory Committee on Public Procurement.

(5) The Secretary of the Board shall represent the Board, its Committees and the public procurement and asset disposal entities in all legal proceedings and enquiries in respect of procurement and disposal activities.

## **23. Accountability to the Board**

The Secretary of the Board shall be accountable to the Board, through the Executive Chairperson, for his functions and responsibilities.

## **24. Conditions or service of Secretary**

(1) The conditions of service including the remuneration package of the Secretary shall be set by the Board with the concurrence of the Minister.

(2) The Secretary shall be appointed for a period of four years and may be eligible for reappointment for only one further term not exceeding four years.

(3) The Board may, with the concurrence of the Minister, terminate the services of the Secretary on any of the grounds set out in section 15.

(4) The Secretary may resign by submitting to the Board written notification three months prior to the date of termination of his position.

## **25. Co-option of advisory personnel**

(1) The Board may co-opt such number of persons as may be necessary and capable of assisting the Board in the conduct of its regular business or to undertake occasional assignments.

(2) Co-opted members shall-

- (a) have no right to vote; and
- (b) be remunerated at the standard rates for professional services, set by the Board and reviewed by the Board on a biennial basis.

## **PART V**

### ***Functions and Powers of the Board (ss 26-57)***

## **26. Functions and powers of the Board**

Unless otherwise provided for in this Act or any other enactment, the Board shall ensure that all public procurement and asset disposal entities, in making their decisions, take into account the principles of-

- (a) an open, competitive economy and changing external obligations in relation, generally to trade and specifically to procurement, which dynamically impact on a continual basis on domestic procurement policy and practice;

- (b) standardisation of procurement items in the interest of cost reduction, ease of maintenance and technological effectiveness;
- (c) aggregation of procurement and disposal activities and items that are common to procuring or disposing entities in order to benefit from economies of scale;
- (d) competition among contractors by using the most efficient and competitive methods of procurement or disposal to achieve the best value for money;
- (e) fair and equitable treatment of all contractors in the interest of efficiency and the maintenance of a level playing field;
- (f) accountability and transparency in the management of public procurement and in the disposal of public assets in order to promote ownership of the system and minimise challenges thereto; and
- (g) integrity, fairness of and public confidence in, the procurement and disposal process.

#### **27. Compliance with the Act**

The Board shall ensure that all procuring and disposing entities comply fully with all the provisions of the Act, irrespective of the means of procurement, disposal, or the assets to be procured or to be disposed of.

#### **28. Advise stakeholders**

The Board shall advise procuring, and disposing entities on all aspects of procurement and disposal management and particularly on the application of the provisions of the Act.

#### **29. Standardised bidding package**

The Board shall adopt and circulate, and amend where necessary, standardised bidding packages and public assets disposal contracts which shall be used on a mandatory basis by all procuring and disposing entities.

#### **30. National standards specification**

(1) Where national standards specifications have not yet been issued, the Board shall, in the interim determine, after consultations with relevant stakeholders, which country's or institution's standards specifications shall be substituted on a mandatory basis by all procuring and disposing entities in their respective bidding packages.

(2) Where neither standardised bidding packages nor national standards specifications exist for a specific context, a procuring or disposing entity shall seek the Board's prior written approval to use an alternative.

#### **31. Derogation by Board**

In exceptional cases, the Board shall permit a procuring or disposing entity to depart from sections 29 and 30, based on a prior written application to the Board detailing the variation being sought with supporting justifications, satisfactory to the Board.

#### **32. Approval of specific instructions**

(1) The Board shall examine instructions and the conditions of contract contained in each bidding package prior to the issuing of a Tender Notice, and more generally, review and assent to any specific part, or the whole of the bidding package, and obtain changes where these are deemed by the Board to be necessary before they are issued to bidders.

(2) The Board shall ensure that the instructions and conditions of contract in bidding packages are congruent with the Act.

(3) In the event that the general and specific conditions in bidding packages and the client's instructions to bidders are incongruent with the Act, the latter shall take precedence.

#### **33. Revision of bid packages**

The Board or its Committees shall, at any point between its review of a bid package and the award of a bid, return such bid to the procuring or disposing entity to make amendments to the bid package should it establish that the bid package-

- (a) is deficient in any specific respect which, unless it is addressed immediately, is likely to result in multiple variations, delays and spiralling costs; and
- (b) patently fails to vest in one contractor (when the bid entails more than one contractor or

is part of a larger activity) overall responsibilities for the full and timely scheduled bid outputs; or to put in place alternative arrangements (be they departmental or project management mechanisms) to achieve same, and thereby cause serious implementation slippage on account of overlapping, ill-defined, or missing links in the chain of command for successful implementation on the ground.

#### **34. Legal status of bid packages correspondence**

From the time a Tender Notice is issued, all-

- (a) correspondence between the bidder and the procuring entity or the Board (including the bidding package) up to the point of adjudication by the Board; and
- (b) communications between a bid winner and a procuring entity or the Board up to the point of signing of the contract and thereafter, throughout the period of the execution and completion of the contract,

shall be deemed to form part of the contract and thus have legal validity.

#### **35. Evaluation procedures**

(1) Procuring and disposing entities shall-

- (a) in all bid packages, provide for instructions, the criteria to be used in the evaluation process, the value and weights to be attached to each criterion, and the evaluation procedure or methodology to be followed in the conduct of the evaluation; and
- (b) establish which procurement methods and procedures shall apply in each case and class of bids, except in emergencies when either sole procurement or competitive negotiations methods and procedures may apply.

(2) Only substantially responsive bids shall be considered for comparison, evaluation, adjudication and award.

(3) The issuing of a bid or an invitation to tender for a procurement or disposal activity that does not comply with the applicable procedures under the Act shall be deemed to be invalid.

#### **36. Evaluation and adjudication**

In the evaluation and adjudication of a bid, no factor outside those explicitly stated in the bidding package shall be taken into account by the evaluators or the adjudicators in arriving at a recommendation or in making an award, unless there are extenuating reasons to use additionally, an industry standard or best practice.

#### **37. Power to adjudicate**

(1) The Board shall adjudicate bid recommendations submitted to the Board by competent bodies and award those bids.

(2) The Board may return bid recommendations for reconsideration, reject recommendations, appoint an independent evaluation team to re-evaluate bids and on its sole determination, make an award to the most compliant bidder, detailing in such instances in its proceedings the precise grounds for the action it has taken.

#### **38. References**

Notwithstanding the provisions of section 35, evaluators and adjudicators shall take into account in ranking, recommending and approving pre-qualification and in adjudicating and awarding bids-

- (a) references cited by pre-qualification applicants and bidders; and
- (b) independent references, in cases in which the evaluating or adjudicating entity regards this to be essential to form a clear view of the physical and financial capacity or performance record of pre-qualification applicants or bidders in terms of their capacity to successfully execute an awarded bid.

#### **39. Industry standards**

Where there are extenuating reasons for evaluating or adjudicating entities to use industry standards as a supplementary or alternative evaluation method to that set out in the bidding package, the prior approval of the Board shall be required and the concerned entity

shall advise all pre-qualification applicants or bidders of this in advance, indicating to them in writing-

- (a) which industry standard or best practice is to be followed;
- (b) the specific criteria and the values and weights to be attributed to each in the conduct of the evaluation and adjudication; and
- (c) the percentage of the total points, the supplementary or alternative standards shall account for.

#### **40. Precedent to be followed**

Where there is a conflict between section 39(a) and any of the provisions of the Act it shall be brought to the attention of the Board, in writing by any interested party immediately, for a decision, on which shall take precedence.

#### **41. Alterations to awarded bids**

(1) Any alteration to the conditions of an awarded bid either before or in the course of its implementation by a procuring entity, that in effect-

- (a) could have impacted on the evaluation and adjudication ranking of the bid and thus, the choice of contractor;
- (b) amends the nature of the awarded bid in terms of contract cost, implementation schedule, components, aggregation or splitting, etc.; and
- (c) determines the awarded bid,

shall require the prior written approval of the Board.

(2) Subsection (1) shall not apply to normal variations in the execution of a contract once such variations are within the contingency sum of a bid approved by the Board or its Committees.

(3) Guidelines for the variations referred to in subsection (2) shall be prescribed in the Regulations.

#### **42. Changes in bidder's circumstances**

Where there are any changes in the circumstances of a bidder, from the point of the submission to the adjudication of a bid, or in the event of an award or at any point thereafter, including execution that could materially affect the bidder's capacity to successfully deliver the required scheduled outputs, this shall be immediately drawn to the attention of the Board or a Committee or the procuring entity by the bidder itself or by any party with an interest in the activity or process in question.

#### **43. Inclusion of all relevant clauses in bidding packages**

In the conduct of their business, the Board, its Committees and procuring or disposing entities shall-

- (a) include in all bidding packages all relevant, standard clauses in respect of assurances, warranties, bonds, insurances etc.;
- (b) ensure that the relevant penalty clauses are contained in all bid packages and shall apply them in respect of non-performance by contractors; and
- (c) not waive provisions relating to good practices and exempt a party from any liability relating to negligent conduct, and thereby not expose the Government to unnecessary commercial risks and liabilities.

#### **44. Retroactive approval**

(1) Subject to subsection (2), there shall be no retroactive approval by the Board or its Committees of any bid issued or invitation to tender by a procuring or disposing entity;

(2) The Board may resolve to issue a retroactive approval of any bid issued or invitation to tender where it is satisfied that a procuring or disposing entity was required to proceed with the bid or invitation due to an urgent requirement or emergency arising from special circumstances; and

(3) The Minister may, by Order, prescribe the special circumstances that the Board shall consider as sufficient to justify the issuing of a retroactive approval of any bid issued or invitation

to tender.

#### **45. Availability of funds**

A procuring entity shall not invite bids for which funds are inadequate or not available, or for which the Ministry has not issued a written confirmation that the required funds shall be made available in a timely manner and in the amount necessary.

#### **46. End of activity report**

All procuring and disposing entities shall submit to the Board, in respect of each bid, an end of activity report not later than the date of final payment to the contractor, detailing the activity's-

- (a) estimated, awarded and final cost, or revenue;
- (b) any changes in scale, complexity, component and outputs during implementation *vis-à-vis* the awarded bid;
- (c) achievement of performance indicators as per specifications;
- (d) variations and sources;
- (e) cost escalation and sources; and
- (f) contractors performance record, among others, to facilitate performance evaluation and monitoring by the Board and the preparation of statistical records for management analyses and the Annual Performance Report.

#### **47. Resiling from agreements**

No procuring or disposing entity shall resile from a contract based on an award of the Board or a Committee without the prior approval of the Board or the Committee concerned.

#### **48. Recommendation of systemic improvements**

The Board shall, periodically, in consultation with Public Oversight Agencies, make recommendations to the Permanent Secretary on policy and negotiation positions the Government should consider adopting, that might best suit the country's interests, at external for a where the agenda includes issues the resolution of which could impact upon domestic procurement or asset disposal as well as to propose amendments to the Act.

#### **49. Management of contractors registration system**

The Board shall be responsible for all aspects of the management of the contractor registration system, inclusive of all decisions on application for registration, reclassification of registered firms and the discipline of contractors in breach of the code of conduct and defaulting on the execution of awarded bids.

#### **50. Establishment of committees and delegation of power**

(1) The Board may establish Committees and Sub-committees to undertake responsibilities delegated to them by the Board under the Act.

(2) The Board may, in writing delegate any of its functions to its Committees or Sub-committees or to a procuring or disposing entity.

(3) A delegation of power under subsection (2) shall not divest the Board of any powers delegated, and the Board may at any time, vary or set aside any decision made thereunder by any Committee or Sub-committee duly established by the Board or by any procuring and disposing entity or rescind any of its delegated powers.

(4) Notwithstanding the provisions of subsection (1) and (2) the Board shall remain responsible and accountable for all the decisions taken in respect of delegation.

#### **51. Operational modalities of sub-committees**

The Board shall determine modalities of operations and functions to be performed by Committees and Sub-Committees and shall, by Notice in the *Government Gazette*, advertise the composition of their membership, one month before such committees and sub-committees commence operation.

#### **52. Obtaining of information**

(1) In the execution of its functions the Board shall-

- (a) obtain such information, documents, records and reports in respect of any aspect of

the public procurement or asset disposal process where a breach, wrongdoing, mismanagement or collusion has been alleged, reported or proven against any entity of the Government, or any contractor, or against any entity outside of Government which has been a beneficiary of a Government contribution for procurement or disposal activity; and

- (b) summon witnesses, call for the production of books, plans documents, and to examine witnesses and parties concerned on oath.

(2) The Board shall commission investigations and institute tender audits, contract audits and performance audits of-

- (a) its Committees, or any procuring and disposing entities with delegated powers of the Board in their exercise of the specific delegated powers in the management of any aspects of the public procurement or asset disposal process in their charge; and
- (b) bids at any stage in the procurement or disposal cycle, including awarded bids, and bids under implementation in order to ensure strict compliance with the provisions of this Act, the specific instructions and the specific conditions of contract as contained in the bidding packages in question.

(3) The Board shall -

- (a) inspect and test or cause to be inspected and tested, works, services and supplies, which are offered, or which are, or have been furnished in compliance with any bid award by the Board or its Committees;
- (b) require any entity of the Government to provide it with such advisory technical expertise in its possession from time to time, that might be of assistance in the execution of its functions;
- (c) prepare, update and maintain a list of experts from which it may contract from time to time, to assist in the execution of its functions;
- (d) seek technical assistance, and enter into such agreements as may be necessary to support its public procurement and assets disposal activities, including the operation of its various Committees with delegated powers, and all the procuring and disposing entities; and
- (e) establish and maintain institutional and co-operative linkages with the procurement and asset disposal bodies, associations, allied entities and interest groups whose objectives are to promote transparent and accountable practices and state of art technologies and management principles.

### **53. Redressing complaints**

(1) The Board shall act upon complaints by procuring and disposing entities, contractors, the media and the public in respect of any party to a procurement or disposal activity, against whom or which an allegation of impropriety is made.

(2) No public entity shall undertake any enquiry into the alleged or actual breach in the procurement or disposal process (excluding the Oversight Agencies, the Botswana Police Service and Commission of Enquiries) without the prior written concurrence and participation by the Board.

(3) Copies of the Reports of any such enquiries shall be deposited with the Board and the Board shall be free to pursue any remedial action it deems necessary on the findings of such Reports.

### **54. Dispute resolution**

In the event of a dispute amongst procuring or disposing entities or between such entities and the contractors, the Board shall, when requested by the parties to such dispute, offer its good office to amicably resolve such disputes.

### **55. Methods of procurement**

Both electronic and paper forms of invitations to tender, the issuing of bidding packages, and the receipt of bid submissions shall have legal validity.

## **56. Electronic procurement**

Where a procurement of disposal is by electronic means, the transmitter shall in each instance be responsible for the confidentiality, completeness, integrity and timeliness of the data and the document being transmitted.

## **57. Medium of communication**

English shall be the official language of all communications except when the Board otherwise determines, or the specific instructions in a bidding package or a Tender Notice so require.

### **PART VI**

#### ***Financial and Administrative Provisions (ss 58-60)***

## **58. Financing of the Board**

- (1) The funds of the Board shall include-
- (a) any grants received from the Government for the discharge by the Board of its functions;
  - (b) any money accruing to the Board arising from the performance by it of its functions under this Act, including fees, charges and levies for services provided to all beneficiaries;
  - (c) all payments received from any other sources in favour of the Board or its entities.
- (2) The costs of the Board shall, in principle, be recoverable.
- (3) The financial year of the Board shall be similar to that of the Government.
- (4) The Board shall maintain with a bank, a designated account into which shall be paid all sums accruing to the Board in respect of subsection (1) and from which all due payments shall be effected.
- (5) The Board shall prepare, for each financial year—
- (a) a financial report that consists of—
    - (i) balance sheets and the other financial statements for the year, as required by applicable accounting standards;
    - (ii) notes to the financial statements, as required by applicable accounting standards; and
    - (iii) an annual report.
- (6) The financial report shall include all information necessary to give a true and fair view of the financial position and performance of the Board.
- (7) The annual report for a financial year shall report on the Board operations and affairs during the year.
- (8) The Board shall cause the financial report for a financial year to be audited by an auditor appointed by the Board and approved by the Minister, and shall obtain the auditor's report.
- (9) The auditor shall audit the financial report and report to the Board whether, in his or her opinion, the financial report gives a true and fair view of the state of affairs of the Board as at the end of the financial year to which it relates, and where the auditor is not of that opinion, the report shall state the reason.
- (10) The Board shall, within six months after the end of a financial year or such longer period as the Minister may approve, give the Minister a copy of the financial report and the annual report for the financial year, and of the auditor's report on the financial report.
- (11) As soon as practicable after the three reports referred to in subsection (10) have been given to the Minister, they shall be laid before the National Assembly.
- (12) The Auditor General shall, if the Minister so directs, examine and report on the accounts of the Board on any aspects of its operations, and the Board shall give the Auditor General all necessary facilities for that purpose.

## **59. Technologies, data-bases and manpower**

The Board shall-

- (a) determine the system-wide data-bases and technology needs of its entities, introduce



and continuously upgrade and maintain these on behalf of all procuring and disposing entities;

- (b) set the competences mix and skills levels required on the part of all officials and entities involved in public procurement and asset disposal, establish the training inputs needed, develop a plan to achieve and maintain these, and cause them to be implemented on an ongoing, modular basis;
- (c) determine conditions of service of its staff, appoint, promote, train and discipline members of its establishment; and
- (d) determine all ancillary management and financial arrangements.

**60. Annual and medium term plans**

The Board shall submit to the Minister-

- (a) an Annual Management Plan based on its current, rolling Agency Development Plan which shall be concurrent to the National Development Plan;
- (b) an Annual Performance Report, including its Audited Report and the Minister shall cause it to be laid before the National Assembly;
- (c) any other occasional report required by the Minister; and
- (d) the Annual Management Plan shall set out the previous years performance results, the objectives of the current year and the resources required to deliver on the specified outputs, among other factors for the Ministry's consideration and approval.

**PART VII**

***Devolution of Public Procurement and Asset Disposal Management (ss 61-65)***

**61. Establishment of Ministerial Committees**

The Board shall establish Ministerial Procurement and Asset Disposal Committees and delegate authority in writing to them, for the management of aspects of the public procurement and the assets disposal process of the departments encompassed by each ministry.

**62. Responsibilities of Ministerial procurement and disposal Asset Committees**

Apart from maintaining the current division of responsibilities for procurement and asset disposal, the Board shall, over time, devolve significant responsibilities to the Ministerial Procurement and Asset Disposal Committees.

**63. Special Procurement Committee**

(1) The Board shall establish a Special Procurement and Asset Disposal Procurement Committee and delegate authority in writing to it, to manage the-

- (a) procurement of highly sensitive works, supplies, services and properties, or any combination thereof, however classified for the disciplined services in respect of which strict confidentiality and utmost secrecy may be required for a fixed duration; and
- (b) items that shall be subject to procurement through this Committee shall be listed in a Schedule to the Regulations.

(2) The disposal of the assets of the disciplined services shall be subject to the appropriate provisions of the Act.

**64. District Administration Committees**

(1) The Board shall establish Procurement and Asset Disposal Committees in the District Administrations.

(2) The Board shall build the capacities of the District Committees on a continuous basis in order to enable them to conduct procurement and asset disposal transparently, efficiently and in an accountable manner.

(3) The Board shall transfer bid adjudication and award authority to the District Committees based on specified and contract duration.

**65. Financial ceilings**

(1) The Board shall review and increase appropriately the financial ceilings of both the Ministerial Committees (including government departments) and the District Committees or any procuring or disposing entities.

(2) The ceilings referred to in subsection (1), shall be subject to biennial review by the Board, tied to an index linked formula, which will trigger automatic biennial increases in respect of both Ministerial and District Committees.

## **PART VIII**

### ***Reserved and Preferential Treatment (ss 66-76)***

#### **66. Economic and social objectives and procurement**

(1) Pursuant to its economic and social objectives, the Government may from time to time introduce reserved and preferential procurement and asset disposal schemes, which shall be consistent with its external obligations and its stable, market oriented, macro-economic framework.

(2) The scheme referred to in subsection (1) shall-

- (a) be targeted and time bound;
- (b) be phased in and out;
- (c) be non-discriminatory in respect of the targeted group or grade of contractors;
- (d) be based on competition among eligible contractors;
- (e) entail their calculation of cost versus the cost of unrestricted procurement or disposal;
- (f) have clear quantifiable objectives to be achieved; and
- (g) contain benchmarks to assess progress.

(3) The schemes referred to under subsection (1) shall apply to-

- (i) contractors of works, service and supplies or any combination thereof however classified; and
- (ii) specific, disadvantaged women's communities and regions and areas subject to occasional calamities.

#### **67. Empowerment of citizen contractors**

In order to promote the empowerment of citizen contractors-

- (a) all citizen contractors shall, in relation to their respective classification be treated fairly and equitably in respect of all procurement and disposal activities;
- (b) there shall be an equitable balance in the distribution of such activities within and across grades and codes of such contractors where applicable;
- (c) the extent of reservation or preference extended to them shall be proportional to their assessed capacities to fully comply with the applicable specifications, specific instructions and conditions in the relevant bidding packages; and
- (d) bids shall be awarded strictly on a competitive basis among firms of a given grade, code and classification in relation to the reservation and preference schemes.

#### **68. Process for preferential schemes**

All procuring or disposing entities shall, when preparing bidding packages or briefs, or evaluating bid proposals, comply with the provisions of this Act in respect of reservation and preference schemes which might be in place from time to time.

#### **69. Certification of eligibility**

To be eligible for a specific reservation or preference, a contractor shall attach to its bidding package a certificate of entitlement from the competent issuing authority.

#### **70. Eligibility for preference**

The eligibility of contractors shall be determined by their classification as provided for by section 121.

#### **71. Reserved schemes**

Reservation schemes shall apply to procurement and disposal activities of the following nature-

- (a) low complexity;
- (b) limited scale;
- (c) repetitive in nature;
- (d) having a financial ceiling;

- (e) open only to citizen contractors; and
- (f) based only on competition among the eligible contractors in the classification in question.

**72. Procurement preferences and reservation schemes** (1) The Minister may prescribe all procurement preferences and reservation schemes applicable, and such procurement preferences or reservation schemes shall be expressly provided for in the evaluation criteria section of the bidding packages to which they are applicable.

(2) The Board shall ensure that all procuring or disposing entities when preparing bidding packages, or evaluating bid proposals comply with the provisions of this Act in respect of reservation and preference schemes as may be prescribed by the Minister.

(3) The issuance of any bidding package to which the prescribed reservation or preference scheme is applicable without inclusion of the prescribed reservation or preference scheme, shall, in terms of section 35 (3), be invalid.

**73. Scale of preference**

(1) The level of preference shall be applied in the following descending order-

- (a) joint ventures between citizen contractors;
- (b) sole citizen contractors;
- (c) joint ventures between citizen and non-citizen contractors; and
- (d) association arrangements between citizen subcontractors and foreign contractors.

(2) The preferences to be accorded under paragraphs (c) and (d) of subsection (1) shall be proportional to the percentage of the contract to be actually executed by the citizen contractors or subcontractors.

(3) The application of preference under subsection (1) shall be set out in the Regulations.

**74. Ranking of bids**

For the purposes of ranking bids, and for comparison only, the applicable percentage preferences shall be added to the tenders of all bidders not entitled to the preference or the full measure of the preference.

**75. Preference for supplies**

Preference in respect of supplies may apply to any product produced locally and may vary in accordance with the percentage of value addition.

**76. Prime contractor and subcontractor**

(1) When a prime contractor, either domestic or overseas, elects or is required to use local subcontractors in respect of any bid submission or in the execution of a bid award, the prime contractor shall append to its bidding package a subcontracting agreement for each subcontractor detailing the key operational principles which shall govern the contract of the parties.

(2) The Regulations shall provide in a separate Schedule guidelines to promote fair, equitable, transparent, timely and successful execution of such contracts in order to build sustainable and competitive citizen capacity.

**PART IX**

***Accountability and Transparency: Audit and Ethics (ss 77-94)***

**77. Independent auditor**

(1) The Auditor General shall undertake an annual performance audit of the Board, its Committees, Sub-committees and the procuring and disposing entities and submit his report to the Minister responsible for Finance.

(2) Should the exigencies of the service prevent the Auditor General from undertaking this activity in a timely manner, the Auditor General may appoint an independent auditor to conduct the annual performance audit of the Board, its Committees, Sub-committees and the procuring and disposing entities.

**78. Liability of auditor**

The independent auditor shall, within a period of five years be liable for any disclosure of fraud, mismanagement or misdemeanour of the Board, its Committees, Sub-committees or the procuring and disposing entities.

#### **79. Audit by the Auditor-General**

The Auditor-General, in exercise of his powers under the Finance and Audit Act may initiate audits at any point of the procurement or disposal cycle, such as during the bid preparatory process (tender audit), in the course of the execution of an awarded bid (contract audit), and after the procurement, when bids have been completely delivered by the contractors (performance audit).

#### **80. Audit recommendation and the Board**

Once a tender audit, contract audit or performance audit has been undertaken, the findings and the recommendation shall be submitted in writing to the Board for its consideration and for the Board to decide on, and instruct the procuring or disposing entity to implement the requisite corrective actions, where such are deemed necessary.

#### **81. Availability and comments on report**

(1) Internal audit reports of the Board, its Committees, Sub-committees or procuring or disposing entities shall be made available to the Auditor and the Auditor's findings shall be referred to, in the Board's Annual Performance Report.

(2) The Board shall discuss the findings in the reports and take the requisite action on them and reflect such action in its Annual Performance Report.

#### **82. Co-operation with the auditors**

In the event of a tender audit, contract audit or performance audit of a bid, and in the case of the annual performance audit of the Board, or its Committees, Sub-committees or any procuring or disposing entity, the Board or its Committees, Sub-committees or procuring or disposing entity shall make available, and cause any procuring or disposal entity that may be the subject of an audit, to make certified copies of all documents requested by the auditing body or bodies and likewise put at the disposal of such body or bodies, any member or official, that they may need to interview.

#### **83. Facilitating investigations**

In the event of an investigation being conducted into the affairs of the Board, its Committees, Sub-committees or a procuring or disposing entity by the competent authority, including the Directorate on Corruption and Economic Crime, the Botswana Police Service or a duly appointed Commission of Enquiry, the Board shall co-operate fully with the investigating authority and shall cause the Committees and the procuring entity to do the same by making certified copies of all the required documentation available and likewise any person who may be required for interviews by the investigating authority.

#### **84. Maintenance of records**

The Board, its Committees, Sub-committees and the procuring or disposing entities shall-

- (a) maintain detailed records of all their proceedings; and
- (b) preserve, maintain and safeguard all relevant documents issued and received.

#### **85. Access to documentation and data bases**

Subject to cost recovery charges, the Board shall give the public access to-

- (a) the standardised bidding packages, forms, national standards specifications and Annual Report and all amendments thereto; and
- (b) data bases containing the-
  - (i) contractors register;
  - (ii) specification providers;
  - (iii) test and certification firms;
  - (iv) insurance and intermodal transport operators;
  - (v) documentation collection; and

(vi) contractors prices and construction price index.

**86. Obligation to advertise**

The Board shall advertise all-

- (a) applications by contractors for registration and thereafter the decisions on the grades and codes accorded to applicants; and
- (b) tenders being invited, bids received, and award decisions and prices.

**87. Publicity and the media**

The Board shall-

- (a) publicise the decisions arising from complaints and challenges dealt with by the Board or the Independent Complaints Review Committee; and
- (b) brief the media from time to time on developments in the procurement and disposal system that are of public interest.

**88. Disclosure of interest by members of the Board**

(1) Every member, on receipt of the Agenda of the Meetings of the Board, or on notification of a matter being brought to the attention of the Board shall-

- (a) sign a standard declaration form of the Public Procurement and Asset Disposal Board indicating whether he has, or intends to acquire, a direct or indirect personal interest in any specific agenda item or matter requiring the Board's consideration and decision; and
- (b) in the event of such interest, the member in question shall not participate in the deliberation or decision making process of the Board in relation to the agenda item or the specific matter in question.

**89. Confidentiality obligations**

(1) All members, the Secretary and support staff of the Board, its Committees, Sub-committees or procuring and disposing entities, or experts engaged to deliver services that may include access to confidential or restricted communications shall comply with the confidentiality requirement set out in this Act.

(2) Upon ceasing to hold office, neither the Board Members, the Secretary and support staff nor its consultants, shall use to their personal advantage, information acquired by them, by virtue of their association with the Board for a period of two years after leaving office.

**90. Code of ethics and declaration of business interests**

All members of the Board, its Committees, Sub-committees and contracted advisors involved in public procurement and asset disposal shall sign-

- (a) a code of ethical behaviour; and
- (b) a declaration of business interests form where necessary.

**91. Classification of information**

All bid submissions and pre-qualification applications for registration, shall, from the time they are received until a decision is made thereon and in the event of an appeal until a decision is arrived at, remain confidential and shall only be available to the Independent Committee in the event of a complaint or to the Public Oversight Agencies in the event of an investigation.

**92. Rights of review and research**

Once a pre-qualification list is approved or a bid has been awarded and the contract duly signed by the contractor and the procuring or disposing entity, or an application for registration approved and details transmitted to the applicant, all the relevant communications shall be classified as restricted, but shall be available for public reviews and research.

**93. Declassification of information**

All communications on bids and registration shall be declassified after two years, except in cases where disclosure would be prejudicial to the interests of Government or contractors, in which case the Board shall retain such communications for a further period of two years.

**94. Transmission of documents**

(1) The Board shall transmit all its files of five years and above to the National Archives

and Records Services, except where an awarded bid continues to be under implementation, dispute or investigation, in which case such files shall be retained by the Board until the process in question is completed before being transmitted to the National Archives.

(2) The files referred to in subsection (1) shall be retained by the National Archives for a period of two years before disposal except where the Board indicates otherwise to the National Archives.

## **PART X**

### ***Establishment of the Independent Complaints Review Committee (ss 95-109)***

#### **95. Independent Committee**

There shall be established, for the purposes of this Act, a body, independent of the Public Procurement and Public Asset Disposal Board, to be known as the Independent Complaints Review Committee (hereinafter called the "Independent Committee").

#### **96. Composition**

The Independent Committee shall be composed of the Chairperson and four members.

#### **97. Appointment**

The Chairperson and Members of the Independent Committee shall be appointed by the Minister.

#### **98. Levels and institutional representation**

Members of the Independent Committee shall be at least of the executive directors level and shall be appointed from among persons of good standing qualifications and experiences drawn from commerce, industry, academia and professions relevant to the work of the Independent Committee.

#### **99. Conditions of service of Committee**

The Minister shall set the conditions of service which shall apply to all Members of the Independent Committee.

#### **100. Secretary of Independent Committee**

(1) The Minister shall appoint a Secretary to the Independent Committee to facilitate the conduct of its business.

(2) The Secretary of the Independent Committee shall attend all meetings of the Independent Committee but shall have no right to vote.

#### **101. Co-option of experts**

The Independent Committee may co-opt a reasonable number of suitably qualified persons to assist it in its work but shall not allow such persons to vote or take decisions.

#### **102. Modalities of operation**

(1) The Independent Committee shall meet when necessary, and at such time and place as the Chairperson determines.

(2) The method of work of the Independent Committee shall be set out in the Regulations.

#### **103. Scope of responsibilities**

(1) The Independent Committees shall deal with-

- (a) challenges by contractors arising at any point in the procurement and disposal process, that is, from the commencement of the process by the concerned entity to the award decision of the Board or its Committees;
- (b) complaints by contractors at any point in the registration, reclassification or disciplinary process or decisions; and
- (c) disputes and resolution of conflicts between-
  - (i) procuring and disposing entities;
  - (ii) such entities and the Board or its Committees; and
  - (iii) contractors in respect of interpretation of the Act;
- (d) issues within the scope of the Act, upon which it has received a written petition from the public and which it deems to be of sufficient public interest in respect of the

- procurement and disposal process;
- (e) conflicts between the Board and employees of the Board; and
- (f) appeals against disciplinary measures by the Board.

(2) The Independent Committee may recommend to the Minister any amendments to the Act, which may become necessary in consequence of its consideration of disputes and its detection of weaknesses in, or ways of strengthening the Act, to prevent recurrences of such challenges or to improve the performance of the regulatory framework.

**104. Requirements in respect of grievances** A party to a dispute who does not get a satisfactory response to his or her grievances may refer a written complaint to the—

- (a) Independent Committee, after following the applicable review procedures of the Board;
- (b) High Court, after following the applicable review procedures of the Independent Committee.

#### **105. Exemption**

(1) When a contract has been concluded by a procuring or disposing entity, based on an award decision of the Board or one of its Committees, and implementation of the contract has commenced following the issuing of a letter of instruction to this effect by the client agency to the contractor, such a contract shall be irrevocable and its execution shall proceed without interruption, even though the award decision by the Board or its Committee may in itself remain disputable by a contractor through the Independent Committee.

(2) However, the Independent Committee may suspend the execution of such a contract if an aggrieved party has, in its judgment, adduced sufficient evidence to demonstrate to the satisfaction of the Independent Committee that the execution of such a contract may cause substantial loss to the public revenue or that it will prejudicially affect the public interest.

#### **106. Meeting of costs**

Any cost incurred by the Independent Committee in the conduct of its business or the execution of its functions shall be met from the budget of the Public Procurement and Asset Disposal Board.

#### **107. Imposition of fines**

The Independent Committee may, in consultation with the Board, levy such fines on complainants as may be necessary in order to recover costs.

#### **108. Award of costs**

(1) The Independent Committee may award costs to aggrieved contractors.

(2) Amounts awarded under subsection (1) shall not exceed the commercial outlay for the preparation of a bidding package when the dispute relates to an award decision and less in respect of other grievances.

#### **109. Co-operation with the Secretary**

All persons involved with public procurement and public asset disposal under the Act, shall co-operate with the Secretary by providing to him all necessary information and data for the Independent Committee to discharge its functions under the Act.

### **PART XI**

#### ***Advisory Committee on Public Procurement and Asset Disposal (ss 110-115)***

#### **110. Establishment of Advisory Committee**

There shall be established an Advisory Committee on Public Procurement and Asset Disposal (hereinafter referred to as "the Advisory Committee").

#### **111. Membership of Advisory Committee**

The Advisory Committee shall be composed of institutional representatives at executive level, who shall be nominated from the following institutions-

- (a) three from the contractors associations and professional bodies;
- (b) three from ministries with large procurement programmes;
- (c) two from the Ministry of Local Government;
- (d) one from the entity charged with the monitoring of public enterprises performance;

- (e) one from the Public Oversight Agencies;
- (f) one from the Ministry of Trade and Industry; and
- (g) two Members of the Board.

#### **112. Meetings and functions of Advisory Committee**

(1) The Advisory Committee shall meet semi-annually and its functions shall be to review the performance of the Board, its Committees, the procuring and disposal entities and the Independent Committee.

(2) The Advisory Committee may make recommendations to the Minister in respect of-

- (a) improvements of the Act and its Regulations;
- (b) improvements in the management of the public procurement and asset disposal system;
- (c) coordination of the policies and practices of the Board with those of the other public entities, namely, Local Authorities and parastatals in the interests of efficiency and effectiveness; and
- (d) standardisation of policies and practices of the three categories of public agencies in keeping with good practices and industry standards.

#### **113. Appointment to Advisory Committee**

(1) Members of the Advisory Committee and its chairperson shall be appointed by the Minister.

(2) The Minister shall invite and receive nominations to the Advisory Committee.

#### **114. Conditions of service of Advisory Committee**

The Minister shall set the conditions of service that shall apply to the Members of the Advisory Committee.

#### **115. Method of work of Advisory Committee**

(1) The Advisory Committee shall decide on its method of work at its inaugural meeting and it shall be serviced by the Secretary of the Board or a nominee of the Secretary.

(2) The method of work of the Advisory Committee shall be consolidated in the Regulations.

### **PART XII**

#### ***Registration of Contractors (ss 116-127)***

#### **116. Register of contractors**

The Board shall maintain an up-to-date register of contractors in works, supplies and services, or any combination thereof, however classified in order to be cognisant at all times of the workload and the performance record of contractors pursuant to its powers as set out in section 49.

#### **117. Requirements to be registered**

To be registered as a contractor, the contractor must be licensed or incorporated under the relevant laws of Botswana.

#### **118. Domicile and registration**

Registration in the Contractors' Register shall be mandatory for contractors domiciled in Botswana intending to bid for Government procurement and asset disposal.

#### **119. Registration and pre-qualification**

(1) The Contractors' Register shall not be considered as a pre-qualification list.

(2) Registered contractors shall be required to satisfy such other pre-qualification conditions as may be specified by the procuring or disposing entities in respect of any bid or disposal activity in order to be eligible to tender in each specific case.

#### **120. Non-eligibility for non-registered contractors**

Non-registered contractors shall be disqualified from tendering, except in projects where the specific instructions in both the bidding package and the Tender Notice explicitly state that registration is not an eligibility requirement to participate.

#### **121. Classification of contractors**



- Registration of contractors shall be by-
- (a) classification of contractors, such as works, services and supplies and any other rational division within a class;
  - (b) grades and codes, based on scale and complexity of procurement and the capacity of contractors, according to international practice;
  - (c) type of effective ownership and control by the applicant contractor; and
  - (d) types of business associations or arrangements between contractors.

#### **122. Review of register**

The Board shall review the Register of Contractors biennially and shall upgrade active contractors and strike off the Register any non-active contractors, unless they reapply to remain on the register for good and sufficient cause.

#### **123. Code of conduct of contractors**

Contractors shall, by virtue of registration, be bound to conform with a code of conduct in respect to all procurement and disposal activities, which code shall be consolidated in a Schedule to the Regulations.

**124. Suspension and de-listing from the register** A contractor who does not comply either with the code of conduct or the contract concluded with a procuring entity may be suspended or delisted by the Board from the Register of Contractors.

#### **125. Non-registration of suspended contractors**

A suspended contractor shall be debarred by the Board from registering a newly incorporated entity for the period of suspension in question.

#### **126. Restriction on defaulting contractor**

Where the defaulting shareholders, directors and senior officers of the suspended contractor join another contractor in key operational positions, that contractor shall be debarred from bidding on new tenders until the period of suspension has lapsed.

#### **127. Procedures and regulations**

The procedures, value and weight of each criterion and the modality to be used by the Board in the registration, review, elevation, de-listing and suspension of contractors shall be set out in the Regulations.

### **PART XIII**

#### ***General Provisions (ss 128-132)***

#### **128. Offences**

(1) Any person who contravenes the provisions of this Act shall be guilty of an offence.

(2) Where an offence under this Act, committed by a contractor or by a person purporting to act on behalf of a the contractor, is proved to have been so committed with the consent, or connivance of, or to be attributable to, or to have been facilitated by, any neglect on the part of any officer or employee of that contractor, that person shall also be guilty of an offence.

(3) A person guilty of an offence under subsection (1) or (2) shall be liable to a fine not less than P10 000 but not exceeding P100 000 or, in the case of an individual, to imprisonment for a term not exceeding 3 years or to both, such fines and imprisonment.

#### **129. Immunities**

No action shall lie against any member or Secretary of the Board, Independent Committee, Advisory Committee or any member of the Board's Committees, Sub-committees or any official of a procuring and disposing entity for any act or omission except in so far as the act or omission complained of was done in bad faith.

#### **130. Regulations**

The Minister may, by statutory instrument, make regulations providing for any matter which is to be provided for under this Act, or which otherwise relates to the administration of this Act.

#### **131. Repeal and savings**

(1) The provisions of Chapter Four of the Supplies Regulations and Procedures of 1988 (hereinafter referred to as the "repealed Regulations") are hereby repealed in so far as they are inconsistent with the Act.

(2) Notwithstanding the repeal effected under subsection (1) any-

(a) application, claim or other process commenced; and

(b) determination, order or ruling made under the repealed Regulations, immediately before the commencement of this Act, shall, in so far as there is no inconsistency with the provisions of this Act, be deemed to have been made under this Act.

(3) The Central Tender Board, Central Tender Committee, Special Tender Board and District Administration Tender Committee established under the repealed Regulations shall, upon the commencement of this Act, cease to exist.

(4) Any responsibility or function of the bodies enumerated under subsection (3) which immediately before the coming into operation of this Act, has or is performed by any other person or institution shall be deemed to be transferred to the bodies established by this Act.

### **132. Transitional period**

Except as otherwise provided in this Act, all departments shall be required to bring their procurement and disposal practices into conformity with this Act within a period of one year from the date of entry into force of this Act.