

TENDERS

Public Procurement Act 15 of 2015

Summary: This Act ([GG 5922](#)) regulates the procurement of goods, works and services by public entities, and establishes the Procurement Policy Unit and the Central Procurement Board of Namibia. It was brought into force with effect from 1 April 2017 by GN 46/2017 ([GG 6255](#)).

Repeals: The Act repeals the Tender Board of Namibia Act 16 of 1996.

Amendments: The Act is substantially amended by Act 3/2022 ([GG 7874](#)), which was brought into force *in part* by GN 318/2022 ([GG 7923](#)). The following provisions of the amending Act are *not* yet in force: the definitions of “chief executive officer”, “framework agreement” and “pooled procurement” in section 1 and sections 5, 6, 9, 10, 12, 15(b) and 18.

The Abolition of Payment by Cheque Act 16 of 2022 ([GG 7995](#)), which was brought into force on 15 March 2023 by GN 47/2023 ([GG 8050](#)), amends section 21.

Savings: Regulations issued under the repealed Act appear to survive in terms of section 80(2) of this Act:

Subject to section 81 [on the treatment of tender contracts already concluded and tender advertisements already issued when the Act came into force], anything done under a provision of the law repealed by subsection (1) and which could have been done under a provision of this Act is deemed to have been done under the corresponding provision.

Regulations: **Public Procurement Regulations** promulgated under this Act are contained in GN 47/2017 ([GG 6255](#)), as amended by GN 129/2017 ([GG 6315](#)) (which amends regulation 1 and inserts Part 2A), GN 78/2018 ([GG 6576](#)) and GN 297/2023 ([GG 8214](#)) (which substitutes regulation 4D(5)). These regulations do not repeal any previous regulations.

Tender Board Regulations issued under the repealed Act are contained in GN 237/1996 ([GG 1403](#)), as amended by GN 140/2013 ([GG 5212](#)); these appear to be superseded by the Public Procurement Regulations.

Rules: Rules issued under the repealed Act survive in terms of section 80(2). The “Tender Board of Namibia Code of Procedure” is contained in GN 191/1997 ([GG 1692](#)), as amended by GN 180/2010 ([GG 4544](#)) which substitutes paragraph 23.

Note that GN 180/2010 contains an error in the name of the principal Act.

Codes of Good Practice: GN 235/2021 ([GG 7671](#)) gives notice of an intention to issue a code of good practice on preferences referred to in the Act in section 71 (national preference) and section 72 (exclusive preference to local suppliers), and publishes a draft code for comment. The final **Code of Good Practice on Preferences** was published in GN 13/2023 ([GG 8020](#)).

Notices: Notices issued under the repealed Act survive in terms of section 80(2). General Notice 160/1992 ([GG 551](#)) contains “Tender Board of Namibia: Preferences” and addresses issues such as local content.

Directives: Directives issued under the repealed Act survive in terms of section 80(2). Administrative Directive 1/2006 relating to over-expenditure is contained in GN 56/2006 ([GG 3611](#)).

Appointments: The Chairperson, Deputy Chairperson and members of the Central Procurement Board are announced in GN 152/2017 ([GG 6333](#)). Lists of individuals eligible for appointment as members of

Review Panels are announced in GN 200/2017 ([GG 6374](#)) and GN 150/2021 ([GG 7579](#)). Board members are announced in GN 34/2021 ([GG 7470](#)), GN 169/2022 ([GG 7828](#)) and GN 156/2023 ([GG 8101](#)).

Cases: The following cases were decided in terms of this Act –

Central Procurement Board v Nangolo NO & Others 2018 (4) NR 1188 (HC) (problems with procedure utilised by review panel; section 26 interpreted with regard to regulation 13 of the Public Procurement Regulations; “standstill period” in section 55(5) apparently rendered nugatory by section 59(2); conflict between sections 59 and 60 resolved by interpretation; section 60(c); section 81(2))

Regarding sections 55(5) and 59(2): “It would seem that our legislation gives the standstill period with the right hand but simultaneously takes it away with the left. This is a matter that may need to be considered and rectified by the legislature, in my considered view.” (para 60).

Radial Truss Industries (Pty) Ltd v Chairperson of the Central Procurement Board of Namibia & Others 2021 (3) NR 752 (HC) (sections 55, 59 and 60; regulation 38 of the Public Procurement Regulations is null and void to the extent that it conflicts with the Act; impermissible for a regulation to create a right for an unsuccessful bidder to request the Board for a “reconsideration” of its selection for award when the Act provides only for reviews of the Board’s selections for award by a review panel appointed by the Minister; the Board has no power under the Act to review its own decisions)

ABB Namibia (Pty) Ltd v Central Procurement Board of Namibia & Others 2021 (3) NR 770 (HC) (section 59 language is not peremptory so no exhaustion of internal remedies is required before administrative review by court; conflicts of interest are not comprehensively covered by section 26(8), and an undisclosed conflict of interest involving a member of the Bid Evaluation Committee, in the form of an acrimonious relationship resulting from legal steps taken by a tendering company “poisons the entire process” and invalidates the decisions taken; Board’s record-keeping and discovery criticised at paras 48-ff)

[96] It is thus important that all those who are involved in the procurement chain, ie in the process of filing, adjudicating and awarding tenders, should, regardless of the level of participation, have proper regard for the principles set out in s 2(a) of the Act. These objects must constitute a constant beacon as they navigate the way through all tender processes. Persons who have an interest should disclose it without having to be confronted so that pureness and impartiality of the decisions is not compromised thereby.

[97] A lot of precious time and resources are wasted when people involved in procurement do not act appropriately. This affects the delivery of necessary goods and services to Namibians, not to mention the delay and costs associated with having to start some of these processes afresh. The lesson to be learnt is that hiding or hoarding a conflict of interest a person has in procurement, in the final analysis, is very costly to the taxpayer and to the proper administration of justice. It must thus be avoided at all costs, like the plague.

[...]

[99] It would seem to me that a policy needs to be put in place by the Minister of Finance regarding the potentially conflicting roles that persons should not be allowed to play in the procurement chain. It is disturbing that a person, who holds a senior position in a company may be appointed as a member of the BEC but on other occasions, the company in which he or she holds a position becomes a tenderer before the [Central Procurement Board of Namibia]. In such circumstances, it would mean that that person runs with the hares today and hunts with the hounds tomorrow and this is unseemly.

The following cases were decided in terms of the previous Tender Board of Namibia Act 16 of 1996 –

Clear Channel Independent Advertising Namibia (Pty) Ltd & Another v Transnamib Holdings Ltd & Others 2006 (1) NR 121 (HC) (brief discussion of allegations concerning applicability of Act to Transnamib)

Disposable Medical Products v Tender Board of Namibia 1997 NR 129 (HC) (General Notice 160/1992, Regulation 8(3)(c), Regulation 8(5))

Serenity Manufacturers v Minister of Health and Social Services & Another 2007 (2) NR 756 (SC) (Regulation 7)

Minister of Education & Others v Free Namibia Caterers (Pty) Ltd 2013 (4) NR 1061 (SC) (administrative review of decision of Tender Board; effect of failure to comply with section 16(1)(b))

CSC Neckertal Dam Joint Venture v Tender Board of Namibia & Others 2014 (1) NR 135 (HC) (review of tender award; considers application of sections 15(1) and 19)

United Africa Group (Pty) Ltd v Chairperson of the Tender Board of Namibia & Others 2015 (2) NR 370 (SC) (section 15(5)-(6) and regulation 7)

Anhui Foreign Economic Construction (Group) Corp Ltd v Minister of Works and Transport & Others 2016 (4) NR 1087 (HC) (relationship between section 7(1)(a) of the Tender Board Act 16 of 1996 and section 5(2)(a) of the Airports Company Act 28 of 1998); overturned on this point by *President of the Republic of Namibia & Others v Anhui Foreign Economic Construction (Group) Corp Ltd* 2017 (2) NR 340 (SC) which found that failure to follow the procedures in the Tender Board Act was fatal to the validity of the purported award)

Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC & Another 2017 (1) NR 1 (SC) (application of Arts 18 and 12 of the Namibian Constitution to decision-making under the Act; no right of access to minutes and documentation of Tender Board in pre-litigation discovery); further proceedings in *Chairperson of the Tender Board of Namibia & Others v Pamo Trading Enterprises CC & Another* 2017 (4) NR 998 (HC); overturned in large part in *Pamo Trading Enterprises CC v Chairperson of the Tender Board* 2019 (3) NR 834 (SC) (holding that procurement decisions are administrative action subject to Art 18 of Constitution; cancellation of tender in this case was both procedurally and substantively unlawful; right to be heard applies even where award was tainted by corruption)

Free Namibia Caterers CC v Chairperson of the Tender Board of Namibia 2017 (3) NR 898 (SC) (damages and restitution not applicable to review of tender board decision; estoppel and legitimate expectation in context of tender award)

Newpoint Electronic Solutions (Pty) Ltd v Permanent Secretary, Office of the Prime Minister & Another 2022 (4) NR 1051 (SC) (sections 7(1) and 18(3))

The following cases were decided in terms of Tender Board Regulations promulgated under section 26A of the Finance and Audit Ordinance 1 of 1926 –

Skeleton Coast Safaris v Namibia Tender Board & Others 1993 NR 288 (HC)

Kerry McNamara Architects Inc v Ministry of Works, Transport and Communication & Others 2000 NR 1 (HC).

Commentary:

Frederico Links, “The Public Procurement Bill: A lot of good, some significant bad, but certainly not ugly”, Institute for Public Policy Research, *Democracy Report, Special Briefing Paper No. 9*, September 2015, available [here](#)

Frederico Links, “Promoting Integrity: The New Public Procurement Framework”, Institute for Public Policy Research & Open Society Initiative for Southern Africa, *Briefing Paper*, August 2017.

COMMENTARY

Frederico Links & Clement Daniels, “The Tender Board: Need for Root and Branch Reform”, Institute for Public Policy Research, 2011, available [here](#)

Malakia Haimbodi, “Public Procurement: Are There Lessons to be Learnt?”, Institute for Public Policy Research, 2011, available [here](#)

Ellison Tjirera, “Public Procurement in Namibia: The Role of Codes of Conduct in Reducing Corruption”, Institute for Public Policy Research, 2011, available [here](#)

Frederico Links & Malakia Haimbodi, “Building Integrity: Corruption and the Construction Industry”, Institute for Public Policy Research, 2011, available [here](#)

Ellison Tjirera, Malakia Haimbodi & Graham Hopwood, “Risking Corruption: Regional and Local Governance in Namibia”, Institute for Public Policy Research, 2012, available [here](#)

SK Amoo & S Dicken, “The Regulatory Framework for Public Procurement in Namibia” in Sue Arrowsmith & Geo Quinot (eds), *Public Procurement Regulation in Africa*, Cambridge: Cambridge University Press, 2012

Anne Schmidt, “The need to reform the Namibian public procurement system: A comment on the Neckertal Dam saga,” *Namibia Law Journal*, Volume 6, Issue 1, 2014

Anne Schmidt, “Public Procurement – A Constitutional Perspective” in Nico Horn & Manfred O Hinz, eds, *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia*, Windhoek: Konrad Adenauer Stiftung, 2017, available [here](#).

The Institute for Public Policy Research publishes regular “Procurement Trackers” which look at the application of the laws on procurement, available [here](#).