

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 repeals the Tender Board of Namibia Act 16 of 1996. It was brought into force with effect from 1 April 2017 by GN 46/2017 ([GG 6255](#)).

Regulations: Regulations issued under the repealed Act appear to survive in terms of section 80(2) of this Act: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and tender advertisements already issued when the Act came into force], anything done under a provision of the law repealed by subsection (1) and which could have been done under a provision of this Act is deemed to have been done under the corresponding provision.

Tender Board Regulations issued under the repealed Act are contained in GN 237/1996 ([GG 1403](#)), as amended by GN 140/2013 ([GG 5212](#)); these appear to be superseded by the Public Procurement Regulations.

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) and by GN 78/2018 ([GG 6576](#)). These regulations do not repeal any previous 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Rules: Rules issued under the repealed Act survive in terms of section 80(2).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](#)) give 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.

Notices: Notices issued under the repealed Act survive in terms of section 80(2).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Directives: Directives issued under the repealed Act survive in terms of section 80(2).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](#)).

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 section 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.” (at para 60).

Cases: 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) (s. 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 (heard prior to the Supreme Court decision) in *Chairperson of the Tender Board of Namibia & Others v Pamo Trading Enterprises CC & Another* 2017 (4) NR 998 (HC) overturned on appeal 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)
- 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).

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](#).