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CHAPTER 245

GOVERNMENT CONTRACTS AND TENDERS

Act 10 of 1998
Act 11 of 2001
Act 8 of 2009
Act 40 of 2013
Act 44 of 2019
Act 1 of 2020
Act 2 of 2021

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GOVERNMENT CONTRACTS AND TENDERS

An Act to provide for Government contracts and tenders.

PART 1 – PRELIMINARY

1. Purpose

The purpose of this Act is to establish the rules and procedures that must be followed with Government contracts and tenders.

2. Interpretation

For the purposes of this Act, unless the context otherwise requires:

"asset" means:

(a) any legal or equitable estate or interest in real or personal property, including a contingent or prospective one; and

(b) any right, power, privilege or immunity, whether actual, contingent or prospective.

"Attorney General" means the Attorney General and includes a legal officer appointed by the Attorney General who executes the office of Attorney General during any vacancy in that office or during the absence or incapacity of the holder of that office, to perform the functions powers and duties of the Attorney General;

"Board" means the Central Tenders Board established under section 9;

"Chairperson" means the Chairperson of the Central Board appointed under subsection 11(1) or (9);

"Consultancy services" means activities of a professional, intellectual, and advisory nature;

"Council" means the Council of Ministers;

"Director-General" means the Director-General of the Ministry of Finance and Economic Management and includes a person in the Public Service who executes the office of the Director-General during any vacancy in that office or during the absence or incapacity of the holder of that office, performs the functions, powers and duties of the Director-General;

"evaluation committee" means the evaluation committee appointed by the Board under the Regulations;

"goods" means objects of every kind and description, including commodities, raw materials, products and equipment and objects in solid, liquid or gaseous form as well as services incidental to the supply of goods, if the value of these incidental services does not exceed that of the goods themselves;

"Government agency" means:

(a) a Ministry; or

(b) the office of a Government Minister; or

(c) an office or body established by or under the Constitution; or

(d) an office or body established by or under an Act of Parliament; or

(e) a prescribed agency;

"Government Contract" has the meaning given by section 2A.

"Minister" means the Minister responsible for finance;

"public money" has the same meaning as in the Public Finance and Economic Management Act [CAP 244];

"Public work" means any work of a public nature executed on behalf of the State and includes rendering any services in connection therewith and any construction manufacture or industry of benefit to the national economy;

Regulations" means the Regulations made under this Act;

"responsible director general" means the director general responsible for the Government Contract or tender or who is responsible for the ministry or agency arranging or undertaking the Government Contract or tender;

"responsible minister" means the minister responsible for the Government Contract or tender or who is responsible for the ministry or agency arranging or undertaking the Government Contract or tender;

"services" means the supply of physical services, or other labour, time or effort, or stand-alone service type contracts (such as security services, catering services or geological services);

"written" or "in writing" means any expression consisting of words or figures which can be read, reproduced and subsequently communicated and includes information which is transmitted and stored by electronic means but only if such communication is authorised by a contracting agency.

2A. Government Contracts defined

(1) Subject to subsection (3), each of the following is a Government Contract:

(a) a contract or arrangement for the supply of goods or services or the execution of public works in consideration of payment out of public moneys;

(b) a contract or arrangement for the disposal of an asset of the Government, including disposals of land, interests in land, buildings or infrastructure, regardless of value;

(c) a concession or franchise granted by the Government.

(2) Any subcontract made in relation to any contract or arrangement mentioned in subsection (1)(a) or (1)(b) is also a Government Contract.

(3) A Government Contract does not include the following:

(a) the engagement of employees under the Public Service Commission Act [CAP 246] or any other Act; or

(b) a grant made by or to the Government; or

(c) a loan made by or to the Government; or

(d) a statutory appointment.

(4) Nothing in subsection (1)(c) is to be taken to affect the requirement for a licence, permit, approval, authority or permission required under or by any other Act.

2B. Duration of a Government Contract

The duration of a Government Contract may exceed 1 year subject to any restrictions and procedures set out in the regulations.

PART 2 – GOVERNMENT CONTRACTS

3. Government Contracts

(1) A Government Contract must be in writing unless it is of a value less than the amount prescribed by the regulations.

(2) Subject to subsection (3), a minister, under this or any other Act authorizing him to do so, may enter into a Government Contract where the consideration in relation to any contract, arrangement, franchise or concession is VT 10,000,000 or above.

(3) Prior to entering into a Government Contract a minister must first:

(a) ensure the contract is consistent with Government policy; and

(aa) ensure that the Government Contract relates to the Ministry's policy responsibilities; and

(b) ensure the contract is fiscally responsible, prudent, cost effective, and is a necessary obligation for Government to assume; and

(c) consult with the Director-General and satisfy himself on reasonable grounds that the Government has or is likely to have the financial ability and resources to meet all of the obligations under the contract including future obligations; and

(d) consult with and obtain the advice of the Attorney General or a legal practitioner approved by the Attorney General in writing, on the legal aspects, implications, and appropriateness of entering into the contract; and

(e) ensure that no conflict of interest exists between a minister or the Council and the other party; and

(f) use a competitive and transparent process when deciding who to award the contract to including where applicable, a tender process as may be prescribed by this Act or the regulations; and

(g) ensure that for contracts with a value exceeding VT 100,000,000 and based on the recommendation of the Board, make a written submission to Council which must include a copy of the proposed contract, the process followed, and comments on the proposed contract by, and under the signatures of, the Director-General and the Attorney General or the legal practitioner. The Attorney General must certify that the procedures in accordance with this or any other applicable Act have been followed;

(h) obtain a Council minute approving the Contract.

(4) Subject to subsection (5), a Director General or his or her authorised delegate, under this or any other Act authorizing him or her to do so, may enter into a Government Contract where the consideration in relation to any contract, arrangement, franchise or concession is less than VT 10,000,000.

(5) Prior to entering into a Government Contract with a value of less than VT 10,000,000 a Director General must:

(a) ensure the contract is consistent with Government policy; and

(aa) ensure that the Government Contract relates to the Ministry's policy responsibilities; and

(b) ensure the contract is fiscally responsible, prudent, cost effective, and is a necessary obligation for Government to assume; and

(c) consult with the Director of the Department of Finance and satisfy himself on reasonable grounds that the Government has or is likely to have the financial ability and resources to meet all of the obligations under the contract including future obligations; and

(d) ensure that no conflict of interest exists between a Director General and the other party; and

(e) use a competitive and transparent process when deciding who to award the contract to including where applicable, a request for quotations process as may be prescribed by this or any other Act or regulation; and

(f) obtain the concurrence of the Director of the Department of Finance that the procedures in accordance with this or any other applicable Act have been followed.

(6) A Government Contract must not be awarded to:

(a) a public servant; or

(b) a minister; or

(c) a Member of Parliament; or

(d) a leader as defined under the Leadership Code Act [CAP 240]; or

(e) in the case of a Government Contract with a value of VT 10,000,000 or above – a person that does not have a tax clearance certificate issued under section 51 of the Tax Administration Act No. 37 of 2018.

3A. Renewal of Government Contracts

A Government Contract must not be renewed unless it complies with the procurement methods as set out in this Act and the Regulations.

3B. Variation and extension of Government Contracts

(1) A Government Contract with a value of VT10,000,000 or above must not be varied, including any extension of the term of the Government Contract unless the Board in writing approves the variation or extension.

(2) In deciding whether to approve a variation to a Government Contract, the Board must have regard to whether:

(a) a variation has been made previously; and

(b) the variation is for 1 year or less; and

(c) the variation represents an increase of not more than 20% in the price of the original terms; and

(d) in the case of an extension of the term of the Government Contract – the extension does not have a value exceeding 100% of the original Government Contract; and

(e) such other matters as the Board considers relevant.

(3) A Government Contract with a value below VT10,000,000 must not be varied or extended unless it meets the prescribed requirements.

4. Execution of Government Contracts

(1) A Government Contract entered into under section 3 must be in the name of the Government of the Republic of Vanuatu represented by the responsible minister or responsible director general.

(2) A document required to be signed evidencing the terms of a Government Contract must be executed by the responsible minister or responsible director general on behalf of the Government.

(3) A Government Contract may be renewed or varied in the same manner as described in subsections (1) and (2).

5. Validation of prior contracts

All things lawfully done before the passing of this Act, will be deemed to have been validly and lawfully done under the authority of this Act and any contract entered into is ratified and confirmed.

6. Application of Act to existing arrangements

The provisions of this Act will apply to any arrangement to enter into a Government Contract which at the date of commencement of this Act has not been executed.

7. Effect of Government Contract entered into in breach of this Act

A Government Contract entered into after the commencement of this Act, which is in breach of the provisions of this Act, will be void, of no effect, and will not be binding on the State or the Government.

7A. Potentially Excluded Contracts

A Government Contract which is funded by a foreign donor or another organisation is subject to the provisions of this Act or any regulations made under this or any other Act, unless it is inconsistent with any requirements of the funding agency.

PART 3 – TENDERS, QUOTATIONS AND PROPOSALS

8. Requirement to obtain tenders, quotations and proposals

(1) This section applies when:

(a) entering into a Government Contract; or

(b) entering into a contract for the contracting out of a Government service; or

(c) purchasing of goods or services.

(1A) The following persons must comply with the quotation, proposal or tendering process set out in this Act and the Regulations:

(a) the responsible minister; and

(b) the responsible director general of a ministry; and

(c) any other person authorized by the responsible minister or the responsible director general.

(2) The responsible minister, the responsible director general of the ministry, or any other person authorized by the responsible minister or the director general to do so is responsible for the annual planning of its procurement and for:

(a) the preparation and drafting of its requirements through technical specifications; and

(b) the preparation of tender documents based on the Standard Tender Document issued by the Board; and

(c) the advertising of its procurement and the seeking of any approval from the Board required in accordance with this Act or any other Act.

PART 4 – BOARD

9. Establishment of the Board

There shall be established a Board.

10. Composition of the Board

(1) The members of the Board are:

(a) a Chairperson appointed under section 11; and

(b) the Director-General of the Ministry responsible for finance or his or her representative; and

(c) a representative of the State Law Office.

(2) A quorum for a meeting of the Board is 3 members.

(3) No tender may be recommended to the Council without the approval of the Board.

(4) The Chairperson shall have a casting vote at Board meetings.

(5) If a member of the Board stands to gain financially or has a conflict of interest in a contract he must not continue to be a member of the Board considering tenders for that contract.

(6) A member of the Board who has a direct or indirect personal interest in a matter being considered or to be considered by the Board must, as soon as reasonably practicable after the relevant facts concerning the matter have come to his or her knowledge, disclose the nature of his or her interest to the Board.

(6A) A disclosure of interest in a matter is to be recorded in the minutes of the meeting of the Board and the member must not be present while that matter is being dealt with and he or she must not take part in any deliberations or vote relating to the matter.

(7) The Board may co-opt any person for the purpose of providing technical advice and such person will not be entitled to a vote.

(8) In all of its activities the Board must act independently, and is not to be subject to interference or influence from any person.

(9) No member of the Board, other than the Chairperson, will be paid by reason of his membership of the Board.

10A. Secretary of the Board

(1) The Secretary of the Board is to be appointed by the Public Service Commission in accordance with the Public Service Act [Cap. 246].

(2) The Secretary is responsible for the day to day administration of the Board.

11. Chairperson of Board

(1) The Minister is to appoint a Chairperson of the Board on merit following a fair and transparent selection process.

(2) The Chairperson:

(a) must be a person who has qualification and experience in the practice of law or accounting or commerce; and

(b) must not be a member of Parliament or hold any other public office; and

(c) will not be deemed by virtue of the office to be employed in the Public Service; and

(d) must be a person of good reputation in the community and enjoy public confidence; and

(e) must not have a criminal record.

(3) The Chairperson will be appointed for a term of 3 years.

(4) Subject to an enactment determining the Chairperson's remuneration, the Chairperson will be remunerated at a rate fixed by the Government Remuneration Tribunal from money to be appropriated for that purpose.

(5) The Chairperson may be removed or suspended from office only by the Minister for incompetence, disability, bankruptcy, neglect of duty or misconduct.

(6) The Chairperson may resign from office by giving one month's notice in writing to the Minister.

(7) On the occurrence of a vacancy in the office of chairperson a new Chairperson must be appointed as soon as practicable in accordance with subsection (1).

(8) The appointment of a Chairperson in breach of the provisions of this section will be void and of no effect and a suitably qualified person must be appointed to the vacancy.

(9) The Minister may appoint an Acting Chairperson from amongst the members of the Board for a specified period if:

(a) the Chairperson is absent, incapacitated and unable to attend a schedule meeting of the Board; and

(b) the business of the Board cannot be pursued without the Chairperson's vote.

(10) The Acting Chairperson appointed under subsection (9), in carrying out the functions and powers of the Chairperson, must:

(a) meet the criteria for quorum set out under subsection (2); and

(b) act only during the period of appointment as an Acting Chairperson; and

(c) carry out his or her functions as specified under this Act.

11A. Functions of the Board

(1) The Board has the following functions:

(a) to manage procurement procedures for tenders with a value of VT 10,000,000 or above; and

(aa) to make recommendation to the Council to approve Government Contracts with a value of VT10,000,000 or above; and

(ab) to make recommendation to the Minister under section 15C; and

(b) to develop and disseminate standard forms for use by government agencies in the planning of procurement, for recording and reporting on procurement processes, for advertisements to be placed in the appropriate media and procedures and forms to be used in contract management; and

(c) to establish and maintain the Board's website for the provision of procurement information and the publicity of Government Contracts; and

(d) to develop, introduce and manage electronic information and procurement system for the procurement of works, goods and services in Vanuatu, including:

(i) electronic advertising, convening and receipt of bids; and

(ii) the development of framework agreements and contracts; and

(iii) the use of electronic reverse auctions; and

(iv) any or all procurement modalities leading to the optimal use of public resources; and

(e) to monitor and ensure that any electronic system developed by one of more contracting agencies are done in compliance with this Act or any other Act; and

(f) to develop guidelines and instructions regarding the interpretation and implementation of this Act or any other Act; and

(g) to monitor compliance with this Act or any other Act and proposing any amendment to them regarding public procurement which appear necessary in the light of international practices and experience gained in the course of the public procurement process in Vanuatu; and

(h) to present a quarterly report to the Council regarding contracts approved by the Board; and

(i) to present an annual report to the Government regarding the overall functioning of the public procurement system; and

(j) to develop, promote and support training and professional development of officials and other persons engaged in public procurement, including their adherence to the highest ethical standards; and

(k) any other function imposed by this Act or any other Act.

(2) In addition to subsection (1), the functions of the Board in respect of a tender process include:

(a) the approval of all tender documents which do not conform to the Standard Tender Documents issued by the Board; and

(b) the approval of other tender processes not based on an open and competitive tender process; and

(c) the appointment of the evaluation committee; and

(d) the receipt and opening of tenders; and

(e) the assessment of tenders in compliance with the tender process under this Act or any other Act; and

(f) the recommendation of an award to the Minister for submission to Council of all Government Contracts with a value exceeding VT 100,000,000; and

(g) the notification of an award to the successful and unsuccessful tenderers; and

(h) the management of complaints from tenderers.

(3) If a function is imposed on the Chairperson under this Act or any other Act, such function may be exercised by the Board or by a person delegated in accordance with the provisions of subsection 11(9).

PART 5 – TENDER PROCESS

12. Procedure

(1) The Board must recommence the tender process if:

(a) the Board cannot approve the awarding of a Government Contract; or

(b) the Board cannot make a recommendation to the Council to approve the Government Contract; or

(c) the Council does not accept the Board's recommendation.

(2) The Board must not consider a tender or make a recommendation to the Council in respect of a tender:

(a) that has not complied with this Act or any other Act; or

(b) from a person, body corporate, company or entity who has not submitted the tender in accordance with, and followed the procedure prescribed under this Act or any other Act; or

(c) which has not been the subject of a report by the evaluation committee.

(3) The Board must not consider a tender or make a recommendation to Council where the tender is submitted after the time and date specified for the submission of the tender has expired.

(4) The Council must not decline a recommendation for acceptance of a tender from the Board unless there are compelling reasons to do so, and where the Council does decline a recommendation it must provide its reasons in writing to the Board within 14 days of making that decision.

(5) The Council must not accept a tender unless the tender has been through the tender process in accordance with this Act.

(6) To avoid doubt, the Minister together with the responsible minister, are responsible for submitting all recommendations made by the Board to the Council.

(7) Nothing in this section gives the Minister or the responsible minister the power to change any recommendation of the Board.

13. Breach of tender process

Unless the breach is of a minor, trivial or technical nature, a contract entered into in breach of the tender provisions of this Act, or regulations made under this Act, will not be binding on the State or the Government.

13A. Contract splitting

(1) A government agency or the Board must not split a single procurement requirement into separate packages or award more than one contract or arrangement in relation to the same or substantially similar subject matter for the purpose of avoiding the requirements of the tender process provided for by this Act or any regulation made under this Act.

(2) Despite subsection (1), a government agency may divide a procurement requirement, which could be procured as a single contract into a package consisting of several lots which are to be bid together, where it is anticipated that the award of several separate contracts may result in the best overall value for the government agency.

13B. *(Repealed)*

13C. Protection of whistleblowers

(1) A person who becomes aware of a breach or an alleged breach of the tender process provided for by this Act or the regulations may report it orally or in writing to:

(a) the Director of the Department responsible for finance; or

(b) the Director of the Department of Finance; or

(c) any other senior official within the Department of Finance or the Ministry of Finance and Economic Management; or

(d) any senior official within the Office of, the Auditor-General, the Commissioner of Police or the Public Prosecutor.

(2) If a person referred to under subsection (1) is a public servant, such person must make such a report.

(3) A person referred to under subsections (1) and (2) may make such report under conditions of anonymity.

(4) The Director-General or the person authorised by the Director-General may refer the matter to the Auditor-General, the Commissioner of Police and/or the Public Prosecutor.

13D. Complaints Review Mechanism

(1) A tenderer may lodge a complaint with the Board if the tenderer believes that a person has breached a provision of this Act.

(2) Any complaint lodged in accordance with subsection (1) is to be heard by an independent expert in accordance with the procedures prescribed by the regulation.

PART 6 – OFFENCES AND PENALTIES

14. Offences and penalties

A person who contravenes section 3A, 3B or 4 or subsection 3(3), 3(5), 8(1) or 13A(1) commits an offence and is liable on conviction:

(a) in the case of a natural person - to a fine not exceeding VT 2,000,000 or imprisonment for a term not exceeding 2 years, or both; or

(b) in the case of a body corporate- to a fine not exceeding VT 10,000,000.

15. No interference with Board

(1) No person shall influence or attempt to influence the Board in any manner.

(2) If a person contravenes subsection (1), the person commits an offence and is liable on conviction:

(a) in the case of a natural person - to a fine not exceeding VT 5,000,000 or imprisonment for a term not exceeding 5 years, or both; or

(b) in the case of a body corporate- to a fine not exceeding VT 25,000,000.

15A. False or misleading information or documents

If a person knowingly or recklessly provides to the Board information or documents that are false or misleading in relation to a Government Contract, the person commits an offence and is liable on conviction:

(a) in the case of a natural person - to a fine not exceeding VT 5,000,000 or imprisonment for a term not exceeding 5 years, or both; or

(b) in the case of a body corporate- to a fine not exceeding VT 25,000,000.

15B. Disclosure of information

(1) A member of the Board or the evaluation committee must not directly or indirectly disclose to any person any information or document in relation to a Government Contract or a tender, unless the disclosure:

(a) is for the purpose of discharging a duty, performing a function or exercising a power under this Act; or

(b) is made to a recipient who is legally authorized to receive such information; or

(c) is ordered by a court.

(2) A person who contravenes subsection (1), the person commits an offence and is liable on conviction to a fine not exceeding VT 5,000,000 or imprisonment for a term not exceeding 5 years, or both.

15C. Suspension against submitting a tender

(1) Subject to subsection (2), the Minister may, by written notice to a person, suspend the person from submitting a tender under this Act if the Minister is satisfied that the person has failed to comply with this Act or the regulations.

(2) The Minister must not give a written notice to a person unless the Board has recommended the suspension of the person to the Minister.

(3) Before making a recommendation, the Board must give a person at least 14 days in which to make a written submission to the Board on the person's proposed suspension, and the Board must have regard to any submission so made.

(4) After considering any recommendation made by the Board, the Minister must give a notice of suspension to the person concerned or take no further action.

(5) A notice of suspension must specify the reasons for, and the period of, the suspension. The period of a suspension is not to exceed 5 years.

(6) If the Minister decides not to take any further action, the Minister must provide his or her reasons in writing to the Board.

(7) A notice given by the Minister that does not comply with subsection (2) is null and void.

16. Breach of Leadership Code

Where a person convicted of an offence under this Act is a leader, as that term is defined in the Leadership Code, and that offence amounts to a breach of the Leadership Code then that person is also liable to be dealt with under the Leadership Code in addition to any penalty imposed under this Act.

PART 7 – MISCELLANEOUS

17. Regulations

The Minister may make such regulations as are necessary for giving full effect to this Act and for its proper administration, including regulations for all or any of the following, regardless of the value of the Government Contract:

(a) prescribing the procedure and method that must be followed when arranging a Government Contract;

(b) prescribing the procedure and method that must be followed when entering into a Government Contract;

(c) prescribing the rules, procedure and method to be followed in arranging or calling for, and approving or recommending quotations and tenders for Government Contracts and the contracting out of Government services or purchasing goods, services, or supplies on behalf of the State or Government;

(ca) exemptions to this Act during a declared state of emergency;

(cb) annual procurement plans for government agencies;

(d) prescribing offences against the regulations made under this Act and penalties therefore.

18. Audit

The records, minutes and decisions of the Board are to be:

(a) audited annually by the Auditor-General; and

(b) reviewed at any time by the Public Accounts Committee and that Committee has the same powers and functions in a review under this Act as it has under any other enactment.

Table of Amendments

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13A	*Substituted by Act 40 of 2013*
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13B	*Repealed by Act 44 of 2019*
13B(1)(d)	*Inserted by Act 40 of 2013*
13B(4)	*Inserted by Act 40 of 2013*
13C(1)(a)	*Substituted by Act 40 of 2013*

13C(1)(b), (c), (d)	*Substituted by Act 40 of 2013*
13C(2), 13C(3)	*Substituted by Act 40 of 2013*
13D	*Inserted by Act 40 of 2013*
14	*Substituted by Act 44 of 2019*
14(1)	*Amended by Act 40 of 2013*
14(2)	*Substituted by Act 40 of 2013*
15(2)	*Substituted by Act 44 of 2019*
15A – 15C	*Inserted by Act 44 of 2019*
17	*Amended by Act 44 of 2019*
17(ca) and (cb)	*Inserted by Act 44 of 2019*
18	*Repealed by Act 40 of 2013*
18(a)	*Substituted by Act 44 of 2019*
18, 19	*Inserted by Act 40 of 2013*
19	*Repealed by Act 44 of 2019*
Throughout	*Expenditure Review Committee updated to Public Accounts Committee*
Throughout	*Tenders Board, Board or Central Tenders Board updated to Board*