

LEGAL REVIEW FOR THE IMPLEMENTATION OF SUSTAINABLE PUBLIC PROCUREMENT IN MAURITIUS

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I. A review of the Public Procurement Act 2006 (PPA)

A. Background

The Public Procurement Act (PPA) is classed as an Administrative/Public law which regulates the procurement activities of public bodies. It was adopted by the National Assembly in 2006. It became operational in January 2008, along with the Public Procurement Regulations and Public Procurement (Suspension and Debarment) Regulations. Recently, another set of regulations known as the Public Procurement (Disqualification) Regulations 2009 was introduced. All these have significantly transformed our public procurement system.

The PPA is based on the UNCITRAL Model Law on Public Procurement, and the World Bank Procurement rules. It complies with international best procurement practices and shares the common objectives of public procurement systems which are:

- maximise economy and efficiency in public procurement, and obtain best value for public expenditures
- promote economic development of the Republic of Mauritius, including capacity building in the field of public procurement
- promote competition and foster participation in public procurement proceedings of qualified suppliers, contractors and consultants
- provide equal access without discrimination to all eligible and qualified providers of goods, works and services, and fair and equitable treatment of all bidders
- promote integrity, fairness, accountability and public confidence in the public procurement process; and
- achieve transparency in the procedures, process and decisions relating to public procurement.

B. Brief Description

The PPA contains nine parts.

The first part deals with definitions and scope of application. The PPA applies to any procurement undertaken by public bodies which appear in the Schedule to the Act as well as those which meet the definition of public body. However, defence and national security procurements are excluded as well as projects financed by funding agencies, where the procurement rules of these funding agencies prevail. Moreover, it is provided that other organisations may be exempted by regulations, such as those state organisations which perform commercial operations and have to compete in the market.

Parts II and III of the Act define the institutional framework. The following institutions are established:

- the **Procurement Policy Office (PPO)** as an independent policy making and monitoring body - the oversight and regulatory body for public procurement;
- the **Central Procurement Board (CPB)** as a body corporate responsible for the vetting of bidding documents and conduct of the bidding process of all contracts exceeding the amount prescribed in the Schedule: and
- the **Independent Review Panel (IRP)** as another independent institution, to entertain complaints, and review applications from unsatisfied bidders who have to, in the first place, address their challenge to the public body concerned.

With a view to guarantee the independence of the above institutions, appointment of the chairpersons and members are made by the President of the Republic on the advice of the Prime Minister tendered after having consulted the Leader of the Opposition.

Part IV of the PPA sets out the procurement methods to be applied depending on the relevant circumstances. They are listed in order of hierarchy, and open advertised bidding is the default procurement method. It also provides for the conditions for use of procurement methods other than open advertised bidding, and the obligation to record the reasons for doing so in the procurement file. The relevant regulations supplement these provisions by prescribing the thresholds for the use of Restricted Bidding, Request for Sealed Quotations and Direct Procurement methods. The conditions for use of Emergency Procurement and Request for Proposals are also clearly stipulated both in the Act and the Regulations.

Part V focuses essentially on the conduct of the bidding process and thus it seeks to safeguard the integrity of the procurement process. It sets out the procedures and conditions for a prequalification exercise applicable to large and complex works and complex equipment, exceeding the prescribed threshold. The other essential features in this part are about the use of a Two Stage Bidding process, a Margin of Preference as prescribed in the regulations, the requirements of bid security, the procedures related to receipt and custody of bids, the minimum time for submission of bids, withdrawal and modification of bids, bid validity period, opening procedures, examination and evaluation of bids, post qualification, cancellation of bidding process, award of contract procedures and debriefing. These procedures are further elaborated in the regulations.

Part VI highlights the rights of bidders who claim to have suffered, or to be likely to suffer loss or injury due to a breach of duty imposed on a public body or the Central Procurement Board, to challenge the procurement proceedings. The regulations provide for the format of the challenge and application, the deadlines for submission of application as well as those for responding to the applicants.

Part VII deals with the mandatory requirements of a procurement contract, the procedures and conditions for amendments, including the limit in value that such amendments may cause, requirements for payments and payment of interest, and conditions for termination of contract, including termination by convenience, where the contractor may be refunded expenses incurred but not loss of profits. These

provisions are reflected in more details in the Standard Bidding Documents issued by the PPO for mandatory use.

Part VIII provides for duties and responsibilities of public bodies, conduct of public officials, bidders and suppliers so as to ensure integrity in public procurement. Thus, it is provided that:

- public bodies are not allowed to artificially divide the modalities of procurement in such a way to avoid necessary formal tendering;
- public officials shall not commit any corrupt or fraudulent practice,
- bidders having a close relative or someone with substantial interest working in a public body are not eligible to bid or to be awarded a procurement contract
- public officials shall avoid conflicts of interest in carrying out their duties.

The procedures for the suspension and debarment of bidders and suppliers involved in fraud, misconduct, collusion or coercive practices are also found in this section and are supplemented by the Public Procurement (Suspension and Debarment) Regulations.

Part IX, the last part, contains miscellaneous provisions, such as oath of office and declaration of assets by members and officials of the three institutions established under the PPA, offences, safeguards against undue influence, immunities for the institutions and consequential amendments. It also contains provisions for the issue of regulations.

It would be observed that all the different parts of the PPA seek to achieve the objectives of a sound procurement system and create obligations for public bodies. Such obligations are related to compliance to the Act and regulations at every stage of the procurement cycle in terms of choice of procurement methods, advertising rules, and maintenance of records, challenge and appeal procedures, response times, payment procedures and so forth. Finally, the provisions safeguard government obligations in international and regional trade through the opening of the market to all potential bidders, ensuring non-discrimination, dissemination of information and allowing sufficient time for bidding.

II. Possibilities of implementing SPP under the current legislation

A. Procurement Cycle

Sustainability criteria at the key stages of the procurement cycle:

- Identification of Needs (including Planning the procurement)
- Defining contract requirements
- Selecting Suppliers (qualifying suppliers)
- Awarding the contract

- Contract Management

B. OAB (National)

Section 17 of PPA 2006 states that a public body may limit participation in open procedure to citizens of Mauritius or entities incorporated in Mauritius subject to certain conditions.

C. Description of the subject matter

There is a possibility for introducing sustainability components when describing the subject matter of the procurement. Public bodies can include technical requirements. These are contractual obligations relating to the specification of the goods, works or services to be supplied. In principle a public body can include such requirements that relate to the social or environmental features of the item. It may include requirements that food served in employee canteens should cater for all religious groups, or that paper should be made from recycled materials, window frames out of wood or the specifications for photocopier may include energy consumption within a certain level.

However the conditions that do not relate to the performance are prohibited. For instance, it is not allowed to have a requirement to use unemployed persons in the firm's whole business or a condition that the contractor should have investments in tobacco companies.

D. Restricted Bidding

Section 19 provides the grounds for using restricted bidding. It only requires soliciting bids from a minimum of 5 known bidders. Bidders may be shortlisted based on sustainable criteria. For example, for low value purchases, bids may be solicited from local SMEs.

E. Community and end-user participation

Section 22 prescribes the use of Community and end-user participation procurement method. It states that 'where the participation of end-user or beneficiary community may result in enhancing the economy, quality or sustainability of the service to be procured, or the very objective of the project is to create employment and the involvement of the beneficiary community, such end-user or community may participate in the delivery of services...'. In these types of projects mostly NGOs and other small agencies are likely to be involved.

F. Disqualification of Suppliers

Section 35 stipulates disqualification of suppliers on the ground of material breach of contract. For instance, in some procurements suppliers may be disqualified if their conduct is contrary to the core principles of labour/environmental regulations to the extent that these principles are specified as contractual terms.

G. Margin of Preference

Section 37 concerns examination and evaluation of bids and section 37(9A) provides a margin of preference for Domestic Suppliers and Domestic SMEs.

H. Labour Clauses (Public Contracts) Convention, 1949 [Convention 94]

Mauritius has ratified the above Convention. The aims of the Labour Clauses are:

- employees performing works under public contracts do not enjoy conditions of labour less favourable than those enjoyed by other workers in the same trade or industry
- to remove labour costs being used as an element of competition among bidders for public contracts
- eliminate the negative effects of tendering on the workers' labour conditions
- to ensure that public contracts do not exert a downward pressure on wages and working conditions

Section 46(5)(6)(7)(8)(9)(10) of the PPA 2006 reflects ILO core labour clause:

46(5) *There shall be included in every procurement contract a clause ensuring –*

(a) *rates of remuneration and other conditions of work of the workers engaged in the execution of the contract that are not less favourable than those established for work of the same character in the trade concerned –*

(i) *by collective agreement applying to a substantial proportion of the workers and employers in the trade concerned;*

(ii) *by arbitration awards; or*

(iii) *by Remuneration Regulations made under the Employment Relations Act 2008;*

(b) *where remuneration and conditions of work are not regulated in a manner referred to in (a), rates of remuneration and other conditions of work which are not less favourable than the general level observed in the trade in which the contractor is engaged by employers whose general circumstances are similar.*

(6) *No contractor shall be entitled to any payment in respect of work performed in the execution of the procurement contract unless he has, together with his claim for payment, filed a certificate –*

(a) *stating rates of remuneration and hours of work of the various categories of workers employed in the execution of the contracts;*

(b) *stating whether any remuneration payable in respect of work done is due;*

(c) *containing such other information as the public body administering the procurement contract may require to satisfy himself that the provisions of this Act have been complied with.*

(7) *Where the public body administering the procurement contract is satisfied that remuneration is still due to a worker employed on a public contract at the time the claim for payment is filed under subsection (2), he may, unless the remuneration is sooner paid by the contractor, arrange for the payment of the remuneration out of the money payable under the procurement contract.*

(8) *Except with the written consent of the public body administering the contract, no contractor shall transfer or assign a procurement contract.*

(9) *Every contractor shall display a copy of subsections (5), (6) (7) and (8) at the place at which the work required by the contract is performed.*

(10) *In this section, “worker” has the same meaning assigned to it under section 2 of the Employment Rights Act 2008.*

III. Legislations related to Sustainable Public Procurement

A. The Environment Protection (Industrial Waste Audit) Regulations 2008

The Regulations set out a list of industrial activities requiring an industrial waste audit describing how the organization addresses issues with regards to:

- air and water pollution
- solid waste
- hazardous substances
- hazardous waste
- environmental noise
- odour

B. Road Traffic (Control of Vehicle Emissions) Regulations 2002

The Act provides, that prior to registration:

- Every motor vehicle will have to be constructed and maintained in such a manner that smoke and noise emitted from it does not exceed the prescribed limits.

- Only petrol driven motor vehicles that shall be capable of running on unleaded petrol shall be registered as from 1st January 2003.
- No new diesel driven motor vehicle shall be registered unless it complies with opacity limit of 40% and the prescribed standard of exhaust emission as from 1st September 2003 and 1st January 2004 respectively. As from next year an enhanced quality of diesel will be imported.
- Prior to the delivery of a new or second hand imported vehicle to its owner, a dealer will have to issue a certificate testifying that the motor vehicle meets the prescribed standards relating to both exhaust and noise emissions.

C. Environment Protection (Standards for hazardous wastes) Regulations 2001.

The Regulations deal with environment protection.

D. Building Act

A new legislation pertaining to building is in the pipeline. This legislation will promote the concept of 'Green Building' in Mauritius.

E. Food Regulations 1999 made under the Food Act 1998

PART II - PACKAGES FOR FOOD

Use of harmful packages prohibited

No person shall import, manufacture, advertise for sale, sell or use or cause to be used in the preparation, packaging, storage, delivery or exposure of food for sale, any package, contact material or container which yield or could yield any toxic, injurious or tainting substance to its contents.

F. THE EMPLOYMENT RIGHTS ACT 2008

PART II – AGREEMENTS

Discrimination in employment and occupation

(1) (a) No worker shall be treated in a discriminatory manner by his employer in his employment or occupation.

(b) No person shall be treated in a discriminatory manner by a prospective employer in respect of access to employment or occupation.

PART III – MINIMUM AGE FOR EMPLOYMENT

Employment of children and young persons

(1) No person shall employ a child for employment or work in any occupation.

PART V – REMUNERATION

Equal remuneration for work of equal value

(1) Every employer shall ensure that the remuneration of any worker shall not be less favourable than that of another worker performing the same type of work.

G. THE OCCUPATIONAL SAFETY AND HEALTH ACT 2005

PART II - DUTIES AND RESPONSIBILITIES

General duties of employers

(1) Every employer shall, so far as is reasonably practicable, ensure the safety, health and welfare at work of all his employees.

(a) ensure that any person not in his employment is not exposed to any risk to his safety or health.

Duties of designers, manufacturers, importers and exhibitors

(1) Every person who designs, manufactures, imports or supplies any article for use at work shall –

(a) ensure, so far as is reasonably practicable, that the article is so designed and constructed as to be safe and without risk to health when used in a reasonable manner; and

(b) take such steps as are necessary to ensure that there will be available in connection with the use at work of the article, adequate information, by way of certificate, manual, pamphlet or otherwise, about –

(i) the use for which it is designed and has been tested; and

(ii) any conditions necessary to ensure that, when put to that use, it will be safe and without risk to health.

H. The Sex Discrimination Act - 2002.

The objectives of the Act are mainly to:

- give effect to certain provisions of the Convention on the Elimination of all forms of discrimination against women.
- eliminate, discrimination against persons on the ground of :
 - sex
 - marital status
 - the provision of goods, services and facilities
 - association and partnership

- promote recognition and acceptance within the community of the principle of the equality of men and women

Sex discrimination is also addressed under section 16 of the Constitution.

I. Competition Act 2007

The Competition Commission of Mauritius (CCM) is a statutory body established in 2009 to enforce the Competition Act 2007. This Act establishes a competition regime in Mauritius, under which the CCM can investigate possible anticompetitive behaviour by businesses.

The section related to bid rigging provides:

(1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if one party to the agreement -

(a) agrees not to submit a bid or tender in response to an invitation for bids or tenders; or

(b) agrees upon the price, terms or conditions of a bid or tender to be submitted in response to such a call or request.

(2) Subject to subsection (3), any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.

(3) This section shall not apply to an agreement the terms of which are made known to the person making the invitation for bids or tenders at, or before, the time when any bid or tender is made by a party to the agreement.

J. THE PREVENTION OF CORRUPTION ACT 2002

The object of the Act is to provide for the prevention and punishment of corruption and fraud and for the establishment of an Independent Commission Against Corruption (ICAC). The ICAC has been set up by virtue of the Prevention of Corruption Act 2002. Its main strategy is based on “Integrity of Systems and People”. The focus is on the promotion of integrity management, good governance, ethical operations and conduct, value-based education and trust building in public administration.

Article 61 of the Criminal Code also addresses Corruption issues.

K. ENERGY EFFICIENCY ACT (Act No. 3 of 2011)

The Act provides for the setting up of the Energy Efficiency Management Office within the Ministry responsible for the subject of energy. This Office has the following two objects: first, promoting the efficient use of energy, and second, promoting national awareness for the efficient use of energy as a means to reduce carbon emissions and protect the environment. The functions of the Office include developing and implementing strategies, programmes and action plans, for efficient use of energy, establishing energy consumption standards, and formulating and recommending innovative financing schemes for energy efficiency projects.

The Act is yet to be promulgated.

IV. 4. Proposals for new provisions in PPA 2006 to fully implement SPP

A. Objective of the Procurement System

To add among the objectives of the procurement system:

“Contribution to the implementation of economic, social and environmental policy objectives through procurement”.

The inclusion of this objective gives legal certainty for the application of SPP. It legitimates the application of measures directed at the protection of environment and social issues.

B. Compliance with relevant laws

The Act should make provision for the government to promote procurement from suppliers that are compliant with Mauritian laws and policies on environment, labour and human rights. For instance, under the Occupational Safety and Health Act 2005, every employer shall ensure the safety, health and welfare at work of all his employees. Contractors should ensure that the workers are working in a safe environment. Furthermore, The Employment Rights Act 2008 (as reflected in PPA 2006) stipulates all government contracts should a clause ensuring a reasonable remuneration and appropriate working conditions for workers engaged in the execution of the contract.

C. Qualifications of Bidders

In certain procurements, Suppliers and Contractors should have capability in environmental aspects. Together with financial and other capabilities, suppliers will be qualified if they also have environmental qualifications.

The following provisions to be added:

- (1) Ascertainment by the procuring entity of the Qualifications of suppliers or contractors at any stage of the procurement proceedings.
- (2) Suppliers or contractors shall meet such of the following criteria as the procuring entity considers appropriate and relevant in the circumstances of the particular procurement:
 - (a) that they have the necessary professional, technical and **environmental qualifications**, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and the personnel to perform the procurement contract;
 - (b) that they meet ethical and other standards applicable in Mauritius
- (3) Where appropriate, bidders may be asked to submit evidence of their environmental and social policies (credentials).

(4) To include a clause allowing public bodies to select consultants, where appropriate, who have a track record on corporate environmental and social performance: firms that have an environmental and social responsibility policy, management plan and report publicly on related performance. Further to select a consultant with proven environmental and social sustainability track record linked to the subject matter.

D. Description of Goods, Works, Consultancy Services and Other Services

Eco-label is currently not mentioned in our legislation. It is proposed to include in the legislation under Section Description of Goods, Works and Services, provision for the use of eco-label.

The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements, including concerning testing and test methods, packaging, marking or labeling or conformity certification, and symbols and terminology. In case of eco-labels or where national/international standards are used, each reference shall be accompanied by the words 'or equivalent'.

Without prejudice to mandatory national technical rules, the technical specifications shall be formulated either in terms of technical specifications or performance or functional requirements. However, in the case of performance or functional requirements, the parameters must be sufficiently precise to allow bidders to determine the subject-matter of the contract and to allow public bodies to award the contract.

E. Examination and evaluation of bids

Life cycle costing which is at the heart of Sustainable Procurement is not explicitly mentioned in the legislation. It is a fact that the Standard Bidding Document for Goods allow for the application of this concept. In view of its importance not only for SPP but also for good procurement practices, the LCC should be explicitly incorporated in the procurement legislation.

For example,

(1) the evaluation criteria shall relate to the subject matter of the procurement;

(2) the evaluation criteria may include:

(a) the price;

(b) the cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the characteristics of the subject matter of the procurement, such as the functional characteristics of goods or construction and the environmental characteristics of the subject matter, the terms of payment and of guarantees in respect of the subject matter of the procurement

3. Environmental Impact Assessment (EIA) could be a requirement for certain projects, thus broadening the scope of the current EIA provisions.

F. Conditions for performance of contracts

Public Bodies may lay down special conditions relating to the performance of a contract, provided that these are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations. However contracting authorities cannot use conditions which go beyond the performance of the specific contract.

4.6.2 For works and services contracts, and only in appropriate cases, an indication of the environmental management measures that the contractor and service provider will be able to apply when performing the contract.

G. Rejection of abnormally low submissions

Currently, there is no provision to deal with abnormally low bids. It is proposed to incorporate a section on abnormally low submissions. This is relevant to sustainable procurement in situation where bidders submit low bids due to the fact that they are paying extremely low wages to their workers who will be involved in the performance of the contract. Under such circumstances the bid may be rejected as government cannot encourage suppliers and contractors to exploit workers.

A clause dealing with abnormally low bids shall be included in line with Article 19 of UNCITRAL revised text:

(1) The procuring entity may reject a submission if the procuring entity has determined that the price in combination with other constituent elements of the submission is abnormally low in relation to the subject matter of the procurement and raises concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

- (a) The procuring entity has requested in writing from the supplier or contractor details of the submission that gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;
- (b) The procuring entity has taken account of any information provided by the supplier or contractor following this request, and the information included in the submission, but continues, on the basis of all such information, to hold concerns; and
- (c) The procuring entity has recorded the concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a submission in accordance with this article and reasons for the decision shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

Public bodies may reject abnormally low bids where this is due, for example, to non-compliance with employment or labour law rules.

H. Documentary record of procurement proceedings

If any socio-economic and environmental policies were considered in the procurement proceedings, details of such policies and the manner in which they were applied should be properly recorded.

Procurement Policy Office

Mauritius

22 July, 2011