

THE PUBLIC PROCUREMENT ACT

The Public Procurement (Reconsideration and Review) Regulations, 2018

In exercise of the power conferred on the Minister by section 60(1)(f), (g) and (h) of the Public Procurement Act, and every other power hereunto enabling, the following Regulations are hereby made: –

Short title. 1. These Regulations may be cited as the Public Procurement (Reconsideration and Review) Regulations, 2018.

**Interpre-
tation.** 2. In these Regulations –

- “Accountant-General” has the meaning assigned to it by section 15 of the *Financial Administration and Audit Act*;
- “aggrieved party” means a person, firm or entity applying for reconsideration or review, as the case may be;
- “Collector of Taxes” has the meaning assigned to it by section 3 of the *Tax Collection Act*;
- “interested participant” means a person, firm or entity entitled to participate in a review pursuant to regulation 13;
- “parties”, where the context so requires, includes an interested participant.

Reconsideration by Procuring Entity

**Application
for recon-
sideration.** 3. – (1) An application made by a person, firm or entity under section 48 of the Act to a procuring entity for reconsideration of an action or decision taken by that procuring entity shall –

- (a) be in such form as may be prescribed;

- (b) identify the procurement proceedings that are the subject of the application;
- (c) state the alleged non-compliant decision or action of the procuring entity forming the basis of the application and describe the circumstances giving rise to or related to that decision or action;
- (d) state the manner or extent to which that decision or action is alleged to be non-compliant with the Act and identify the relevant provisions of the Act or any regulations made under the Act in relation thereto;
- (e) state the loss suffered or likely to be suffered by the aggrieved party; and
- (f) be submitted, in writing, to the head of the procuring entity.

(2) An application made under paragraph (1) shall be accompanied by any relevant documents in support of the aggrieved party's claim.

Notice of application.

4. – (1) In accordance with section 48(5) of the Act, the procuring entity shall –
- (a) cause a notice of the application to be promptly published in accordance with paragraph (2);
 - (b) notify, in writing, the aggrieved party and other participants in the procurement proceedings to which the application relates –
 - (i) about the submission of the application and its grounds;
 - (ii) of its decision on whether the application is to be considered or dismissed and in the case of a decision

to dismiss, the reasons therefor in accordance with section 48(6) of the Act; and

- (iii) if the application is to be considered, state whether the procurement proceedings are to be suspended and the duration of the suspension.

(2) The procuring entity shall cause the notice given under paragraph (1) (a) to –

- (a) include the matters specified in regulation 3(1)(b), (c) and (d);

and

- (b) be published –

- (i) using the electronic procurement system; and

- (ii) in any other manner likely to bring the notice to the attention of national and international suppliers or bidders, as the case may require.

(3) For the purposes of paragraph (1)(b), notice is given on receipt of the notification by the aggrieved party and the other participants within the time specified under section 48(5)(b) of the Act.

(4) Where an application for reconsideration –

- (a) is not made within the period specified by section 48(4) of the Act, and the procuring entity declines to consider the application; or

- (b) concerns a matter excluded from reconsideration under section 49 of the Act,

the procuring entity shall notify the aggrieved party, in writing, giving the reasons therefor.

Communi- 5. The procuring entity shall –

cation of decision.

- (a) make its decision on an application for reconsideration in accordance with section 48(7) and (8) of the Act;
- (b) communicate its decision to the aggrieved party and each participant in the procurement proceedings to which the application relates within the time specified in section 48(7)(a) of the Act.

Designation of liaison officer.

6. A procuring entity shall designate a liaison officer to be responsible for the purposes of –
- (a) the acknowledgment of receipt of an application for reconsideration;
 - (b) reporting to the head of the procuring entity the applications for reconsideration received and in respect of each application, the relevant time-frames for notice, publication of notice of the application and communication of the decision of the procuring entity;
 - (c) recording of the application for reconsideration and all documents relating to the application, as well as documentation evidencing the receipt or transmission thereof, in such manner so as to form part of the record of the procurement proceedings in accordance with the Act.

*Review by Procurement Review Board***Application for review.**

7. – (1) A review pursuant to section 51 of the Act shall be commenced by the making of an application, in writing, to the Review Board and the application shall –
- (a) identify the aggrieved party and the party whose conduct is to be reviewed;

- (b) identify the matter that is the subject of the application;
- (c) state the alleged non-compliant decision or action of the party forming the basis of the application;
- (d) state the decision or action which is to be reviewed and the grievance resulting from that decision or action; and
- (e) identify the relevant provisions of the Act or any regulations made under the Act relevant to the application.

(2) An application made under paragraph (1) shall be accompanied by a receipt for payment of the application fee specified in regulation 33, and any relevant document in support of the aggrieved party's claim.

Commencement of review.

8. The date of the lodging of the application for review or, in the case of an amended application, the date of re-submission pursuant to regulation 10(2) shall be deemed the date of commencement of the review.

Review Board may refuse review.

9. The Review Board may refuse to commence a review if the application for review does not comply with the requirements of the Act or these Regulations.

Acknowledgement and notice of review.

10. – (1) Upon receipt of an application for review, the Review Board shall cause an acknowledgement of receipt of the application, to be issued to the aggrieved party, in writing, signed by the Chairman or duly authorized member of the Review Board.

(2) Where an application for review is incomplete, contains any material omissions, errors or is otherwise so unsatisfactory as to prevent commencement of the review, the Review Board shall include in the acknowledgment of receipt referred to under paragraph (1), a statement

advising the aggrieved party of the manner in which the application is unsatisfactory and request that the aggrieved party re-submit an amended or completed application, as the case may be.

(3) Upon receipt of an application for review, the Review Board shall notify, in writing, the party whose conduct is to be reviewed and any other participants in the procurement proceedings to which the application relates.

(4) The Review Board shall acknowledge receipt of an application that has been re-submitted in accordance with paragraph (1).

Timeframe for application for review.

11. Applications for review under section 51 of the Act shall be submitted to the Review Board within five working days of the action complained of, or the decision of, or failure to issue a decision by, the procuring entity on an application for review.

Manner of consideration of application for review.

12. The Review Board, upon receipt of an application for review, shall, within five working days of receipt of the application for review cause a notice of the application to be published in such manner as the Board may specify.

Participation in review proceedings.

13. – (1) In accordance with section 53 of the Act, any person, firm or entity having notice of an application for review in respect of a procurement proceeding in which that person, firm or entity has a sufficient interest that is or could be affected by the application the person, firm or entity may communicate, in writing, to the Review Board that person's, firm's or entity's interest to participate in the proceedings.

(2) An application made under paragraph (1) shall be accompanied by a receipt for payment of the application fee specified in

regulation 33, and any relevant document in support of the interested participant's claim.

(3) A communication under paragraph (1) shall –

- (a) identify the relevant review proceeding and refer to the notice thereof;
- (b) identify the person, firm or entity desirous of participating in the review proceedings and state the nature of the interest that is or could be affected in the review proceedings; and
- (c) be delivered to the Review Board within three working days after the publication of the notice of the application for review.

(4) Upon receipt of the communication under paragraph (1) from the person, firm or entity desirous of participating in the review proceedings, the Review Board shall –

- (a) acknowledge, in writing, receipt of the communication, within three working days after receipt thereof;
- (b) within five working days, consider whether the applicant has a sufficient interest and notify, in writing, the person, firm or entity, of its decision on whether the Review Board is satisfied that the person, firm or entity has sufficient interest entitling participation in the review proceedings, and the terms and conditions, if any, of that participation.

Notice of participant.

14. Where the Review Board is satisfied that a person, firm or entity is entitled to participate in the review proceedings, the Review Board shall, within the time-frame specified in regulation 13(4)(b), notify, in writing, the parties to the review proceedings of the inclusion of the interested participants in the review proceedings.

Procedural formalities not to bar aggrieved party or interested participant.

15. For the avoidance of doubt, an omission or error in an application or communication during the conduct of a review that does not –

- (a) prevent identification of a party;
- (b) materially alter the substance of an application for review or a communication of interest to participate,

shall not delay or operate to deny review of the relevant application or communication.

Additional information.

16. The Review Board may, before fixing the date of the hearing of a review, require the parties to supply such additional information or documents as the Review Board thinks fit.

Hearing date.

17. – (1) The Review Board shall –

- (a) fix a date, time and place for the hearing; and
- (b) give notice to the parties, not less than five working days before the date of the hearing, in the form set out as Form A in the Schedule.

Form A, Schedule.

(2) The Review Board may, if it thinks fit, postpone the day or time fixed for, or adjourn, the hearing of a review.

Hearing.

18. At the hearing of a review, the Review Board shall enquire into the grounds of review and may –

- (a) hear evidence from the parties and any witness;
- (b) in accordance with the Act, seek advice of any person who, in the opinion of the Review Board, is able to assist the Review Board in its deliberations.

List of documents.

19. – (1) A notice of hearing shall require each party to provide to the Review Board and to any other party a list and copies of all documents on which each party proposes to rely.

(2) The lists shall, unless otherwise provided by the Review Board, be provided by the parties at least three working days before the date fixed for the hearing.

(3) Subject to regulation 21, the documents referred to in paragraph (1) may contain a redacted document, in which case, the list shall expressly state that the listed document has been redacted with the approval of the Review Board.

Inspection of documents.

20. – (1) Each party may inspect the documents included in the list provided by any other party.

(2) A copy of any document included in the list of a party shall, on the written request of the party requiring it, be provided to that party by the other party within three working days after receipt of the request.

Redacted documents.

21. – (1) Where a party is concerned that a document on which it wishes to rely or include in the list of documents referred to in regulation 20 may contain information that is likely to prejudice its legitimate commercial interests that party may request the written approval of the Review Board to provide a redacted version of the document.

(2) A request to the Review Board under paragraph (1) shall be in writing, and include a copy of the relevant document identifying the parts thereof that give rise to the concern and which the requesting party desires to be redacted.

(3) On consideration of the matter, the Review Board may approve a redacted version of the document to be included in the list of

documents supplied to the requesting party and that approval shall be communicated, in writing, to the other parties.

Proceedings on evidence by affidavit.

22. – (1) Subject to paragraphs (2) and (3), the Review Board may, in its discretion, either as to the whole case of a party or as to any particular fact, proceed and act upon evidence given by affidavit.

(2) Unless the Review Board is satisfied that –

(a) the affidavit is purely formal; and

(b) requiring the attendance of the deponent is made with the sole object of causing delay,

the Review Board may, at the request of a party or otherwise on its own determination, summon the attendance of any person who has sworn an affidavit in the matter for the purpose of giving oral evidence.

(3) Where evidence is given by affidavit, the affidavit shall be delivered to the Review Board not later than three working days before the hearing date.

(4) Where a party's evidence is to be given orally at the hearing of the review, notice of such evidence shall be given by the party to the Review Board not later than three working days before the hearing date.

Summons for examination. Form B, Schedule.

23. Where a person is summoned for examination for the purposes of a review, the Review Board shall serve on that person a notice in the form set out as Form B in the Schedule.

Notice to produce document.

24. – (1) Where the Review Board requires a document to be produced for the purposes of a review, the Review Board shall serve on the

Form C, Schedule.

relevant person, a notice in the form set out as Form C in the Schedule.

(2) The person notified under paragraph (1) shall produce the document specified in the notice within such time-frame as may be specified by the notice.

**Right to
address
Review
Board.**

25. – (1) The Review Board shall give the parties the opportunity to address the Review Board, to give evidence, to call witnesses and to put questions to any person summoned to give evidence.

(2) Where the Review Board obtains information, technical, legal or other assistance or summons for examination any person under section 52 of the Act, the Board shall –

- (a) at the same time as it gives notice of the hearing (or as soon as practicable thereafter and in any event not less than five days before such information or assistance is obtained or person is summoned) notify the parties to the review of the information or assistance obtained or the person to be called as a witness; and
- (b) subject to paragraph (4), give the parties an opportunity of considering the information, technical, legal or other assistance obtained or putting questions to the person summoned at the hearing.

(3) The Review Board may determine if and the extent to which, an interested participant is to be permitted the opportunities referred to in paragraphs (1) and (2).

(4) Paragraph (2)(b) does not apply in respect of legal advice obtained by the Review Board that is the subject of legal professional privilege.

**Failure to
attend.**

26. Where any party to the review fails to attend at the time and place fixed for the hearing, the Board may (after considering any representa-

tions submitted, in writing, to it by the absent party) dispose of the review in that party's absence or adjourn the hearing to a later date.

Service of documents.

27. – (1) Service of any notice, documents, or other form of communication, required by these Regulations may be effected by –

- (a) personal delivery, registered mail, facsimile transmission from a fax machine capable of generating a record of transmission; or
- (b) such other means as the Review Board may approve, in writing, with the written agreement of the parties.

(2) For the purposes of paragraph (1), the parties to the review shall submit, in writing, to the Review Board and each other their respective addresses, telephone and facsimile transmission numbers or other contact information necessary for service, including any change in the details thereof arising before conclusion of the review.

Verbatim record.

28. The Review Board shall –

- (a) cause to be made a verbatim record, in writing, of the proceedings of the hearings;
- (b) after the Review Board has issued its decision, a copy of the verbatim record authenticated as required by paragraph 8 of the Third Schedule of the Act, shall be sent to the procuring entity for inclusion in the record of the procurement proceedings

Third Schedule.

required to be maintained by that procuring entity under the Act.

Consolidation of review.

29. – (1) Subject to paragraph (2), the Review Board may consolidate reviews if it appears to the Review Board that –

- (a) the facts of two or more reviews before it are similar or some common issue of law or fact arises in both or all the reviews;
- (b) it is convenient to the parties;

- (c) no prejudice will result from consolidating the application for review; and
- (d) written notice of the consolidation is given by the Review Board, to all affected parties.

(2) The Review Board shall give the parties an opportunity to show cause why a review should not be consolidated.

**Decisions
of Review
Board.**

30. The decision of the Review Board shall –
- (a) be limited to the claim made by the applicant;
 - (b) be in writing and recorded in such form specified under the Act and signed by the Chairman or any duly authorized member of the Review Board;
 - (c) be communicated in writing, to the applicant and the other parties to the review, not later than twenty working days after the date of the conclusion of the hearing; and
 - (d) address the matter of which party shall bear the costs, or any portion thereof, of the review.

Costs.

31. – (1) The Review Board may make such order as to the whole or any part of the costs of the review as it shall consider just and equitable and any such order shall be included in its decision which shall –

- (a) specify the amount of such costs;
- (b) identify the party by whom the costs are to be paid; and
- (c) having regard to the relevant procurement proceedings, specify the manner in which the costs are to be paid.

(2) An award of costs may be made under paragraph (1) against an aggrieved party who withdraws while a review is pending or is underway.

(3) The Review Board may, in its discretion, require the aggrieved party to the proceedings to deposit with the Collector of Taxes, prior to the date fixed for hearing of a review, such sum as the Review Board may direct as security for payment of any costs that may be awarded.

(4) The receipt for the payment of the deposit referred to in paragraph (3) shall be forwarded to the Chairman of the Review Board at least three working days before the date set for the hearing.

(5) On conclusion of the review if the aggrieved party is not liable to make payment in satisfaction of an award of costs the security referred to in paragraph (3) shall be refunded to the aggrieved party within thirty working days of the notification of the decision of the Review Board.

Fee. 32. – (1) Upon an application under regulation 7 or 13, the applicant shall deposit with the Collector of Taxes a non-refundable application fee in an amount equivalent to 0.05% of the stated procurement contract price.

(2) The application fee referred to in paragraph (1) shall not be payable in the event of the re-submission of an application for review, at the request of the Review Board, of an amended application.

(3) The Review Board may include an amount equivalent to the application fee in any costs to be awarded to the aggrieved party.

Collector of Taxes to remit costs, etc. 33. The Collector of Taxes shall remit to the Accountant-General the sums and fees received by the Collector of Taxes under regulations 31(3) and 32(1).

Time. 34. The Review Board may –

- (a) if it thinks fit, extend the time appointed for doing any act and may do so notwithstanding that the time appointed has already expired;
- (b) in special circumstances reduce the time appointed by these Regulations for doing any act, at the request of a party to the hearing and with the agreement of the other parties.

Dismissal of certain reviews.

35. – (1) Where, at any stage of the proceedings, a review is found to be –

- (a) frivolous or vexatious; or
- (b) reasonably suspected to have been instituted to delay the outcome of a procurement proceeding,

or if, for any other reason, the Review Board is satisfied that the review ought to be discontinued in the public interest, the Review Board may dismiss the review forthwith and if reasonable and foreseeable loss has been caused to a party as a result of the review that loss may be taken into account in any award of costs.

(2) In making a decision under paragraph (1), the Review Board shall consider the nature of any injustice or abuse of the review process, including –

- (a) the application for review;
- (b) any prior or contemporaneous requests or reviews by the party;
- (c) other oral or written communications from the aggrieved party to any procuring entity or public officer;
- (d) any substantiated representation from a party of the effect of the review proceedings on the procurement proceedings, including

the relative advantage or disadvantage resulting therefrom for any bidder or class of bidder to the procurement proceeding.

Withdrawal of review.

36. – (1) The aggrieved party, while a review is pending may, at any time, withdraw the review by forwarding to the Review Board a written notification of withdrawal signed by the aggrieved party and the Review Board shall inform the other party or any interested participants of the withdrawal.

(2) A notification of withdrawal by the aggrieved party may be

Form D, Schedule.

made in the form set out as Form D in the Schedule.

Witnesses.

37. – (1) Subject to subsection (2), any person summoned to attend and to give evidence or to produce any paper, book, record or document before the Review Board shall –

- (a) be bound to obey the summons served upon him;
- (b) be entitled, in respect of such evidence or the disclosure of any communication or the production of any such paper, book, record or document, to the same right or privilege as he would have before a court;
- (c) be entitled to be paid, from the public funds, his expenses, including travelling expenses, at rates prescribed by the *Witnesses Expenses Act* for the witnesses who are entitled to have their expenses paid from the public funds.

(2) The Review Board may disallow the whole or any part of such expenses in any case if it thinks fit.

(3) A person who –

- (a) without sufficient cause, fails or refuses to –

- (i) attend at the hearing of the review in obedience to a summons under these Regulations;
- (ii) produce any document which that person was served notice to produce;
- (b) being a witness, leaves the hearing of the review without the permission of the Review Board;
- (c) being a witness, refuses, without sufficient cause, to answer any question put to him by or with the permission of the Review Board;
- (d) wilfully obstructs or interrupts the proceedings of the Review Board,

commits an offence and is liable on summary conviction before a Parish Court to a fine not exceeding two million dollars.

Representative.

38. – (1) A party may, for the purposes of the review and any proceedings connected with it, be represented by an attorney-at-law or any other person.

(2) Subject to paragraph (3), if a party is being represented at the hearing of a review, the party shall cause notice, in writing, of the name and address of the representative to be given to the Review Board not less than three working days before the hearing of the review.

(3) In the case of an interested participant who participates on or after the commencement of the hearing, the notice referred to in paragraph (2) shall be submitted by the interested participant within such time-frame as the Review Board specifies.

Record-keeping.

39. – (1) The Review Board shall cause a record to be kept of –

- (a) every document issued, received, submitted or produced in relation to or in connection with the review;
- (b) the receipt, delivery, communication or publication of the documents referred to in sub-paragraph (a); and
- (c) the verbatim record of the review hearing.

(2) The record referred to in paragraph (1) shall be secured, identified, organized and maintained in such manner so as to enable efficient retrieval of the record or any part thereof.

Inspection of record.

40. A party who has appeared in the review proceedings shall be entitled to –

- (a) inspect the record of the review proceedings; and
- (b) a copy of the record or any excerpt thereof on payment of a fee of thirty dollars per page.

Duty to give reasons.

41. In exercise of its functions the Review Board shall act in a timely fashion and give reasons, in writing, for each decision made and action taken under section 51(5) of the Act.

SCHEDULE

(Regulations 17, 23, 24 and 36)

FORM A

No:

The Public Procurement (Reconsideration and Review) Regulations, 2018
(under regulation 17)

Notice of Review Hearing

To:

Of:
(Address)

From: The Procurement Review Board

.....
(Address for service here)

TAKE NOTICE THAT has
(Name of aggrieved party)
commenced a review of the decision of
contained in dated, a
(Insert type of document) (Insert date of document)
copy of which is attached to this Notice.

1. The details of the matter under review are:

.....
.....
.....
.....

2. The Aggrieved Party claims the following grounds for review:

.....
.....
.....
.....

3. The relevant facts and law which form the basis of the grounds for review:

- (a) findings of fact challenged (indicate the public procurement proceeding, technique, procedure, bidding document terms, etc., and the decision and the date thereof);
- (b) findings of law (indicate legal basis for review, i.e., relevant legislation (Act or Regulations thereunder), bidding document, framework agreement terms, etc., alleged breached).

.....
.....
.....
.....

4. List of documents in support:

.....
.....
.....
.....

5. Number and name(s) of witness(es), if any:

.....
.....
.....
.....

6. Legal or other personal representatives (if any)

.....
.....
.....
.....

7. State desired action, if any, which the aggrieved party would like the Review Board to exercise (see section 51(5) of the *Public Procurement Act*):

.....
.....
.....
.....

AND TAKE NOTICE that a hearing of the review is set out for –

Date:

Time:

Place:

Signed this day of , 20 .

.....
Chairman
Procurement Review Board

FORM B

No:

The Public Procurement (Reconsideration
and Review) Regulations, 2018
(under regulation 23)

*Summons to Witness to Appear before the
Procurement Review Board*

TO:
(Name of witness)

Of:
(Address of witness)

Take Notice that you are hereby summoned to appear before the Procurement Review Board for examination pursuant to regulation 2 of the Public Procurement (Reconsideration and Review) Regulations, 2018.

The Procurement Review Board is presently conducting a review of upon the application
(Specify public procurement proceeding)

of
(Name of aggrieved party)

Nature of Claim:

.....
Please be present as follows:-

Date:

Time:

Place:

.....
You have the right to be represented by an attorney-at-law or any other person.

Failure to appear without reasonable excuse may subject you to a fine not exceeding two million dollars pursuant to regulation 37(3) of the Public Procurement (Reconsideration and Review) Regulations, 2018.

Dated this day of, .

.....
Chairman
Procurement Review Board

No:

The Public Procurement (Reconsideration and Review) Regulations, 2018
(under regulation 24)

Notice to Produce Document

In Relation to a Hearing Conducted
by the Procurement Review Board

TO:
(Name of person to produce document)

Of:
(Address of person)

Take Notice that you are required to produce pursuant to regulation 24 of the Public Procurement (Reconsideration and Review) Regulations, 2018, for inspection by the Procurement Review Board the following document(s):

.....
.....

which shall be produced at the offices of the Review Board at:

.....
.....

Failure to produce such documents without reasonable excuse may subject you to a fine not exceeding two million dollars pursuant to regulation 37(3) of the Public Procurement (Reconsideration and Review) Regulations, 2018.

As defined by section 2 of the Public Procurement Act, 2015, “document” means anything in which information of any description is recorded.

You have the right to obtain advice from an attorney-at-law or any other person in respect of this notice.

Dated this day of , .

.....
Chairman
Procurement Review Board

FORM D

No:

**The Public Procurement (Reconsideration
and Review) Regulations, 2018
(under regulation 36)**

Notification of Withdrawal of Review

To: The Procurement Review Board

.....
(Address for service here)

From:
(Name of applicant/aggrieved party withdrawing review)

Of:
(Address of applicant/aggrieved)

NOTIFICATION IS GIVEN THAT:

..... made an application for review
(Name of applicant/aggrieved party)

of the decision of : dated
....., to the Review Board (a copy of which is
attached to this Notification) and that the named applicant/aggrieved
party HEREBY WITHDRAWS the review.

Signed this day of , 20 .

.....
Applicant/aggrieved party

Made on the 26th day of March, 2018.


Minister of Finance and the Public Service