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**CHAPTER 245
GOVERNMENT CONTRACTS AND TENDERS**

*Act 10 of 1998
Act 11 of 2001*

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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

(1) 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;

"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;

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

"Minister" means a minister of the Council of Ministers;

"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;

"Responsible minister" means the minister responsible for the contract or tender or who is responsible for the ministry or agency arranging or undertaking the contract or tender;

"The Minister" means the minister responsible for the Tenders Board.

(2) In this Act paragraphs will be read conjunctively as if the word "and" linked each

paragraph unless the word "or" appears between paragraphs.

2A. Government Contracts defined

(1) Subject to subsections (3) and (4), each of the following is a Government Contract:

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;

a contract or arrangement for the disposal of an asset of the Government;

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) The consideration in relation to any contract, arrangement, franchise or concession must exceed VT 5,000,000.

(4) A contract or arrangement for raising loans for the Government is not a Government Contract.

(5) 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.

PART 2 – GOVERNMENT CONTRACTS

3. Government Contracts

(1) Every Government Contract must be in writing.

(2) Subject to subsection (3), a minister, under this or any other Act authorizing him to do so, may enter into a Government Contract.

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

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

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

(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;

(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;

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

(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 or any other Act or regulation;

(g) 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. Execution of Government Contracts

(1) Every 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, and every document required to be signed evidencing the terms of the contract may be executed by the responsible minister on behalf of the Government.

(2) The terms of a Government Contract may be varied or discharged in the same way.

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.

PART 3 – TENDERS AND QUOTATIONS

8. Requirement to obtain tenders and quotations

When entering into a Government Contract or a contract for the contracting out of a Government service or the purchasing of goods or services, a minister, or director-general of a ministry, or any other person authorized to do so, must comply with the quotation or tendering process in accordance with this Act or with any regulations made under this or any other Act.

PART 4 – TENDERS BOARD

9. Tenders Board

There shall be established a Tenders Board comprising those persons specified in section 10 which will report and be responsible to the Minister responsible for the Tenders Board for receiving, assessing, approving (where applicable) and recommending acceptance of government tenders with a value of more than VT 5,000,000.

10. Board

(1) The Tenders Board will consist of the following persons:

- (a) a Chairperson;
- (b) the director-general of the ministry which is procuring the goods or services, or his representative;
- (c) the Director-General, or his representative;
- (d) a representative of the ministry responsible for procuring the goods or service who has detailed knowledge of the requirements of the ministry in relation to the contract to be performed;
- (e) where the Government Contract is of a value of VT 10,000,000 or more, a person with legal qualifications or experience appointed by the Minister after consultation with the Chairperson of the Board.

(2) There must be a minimum of three persons to constitute a quorum and where applicable the person appointed under subsection (1)(e).

(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) *(Repealed)*

(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

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 Chairperson of the Board shall be appointed by the Prime Minister, after consultation with the leaders of every political party represented in Parliament and a recognized representative of the private business sector (such as the Chairperson of the Vanuatu Financial Centre Association Limited or President of the Chamber of Commerce).

(2) The Chairperson:

- (a) must be a person who has a wide detailed knowledge and experience in the practice of law or accounting or commerce;
 - (b) must not be a member of Parliament or hold any other public office;
 - (c) will not be deemed by virtue of the office to be employed in the Public Service;
 - (d) must be a person of good reputation in the community and enjoy public confidence.
- (3) The Chairperson will be appointed for a term of 3 years, but will hold the appointment on a part time basis.
- (4) Subject to an enactment determining the Chairperson's remuneration, the Chairperson will be remunerated at a rate fixed by the Prime Minister on the advice of the Public Service Commission from money to be appropriated for that purpose.
- (5) Subject to subsection (6), the Chairperson may be removed or suspended from office only by the Prime Minister upon a resolution of Parliament 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 Prime 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 Chairperson appointed in breach of this section will be deemed to have resigned his office from the date that he is advised of that fact by the Minister, or when the Supreme Court makes a finding to that effect, whichever shall occur earlier.

PART 5 – TENDER PROCESS

12. Procedure

- (1) The Board must recommence the tender process when it cannot make a recommendation or its recommendation is declined by the Council.
- (2) The Board must not consider a tender or make a recommendation to Council in respect of a tender from a person, body corporate, company or entity who has not submitted the tender in accordance with, and followed the prescribed procedure under this or any other Act or regulations made under this or any other Act.
- (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 table its reasons 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 responsible for the Tenders Board is responsible for actually tabling all recommendations made by the Board to the Council. Nothing in this subsection gives the Minister the power to change any recommendation of the Tenders 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 person who enters into 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 the regulations commits an offence and is punishable on conviction by:

a fine not exceeding VT 1,000,000 or imprisonment for a term not exceeding 1 year, or both; or

a fine not exceeding VT 5,000,000 if the person is not an individual (e.g. a company).

(2) For the purposes of prosecuting an offence against subsection (1), a contract or arrangement entered into by a company is deemed to be entered into by each director and officer of the company.

(3) Any contract or arrangement entered into in respect of which a person is convicted of an offence against subsection (1) is void. However, any moneys paid to the Government of the Republic of Vanuatu under the contract or arrangement are not repayable despite any provision to the contrary in the contract or arrangement.

13B. Regular suppliers

(1) This section applies if:

more than one contract or arrangement is entered into in relation to the same or substantially similar subject matter during the course of a particular year; and

the total consideration payable in respect of those contracts or arrangements for that year exceed VT 5,000,000; and

one or more contracts or arrangements in relation to the same or substantially similar subject matter are entered into in a subsequent year or years.

Each contract or arrangement entered into in a subsequent year or years must comply with the tender process provided for by this Act and the regulations, whether or not the individual contract or arrangement exceeds VT 5,000,000.

This section applies despite any other provision in this Act.

13C. Protection of whistleblowers

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:

the Director of the Department responsible for finance; or

any other senior official within that Department or the Ministry responsible for finance.

A person performing functions in or for any Ministry or Department must not victimise, or discriminate against, an employee of the Public Service because that employee has reported breaches or alleged breaches of the tender process.

The Director or any senior official who under subsection (1) receives a report of any breach or alleged breach of the tender process must refer the matter to the Director-General or a person authorised by the Director-General.

(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.

PART 6 – OFFENCES AND PENALTIES

14. Offences and penalties

(1) A person who acts in breach of sections 3, 4, 8, 10(2), (3), (4), (7) or 12, or regulations under this Act commits an offence and is liable on conviction to a fine not exceeding VT 1,000,000 or imprisonment for a term not exceeding 1 year or in the case of a person or organization other than an individual, to a fine not exceeding VT 5,000,000.

(2) It will be a defence in any proceedings under subsection (1) where a person can satisfy the court that the offence was not intentional and that the breach was minor, trivial, or technical.

15. No interference with Board

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

(2) A person who acts in contravention of this section is liable on conviction to a fine not exceeding VT 2,000,000 or imprisonment for a term not exceeding 2 years, and in the case of a person or organization other than an individual, to a fine not exceeding VT 7,000,000.

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:

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

18. Public Accounts Committee

The records, minutes, and decisions of the Board may be reviewed at any time by the Public Accounts Committee and that Committee will have the same powers and functions in a review under this Act as it has under any other enactment.

Table of Amendments

1 Amended by Act 11 of 2001

2A Inserted by Act 11 of 2001

9 Amended by Act 11 of 2001

10(1) (e) Amended by Act 11 of 2001

10(2) Amended by Act 11 of 2001

10(6) Repealed by Act 11 of 2001

10A Inserted by Act 11 of 2001

12(6) Inserted by Act 11 of 2001

13A-13C Inserted by Act 11 of 2001 (re-numbered from 16A-16C)

Throughout Expenditure Review Committee updated to Public Accounts Committee