

IN THE FOURTH SESSION OF THE SIXTH PARLIAMENT OF THE FOURTH REPUBLIC OF GHANA

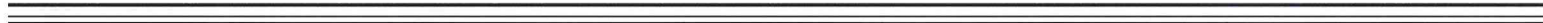
REPORT OF THE FINANCE COMMITTEE

ON

THE PUBLIC PROCUREMENT (AMENDMENT) BILL, 2015

FEBRUARY, 2016

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**REPORT OF THE FINANCE COMMITTEE ON THE PUBLIC
PROCUREMENT (AMENDMENT) BILL, 2015**

1.0 INTRODUCTION

The Public Procurement (Amendment) Bill, 2014 was presented to Parliament and read the first time by the Minister for Finance, Mr. Seth Emmanuel Terkper on Friday, 24th July, 2015 and referred to the Finance Committee for consideration and report in accordance with Article 174 (1) of the 1992 Constitution and Order 169 and 125 of the Standing Orders of the Parliament of Ghana.

Pursuant to the referral, the Committee met with the Hon. Deputy Minister for Finance, Mr. Cassiel Ato Baah Forson, the Chief Executive of the Public Procurement Authority, Mr. Sillas Mensah, and Officials of the Ministry of Finance, Public Procurement Authority and Attorney General's Department and deliberated on the referral.

The Committee is grateful to the Hon. Deputy Minister, the Chief Executive Officer and Officials from the Ministry of Finance, Public Procurement Authority and Attorney General Department for the assistance.

2.0 REFERENCE

The Committee referred to the following documents at its deliberations:

- a. The 1992 Constitution of Ghana;
- b. The Standing Orders of the Parliament of Ghana;
- c. The Public Procurement Act, 2003 (Act 663); and

- d. Interpretation Act 2009 (Act 792).

3.0 BACKGROUND

The Public Procurement Act was enacted in 2003 as part of efforts to ensure good governance and improve public financial management in Ghana. The Act provided national rules on public procurement to foster competition, efficiency, transparency and accountability in the public procurement process for goods, works and services. It was also to provide for the fair, equal and equitable treatment of suppliers and contractors and promote the integrity of and confidence in the procurement process.

However, after nine years of implementation, the Act has exposed some administrative bottlenecks, delays and imbalances in the procurement structures that have been created making it necessary for the Act to be reviewed. Prominent among these are the low procurement thresholds for high spending public institutions such as the Bank of Ghana, the Central Management Agencies, Ministries, Departments and Agencies as well as for the Metropolitan, Municipal and District Assemblies. Also there have been difficulties in the application of the Act to commercially oriented State Owned Enterprises some of which still seek freedom from the Act because of their independence from direct government control.

The proposed amendments to the Act therefore seek to remove ambiguities and the operational challenges that have bedeviled the smooth implementation of Act 663 since its inception. It will also correct editorial errors in Act 663 and re-arrange the provisions in Part Two by the re-enactment of that Part to provide a more logical sequence of the provisions for greater clarity. The amendments also seek to ensure that Act 663 conforms to sections 4 (1) and (2) of the Local Government Act, 1993 (Act 462) to decentralize the procurement process in MMDAs.

The enactment of the Bill will make the law more user-friendly and reduce the obstacles to compliance, reduce ambiguity and ensure clarity in the parent Act. This will invariably promote transparency and accountability in public procurement in Ghana.

4.0 PURPOSE OF THE BILL

The Bill seeks to amend the Public Procurement Act 2003 (Act, 663) to take account of current international best practices to ensure a more transparent and accountable procurement system in Ghana and to provide for related matters.

5.0 DIVISION OF THE BILL

The Public Procurement (Amendment) Bill, 2015 has fifty-eight (58) Clauses with Clause 58 amending the principal enactment by the substitution of the Schedules.

Clause 1 of the Bill amends section 2 of the Act to broaden the object of the Authority to include the environment and social sustainability.

Clause 2 of the Bill amends section 3 of the Act on the functions of the Authority to empower the Authority to develop rules and instructions. The amendment also takes account of the fact that the Board of the Authority is to advise the decentralized units of government on issues related to public procurement within their districts.

Clause 3 amends Section 4 of Act 663 to bring clarity to the number and composition of the membership of the governing body and the duty of the Board. Clause 4 substitutes section 10 of the Act. The clause expressly specifies other sources of funds of the Authority, in addition to moneys provided by Parliament to the Authority.

Clause 5 amends section 13 of the Act on annual report and provides that the annual report concerning the decentralised bodies and the relevant part of the audited account, together with relevant part of the auditor-General reports effecting specific decentralised bodies are to be submitted to the Metropolitan, Municipal and District Assembly for debate.

Clause 6 re-enacts Part Two of the Act. This is to enable the logical sequence of provisions on procurement structures. The amended part deals with the scope and application of the Act.

Section 14(1) (d) has been amended in clause 6 to clarify the scope of funds and include internally generated funds within the scope of the Act. The formal discretion given to the Minister for Finance to decide that it is in the national interest to use different procurement procedures from those provided under the act has been removed.

The provisions for the declaration of the procurement entity in section 16 remains essentially unchanged except that the scope for the declaration of the procurement entity has been widened to support an application by a procurement entity for its subsidiary or agency to be declared a procurement entity.

Certain state owned enterprises operating commercially have rejected the applicability of the Act and have sort to maintain their procurement process on the basis of undue delay because they have to go through the concurrent approval processes. Based on the principle of standardisation of the national procurement rules and the need to supervise public spending, the Public Procurement Authority is of the view that public institution must apply uniform rules. In this regard, a combination of this amendment and those proposed to the First and Second Schedules make it easier for state own enterprises to apply Act 663.

Major changes have been introduced in section 15 and 17 by the re-categorisation of entity tender committees, the re-composition on their membership and that of the tender review committees. There has been a substantial increase in their approval thresholds.

These changes have become necessary in order to streamline and reduce the excessive cost to the government as regards to the administration of these structures.

Entity tender committees have been re-categorised according to function and spending limits. The composition of the membership of these bodies has been changed. This is in order to strengthen the purchasing functions of government institutions and is expected to give greater control to entities for their purchasing activities with the need for accountability.

The functions of entity tender committees and tender review committees were not given satisfactory prominence in the First Schedule and Second Schedule of the Act. The transfer of their functions to the body of the Act will make their functions more visible and reader friendly. New provisions have therefore been introduced that link the procurement entities, entity tender committees and tender review committees to their various categories, memberships and thresholds in the revised First, Second and Third Schedules.

Sections 15 and 17 have been merged to specify the functions of the various procurement structures such as the procurement entity, head of entity, procurement unit, entity tender committees and tender committees with their corresponding functions. In line with the decentralisation policy, these sections distinguish the procurement structures of Ministries, Departments and Agencies from the procurement structures of the Metropolitan, Municipal and District Assemblies.

A new section 20A on the functions of an entity tender committee enables the delegation of authority by a member of an entity tender committee and a tender review committee. The section also allows Chairpersons to delegate their membership functions appropriately in writing. The need for the power to delegate prevents the administrative delays that occur when chairpersons and members are absent or unavailable at meetings.

The functions of separate entity tender committees for Ministries, Departments and Agencies from the procurement structures of the Metropolitan, Municipal and District Assemblies are provided in the new provisions of section 20B. Section 20C links the Second and Third Schedules that deals with the composition and approval thresholds for entity tender committees with the new provisions of section 20B. The thresholds limits for procurement methods have also been increased in section 20C and now from the Fifth Schedule. The provisions on the meetings of entity tender committees and tender evaluation panels are in sections 20D and 20E.

The amendment in section 20F changes “board” to “committee” to make it clear that committees derive their authority from the principal enactment. The key amendment, in accordance with decentralisation objectives is the creation of appropriate tender review committees for Ministries, Departments and Agencies and Metropolitan, Municipal and District Assemblies.

In order to reduce excessive administrative costs and enhance efficiency, the tender review boards, with the exception of the central tender review board, have been removed. Ministries, Departments and Agencies will work toward the central tender review committees and Metropolitan, Municipal and District Assemblies towards the newly created regional tender review committees. The current set up of the entity tender committees and the tender review boards hinders the efficient operation of the procurement process. These committees have therefore been simplified and streamlined to permit timely and flexible operations. The procurement structure will now only comprise the head of entity, the entity tender committee and the central tender review committee for ministries, departments and agencies and the regional tender review committee for Metropolitan, Municipal and District Assemblies. Each of these committees will perform review functions for the entities beneath them.

A new provision in section 20G adds the review of the decisions of tender review committees to the administrative review power of the Board of the Authority.

Editorial changes are made to section 21 of the Act on procurement plans in clause 7 of the Bill. The amendment also provides for the publication of procurement plans and updates of the procurement plan on the website of the Authority and further repeals section 21(5) of the Act.

Clause 8 amends section 22 (1) by introducing sustainability criteria in tenderer qualifications. By virtue of clause 8, a tender is now required to possess environmental qualifications and meet the ethical and other standards that are applicable in Ghana.

Novel provisions on non-material deviations are introduced in new subsections (7), (8) and (9) of section 22. This is to clarify the treatment of non-material deviations. The Act provides for the treatment of material deviation. Non-material deviations have been relegated to the Public Procurement Authority Manual and this has resulted in the inability of an entity to effectively manage these situations. A new provision has been introduced by the amendment to this section to enable an entity request the legalization of a foreign document produced by a tenderer to demonstrate the qualification of the tenderer for the tender procedure.

Clause 9 introduces section 22A which authorizes the Board to suspend a supplier or consultant either on its own accord, after investigations, or upon the recommendation of the procurement entity in a number of specified circumstances that include unsatisfactory performance, failure to perform contractual obligations and contravention of the Act.

The amendment to section 26 on the form of communication in clause 10 brings the section into conformity with the UNCITRAL rules on the protection of classified information contained in a tender document submitted by a tenderer.

Section 28 on the record of procurement proceedings has been amended in clause 11 by the inclusion of additional circumstances that must be recorded in the record of procurement proceedings. Section 28(4) has been rephrased to clarify the meaning of that section and avoid the effect of ousting the jurisdiction of the courts.

A new section 28A on the cancellation of procurement has been introduced by clause 12. This is differentiated from the provisions on rejection of tenders. The provision particularly provides for the cancellation of procurement in situations where a successful tender fails to sign a contract.

Section 31 on the public notice of procurement contract awards is amended in clause 13, to permit the publication of contract awards on the website of the Authority. The clause rephrases section 31(2) to make it possible for other manner of publication, other than publication on the website of the Authority, to be provided for in Regulations.

Clause 14 introduces section 32A to protect sensitive information of the tenderer and the procurement entity, especially in cases where disclosure could compromise national security or pre-qualification or pre-selection stages of the procurement process.

In clause 15, editorial changes are made to section 33 on the description of goods, works and services. The clause also introduces new subsections (3) and (4) to permit the use of ~~standardized trade terms and conditions for sustainable public procurement in the drafting~~ of technical specifications.

A new section 34A on methods of procurement and conditions of use, including framework contracting, is introduced in clause 16. The clause authorizes the Board to introduce new methods of procurement based on international best practice.

Section 38 on restricted tendering is amended in clause 17. The clause restricts this practice to situations that involve procurements of a highly complex and specialised nature.

Section 40 on single source procurement is amended in clause 18. This is in line with the revised provisions of the UNCITRAL model law on the procurement of construction, goods and services. Section 40(I) (d) has also been rephrased to remove the ambiguity as to whether or not it is to be read as a composite section. Section 40(2) has been amended to permit the use of single sourcing to procure projects to promote socio-economic policies that are sustainable to public procurement.

An editorial correction is made to section 42 on the request for quotations in clause 19. The amendment also adds a new subsection (2) which provides that the successful quotation should be the lowest evaluated quotation that meets the needs of the procurement entity in the request for quotations.

The amendment to section 43 in clause 20 on the procedure for request for quotations is to ensure the actual comparison of invoices by entities as opposed to just obtaining a number of invoices for the sake of compliance which is considered unsatisfactory for transparency purposes. The amendment is also to regulate the submission of multiple invoices by one company.

The amendment to section 44 on national competitive tendering in clause 21 confirms the reservation of national competitive tendering for citizens and strengthens the policy that

gives a preference based on nationality to Ghanaian tenderers. These amendments also take into account the efforts being made by the international community to foster aid effectiveness through the use of country systems and the use of public procurement as a tool, not only for public financial management, but also for the harmonization of cross-border trade.

Section 47 of the Act on procedures to invite tenders or applications to pre-qualify is substituted in clause 22.

The amendment in section 49 on the provision of tender documents in clause 23 is to enable the Board determine the price of a tender in the event that electronic procurement procedures are used.

Editorial changes are made to section 50 on the contents of tender documents and use of standard tender documents in clause 24.

Clause 25 repeals subsection (2) of section 53 of the Act which deals with the time frame in respect of the preparation of national competitive tenders. The provision is incorporated under clause 21 as a new subsection to section 44.

The amendment in clause 26 is in respect of section 54(2) that deals with the validity of tenders, modification and withdrawal of tenders.

An addition of words “in writing” is the subject of the amendment to section 57(1) in ~~clause 27. The amendment requires the request for clarification by a procurement entity~~ to be in writing for the avoidance of doubt. An editorial correction is made in clause 28 to correct the wrong reference in section 58(4) (b).

The amendment of section 59 on the evaluation of tenders in clause 29 is to limit the evaluation criteria strictly to procurement subject matter and to criteria that has been pre-disclosed.

Section 60 on the margin of preference is amended in clause 30 to widen the scope of the provision to another preference authorized by the Board or required by Regulations or any other enactment.

Clause 31 amends section 64 on the prohibition of negotiations with suppliers or contractors to take account of the correct nomenclature of tender review committees referred to in the Act as tender review boards.

Clause 32 amends sections 66 to change the reference to the Schedule in the principal enactment which is consequential to the amendments made to Act 663.

In clause 33, an editorial correction is made to section 68 (2) (1) which deals with content of requests for proposals for consultancy services by correcting the wrong reference to section 57.

Clause 34 repeals subparagraph (vii) of section 69(2)(v) as the provision is not applicable to engagement of consultants.

Section 72 on the conditions for use of other methods of selection of consultants is amended in clause 35 to change the reference in section 72(4) to the Fifth Schedule that has replaced the Third Schedule of the principal enactment.

Section 74 on the evaluation of proposals is amended in clause 36 to specify that evaluators of technical proposals are not to be given access to the financial proposals until the technical evaluation is reviewed and approved by the head of entity.

Clause 37 amends the headnote to section 77 to make it clear that the confidentiality provision applies to the process for the selection of consultants.

The heading of Part Seven of the Act is amended in clause 38 to read “Complaints and Administration Review” to accurately reflect the contents of the Part. Section 78 on the right to review is amended in clause 39 to introduce new subsections to state the three avenues where complaints on the procurement process may be lodged.

Clause 40 amends section 79 on the review by a procurement entity to make some editorial changes. The amendment also introduces key changes to the process of review by a procurement entity.

The provision on administrative review in section 80 is amended by clause 41 to remove the element of “illegality” and replace it with an element of “non-compliance” as revised under the framework provisions of the UNCITRAL model law on construction, goods and services.

Section 82 on the suspension of procurement proceedings is substituted in clause 42 with a clearer provision to remove the discretion previously given to an entity to determine that urgent public interest considerations require the procurement process to proceed. The onus is now on the Authority to make that determination as the regulator of the sector.

Clause 43 and 44 introduces the word “vehicles” to the heading in Part Eight and section 83(1) of Act 663 respectively. The rationale is to broaden the subject matter dealt with Part Eight of Act 663 to include the disposal of vehicles.

Clause 45 inserts a new provision as section 83A to provide for instructions and guidelines for the disposal of vehicles, unserviceable stores and obsolete equipment. This is a relocation of section 85 from Part Nine of the Act on miscellaneous provisions to Part Eight. Clause 46 accordingly repeals section 85 of Act 663.

Section 86 on the code of conduct is substituted by clause 47 to make provision to address a conflict of interest situation that may arise in the course of a procurement procedure.

The amendments to section 87 in clause 48 are editorial and reflect the change of name from tender review board to tender review committee.

Section 89(2) is amended in clause 49 by the inclusion of the words “or any other person” to make it possible for an investigator appointed by the Board to exercise the powers conferred on that investigator in respect of a person other than a procurement entity, tenderer, supplier, contractor or consultant provided that the at person is concerned with the procurement proceedings under investigation.

Section 90 on procedures on completion of investigation is substituted by clause 50 by deleting subsection) 1) (b) and re-arranging subsections (2) and (3) for a better sequestration.

The amendment of section 92 in clause 51 increases the number of penalty units for an offence from one thousand to two thousand five hundred to reflect prevailing levels and increase the effect of deterrence. The other amendment relocates the penalty for the breach of a regulation from section 97 to section 92.

Section 94 on the review of thresholds is repealed by clause 52. Due to the dynamic nature of thresholds values, a periodic review is necessary to take account of inflationary or currency depreciation trends and enable the timely amendment of threshold levels to correspond to the changing purchasing needs of an entity. Section 94 of the Act subjects the review of threshold levels specified in the Third Schedule to an amendment process by Parliament

Clause 53 amends section 95 on public access to legal texts by shifting the burden of ensuring public access to administrative rulings to the Authority as the legal body responsible for procurement.

Clause 54 substitutes section 96 on international obligations. The new provision ensures the compliance of international agreements with domestic procurement legislation.

Section 97 on Regulations is amended by clause 55 to give the Public Procurement Authority the mandate to effect changes to thresholds and the Schedules by legislative instrument.

The amendment to the interpretation section, section 98, by clause 56, introduces new definitions and deals with editorial corrections.

Clause 57 substitutes section 99 (4) by reconstituting tender review boards and entity tender committees in accordance with the First and Second Schedules provided for in this Bill.

Clause 58 substitutes the Schedules in Act 663 with new Schedules provided for in the Bill.

6.0 OBSERVATIONS

Rationale for the Bill

The Committee was informed at its deliberations that, the Public Procurement Act (Act 663) was enacted in 2003 as part of the good governance initiative and public financial management reform in Ghana. The Act provided national rules on public procurement to foster competition, efficiency, transparency and accountability in the public procurement of goods, works and services. It also provided for the fair, equal and equitable treatment of suppliers and contractors to promote the integrity of and confidence in the procurement process. The implementation of the Act for the past nine years has revealed some imbalances in the procurement structure that have created administrative bottlenecks and imbalances. The major weaknesses identified in the principal enactment relate to the categorization, membership and functions of entity tender committees and the need to clarify and harmonise their functions. The Hon. Deputy Minister explained to the Committee that it has become necessary to reconstitute the entity tender committees in order to speed up procurement decision-making, minimize delays and avoid associated administrative and transaction costs. There have also been difficulties in the application of the Act to most commercially oriented State Owned Enterprises because of their independence from direct government oversight. This has occurred due to the low procurement thresholds. It has therefore become necessary to re-categorize these entities to allow for a more sustainable threshold that reflects the expenditure patterns of these institutions. Low procurement thresholds for high spending public institutions such as the Bank of Ghana, the Central Management Agencies, Ministries, Departments and

Agencies as well as for the Metropolitan, Municipal and District Assemblies and state owned enterprises have also made it necessary for the law to be reviewed. The amendments are also intended to ensure that Act 663 conforms to provisions in 4 (1) and (2) of the Local Government Act, 1993 (Act 462) to take into consideration the decentralization programme.

The amendments have become necessary to remove ambiguities and the operational problems that have bedeviled the smooth operation of the Act since its inception. The amendment will also take into account current international best practices necessary to enhance the operation of the Act, correct editorial errors in Act 663 and re-arrange the provisions in Part Two by the re-enactment of that Part to provide a more logical sequence of the provisions and greater clarity.

Basis for Determination of New Threshold Levels

Officials from the Public Procurement Authority explained to the Committee that as a result of the low thresholds, entity heads could not do any substantial work without delays and this restricts the ability of entity heads to effectively respond to emergencies when they arise. The revision is to allow entity heads respond swiftly to emergencies when they arise and to allow for ease of transactions. The process is also to allow for the administrative efficiency of the tender process. The Deputy Minister explained to the Committee that the new threshold figures were arrived at having regards to the current consumer price index, rising commodity prices and exchange rate fluctuations. She explained that due to the dynamic nature of threshold values, a periodic review is necessary to take account of inflationary or currency depreciation trends. She indicated that the policy behind the increase in threshold levels is to give public institutions greater responsibility and control over a larger pool of funds within the limit of funds duly appropriated by Parliament under the Appropriation Act in any given year.

7.0 PROPOSED AMENDMENTS BY THE COMMITTEE

The Committee after its deliberations proposes the following amendments for the consideration of the House:

1. *Schedule 1B1 - Amendment proposed –*

a) Composition of Entity Tender Committee for the Legislature, delete

“Majority Leader”,

“Minority Leader”,

“Chairperson of Public Accounts Committee”

“Chairperson of Works Committee”

“Chairperson of a third parliamentary Committee (selected by the Speaker)

“2 Members of Professional Bodies”

and insert the following:

“3 Heads of Departments, including user Department”

“3 Members of Relevant Professional Bodies”

“A former member of the legislature (selected by the Leadership of Parliament)”

b) Composition of Entity Tender Committee for the Judiciary, delete

“2 Members - Judicial Council”,

“3 Members – Superior Courts”,

“2 Members of Professional Bodies”

and insert the following:

“A Judge of a Superior Court”

“3 Heads of Departments, including user Department”

“3 Members of Relevant Professional Bodies”

2. *Schedule 1B 4 – Category D - Amendment proposed –* Members of the tender Committees of Regional Offices of Subvented Agencies and Government Departments, delete “Attorney from the Attorney-General’s Office” and insert “A Lawyer representing the Attorney-General”

3. *Schedule 1B 4 – Category D - Amendment proposed* – Members of the tender Committees of Regional Hospitals, delete ““Attorney from the Attorney-General’s Department” and insert “A Lawyer representing the Attorney-General”
4. *Schedule 1B 5 – Category E - Amendment proposed* –
 - i) Members of the tender Committees of District Office of Subvented Agencies and Government Departments, delete “Attorney from the Attorney-General’s Office” and insert “A Lawyer representing the Attorney-General”
 - ii) Members of the Tender Committee of District Hospitals,
 - a) Column 4, delete “Head of Nursing” and insert “Clinical Coordinator”
 - b) Column 6, delete “Representative of the Regional Health Directorate” and insert “Hospital Administrator”
 - c) Column 5, delete “Attorney from the Attorney-General’s Office” and insert “A Lawyer representing the Attorney-General”
5. *Fifth Schedule - Amendment proposed* – Threshold for National Competitive Tender, Contract Value Thresholds for Goods, delete “GH¢25,000.00” and insert “GH¢100,000.00”
6. *Fifth Schedule - Amendment proposed* – Threshold for National Competitive Tender, Contract Value Thresholds for Works, delete “ GH¢50,000.00” and insert “GH¢200,000.00”
7. *Fifth Schedule - Amendment proposed* – Threshold for National Competitive Tender, Contract Value Thresholds for Technical Services, delete “GH¢25,000.00.” and insert “GH¢50,000.00”

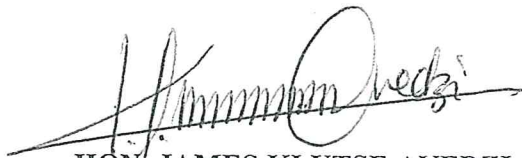
8.0 CONCLUSION AND RECOMMENDATION

The Committee having carefully examined the Bill is of the view that, the passage of the Bill will help promote good governance and strengthen the public financial management system in Ghana. The passage of the Bill will also strengthen existing rules on public procurement to foster competition, promote efficiency, transparency and accountability in the public procurement of goods, works and services. The Bill also provides remedy for

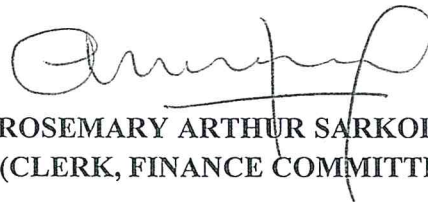
the implementation and administrative challenges in Act 663 to ensure a more efficient, and cost effective procurement in Ghana. The amendments also removed ambiguities in the parent Act to ensure a more sustainable procurement system.

The Committee therefore recommends to the House to adopt its report and take the Public Procurement (Amendment) Bill, 2015 through second reading in accordance with Article 106 of the 1992 Constitution and Orders 126 and 127 of the Standing Orders of the House.

Respectfully Submitted



**HON. JAMES KLUTSE AVEDZI
(CHAIRMAN, FINANCE COMMITTEE)**



**ROSEMARY ARTHUR SARKODIE (MRS.)
(CLERK, FINANCE COMMITTEE)**

